

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

vs

MOQETHI MOLATO

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu  
on the 10th day of March, 1998

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The accused is charged with the murder of Lefu Kao. The incidents that culminated in the death of the deceased took place on the 13th November, 1993.

On the 2nd December, 1997, when the matter first came before me, the accused pleaded guilty to culpable homicide on the advice of his counsel Mr. *Nchela*. Mr. *Lenono* for the crown did not accept the accused's plea. Mr. *Nchela* for the accused applied for reference of the accused to a psychiatrist for examination. The Crown supported accused's application. The court asked Mr. *Lenono* for the Crown to

arrange for the accused's psychiatric examination. The court also made the following order:-

"Accused is referred for psychiatric examination. His bail is cancelled and accused will remain in custody from this day forward."

On the 24th February, 1998, when the matter came before court., both Mr. *Nchela* for the accused and Mr. *Lenono* for the Crown agreed that the medical report showed the accused was fit to stand trial although he was confused at the time of arrest. The court went over the psychiatrist report and agreed that with both counsel that the conclusion of the psychiatrist is that the accused is fit to stand trial. I will return to the medical evidence because, the court called the psychiatrist at the end of the Crown and the defence cases.

The evidence in the depositions made at the preparatory examination was substantially not disputed. Nevertheless the Crown and the defence selected a few witnesses to give *viva voce* evidence to clarify and elaborate on a few facts for the benefit of the court and the accused.

It was decided for convenience (when the depositions were read) to treat the admitted depositions as if actual witness had given evidence in court. The deposition of Mampono Phatsoa was called PW1, that of

Mafrance Motjatji PW2, that of Malekhetho Khang PW3 and that of Detective Lance Sergeant Mosoeu PW4.

Mampono Phatšoa PW1 was from a funeral, on the way home, when she met the accused. Accused was on horseback. Accused asked what PW1's name is. Accused then asked the man he was with to come and as he said this, he produced a knife from his pocket. Accused said they should kill a woman, PW1 does not remember. Accused rushed at PW1 and attempted to stab PW1. PW1 ran away.

Accused and the other man were complete strangers to her. PW1 says she did not hear what the other man tried to say to her as she is deaf. All she can say is that she had not provoked the accused in any way.

Mafrance Motjatji PW2 states that accused came to where there was a removal of mourning cloth ceremony at Mankoeng. She was asked by accused's grandmother to serve the accused with porridge. This she did. The porridge was hot and at the request of the accused, no sugar was added to the porridge. Accused consumed the porridge. Other people were served the same porridge and they ate it. Accused did not finish the porridge.

PW2 stated that she has never been accused of bewitching anybody through food. She is surprised that there is now an allegation of witchcraft levelled against the porridge which was eaten by several other people. This porridge is now being linked to the death that occurred. PW2 says she never quarrelled with accused. As a member of accused's family she has never received a report that the accused is mentally disturbed.

PW3 Malekhetho Khang is the accused's grandmother. Accused is the son of the daughter of PW3. She has never heard of any mental disturbance associated with accused. The relations between PW3 and the accused are good and the accused respects her. Accused had even given one of his daughters to PW3 to look after PW3, as PW3 is old.

On the 13th November, 1993 accused came to see PW3 and accused's daughter on the way to a funeral at Molikua's. Accused was served with food. After that he asked for porridge (motoho). Motoho is sour porridge which people in this country drink. PW3 says she asked PW2 to give accused the porridge he was asking for. PW2 served the accused with this porridge without sugar at the request of the accused. Accused did not finish the porridge. Accused who was with a companion the left.

Later in the day she was informed by their headman that accused had killed a person. PW3 says she went to where the deceased was. The deceased lay below the road and the accused was sitting nearby. While she was at the scene of the killing, men expelled her and threatened to assault her. PW3 says people of her village have often referred to her as a witch. Not long after this incident accused's uncle came to fetch accused's daughter. Accused used to be on good terms with her and was always served with food by PW3 without incident or complaint.

PW4 was Detective Lance Sergeant Mosoeu. He received a report about the deceased's death and went to the scene of crime. He found a corpse which he undressed and found it had one stab wound in the middle of the chest. The Chief handed the accused and a knife to PW4. PW4 took the body to the mortuary. Accused was subsequently charged with murder after giving an explanation.

The knife that was used by the accused on the deceased was an exhibit before the Magistrate at the preparatory examination. It had since been misplaced. This presented no problems as both the Crown and the defence admitted facts surrounding it and that accused had used it on the deceased.

The post-mortem report handed by consent shows deceased died

of a stab wound on the left side of the chest on the lateral inferior aspect. There was a laceration of the left lung. The cause of death due to left haemopneumothorax and left lung laceration and collapse.

