

CRI/T/68/91IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

MONTIELI TLAITLAI

ACCUSED

J U D G M E N T

Delivered by the Honourable Chief Justice
Mr. J.L. Kheola on the 19th day of
October, 1995

The accused is charged with murder. It is alleged that upon or about the 31st day of May, 1989, and at or near Tlaitlai village in district of Mafeteng, the said accused did unlawfully and intentionally kill one 'Mathabang Tlaitlai.

To this charge the accused tendered a plea of guilty to culpable homicide. The Crown did not accept the plea and decided to prove the crime of murder.

According to the medical evidence, which was accepted by the defence, the deceased died as a result of left haemopneumothorax and subsequent haemorrhagic shock. Externally there was a deep penetrative wound left axial line.

It is common cause that all the injuries which caused the

death of the deceased were inflicted by the accused with a sharp instrument identified as Exhibit I.

The first witness called by the Crown is one Sootho Khantsi. He testified that at dusk on the 31st May, 1989 he was at his home when he heard an alarm by one 'Matanki, the wife of the accused. He immediately went to the home of the accused. When he arrived there he entered into the house and found the accused sitting on the bed. The deceased was lying on the floor. He asked the accused what was the matter. He said that there was nothing. Seeing that the deceased had some injuries Sootho rushed to the chief's place and told the chief what he had seen. The chief came to accused's house accompanied by Sootho and asked him what had happened. The accused said that when he heard obituaries over the radio he suddenly remembered his late mother. He then rushed at the deceased and stabbed her with Exhibit I. He later handed over exhibit 1 to the chief.

Sootho observed the following wounds on the deceased - a wound below the left eye, a wound on the left breast, another on the left shoulder and the last one on the head. The deceased was still alive. After her wounds were bandaged she was carried to her home. She died during the night. The deceased was accused's aunt.

Under cross-examination Sootho said that the accused explained that the deceased had killed his late mother by witchcraft.

The second witness called by the Crown is Bochabela Tlaitlai who is the chief of that village. He said that when he saw the deceased lying on the floor with several injuries on her. He asked the accused what had happened.

In reply he said that he was listening to obituaries over the radio when the deceased arrived. He suddenly remembered his late mother. He then rushed at the deceased and stabbed her with Exhibit I which was given to him (the chief) by the wife of the accused who admitted that it was the weapon he used to stab the deceased.

Chief Bochabela explained that when the mother of the accused died in 1989 it was alleged that she had been bewitched by the deceased. The latter denied this allegation. He told the Court that there were many witches in his village..

P.W.3 'Malehlohonolo Tlaitlai is the aunt of the accused. She testified that on the evening in question she was sleeping in her house when one Tseliso came and woke her up. She went to the home of the accused. The accused explained to the chief why he stabbed the deceased. 'Malehlohonolo testified that the relations between the accused and the deceased were cordial. The accused and his wife used to visit the home of the deceased. The latter also used to visit the home of the accused and they used to sing together the hymns of the Apostolic Church. She said that she and accused are maintaining good relations.

In his defence the accused went into the witness box and gave a sworn statement in which he said that he has a mental illness. He sometimes consults a psychiatrist or a traditional doctor. He strongly believes in witchcraft and has held that belief for a very long time. He strongly believes that his late mother was killed by the deceased through witchcraft. His belief is based on the ground that before her death his mother had been a very healthy person. When she fell ill she said that the deceased was straggling her. She was lying on the ground and held her neck as if she was removing the hands of a person strangling her. The deceased eventually came to his parents' home and her attention was drawn to what his mother had said. In reply she did not refute the allegations against her but said that his mother should not point out her alone, she must point out the others as well.

The accused said that before the death of his mother his relations with the deceased were cordial. The death of his mother soured their relations to such an extent that they no longer visited each other's home. At about 8.00 p.m. on the night in question the deceased came to his home. At the time of her arrival he was listening to the obituaries over the radio. He asked her what he wanted at his place. He repeated the question three times but the deceased did not respond. He got frightened because the deceased had killed his mother. He took Exhibit 1 and stabbed her with it. He did not aim at any particular part of her body, nor did he count the number of times he stabbed her; but it was more than once. He intended to injure

her in order to scare her away from his home.

The accused denies that they used to visit the home of the deceased for the purpose of singing hymns together. He kept Exhibit 1 under his bed because he used it to slaughter cattle.

In her submission **Miss Mokitimi**, counsel for the Crown, stated that intention of an accused person can be inferred from the part of the body which was injured and the weapon used by the accused. In the present case the accused stabbed his victim directly on the heart region and that wound caused extensive internal bleeding. He used a very dangerous weapon which is a long metal, sharp pointed and sharpened on both sides. The accused has attempted to rebut this inference by saying that he was frightened and did not even count how many times he stabbed the deceased. He did not aim at any particular part or parts of the body. This cannot be true because there is only one dominant wound which is the only one dominant wound which is the cause of death. The deceased was sitting on a chair when the accused aimed his thrust at the heart of the deceased. It is most unlikely that it was just by chance that the thrust landed on the heart.

