

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

v

MOLAHLEHI MAQALIKA

For the Crown : Miss N. Mokitimi

For the Accused : Mr. A.T. Monyako

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 7th day of August 2000

The Accused pleaded not guilty to a charge of murder. The indictment showed that:
“..... upon or about the 16th of May 1993 and at or near Tebellong in the district of Qacha’s Nek, the said Accused did unlawfully and intentionally kill MOIKETSI RAMPHALLA.”

The body of the deceased was found at a school, near a school room, where on the previous night there had been a musical concert. The deceased had a wound on the left chest as testified by Blyth Mpheta who was PW5 at the Preparatory Examination (PE) and whose evidence was admitted. The position of the wound was also corroborated by former policeman Joel Lebaka (PW4) who was PW7 at the PE. He arrested the Accused together with PW3 Det. Sgt Jobo who

was PW8 at the PE. Accused was arrested on the 2nd June 1993.

As aforesaid the evidence of only two witnesses given at the PE was admitted, including the postmortem examination report (Exh "1"). On the 3rd February 1994 the PE was held in this matter and eight (8) witnesses were led who were as follows: Mosalue Phatela (PW1), Phoofolo Phoofolo (PW2), Sankoela Ramphalla (PW3), Mara Mosobe (PW4) Blyth Mpheta (PW5), Bolomo Makakane (PW6), 7430 D/Trooper Lebaka, (PW7), No 3465 D.Sgt Jobo (PW8).

The first witness to be called by the Crown was Sankoela Ramphalla (PW1). He stayed at Ha Phatela in the district of Qacha's Nek. He could read and write in Sesotho. He was 26 years old. He knew the Accused. He knew him to be a resident of Tebellow and he was not a fellow villager. He had known the Accused before the 15th of May 1993. He also knew the deceased in this case and he had been the witness' uncle.

On the 15th of May 1993 the witness was at Tebellow Secondary School where there was concert which was held in a school hall. There was also present Mopeli Secondary School singers as one of the competitors. There was merry making and singing until earlier in the following morning when a fight erupted between one Mofolo and one Hood. The latter must have been a different person from the one referred to as Bahlakoana. They were engaged in fisticuffs. One Maraling (who became DW 2) came into the scene and made as if he was stopping the fight but he assaulted those from Ha Phatela village. He beat one Kamela and Rantekana. The two then ran away. He had been hitting them with open hands. He left them. And then Maraling came to beat the witness with an iron stick which the witness warded off with his hands until he got tired. He went toward the door. He was not able to go out. His uncle (the deceased) then asked Maraling as to why he was assaulting the witness when it appeared that the witness was not even fighting.

Maraling replied to say that deceased should "go away" (fotsek). It was then and immediately that deceased and Maraling engaged in exchange of blows with sticks. At that time the witness was standing aside and watching. Accused then came in from the side to the deceased whose blows he parried with a stick. He had the stick held in his left hand and then

stabbed the deceased with a knife which he held with his right hand. The witness also spoke to the effect that the Accused has also parried the blows from both fighters. The deceased then exclaimed: "go aside this man has already stabbed me with a knife". It was then that the witness and other ran and squeezed out of the door. The witness went out together with deceased and others.

The witness having ran out, he then went round the building after deceased some short distance whereupon he found the deceased down having fallen near a class room. He was not able to rise. He then went on to make a report to others about the injury of the deceased. One was Kamele. They then went away to their homes with one Phoofolo, to attend to his (witnesses) wounds which he had received when he was attacked by Maraling. It was the last time that he saw the deceased. That time it was in the early morning hours when, as the witness testified, the deceased died at the spot where he had fallen. The witness last saw the Accused in the hall during the fight. He had known the deceased well. On that night he had taken liquor. He was drunk. This was the case with the Accused. The witness had seen the Accused partaking of liquor in the concert hall. Before this incidence the Accused and the deceased were on friendly terms and had never clashed before. On this night the deceased had never attacked anybody. All he did was to question Maraling as to why he was assaulting the witness. That alone brought about the attack on the Deceased.

On cross examination by Mr. Monyako the witness repeated that he saw the Accused drinking beer in the hall although he did not know how many beer cans or bottles he drank before the fight. He had been drinking with Maraling, Hood, Bahlakoana and others. Bahlakoana was the one who appeared most drunk. There were those who even came already drunk. Of those Maraling was the first to leave. The distance between where there was drinking and the stage was about sixteen (16) paces. Drinking had been done by this group of people next to one wall of the full hall. Then there was singing by the Mopeli Secondary School on whom the witness had had his attention concentrated. He was nearer the singers than that group which was drinking at the side of the hall although he was towards their side but certainly not on the opposite side.

Maraling was the first to leave and reprimanded those who were making unnecessary noise

not to do so and not to join those noise makers. He did not succeed to quell the troublemakers. Deceased was not amongst those who were making noise. The encounter between deceased and Maraling was brought about when deceased asked Maraling what the reason was for the assault on the witness (PW 1). Maraling had turned to the witness (who was not among the noise makers) when the fighting was starting. The fighting was between Accused and Mofolo. It has been before Maraling got into the picture. At that time all the people who attended the concert were still in the hall.

Another portion had joined the group that was singing. While the witness was with the group singing he was able to see all what was happening. He estimated the distance in between as having been about six (6) paces. He did not hear what Maraling was saying but it had been after he had beat up Kamele and Rantekane with bare hands. He later was possessed of a stick while the witness said he was hit with a stick when he was standing near the wall doing nothing. He denied that he was disobedient at all. Maraling was not saying anything to the witness except belabouring him with a stick. He left the witness only when the witness was tripped near a table. It was at that time the Deceased asked what was happening.

