CRI/T/33/92

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

KATISO PEETE	**1ST Accused**
SEHLOOHO KOEKOE	**2nd Accused**

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 27th day of March, 2000

This is a very old matter. Even if it were to start on the first day it was set down for on 22-11-99 it could not be pardonable that it came to be heard more than ten years after the incident that gave rise to the accused being charged.

The hearing failed to start on the above date because of absence of witnesses in respect of whom there was not even proof that any had been served with subpoenae. Thereupon the matter was postponed to 7th March, 2000. On that day none of the accused who were on bail pitched on time in Court. One of them arrived

two hours later than Bench Warrants for their arrest had been issued and explained that he had gone to the old High Court premises and didn't know that the seat of the Court had shifted to the new grounds. The warrant against him was therefore cancelled. The other accused arrived under police escort the following day stating that though he was ready and willing to come to Court he had no money to facilitate his conveyance from his home to Court. Thereupon his Bail was suspended for the duration of this trial which started two weeks ago.

The accused are charged with murder; it being alleged that on or about 28th October, 1989 and at or near Luma-Luma Ha Peete in the District of Berea the accused did one or the other, unlawfully and intentionally kill Motsamai Mokotjo.

The accused pleaded not guilty to the charge.

A disconcerting offshoot of the delay in bringing this matter to trial is that the evidence of two Crown witnesses who have since died i.e. PW2 and PW5 Molula Mitchell and Trooper Seboka respectively had to be admitted without benefit of being tested by means of Cross-examination. This was done in terms of Section 227 of our Criminal Procedure and Evidence Act 7 of 1981.

The Post-Mortem report of the Doctor who performed the post-mortem examination was also admitted without being tested because that doctor is said to have completed his stint of service in Lesotho and left for his country of origin or is otherwise untraceable.

The exhibits allegedly used in the combat between the accused and the deceased are said to have been lost somewhere in the Subordinate Court T.Y. before they could reach the High Court.

Needless to say with the exception of one extraordinary witness of amazing mental clarity all other witnesses' recollection of events had understandably faded. I need not emphasise what a distressing state of affairs this sort of thing amounts to. I would urge the authorities concerned in the administration of Justice to find an immediate remedy to this dissatisfactory malady that can only, if allowed to prevail, result in the subverting of the administration of justice and disrepute of the judicial system in this territory.

The admitted Post-mortem examination report marked "A" indicates that the deceased's body was examined by Dr Muwari more than 24 hours after the alleged

assault. The doctor formed the opinion that death was due to head injury. The post-mortem was conducted on 01-11-1989, the body having been identified to the doctor by Malefetsane Mokotjo (PW3) and Monare Foso (PW4).

With regard to external appearances the doctor has catalogued:

(1) multiple deep cuts on right wrist going through bone

(2) multiple deep cuts on both ankles going through bone

(3) multiple lacerations

(4) skull fracture behind left ear and subdural haematoma.

The evidence of PW1 'Matiisetso Mabote narrates a simple tale that on the day in question i.e. 28-10-89 she had occasion to go to MaRegina's house. Her purpose for going there was to borrow some yeast. MaRegina is a known brewer of beer for sale in the neighbourhood.

It was after sun set when PW1 set for MaRegina's house. In there she found the late Molula PW2 at Preparatory Examination, one 'Maselepe and the deceased. The trio were just seated and engaged in light conversation when PW1 came there. MaRegina was however absent.

PW1 asked for yeast from 'Maselepe who went to fetch it from the other house.

It was at this point that accused 2 entered the house in which the deceased, PW1 and Molula were seated. Accused 2, without uttering a word and in response to no provocation whatsoever hurled abuse at the deceased imprecating a curse upon the latter's mother's front passage. There and then and in the same instant he fetched the deceased a blow on the head with a quince stick. The deceased who had been seated rose immediately and hit back at the deceased too and dealt him a stunning blow which felled the latter to the ground. The deceased remained standing and apparently watching over accused 2's next move. Accused 2 rose and while the deceased's attention was focussed on him and away from the doorway accused 1 who was then acting headman or chief of the area budged in unbeknown to the deceased and dealt the deceased a stunning blow at the back of his head around the neck region whereupon the deceased fell face down and never managed to rise again. The blow to the nape of the deceased's neck was dealt by accused 1 with an iron-rod.

Then the two accused continued belabouring the deceased with the above-mentioned weapons while the deceased was down. During the process of belabouring the deceased thus accused 2 relieved himself of the quince stick which he had been

using and instead equipped himself with a home-made sword supplied by accused 1 and continued chopping at the deceased's wrists and heels (described as ankles in the post-mortem report Exhibit A)

It is PW1's evidence that this assault lasted about an hour.

