

IN THE COURT OF APPEAL OF LESOTHO

In the matter between :

MAMOLUMELI MOLEFE

Appellant

and

R E X

Respondent

HELD AT MASERU

CORAM :

MAHOMED P
BROWDE J.A.
KOTZE' J.A.

JUDGMENT

BROWDE J.A.

The appellant appeared before the court *a quo* charged with murder. The allegation against her was that on 25th March 1989 she poured petrol or other flammable liquid over the deceased Joseph Molefe (her husband) and set him alight thus causing him to sustain severe burns from which he subsequently died. The indictment contained the allegation that the pouring of the liquid was done with the intention to kill.

Most of the facts were common cause. The appellant and the deceased were married for some 30 years at the time of the alleged offence and had eight children. The marriage was not a happy one due to the deceased's attitude to the appellant which was deposed to by her and the child of the marriage Makopane Molefe. They both stated in evidence that the deceased treated the appellant badly and often assaulted her. He was employed as a miner in South Africa and came home at week-ends when it was regular conduct for him to treat the appellant with scorn and often to assault her physically.

On the day in question i.e. the 25th March 1989 there was to be an ancestral feast at the home of Abele who was one of the children of the deceased and appellant, both of whom attended. They took liquor along with them but on their arrival found that no food had been prepared there as a result of which the people there present contented themselves with imbibing the liquor. The appellant gave evidence in the course of which she stated that this was the first occasion on which she had partaken of liquor. It is not disputed that as a result she became drunk and was in that condition when, towards sunset, she followed the deceased home. Their home was apparently a rondavel in which a fire had been lit on the floor. When the appellant entered, the deceased demanded food. The appellant then cooked some soup and when this was put before the deceased, and in the presence of three

children who were in the rondavel at the time, the deceased said (as deposed to by the accused)

"I had prepared dogs food for him, he tried to kick the plate and I shifted it away he tried to grab me and I retreated towards the children I went out and as I was going out he tried to trip me and I went out staggering I was hurt also and I was already crying."

It was then that she saw a tin which contained the flammable liquid and due to the provocation described above and her mind clouded by the drink, she picked it up, re-entered the rondavel, told the children to leave and then threw the contents at and over the deceased. Some drops of the liquid reached the fire and this immediately caused flames which in turn enveloped the deceased. The deceased was burnt to such an extent before the flames on him were extinguished that he was taken to the nearest hospital where he died the next day. The post mortem examination was carried out within a few days and the only injuries found on the deceased were described by the medical officer as "Severe Burns - surface area (in excess of) 50%."

On those facts the learned Chief Justice who heard the matter in the High Court came to the conclusion that the

appellant had the intention to kill the deceased. This conclusion was in broad terms based on the proposition that a person who deliberately does an act which that person appreciates might result in the death of another and acts recklessly as to whether such death results or not, intends to kill. Consequently the learned Chief Justice found the appellant guilty of murder. He also found that the provocation i.e. the facts which I have briefly set out above and the drunkenness caused by the appellant's partaking of liquor for the first time were extenuating circumstances. The appellant was thereupon sentenced to imprisonment for a period of 7 years.

The first point raised on appeal before us was that the Crown had not proved that the burns suffered by the deceased were the cause of death. This submission was based on two criticisms of the Crown evidence namely :

- (1) That the doctor who performed the post-mortem did not state that the burns were the cause of death. In this regard it should be stated that the post-mortem report was filled out in a sloppy manner. No details are given as to how long before the examination the deceased died, nor is it stated what the cause of death was. Perhaps because of the awful burns sustained by the deceased - they were described in

evidence by, inter alia, a neighbour who rushed to the scene - the doctor took it for granted that "Severe Burns - surface area in excess of 50%" was sufficient indication of the cause of death particularly as it was indicated in the report that there were no other visible injuries. However these matters should be clearly dealt with and not left to be decided by inference from a reading of the whole report. I am, however, satisfied that the doctor intended to indicate that the burns caused the death.

