

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEKHETHO MAHASE

V

REX

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 1st day of November, 1995.

The accused is charged with murder:

In that upon or about the 28th of August, 1992 and at
or near Ha-Leteketa in the district of MAFETENG,
the said accused unlawfully and intentionally killed
MORAMANG SHAMO MOLEFINYANE.

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Accused pleaded not guilty.

At the outset, I must state that the medical evidence and the fact that deceased was stabbed by the accused in the chest region is not disputed. It was this wound that injured the right ventricle of the heart of the deceased causing the bleeding that led to deceased's death.

With the *actus reus* admitted, there are two questions that have to be answered namely whether accused had the requisite specific intention to kill or whether even if the accused did, the killing was justifiable.

The Crown which bore the onus of proof, called four witnesses.

P.W.1 Trooper Tšelo is the policeman who collected the deceased's body and gave the accused a charge of murder. He was given the deceased's clothes and the accused's knife. Under cross examination P.W.1 denied deceased's stick was also given to him.

The next witness was P.W.2 Pitso Ntjatje, who states they went to Makamohelo's place to drink Basotho beer. They found accused already drinking. According to him deceased around 8.30 p.m. stood up in order to go outside. On the way out he complained that deceased had tripped him. Accused asked for

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forgiveness. After this, drinking continued. Deceased went out again, on his way back deceased complained that accused had kicked him on the knees. Accused asked for forgiveness. For no apparent reason, accused then insulted all the people in the room and said "Nyoya meng ting"—translated, this means "your mothers' vaginas". This is one of the most offensive and abusive language that can be uttered in the Basotho language. Accused removed his overcoat and closed the door after the deceased had gone out. P.W.2 and others had to struggle with accused in order to get out.

P.W.2 says Nkalimeng P.W.3 told him that deceased was calling him because that person had stabbed him. He took deceased into the house laid him on the blanket with the help of others. Not long thereafter deceased died. P.W.2 denied deceased did anything to accused, and also stated that deceased did not have a stick.

Under cross-examination he stated that deceased and accused were acquaintances. P.W.2 denied that there was any dancing in the house. He denied deceased ever said aloud that accused was after him or that he poked accused with a stick. P.W.2 also said accused never said deceased had spilled his beer or words to that effect.

P.W.2 further denied that accused threw his overcoat on the deceased and

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stabbed deceased. P.W.2 was very confused about whether there was a light or not. Sometimes he said there was light and that it was put out by the accused.

P.W.3 Nkalimeng says accused was the first to join the group that was drinking Basotho beer. Later deceased and P.W.2 came. While they were drinking, deceased said to the accused

"Sir, why are you kicking me?"

The witness was three paces from them. Makamohelo (the hostess) intervened and accused apologised. Deceased went out and on his return he heard accused complaining that deceased had kicked him. She did not see what had in fact happened. She says she only heard deceased say -

"Why are you kicking me, what do you want from me?"

Accused took off his coat and said:

"Your mothers' vaginas, all of you."

P.W.3 ran out of the house. There had been no dancing at all. She had not seen deceased spill accused's beer. At the time she ran away, the light was still on.

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While P.W.3 was outside the gate of Makamohelo's site deceased came. P.W.3 advised him to go home as he was being attacked. Deceased said it was no use that man had finished him. Deceased asked P.W.3 to call P.W.2 for him. This she did, then went to sleep.

In cross-examination P.W.3 says at the time deceased complained of having been kicked, the second time, deceased was sitting on the bench while accused was sitting on an aloe stump. From the position they were sitting, accused could not have kicked deceased at that stage. P.W.3 says she does not know what had happened before that. P.W.3 says there was a plain radio in the house, not a cassette player. There had been no dancing.

The witness that followed was P.W.4 Malipolelo Tlali. She states that while they were drinking at Makamohelo's, deceased complained that accused had kicked him. She did not see the kicking. Makamohelo reprimanded accused and he apologised. Drinking continued. Deceased went out and came back. After he had sat down for some time, deceased complained that accused had kicked him. Deceased had been sitting for about 10 minutes when he said this. The witness suggested she had no idea of time but her time estimates were correct. Accused reacted by insulting all people in the house by saying:

"Your mothers' vaginas you are showing no respect for me all of

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you."

Accused stood up and she ran away. The time could have been 7.45 p.m. There was no music in the house. Deceased's beer had never been spilled and replaced nor was such an offer made. Deceased was not carrying a stick. Deceased never threatened anybody with a stick.

Under cross-examination, it emerged that deceased was her guest. She denied that she had told accused that accused belonged to the Batšoeneng clan to which the deceased belongs and that she revealed this fact when deceased had spilled accused's beer. She denied there was dancing. P.W.4 said deceased was sitting on an aloe stool and accused was sitting on the bench.

The Crown closed its case.

