CRI/T/27/95

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

LEMENA LEBUSA

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 15th day of May, 2000

The accused is charged with murder; it being alleged by the Crown that upon or about 14th May, 1988 and at/or near Ha Jopo in the Mohale's Hoek district he did unlawfully and intentionally kill Nako Selone.

To this charge the accused pleaded not guilty.

As the indictment indicates this is a very old case that took simply too long before trial.

It is unacceptable that a Preparatory Examination record which appears to have been completed on 9th November, 1988 incurred such a long delay to be typed that the typed scripts only reached the Registrar's office on 2nd August, 1995. It is equally unacceptable that after all such delay a further delay was incurred in the Registrar's office with the result that the accused had his first appearance before this Court only on 26th November, 1999 when because of sloppiness in the service of subpoenae for witnesses the case was called just for mention before it could definitely take off on 22nd March, 2000.

In an attempt to shorten proceedings the defence admitted the depositions of the following witnesses who testified at the Preparatory Examination of this matter in the Court below :

PW6 Mokheseng Selone

PW7 Detective Trooper Lepheane

PW8 Dr W E Nolting

Further admission was made in respect of PW5 Moqibi Ntilo's evidence. The admission was in terms of the Criminal Procedure and Evidence At 7 of 1981 section 227.

The admissions were accepted by the Crown and read into the recording machine and thus made part of the proceedings before this Court. Needless to say the post-mortem report was handed in and marked Exhibit "A".

In terms of Dr Nolting's post-mortem report death could have occurred on 15th May, 1988. This doctor established the cause of death as severe haemorrhage from the stomach and intestines caused by piercing wounds. The doctor indicates that his findings are consistent with the report that he received that the deceased had been stabbed.

The external appearances are described by Dr Nolting as being of a man with swollen body and loose skin and blisters all over. He attributes this phenomenon to freezing, possibly the result of refrigeration in a funeral parlour.

The doctor further observed what he describes as ***omentum*** coming through the wound in the abdomen. He observed one wound on the back and one wound on the right hip as reflected in the diagram attached to Exhibit "A". The diagram reflects at (1) a four centimetre long wound caused by a sharp object. The ***omentum majus***

hanging out. At (2) is reflected a two centimetre long would caused by a sharp object. The would is described as very deep. At (3) is described a small wound that is not deep but which goes to the bone.

PW5's admitted evidence shows that his home is at Ha Jopo and that on the evening of that day a concert was taking place in a hall in that village. PW5 was present at that concert. He had occasion to leave for his homestead but on turning back to the concert hall he found the deceased fallen inside the concert hall. PW5 saw the wound on the deceased's belly and sought the help of women to hand over a doek with which PW5 attempted to tie the belly with a view to staunching the bleeding.

PW5 said the chief arrived and ordered men to look for the culprits in the act. The accused who later was charged as accused 1 along with another came to the concert hall after thus being rounded up with PW2. The accused i.e. Lemena Lebusa according to PW5 confessed to the stabbing of the deceased. The deceased also was rueful that Talasi had joined in the chase after him otherwise he said he would have "outdone" people who had set after him.

PW6 also resides at Ha Jopo. He is the elder brother of the deceased. He was sent for in the night when his brother was said to have sustained serious injuries. PW6 saw for himself when he arrived at the concert hall that the deceased was stabbed. PW6 and others asked who had stabbed the deceased the deceased replied that "it was Lemena, he was with Khatampi and Mongoli". The deceased could still speak then.

However attempts to rush him up for medical attention were foiled by the fact that he died along the way. According to PW6 the deceased had intimated to him shortly before he died that he was tired and had preferred being taken back home. His actual words, uttered shortly before he died and while he was carried on a ladder intended to convey him to a vehicle some distance away were "I am finished" and he died. The body was conveyed to the doctor who performed the post-mortem examination.

PW7 a police officer attached to the CID at Qacha's Nek testified at Preparatory Examination that on 16th May 1988 he was at Ha Sekake. He knew the accused. On that day the accused was with his relatives at Ha Sekake.

PW7 examined the body of the deceased in the presence of the accused. PW7 observed the wounds which have been referred to earlier. He accordingly cautioned the accused and gave him a charge of murder. PW7 conveyed the body along with the accused to Qacha's Nek. The body of the deceased sustained no further injuries during the conveyance between Ha Sekake and Qacha's Nek.

