

CRI/T/12/94

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

'NEKO MAJARA

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 5th day of June, 1995.

The accused is before me on a charge of murder, it being alleged that on or about 19th May, 1993 and at or near Mokhethoaneng in the district of Berea he unlawfully and intentionally killed 'Matlhahane Chake.

When the charge was put to him, the accused pleaded guilty to culpable Homicide which plea was, however, not accepted by the crown. Consequently, a plea of not guilty was entered.

At the commencement of the trial, Mr. Mathafeng, who represents the accused in this matter, told the court that the defence admitted the depositions of Sgt. Maphatsoe and Mohaliki Chake who had testified as P.W.1 and P.W.7, respectively, at the Preparatory Examination proceedings. Mr. Mofelehetsi, counsel for the crown, accepted the admissions made by the defence

counsel. The depositions of P.W.1 and P.W.7 at the proceedings of the Preparatory Examination were, therefore, admitted in evidence and it became unnecessary to call the deponents as witnesses in this trial.

Again in the course of the hearing of this trial, Mr. Mathafeng on behalf of the accused person, admitted the deposition of Tumisang Sestine, who had testified as P.W.6 at the proceedings of the Preparatory Examination. The admission made by the defence counsel was accepted by Mr. Mofelehetsi for the crown. The deposition of P.W.6 at the Preparatory Examination proceedings likewise became evidence and it was therefore, unnecessary to call the deponent as a witness in this trial.

The post mortem report of a medical doctor who had performed the autopsy on the dead body of the deceased was not challenged. It was accordingly handed in from the bar as exhibit "A" by consent of both counsels.

Briefly stated, the evidence of Sgt. Maphatsoe was to the effect that on the night preceding 20th May, 1993, he was on duty at the CID office in Maseru. He received a certain report following which he proceeded to a village called Mokhethoaneng. He was

travelling in a police vehicle.

On arrival at the village, the police officer went to a certain cafe where he was shown a dead body of a woman. The body was identified to him as that of the deceased "Matlhahane Chake. It was covered with blankets and lying in front of the counter inside the cafe. On uncovering it, Sgt Maphatsoe found that the body was lying in a pool of blood. He examined it for injuries and observed two open wounds. The first wound was above the left breast and the second wound was on the left arm. The accused together with a knife were handed to him by the chieftainess of the area. Following the accused's explanation Sgt. Maphatsoe cautioned, arrested and charged him as aforesaid. He took possession of the knife and kept it in the custody of the police. Although it had been handed in as Exh "1" at the proceedings of the Preparatory Examination, the knife could no longer be traced. It was, therefore, not available for use as exhibit in this trial.

After he had examined it for injuries, Sgt Maphatsoe conveyed the deceased's dead body in a police vehicle, to the mortuary at Queen Elizabeth II hospital, where it was examined by a medical doctor. The dead body sustained no additional injuries whilst it was being transported from the village of

Mokhethoaneng to the mortuary at Queen Elizabeth II hospital.

As it has already been pointed out earlier, the post mortem Examination Report was, by consent of both counsels, handed in from the bar as Exh "A". According to Exh. "A" on 25th May, 1993 Dr. K.L.Lerotholi examined a dead body of a female African adult at Queen Elizabeth II hospital. The body was identified as that of the deceased, 'Matlhahane Chake, by Mohalike Chake and Lentsoe Chake.

The evidence of Mohalike Chake was to the effect that the deceased was the wife of his own brother. He, therefore, knew her well. He confirmed the report, Exhibit "A", that he was one of the people who, on 25th May, 1993, identified the body of the deceased before Dr. K.L. Lerotholi, the medical doctor who conducted the post mortem examination.

Dr. Lerotholi's external examination of her dead body revealed that the deceased had sustained a 5 cm x 2 cm gaping wound on her left intercostal space. She had sustained another 6cm x 2cm laceration on her left brachial region. The laceration on the arm was vertical and no vessels had been transected.

On opening the body, the medical doctor found

that the wound on the left intercostal space of the deceased had penetrated into the thoracic cavity and punctured the medial portion of the left lung. The result was massive haemothorax and collapse of the lung. On the basis of these findings, the medical doctor formed the opinion that death was due to the massive haemothorax and collapse of the lung.