Accused gave evidence in his own defence. He admitted that he had been drinking at Makamohelo's where he was joined by deceased and P.W.2 Pitso Ntjatje. There was music and dancing. While there was dancing, deceased accidentally tripped against his leg, but accused him of having deliberately tripped him. When Makamohelo intervened, he apologised. Deceased had spilled his beer, but Malipolelo P.W.4 said he should not be too angry because deceased was her guest. P.W.4 said deceased belonged to the same Batsoeneng clan as accused,

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therefore Malipolelo P.W.4 would replace the beer. As promised, P.W.4 bought the accused beer.

Deceased, who was dancing, came towards him again and accused warned him that he would spill his beer. Deceased replied that accused was after him. Deceased was carrying an olive stick. Deceased said he would hit accused with a stick while accused was sitting down. Accused said deceased could not do so. Deceased continued dancing. When deceased approached accused again, he poked accused with a stick. Accused quickly reacted by removing his overcoat and throwing it on he accused's face and stabbing him with a knife in the chest region. Accused says he did this because deceased's eyes exhibited aggression. When he looked up, he realised everyone had left the house, he was only left with P.W.2 Pitso.

When accused got out of the house, Makamohelo (the hostess) told him to go home as he had been fighting. Accused went home.

The following day, the Chief's messengers came for him. He handed over the knife he had used to the Chief on finding deceased was dead. Accused says he had no intention to kill deceased. Accused said he had taken 10 to 20 scales of beer before he came to Makamohelo's house. A scale is half a litre. Accused says he needs 30 scales in order to get drunk. He took five more scales at Makamohelo's.

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Under cross-examination accused said he did not know deceased at all. As he was drunk, he could not run away. Deceased was also drunk. People who deny deceased had a stick do so because of the misfortune that has occurred. Accused says although the police asked him a few questions, he never told them the deceased had a stick or had attacked him with a stick. It did not occur to him to tell them because he was not asked a specific question about the deceased's stick. He saw the deceased's stick taken by the police along with deceased's body.

Accused called Warrant Officer Khoele as his witness. Warrant Officer Khoele denied that they took deceased's body along with a stick.

When one assesses the evidence as a whole, it seems P.W.2 did not see a lot and his memory was bad. He was inclined at places to put the accused in the worst possible light. He does not remember how the light was put out or whether it was put out at all. Yet he blames this on accused and contradicts himself badly. What is clear and which is corroborated by P.W.3 and P.W.4 is that accused suddenly became aggressive and used abusive language against all the occupants of the house.

P.W.3 Nkalimeng was the most cogent and impressive of all Crown witnesses. She stated quite honestly that she does not know when and how deceased had been kicked by accused. At the time deceased made this complaint, he was already seated away from the accused. P.W.4 corroborates P.W.3 and P.W.2 on

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how the fight started. P.W.4 was not generally truthful but on how the fight started, she is corroborated by other witnesses and by circumstantial evidence.

Whether deceased spilled accused's beer and P.W.4 bought a replacement for it, is not of material importance in this case. Similarly, whether there was dancing or not cannot affect the outcome of this case in a significant way except on the question of credibility of Crown witnesses in a general way. Everything in such cases depends on the circumstances of each case.

It is common cause that the initial cause of friction between accused and deceased is the fact that deceased tripped on the leg of accused. Whether this was deliberate or not was not initially important. Deceased put his complaint in terms that implied that he regarded this as a deliberate kick. Accused denied this, but after some exchange of words it was accepted by all that accused should apologise. This was done and deceased accepted the apology.

None of the Crown witnesses saw the second tripping or kicking of deceased by the accused when deceased re-entered the house and sat down after having gone out. According to Crown witnesses, deceased's reaction to this accusation was to insult everybody in the house causing pandemonium and the sudden exit of the people inside the house. None of the witnesses saw the fight as there was a scramble to get out of the house. P.W.2 remembers that accused removed his coat

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but even in this he is not clear. P.W.2 and P.W.3 got it from the deceased that accused had stabbed him.

The accused's evidence, except for the fact that he says there was dancing, is in many ways consistent with that of the Crown witnesses as to the tripping that resulted in a misunderstanding. It is on how the fight began that his evidence is in direct conflict with that of Crown witnesses. According to accused, while deceased was dancing he came too near accused's feet that accused had to alert deceased to the possibility that deceased might again spill accused's beer. According to accused, deceased did not like this and he said accused was after him. Deceased threatened accused with the stick that deceased had in his possession. Deceased danced away and when he came near accused again as he was dancing, deceased poked accused with a stick. Accused reacted quickly, removed his overcoat and threw it over deceased's face and stabbed deceased with a knife in the chest region. When accused looked around, he found that he was only left in the house with P.W.2, everyone had left the room.

I reject accused's story that deceased used a stick on him or that the deceased had a stick. I accept the evidence of Crown witnesses that accused suddenly insulted all occupants of the house causing them to fear for their safety with the result that they vacated the house as fast as their feet could carry them.

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The crisp question for determination is whether in the circumstances of the case accused had the *mens rea* that will justify a conviction of murder.

There is the question of consumption of a substantial amount of Basotho beer and whether this in any way affected his capacity to form a specific intention to kill.

The Crown invited me to consider whether accused was so drunk that he could be regarded as temporarily insane through intoxication.