Mr. Mathafeng, counsel for the defence, submitted that the Crown has not supplied any material from which an inference can be drawn that subjectively the accused foresaw that the injuries he inflicted on the deceased would cause her death. He based his submission on the following grounds:

1. That the deceased was capable of harming him (accused) through witchcraft,
2. The deceased intruded into the home of the accused and refused to leave nor state the object of her visit,
3. the deceased decided to make such intrusion at night,
4. the accused did not seek out and stalk the deceased, see **Rex v. Nathane** 1974-75 L.L.R.
5. there is only one wound which probably is the fatal one,
6. the accused told the Court that his intention was to injure and to frighten the deceased to leave his place.

The above submissions by the defence counsel are made on the assumption that the accused's version of what transpired before he stabbed the deceased with Exhibit 1 is the correct one. The story of the accused must be analysed very carefully and also be considered not in isolation but with all the evidence in the case. Immediately after the stabbing of the deceased the chief confronted the accused and asked him why he stabbed the deceased. His reply was that when the deceased arrived at his home that night he was listening to the obituaries over the radio. He suddenly remembered his late mother and took Exhibit 1 and

stabbed her (deceased). He did not mention that the first thing he did was to ask the deceased the reason for her visit and asked her to leave his house; that she refused to leave and failed to give the reason for her nocturnal visit.

It seems to me that according to the accused's story the most important reason why he stabbed the deceased was that she refused to leave the house when he ordered her to do so. She also refused to explain the purpose of her visit at that time of the night. It is surprising that when the accused explained to the chief the reason why he stabbed the deceased, he did not mention that she refused to leave his house when he ordered her to do so. He did not mention that she refused to give the reason of her visit at that time of the night. These important facts ought to have been first and foremost in his mind when he first gave an explanation. It is improbable that he could forget such important facts in his explanation to the chief. I have formed the opinion that the accused is telling a lie and that these new things which he mentions for the first time in Court are an after thought.

It cannot be true that after the death of the mother of the accused the deceased never visited his (accused's) home. We have heard the evidence of his aunt who said that the accused and his family and the deceased used to visit each other's home and sang hymns together. The impression I had of 'Malehlohonolo Tlaitlai, as a witness, was that she was reliable and was telling the Court the truth. She testified that she and the accused had and still

have very cordial relations. This fact was never challenged by the defence and there was no apparent reason suggested by the defence why she could falsely make statements which conflict with those of the accused.

I have formed the opinion that when the deceased arrived at the home of the accused that evening it was not for the purpose of practising witchcraft on the accused and his family, but for the purpose of singing hymns with the accused or just a friendly visit. Unfortunately she came at the wrong time when the accused was listening to obituaries over the radio. He suddenly remembered his late mother who was allegedly bewitched by her. As a person who believes in witchcraft the accused knows that witchcraft is secretly practised. A witch does not openly go to her victim's house and bewitch him. The deceased could not have gone to the accused's home at night and for the first time after a long time, in order to practise witchcraft on him. I believe the evidence of 'Malehlohonolo that the deceased and the accused used to visit each other. On that fateful night the deceased was visiting the accused's for an innocent purpose but merely came at the wrong time and upset the accused.

In *S. v. Sigwahla* 1967 (4) S.A. 566 A.D. at p.570 Holmes, J.A. said:

"that, however, does not conclude the enquiry because the following propositions are well settle in this country:

1. The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as **dolus eventualis**, as distinct from **dolus directus**.

2. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of a **bonus paterfamilias** in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The **factum probandum** is **dolus**, not **culpa**. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.

See **S. v. Malinga and Others** 1963 (1) S.A. 692 (A.D.) at p. 694 G-H and **S.v. Nkombani and Another**, 1963 (4) S.A. 877 (A.D) at pp. 883A-C, 890B, 895F."

The facts in **Sigwahla's** case were more or less the same as the facts in the present case. The learned Judge of Appeal summarised them on page 570 as follows:

"In the present case the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body."

In our present case the salient facts are that the accused was listening to obituaries over the radio; the deceased suddenly entered into the house and sat on a stool; the accused suddenly remembered his late mother who was allegedly bewitched by the deceased; he took Exhibit 1 from under the bed and stabbed her because he was scared and thought that the deceased had come for the purpose of practising witchcraft on him. There is nothing to suggest that the accused was not aware that Exhibit 1 is a very dangerous weapon; he used it for the slaughtering of cattle and was definitely aware that it was a lethal weapon. He directed his thrust at the chest of the deceased. He intended to injure the deceased. In my opinion the only reasonable inference to be drawn from those facts is that the accused did subjectively foresee the possibility of that stab being fatal but was reckless of such result. In that sense the accused had the legal intention (*dolus eventualis*).

For the reasons stated above I find the accused guilty of murder as charged.

My assessors agree.


J.L. KHEOLA
CHIEF JUSTICE

19TH OCTOBER, 1995.

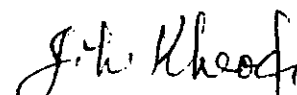
Extenuating Circumstances

It is trite law that a belief in witchcraft is an extenuating circumstance. The accused believed very strongly that the deceased was a witch who killed his mother through witchcraft. As she was dying she held her neck and said that the present deceased was strangling her. The accused believed that the deceased actually strngled his mother.

Another extenuating circumstance is that this is a case of **dolus eventualis**.

Sentence: In passing sentence I took into account all the nitigating factors mentioned by **Mr Mathafeng**.

The accused is sentenced to ten (10) years imprisonment.


J.L. KHEOLA
CHIEF JUSTICE

19th October, 1995.