

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

VS

TSELISO GEORGE

JUDGMENT

**Delivered by the Honourable Mr. Justice B.K. Molai on
23rd day of October, 2000**

The accused is before me on a charge of murder, it being alleged that on or about 7th January, 1996 and at or near Ha Mokhameleli in the district of Berea, he unlawfully and intentionally killed Setsoha Mohanoe.

When it was put to him, the accused pleaded not guilty to the charge. It is, perhaps, worth mentioning, at this juncture, that Mr. Fosa, counsel for the defence, admitted, on behalf of the accused person, the depositions made

by Malebanye Khang, Dr. Damane and Trooper Sojane who had testified as P.W.2, P.W.7 and P.W.8, respectively, at the proceedings of the Preparatory Examination. Mr. Rantsane, counsel for the crown, accepted the admissions made by the defence counsel. The depositions of Malebanye Khang, Dr. Damane and Trooper Sojane were accordingly admitted in evidence in this trial.

In his evidence P.W.4, Trooper Tasoane, testified that he was a member of the Lesotho Mounted Police Service, based at Teya-Teyaneng Police Station in the district of Berea. However, in January 1996 he was stationed at Pulane Police Post, still in the district of Berea. On 8th January 1996 he was at his duty station, when the accused who was his acquaintance, came to him and reported that on 7th January 1996 he had assaulted a certain person by the name of Setsoha Mohanoe.

According to him, P.W.4 did not there and then arrest the accused. Instead, he told the accused to return home and wait there until Setsoha Mohanoe had lodged a complaint at the Police Post. However, on 10th January 1996, the accused again came to P.W.4 at the Police Post and reported that the person he had previously reported to have assaulted had died. When the accused told him that the weapon with which he had assaulted Setsoha Mohanoe was at home, P.W.4 told him to go and bring it to the Police Post. The accused did comply. P.W.4 took possession of the weapon, which was a brownish timber (*lebetlela*) stick. He cautioned and gave the accused a charge of murder as aforesaid. P.W.4 then took the stick

to the Magistrate Court where the Clerk of Court ordered that it should be kept by the Police as exhibit. The stick was handed in as exhibit "1" at the Preparatory Examination proceedings. It was subsequently kept in the police exhibit room, where it had since disappeared and could not, therefore, be handed in as exhibit in this trial.

It is significant to mention that, in his evidence, P.W.4 specifically denied the suggestion that the accused had told him that, when he assaulted Setsoha Mohanoe with a stick, the latter had been throwing stones at him. According to P.W.4, what the accused told him was that Setsoha Mohanoe had been grazing his horse on the grave yard which was on the reserved pasture. When he (accused) wanted to impound his horse, Setsoha Mohanoe had resisted and that was the reason why he assaulted him.

The evidence of Trooper Sojane was to the effect that, he too was a member of the Lesotho Mounted Police Service based at Teya-Teyaneng Police Station, in the district of Berea. On 11th January 1996, he was requested by the Police at Pulane Police Post to proceed to the mortuary at Teya - Teyaneng government hospital and examine the dead body of Setsoha Mohanoe for injuries. He did comply. On examining it, he found that the body had sustained an open wound on the forehead above the right side eye, another wound on the back of the head and bruises on the left arm.

According to his deposition, which was admitted in evidence in this trial, Dr. Damane was the medical doctor at Teya-Teyaneng government

hospital. At about 3:00p.m , on 25th January 1996, he performed an autopsy on a dead body of a male African adult at his hospital. The dead body was identified before him by Malebanye Khang as that of Setsoha Mohanoe. This was confirmed by Malebanye Khang, whose deposition, at the Preparatory Examination proceedings, was admitted in evidence, in this trial. According to Malebanye Khang the deceased, Setsoha Mohanoe, was his son-in-law. He had, therefore, no difficulty in identifying his dead body before the medical doctor.