The first witness to give sworn *viva voce* evidence before me was PW5 Mohale Kao of Mosalemane. He stated that he knows the deceased who is his younger brother. He knows the accused who is also his relative. On the date the deceased died they had gone to bury a child of his nephew. At this funeral they were with deceased. The funeral took place without any notable incident.

When accused and Molato Phatla left for home, they were following the deceased who was on horseback. Before they left for home Molato Phatla had told him there was something strange about the accused. Molato Phatla even suggested that the deceased should lend the accused the horse. Molato Phatla said accused was strange and it seemed the accused would not be able to go home. Accused, Molato Phatla and deceased left PW5 behind.

PW5 says not very long thereafter at dusk he was notified of the death of his younger brother. He found his younger brother dead below the road and the accused sitting nearby with several people. Accused admitted killing deceased. Accused in answer to his questions

said he does not know why he killed the deceased. He found the accused tied up in case he attempted something. The accused was peaceful and normal. They handed the deceased and his brother's corpse to the police the following day. They had guarded the corpse the whole night.

The Crown called PW6 Khotso Mokupo who gave sworn evidence. PW6 says on the day in question at about sunset, he was untethering cattle when accused said (to the man he was with) they should kill a woman who was ahead of them. Accused was angry and he was about 200 paces from him. The accused was on horseback. The accused barred the way of that woman. The woman shielded herself behind the man the accused was with. When the accused went for this woman, she ran away.

Accused then stabbed the man he was with, with a knife. That person fell and rolled down the road and fell below it. Accused then said he had stabbed the woman who was stopping him from going home. Accused was still on horseback when he stabbed this man.

A man came who had been apparently following the accused and the deceased asked PW6 to help him because the accused was mad. This man's name was Molato. At the time Molato was saying accused

was mad, people from the village were coming. They used a rope belonging to PW6 to fasten the hands of accused. Accused was peaceful and relaxed just before and after his hands were fastened. The accused's knife was taken from him. Accused said he did not know why he killed deceased. He looked normal when he answered these questions. He seemed not to know why he had killed the deceased.

While accused was on horseback he was making a noise. He said he had stabbed a woman who stopped him from going home. It did not make sense to PW6 for the accused to stab a man when he claimed he had stabbed a woman. After this accused got down from the horse and handed over the knife voluntarily. Accused did not react in any way when his hands were tied up. The people tied him up because they thought he might run away.

The crown then called Molato Phatla PW7. Duly sworn PW7 stated that he is related to the deceased although they did not live in the same village. On the material day they got to the family where there was going to be a funeral early. They decided to pass on to the place of accused's grandmother PW3 to see accused's daughter and that of his cousin. They found the accused's grandmother not at home as she had gone to where a mourning cloth was being removed. PW7 and the accused got there and found the accused's grandmother PW3 there.



The accused's grandmother PW3 complained to the accused that people had killed her daughter (meaning accused's mother). Accused said no one could be blamed for the death of his mother. His mother fell off a cliff due to drunkenness. Accused's mother had died six months before that day.

PW7 continued his evidence and said they were given a meal. Unmasked PW3, the accused's grandmother brought porridge and gave it to the accused. Accused drank it but PW7 refused to share it with accused. PW7 says he did so because he was suspicious and had heard that she was a witch. In the view of PW7 she might bewitcher her grandson unintentionally. PW7 says he did not mention this fear to the accused.

They then went to the funeral. After they had been given a meal PW7 saw accused removing his blanket and shirt. When PW7 stopped him, accused said he was going to buy sweets for the child but went to a place where there was no shop. PW7 stopped accused. Then he reported to PW5 (the brother of accused) that accused was giving him problems. He had never seen accused in that condition. Accused seemed to be mad. PW5 said they should go home.

PW7 says on their way home, they met the deceased. He warned

deceased of the accused's condition and that accused might assault them or run away. Deceased offered accused his horse. They walked a long distance but at Lekhalong, accused dismounted and said they should go back, he would like to sleep at his grandmother's place as it was late. Deceased took his horse and left them arguing. Eventually accused was persuaded to continue the journey home. Accused then ran and caught up with the deceased and got on to the horse of the deceased. They were going with deceased and accused had given the deceased his hat and stick. PW7 was following at a distance and the deceased and accused were sometimes out of view as the road has ups and downs.

At some stage, when he came into view, he saw deceased fall down and roll down the road while accused was still on horseback. PW7 ran towards them and heard a woman say "whose child is this who wants to kill us?". PW7 went to the deceased who could not talk and was on the point of death. PW7 took 3 stones and went towards the accused. Accused said he had stabbed a woman who was stopping him from going home. PW7 shouted to PW6 to call people and bring a rope. People came and accused removed his blanket, got down the horse and threw away the bloody knife.

