

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

TEFO TEFO
NKHETHELENG TEFO

1st Accused
2nd Accused

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice
J.L. Kheola on the 24th day of November, 1995.

The two accused are charged with two counts of murder and two counts of assault with intent to do grievous bodily harm. The murder charges relate to the deaths of 'Mantho Kalake on the 15th day of June, 1989 and to the death of 'Matsotang on the 18th day of June, 1989 having been assaulted on the 15th day of June, 1989.

The assault cases relate to Ntsoipi Kalake and 'Masamuel Ntsamaeeng Motlalane, committed on the 15th day of June, 1989.

The accused pleaded not guilty to all the charges.

At the beginning of the trial, Mr. Tsotsi, attorney for the

defence, made a formal admission of the two post mortem examination reports and the two medical reports relating to the people who were assaulted. The identity of the deceased was admitted.

According to the post-mortem examination report (Exhibit "A") the death of 'Mantho Kalake was due to internal haemorrhage causing left haemothorax and haemorrhage due to lacerated left cephalic vein.

The death of 'Matsotang Kalake (Exhibit "B") was due to generalised peritonitis. There was a penetrating wound on the left chest, it was 7cm. deep and 5cm. long.

P.W.1 'Mapabatso Motlalane is the daughter of the complainant in count 4. At the time of the start of the trial the complainant Ntsamaeeng Motlalane was already late. She testified that on the night in question she was sleeping in her house when she heard the accused shouting and calling her mother by her name. She (Ntsamaeeng) kept quiet. The accused came to her house and asked her the whereabouts of her mother. She told them that her mother was sleeping in her hut. P.W.1 came out of her house to find out what was happening. There was moonlight. When they came to her mother's hut A2 opened the door and went in. A1 remained outside. P.W.1 says that she asked A1 what was the matter. He replied that they wanted her so that she should go and resurrect his mother whom she had killed.

P.W.1 says that there was light from a paraffin lamp in her mother's hut. From where was standing she could see in the hut because the door was open. A2 hit her mother on the head with a sword. However her mother covered her head with her arms in such a way that the blow or blows landed on her arms. A1 spoke to A2 and said that he must stab her as they had already killed her friend 'Mantho. She (P.W.1) cried and raised an alarm. She went to the chief and reported to him what was happening at her place. The chief came with her. They found her mother being in a very serious condition. She was groaning and breathing with difficulty. Her right upperarm was fractured and the left forearm was also wounded. P.W.1 says that as far as she was aware her mother never quarrelled with the accused. The two families lived peacefully together. The weapons before Court are not the weapons which the accused were using. A1 had a spear and A2 had a sword.

Under cross-examination P.W.1 said that in 1985 the son of A1, Makhosi, was killed by lightning. She denied any knowledge of a case by A1 against 'Mantho for killing his son through witchcraft. She said that A1 did not say: "drag her so that she can go and resurrect my mother." She insisted that A1 said: "Stab her so that she can go and resurrect my mother." She said that her mother was assaulted in her hut until she (P.W.1) left for the chiefs place in order to report to the chief that the accused were assaulting her mother.

P.W.2 'Mamotselisi Kalake is the daughter-in-law of 'Mantho

Kalake (deceased in count 1) and 'Matsotang Kalake (deceased in Count 2) is her husband's sister. On the night of the 15th June, 1989 P.W.2 was in her house when she heard dogs barking and the scream by 'Mantho saying that she was dying a cruel death. She came out of her house and saw 'Mantho, 'Matsotang and the two accused. Accused 2 stabbed 'Mantho who screamed and said that she was dying a cruel death. Accused 2 then stabbed 'Matsotang on the belly with a shiny weapon. He said that he was going to kill them all.

