CRI/T/11/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

PHAKISO SEATE

JUDGMENT

For Director of Public Prosecutions :
Mr. L. Qhomane/Miss N. Nku/Miss L. Maqutu

For Accused One : Mr. M.E. Teele

Delivered by The Honourable Mr. Justice T. Monapathi on the 9th day of March 2000

Phakiso Seate (Accused) and one **'Matumelo Lerata (A2)** had been charged with the murder of **Khahloe Ntlhokotsi** (deceased). Accused joined issue with the Crown. So did his Co-accused who was discharged at the end of the Crown case. The Accused gave evidence in his own defence after the close of the Crown case. The main issue remained to be as to whether the Crown had proved its case beyond a reasonable doubt. It became related with the defence's contention

that the assault, which the Accused admitted, was not the cause of the deceased's death.

It was alleged that upon or about the 1st day of April 1994 at or near Ha Makoatlane in the district of Berea, the said Accused did unlawfully and intentionally kill the deceased. The post mortem report showed that death of the deceased had been due to "fracture of scalp with brain hemorrahagy (sub-dual and intra cerebral haemorragy) "Hemorragy" should have meant Haemorrhage."

A Preparatory Examination (P.E.) had been held at which the following witnesses made depositions P.W.1 Lefu Ntšala, P.W.2 Tumelo Lerata, P.W.3 Khunong, P.W.4 Monaheng Ntsokotsi, P.W. 5 Paolosi Ntsokotsi, P.W.6 Moratuoane Ntsokotsi, P.W.7 Selai Moeketsi, P.W.8 No. 6445 D/L/Sgt Monyeke of the Royal Lesotho Mounted Police. The depositions of P.W. 4 and P.W.7 at the P.E. were admitted as evidence and read into the recording machine.

The admitted evidence of Monaheng Ntsokotsi the elder brother of the deceased was that it was on a Easter Friday when he left with the deceased to the place of one Pheko. They had gone to drink beer. There was drinking and dancing at that place. Deceased happened to dance with A2. The witness became suspicious as he saw deceased and A2 hugging and holding each other's waists in their dancing movements. He thought they were in love.

The witness then went to A2 and asked her why she could have a love affair with deceased who was so young. A2 responded by saying that deceased was merely her son. The reply suggested a denial and that the deceased was too young to be her lover. This issue of the love affair was raised with A2 about three times. In the end the witness no longer saw the deceased and A2. He testified that he did

not search for them. It did not seem that the issue of the love affair was raised with both the deceased and A2. Nor that this love affair was proved except the witness' mere suspicion. It could not be established from the evidence that A2 and the deceased left together. It was submitted that it could only be a matter of speculation.

The witness testified that he went to sleep at a different place from where the deceased had normally slept. On the following day he received a report from his father that the deceased had been assaulted. When he got to their home he found that the deceased had in fact been assaulted. He was injured and was unable to talk.

P.W.7's evidence was admitted. He was the person who identified the deceased to the doctor before the latter could perform a post-mortem examination on the body of the deceased. The deceased had been his cousin. The post-mortem report was admitted in terms of section 223(7) of the Criminal Procedure and Evidence Act of 1981 since the doctor had left the country. The postmortem report spoke of an "opened wound at the back side of the head (a compound fracture)." It had further reported of the cause of death as stated earlier in the judgment. Defence Counsel remarked that the report had said nothing about the skull and its contents. I thought a "compound fracture" meant that at least the skull had been damaged or cracked.

One of the points made by the Accused concerned the injuries found on the deceased. It was that the doctor had not recorded the fact of the haemorrhage in the space of the paragraph 10 of the post- mortem examination report form. It was suggested that if it was so it meant that the report was inaccurate as to the injuries

and the cause of death. About the first aspect was the contention that the absence of that report was caused by the fact that the doctor had not opened the skull.

The evidence of P.W.5 Paolosi Ntsokotsi was used as support for the contention that the doctor could not have explored the inside of the skull to investigate the cause of death or the extent of the injury. The witness said he saw the deceased and made preparations for his burial. The deceased's head was not sutured neither was it held in any place with bandage. If the doctor had opened the skull as Counsel later argued the sutures or bandage would have been seen. Counsel further argued that in the circumstances the Crown had failed to prove that the assault was the cause of death.