There was then a lot of noise people were scattered about. Others even went through the window. He was able to hear what was said between Deceased and Maraling. He was very close. Maraling had said Fotsek (go away) when then the fighting started exchanging blows with sticks. He did not see injuries on any of the constants. Molahlehi intervened (Accused did) and warded off the blows and then stabbed. He had seen the Accused approach when there had been some kind of a free for all. He approached from the side. He had not known the relationship between Maraling and Accused. He would not have denied that Maraling was younger brother of the Accused. When Accused parried the blows it was at the time he had just been beaten up. He had not been far he had approached. He had moved away from that table which had tripped him. About a pace or so away.

When Accused so parrying the blows he was just away from them on their side. The witness had seen the Accused approach. He had a stick on the left hand and a knife on the right. It was shiny that is why he realized it was a knife. He saw him clearly when he stabbed. He did

not see the type. He had only seen the blade but not the handle. He inflicted only one stab wound. The Deceased exclaimed that he had been stabbed. Thereafter they ran away. He did see blood dripping from his chest area and was appearing from his clothing.

The hall was lit by a paraffin lamp and candles. That were placed round the walls and the table. The candles and the lamp cast adequate light in the hall. Witness was emphatic that he clearly had seen that the Deceased was injured and was oozing blood. He denied that he could not see because of lighting. He said he was close to the fighters. He and Deceased almost got out together because they squeezed through the door. It was during the hours of about 3.00 in the early morning. He did see blood coming out from the Deceased and this he saw when outside having turned around a corner of the building. On the ground he did not see blood drops but traces on the Deceased's skipper. He testified that he saw that Deceased had fallen about twenty to twenty five paces from where he had been stabbed.

A messenger of the chief would have been sent as usual when there were concerts. The witness did not know whether it was done at the concert. It was not his village. When it was suggested that accused would say he was sent by the chief to go and see that the concert ran smooth, he would not deny that. When it was further suggested that when there was a lot of noise Accused closed the concert and ask occupants to leave, he denied that and said it would be his first time to know about that. When challenged the Accused would say he had not known until later towards morning that a body had been found dead, he did not know because he (the witness) went away. He had been with Molefi, Mosaluoe and teachers when he got a message (report) that someone had been found dead that he would not deny. He was emphatic that he saw Accused assault Deceased with a knife. To this he said he swore to God. He said Deceased was seen by the witness and the Accused must have been seen by others stabbing the Deceased. He would not know why he picked on Deceased. He did not know the reason. He did not know why Deceased was stabbed. He would have no reason for lying. This witness withstood Mr. Monyako's cross examination. He appeared honest and unshaken. He must have been telling the truth.

PW 2 was young man of 22 years of age. He had then been 18 years at the time of the

fight. He stayed at Tebellong Ha Phatela. He was illiterate. He knew Accused. He was at the concert at Tebellong Secondary School when it was on the night of the 15th May 1993. Deceased was his cousin. At the concert he was not a singer he was a student from another school, and he was just going to enjoy the music.

The concert begun and proceeded. It broke off early because there was a fight. Maraling and Accused fought and one Sankoela (PW 1) was also fought. One Rantekane was also fought. He was also present in the concert hall where he was standing next to a table. During the fight he was still at the table. He was about a pace away from where the fight was taking place. Deceased was at that time sitting at the back at the chairs. Accused was then roaming about at the stage. The stage was about 4 to 5 paces. He then saw that Maraling and Accused were involved in a fight. It was against PW 1 and one Rantekana. He had before then been hitting others with his open hand. He went back to the stage where he was roaming about. It was after that fight involving the Accused, Maraling and PW 1.

Maraling had before been belabouring PW 1 with a stick. Deceased had come to ask what was happening "to his children". Maraling had answered back by saying he must go away (Fotsek). Deceased and Maraling were involved in a fight with sticks when Accused came from the side warded off blows from Deceased and then stabbed Deceased on the left breast upper chest area. Deceased had attempted to go to the side when Accused had come from the back about a pace away as the witness testified. After the stabbing which the witness said he clearly saw Deceased was reported by this witness to have said: "Go away from the door so that I can get out, this person has stabbed me." The witness said they rushed out followed the Deceased out and found him having fallen down ahead of them. The witness then went home. He later saw Deceased's corpse at the mortuary when it was fetched in order for burial which was done later.

When taken back to the earlier events in the hall the witness said there had been people drinking including Accused, Maraling, Bahlakoana, and Hood. He did not see Deceased drinking. They were drinking beer from bottles. After then he did not see Accused do anything because he went home. He never saw him after the stabbing.

Under cross examination by Mr. Monyako the witness reiterated that he had seen the Accused roaming on the stage. It was before the stabbing not afterwards as he later corrected himself. The witness said he had at all times surveyed the events surrounding the stabbing been watching the Accused but not all other times. He had all the same seen Accused go up and down the stage but not when he left the stage. Next he saw Accused stab the Deceased. He was from the back of Deceased when he emerged. Accused had never spoken to Deceased on that day. It had only been Deceased and Maraling who spoke to each other. Accused was from behind the Deceased when he emerged. The witness had been about four to five paces away. It was still noisy then. The witness could still hear conversation between Maraling, Deceased and others despite the noise in the hall. Lighting had been with candles and another lamp at the table.