P.W.2 says that there was moonlight on that night and that was the reason why she saw well what Accused 2 did. She ran away immediately after Accused 2 stabbed 'Matsotang on the belly. She went to the home of one Pitso and woke him up. They both stood at the doorway while her husband, Ntsoipi Kalake (P.W.3) stood at Pitso's forecourt. Accused 2 came and stabbed P.W.3 on the left breast with a shiny object. He (P.W.3) fell down. Before he was stabbed he was just standing there and not doing anything. He was holding a stick in his hand. Accused 2 ran away after he had stabbed P.W.3. She said that on the night in question the deceased ('Mantho) was sleeping with her (P.W.2's) daughter 'Matsepiiso and not with one kalake kalake. 'Matsepiiso was the girl who raised the alarm because she was crying and running away. She denied that P.W.3 was actually chasing the two accused when Accused 2 stabbed him on the chest. She also denied that 'Matsotang was actually attacking the accused when Accused 2 stabbed her. She was just standing and not doing anything.

P.W.3 Motlalepula Ntsoipi Kalake is the son of 'Mantho and the husband of P.W.2. His evidence is that on the night of the 15th June, 1989 he was sleeping in his house when he was awakened by the barking dogs and the noise of children who were screaming. He came out of the house and rushed towards the direction from which the noise came. When he came to the forecourt of the house of Pitso he stopped and called the children to come to him. At that time Accused 2 suddenly came to him and stabbed him with something above the left breast. He fell down. He had been holding a stick in his hand before Accused 2 stabbed him. He had not used the stick in any way because he was not aware of what was happening. His main concern was to get to the children and to find out from them what was happening and why they were crying.

After he had fallen down Pitso and one Rakoebu came and carried him into the house where his mother was. She was already dead. Prior to the 15th June, 1989 his mother had not quarrelled with the accused and their family in any way. The two families were living peacefully together. P.W.3 says that when Accused 2 stabbed him Accused 1 was nearby but he did not say anything to Accused 2. He denies that when he was stabbed he was chasing the accused. He does not know of a case in which his mother was charged with the killing of one Macosi through witchcraft. The death of Macosi did not sour relations between the two families.

P.W.4 'Matsepiso Kalake is the granddaughter of the late 'Mantho Kalake. On the night of the 15th June, 1989 she was

sleeping in the same house with her grandmother. The door was closed but not locked. It was suddenly opened and the two accused came in. Accused 1 ordered 'Mantho to wake up and go and resurrect his mother. He held her. A2 came and stabbed her with a shiny object at the back between the shoulders. At that time there was light from the lamp. P.W.4 says that she did not know how 'Mantho had killed the mother of the accused. As far as she knew the two families i.e. her family and that of the accused have never had any quarrels.

After the stabbing of her grandmother she (P.W.4) ran away and went to her parents' home. She reported to her father that the accused were killing her grandmother. She was crying when she fled to her parents' home. Before she ran away the accused dragged 'Mantho out of her house.

P.W.5 Pitso Kalake testified that on the night in question he was sleeping in his house when P.W.2 came and woke him up. He opened the door and peeped. He saw P.W.3 standing at his (P.W.5's) forecourt. He asked him what was happening because he heard noise before he peeped at the door. P.W.3 answered and said that Accused 1 had just disappeared at the corner of the house. At that time Accused 2 was coming from the direction of the late 'Matsotang's house. He was in a hurry and was going towards P.W.3. When he came to him he stabbed him with a shiny object/iron. P.W.3 fell down while Accused 2 ran away. P.W.5 says that he took P.W.3 into the house and stopped the bleeding from the chest wound. Thereafter he left P.W.3 in the house.

When he got out of the house he found the late 'Mantho lying at the forecourt. She was already dead. She had a wound on the left side of her body.

P.W.6 Litsietsi Rabiri says that on the night in question he was at his home. P.W.7 Rakoebu Kalake came to him and reported to him what the accused had done. He went to the home of the father of the accused and confronted them with the allegations which had been made against them relating to the injuries sustained by 'Mantho, 'Matsotang, Ntsamaeeng and Ntsoipi. Accused 1 reacted by remarking: "Is that person Ntsamaeeng still alive when my mother is dead?" The accused admitted that they caused all those injuries because 'Mantho and Ntsamaeeng had bewitched their mother. When she was dying she mentioned their names. Accused 2 said that they assaulted 'Matsotang because she moved in a boastful manner when she was before them. So they dealt with her accordingly.