The witness PW5 was at his home late into the night and he had been asleep. He received a message that the deceased (his son) had been assaulted. He was shown a place where he was allegedly assaulted but later taken to the Chief's place which was five hundred (500) metres away when found. He was leaning against the wall and in a sitting position. He said he was assaulted and he was feeling cold. The witness examined the deceased. He found that he had an open wound which was slightly bleeding above the left eye and a swollen one at the back. The witness said there was a depression at the middle top of the head. He said he saw in all three injuries. The witness however admitted that the examination he did could not have been a thorough one in the circumstance that is why he could speak of a swelling later a depression, three injuries and later two. He was examining the deceased with the aid of a torch because it was dark.

The witness said Tampo Ntsokotsi's vehicle was found but it did not have lights. It was however able to travel to the Chief's place and carried the deceased to his home where he remained overnight. The witness said the deceased did not

receive any further injuries until he was carried to the Queen Elizabeth II Hospital in Maseru by use of another vehicle which belonged to someone who had gone to attend a church feast. Another vehicle except that one of Tampo had been found but there had been no driver or some such problem. The deceased was placed in the ward 4 of the hospital. He had since the previous day been unable to speak. He looked hopeless. The witness went home after the deceased was admitted into hospital.

The witness said on arrival at his home he asked the Chief to call all those who had been involved in the assault of the deceased. A meeting was arranged at the Chief's place where the witness' brother, the chief and the Accused were present. The Co-accused was not present the meeting was dispersed after the Accused was confronted with the allegations of the assault on the deceased. On the following day a report was received that the deceased had died. An arrangement was made by the witness to place the deceased in a mortuary following a letter from the Chief to the police.

The witness was closely questioned about the inability of Tampo, who was a neighbour and relative of the deceased, to use his vehicle to carry the deceased to hospital that very night of his injury. This Tampo's vehicle as it was suggested was said to have been mechanically sound but without good lights. An impression was sought to be created that since Tampo was a relative his inability to assist further was caused by a family disagreements. Most probably there was such a misunderstanding inasmuch as the witness called it a "family matter" but I was not convinced that there was an outright refusal on the part of Tampo. It was clear on the evidence however that Tampo had been unwilling to use his vehicle because of bad lights.

Mr. Teele suggested that inasmuch as Tampo had driven to the chief's place he might as well have risked travel to Maseru or Teyateyaneng Hospital. Adamant as the witness was, I sensed that there was more than met the eye concerning the relations between the witness and Tampo. Although much was made about this I did not see how it was an intervening cause in the strict sense of *novus actus interviniens* even if Tampo has in truth refused or was unwilling to assist. One suggestion was that the witness was reluctant to use Tampo's vehicle because Tambo had suggested that the Accused should not be charged.

The witness was also questioned about his unhappiness over the fact that his son had been away from home that night. He denied however that whipped his son. A point was sought to be made that the deceased's father's reluctance to take deceased to hospital supported the inference that he had indeed whipped the deceased.

P.W.1 was Royal Lesotho Mounted Police Officer No. 6445 Monyeke. He had been PW8 at the PE. In April 1994 he received a report about the death of the deceased. As a result he went to a mortuary where he found the deceased's body. He observed a wound above the left eye, another on the left ear, a bruise on the head and a swelling at the back.

His investigation led him to the Accused and his Co-accused who reported themselves at the Police Station where they were charged after giving certain explanations. They were placed under arrest. On the day of their arrest a timber stick was brought by the deceased grandmother's Moratuoane Ntsokotsi. Accused contended that it was the stick that he had used. The stick was kept at the Police Station. It was later handed in at the P.E. but disappeared thereafter.

Under cross examination by Mr. Teele the witness was made to recall exactly where the alleged injury on the ear. He said he saw about three depressions, the biggest which was in the middle of the head. He also remembered seeing an open wound. The dead person he saw was identified to him. He therefore excluded a mistake of identifying of the body even though he testified that it was Paulosi Ntsokotsi who identified the body to him. It was Paulosi the deceased's father who said he left for work after the death of his son. He could not have confirmed identifying the deceased to the police.