I can think of no good reasons why the opinion of the medical doctor that the deceased died as a result of the massive haemothorax and collapse of the lung caused by the wound on her chest should be doubted. The important question that now arises for the determination of the court is whether or not the accused is the person who inflicted the wound on the deceased and, therefore, brought about her death.

In this regard, the court heard the evidence of P.W.2, 'Mantebaleng Khojane, who testified that she was a school teacher at Makebe Primary School. The accused was a son of her paternal aunt and, therefore, her cousin. On the evening of the day in question, 19th May, 1993, she went for a drink at a cafe of a certain Mokopi Molai in the village of Mokhethoaneng. She was in the company of the deceased, "Matlhahane Chake who was her personal friend. After her arrival at the cafe, P.W.2 bought altogether three quart bottles of beer which she shared with the deceased.

They were standing at the counter as they drank their beer and chatted in the cafe. Whilst she and the deceased were drinking, other people also arrived in the cafe. They were Tumisang Sestine and Theko Limena. Shortly thereafter the accused also came to the cafe. He was in the company of a certain Isaac Khojane. On arrival, the accused appeared to be already under the influence of liquor. He and Isaac sat on a bench next to Tumisang and Theko.

According to P.W.2, there was a time when the accused left the bench on which he and the other people were seated in the cafe. He came to the counter where she (P.W.2) and the deceased were standing as they drank their beer. On arrival at the counter the accused caught the deceased by blanket and pulled her out of the cafe. The deceased did not offer any resistance and the two went out of the cafe peacefully. About 9 minutes later the deceased returned into the cafe. She was followed by Mokopi Molai. As she re-entered into the cafe, the deceased said : 'Mantebaleng, I am dying. 'Neko has stabbed me with a knife.' As she uttered those words the deceased fell on the floor. She was clearly bleeding from the chest and the arm.

A certain Aaron Kheo, whom P.W.2 noticed for the first time in the cafe, tried to support the deceased.

Mokopi Molai, the owner of the cafe, went to look for a vehicle, presumably with which to rush the deceased for medical treatment. When Mokopi Molai returned with the vehicle, the deceased had unfortunately already passed away.

Later, on the same night, the police arrived at the cafe. According to P.W.2, the accused told the police that he had stabbed the deceased because he wanted a M100 which she owed to him. Eventually the dead body of the deceased and the accused were taken to Maseru by the police.

Mokopi Molai testified as P.W.1 and confirmed that he was the owner of the cafe in the village of Mokhetsoaneng. On the evening of 19th May, 1993 he and his wife, 'Malerato Molai, were working in the cafe. On his arrival at the cafe that evening, Theko Limena, Tumisang Sestine, P.W.2 and the deceased ('Matlhahane Chake) were amongst the people who were drinking in the cafe.

At about 7.45 p.m. he was about to close the shop when he noticed the accused and Isaac Khojane coming in. They were already under the influence of liquor. He then asked the accused what he wanted at the shop so late when he was already drunk. In reply the accused said as he (P.W.1) was about to close, he

would soon leave the shop. However, the accused and his companion sat on a bench.

Shortly, thereafter, the accused stood up and went to the counter where the deceased and P.W.2 were drinking their beer. P.W.1 then noticed the accused pulling the deceased, 'Matlhahane Chake, out of the shop. As he thus pulled her, the accused was telling the deceased that they should leave. A few minutes after the accused and the deceased had gone out of the shop P.W.1 heard the latter screaming: "Neko leave me alone. Jo! Neko is stabbing me with a knife" or words to that effect. When he heard the scream P.W.1 went out of the shop and found that the deceased had been injured. He assisted her back into the shop where she fell on the floor. P.W.1 could see that the deceased had, on the left chest, a wound which was bleeding profusely. She also had a large bleeding wound on the left arm. P.W.1 then ordered the accused, who was by then seated on a bench inside the shop, not to leave that place. He himself went to look for a vehicle.

P.W. 1 confirmed the evidence of P.W.2 that when he returned with the vehicle, he found that the deceased had already passed away. He then used the same vehicle to go to Maseru police station where he reported the incident. He confirmed the evidence of Sgt Maphatsoe that the police officers immediately



attended the scene of crime and the body of the deceased was eventually taken away in a police vehicle.