Accused had emerged behind Deceased and just stabbed the latter as he (witness) demonstrated. He was still a bit towards the back but more towards the left side. Witness repeated that before stabbing the Accused had parried the blows between Deceased and Maraling. He did this with his left hand and stabbed with his right hand. The stabbing was done on the left side of the Deceased having appeared from the back towards the left of the Deceased. The stabbing was done with the right hand. This the witness was not able to easily demonstrate because he held the knife with his left hand because as he said he was left handed. I thought it was well explained in the absence of contradiction. He said he was able to use both hands. I cannot say his demonstration that he used both hands to write was conclusive. I however thought that his demonstration was clumsy

Witness repeated that the Deceased asked for his way through the door after being stabbed. Someone must have opened the door. It was already opened. They followed the Deceased out. He was not aware who had been closest to the Deceased as all went out in a rush. Deceased had put on a black lumber jacket. Only the back of the part of the knife was seen by the witness. It was an okapi knife. The witness recalled that Maraling was also putting on a black leather jacket. The witness insisted that Accused was involved in the fight despite his denial. He said the Accused killed. The witness said it was his first time to hear that the Accused had been sent by the chief to quell any troubles that would arise. He denied it. Towards the end the witness said he could not even think of reporting the incident to the police because was still young

and immature. It had been his first time to come across such an occurrence which had frightened him.

When clarification was sought by gentleman Assessor Sesioana the witness responded that he had not know the cause of any assaults except that he thought this could have been a result of drunkenness. The drunkenness must have been the cause of the Accused's actions of going up and down. The Accused's reaction after the stabbing was not seen by the witness because they were on the rush to the outside. There had been confusion and a kind of a free for all where there was fighting with sticks involving people like Rantekane, Phoofolo and later PW 1, Maraling, Deceased and Accused. In the end Accused faced Deceased at the time PW 1 and Maraling were in the picture. Deceased was also having a stick. Accused was warding off blows from sticks in which Deceased was also involved with Maraling in a fight. I concluded that the witness' account must have been the truth and it was correct despite his obvious immaturity which suggested confusion at some instances. I saw no factor which disturbed his reliability.

PW 3 was 3465 Detective Sergeant Jobo. Around 1993 he was stationed at Qacha's Nek. He was investigating officer in the present case. He also arrested Accused. On the 7th June 1993 he met the Accused at Tebellong. He had received information about the death of Deceased. Then he met the Accused following his (witness) investigation. He explained that he was a policeman investigating the case. Accused was cautioned that he was free to volunteer an explanation. He did not make any explanation except that he knew nothing of killing of the Deceased. He was not satisfied with the explanation and he told Accused that he was being placed under arrest and charged with murder. He did not hand to the witness a weapon he allegedly used. After that Accused was told to go with and accompany Detective Trooper Lekaka. The witness remained to attend to other investigations. Later on Accused was admitted for remand and bail granted. P. E. was later held.

Indeed the witness says he later met the Accused and Trooper Lekaka where they had waited for transport at the bus stop. When he arrived he found the Accused wild, difficult and unwilling to go to the police station. He had to be overpowered and was forcefully handcuffed because he was resisting. One of the fingers of the witness was even bit by the Accused who held

on to the witness. In order to have the witness extricated Trooper Lekaka even had to take out his firearm and shoot the Accused on one of his legs thus damaging his toe. This ended in the leg being placed in Plaster of Paris and the Accused going on crutches. It was because the witness was in danger. The witness had been pleading for help. The Accused had been resisting arrest. He was to be brought under control. The shooting happened inside a hut where the witness found the other police officer (his colleague) and Accused. Accused was sent to hospital as a result of the injury to his foot.

The witness did know whether there was another Maraling other than Maraling who ran a business. The witness said one Maraling was the one who handed over the Accused. Maraling did not provide them with any beverages. They went via a place called White Hill. There they did not drink anything like beer. Nowhere had he taken beer together with the Accused. He would not know what transpired between Trooper Lekaka and the Accused after the witness had left the latter with the former as aforesaid. Indeed the witness was surprised as to why the Accused had suddenly become hostile and was not obeying instructions. He however did not attempt to find out what had happened after they separated. The witness denied that he became aware that the Accused and Trooper Lekaka had become intoxicated. He denied having fought the Accused. He replied that he would not fight a person under his control. Indeed there had been a struggle because Accused refused to go along peacefully with the police officers. When it was suggested that intoxication was result of that strange behaviour from Accused, he would not deny if in his absence there had been such drinking. The defence did not end up suggesting what influence the element of intoxication could have had on investigations or any relevant factors. I found the witness to be a straightforward and reliable witness.

The next witness was PW 4 who was Trooper Joel Lekaka. He was a fellow worker with PW 3. On the 16th May 1993 he was at Sekake Police Post in Qacha's Nek. He had retired from the police force in the year 2000. He was involved in the investigations of the present case. They had received information from two messengers of the chief concerning the death of the Deceased. One of the messengers was the Accused. The witness had met the Accused several times before. That was so even after the event of discovery of the body, at Ha Sterling where the witness was on his normal police duties. They had met later when he was accompanied by sergeant Jobo (PW

3). The witness and police officer Makhutla followed the report.

Following the report they attended at the village where they met the chief at Ha Sterling. They were then shown a dead body of a man next to a school building. The witness and his colleague examined the body to discover any wounds. There was only one wound on the chest. The body was thereafter taken to a mortuary in Qacha's Nek. On the way the body received no further injuries. The witness and the chief's messengers including Accused parted at the school building where the body was found.