It was during the course of this assault that accused 2, casting his menacing glance at PW1 and Molula who had been standing stuck by the wall and frozen in fright hurled abuse at them and said "just as well you have stuck by that wall, your mothers' vaginas"'

Accused 1, according to PW1, when he entered appeared to be in a fighting mood. He did nothing to intervene. He didn't reprimand accused 2 for swearing at PW1 and Molula by their mothers' private parts despite that he must have heard when this was uttered and seen to whom it was so uttered. Instead he continued belabouring the deceased with an iron rod on "joints of both hands and feet". When accused 2 uttered these abusive words he is reckoned to have been barely an arm's length from accused 1.

It is PW1's evidence that 'Maselepe didn't make her way back into the hut where the assaults were taking place. She was insistent that she doesn't take alcohol; further that it had been days since MaRegina's supply of beer had dried out. She vehemently denied that anybody was drinking beer in that hut nor was any being sold that evening.

She told the Court that she and Molula managed to escape from the hut leaving the two accused in there with deceased lying prostrate on the ground. She and Molula separated immediately on coming outside where they saw a big number of boys gathered there by the door outside doing nothing.

Before leaving the hut she said she had observed wounds effected on the deceased's wrists and heels.

PW1 learnt in the morning that the deceased had died.

PW1 denied that accused 1's version that the deceased and accused 2 were holding fighting positions at any stage after accused 2 had picked himself up from the temporary fall he had had shortly because accused 1 hit the deceased at the back

of the neck and the latter never rose again.

PW1 stood the brunt of cross-examination well and her story had a strong ring of truth to it. In fact accused 2 despite his earlier attempts to discredit PW1's evidence ultimately took the attitude in his evidence that if PW1 says these things that she testified to happened in her presence he would have no quarrel with her evidence because, as he said, she was testifying to what she saw.

Indeed even accused 1 found himself in a cleft-stick in his attempt to cast doubts on Pw1's version. His counsel had intimated that she couldn't have made accurate observations because of an admixture of fright and drink. But her acceptable and credible story is that she doesn't drink and that more over there was no drink at MaRegina's that evening. The version of both accused centred on this contention was thus demolished and exposed as palpably false.

I reject accused 2's story that when he came to MaRegina's house he ordered a scale of beer from 'Maselepe. I reject likewise his statement that for no apparent reason the deceased rose and hit him first with a knob Kerrie made of putty.

The vain attempts by both accused to show either that PW1 and Molula had either long left the scene according to accused 1 who said he remained in there for hardly five minutes trying to separate the two combatants and left no one else but the deceased and accused 2 are rejected as devoid of all truth. They are vain attempts aimed at depriving the scene of eye-witnesses.

Because when leading PW1 the Crown in fairness particularly to accused 2 alluded to possible love affair between the deceased and accused 2's wife, which possibility amounted to no more than just a rumour, the court sought to elicit from PW3 Malefetsane Mokotjo whether there could be any basis from this rumour regard being had to the fact that normally there is never a smoke without a fire. But on this aspect of the matter PW3 said he has for a long time been a surviving head of the Mokotjo family and that at no time was a complaint made to him in that capacity about the existence of illicit love affair between his nephew the deceased and accused 2's wife.

Of importance is that no version to the contrary was put to Crown witnesses on behalf of any of the accused. Yet accused 2 when giving evidence under oath said that he actually complained to PW3 about the latter's nephew's conduct. On the basis

of ***Small vs Smith*** 1954(3) SA at 434 this contention stands to be rejected as an afterthought. Needless to say ***Small*** was referred to with approval by Maisels P in ***Phaloane vs Rex*** 1981(2) LLR at p.246 in the following apt terms :

> "It is generally accepted that the function of counsel is to put the defence case to the Crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. C/f ***Small vs Smith*** 1954(3) SA at 434."

The contention of accused 1 also stands to be rejected in that it is too little to the point to be worthy of serious consideration. First he doesn't come out clearly as saying there was a love affair between the deceased and accused 2's wife. He dodged giving a straight answer to this. He merely contended himself with saying accused 2's wife came to him long time before the incident complaining that the deceased threatened her with a knife and took away R20-00 from her passport without her consent. While this has the demerit of not having been put to Crown witnesses it doesn't serve as proof of a love affair referred to above. Moreover it took place so long before the incident as not, without proper basis, to be capable of furnishing motive for the unprovoked attack on the deceased.

It remains to deal briefly with the position in law. The intention to murder can

be gathered from (1) the nature of injuries inflicted on the deceased which in turn give a suggestion of the type of the weapons used, (2) the position in the body of the deceased where the injuries have been inflicted (3) and the degree of force with which the weapon was wielded to inflict those injuries.