Dr. Damane went on to testify that his external examination of the body revealed that the deceased had sustained lacerations on the forehead and the occipital region. On opening the head, the examination revealed that there was a depressed skull fracture and subdural haemorrhage. According to him Dr. Damane took notes at the time he examined the body of the deceased. From those notes, he prepared a Post Mortem report which he handed in as exhibit "A" and part of his evidence.

I can think of no good reason why the opinion of the medical doctor that the deceased died as a result of the injuries inflicted on his head should be doubted. The salient question for the determination of the Court is, whether or not, the accused is the person who inflicted the injuries on the deceased and, therefore, caused his death.

In this regard the Court heard the evidence of P.W.1, Makhopo Stemmere, who testified that he lived at ha Majoro in the village of

Mapeshoane, in the district of Berea. On 7th January 1996, he went to a place called Nazareth looking for his missing cattle. He was travelling on horse back. On his return from Nazareth, P.W.1 met the deceased, his co-villager, who was also travelling on horseback. After he had told him that he had been to Nazareth looking for his missing cattle, the deceased informed P.W.1 that he had seen cattle, which looked like his, between ha George and ha Mokhameleli. The deceased then offered to accompany P.W.1 to the place where he had seen cattle similar to the ones the latter was looking for.

As they approached Chief Patrick's place, P.W.1 told the deceased that he wanted matches so that he could smoke. The deceased, who did not smoke, had no matches. The two then decided to go to a café belonging to a certain Ntsane where P.W.1 could buy matches. They found no matches at the café. P.W.1 and the deceased then left Ntsane's café and proceeded to another café belonging to a certain Hlaole. After they had crossed a stream on their way to Hlaole's café, P.W.1 and the deceased wanted to pass water. They dismounted their horses and started urinating next to some aloes on the side of the road. It was at that time that the accused, who was not armed with any weapon, came to them and said the place where they were was a reserved pasture. He was, therefore, impounding their horses. According to P.W.1, the deceased released his horse to the accused so that he could impound it. However, P.W.1 himself did not release his horse to the accused. He told the accused that he would rather take him to the Chief's place than impound his horse. There upon the accused said: "*Oh, is that what you are saying?*" After uttering those words the accused hurriedly left in the direction

towards his home in the village.

Thereafter, P.W.1 and the deceased, continued on their way to the café of Hlaole. At the café, P.W.1 went inside. The deceased, who was holding a short sjambok for driving his horse, remained outside attending to the horses. Inside the café, P.W.1 found a lady who was serving customers. He bought a box of matches and went out. As he went out of the café, P.W.1 noticed Hlaole standing outside one of his huts. The deceased was still attending to the horses on the forecourt of Hlaole's place. When he noticed him coming out of the café, Hlaole called P.W.1 to him. P.W.1 did go to Hlaole with whom he entered into the hut.

Inside the hut, P.W.1 was still explaining to Hlaole where he came from and where he and the deceased were going to, when he heard a sound of a stick hitting something outside the hut. He and Hlaole immediately rushed out of the hut to investigate what was taking place. Hlaole was the first to go out of the hut and P.W.1 immediately followed him out. Before he could actually get out of the hut, P.W.1 could see the deceased lying on the ground on the forecourt of Hlaole's house, and the accused delivering a blow with a timber stick on him, as he laid prostrate on the ground. To the observation of P.W.1, the blow landed on the deceased's forehead above the eye. He was, however, no longer sure whether it was the right or left eye. After hitting the deceased with his timber stick, the accused ran away in the direction towards his home village. Hlaole unsuccessfully tried to assist the deceased to a sitting position.

According to him, P.W.1 tried to take the deceased to their home village, but people who had gathered at the scene refused and told him that, he would rather go and report the incident to his Chief. The accused, who had injured the deceased, would have to carry him to a medical doctor for treatment. P.W.1 assured the Court that, there were no stones on the forecourt of Hlaole's home where he saw the accused assaulting the deceased. In his evidence, P.W.1 eventually left the deceased and returned home.

The evidence of P.W.2, Hlaole Phahla, was that he lived at ha Mokhameleli in the district of Berea. He knew the accused who lived in the same village as he did. He also knew the deceased in his life time. He was the son of Makoetje.