The witness was on a mission later. It was to arrest Accused. They succeeded to do so at Ha Sterling. The witness was the one engaged in investigating the case. He did meet the Accused after he had reported the matter to the police. It was, on the last occasion, when they were together with PW 3 to arrest Accused which they succeeded to do so.

The witness confirmed that they went with the Accused and PW 3 towards the bus stop. Having crossed the river PW 3 left the Accused with the witness near a village. PW 3 was to attend on some other business. PW 3 was seniormost. The twosome proceeded to the bus stop. There in a small village a café near the bus stop they waited in that café which was housed in a flat-roofed building. The witness did not describe the building as a hut. It was in that café that the witness took beer together with Accused who also bought bottled beer for himself. They (police officers) had previously been having drinks. He did not however know if the Accused had previously had beer at Ha Sterling.

PW 3 later arrived after a short time (fifteen to twenty minutes). They prepared to go. Accused then refused to go and said he would not go to the police office about a charge he did not know about. He resisted going with the witness and the other officer. The witness said they had to overcome the Accused in order to handcuff him. It was only after he was shot on the leg that he succumbed, having bit PW 3 on one finger. He explained that at the time of the struggle PW 3 exclaimed that he was bit. The witness took out a gun to shoot in order to disable the Accused. It was then that they were able to handcuff him. The witness had not even fired a warning shot. The Accused was taken to the police office and then later to hospital where they

left him. He later saw Accused after some months. It was a casual meeting in the village.

The only cross examination of the witness was to find out if the witness had earlier taken beer. The witness agreed. Secondly whether he knew if the Accused had earlier taken beer in the village which the witness said he had not known. At Ha Sterling the witness was taking beer with villagers and PW 3. The witness agreed that this aspect of having taken beer with Accused was a bad practice that police rules did not allow. I had no reason to doubt the evidence of the witness who substantially corroborated PW 3. That became the end of the Crown's case.

An application for discharge of the Accused, for absence of *prima facie* case, was rejected by this Court. At that stage the defence had agreed that there had been a free-for-all as a result of which a *prima facie* case could not be established. Refer to the admitted evidence of Mosaluoe Phatela which established that free for all on the last occasion of the commission where Accused proceeded towards the fighting. "In my view I thought he was going to stop the fighting. It was after that that an alarm was raised that someone was dying." I also noted that Accused was said to have (himself) reported the death to the chief as testified by the witness. I concluded that:

"It was obvious that on the principles enunciated above a reasonable man might return a verdict of guilty if not on the charge but on any other offence of which he would be liable."

I dismissed the application as shown in my ruling of the 1st day of December 2000.

The Accused testified on his own behalf. He said he resided at Tebellong. He was a married man with three children. He recalled the events of that day when there was a concert at a school in 1993 organized by the secondary school. He was detailed by the chief to oversee the good and peaceful running of that concert. The concert was to be in a church building. The Accused introduced himself as the chief's hand to the teachers and children. He was introduced to one headmaster. Announcement was made publicly that the chief expected orderly conduct of that concert. That the witness would intervene whenever there was a disturbance and where necessary he would stop the concert.

A little after beginning of the concert there was confusion. This involved one Mofolo and

Bahlakoana. They were noisy. They had quarrelled and wanted to fight. This was investigated. One Mofolo who was the instigator was expelled. There was progress and order for some time. Trouble erupted once again. Accused was not able to identify those who were involved. This necessitated a stoppage of the singing. He gave one more notice that he was dismissing those who were causing mischief and stopped the concert. He felt there was a need to dismiss occupants and stop the concert. They listened and left. School children went out first.

Maraling, Sello and others remained in the concert room. After thirty minutes of the dispersal of the children Rantekane arrived. Some children were still in the church. Rantekane reported that there was someone who had been discovered fallen outside. There was moonlight. The witness saw blood next to the body of the Deceased who was found fallen nearby at a spot outside near a classroom. There was no blood at any other spot. The body was already cold. That is the Deceased had already died. The Accused then went away with Maraling, Rantekane and one Pitso. The body was left where it was. They went to report to the chief.

The Accused said he reported to the chief that there had been a fight. That the Accused stopped a commotion or fight on the first occasion. On the last he stopped the concert. In the meantime he left some boys to watch over the dead body until the next morning. A letter was written to the police on the next morning which the Accused delivered. There he made an explanation to the police. It was the same explanation as the one before the Court. After that they found transport to White Hill where the Accused alighted and proceeded to his home. He gave a report to the chief. Police came the next day. They proceeded to where the body of the deceased was examined. A wound was found on the middle of chest. The body was released to the police.

Accused said when he had gone to the concert on the previous day he had not carried anything. It was one Mofolo who had carried a homemade dagger. Otherwise he had seen no one carrying a weapon. The Accused had not been aware of Deceased's presence in the hall. Accordingly he would not see him do anything. He did not see him leave the concert hall. He saw the witness Maraling, and Mosaluoe, the latter whose evidence was admitted. He also saw PW 1. They were present in the concert hall. He quarrelled with neither. He was not aware as

to the time which they left. He reiterated that he did not see the Deceased. He did not assault the deceased nor stab him with a knife. He saw PW 1. The Accused testified that he had himself quarrelled with no one. He never assaulted the Deceased. Neither did he intervene in the fight between Deceased and Maraling. Neither had he seen Maraling and Deceased fight. Accused denied any involvement in the fight nor that he stabbed the Deceased. He therefore did not know why the Crown witnesses picked on him. It could be that they were against his having stopped the concert. He denied that he had been drinking nor that he was going up and down in the hall. He denied that there had even been any drinking in the concert hall.