In his evidence P.W.7 Rakoebu Kalake confirms what we already know. He says that the accused admitted that they inflicted the injuries found on the deceased persons and Ntsamaeeng. They said that they never saw P.W.3 at all that night. It is significant that they now say that they or one of them stabbed P.W.3 in self defence because he was attacking them. This is surprising because when their attorney was cross-examining P.W.6 he put it to the witness that the accused will say that they never saw P.W.3 that night. This contradiction goes to show that the accused have no defence against the charge

concerning P.W.3.

In his defence Accused 1 testified that prior to the 15th June, 1989 his mother was well and never complained of any illness. On the night in question he was at his home. A messenger came and said that his father was calling him to come urgently. He went to his parents' home with his wife. He found his mother standing and saying that 'Mantho and Ntsamaeeng were calling her and said that they wanted her to go and die far away. He held her and forced her to sit down. She tried to rise again but he overpowered her. She suddenly tilt her head and he noticed that she was dead.

Accused 1 says that that afternoon he was returning from the river when he found his mother sitting outside her house. He joined her. Immediately after that Ntsamaeeng arrived and asked for snuff from his mother. The latter said that she had no powdered tobacco and gave Ntsamaeeng tobacco leaves to go and grind them for herself. Ntsamaeeng declined the offer and left.

After his mother had died he went to Accused 2 and said that they should go and call 'Mantho and Ntsamaeeng to come and resurrect their dead mother whom they had killed through witchcraft. He picked up the iron rod (Exhibit "2") which he found outside the house where the children had been playing with it. They went down to 'Mantho's house. The door of her house was divided into two parts. The top part was open. 'Mantho was already standing near the door. She was half naked. She was

in the company of a small boy named Kalake. They got into the house, grabbed her and pulled her out. She tried to get hold of Kalake but they ordered her to leave the child. As they got out he (A1) was behind 'Mantho and A2 was in front of her. There is a narrow passage between 'Mantho's house and the goats' kraal. They moved along the passage. 'Mantho turned quickly and pushed him (A1) forcing him to bump against the wall of the house. The handle of Exhibit "1" also hit the wall while the sharp point was pointing towards her. It stabbed her on the left side of her body. Accused 1 says that it was an accident that 'Mantho collided with the sharp point of Exhibit "1".

Accused 2 says that when he noticed that 'Mantho was escaping he chased her and stabbed her at the back with Exhibit "2". He stabbed her because he wanted her to stop and go to where his mother was and resurrect her.

Accused 1 says that as Accused 2 was chasing her, P.W.3 intercepted them and tried to hit him (A1) with a stick but he dived and evaded the blow. He (A1) then ran away towards P.W.3's home. When he came to the forecourt he met 'Matsotang. She was raising up her arm with something in her hand and was trying to hit him with that thing. He quickly retaliated and stabbed her on the rib cage with Exhibit "1". From there he ran away to Lihlabaneng outside the village. They then proceeded to Ntsamaeeng's place. On their arrival there A2 opened the door and got in. He (A1) stood at the door and told A2 to pull Ntsamaeeng out so that she could go and resurrect his mother.

It was dark inside the house. A2 pushed her over the lower portion of the door and she broke her arm when she fell outside. He (A2) then hit her on the head with Exhibit "2". They left her there when they noticed that her arm was broken. They went home where they were eventually arrested.

In cross-examination A1 said that A2 hit Ntsamaeeng twice with Exhibit "2" before they realised that she had broken her arm.

The version of A2 is substantially the same with that of A1. He says that as they were going through the passage he heard a scuffle behind him and turned. He saw that A1 had fallen down and 'Mantho was running away. He chased her and stabbed her at the back three times in an attempt to stop her. He did not stop her in front because he thought that she might fight him. This is the ridiculous part of the story of A2 because there was no way an old lady of 69 years of age could under any circumstances attack such a strong young man. It is not even possible that she could run as fast as the accused want us to believe.

