CRI/T/70/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

V

MOEKETSI RAMAROU

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 9th day of March, 1995.

---

Accused is charged with the crime of murder of the late Motlatsi Bohloko who died on the 3rd November, 1987.

The events that led to this death occurred at Hermon before 8.00 a.m. not far from a Lesotho Evangelical Church school.

According to P.W.2 Florry Makhele Accused and Deceased were

/...

seen fighting throwing stones at each other. School children were watching. They eventually got hold of each other and began rolling down a slope. P.W.2 went to call P.W.1 Reverend Kobeli Lesoli.

P.W.1 says at the stage he witnessed the fight Accused was on top of the Deceased. P.W.1 never went nearer, he watched the fight from a distance of about 400 or 500 metres. Accused was on top of Deceased hitting Deceased with his fist, holding Deceased with one hand. Deceased was also fighting with his hands. Accused then picked up a stone with both hands and hit Deceased with it with both hands on the head or the head region. Accused hit Deceased with the stone once on the head and again hit Deceased aonce on the legs.

P.W.2 continues her evidence and says after they had caught hold of each other Accused and Deceased had something like an iron rod in their hands and wrestling over it. P.W.2 says she does not know how the fight started she only saw them throwing stones at each other. P.W.2 is not sure exactly when he went to call P.W.1. She says she only saw Accused hit Deceased with a stone while Deceased was on the ground. Accused raised the stone with both hands. Under cross-examination P.W.2 says Accused was

/...

standing when he hit Deceased with a stone. She was 200 metres away. P.W.2 said she was confused and said she had forgotten how it all happened.

P.W.3 a relative of Deceased came after the fight when Deceased was already dead. P.W.4 a policeman who was an investigating officer was not present in Court. His deposition was read into the record and was admitted by the consent of both parties.

There was some dispute about the size of the stone used on Deceased. it was eventually brought and was marked Exhibit 1. It was 6 Kilograms in weight. The iron rod which Deceased had was an aluminium 3 feet long rod which weighed ·54 Kilograms.

Accused claims he killed Deceased in self-defence because Deceased had produced a knife while Accused was on top of him. He could not dispossess Deceased of the knife without getting himself injured as he would have had to hold the sharp edge of the knife. Accused denies he ever assaulted Deceased with his fist or bare hands. He says while he was on top of Deceased he restrained Deceased from using the knife with his left hand. Eventually he picked up the 6 Kilogram stone with his right hand

/...

and dropped it on the Deceased forehead. This was done in order to disable Deceased.

The cause of the fight was that Deceased had been causing his sheep to drink Accused's water. The water was in a bath and water is scarce in the area. When Accused talked to Deceased about this trying to reason with Deceased, Deceased said Accused can go where he liked and attacked Accused with stones. They were 10 yards apart when this happened.

According to Accused (in his evidence-in-chief) at the place where the fight took place he showed the police the stone he used on Deceased and the Deceased's iron rod. Accused says he also mentioned to the police the knife the Deceased had. The police took the stone and the iron rod and ordered him to get into the police vehicle. The police did not carefully look for the knife. The word Accused used in connection with the knife is "batlisisa" which means look for thoroughly. The police also took the body of Deceased with them and left it at the Mafeteng mortuary. They then passed on with him to the Mafeteng Charge Office.

Accused told the Court that Deceased was 6 feet tall and rather slim. Deceased was over sixty years of age. In good

health and strong. The Court observed that Accused is 5 feet 5 inches tall, well built, in good health. Accused is also fairly strong and was able to lift the six kilogram stone with one hand and demonstrate how he dropped it on the Deceased. It was however clear that Accused could only lift that stone with great difficulty. He could not have managed to do so if Deceased was wriggling and fighting back.

During cross-examination Accused said he hit Deceased with that 6 Kilogram stone because he wanted to be able to bring the fight to an end so that he could go to school. Accused denied he used both hands to lift the stone. He said he used one hand to avoid crushing the Deceased's skull. Accused description of how he dropped the stone on Deceased does not give the impression that Deceased was able to move. He says he put his knee on the chest of the Deceased in order to use the stone. The Deceased according to the Accused was trying to use his left hand to get up while the other hand which had a knife was pinned down by the Accused with his left hand. This in my view would have made it difficult for accused to lift the 6 kilograma stone with one hand. This may not be an accurate description of what happened.