Accused testified that he was only arrested after about a month after the incident. He did not know why the police had to shoot him in the leg as they did. He was shot while already under arrest. He was hospitalized afterwards as the given medical book showed. He was later remanded and granted bail. Accused said he did not know why police shot him.

Miss Mokitimi, Crown Counsel had during the proceedings left the office of the Director of Public Prosecutions to another government department. She was recalled specially for this case through intervention of the Registrar. Otherwise the progress of this case would have been stultified. This is the line of cross examination by Miss Mokitimi:

“ Q. Ntate Maqalika, on that fateful night were you ever near the Deceased person?

A. No.

Q. Did you have any difference with the Deceased?

A. No not at all.

Q. How would you say your relationship with the Deceased was?

A. They were normal.

Q. On that night were you holding any weapon?

A. No.

Q. Not even a stick?

A. Not even a stick.

Q. Nor even a knife?

A. Not even a knife.

That is all.”

There was obviously no need for re-examination from Mr. Monyako.

The questioning of the witness by my Assessor was much more helpful. In response to it the Accused replied as follows: Maraling was the Accused's brother. He was present at the concert. He never quarrelled with anybody. There were boys from Ha Phatela. No one fought with them. That PW 2 said the Accused helped Maraling who was quarrelling with someone in the hall, the response was that that could not be correct. When he was reminded that it was said that he (Accused) came from the side and stabbed the Deceased, he said there was no truth in that. That furthermore he shook a knife in the air and said "I stabbed him". He denied that that ever happened. It was suggested that the Accused had held a beer quart bottle for some time in the hall from which he was drinking. This he denied and added there was never any drinking of beer in the hall. That PW 2 had said the Accused had held a stick in his left hand and a knife in his right hand. This he denied. That Accused stabbed the Deceased from the side of Maraling. That Accused also denied even suggesting that Maraling and Deceased never even exchanged blows. When it was put to him that one witness also corroborated PW 1 on this aspect. Accused replied that none of those things happened. A suggestion was made that the likelihood was that in order to intervene between Deceased and Maraling the Accused must have held a stick or some weapon and could not have been barehanded. He replied that the orders given to him were that he should not carry any weapon.

When examined by the Court the Accused confirmed the Court's observation that substantially there was nowhere he agreed with the Crown's evidence. He said the reason was that he was being falsely incriminated by people who had no intention of telling the truth. He stated that the only fight that there was was between one Mofolo and one Bahlakoana. Hood was not involved but he was the one who intervened together with the Accused. He was never involved in a fight. It was said they were involved in fisticuffs. Maraling came into the scene. This he denied completely. Accused said he was the only one who intervened. He denied further that Maraling had made as if he was intervening but it was a guise or a ruse to enable him to assault those from Ha Phatela village. This he also denied. That Maraling beat Kamele and Rantekane with fists. This he also denied.

Accused added that people only got out of the hall where they were dismissed. That Maraling never came back with an iron rod, He denied this that the witness went towards the door. That Deceased then asked Maraling why he was assaulting PW 1 when it appeared that PW 1 was not even fighting. Accused replied that he never saw the two together nor in fighting posture. That Maraling had replied "Go away" (Fotsek). This he also denied. He also denied that it was then that Deceased and Maraling got into blows. That there was witness (PW 1) who was at that time standing aside and watching. It was also denied that there was even such fighting. It was suggested that then the Accused came from the side, parried the blows of the Deceased and stabbed the Deceased. This he also denied. Then the Deceased exclaimed to PW 1 that he must go aside because Accused had already stabbed him. This he denied. When asked as to why the witnesses would incriminate the Accused he replied that it was a scheme by them to run away from what they did. That he was the only one who used a knife he replied that it was part of a plot because he was the chief's hand.

It became very clear to the Court that the Accused was prepared to deny everything about his involvement in any offence including innocuous one. He denied involvement in the second scuffle, the one allegedly leading to the assault on the Deceased. The question would be why he was absent in this one when he ought to have at least intervened. He denied that there was drinking in the hall. He denied that Maraling was involved in any scuffle. All these denials were made because what he said was a plot against him.

I took note that it was not denied that the Accused reported the matter to the chief and he was one of the messengers to the police. Despite this the Accused was shifty and clearly bent on lying. More of this kind of attitude was to come from Maraling who became DW 2.

DW 2 Maraling Maqalika testified that Accused was his brother (uncle's son). He said he originally did not know why Accused was arrested. Those arresting Accused did not tell the witness. He found out later that Accused was charged as allegedly having killed Deceased. The witness went to that concert where Deceased was allegedly stabbed. He went alone. He arrived after the concert had begun. He had carried no weapons at all. He said the concert hall was lit with a column lamp which is a paraffin lamp. He said there were no other lights. The

Court observed that this was contrary to the alleged presence of candle lights in the hall. He said there were none except the column lamp.

DW 2 said he observed that there was a quarrel between one Mofolo and one Bahlakoana. It was a quarrel which resulted in Mofolo drawing out a knife intending to stab Bahlakoana. The Accused successfully intervened and stopped the fight. By the chief he referred to the Accused. There was quiet after that and the concert continued. The witness did see that the two fighters remained in the hall. There was yet another noisy eruption although the witness was not aware where it came from. There was then a lot of confusion. As a result the Accused ordered all the children out of the hall and to disperse, because there had been chaos in the hall. It seemed all they wanted to do was to fight.