In the instant case though the multiple wounds were found mostly on the wrists and ankles the fatal one was on the head; a no doubt one of the most vital parts of the human body. Furthermore it has not escaped the attention of this Court that these wounds were so deep as to get to the bone. This betrays application of brutal force coupled with savage violence. The nature of the injuries described by the doctor as cut wounds on wrists and ankles corroborates PW1's version that they were inflicted with both iron rod and home-made sword both of which weapons were said to have been wielded by accused 1 and 2 respectively.

An attempt was made on behalf of the defence to show that the accused couldn't have conspired to attack and kill the deceased as none of them knew that the deceased was in there - Accused 2 having come there after exhausting the beer his wife and he had been treating themselves to at accused 2's home and having been attracted to the scene by a "phephezela cloth" which is usually displayed around beer

halls as an invitation to beer drinkers that beer is in good supply at any such place; while accused 1 for his part was gravitated to the scene on hearing sounds of disturbance inside MaRegina's hut.

The simple answer to this contention which seeks to vitiate the existence of common purpose or conspiracy to commit a crime is that common intent can come about in a variety of ways among which is included the instant and spontaneous participation in the crime without proof of any previous meeting at which a plan to commit a crime was hatched. Thus if A and B moving from opposite directions and without betrayal of any previous meeting between the two, come upon C and each inflicts injuries from which C dies, then it can be inferred from the individual acts of each participant that they must have conspired before-hand to embark on the unlawful and wrongful enterprise in pursuit whereof death resulted.

The two accused were hard put to it to furnish any reason why PW1 would come and falsely implicate them in this trial. They acknowledged that there has never been history of previous existence of bad blood between either of them and PW1. Her story was supported to a large measure by that of another eye-witness the late Molula PW2 save in the minor respect that while Molula says accused 2 used the

home-made sword throughout PW1 says accused 2 started off using a stick but ended with using this home-made sword. I would resolve this discrepancy in favour of PW1's version which was subjected to probing by cross-examination while that of PW2 enjoyed no such test. Moreover as I stated earlier PW1's quality of delivery of her tale, her demeanor, composure and lack of bias in favour of either side to the dispute inspired this Court with confidence that her testimony is credit worthy. She indicated that the deceased was no friend of hers and owes him or his memory no favour. In the same breath she bore neither of the accused any grudge.

The fact also that after committing this crime accused 2 went away for close to a year fully aware that the deceased could not have survived the injuries he sustained indicates that he was fleeing from his crime. I reject his story that he was not aware what could have befallen the deceased when he parted with the latter. In fact having stated that the deceased was much feared by chiefs and police alike, a factor again which was never put to the Crown witnesses, accused 2 gave an inkling of his attitude when he conceded hat anyone fighting with a man of the description he vividly painted as feared would be put under the necessity not to spare such a man any quarter when fighting him. This attitude may well account for the multiple savage injuries the deceased sustained before and no doubt even long after he had

died. Accused 2 said the fight lasted about thirty minutes. PW1 places the duration of the attack on deceased as lasting about an hour. I accept therefore that the assault on the deceased before and after he had died went on for no less than thirty minutes.

In a vain attempt to persuade the Court that he had been provoked by the deceased's conduct towards his wife accused 2 made so bold as to say under oath that he caught the deceased in bed with his wife years before this incident. The amazing thing about this story is that accused 2 did nothing about such a provocative challenge to the integrity of his marital rights. This is an afterthought and fabrication indulged in in an attempt to give substance to the rumour which credible evidence showed had no substance. None of the Crown witnesses was told that accused 2 caught his wife in bed with the deceased. Moreover the fact that years passed without accused doing anything about it is a further indication that there was no substance in the alleged incident.

For the above reasons this Court is satisfied that the Crown has proved beyond doubt that the two accused are guilty of murder; and I so find.

My assessors agree.

J U D G E
27th March, 2000

EXTENUATION

Extenuating circumstances have variously been described as factors which if proved should redound to an accused person's benefit.

The benefit which the accused person derives from extenuating circumstances, if established, is that instead of suffering the ultimate penalty he will only serve a term of imprisonment.

To this extent extenuating circumstances palliate the moral blameworthiness of the accused convicted of a capital offence.

The onus to establish the existence of extenuating circumstances is on the accused on a balance of probabilities; and the test is subjective.

The judgment that a Court makes when presiding on the instant phase of trial is a moral one. In going about this task the Court is enjoined to take into account any factor which is not too remotely related to the alleged extenuating circumstances raised on behalf of the accused.