P.W.2 confirmed the evidence of P.W.1 that on the afternoon of 7th January 1996, the latter came to his home in the company of the deceased. They were both going on horseback. After their arrival at his home, P.W.1 went into the café, whilst the deceased remained attending to their horses on the forecourt. When he got out of the café, P.W.1 came to him in his house. Whilst P.W.1 was talking to him in the house, P.W.2 heard a sound of a stick hitting something outside. According to him, P.W.2 immediately rushed out of the house to investigate what was taking place. Outside the house, P.W.2 saw the accused actually hitting the deceased a blow on the forehead with a stick. The deceased fell to the ground when he was thus hit the blow. P.W.2 denied, therefore, the evidence of P.W.1 that the deceased was already lying prostrate on the ground when the accused hit him the blow on the forehead

with the stick.

P.W.2 went on to tell the Court that, when he saw the deceased falling to the ground, he rushed to assist him to a sitting position. The accused then moved backward and said to the deceased: "*I shall kill you*". According to him, P.W.2 unsuccessfully tried to assist the deceased to a sitting position. He, however, noticed that the deceased had sustained a laceration on the forehead and a swelling on the head. He assured the Court that there were no stones on the forecourt of his house where the accused had assaulted the deceased.

P.W.2 told the Court that, after he had failed to assist him to a sitting position, he left the deceased and went to make a report at the Chief's place. After reporting to him, the Chief detailed one Charles to go and call Tšotleho who was a member of the village development committee. P.W.2 then returned to his place where he found many villagers already gathered. The accused, who was no longer carrying the timber stick, he had used to assault the deceased, was also there. According to P.W.2, the deceased was eventually carried by the villagers to a spot from where he could be transported in a vehicle to the hospital. However, he himself did not accompany the deceased to the hospital.

In his evidence P.W.2 testified that he used to be the pound master at his village but that was long before the time when he saw the accused assaulting the deceased. He was not, therefore, the pound master of his

village in January 1996.

P.W.3, Matšolo Phahla, told the Court that she was a daughter-in-law of P.W.2 with whom she lived in the same homestead at ha Mokhameleli. She knew the accused who lived in the same village as she did. She also knew the deceased in his life time. The deceased lived in a neighbouring village.

According to P.W.3, she own a café at her homestead. She remembered that on the afternoon of 7th January 1996, she was serving customers in her café when P.W.1 came and bought a box of matches. After he had bought the box of matches, P.W.1 left. Shortly, thereafter, P.W.3 heard the sound “*qaa!*” outside the café. It was the sound of a stick hitting something. Immediately she heard that sound for the second time, P.W.3 went out of the café to investigate. Outside the café, P.W.3 noticed the deceased, who had fallen on the forecourt of her homestead. The accused who was holding a timber stick in his hand, was standing next to where the deceased was lying prostrate on the ground. According to her, P.W.3 approached to the spot where the deceased was lying on the forecourt and observed that he had sustained injuries on his head from where blood was flowing. She was frightened by the sight of injuries on the head of the deceased and raised an alarm. As a result of the alarm she had raised many villagers gathered at the scene. After the villagers had gathered at her homestead, P.W.3 heard the accused explaining that he was the one who had injured the deceased. However, P.W.3 did not know if any person had asked the accused anything

before he made that explanation. P.W.3 confirmed the evidence that the deceased was eventually carried away for medical treatment by the villagers.

In his defence, the accused testified from the witness box as D.W.1 and told the Court that he was the chairman of the development committee at his home village. On the afternoon of 7th January 1996, he took his horse to the eastern side of the village. Whilst he was tethering the horse there, D.W.1 noticed two horses and a colt grazing on reserved pasture where there were graves. As they grazed on the reserved pasture the two horses still had their saddles on. He could not, however, see any person where the horses were grazing.