The unchallenged evidence of Tumisamg Sastine, who as it has already been pointed out earlier in this judgment testified as P.W.6 in the proceedings of the Preparatory Examination, was to the effect that on the evening of the day in question, 19th May, 1993 he was at the shop of P.W.1. He apparently did not see the accused actually pulling the deceased out of the shop. He, however, confirmed that whilst he was in the shop he heard the deceased screaming outside: "Neko has stabbed me with a knife" or words to that effect. When she entered into the shop the deceased fell on the floor. He could see that the deceased had sustained two injuries viz. a stab wound above the left breast and another wound on the left arm. After the accused had admitted that he was the one who had stabbed the deceased, the witness left the shop and returned to his house in the village of Mokhethoaneng.

In his evidence P.W.3, Theko Limena, told the court that he was illiterate and hard of hearing. A brother of the deceased was married to his sister. The deceased was, therefore, his sister-in-law.

According to him, on the evening of the day in

question, 19th May, 1993, P.W.3 went to buy tobacco at the shop of P.W.1. On arrival he found many people at the shop. The deceased, P.W.2, P.W.1 and his wife were all standing behind the counter. The accused and Isaac Khojane were standing outside the counter and facing the people behind the counter. Neither the accused and Isaac nor the people behind the counter were talking or doing anything in the shop.

It is significant that of all the witnesses who have so far testified before the court P.W.3 is the only one who says P.W.2 and the deceased were standing behind the counter whilst the accused and Isaac were standing outside the counter. Although in his evidence, P.W.3 told the court that the people in the shop were not talking it must be borne in mind that in his own words he was hard of hearing. He probably did not hear the people who were talking in the shop. Indeed, I would find it strange that the people in that shop were not talking, more particularly so as there was beer selling and drinking in the shop.

Be that as it may, P.W.3 went on to testify that he asked for "BB" tobacco and was served by P.W.1's wife. After he had paid for the tobacco he noticed the accused violently pushing the deceased out of the shop. Because of the manner in which the accused was pushing the deceased, P.W.3 followed them out of the

shop. However, when he came to the entrance, he passed the accused who was returning into the shop.

Outside the shop P.W.3 found the deceased who made a certain report about the accused. The deceased then returned into the shop and P.W.3 followed her. On entering the shop, the deceased fell on the floor. She had clearly sustained, above her left breast, a wound which was bleeding profusely. There was another bleeding wound on her left arm.

Whilst he (P.W.3) and other people were assisting her, the accused was just standing at the counter and did nothing to assist the deceased who eventually passed away. He confirmed that, later on the same night, the police attended the scene of crime and carried away the dead body of the deceased.

In my view, P.W.3 was not entirely reliable witness. I am not prepared, therefore, to accept his evidence as the truth unless it has been corroborated by the evidence of a more reliable witness.

In her testimony, P.W.4 'Masekate Chake, told the court that the deceased, who was her relative, lived in the same village as she did. According to her on the night of 19th May, 1993 P.W.4 was with her husband at her house in the village of Mokhethoaneng when she

heard a scream. She drew the attention of her husband to the scream. Whilst she was talking to her husband P.W.4 heard a knock at the door. When she opened the door she found it was Mohalike Chake, the younger brother of the deceased's husband. Mohalike Chake made a certain report following which P.W.4 and her husband immediately proceeded to the shop of P.W.1 in the village.

On arrival at the shop P.W.4 found the dead body of her relative, the deceased. It was covered with her (deceased's) own "Letlama" blanket. She uncovered the body and examined it for injuries. She found that the deceased had sustained two injuries viz. a wound on the left breast and another wound on the left arm. When she inquired how the deceased had sustained those injuries, the accused said he had stabbed her with a knife. Asked where the knife was and why he had stabbed her, the accused did not reply. P.W.4 then closed the mouth of the deceased. She asked for a candle from the wife of P.W.1. With the aid of a candle light P.W. 4 searched the surroundings outside the shop. In the course of the search she noticed something shinning on the ground, about 5 paces from the building of the shop. She picked it up and found that it was a knife. She took possession of the knife, returned into the shop and handed it to the local chieftainess, 'Mabofihla Majara, who had also

arrived at the shop.

