

CRI/T/16/99

IN THE HIGH COURT OF LESOTHO

**In the matter of :**

**R E X**

**vs**

**MATLOU MAKARA**

**J U D G M E N T**

**Delivered by the Hon. Mr Justice M.L. Lehohla on the 2<sup>nd</sup> day of June, 2000**

The accused stands charged with the crime of murder, it being alleged that on or about 7<sup>th</sup> January, 1996 and at or near Corn Exchange in the Leribe District he did unlawfully and intentionally kill one Selala Putsoa.

The accused pleaded not guilty to this charge.

The preparatory depositions of : PW1 Lefeela Abiel Putsoa and PW7 D/Trooper Kharafu were admitted on behalf of the defence and the Crown accepted the admitted depositions.

Because the reasons why the post mortem report of Doctor Ali who examined the deceased did not accord with provisions of Section 227(1) of the Criminal Procedure and Evidence Act 7 of 1981 the Crown was put under the necessity to call PW8 Mr Lebeta the Senior Prosecutor who had led evidence at the Preparatory Examination of this case. It was thanks to PW8 that the Court learnt that actually the doctor who had performed the post mortem examination on the deceased was a foreigner and had long left Lesotho for good at the time the Preparatory Examination was held. The evidence of PW8 therefore gave a different complexion to the Magistrate's inadequate and blunt statement recorded at page 9 of the Preparatory Examination record that "the Senior Public Prosecutor informs court that *the medical doctor who carried out the post mortem upon the deceased herein is not able to come to court*". Emphasis supplied by me.

I may just point out that among acceptable reasons set out in Section 227(1) the one indicated in italics above forms no part.

The admitted evidence of PW1 is to the following effect : viz the deceased was his son. He gave the son's age as 19 years. PW1 received a report of his son's death and attended the post mortem examination conducted on the deceased on 26<sup>th</sup> January,

1996.

PW1 later buried the remains of his son.

The admitted depositions of PW7 could be summarised as follows :

PW7 is a Detective trooper who at the time was stationed at Maputsoe Police Charge Office.

While on duty on 8<sup>th</sup> January, 1996 he received a report from Corn Exchange. He immediately set out for Corn Exchange. He met the accused at the latter's home. He asked him for an explanation after introducing himself to him, explaining the nature of his business there that day and giving him the necessary warning against self-incrimination.

The accused handed over to PW7 a "Lebetlela" stick which he explained he had used in a fight with the deceased.

PW7 took away the stick which he hoped to later hand to the court below as an exhibit but unfortunately failed to find it from the place of custody in the Police store-

room for exhibits.

PW7 was also handed a home-made knife by the accused who said it belonged to the deceased. This was handed over in the court below and marked Exhibit "1".

PW7's further investigations of the case revealed that the deceased had not used this knife in his fight with the accused. He accordingly arrested the accused and gave him a charge of murder of the deceased.

PW5 Kapare Ramaqele gave sworn evidence before this Court. He said he stayed at "C.X" at Mafotholeng. He knew the deceased as they stayed in the same village. He said he knew the accused in the same way.

Asked to relate the events of 17-01-95 if he knew and could recall them he said that he, the deceased and PW6 Isaac Lieta were seated under a tree shade. The tree belonged to PW4. This was during the day.

While thus seated with his companions mentioned above PW5 saw the accused come and go past where they were. The accused came from the direction of his home

leading to Moeketsi's shop. When the accused was going past nearby the deceased asked 50c of him and the accused's response was in the nature of a question whether the deceased knew him to be working. The deceased responded by saying it was not because the accused was working that he was asking 50c of him. All it was, he explained, was just that he was asking for it.

The accused then made for his place of employment at Mamoeletsi's place where he was a hired herdboys looking after stock. At the time the accused was not carrying anything in his hands.

The trio stayed for a while there. But after some thirty minutes the accused emerged in company of three dogs also carrying a stick while at the same time shouting that Selala the deceased should wait there. To all appearances as far as PW5 was concerned the accused seemed to be in a fighting mood. PW5 testified that the trio ran away when they saw the accused approach in the manner just described. PW6 corroborated the aspect of the trio running away; but he was unable to say why they did so without immense probing. In fact getting anything from him was an uphill task. He didn't know where Muvango which he claimed he came from was. He thought it is in Lesotho though you have to go past Pretoria from Maseru to reach it.