After the children were driven out of the hall by the Accused the concert having been closed some people including the witness remained at the table and were not connected with the confusion that had just occurred. The school children stood at the back towards the corner. They were ordered by the Accused, the teachers and others including the witness who assisted. The people who went out of the hall were boys and old people. Before the Accused ordered the people out the witness said he was involved on the second occasion because he was with students protecting them. The witness said he did not see the Deceased during the second eruption. He had gone out with the crowd. The witness did not notice in what condition the Deceased was when he left the hall. Before the people were ordered out the witness said he neither assaulted PW 1, Deceased nor quarrelled with anyone. He denied that he even got into a squabble with PW 1 nor did Accused intervene. Neither did the witness quarrel with the Deceased. The Deceased had appeared much younger than the witness as the witness had observed. The witness was not able to know why it was stated in evidence by the Crown that he had quarrelled with PW 1 and Deceased. It was because nothing like that had happened. He would not know why he was unfairly implicated.

While in the hall a certain report did come after some considerable time. It was brought by one Rantekane. The gist of the report was that there was someone outside who had fallen. The witness did go to the spot together with the teachers and the chief. On his arrival he saw that

there was someone lying supine in a pool of blood by his body. The witness was only able to see the blood around the body.

The witness denied that there was any drinking of beer in the hall. Rantekane's home was at Ha Phatela village. It could not be correct that he (the witness) beat up boys from Ha Phatela village. Neither had he quarrelled with any of them. The Deceased could have been assaulted at a place away from the hall. After the incidence they were with the Accused, the headmaster, Rantekane and the witness to report. That was all the witness knew about the events of the concert night.

The Crown Counsel did not see fit to cross examine this witness. Neither was there any need for re-examination therefore by Mr. Monyako for defence. My Court assessor then went about clarifying certain things from the witness' evidence. This went as follows: The witness agreed that the period between the dismissal of the concert and when the report came from Rantekane was fairly long although he was not sure that it could be thirty minutes. Those who remained in the hall with students before the report came were just seated and doing nothing intending to do nothing but watching over the children.

Witnesses who had previously given evidence said Accused was seen holding a bottle of beer. This the witness said he did not see. He did see the fight between Mofolo and Bahlakoana although it did not go far. One of them had already taken out a knife before intervention. The witness did not see Mofolo fall down. He denied that it was true, as PW 1 had alleged, that he kicked Mofolo while he was on the floor. During this time when Mofolo and Bahlakoana were fighting the witness did not see the Accused nearby. The witness said he did not hear Deceased say that he had been stabbed with a knife by Accused before Deceased got out of the hall as PW 1 testified. The witness denied having said "Fotsek" (Go away) to the Deceased at any time. They never spoke. He never attacked the Deceased at all.

DW 2 denied that he was carrying a stick at that time when Accused stabbed the Deceased. This the witness denied. The witness said the Accused was not carrying anything in his hands. Neither the Accused nor Deceased were drunk because there had been no beer

drinking in the hall. DW 2 said he was not even aware that about two hundred metres from the hall there a place where there was beer drinking and sale of liquor.

The Court thereafter proceeded to ask questions. This the Court proceeded to do in the interests of justice and the Court not being an uninterested umpire. Mr. Monyako did indeed protest that the questioning was on some points too strident. It was along the following lines.

The witness had quite recently known when the case was in Maseru that he would be a witness, although he would not know the exact date. He agreed that there was a scuffle on two occasions. He said in none of them the Accused was involved except as a chief. In only one of them he was involved. He intervened on two occasions. On the second occasion it was not clear what was happening the Accused was seen removing everyone from the hall. The witness did not see anything but chaos. He ultimately agreed there was fighting. He was able to see there was fighting when he saw people pushing and the chief exhorting them to go out of the hall. He saw that there was fighting which thing prompted the chief to intervene. They were pushing, hitting out with fists and school children going about confusedly. The fighting did not concern school children although he had not known where it started. He did not know the people who were involved in the fight.

The Court questioning was getting tighter at this stage when the witness had to be warned to divulge as much as was necessary. It was clear that he was hiding something. If students were not involved it must have been older people whom he knew. It was because according to him children and older people were at different parts of the hall. Older people were the ones who were fighting. When the witness was being clearly evasive he had to be told by the Court in serious terms that he should not hide things. Having said he (the witness) and the Accused had just been involved in taking out some people from the hall he was told by the Court that there should have been no difficulty in identifying people who were involved.

The witness ended agreeing that he knew some of the people he was dealing with or who were involved in the scuffle. He ended up saying it was one Hood. He was fighting with one Mofolo. The latter went out. This took long for no obvious reason. His intention had clearly

been to hide as much information as possible. Then he agreed that he was near them or went towards where they were from the table when told that he was pretending to stop the fight but himself assaulted people from Phatela Village. He knew Kamele and Rantekane. It was said the witness even assaulted those people who ran away. It was said he was possessed of an iron stick and hit one of the witnesses (PW 1). This he denied. It was in this situation then that Deceased asked why the witness was assaulting PW 1. It was then that the Deceased was told to go away. All this he denied. That the witness and Deceased got into an exchange of blows with a stick. PW 1 had said he was near the witness. This he denied. At the time the Accused came. He came between the witness and Deceased parried Deceased's blows with a stick and then stabbed with his right hand. This the witness denied. And thereafter the Deceased remarked that he was stabbed. He denied hearing that. Neither did he see the Deceased go out of the hall. He did not know why the witness would incriminate the Accused, the witness' brother. The witness said he went through the same process in the past when he was falsely charged. It was said that he had committed a medicine murder. He said the Accused was incriminated merely because he had intervened.

