

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

SALANG THAKAPHALA

ACCUSED

JUDGMENT

**Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 30th day of November, 1999**

The accused is charged with the murder of one Lerato Khiba upon or about the 24th day of August, 1991, and at or near Mathuoaneng in the district of Mokhotlong.

He pleaded not guilty.

The first witness called by the Crown was one Theriso Khiba. He testified

that on the 24th August, 1991 he was returning from Platberg. He was accompanied by the accused. Both of them were on horseback. It was at night but there was moonlight. As they approached their village they caught up with four men. He identified them as the deceased (Lerato Khiba), Teboho Khiba, Telang Khiba and Kabelo Khiba. The four men were walking in the same direction as the accused and the witness. Lerata says that when they came to the four men the latter left the path followed by him and the accused because they feared that the horses would trample on them because they moved too close to them. Immediately after they had passed the four men Lerata noticed that the accused had remained behind and was moving up to the path taken by the four men. He was about twenty metres from him. The accused bent down and picked up something. Lerata did not see what the accused was picking up.

Thereafter the accused ordered the four men to stop so that they could talk. The accused then asked the deceased the following questions: "why do you move around with my wife at night when I am away from home? Why do you wean my child the whole night? The deceased answered and asked the accused whether he had ever caught him with his wife. The accused asked" "Did you want me to catch you? The deceased answered and said" "I thought you were going to ask me sensible things, you can go and ask those question to your grandmother. " Kabelo

warned the others to move to one side because something was about to happen. Lerata says that from the angry exchange of words between the accused and the deceased he realized that a fight was imminent. He suddenly saw one of the men fall down and the rest dispersed. He had not seen what caused him to fall.

He dismounted and rushed to the man who had fallen. He found out that it was the deceased. He tried to make him sit up. He called the men who had dispersed to come and help him. Teboho and Telang came, Kabelo and the accused did not come back. They tried to help the deceased but in vain because he could no longer walk. Lerata mounted his horse and the deceased was lifted on to the horse and sat beside Lerata. He was carried to his home. On the following day the deceased was taken to a clinic. He subsequently died but Lerata does not know when he died. He had seen that he had a wound on the chin and at the back of the head.

P.W.2 Malefetsane Khiba was at his home on the night of the 24th August, 1991 when the accused came to him and reported that the deceased had been injured. He asked him to go and help him. P.W.2 often helped injured people in the village because he learned first aid while he was working in the mines. He took his bandages and hurried to the home of the deceased. He had a wound on

the chin and another at the back of the head. He bandaged those injuries. On the following day the accused admitted that he had caused the injuries of the deceased. It is common cause that some pressure was applied on him before he made the admission.

P.W.3 Mokhethi Khiba was at his home on the morning of the 24th August, 1991. Accused arrived there and was in a fighting mood. A woman by the name of 'Manraile was present when the accused arrived. He angrily asked her why she took his wife to men when he is absent from his home. 'Manraile denied that she ever did so. Accused slapped her and said that 'Malebusa told him so. P.W.3 intervened and promised the accused that he would resolve the matter when he came back. He came back in the afternoon and did not confront the accused with 'Manraile. At night one 'Mantsepiseng came to him and reported that the deceased had been injured and was bleeding. He went to the chief's place and reported the matter. He was at the chief's place on the following day when accused admitted that he inflicted the deceased's injuries.

The depositions of P.W.2 Kabelo Khiba and P.W.6 Trooper Bekebeke at the preparatory examination were admitted by the defence and read into the record and form evidence in this case. Kabelo Khiba confirms what we already know that

after the accused had accused the deceased of being in love with his wife he heard the sound of something hitting the deceased. He fell down and was subsequently taken to his home.

The post mortem examination report was also admitted as evidence by the defence. According to it the cause of death was epidural haematoma left occipital region. Externally there was a laceration on the chin, broken tooth and laceration occipital region. There was a fracture of the occipital skull.