In his defence, the accused gave evidence on oath and told the court that on the day in question, 19th May, 1993, he and Isaac Khojane were at a shop of Ranthako in the village of Mokhethoaneng. They had been drinking quart bottles of beer for the whole day. He was, however, not very drunk.

At about 9 p.m. the accused and his friend Isaac proceeded to the shop of P.W.1 to drink more beer. He confirmed that on arrival at P.W.1's shop he found Tumisang Sestine, P.W.2, P.W.3, the deceased, P.W.1 and his wife. Some of the people in the shop were drinking beer whilst others were dancing to a music.

Initially the accused told the court that he did not buy any beer at P.W.1's shop because on his arrival at the shop P.W.1 asked him what he wanted at the shop since he was already drunk. When he was questioned by the learned Assessor, the accused, however, changed and said he did buy one quart bottle of beer which he shared with Isaac. The evidence of accused that he bought beer at P.W.1's shop was denied by P.W.1 himself, P.W.2, P.W.3 and Tumisang Sestine.

The evidence was, in my view, simply overwhelming against the accused. There is no doubt in my mind,

therefore, that the accused was not being honest with the court when he told the learned Assessor that he had bought a quart bottle of beer at P.W.1's shop.

Be that as it may, the accused went on to testify that he and the deceased had an illicit love affair. Before leaving the shop he went to his lover, the deceased, at the counter and asked her when she would return M100 he had lent to her. In reply the deceased said she would return the money soon. Thereafter the accused was leaving the shop when the deceased caught hold of him and said she wanted to go with him. The accused tried to free himself from the deceased who, however, held on to him till they got out of the shop. In the process the zip of his lumber jacket broke open.

It may be mentioned that in their evidence P.W.1 and P.W.2 told the court that they clearly saw that when he arrived at the shop, the accused was wearing a sleeveless lumber jacket which was already open and not zipped. They denied the accused's evidence that when he and the deceased went out of the shop the latter was in any way holding him. Their evidence that as they went out of the shop it was the accused who was pulling or pushing the deceased was corroborated by P.W.3 and Tumisang Sestine. I am prepared to accept as the truth the evidence of P.W.1

corroborated by P.W.2, P.W. 3 and Tumisang Sestine and reject as false the accused's uncorroborated version on this point.

In any event, the accused told the court that to his knowledge, the deceased was a person ordinarily scared of knives. When they were outside the shop, the accused, therefore, pulled a knife out of his pocket intending to scare the deceased. He then struck a single blow at the deceased with the knife which, in the process, cut the deceased's left arm and penetrated into her chest. He conceded that he must have used great force for the knife to have cut the deceased's arm and penetrate into her chest. According to the accused, after he had stabbed the deceased, the knife dropped to the ground. He could not see where it had dropped because it was dark outside. He denied, therefore, the suggestion that he had thrown away the knife after stabbing the deceased.

After the accused had stabbed her in the manner he described, the deceased returned into the shop. He followed her. Inside the shop the deceased screamed that he (accused) had stabbed her with a knife and then fell on the floor. Th accused tried to assist her to a sitting position but unfortunately the deceased passed away. The accused denied, therefore,

the evidence of P.W.3 that he did nothing to assist the deceased after he had injured her.

Although the accused claimed to have assisted the deceased after he had injured her, it is worth mentioning that P.W.3's evidence that he did not, was corroborated by P.W.2 and P.W.1. In my view, the accused was not being honest with the court. I reject as false his story and accept as the truth the evidence of P.W.3 corroborated by that of P.W.2 and P.W.1.

By and large, I am satisfied, on the evidence, that the accused is the person, who inflicted the stab wound on the deceased's left breast and, therefore, brought about her death. The question that immediately arises for the determination of the court is whether or not in stabbing the deceased with a knife, as he did, the accused had the requisite subjective intention to kill.

In the contention of the accused, he had no intention to kill the deceased. He merely wanted to scare her away. It must, however be remembered that in the evidence of the accused himself when he pulled out the knife to scare away the deceased, as he wants this court to believe, it was dark outside the shop and admittedly the deceased could not see it (the



knife). That being so, I find it incredible that the accused would have reasonably expected the deceased to be scared away by a knife she could not see under the darkness. The accused was simply not being honest with the court and I have no hesitation in rejecting his evidence, as false, on this point.