Further that the Republic of South Africa is in Lesotho. Indeed the Court recalls its own agony it underwent in order to drag from him if the pace kept by the accused when next he approached was the same as the former and whether it wasn't in fact the carrying of the stick and the increase in the pace that caused them to run away. His evidence is thus dismissed as of a dullard who didn't know what his business was in Court. It dawned to this Court that this was so during the first five sentences he uttered when asked to testify. Though to me he looked hardly 21 he insisted that he was aged 82. Asked if he thought he is the same age or older than one of my assessors who is 80 he realised that he had exaggerated his age by an enormous margin albeit that he is illiterate. The tenor of his evidence did not detract from such flights of fancy as pointed out above. The disturbing feature was the facility with which he churned it from his mouth.

However the clear testimony of PW5 inasmuch as it has the ring of truth to it and supported as it is by logic and common sense seems to be enough to be relied upon as giving assistance to the Court in its endeavour to discover the truth in this matter.

PW5 said the accused who appeared to be in a fighting mood was less than a

100 metres from the trio when he shouted. This coupled with other factors mentioned above makes sense as to why the trio ran away.

PW5 said the deceased and PW6 ran towards Moeketsi's home while he himself ran in a different direction towards the corner of Stanley's yard. It is while in this position that he was able to see his two companions as they ran away. He couldn't at this stage see the accused because he was obstructed from view by Stanley's house and trees immediately around it. However the accused was still shouting for the deceased to come so that they could talk.

PW5 saw the deceased go down through the gate; and as PW5 had climbed the rise from the corner he had turned the deceased and the accused fell within his view. They were standing and were not far apart, he said. In fact the distance separating the two was given as one metre; while PW5 who was observing all this was 50 paces away at the time. PW5 says the accused was shouting and saying in a raised voice "do you know me to be working". Saying so the accused had raised his stick at the deceased.

Then PW5 said he saw the deceased take from around his waist something

shiny. Then the deceased turned and ran away. The accused gave chase.

But when the deceased ran past Maletlala's hut he tripped and fell. The accused was chasing after him still. He caught up with the deceased and fetched him three blows with a stick.

PW5 called for Moeketsi the owner of a nearby shop to come and help. When Moeketsi came out PW5 who was just a small boy in a state of fright ran away. He learnt later that the deceased was taken to hospital. He said the nearest he came to the scene when he made the observation of the blows he saw being delivered was about 20 paces.

Told by *Mr Mpaka* for the defence that the accused's story is that the accused didn't respond when deceased asked 50c of him first time ever PW5 was adamant that the accused's response was "Do you know me to be working".

PW5 denied that the accused proceeded *without responding* to where he was staying.



PW5 denied that from where the accused was staying the latter was going to the shop to buy chewing gum.

The story put was that the stick the accused was carrying was Potlaki's and he was returning it to its owner.

PW5's story regarding the presence of dogs which the accused denies is worthy of credit in that he didn't tend to exaggerate the viciousness of the dogs when asked by the court how big they were. Asked how big was the biggest of the dogs he demonstrated "2½ feet high".

"Were any of them vicious-looking or were they ordinary dogs.....? *They were ordinary.*

But you told me you feared them hence you ran away. Why then if they were that ordinary .....? The way he was walking and the fact that they seemed to be heading for the person".

The evidence of PW5 is satisfactory in this regard because he had earlier indicated that the accused was making for the spot where the trio were seated at a

heightened pace. He also was able to give a common sense therefore acceptable answer to the question put to him that “the accused couldn’t have been accompanied by dogs because he owns none” by saying “Those dogs were used to him because they belonged where he was employed”.

It is true that the Preparatory Examination record does not reveal PW5 as having mentioned the question of dogs accompanying the accused. But the probing by questions asked in this Court even though done so many years after the event evoke memories which nobody bothered to evoke in the Court below. Thus it is of importance that the Court at this stage observes closely the demeanour of the witness while responding to questioning in order to guard against embellishing of the story that puts the adverse party falsely in dim or bad light. I am confident that such cannot be a valid criticism to level against Pw5 whose evidence I accept as satisfactory.