D.W.1 told the Court that, after he had seen those animals grazing on the reserved pasture, he went to his house, took his stick and proceeded to them. On arrival he found P.W.1 and the deceased seated next to nearby aloes. He told them that if they were visitors they should know that their horses were not allowed to graze where they were grazing because that place was a reserved pasture and there were also graves there. Thereupon the deceased insulted him saying: *"your mother's vagina, you are: A child of a witch, there is my horse. Go and impound it."* According to him D.W.1 did not respond to that. However, the deceased immediately went to where the horses were grazing. He was followed by P.W.1. DW.1 himself remained standing next to the aloes. The deceased and P.W.1 caught hold of their horses and brought them to where he was standing, next to the aloes. On arrival to where he was standing, the deceased said: *"Here is my horse.*

Take it because you said you wanted it" The deceased was very angry when he uttered those words.

According to him, D.W.1 explained to the deceased that he did not say he should bring the horse to him. What he meant was that he would have to impound the horses if they continued grazing where there were graves. At that stage P.W.1 said to him: *"this one of mine you will not impound. You would rather take me before your Chief"*. D.W.1 then told P.W.1 and the deceased that he was, in fact, impounding their horses. They should, therefore, lead them to the Chief's place. P.W.1 and the deceased then led their horses in the direction towards the Chief's place. According to him, D.W.1 followed them, in the understanding that P.W.1 and the deceased were taking the horses to the pound which the deceased knew very well because on several previous occasions his animals had been impounded there. He had on one occasion even refused to pay for his impounded animals. They were eventually taken to the district pound at Teya-Teyaneng where they eventually died because he still refused to pay for them.

D.W.1 told the Court that when they were approaching the home of P.W.2, who was the pound master, he remembered that P.W.1 had said, rather than impound his horse, he (D.W.1) should take him to the Chief's place. He decided, therefore, to go to Mafatle 'Mokose who was the village headman and member of the village development committee. D.W.1 thus parted company with P.W.1 and the deceased. He, however, found Mafatle 'Mokose not in at his home.

In his evidence D.W.1 told the Court that the practice at his village was that, before the pound master could put animals into the pound, a report had to be made to him. P.W.2, the pound master, would not, therefore, be able to put the horses he (D.W.1) had impounded into the pound until he had made a report to him. When he could not find Mafatle 'Mokose at his home D.W.1 hurried to the home of P.W.2 in order to make a report to him about the horses which were already waiting there. According to him, D.W.1 approached P.W.2's place from the western side of his homestead. From that direction, the forecourt was out of sight due to P.W.2's row of houses. As he appeared on the forecourt from a corner of one of P.W.2's row of houses, D.W.1 noticed the deceased who was coming towards him. The deceased was then about ten (10) paces away (indicated) from him and holding a stone in his right hand. He was holding other stones in his left hand. Also a sjambok was hanging by its strap from the deceased's left forearm.

According to D.W.1, the moment he saw him, the deceased who was about 3 paces away threw a stone at him. He warded off the stone with the timber stick he was carrying in his hand. The deceased then threw another stone at D.W.1 who, however, ducked away and the stone missed him. Before he could throw a third stone at him, D.W.1 hit the deceased a blow on the left side of the head with his stick. D.W.1 immediately delivered another blow with his stick on the forehead of the deceased who then fell to the ground. Thereafter, D.W.1 walked away and returned to his house. He even forgot to make the report he was supposed to make to P.W.2, the pound master.

D.W.1 told the Court that as he passed next to where the horses had been grazing on the reserved pasture on his way to his house he met Tšotleho Phiri, one of the members of the village development committee. He asked him to go with him to his house where he reported to him what had happened. Whilst he and Tšotleho Phiri were at his house the Chief's messenger, by the name of Charles Mathula, came and told them that the Chief was instructing them and other members of the village development committee to proceed to P.W.2's place where he (D.W.1) had caused injuries. They complied.