After he had stabbed her three times, P.W.3 stopped him from assaulting her further. He (A2) went away and followed A1. When he came to P.W.3's forecourt he saw a person raising up a stick in an attempt to hit him. He noticed that it was P.W.3. He (A2) stabbed him with Exhibit "2". P.W.3 fell down. He then proceeded to Ntsamaeeng's place. His story of what happened at Ntsamaeeng's place is the same as that of A1. He says that after

he had pushed her over the door she refused to rise. He hit her several times but she did not rise. He held her hand and tried to pull her up. He realised that her arm was broken. He then spoke to Al and said "Let us leave this devil, it is broken." They left her there because he hit her on the head and her mind would not function properly to enable her to resurrect his mother.

I have considered the evidence of the Crown and the defence and have the following remarks and findings to make. It is very clear that when their mother died the accused had a very strong belief that she was killed through witchcraft by 'Mantho and Ntsamaeeng. Their belief was supported by what their mother said when she was dying. They became very angry and decided to go to the homes of the two "witches". They allege that their intention was to go and fetch the witches so that they could come and resurrect their mother. This allegation cannot be true in the light of the fact that they armed themselves with very lethal weapons before they left for their destinations. They knew that they were going to the homes of old ladies who had no husbands. What resistance did they expect to encounter from such harmless and unarmed old ladies?

It seems to me that they armed themselves with lethal weapons before they left for their destinations because they intended to kill their victims. If what they are saying were true they would not have mortally injured the very people who had to go to their parents' home to resurrect their dead mother. Two

Crown witnesses who saw the weapons used to kill 'Mantho and Ntsamaeeng have told this Court that Exhibits "1" and "2" are not the weapons which they saw on that fateful night. They refer to the weapon used by A2 as a shiny object. Exhibits "1" and "2" are not shiny objects. It is possible that they lost their lustre because they have been kept in the exhibit-room for more than five years. Be that as it may, Exhibits "1" and "2" are extremely dangerous weapons which appear to have been well kept in the house. A1 is telling a blatant lie that he found Exhibit "1" lying outside the house where children had been playing with it. It is not the type of weapon that the children can be allowed to play with.

Accused 2 says that Exhibit "2" was stuck in the roof (thatch). I can agree with that because most Basotho men keep their spears in that manner. It is the safest way of keeping a dangerous weapon because it cannot be easily seen and it cannot rust. The two weapons exhibited in this Court are long, thin round iron rods of about a metre long and sharp pointed on one end. They can be used in stabbing something or in striking as a stick. I have said that there was no need for the accused to carry such dangerous weapons when they went to their victims' home unless they intended to kill them or to seriously injure them. I have said that if their intention was to fetch them so that they could resurrect their dead mother they would have taken proper care of them and even nursed them after they accidentally injured them, as they allege.

It is common cause that 'Mantho was not sleeping alone in her house when the accused arrived. The accused say that he was sleeping with a boy named Kalake. The Crown witnesses say that she was sleeping with a girl named 'Matsepiso. It is improbable and not according to Basotho custom that an old lady like 'Mantho can prefer to sleep in the same room with her grandson when she has a granddaughter. 'Matsepiso has given evidence that she was sleeping in that room with her grandmother when the accused arrived. A1 held her and A2 stabbed her at the back with a shiny object. She ran away and reported to his parents what was happening at her grandmother's place. Her mother (P.W.2) says that when she got out of her house she saw the two accused, 'Mantho and 'Matsotang walking towards her house. A2 stabbed 'Mantho first and then stabbed "Matsotang on the belly. He then threatened that he was going to kill them all.

The story of the accused that 'Mantho was accidentally stabbed when she tried to escape is so improbable that it cannot be true and it is beyond any reasonable doubt false (R. v. **Difford**, 1939 A.D. 370 at p.373). 'Mantho was an old lady who could not run and overpower such a young and able-bodied man as A1. Accused 2 admits that he stabbed her at the back three times because he was afraid that if he stopped her from the front she would fight him. That is nonsense. He dragged her out of her house and she offered no resistance. In fact when P.W.2 saw them approach her house 'Mantho was walking and not being pushed.

I am convinced that the story of the accused is altogether

untrue regarding the manner in which 'Mantho is alleged to have sustained the fatal wounds. I believe the story of P.W.2 and P.W.4 who are eye-witnesses. They were honest witnesses who gave their evidence in a satisfactory manner.