The witness said he travelled to the deceased's village where he made necessary investigations. On of the people he spoke to was Mohlouoa and Lerato Khunong. It was true that the witness could have mistook the nature of the wound on the deceased's ear despite that he had made recordings thereof in his notebook. I however did not observe the serious flaw that the defence sought the Court to note. This did not mean I became unaware of the slight variations in the witness testimony. My concern was whether serious wound that was revealed on the head of the deceased that could not have been caused by anyone other than the assault by the Accused.

Moratuoane Ntsokotsi who was PW 6 at the PE was called in as PW 13. She had been at her home during the Easter Friday night in the village of Lekokoaneng where the deceased was assaulted. Deceased was her grand child. She got a report that night about the deceased who came in a vehicle accompanied by his father. This was after a report had been received of an assault on the deceased who had been lying somewhere.

A few of people had gone to ask Tampo assistance with his vehicle. The witness testified that it was not Tampo's vehicle but another which brought the

deceased to his home. The vehicle had been brought from a neighbouring village. Tampo's vehicle had been said to have had its lamps damaged by his son but it was otherwise in good condition.

A mattress bedding was made for deceased who arrived drenched in water. He had a wound on the left eye. He was unable to speak. He was not immediately taken to a doctor because transport was not available that night.

The evidence of PW 3 Lerato Khunong and PW 2 Tumelo Lerata were to the effect that the deceased was struck a blow with a timber stick and he fell down. That he was subsequently belaboured on the ground PW 3 had been at the church feast. He had gone out when he heard screams from A2. It was about sixty metres from where the witness was. Together with PW2 and one Ntšala they rushed to where the screams came from. They then found A1, A2 and other people. It was then that he found Accused and deceased struggling over a stick.

It appeared that the stick got loose and Accused was able to hit the deceased who fell down. At the time A2 had been throwing stones and had been missing. She was drunk. She was the same lady who had been dancing with the deceased, one person intervened and the witness went away because he was scarred. He later heard that the deceased was hospitalized. This witness appeared not to know the background of the fight. He came into the picture when already there was that struggle between the deceased and the accused.

P.W.2's evidence did not differ materially from that of PW3 in that they could have arrived at the same time with the latter after hearing the screams himself. He said he found Accused and the deceased quarrelling over a stick. This stick the Accused ultimately wrested off from the deceased whereupon he hit him

several times with it. I did not see the evidence of the witness to differ very much from that of PW 3 except that much was made in the cross examination about the desire of the witness to protect his mother who had been drunk and involved in shouts of a drunk person. In a similar way he found deceased and Accused quarrelling over a stick until the beating which the Accused administered on the deceased. He said at the time no one was attempting to intervene.

The Accused gave evidence in his defence. He had been at a drinking place on the day of the day of the fight where he took about three quarts of beer. He left at about seven at this place. He was going to his own home. He was alone. He went via one Pheko's café which was also a drinking place in the village. There he bought another drink.

At Pheko's place he found A2, the deceased and another person. If I recall well deceased's brother was present. There was drinking, music and dancing. A2 also partook of Accused's beer. A2 wanted to leave with Accused because it was dark. They went together towards the village of Ha Makoatlane. He said he was not feeling drunk but was "just nice." A2 was that lady about whose dancing with the deceased and the suspected love affair the deceased had complained.

When they were on their way he heard the sound of stones thrown at them and hitting a pole. They hid against a house. The stone throwing continued even when they had gone into a passage. There he became aware of the identity of the stone thrower. It was the deceased. He hit with a stick and fell deceased down. At that time people had appeared. He denied that he belaboured the deceased who had fallen down. At that time A2 was making a lot of angry noise and at the same time was throwing stones in response to that initial stone thrower. She was drunk and hitting deceased with stones. She was only able to stop when one of the boys

(presumably her son) took her away. The Accused confirmed that Tumelo was one of the boys who arrived at the scene. Accused said he had never intended to injure nor kill the deceased who he had met by chance when he was going away to his home. I did not find any reason to disbelieve PW 2 and PW3 about the incident of the Accused having grappled with the deceased for the stick. The denial by Accused of this incident was unconvincing.