Mr. Monyako remarked that the questioning was harsh and questioning the witness despite the Crown Counsel having not challenged the evidence of the witness. I have already communicated my role and why I intervened with regard to the Accused. I had a distinct impression that the witness was not only rattled but he was exposed as a liar and someone who would go all out to hide the truth. On this instance it was to protect the Accused, his brother.

It was submitted there were two versions one for the Crown and another for the defence. I did not use the test of weighing the two versions as was suggested I should. It was also said therefore the Crown has not proved its case beyond a reasonable doubt. I did not agree most respectfully. All I observed was that in reality here were two credible witnesses PW 1 and PW 2 who were present in the concert hall and who knew the Accused and the Deceased fully. Their evidence was overwhelming. No motive was suggested as to why they allegedly falsely testified against Accused. On the other hand was the evidence of the Accused and DW 2 who told palpable untruths and were prepared to deny every piece of evidence and to distance themselves as much as possible from the events surrounding the fight between Deceased and DW 2 and later

the involvement of the Deceased. Despite having been identified they attempted to stick to their story namely that while they intervened in the first scuffle (involving PW 1 and DW 2) that they had nothing to do with the second one which the Crown witnesses said it involved Deceased, Accused and DW 2 on the other hand. The attitude of both Accused and DW 2 showed just that intention to deny not only immaterial things but all things that concerned their involvement. The Accused's attitude had been even up to the stage when he applied for discharge that he had also been involved in what was a free-for-all. That meant that he was also involved. He later changed that.

It would be a matter of common sense that even though the Accused had been acting as a chief throughout except on this last scuffle when DW 2 who was his brother was involved. The motive was to defend his brother. Even then this was not commensurate with the attack his brother faced. Accused acted excessively. Then he took sides with fatal consequences. That had been preceded by the Accused's question as to what was happening to "his children". He meant DW 2.

The Court has already acknowledged that PW 2 could have clumsy in his demonstration of what happened during the stabbing but he fully corroborated PW 1 in all respects. As I have judged both were reliable witnesses who were not shaken under cross-examination. On the other hand the Accused and his witness were shifty and bent on lying. They denied everything short of saying that they were just seated throughout did not do anything or see anything. Their reticence said it all. The Crown witnesses told their stories well and in a highly convincing manner except for the clumsiness PW 2. Accused and his witness on the other hand lied "in a detectable manner throughout." See PEKANE BAKINYANE CRI/T/89/94 15th May 1995 per Maqutu J at page 9.

The case of PEKANE BAKINYANE (above) which was referred to me by Mr. Monyako on the question of lack of corroboration of the evidence of PW 1: I also found useful in other respects. Most importantly was the attitude of the Court where as it is trite law the Crown has onus of proof which it has to discharge. "Accused should not be convicted merely because he is a liar as this one appears to be." The distinction with the present case is that the evidence of the

Crown is very convincing and overwhelming, while the Accused's story is inherently improbable. In PEKANE BAKINYANE'S case (above) there must have been doubts about certain factors for example that of identification. That is why the accused was given benefit of doubt.


It is the credible evidence in the present case that leads me to that Accused's "explanation is improbable, but that beyond any reasonable doubt it is false." See R v DIFFORD 1937 AD 370 at 373.

I was mindful that as Davis AJA said in R v M 1946 AD at 1027:

"The court does not have to believe the defence in all its details, it is sufficient if it thinks that there is a possibility that it may be substantially true."

The Court concluded as shown earlier that the Accused's case was demonstrably false and inherently so improbable as to be rejected as false.

I could only say that as the facts suggested the Accused did not have any intention to kill the Deceased. He killed him negligently. I would not take the fact that the Accused used a knife to stab the Deceased at a vulnerable upper portion of the body as showing intention to kill. As I have said the circumstances indicated otherwise. What one can call spontaneity of action or response to things (the fight between Deceased and DW 2) seemed to have been what governed to behaviour of the Accused. Contrast REX v NEKO MAJARA 1991-96(1) LLR 750. Accused would therefore only be guilty of Culpable Homicide. My Assessor agreed.



T. Monapathi
Judge

SENTENCE

Delivered by the Honourable Mr. Justice T. Monapathi
on the 8th day of August 2001

This is a 1994 murder case judging from the case number by which it goes. The file also

shows that by the 6th February 1995 something was happening towards making the case to commence. Happily by the end of last year the case commenced in earnest and it was in a rush so that by the end of June this year all that remained was a judgment to be pronounced. There was judgment yesterday which resulted in the Accused being convicted of Culpable Homicide after judgment was read.

This Accused person has been convicted as aforesaid. I have made my reasons about how I found that he still had to be convicted of having said to have committed killed negligently despite that he used a lethal weapon on a delicate part of the body. In his favour what was found was a single stab wound on the chest of the deceased. I justified in my judgment why I would not find that he intended (*dolus*) to kill either in the direct (*directus*) or indirect (*indirectus*) manner.

The circumstances of what was happening on this night of the concert suggest a situation where an unfortunate thing like this was likely to happen. Although this Accused person himself denies that there was drinking there must have been drinking and I believed witnesses who said he had been drinking. And he himself was drinking. This is what I believed. The only problem is this one of attaching a moral judgment to drinking when it is not absolutely shameful. They do not realize that in appropriate circumstances Courts will regard drinking as a mitigating factor.