The accused admittedly used, with great force, a weapon as lethal as a knife to stab a defenceless woman on the upper portion of her body. He must have realised that death was likely to occur. He nonetheless stabbed the deceased reckless of whether or not death did occur. It is reasonable to infer, therefore, that in stabbing the deceased with a knife, as he did, the accused had the requisite subjective intention to kill, at least in the legal sense.

In the result, I have no alternative but to come to the conclusion that the accused is guilty of murder as charged. He is accordingly convicted

My assessor agrees with this finding.

  
B.K. MOLAI

JUDGE

5th June, 1995.

For Crown: Mr. Mofelehetsi

For Defence: Mr. Mathafeng.

### EXTENUATING CIRCUMSTANCES

Having convicted the accused of murder, the court is now enjoined by the provisions of S. 296 of the Criminal Procedure and Evidence Act, 1981 to state the existence or otherwise of any factors that tend to reduce the moral blameworthiness of his act. In this regard, the court is invited to take into account firstly that there is evidence that before inflicting the fatal injury on the deceased the accused had been consuming beers and was, therefore, intoxicated. Secondly, in inflicting the fatal injury upon the deceased as he did, the accused had, in the finding of the court, legal intention to kill and had not, therefore, premeditated her death.

It is, in my opinion, a well known fact of life that, under the influence of liquor, people tend to do things they would otherwise not do when sober. I, therefore, entirely agree with the decision in S. v. Ndhlova (2) 1965(4) S.A. 692 where Homes, J.A. had this to say at p.695:

"Intoxication is one of humanity's age - old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime."

There is, in this case, no evidence that the

accused planned or premeditated the death of the deceased. For this reason the court found that in inflicting, as he did, the fatal injury on the deceased, the accused had intention to kill, in the legal sense i.e. he did not premeditate or plan her death. This absence of premeditation is, in my judgment, a factor that tends to reduce the moral blameworthiness of the accused's crime of murder.

From the foregoing, I come to the conclusion that extenuating circumstances do exist in this case viz. intoxication and lack of premeditation. The proper verdict is, therefore, that the accused is guilty of murder with extenuating circumstances.

#### SENTENCE

In mitigation of the accused's punishment, the court was invited to consider a number of factors viz. that the accused had no record of previous convictions and was, therefore, a first offender; when the charge was put to him, the accused pleaded guilty to culpable Homicide, hopefully as a sign of his remorse; he was a breadwinner for his wife and three (3) minor children, who would be without a breadwinner and, therefore, suffer mostly if the accused were to be severely punished by a long term of imprisonment; the offence was committed some two (2) years ago and the fact that it had since been lingering in the mind of

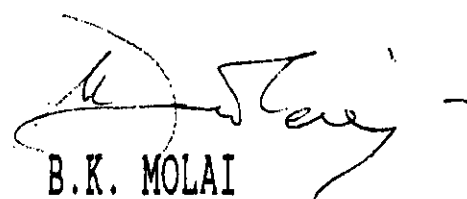
the accused person was a punishment in itself. The court had also been reminded that according to custom, the relatives of the deceased would, in all probabilities, sue the accused to raise the head of the deceased in the amount of ten (10) herd of cattle. In sentencing him the court should, therefore, bear in mind that the accused was yet to face another punishment in the civil courts or else the accusation that the courts of law punished a person twice for the same offence would be hard to avoid.

I concede that all the factors to which the court's consideration has been invited, in mitigation of the accused's punishment, should properly be taken into account. I am, however, not prepared to turn a blind eye to the seriousness of the offence with which the accused has been convicted. He has been found guilty of depriving another human being of her God given life which is, for that reason, sacred.

The court takes note of the fact that the deceased and other members of the society were innocently enjoying themselves over a glass of beer after a day's work. It is disturbing that the accused decided to go to their drinking place armed with a knife with which he fatally stabbed the deceased for the flimsiest of reasons. Too many people in this country have lost their lives through the use of these

knives. There is a real need to bring this to a halt

I come to the conclusion that, in the circumstances an appropriate punishment, which is likely to deter the accused and people of his mind from a repetition of this sort of a thing, is twelve (12) years imprisonment. The accused is accordingly sentenced.



B.K. MOLAI

JUDGE

6th June, 1995.

For: Crown : Mr. Mofelehetsi

For Defence : Mr. Mathafeng.