I will not deal with it. It was adequately dealt with in *Matsaba v. Rex C of A* (CRI) No. 5 of 1990 (unreported). In our law, although such a person was "by reason of intoxication insane" acquitted, he is then sent for an indefinite detention at His Majesty's pleasure like all insane people. In reality this is sometimes a calamity worse than being found criminally liable and being convicted and sentenced to a definite term of imprisonment.

G.H. Gordon's *Criminal Law*, 2nd Edition, 12 - 01, dealing with the way intoxication is viewed in Scotland, states:-

"The law regarding intoxication as a defence to a criminal charge is an unsatisfactory compromise among a number of attitudes and principles. On the one hand it is felt drinking should never be taken into account in ascribing responsibility for a crime, because it is a voluntary condition and is, moreover, a reprehensible one. As Hume says, 'one cannot well lay claim to favour, on ground of that which in itself shews a disregard for

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order and decency'. On the one hand a man who gets drunk and commits a crime sometimes arouses sympathy rather than indignation."

P.W.3 says that the deceased was the target of the accused's attack merely because he had complained of having been kicked. When accused initiated the attack on the deceased, he did it in such a way that even the other people felt unsafe.

In rejecting the accused's story I am fortified by the fact that he himself admits his mind was a bit befuddled by drink, consequently he cannot deny everything that the Crown witnesses said.

This (as I have already shown) is not a case in which *The Criminal Liability of Intoxicated Persons Proclamation No.60* of 1938 applies. In terms of its Section 2(2)(b), it is only relevant where:

"the person charged was by reason of intoxication insane temporarily or otherwise at the time of such act or omission."

Intoxication should never be taken out of the social context and the need for deterrence and to discourage antisocial behaviour that violates the rights of other people. For this reason, I believe academics have interpreted the Appellate Division case of *S v. Chretien* 1981(1) SA 1097 out of its factual context. The Court was not dealing with,

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"Someone who is dead drunk and is not conscious of what he is doing (who) is not liable because a muscular movement which is done in this condition is not a criminal act."

The rubric of the case does not fully bring out the *ratio decidendi* of that case. The Appellate Division had not accepted the accused was dead drunk. Therefore the Appellate Division confirmed the conviction of culpable homicide in a case where an intoxicated driver drove into a crowd killing one person and injuring five others. The decision of the Durban and Coastal Division was therefore confirmed by the Appellate Division and is reported as *R v. Chretien* 1979(4) SA 871. In that case Friedman J said at page 878 AB:

"There is a common misconception that the presence of alcohol in the sense that the accused person being in an alcoholic state, is generally and wrongly taken into account by the court as a mitigating factor. That is a belief that must be dispelled. In the present case the fact that the accused had clearly imbibed far too much alcohol was a factor we took into account in weighing whether or not the accused had an intention to kill, and the fact that he was in an inebriated state was a factor that influenced us in concluding that the accused should be convicted not of murder but of a lesser crime of culpable homicide."

Returning to the facts of this case, it seems to me the accused had taken too much liquor. Basotho home brew beer differs in potency. Accused was not as balanced as he should have been. Like all people who have taken too much alcohol, he must have been inclined to take offence too easily and consequently got provoked by any exchange of words with the deceased that might have been legitimate. Whether accused had or had not tripped or kicked deceased, accused did not like the

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fact that deceased had said accused was doing something wrong. Accused's temper flared and displayed aggression not only against deceased but against all the people in the house, whom he insulted collectively. I do not have to be in the accused's mind to realise that at the root of his behaviour was his inebriation. In *R v. Bourke* 1916 TPD 303 at page 305 Wessels J said:

"It is a well known fact that there are various degrees of drunkenness. A man may drink a small amount of liquor, the effect of which may be upon him to excite him and make him to act differently to the way he would act if he were absolutely sober."

In this case, the accused had taken between fifteen and twenty five scales of beer. That is quite a lot, although accused says he could still take five more before he became drunk.

In order to determine that the accused is guilty of murder I must be satisfied that he had the specific intention to kill. In *Rex v Innes Grant* 1949(1) SA 753 at page 765 Centlivres JA said:

"What authorities describe as voluntary drunkenness may be relied upon by an accused to show that in committing the act charged against him he did not have the specific intent, which is a necessary element in the crime charged against him."

In *S v. Sigwahla* 1967(4) SA 566 at page 570 BE Holmes JA, dealing with the specific intention required for the Court to convict the accused of murder, said:

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"The fact that the accused ought reasonably to have foreseen is not sufficient. Subjective foresight like any other factual issue, may be proved by inference It cannot be so drawn if there is a reasonable possibility that the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so."

Since I have to judge everything concerning the accused's intention, focussing on the accused's particular mind not just that of a reasonable man, I cannot see how I can find it as a fact that the accused had the specific intention to kill deceased. At the very worst, I am obliged to give him the benefit of doubt on this question of requisite *mens rea* to kill, that must be present in a case of murder.

Accused is therefore guilty of culpable homicide, but not guilty of murder.

Stand up accused. You are found guilty of culpable homicide.

W.C.M. MAQUTU
JUDGE