According to D.W.1, on arrival at P.W.2's place he found many villagers already gathered there. On the instructions of the Chief's messenger, D.W.1 reported to the villagers how he had injured the deceased. He offered to bear the expenses of taking the deceased to hospital for medical treatment. He asked the villagers to assist by carrying the deceased to the bus stop whilst he went to look for a vehicle with which to transport the deceased to hospital. He did managed to find and hire a van by which he conveyed the deceased from the bus stop to Pulane Police Post. As there were no medical forms at Pulane Police Post, D.W.1 was referred to Teya-Teyaneng police station where the medical forms were filled and the deceased taken to Teya-Teyaneng government hospital. Thereafter D.W.1 returned home.

On the following day, 8th January 1996, D.W.1 went to Pulane Police Post and reported that the deceased had been left at Teya-Teyaneng government hospital on the previous day. According to D.W.1 he was told by P.W.4 to return home and wait there until the deceased had lodged a

complaint to the Police after his discharge from the hospital.

In his evidence, D.W.1 told the court that, on 9th January 1996, he went to visit his relative who had been hospitalised at Mapoteng hospital. On his return home, he went via Teya-Teyaneng government hospital to see the deceased. On arrival at the hospital, he was informed that the deceased had passed away.

On the following day, 10th January 1996, D.W.1 went to Pulane Police Post and reported to P.W.4 that the deceased had passed away at Teya-Teyaneng government hospital. P.W.4 then instructed him to go home and bring the weapon he had used on the deceased to the Police Post. D.W.1 did go to his home from where he brought, to the Police Post, the timber stick he had used on the deceased. P.W.4 took possession of the stick after which he took down, in writing, his statement. According to D.W.1 the statement he had made to P.W.4 was the same as the evidence he had given before the court.

It is worth mentioning that in his evidence P.W.4 told the court that, after D.W.1 had surrendered the stick he had allegedly used to assault the deceased, he cautioned him in terms of The Judges' rules and gave him the charge as aforesaid. D.W.1 then declined to make any statement to him. That was not disputed by D.W.1. I find it reasonable that after D.W.1 had told him that the person he had assaulted had passed away P.W.4 regarded him as a suspect. He could not, therefore, have interrogated D.W.1 without first

warning him in terms of The Judges' rules. I am inclined to accept as the truth P.W.4's evidence that after he had cautioned him, D.W.1 did not make a statement to him. In his evidence that he made a statement to P.W.4 which statement was reduced to writing, D.W.1 was, therefore, not being honest with the Court.

It will be recalled that in his evidence P.W.1 told the Court that after crossing a stream on the way to P.W.2's café, he and the deceased stopped and dismounted their horses so that they could pass water. Whilst they were urinating next to the aloes on the side of the road, P.W.1 and the deceased were holding their horses by their bridles when D.W.1 came and demanded the horses so that he could impound them for being on a reserved pasture. The evidence of P.W.1 that he and the deceased were holding the horses by their bridles whilst they were urinating next to the aloes on the side of the road, was denied by D.W.1 who told the Court that when he saw them from his village, the horses were grazing unattended on the reserved pasture where there were graves. As the horses still had saddles on when he first noticed them, D.W.1 suspected that they might belong to visitors who did not know that the place where their horses were grazing was not only a reserved pasture but also a grave yard. He, therefore, went to the horses intending to warn the owners thereof to remove the horses because the place where they were grazing was a reserved pasture and grave yard.

In my view, if it were true that as they urinated next to the aloes on the side of the road P.W.1 and the deceased were holding their horses by their

bridles, as the former wished the court to believe, D.W.1 would have seen that there were people standing with the horses next to the aloes on the side of the road. D.W.1 would not, in my views, have been so unreasonable as to go and order people, who were standing with their horses on the side of the road, to remove the horses simply because the place where they were standing was a reserved pasture. I am inclined to accept, as sensible, the evidence of D.W.1 that when he noticed them, from his village, the horses were grazing unattended on the reserved pasture where there were graves. I reject, therefore, P.W.1's version on this point.