When Accused was asked in cross-examination whether he ever

told anybody about the knife that Deceased had, Accused said he never told anybody. Accused said he first mentioned the knife before the police at Mafeteng Charge Office after the Deceased's body had been left at the Mafeteng mortuary. He never told the police about the knife at Van Rooyen's Gate, the headman of the village and the Mafeteng police at the place where the fight had taken place in the village of Hermon. In other words at the scene of crime where the knife should have been looked for, it was never mentioned to the police. He only mentioned the stone Exhibit "1" and the aluminium rod of the Deceased Exhibit "2".

Although Accused said they were friendly with Deceased, Accused admitted under cross-examination that they had fought before. The cause of that fight was that Accused had told the police that he suspected Deceased of killing his sheep. For that reason Deceased attacked Accused. At first Accused said he did not defend himself. Later he said he did. This in my view gives the impression that Deceased and the Accused were not on the best of terms although they had to live as neighbours.

Deceased was carrying a light aluminium rod. This is on ·54 kilogram. It is not as heavy as sticks that Basotho people carry for offensive purpose. According to Mr. Ntlhoki during P.W.1's

cross-examination. it had inflicted a small laceration on the Accused. Accused (when he gave evidence) told the Court that this was a serious wound. Accused stated he had successfully pinned down Deceased but was under pressure to get up because he had to go to school. That is why among other things he had to take steps to terminate their fight with Deceased. Asked if he realised he might kill Deceased by hitting on the head, his reply was that he knows when the man a man is hit on the head he sometimes becomes helpless. Accused also came out with the story during cross-examination that he was hit by Deceased with a stone on the thigh. this was something new.

Deceased's behaviour as described by Accused seems illogical and absurd. If so Deceased must have been looking for trouble. This evidence on Deceased's character led to a revelation that although Deceased was alleged to be the aggressor on the first occasion when Accused and Deceased fought over allegations made by Accused that Deceased had killed a sheep belonging to Accused. the matter went to a Local Court. The Local Court according to the Accused under cross-examination said the Local Court wrongly convicted him and found that it was the Accused not the Deceased who was the aggressor.

It seems to me that Accused by attacking the character of Deceased and showing himself to be the good one Accused partially lost the protection of Section 249 of the *Criminal Procedure and Evidence Act* 10 1981. This Section should be applied with fairness. Accused's previous convictions or the fact that he is bad character should not be disclosed unless he claims he is of good character and attack the character of the prosecutor and witnesses of the prosection. In this case the prosecution was entitled to put the record straight through cross-examination to show that it was the Accused rather than Deceased who had been the aggressor on the first occasion that the Deceased and the Accused fought.

As it turns out if Deceased was labouring under a smouldering resentment, it is not improbable that he was the aggressor on this occasion. I do not think how the fight started is important. I find it also not important who was the real aggressor. The Deceased is dead he cannot tell us his side of the story. I will therefore assume in the Accused's favour that he acted under provocation of some kind when he got into this fight. It does not mean that becaue he is alive and has to face the music alone, now that Deceased is dead, he could not have been provoked by the Deceased in some way. Therefore I will not

/...

assume Deceased was not responsible for this fight. The reason being that in my view Deceased ought not to throw stones at the Accused in Accused's own home.

I believed P.W.1 that when he first saw the fight, Accused was on top of Deceased hitting him with a fist and that Deceased was fighting back. I note, of course, that P.W.1 was a considerable distance away. I prefer P.W.1's version that Accused used two hands in hitting Deceased with the stone Exhibit "1".

Accused in my view was not defending himself when he hit or dropped a six kilogram stone on the Deceased. I do have problems with Accused's story that Deceased had a knife. Deceased had no knife. What Accused alleges is false. Accused's evidence is full of contradictions and improbabilities on this point. Compare what he said in his evidence-in-chief and what he said under cross-examination. His admission that he never said this immediately after the fight but said this at the police station in Mafeteng much later in the day makes me believe that this knife story was invented after the event. One would expect that fact to have been disclosed immediately after the fight when the scene of crime was combed for exhibits. Indeed I have serious

/...

doubt whether Accused said this to the police at Mafeteng at all. Even if Accused said so I consider that allegation of the knife to have had relatively little value at that stage.