- (2) At the trial a sworn statement by one 'Matlhoriso Pholo (since deceased) was handed in which contained the sentence "The deceased did get further injuries on the way." This was in reference to the conveyance of the deceased to hospital by a driver obtained by the deceased's son. This statement was untested and hearsay since there was evidence that the deponent did not accompany the deceased to the hospital. Although no one could say this with certainty the deponent herself did not say she went to the hospital and in any event, as I have already said, there was no evidence of any injuries on the deceased other than the burns.

When one bears in mind, as was pointed out by the learned Chief Justice, that prior to his burns the deceased was a healthy person, that he was taken to hospital at night and he was dead the next morning there is no room in this case for a possible *novus actus interveniens*. I am of the opinion that any suggestion of a cause of death other than the burns is fanciful and unrealistic and consequently I am satisfied beyond reasonable doubt that the massive burns sustained by the deceased as described by the witnesses were the cause of death.

The other submission made by Mr. Teele, who appeared before us for the appellant, was that the Crown had failed to prove that the appellant had had the necessary intent to kill. He pointed out that the Court *a quo* had found that the appellant was drunk and that she had been provoked and urged us to find that when she threw the liquid over the deceased the combination of drunkenness and provocation rendered her incapable of forming an intention to kill and therefore she should be acquitted. I cannot accede to that submission. What I do think, however, is that having regard to the combination of the provocation and the effects of the liquor the Crown failed to prove beyond reasonable doubt that the appellant had the intention to kill and that consequently she should have been found guilty of culpable homicide. Mr. Ramafole, who appeared for the Crown, cited the case of Davies J (as he then was) in Rex v George 1938 CPD 487 in which the

learned judge said,

"Provocation which to an ordinary man who is quite sober would not be nearly enough to deprive him of self-control may be more than sufficient in the case of a man who is considerably drunk, and consequently, although the drunkenness by itself would not be sufficient to reduce the crime from murder to culpable homicide or the provocation would not be sufficient by itself to reduce it, it may well be that in some cases the two connected together have such an effect on the mind of the prisoner as to deprive him of his self-control and of his faculty of realising on the spur of the moment what he is doing and forming any real intention to kill."

Laws of Basutoland 1960 Vol. II Proclamation 42 of 1959

provides:-

- "4. (a) The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.
- (b) For the purposes of this section the

expression "an ordinary person" means an ordinary person of the class of the community to which the accused belongs."

Counsel for the Crown, on the basis of dicta such as that cited, reluctantly but in my view properly conceded that the appellant should have been found guilty not of murder but of culpable homicide.

I think that that was the proper verdict which should have been arrived at by the learned judge *a quo*.

That being so I turn to the question of sentence. Having reduced the severity of the finding from murder to culpable homicide I think the sentence should also be reduced. The appellant had for years suffered the indignity and humiliation, not to mention the physical pain, caused by the taunting and assaults of the deceased. If that continues to happen the day will inevitably dawn when the worm turns and something like the gruesome event occurs which caused the death of the deceased. This does not mean however that the courts will ever countenance women, who have for generations been the butt of the inhumanity of men, taking the law into their own hands. In arriving at a fair sentence one must attempt to balance the understanding of the appellant's plight and condition on the one hand, and the needs of the community on the other. I believe that such balance

would be achieved as far as is reasonably possible in this case were the appellant to be sentenced to serve a terms of 5 years imprisonment 2 years of which is suspended for 3 years on condition that during that period she is not found guilty of an offence involving violence.

I would therefore uphold the appeal and would set aside the conviction and sentence substituting therefore the following:-

The appellant is found guilty of culpable homicide and sentenced to imprisonment for a period of 5 years, 2 years of which is suspended for 3 years on condition that during that period of suspension she is not found guilty of an offence involving an assault on the person of another for which a sentence of imprisonment in excess of 6 months is imposed.

Delivered at Maseru, this day of July, 1995.

..... *Browde*
J. BROWDE
JUDGE OF APPEAL

I agree and it is so ordered *I. Mahomed*
I. MAHOMED
PRESIDENT

I agree *G. P. C. Kotze*
G. P. C. KOTZE
JUDGE OF APPEAL