PW5 denied that it was at this stage that the accused for the first time ever asked “Hey man do you know me to be working”.

PW5 says he didn’t hear the deceased respond and say “Hey man are you cheeky or resistant”. Indeed from the pitch of voices and given the distance that PW5

was from the two he would have heard if the deceased offered any such provocative utterance to the accused. I reject it as a made up story to seek *false* justification for the assault meted out at the deceased. Likewise I reject the suggestion that the deceased looked furious to the accused because the accused had said “monna” to him yet the accused being younger than the deceased was being disrespectful to say “monna” meaning “man” to the deceased because if this was uttered PW5 would have heard it and he said he didn’t hear the accused say “monna” to the deceased nor the other take objection to the supposed utterance.

The story continued to be put to PW5 that in the context of what appeared to be the deceased bent on giving the accused his desserts, is to me farcical indeed. The accused armed with a stick, standing a metre away from the deceased, and in company of his dogs the mere sight of which had caused the trio to run away in panic wants the Court to believe that the deceased was taxing him with insubordination yet hardly a second afterwards he turned tail and fled from the supposedly insubordinate accused!

PW5's story is worthy of credit also because he didn’t seek to conceal the fact that the deceased drew some shiny object from his waist. But if this turns out to be

the knife that was handed in in the Subordinate Court its role was absolutely minimal. It appears to me that the deceased only drew it to buy time within which to turn and run away from the accused who seemed bent on assaulting him for asking for 50c of him when the deceased knew he was not working.

PW5 denies that the deceased turned and faced the accused and said to him I can kill you. Asked how he can deny this yet he was so far away he said the voices of the duo were high-pitched; thus if such words were uttered he would have indeed heard them. I accept PW5's attitude and explanations without any reservation.

The accused's story is that he was 18 years at the time of events in this case herding after stock at Corn Exchange. He says he is illiterate.

One day in 1996 he left home for the village centre. When he returned from there he met the trio mentioned earlier. One of them Selala asked for 50c from him. The accused says he ignored him and went past without replying. The deceased said "hey man I am talking to you".

The accused having reached home and spent about 45 minutes remembered that

he was still having Potlaki's stick which the owner had lent him. He there and then made for Potlaki's home without the stick for his idea is that he was going to see if Potlaki is there and if he was he would invite Potlaki to accompany him to the home of the accused to fetch the stick with him.

The accused said he took a different route from the one which goes past the trio. Failing Potlaki at the latter's home the accused returned to where he stayed. On his way he met the trio where they had always been. The deceased again asked for 50c from the accused. It is then that the accused said "Hey man I don't have money. I am not working." The deceased in reply said I shouldn't call him "man". The deceased further said go away with that little money of yours and ended with uttering the abusive phrase "your mother's .... I see you think you are better". The accused says he let him be and parted with him and went home only to come back 45 minutes later. This time carrying Potlaki's stick. Carrying it to its owner.

It is to be wondered why this time he parted from his rule of leaving the stick and go and find out if Potlaki is there so that if he was the two should go and fetch it from the accused's home.

Coupled with the fact that none of the things the deceased is said to have said to provoke the accused it is not beyond imagination of this Court that because the accused had resented being asked for 50c by the deceased he felt this time that Potlaki's stick would come in handy. Hence his departure from the rule he had set for himself accompanied by an increase in his pace and a pack of dogs this time. It would not be wrong, gathering from the evidence and facts of this case to conclude that the accused felt it was about time he knocked the stuffing out of what he felt to be a demeaning form of behaviour on the part of the deceased.

The accused's story is a long rambling tale devoid of substance. Indeed when confronted with the crucial question why it is that the blows he said he effected on the deceased's hands were not recorded by the doctor who performed the post-mortem the accused was clearly in a cleft stick and dumb-founded.

His reason for chasing after the deceased who was running away and therefore out of the fight even supposing he was ever part of it holds no hope for anyone seeking to rely on self-defence. No one can defend himself from another who is fleeing.