According to P.W.2, Accused 2 stabbed 'Matsotang without any provocation as they and 'Mantho were being escorted towards her (P.W.2's) house. A1 says that 'Matsotang was attacking him and he stabbed her in self defence. She raised up her arm and tried to hit him with something in her hand. He then stabbed her on the rib cage. It is significant that immediately after the accused had assaulted their victims they were summoned to appear before the chief. They were asked to explain why they assaulted their victims. Regarding 'Matsotang A2 said that she walked in a boastful manner when she passed near them and that they dealt with her accordingly. This explanation was made before P.W.6 and P.W.7. In this Court, they have given a different explanation. It seems to me that this latest explanation is an afterthought which I reject outright.

Regarding P.W.3 the accused explained to P.W.6 and P.W.7 that they never even saw him that night. It cannot be true that he attacked one of them.

Ntsamaeeng Motlalane was also badly assaulted in her own house simply because the accused believed that she bewitched their mother. They admit that when they arrived there they asked P.W.1 the whereabouts of Ntsamaeeng. She told them that she was

in her house. She came out of her house to see what was happening. A2 opened the door and entered. He hit her with a sword on the head. A1 said "stab her, we have already killed her friend, 'Mantho Kalake." The accused admit that they assaulted her by pushing her over the door and later hitting her with their weapons where she had fallen. I reject that story because P.W.1 saw how her mother was assaulted. At the time of the trial Ntsamaeeng had already died. The Crown attempted to have her deposition at the preparatory examination admitted in terms of section 227 (1) of the Criminal Procedure and Evidence Act 1981. Their application failed because they had not proved on oath to the satisfaction of the Court that the deponent was dead.

The accused had the requisite intent to kill the two deceased persons and the intention to cause serious bodily harm on the complainants. Their intention can be inferred from the following factors:

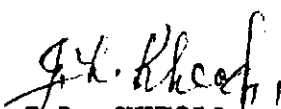
1. Before they left their homes they armed themselves with very lethal weapons;
2. When they came to the homes of the so-called witches they brutally assaulted them;
3. They made no attempt to safely escort the so-called witches to their homes so that they could resurrect their dead mother as they falsely alleged that their intention

was to fetch them for that purpose;

4. When the chief told them that Ntsamaeeng was still alive, they expressed their anger that she was still alive when their mother was dead. It is clear that when they left her they hoped that she would die after a short time;
5. The vital parts of the body i.e. the head and chest were directly hit or stabbed with those lethal weapons.

I am convinced that the accused had the requisite intention to kill in the form of **dolus directus**.

For the reasons stated above I find the accused guilty as charged in all the four counts.


J.L. KHEOLA
CHIEF JUSTICE

24th November, 1995.

For Crown : Miss Nku
For Accused : Mr. Tsotsi

Extenuating Circumstances.

It is trite law that a belief in witchcraft is an extenuating circumstance (R. v. Fundakubi, 1948 (3) S.A. 810 (A.D.) at pp. 818-20). There is overwhelming evidence that the accused believed that their mother was killed by 'Mantho Kalake and Ntsamaeeng Motlalane through the practice of witchcraft.

I find that there is an extenuating circumstance.

Mitigation

In passing sentence I took into account the following mitigating factors:

1. The accused are first offenders.
2. They both have young children of school-going age.
3. Their wives are housewives who have no income at all.

In passing sentence I have to balance the personal circumstances of the accused with the interests and the protection of the public. The accused went on the rampage and indiscriminately assaulted any member of the public they came across. In fact 'Matsotang (the deceased in count 2) had not been mentioned by the accused's mother as one of the people who was bewitching her. Ntsuipi was also not doing any harm to the accused.

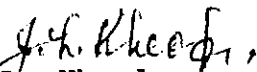
Sentence: Count 1: A1 A2; Thirteen (13) years'
imprisonment each.

Count 2: A1 and A2; Thirteen (13) years'
imprisonment each.

Count 3: A1 and A2; Eighteen (18) months'
imprisonment each.

Count 4: A1 and A2; Eighteen (18) months'
imprisonment each.

Sentences to run concurrently.


J. V. Kheola
CHIEF JUSTICE
24/11/95