People came and asked accused what had happened, but accused

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said he did not know how it happened. PW5 (the brother of deceased) was sent for. They guarded the corpse and the police came the following day. Accused had said he was dizzy and could not see well some time after drinking the sour porridge. Accused and deceased were friendly. Accused's hands were tied as a precaution as he had killed a person.

At the end of the Crown case, the accused gave sworn evidence. He stated that he has a wife and five surviving children and that he is not in full time employment. He survives by doing odd jobs here and there.

On the day that is the subject matter of these proceedings, he went to Phatšoe with PW7 Molato Phatla. The purpose was to attend a funeral. As it was early he went to the home of his grandmother PW3. Accused's daughter lived with PW3 at that time. PW3 was not at home. He found her at the home of a family that was removing a mourning cloth. Accused's grandmother PW3 on seeing the accused cried and said people of the village were accusing her of witchcraft. Accused asked for sour porridge from her after they had eaten meat and mealie pap. When accused had partaken of the sour porridge he took a very small quantity of beer from a small container. After that he hurried to the funeral he had come for.

On the way to the funeral accused told PW7 that he had a headache. They went to the cemetery and the home of the bereaved. After this accused does not remember anything. When he again became aware of his surroundings his hands were fastened with a rope. The deceased was nearby dead. He was asked why he had killed the deceased. He could not explain. He was subsequently handed to the police. He had a knife in his possession for purpose of carving meat.

Accused had never had any sign of madness before then. He has not had any attack of madness since that day. Accused states he must have been mad to have killed the deceased with whom they had never quarrelled. They had always had friendly relations with the deceased. The knife that was exhibited in court as having been used by him to kill deceased was his.

Accused later instructed his uncle to fetch his daughter from his grandmother PW3. Accused says PW3 had cried when he saw him and asked him if he was going to take away his daughter. It was then that she added that people called her a witch. Accused blamed the sour porridge for his misfortune. Before this he did not believe his grandmother PW3 was a witch.

I ordered the psychiatrist to be supplied with the preparatory

examination record, a transcript of the evidence of the accused and the report he had made about the accused. I also ordered that the psychiatrist be subpoenaed to come and give evidence.

Dr. S. Shaikah gave his sworn testimony after stating his qualification. These included Bachelor of medicine and surgery and a diploma in psychological medicine. Dr. Shaikah had practised as a psychiatrist since 1969 and had been working in Lesotho since 1992.

In his report dated 11th December, 1997, he had stated that, at that time the accused showed no signs of mental illness and that he is fit to stand trial. Dr. Shaikah had expressed a desire to do further work on the accused.

During his examination on the 11th December, 1997, Dr. Shaikah had made the following finding about the accused:-

"He was co-operative during the interview. No signs of restlessness, agitation or psychomotor retardation were observed. His affect was adequate and congruent. No formal thought or perceptual disorder were elicitable. His attention span and concentration are within normal limits. Immediate and recent memory are intact. He has circumscribed loss of memory of alleged incident in which

he stabbed his distant relative, Mr. Lefu. He could describe details up to burial and journey back to deceased house. He felt heat in the body and then became confused and has no recollection of what happened. He became aware of himself after a few hours and found himself in police custody. He is oriented as to time, place and person."

Dr. Shaikah handed in his medical report.

During his sworn testimony Dr. Shaikah stated that after reading the preparatory examination record and the accused testimony he believes the accused suffered possibly from psychogenic amnesia at the time he killed the deceased. This was of short duration.

Dr. Shaikah stated that if the accused had been brought for examination immediately after the incident, blood samples and other data would have been collected to make his diagnosis more certain. What he ventures as his opinion to the court is to him the best possible diagnosis he can make under the circumstances. Dr. Shaikah said he would like to perform an abreaction test on the accused. This is a form of hypnosis induced by special drugs introduced in accused's system intravenously. This lowers his conscious resistance and might facilitate the recall of forgotten events or lost memory. Dr. Shaikah

quoted from the following from *Synopsis of Psychiatry* by H. Kaplan and B. Sadock about accused's condition:-

"Amnesia usually terminates very abruptly and recovery is generally complete with few recurrences."

Dr. Shaikah concluded his evidence by saying with the constraints under which he was operating, the balance of probabilities favours the diagnosis of psychogenic amnesia.

Dr. Shaikah was questioned about people's belief in witchcraft. He said science discards witchcraft as a fact. Nevertheless this superstition is everywhere and affects the lives of those who believe in it strongly. When people cannot rationalise an event they resort to belief in the supernatural to explain away that event.

The witnesses that gave evidence before me were in general satisfactory. The only witness whose evidence was biased was that of PW7. His evidence was channelled towards proving that the accused had been bewitched by accused's grandmother PW3. PW7 tried to put accused's grandmother PW3 in the worst possible light. Fortunately the evidence of other witnesses such as PW2 shows PW7 was wrong. PW7 put across to the villagers his witchcraft theory. The result of this was that villagers became so hostile to the accused's grandmother PW3 that they almost assaulted her. Although PW7 was mistaken, I realise

he genuinely believed that the accused's grandmother was a witch.