Failure to call the police in the hope that the question would be put to the police about the knife does not carry the matter further. Mr. Lenono for the Crown referred me to the case of *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 where the Court said:-

> "The law would fail toprotect the community if it admitted fanciful possibilities to deflect the cause of justice."

I think there is some sense in that but it is not enough to convict the accused on the basis that he lied about the knife.

Accused has admitted in cross-examination that he decided to terminate the fight quickly in ordr to go to school. In using the heavy stone he acted negligently to the point of recklessness. This is particularly so because Deceased was down, on the ground and the Accused was odn top of him. Accused from his own evidence says he had an upper hand. We cannot ignore the fact that Deceased was estimated by the Accused to be over sixty

/...

three years of age when Accused forty two years old. Which could mean a difference of twenty years between their ages. Even if Deceased was a strong old man, it is doubtful if he could have had the stamina of a forty two years old such as the Accused.

It is not unreasonable to infer that the fist blows that Accused delivered on the Deceased must have had an effect on the Deceased. That is why Accused was able to pick up the stone while Deceased was stupefied by the blows inflicted with his fist. Accused had to invent the existence of a knife to justify his unjustified use of the stone.

I have very little doubt that the Crown has not proved the Accused is guilty of murder. With the provocation and the heat of the fight that evidence discloses I doubt if Accused had the subjective intention to kill. See *S v Sigwahla* 1967(4) SA 566. The test for murder is not an objective one, it is subjective. We cannot exclude the possibility that the Accused was by then so angry that his anger beclouded his judgment.

What cannot be doubted is that Accused was negligent in using the heavy stone. If he was reckless I am prepaed to give him the benefit of the doubt on that point. In other words I am

/...

not certain because of the anger and state Accused was, if he really appreciated what he was doing and that he acted recklessly as to whether such death results or not. See *S v Mini* 1963(3) SA 188. I will not go into the *Criminal Law Homicide (Amendment) Proclamation* of 1959. It would merely cause confusion in this case as it always does because it is based on English law. It is pointless because I have already given the Accused the benefit of doubt because the Crown has not proved the requisite subjective foresight of death. To put the requirement in the words of Holmes JA in *S v Sigwahla* (supara) at page 570E:

> "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 accused that accused did not forsee, even if he ought reasonably to have done so, even if he probably did do so."

I therefore in the light of the aforegoing find the accused guilty of culpable homicide.

W.C M. MAQUTU
JUDGE

For the Crown : Mr. A.M. Lenono
For the Accused: Mr. M. Ntlhoki

SENTENCE

I have listened to Mr. Ntlhoki who has made the following points in his plea in mitigation of sentence:

1. The Accused has waited in agony for over eight years for his trial.

2. He had no criminal record of murder up to that time.

3. He has been a teacher who was the sole breadwinner of his family.

4. Imprisonment of over three months will lead to the loss of his job as a teacher.

5. Ten head of cattle will be claimed again him as damages for the death of Deceased.

6. Accused has told him he is sorry that he caused the death of Deceased.

/...

7. Accused is now a man of 50 years of age when he committed the crime he was only 42 years old.

I have taken into account what Mr. Ntlhoki has said but to take only the personal circumstances of the Accused into account and disregard those of Deceased and his family would not be fair. Taking the personal circumstances of the Accused is done as an end of society. There are other ends and expectations of society that the court has to take into account as well.

Deceased had a family and relatives that mourned his death too. He must have been a breadwinner within his means. the relatives of Deceased are looking to the Court to impose a sentence that will show it appreciates that the life of Deceased was sacred too.

If Deceased was genuinely sorry he should have pleaded guilty to Culpable Homicide from the very beginning. Saying he is sorry at the end of a trial which took several days does not help very much. Nevertheless it is obvious that he must have been sorry after his anger had subsided. What is regrettable is only that he took a chance and went for an acquittal in order not to avoid taking his punishment. This is human and understandable.

/...

The Court in its sentences must reflect the attitude of right-thinking people. Retribution is by no means an obsolete consideration. Although deterrence may not always result from punishment, the expectations of relatives of deceased that those that have taken the life their loved one should be punished must not be ignored, lest they take the law into their hands. *R v. Karz* 1961(1) SA 231. Nevertheless this Court has a duty to see that righteous anger does not becloud judgment. Punishment must be just, adequate and balanced.

Having taken all these factors into consideration the Accused is sentenced to four years' imprisonment.

W.C.M. MAQUTU
JUDGE