It is not really disputed that when D.W.1 came to P.W.1 and the deceased where they were admittedly next to the aloes on the side of the road, there was an altercation between them over the horses which D.W.1 threatened to impound for grazing on the reserved pasture where there were graves. According to P.W.1, the deceased offered no resistance to D.W.1's suggestion that he was impounding his horse. He, however, told D.W.1 that he would not impound his horse which he was holding whilst urinating on the side of the road. He (D.W.1) would rather take him before the Chief. Thereupon D.W.1 uttered the words "*oh, is that what you are saying*" and hurriedly left in the direction towards his home/village. P.W.1 and the deceased then continued on their way to P.W.2's café where the former wanted to buy matches:

The evidence of P.W.1 was, in this regard, different from that of D.W.1 who testified that when he told P.W.1 and the deceased to remove their horses

from where they were grazing on the reserved pasture and grave yard or else he would impound them, the deceased insulted him by his mother's private parts. He, however, ignored the deceased's insults. Instead, he told P.W.1 and the deceased that he was, in fact, impounding their horses. They should, therefore, lead them to the pound. P.W.1 and the deceased complied. He followed them as they led the horses in the direction towards the pound at the place of P.W.2 who was the pound master. D.W.1 denied, therefore, the evidence that, after the altercation, he hurriedly left in the direction towards his home in the village. According to D.W.1, when they approached P.W.2's place, he remembered that P.W.1 had said he (D.W.1) should take him before the Chief rather than impound his horse. He then went to the house of Mafatle 'Mokose who was the headman and member of the development committee in the village. He thus parted company with P.W.1 and the deceased who both continued on their way to P.W.2's place. However, on arrival at the Chief's place, D.W.1 found the headman, Mafatle 'Mokose, not in.

D.W.1 told the Court that the practice in his village was that animals which had been impounded could not be put into the pound before a report had been made to P.W.2, the pound master. When he could not find the headman, Mafatle 'Mokose, at the Chief's place, D.W.1 hurried to P.W.2's place where the horses, he had impounded, were already waiting in order that he could make a report to P.W.2 who would then put them into the pound. As D.W.1 approached P.W.2's homestead from the western side, the forecourt was out of sight. It had been obscured by P.W.2's row of houses. However,

when he appeared from a corner of one of P.W.2's row of houses, D.W.1 noticed the deceased on the forecourt of the homestead. He was coming towards him and carrying a stone in his right hand. In his left hand the deceased was carrying other stones and a sjambok was hanging by its strap from the left forearm. The moment he saw him, the deceased, who was then about three (3) paces (indicated) away from him, threw a stone at D.W.1. According to him, D.W.1 warded off the stone with his timber stick. The deceased then threw a second stone at D.W.1 who, however, ducked and the stone missed him. Before he could throw a third stone at him, D.W.1 hit the deceased a blow on the left side of the head with his stick. Almost immediately D.W.1 hit the deceased another blow on the forehead with the stick. The deceased then fell to the ground. Thereafter, D.W.1 left the deceased and returned to his house in the village. He had forgotten to make the report which he was supposed to have made to P.W.2, the pound master.

It is significant to recall that in his evidence, P.W.2 told the Court that he had been the pound master in his village a long time ago. Certainly on 7th January, 1996 he was no longer the pound master. It could not, therefore, be true that D.W.1 had to report to P.W.2 about the animals he had impounded on the reserved pasture as the former wished the court to believe.

I must also say I find it strange that when he remembered that P.W.1 had expressed the wish to be taken before the Chief rather than his horse be impounded, D.W.1 went to the chief's place alone, leaving P.W.1 behind. A

logical thing for D.W.1 to have done, in the circumstances, would have been to take P.W.1 with him when he went to the home of Mafatle 'Mokose, the headman. I am convinced that the dilemma, which D.W.1 was facing here, was a reasonable explanation as to why he came to P.W.2's place after P.W.1 and the deceased had arrived there, if his evidence, that after the altercation with P.W.1 and the deceased at the aloes he proceeded with them to the pound at P.W.2's place, were the truth. In my finding, a sensible explanation why D.W.1 came to P.W.2's place after P.W.1 and the deceased had arrived there is in the evidence of P.W.1 that after the altercation which took place at the aloes, D.W.1 left them and hurriedly went in the direction towards his home in the village. I am prepared, therefore, to accept, as the truth, the evidence of P.W.1 and reject, as false, D.W.1's version on this point.