People such as PW7 are a danger to society, indeed PW7 even subsequently influenced the accused to believe his own grandmother was a witch. During accused's state of confusion, accused did not believe his grandmother was a witch. Otherwise accused would not have demanded that they should return to the home of his grandmother to sleep there.

All evidence including that of PW5, the brother of the deceased shows that accused was alleged to give problems even before he left for his home after the funeral. Accused's mind became disturbed and deranged all of a sudden. The deceased helped the accused and put accused on his own horse and walked home on foot next to the accused. On the way for no apparent reason accused decided to stab a woman he did not know with a knife. Unfortunately accused stabbed the deceased while accused was still riding the horse of the deceased. Accused says he must have been mad and everybody who gave evidence of his condition says he was mad at the time.

It is by no means the first time the court is faced with a case of temporary insanity. In the case of *Rex v Moseli* 1977 LLR 225 this court was faced with a case of mental disturbance of a temporary



nature and which was not recurrent. Dr. Shaikah says the accused's condition of psychogenic amnesia was temporary and not likely to be recurrent, although he cannot be absolutely sure of his diagnosis. In the case of *Rex v Moseli* at page 241 Cotran CJ summarised the findings of the psychiatrist as follows:-

"Combined with the alcohol the accused consumed, it produced loss of awareness and contact with his surroundings, and a mental illness which he described as "psychosis" of toxic origin developed. The psychosis had hallucinatory, paranoid, confusional and schizophrenic features. He was of opinion that during this period the accused suffered from a mental disorder amounting to temporary acute insanity."

In this case alcoholic or hallocegenic or intoxicating drugs are not a feature. There is no evidence of acute stress or fatigue but nevertheless Dr. Shaikah finds the only diagnosis possible as psychogenic amnesia.

In the case of *R v Tsukulu Makaba* 1977 LLR 229 there was stress caused by grief following upon the death of the wife of the accused. For no apparent reason accused developed a belief that a poor old woman was the witch who had caused the death of his wife. Accused in a sudden unexpected bout of temporary insanity killed that poor woman. And from that point accused's insanity was gone and he became normal again. Dr. Ntšekhe stated that the term insanity is in that case a layman's description not a medical or psychiatric one.

The onus of proving insanity to any degree is on the accused on a balance of probabilities once he is fit to plead. In this case the accused says he must have been mad when he met the misfortune of killing the deceased. Evidence of Crown witnesses support him, a fact Mr. *Lenono* concedes. I can only associate myself with what Mofokeng J said in *R Tsukulu Makaba* 1977 LLR at page 234 to the effect that:

The findings and conclusions of the psychiatrist are fully borne out by the evidence before me. Without any hesitation, therefore I have come to the conclusion that the accused was insane at the time he committed the offence with which he is charged and was not responsible, in law, for his action at the time the act was done."

Mofokeng J at page 232 of *R v Tsukulu Makaba* had already referred to Dr. V.R. Ntsekhe's finding to the effect that "in his opinion the accused was temporarily insane at the time of the alleged offence".

I can only say in passing that there was no witchcraft in the sour porridge at all. I do not believe PW3 could bewitch her own grandchild. Accused did not believe his grandmother was a witch during his insanity. Otherwise he would not have wanted to go back home to go and sleep there. PW7 Molato Phatla influenced all people including the accused that the sour porridge he drank was bewitched. This is not so, but accusations of witchcraft are easy to make and hard to refute. It is usually innocent old women who are falsely and unjustly accused of witchcraft. This evil ought to cease because the innocent suffer, but

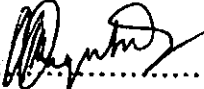
superstition is unfortunately hard to eradicate. People who hold these beliefs of witchcraft are genuine in their beliefs but mistaken.

It remains for me to determine the accused's fate. In *Rex v Tsitso Matšaba* CRI/T/18/89 Lehohla J did what Cotran CJ and Mofokeng J did in the cases of *Rex v Moseli* and *Rex v Tsukulu Makara* to which I have referred. In all these cases the accused had been found to have been temporarily insane. I therefore in terms of Section 172(3) of *The Criminal Procedure and Evidence Act* 1981 return a special verdict and find that:-

The accused is guilty of unlawfully killing the deceased, but was insane at the time he did the act. Therefore the accused shall be kept in custody in some prison pending the signification of the King's pleasure.

My assessors agree.

This verdict does make it possible for the psychiatrist to make further investigations and give the accused appropriate medical treatment if it is called for.

  
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 W.C.M. MAQUTU  
 JUDGE

For the Crown : Mr. A.M. Lenono  
 For accused : Mr. Nchela