The version of the accused is more or less the same with that of the Crown. He says that on the previous day when he arrived from Natal his kids were sitting alone in the house because his wife was not there. They told him that their mother is always out to Khalahali with the deceased and returns home at night. He felt very angry. He says that after he had exchanged angry words with the deceased when he found him and three other men at the scene of the fight, the deceased suddenly rushed at him with a stick. Realizing that the deceased was fighting he picked up a stone and hit him with it. When the deceased fell down he left and went to his home without rendering any assistance to him. He had realised that he had severely injured the deceased because when he came home he immediately went to his uncle Malefetsane Khiba who has first aid experience.

Mr. Mafantiri, counsel for the defence, submitted that the accused testified in his defence that he assaulted the deceased with a stone because the latter attacked him with a stick. This is admitted by the Crown, so he submitted. He submitted that the accused is therefore entitled to an acquittal as he acted in self-defence. He referred to **Beleme v. Rex** 1993 -1994 LLR-LB p.7. The facts of that case are entirely different from those of the present case. In that case the appellant had convinced the court that he was acting in self-defence. In the present case the accused has hopelessly told this Court nothing but a pack of lies. He prepared to attack the deceased even before he accused him of having an illicit love affair with his wife. He picked up a stone and was already holding it in his hand when he started asking the deceased those provoking questions. The deceased then became angry and ordered the accused to go and ask his grandmother those questions. It was at that stage that he released his deadly missile and mortally injured the deceased. The deceased was still standing where he had been standing when the accusations started and never moved an inch until the missile hit him. That is the evidence of P.W.1 and that of Kabelo Khiba (P.W.2 at the P.E.) Whose evidence was admitted. The deceased never attacked the accused at all.


The accused planned the attack as soon as he saw the deceased that evening. The accused admitted that he became unsettled by the infidelity of his wife upon

his arrival the previous day when he found his children alone without their mother. He actually attacked one 'Manraile for allegedly taking his wife to men. He assaulted her. There is no doubt in my mind that when he saw the person he suspected of committing adultery with his wife he became very angry. However that did not justify the killing of the deceased. He did not catch the deceased red handed committing adultery with his wife. He relied on hearsay by his children and one 'Malebusa. In my view the killing of the deceased was altogether unjustified and unlawful.

In my view even if the accused did not have actual intention to kill the deceased he had legal intention which consists of foresight on the part of the accused that the circumstance may possibly exist coupled with recklessness as to whether it does or not. As a Mosotho man the accused knows very well that a stone in the hand of a Mosotho man or youth is a very deadly missile with which many people have been killed. He foresaw the possibility of death of the deceased following the severe injuries which a stone was likely to cause. However he was reckless as to whether it did or not.

I find the accused guilty of murder as charged.

My assessors agree.


J.L. KHEOLA
CHIEF JUSTICE

30TH NOVEMBER, 1999

For Crown - Mr. Semoko
For Accused - Mr. Mafantiri

Extenuating Circumstances

The fact that the Court has found that the intention to kill is one commonly known as **dolus eventualis** is an extenuating circumstance. There is no doubt that the deceased and the accused's wife used to behave in a deplorable manner by going away together during the night when the accused was away from home. On one occasion when accused arrived at his home at night his young children were left alone. They reported to their father that she had gone to Khalahali with the deceased. He accused the deceased of weaning his children.

There is no doubt that the accused was very angry and even assaulted another woman in his village for taking his wife to men. His anger was altogether unjustified because he never caught the deceased committing adultery with his wife. However his anger is a factor which may lessen his moral blameworthiness.

I found that there were extenuating circumstances.

In passing sentence I took into consideration the following factors:

1. Accused is a first offender.
2. He is still facing civil case for a compensation of ten head of cattle

in order to “raise the head” of the deceased according to Sesotho custom.

3. This charge has been hanging over his head for eight years.

Sentence: Seven (7) years’ imprisonment.


J.L. KHEOLA
CHIEF JUSTICE

30th November, 1999

For Crown : Mr. Semoko

For Accused : Mr. Mafantiri