One of the boys was sent to call the chief. The chief arrived. Then the deceased was asked what he had done to receive an assault. He said he had raped A2. That it was Accused and A2 who had assaulted him. The chief then left. After some time the deceased was removed to the chief's place where his father and brother arrived. There was a reference to Tampo's presence. Deceased's father was angry with deceased remarked about that he had often warned the deceased not to go about loose about night. The remarks had culminated with deceased's father whipping deceased with a sjambok. This was stopped by intervention of the chief and Tampo. Deceased then reported that he had been assaulted by Accused and A2.

I have already made certain findings including this one about the medical report and submission made by the defence. And the circumstances surrounding the events as after the injuring of the deceased and those concerning the problems about Tampo's transport, his vehicle and its condition.

I concluded that there must have been a lot of delay in sending the deceased to hospital. This delay was caused by so many things, it included the problem of the misunderstanding between deceased's father and Tampo. That is why in response to one of the question concerning relationship between the deceased's father and

Tampo, the deceased's father replied that it was a family matter.

I did not think that those circumstances (of the delay) were an intervening event or a separate cause of death of the nature of *novus actus interveniens* as we understand it. I concluded that that injury which caused the facture of the skull and the haemorrhage was the cause of death and it was caused by that timber stick which this accused admitted to have used in the assault on the deceased. There were of course a few injuries that the doctor described, even those that were described by the witnesses themselves including the police officer. These were minor injuries. I am not able to say that the deceased's father or A2 could have caused these minor injuries. To remind you A2 was 'Matumelo.

The accused himself has given a statement under oath in his own defence. The Accused described those circumstances beginning from the time when he visited one drinking place, if I recall well it was Pheko's café. There was drinking of beers. At the first place he took some three beers, according to him. It must have been at this second place where he took another beer and where he met 'Matumelo and others, including the deceased. He says after that drink he had about 7.00pm or was it 9.00pm, when he resolved that he was going back to his home. It was then that 'Matumelo asked the accused to accompany her because it was dark.

It was shortly after their departure that there was that bout of stone throwing, some stones hitting against poles, things like that, and accused hiding at the back of houses to run away and to hide himself from these stones. Eventually at the back of the houses of was a passage of which this accused came to realise who the thrower of these stones was. He began to realise that it was the deceased. He then describes his acts which constituted in attempt to defend himself against this

deceased and that he ultimately assaulted the deceased in self-defence. Meaning that he admitted to having assaulted this deceased with the timber stick. If I recall it must have been the timber stick that the accused said belonged to the deceased.

I do not think this accused is to be believed. What I believe happened is that there was a stage where this accused and the deceased grappled and were fighting for the stick and this is the incident that described exactly by PW2 and PW3. I did not see why I should not believe PW2 and PW3 in describing these circumstances starting from when there was a fighting over the stick, when eventually the accused was able to win the stick and thereupon assaulted the deceased. This appears to be what happened. It was correct that these two witnesses may not have been unable to see what happened as before they came into scene. I was not able to speculate as to what happened before the grappling over the stick except what the Accused said. But what was clear was that there was a struggle over the stick between the two gentleman. The accused wrested off the stick and thereupon beat up the deceased when he could have easily left the deceased. At the same time heeded the warning against adopting an armchair approach.

I am not able to say that this killing by the accused was intentional. At the same time the evidence that is on record does not indicate in anyway that the accused was acting in self-defence. There is a lot of confusion concerning the involvement of 'Matumelo, this aspect of her having been seen throwing stones in a drunken activity. At the same time there is this other description of events, including that the deceased's father having whipped the deceased with a sjambok.

The confusion even starts from that time when the deceased was seen dancing

with 'Matumelo (A2), in a way that brought about that complain that I have already spoken about in my judgement and the suspicion being that the deceased was in love with A2. It is clear that this matter of love affairs between 'Matumelo suspended love affair between 'Matumelo and the deceased and drunkenness had a place in the confusion that we have here. This included this confusion as to where suddenly did the deceased follow this accused after the accused had gone out of the shebeen with 'Matumelo. Why did that young man follow up the accused and A2? Why did that happen? Why this coincidence that the deceased had been seen accompanying A2, then there was a fight between Accused and deceased.