It will be remembered that, in his evidence, P.W.1 told the Court that, when he came to where he and the deceased were, next to the aloes, D.W.1 was not armed with a stick or any weapon for that matter. Although he testified that before going to the horses that were grazing on the reserved pasture where there were graves he went to his house and armed himself with a stick, D.W.1 assured the Court that he suspected the horses to belong to some visitors who were, perhaps, unaware that the place where their horses were grazing was a reserved pasture and grave yard. He did not, therefore, expect a resistance of any sort when he went to those horses. That being so, it seems to me unlikely that D.W.1 would have armed himself with a stick or any weapon, for that matter, when going to those horses. Particularly so because, in his own words, when he left home for those horses, D.W.1's

intention was just to draw the attention of the owners thereof, whom he suspected to be visitors, that they should remove their horses from the area where there were graves.

There is no doubt in my mind, therefore, that when he left P.W.1 and the deceased at the aloes and hurried in the direction towards his home in the village, D.W.1 was going to arm himself with the timber stick he subsequently used to assault the deceased on the forecourt of P.W.2's homestead.

From the aforesaid, it is obvious that the view that I take is that the answer to the question I have posed, earlier in this judgment, viz. whether or not the accused is the person who inflicted the injuries on the deceased and therefore, caused his death must be in the affirmative. The next important question for the determination of the Court is whether or not in inflicting the injuries on the deceased, as he did, the accused had the request subjective intention to kill.

In his evidence, the accused told the Court that when he assaulted him, as he did, the deceased was unlawfully throwing stones at him. In other words, the accused was telling the Court that he acted in self-defence. I am alive to the fact that none of the crown witnesses, who have testified in this trial, told the Court how the accused started assaulting the deceased on the forecourt of P.W.2's homestead. Only the accused did. However, his story was that as he approached P.W.2's homestead, the forecourt was obscured by

the row of P.W.2's houses and, therefore, out of sight. It was only when he appeared from a corner of one of P.W.2's houses that the accused noticed the deceased on the forecourt. The deceased was, at that time, already carrying stones and coming towards him, thus suggesting that the deceased had seen him coming even before D.W.1 appeared on the forecourt from the corner of one of P.W.2's houses.

If we were to believe the accused's story that, as he approached P.W.2's homestead, he could not see on the forecourt because that area was obscured by P.W.2's row of houses, it seems to me that for the same reason the deceased, who was admittedly on the forecourt, could not have seen the accused coming. That being so, I find it incredible that the deceased could have gathered stones in readiness to attack the accused as he appeared from the corner of one of P.W.2's houses. In my finding, the accused was simply not being honest with the court on this point.

According to the evidence of the accused, when he started throwing stones at him, the deceased was at a distance of only three(3) paces from him. That distance is, in my view, too short for a person to throw stones at another. In any event, the accused told the Court that he used his stick to ward off one of the stones thrown at him by the deceased. Surely that stone could not have fallen far away from where the alleged scuffle was taking place on the forecourt. In the evidence of the accused himself, the deceased had not yet thrown the third stone when he was hit the two blows that fell him to the ground. That granted, the third stone ought to have been seen next to the spot

where the deceased had fallen on the forecourt. However, P.W.2, the owner of the homestead where the scuffle allegedly took place, assured the Court that ordinarily there were no stones on his forecourt. Nor did he see any after the deceased had been assaulted there. The evidence of P.W.2, that there were no stones in the vicinity of the spot where the deceased had fallen on the forecourt of P.W.2's homestead was corroborated by P.W.1 who told the court that he did not see any stones there.

There is no doubt, in my mind, that the accused was not testifying to the truth when he said before he assaulted the deceased, as he did, the latter was throwing stones at him. In my finding, the truth of the matter is that after his altercation with the deceased and P.W.1 at the aloes, the accused returned to his house, armed himself with his timber stick and followed them to P.W.2's place where he found the deceased attending to the horses on the forecourt and attacked him, as he did, without any provocation at all, at that stage. In hitting the deceased the blows on his head with his timber stick, the accused must have used such a savage power that the former sustained depressed skull fracture.