Such factors may consist individually of -

(1) youthfulness - or immaturity
(2) drunkenness
(3) provocation
(4) lack of premeditation
(5) or even at times the fact that the form of intent proved is *dolus eventualis* as opposed to *dolus directus*.

The list is not exhaustive.

However it is distressing to note that the authority of ***Naro Lefaso vs Rex*** C. of A (CRI) No.7 of 1989 on extenuation (unreported) from page 11 to page 12 has been overlooked or ignored, which expressed in the words of Schutz P is to the effect that :

> "......................... I would stress that in a matter as vitally important as extenuation, if the defence counsel wishes to rely on an *ex parte* statement not based on sworn evidence he should ascertain clearly whether the Crown admits its factual correctness. If the Crown does not, defence counsel must consider whether he will lead evidence or not. Needless to say I am not referring to an argument which seeks to derive

> inferences (that extenuate) from proved facts, but an argument that asserts facts as facts without proof of them themselves".

Needless to say in the instant case respective Counsel for the accused informed Court that they didn't ascertain from the Crown if the latter accepted their *ex parte* oratory as factually correct. The Crown insisted therefore that no extenuating circumstances exist in this case.

The Crown in the same breath conceded that accused 2's evidence that when he left his home he had taken beer to which he had been treated by his wife was not gainsaid. Furthermore the fact that there was this rumour of illicit love affair between his wife and the deceased even if when taken in isolation is worthless, the cumulative effect of this factor taken in conjunction with drink is a factor which about fits the bill. In this sense the Court accepts that a combination of these factors had a bearing in reducing his moral blameworthiness. The two factors working on each other were capable of egging accused 2 on to embark on rash action at the mere sight of the deceased whom he perceived as responsible for causing his discomfort and souring his marital life.

Although not much goes for accused 1 on the damning evidence that went

against him in the main trial and hardly anything goes in his favour at this phase of the proceeding yet if one considers and accepts that his was a lesser role played in the execution of this sordid act, viewed from the angle that a man who would in the circumstances use brutish force as an "aggrieved" and drunken party would be accused 2; then it stands to reason that accused 1 could not have in the circumstances exceeded the self-deluded and so-called "wronged party" in executing this savage attack on an innocent man.

For the above reasons the Court finds that extenuating circumstances exist in respect of accused 2. In respect of accused 1 the Court very very reluctantly finds only barely that he should benefit from the highly strained and extended logic expressed above in order for him to escape the ultimate penalty.

COURT'S RULING ON PLEAS IN MITIGATION

My assessors and I have heard the pleas in mitigation advanced on your behalf by your respective Counsel. They very correctly indicated that in respect of accused 1 that he is a first offender and regard being taken of the fact that he is a fairly aged man, it stands to his credit that he has had, so to speak, a clean slate of existence up

to now. I am told that he is a peasant farmer, supports a wife and children and of course I take it that it is true that he showed remorse in this Court as I observed him during this trial. I am also told he is senile.

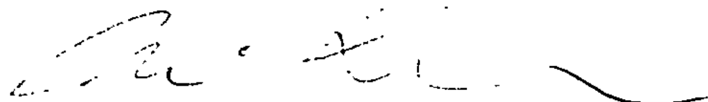
In respect of accused 2 likewise I am told he has no previous convictions and that he supports an old and sickly mother, and that this is true in respect of both accused - the long wait to date has been very stressful. I did indicate in the main trial that it is regrettable that upwards of ten years have been spent before this matter could come to trial today. Apparently this must have influenced *Mr Masiphole* very negatively because he asked me if I understood that this matter has taken such a long time. I have no qualms in assuring the learned Counsel that without any prompting I took that into account.

Having said all these, the Court will be failing in its duty if it could regard murder of a savage nature like this one as anything other than one that merits a proper remedy. With respect to accused 1 who was a chief, the fact that he participated in this savage attack on his subject, and accused 2 for no reason whatsoever did this savage act on a fellow being are matters of grave concern and total unacceptability.

The deceased was given no opportunity to answer for himself, while the two accused are standing here and have been given an opportunity to answer for themselves. The chief and accused 2 constituted themselves prosecutor, judge and executioner, all wrapped in one; with the result that the poor victim didn't survive. Well he also had next-of-kin. I am told one of you has got a wife and the other aged mother and so forth. I stress that the deceased also has got next-of-kin.

Now the least sentence I can impose on accused 1 is one of fourteen years' imprisonment and in respect of accused 2 fifteen years' imprisonment.

My assessors agree.



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JUDGE

27th March, 2000

For Crown : Ms Mofilikoane
For Accused 1 : Mr Mpaka
For Accused 2 : Mr Masiphole