It looks like in this concert hall there was a lot of singing, a lot of moving up and down. There were occasions where there were fighting, one of which the Accused himself intervened. Because it was undeniable that this man must have been sent by his chief as his hand to see that there was order in that hall. What was just unfortunate was that he got involved in a fight that involved his brother. I want to believe that if it was not his brother who was involved he could

not have been involved in this fatal action.

If I saw things well through the evidence there were both children and adults in the hall. One can imagine what happens in situation like that. I am satisfied that the Accused is not a young man. He is a man with a family, a wife and three children. That is a family to support.

Not only that, during the course of his arrest he appears to have received an injury. I am not prepared to go more into that except to say it appeared to have been a rather dangerous injury that he received. This was to the extent that his leg was placed in Plaster of Paris and Accused was not even immediately remanded because it was felt that he had received serious injury. These things I considered in the Accused's favour. Adding on to that injury was the fact that the treatment and medication still follows up to date as the green medical booklet shows. This I also took into consideration.

The Accused has committed a serious offence. It is serious because a life has been lost. That dead man will not come back. If he was a family man his family would remain without his support and without no one to fend for that family. That is why our Courts are enjoined to mete out punishments for people who have committed crimes.

I noted also that the Accused was a first offender which however does not mean that he becomes immune to certain punishments nor necessarily that his sentence has to be the lightest of them all.

Sentencing is not an easy task because you have to balance so many things. In your discretion as a Court you try to balance a lot of things. And you avoid a sentence that is shockingly lenient nor a sentence that is shockingly harsh. You use your discretion to give a punishment that meets the crime that has been committed, a punishment that takes into consideration the circumstances of an accused person an individual and it must be a sentence that addresses itself to the sentiments and expectations of the community so that the Courts are not held in disrepute. Because the community has its eyes open to see that sentences are not nonsensical. I am saying the community has its eyes open to see that sentences are not nonsensical. And one of the things to consider will be whether the person has a previous conviction and again the prevalence of the crime in the community. The motive behind the commission of that crime and then remorse.

There are many purposes for which sentences are imposed such as deterrence, retribution and seeking to rehabilitate an accused person. As I learn this is the emphasis that is put in in most the penal systems these days. Deterrence is also stressed. So that others with like minds will see that there is no value in committing crimes. So that sentences become a form of a real warning to the community at large.

In this country sentence is the discretion of the Court. The Court looks at so many things such as those I have just summarised. Sentencing like all social disciplines ends up becoming less than a perfect art and becomes full of disparities. Indeed in response to complaints about sentences that have been meted out in the past the Law Reform Commission of Lesotho has issued out a commentary in Reference No.1 of 2001. It is called **Sentencing Trends in the High Court and The Court of Appeal**. In the background to this commentary is a feeling that

judgments from this Courts are haphazard, and they are arbitrary. And that there is no thinking about some sentences that are imposed as being too lenient “to people convicted of serious crimes.”

So that the recommendations that will be brought about following the above commentary will result in a grid/table eg. murder without extenuation 12 - 20 years. Culpable Homicide 6 - 12 years with suspension and so forth. Because the authorities tell the Courts that they are fed up with sentencing trends. Speaking about Guiding Principles in his Monogram **Sentencing Guidelines in Lesotho** The Hon. Mr. Justice S N Peete says at page 5:

“The need for working out guiding principles become even more pressing when glaring disparities occur and certain judicial officers are targeted by critics as being lenient. Guidelines may be a helpful solution without eroding the judicial discretion in the matter of sentencing.”

I need not say anything more than that except to say that sentencing is not an easy task.

I repeat that one considers so many thing that one observes as a sentencing Court. Even as a Court one investigates things that can favour the accused person. All one is briefly saying is that this man should not be punished harshly or leniently but be given a reasonable sentence. We believe that this man should be enabled to come back to the society. And that if he does go to prison having been incarcerated, he still goes into a community of human beings. So that a prisoners remain human beings. The best attitude, if not an ideal, one dictates that he must be dealt with reasonably at all times. A prisoner is someone who has just wronged the society and nothing more.

We still have in our statute book a requirement or provision that people or wrongdoers will be sent to prison. A lot of things are done in most jurisdictions to want to avoid the harshness or the eventuality of people going to prison. This is brought about by different types of sentence that seek to avoid people going to prison most of the time for petty offences. There are these sentences such as suspended sentences, community service sentence(See **Criminal Procedure and Evidence (Amendment) Act No. 100 of 1998**), and some other sentences that makes a real effort to avoid the hardships of imprisonment or even the stigma thereof. Where speaking of community service one writer says:

“Community Service is an order of Court whereby the offender is offered the opportunity of compensating society for the wrongs he has done by performing work for the benefit of the community instead of going to prison. Community Service - as an alternative to custody - **Penal Reform International** - October 1999.

But as matters stand imprisonment is still part of our statute book. It is because our Courts and the community feel that there are those wrong doings whose punishment can only attract incarceration and imprisonment if there is reality in the kind of sentences meted out. This is the reality of the legal situation. As I have said before there are certain ways in which the harshness of imprisonment is ameliorated in so many ways one is community service sentence. I speak about another example such as where a prisoner is released during the day to assume his normal or employment as an ordinary citizen but spends nights in prison for a specified period. It is because there has been a realization that prison is not a complete solution.

I come back to say that the Accused has taken the life of a fellow human being. I have to give him an appropriate sentence having considered all those factors I have already spoken about some which are mitigating as I did observe.

Stand up Sir. I will send you to a term of imprisonment for five (5) years. Only two of those I will suspend for three years on condition that you do not commit a crime involving violence on a human being.

That is all.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the left.

T. Monapathi
Judge