Assuming the correctness of my finding it is reasonable to accept that in assaulting the deceased, as he did, the accused was aware that death was likely to occur. Nonetheless he did so, regardless of whether or not it did occur. That being so, it must be accepted that in inflicting the injuries on the deceased the accused had the request subjective intention, at least, in the legal sense.

In the result, I find the accused guilty of murder as charged.

EXTENUATING CIRCUMSTANCES:

Having found the accused guilty of murder, the Court is now enjoined, by s.296 (1) of the **Criminal Procedure and Evidence Act, 1981**, to determine the existence or otherwise of any factors that tend to reduce the moral blame-worthiness of his act. In this regard the accused went into the witness box and told the Court, on oath, that there was a boundary dispute of a long standing between his Chief and the Chief of the deceased. There was, due to that dispute, a general animosity between the people of his village and those of the deceased's village.

The Court was also invited to take into consideration the fact that there was an altercation between the accused and the deceased when the former came to where the horses belonging to the latter and P.W.1 were grazing on the reserved pasture. The accused had, therefore, been provoked by the deceased, shortly before he inflicted the fatal injuries on the latter.

The Court found, in the judgment, that in inflicting the fatal injuries on the deceased, as he did, the accused had intention to kill, in the legal sense. There was, therefore, no evidence that the accused had premeditated the death

of the deceased.

I have considered all these factors. In my findings, their cumulative effect is that there are, in this case, extenuating circumstances. The correct verdict is, therefore, that the accused is guilty of murder with extenuating circumstances.

My two assessors agree with this finding.

SENTENCE

The law leaves the question of sentence in the judicial discretion of a Presiding Officer. For obvious reasons, there will be as many different discretions as there are different Presiding Officers. This is, perhaps, one of the reasons that make sentencing the most different part of a criminal trial.

In mitigation of sentence, the Court was told that the accused had no record of previous convictions. He is, therefore, a first offender.

The Court was also invited to consider, in mitigation of his sentence, a number of accused's personal circumstances. They have been so eloquently tabulated in the submission made by his counsel that there is no need for me to go over them again. Suffice it to say they have all been taken into account by the Court in determining the sentence imposed on the accused person.

However, the Court cannot turn a blind eye to the seriousness of the offence with which the accused has been convicted. He has deprived a fellow human being of his life. The life of a human being is God-given and for that reason sacred. If he believed that the deceased had wronged him, the accused ought to have brought the deceased before a Court of law where he would be able to ventilate his grievances. He had no right to take the law into his own hands and kill the deceased.

The Courts of law in this Country have, on numerous occasions, warned that they will take a diem view of people who, for the flimsiest of reasons, kill others. That warning seems to be going unheeded. This Court will, however, not fail in its duty to give the accused a punishment that is commensurate with the seriousness of the offence with which he has been convicted. A punishment which will serve as a deterrent and a lesson to the accused and people of his mind that the Courts of law will not tolerate the kind of behaviour against which he has been convicted.

However, the painful thing is that the Court has been told that the accused is a married man who has a wife and children, one of whom is still a minor. There is no evidence that his wife and minor child are not law abiding citizens of this Country. They do not, therefore, deserve punishment. In sentencing him to a term of imprisonment the accused will, however, realise, sooner or later, that our prisons are not like concentration camps of the Nazi Germany where people were tortured and killed. Once he is within the walls of the prison, the accused will be given a humane treatment. His

innocent dependants will, however, be worse off. They will be deprived of their bread winner, the person on whom they relied for all their material needs in life.

In the result, I have come to the conclusion that a sentence of 9 years imprisonment will be appropriate for the accused person. He is accordingly sentenced.



B.K. MOLAI

JUDGE

For Crown : Mr. Rantsane

For Defence: Mr. Fosa