I remained convinced that there is a lot that should have been explained, more especially more evidence seeking to explain the circumstances as before the deceased being seen with the accused fighting over the stick. All in all I would find this accused guilty of unintentional killing of the deceased. He killed him negligently. POKI v REX 1985 - 1989 LAC 29 had been an appeal from the High Court on conviction for murder. The appellants had stabbed the deceased with knives on vulnerable parts of the body. That is why the High Court had concluded that they had "acted recklessly". Mahomed JA found against this conclusion and said at page 31-32 in almost similar vein to the instant matter:

> "The material evidence pertaining to the details of the struggle between the deceased and the appellants emanate from the evidence of the appellants themselves. That evidence points to a swift escalation of events following upon the initial stone throwing by the deceased. The appellants were clearly angry. The circumstances do not support any inference of deliberation, or selection of target areas, which might have been quite unplanned.

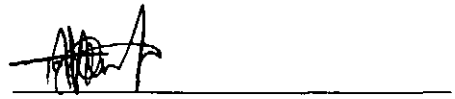
> In the circumstances, I have a doubt as to whether it can safely be said that the Appellants had the requisite *mens rea* to kill the deceased. The Crown has not in any view discharged the *onus* of proving this element beyond a reasonable doubt. It accordingly follows that the Appellants should have been found guilty of Culpable Homicide."

I was also mindful of the warnings of the courts about how a judge should go about a defence story, that there was no need to believe every detail of it, that it was sufficient if I thought that there was reasonable possibility that it may be true. See R v M 1946 AD 1027at 1033 per Davis AJA. Accused's version was false beyond a reasonable doubt.

My finding was that there had been nothing by way of with self defence on the part of the Accused. Rather circumstances were as seen by PW2 and PW3 that Accused ended up assaulting that young man as after they were seen fighting over the timber stick. One could not speak of there having been circumstances strictly speaking suggesting self-defence on the part of the Accused. And most importantly when this assault did take place there were people already assembled at the scene. The Accused could have ably moved away from the young man. I did not see what danger, what real threat there was that could have supported the claim that Accused was acting in defence.

The Accused was therefore found guilty of Culpable Homicide, having killed Khahloe Ntsokotsi in a negligent act.

My assessors agreed.



T. MONAPATHI
Judge

SENTENCE

On the 13th day of March 2000 I sentenced the Accused to a period of imprisonment of four (4) years without the option of a fine.

When Accused's Counsel addressed the Court and asked for a lenient sentence I had already noted that the Accused had merely killed through negligence not intention. I further noted the attendant circumstances of drunkness stone throwing, the grappling for the stick and what I suspected to have been jealousy over A2. It was just a suspicion.

The Court was told that the Accused has two dependent children of one being eight years of age and they being in Standard Six and Standard Seven classes, at school, respectively. Accused also had a wife who was a housewife. All had depended on the Accused and would suffer hardships if the Accused was sentenced to a term of imprisonment.

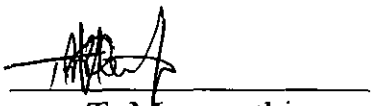
The Accused had already spent two (2) months in prison awaiting trial in this case which has taken close to six (6) years to completion. It was in 1994 when he was in prison. Having worked in South Africa, he has lost his employment and benefits.

I noted that the deceased was certainly a young man who had no dependants. But his life has been lost and he will not return to this world. The death of a human

being remains a serious matter to his relatives, his community and to the state. That is why punishment for such a crime ought to be realistic and not shockingly lenient. If not there will be no value in judgments and sentences and the Courts will be brought into disrepute. It did not matter whether an accused was a first offender.

It has never been a static or immutable rule that a first offender should not be punished to imprisonment. It depends on the circumstances of each case. It is often strongly contended that sending a man to prison puts him at the risk of contamination resulting from his contact therein with difficult characters. It can never always be so. A modern prison is intended for rehabilitation. The element of deterrence cannot always be lost in the sentence of imprisonment. The wisdom and practicality of the punishment has however made it to remain in the statute book.

I had considered all the aspects and submissions towards the sentence in this matter. My order was to send the Accused to imprisonment for four (4) years without option of a fine.



T. Monapathi
Judge

13th March, 2000