The heavy blows which landed on the vital part of the body with fatal consequences are not indicative of light use of force, or force that was tempered by a fall on arms as well. Had that been so then there wouldn't have been a depression and crack on the deceased's skull. Instead the arms and hands where the blows landed would have borne out that aspect of the matter.

The accused however told the Court that he chased after the deceased with the purpose of disarming him in case he would turn at some later stage and stab him with the knife. The accused is in this connection deliberately oblivious of the fact that this interval would have profitably been utilised by him approaching higher authorities about the threat that a knife in the deceased's continued possession holds for him.

The post-mortem report states that the deceased's body was examined on 22<sup>nd</sup> January 1996. The cause of death is said to be head injury.

The external appearances revealed laceration of the right eye brow; and laceration of the occipital region. The skull is shown as having had a depressed fracture. The right temporal bone was affected plus subdural haematoma.

Given that the laceration on the right eye-brow is a good distance away from the depression on the occipital region which is at the back of the skull, the accused's story cannot be true that the head injuries were caused by only one blow which, while partly being borne by the arms and hands, landed somewhere on the head while the first one aimed too at the knife hand was confined thereto. If only one blow managed to hit the head then it either landed on the right brow or at the back of the head. If it landed at the right brow what then caused the depression at the back of the head? If it landed at the back of the head what caused the laceration on the right eye brow? The simple explanation for the more than one injury on the head is to be found in the evidence of PW5 who said he saw the accused deliver three blows on the deceased, and in part from Marorisang who on observing the savagery with which these injuries were effected on a helpless man asked "are you killing him?" the answer to which by the accused was a callous "that's exactly what I am doing".

Finally the unmistakable answer is given by the accused in response to the Gentleman Assessor on my left (Mr Mohapelo's) question.

"What provoked you so much and which you felt he deserved a depressed and cracked head from your blow.....? I don't know what it was".



One gathers from this curious answer a lashing without restraint of blows aimed at the deceased delivered with blind rage and fury. I reject that there is any defence of self-defence in this case therefore.

The position in law is that a man commits murder or unlawful killing if for no reason or for the slightest provocation he aims blows at the vital parts of another, and with savage force wields a weapon to achieve this end or if in pursuit of self-defence he exceeds that defence by a large margin.

*Mr Mpaka* raised important questions to consider in the light of the fact that the stick wielded is not here and therefore the Court cannot rightly say force used was savage if in fact light force was applied in using a heavy stick. While I do appreciate the logic entailed in this submission I cannot ignore the fact that if little force was used then this does not relieve the accused of the responsibility of directing it at the vital part of the body.

The accused is found guilty of murder as charged.

My assessors agree.



JUDGE  
2<sup>nd</sup> June, 2000

For Crown : Mr Kotele  
For Defence : Mr Mpaka

### EXTENUATION

The Court heard during the extenuation phase of the trial that the accused at the time of the commission of the offence was aged 18.

It was submitted that the accused did not initiate the fight. I disagree with this submission. The mere fact that the deceased asked 50c of the accused cannot in my view be tantamount to initiation of a fight

I have taken into account that the accused has no educational background.

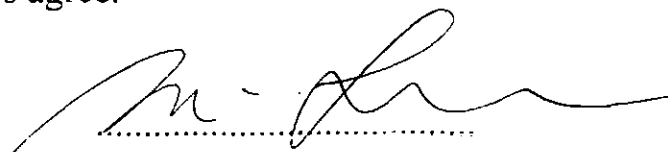
The fact of his youth in my view even standing on its own without interaction with other factors submitted would tend to entitle the accused to a finding that extenuating circumstances exist in his case.

The Court so finds.

With regard to Mitigation of sentence the Court accepts that that the accused has no previous records of criminality. It is important that he be given a second chance. It may well be that if a proper sort of sentence is imposed it would help fulfil a rehabilitative purpose in the accused's life. The Court takes into account the period spent in detention before the trial commenced.

He is accordingly sentenced to five (5) years' imprisonment.

My assessors agree.



JUDGE  
2<sup>nd</sup> June, 2000

For Crown : Mr Kotele  
For Defence : Mr Mpaka