The oral evidence of witnesses led was first, though for a very brief period, preluded by that of PW2 Mongoli Lebusa whose evidence had to stop because the witness was hungry and had not had meals in the morning of the trial. Thus he had to step down and the Court heard the evidence of PW1 Mampolai Sechaba.

PW1 and the deceased were lovers. PW1 knew the accused too because the accused's brother is married to PW1's sister. PW1 stays at Ha Mabatho village which is far from that of the accused and his sister-in-law. PW1 testified that she could neither read nor write.

Moreover on the day of the concert she had come on a visit to her sister's home at Ha Jopo.

In the evening she and her lover i.e. the deceased were at the concert enjoying the entertainment offered there.

PW1 accepted his sister's offer to put up with his lover in one of the huts at her sister's seeing that PW1's attempts to get accommodation elsewhere for the night was meeting with failure. The sister's offer appeared even the more welcome because the husband of PW1's sister was away in the mines in Johannesburg at the time.

PW1 and her lover accordingly repaired to the hut prepared for their accommodation for the night after the exhausting stay at the concert hall.

The night proved uncomfortable because the accused came knocking at the door and making what to me appears to be making a nuisance of himself. Asked who it was by PW1 the accused replied "Lemena".

The occupants of the hut did not open the door for him. He threatened to break the door. Asked why he would break the door he replied by posing a counter question namely why PW1 would not open the door. To this she said she wouldn't open the door because she was sleeping. This in turn led to the question posed by the

accused "with whom are you sleeping". Told that PW1 was sleeping with the deceased the accused is said to have said "if you are sleeping with Nako in this house open and I am going to slaughter him like a goat". Asked why the accused would do that he vouchsafed PW1 no reply. Apparently the accused was incensed by the idea of the deceased sleeping with a woman at his relative's house.

The accused then with the assistance of others including Talasi the deceased's relative started raining stones at the door of this hut which the Court was told did not have any windows.

PW1 suggested to the accused to go and ask his sister-in-law to open the door but he declined to take this suggestion and instead worked himself up into a fury of a man who was frantically preoccupied with hurling stones at the door of the hut in which PW1 and the deceased found themselves entrapped.

Khatampi who at one stage was Lemena's co-accused was heard to say aloud "if there are Mookho i.e. PW1 (her maiden name) and Nako in there kill them both so that the case could have no evidence".

PW1 told the Court that when the deceased heard the voice of PW3 Talasi outside he said "oh you Talasi my brother and you Tanki (PW4) you are in that group. Am I to be killed in your presence".

Apparently in a vain attempt to make believe that Talasi was absent the accused mocked at the deceased and asked "do you think Talasi is outside here".

If I may pause here, it appears that a concerted effort was being made to obscure the identity of people who had joined ranks with the accused to assail the deceased. The accused's identity could not be foiled because he had the undisguised motive to object to the couple unmarried to each other sleeping together at his brother's place in the latter's absence.

The accused was heard by the entrapped couple to call to Mongoli the accused's brother's son and order him to go to the lower house to fetch a spear. It is PW1's evidence that Mongoli managed to bring the spear along because on his return Mongoli was heard to say to the accused "here it is". In any event PW2 Mongoli himself in turn corroborates PW1's evidence on this very important aspect of the matter.

Be that as it may it was during the course of this torment and sheer terror instilled into the deceased and PW1 that the deceased while thus entrapped inside realising that the door was about to give in, asked PW1 to blow off the lamp. He thus made good his escape from the hut aided by darkness inside there. But the moon is said to have been shining outside.

When PW1 went outside everybody had cleared from the premises. She testified that when the deceased fled from the hut the group outside chased him. She, on getting outside, ran away.

She didn't know what direction the chase took. She came to see the deceased later in the concert hall that night. He was wounded. He was already bandaged but PW1 could see blood seeping through the bandage made out of a doek.

Of importance is that in that concert hall PW1 saw the accused, PW2 and PW3 and others. However she didn't hear if the accused said anything.

PW1 heard the deceased relate the events of the night, including the incident that led to his injury, to his brother PW6.

Under cross-examination PW1 was reminded that at Preparatory Examination she did not tell the Magistrate that she met with the accused in the concert hall when deceased was already injured. I don't think much should turn on this omission because it is a fact that the Chief had called for all those who had earlier been to the concert to reconvene at the concert hall where the deceased lay injured. Both PW1 and the accused had earlier been to the concert.

It was put to PW1 that accused was not in the concert hall at the time PW1 was relating her story to the gathering. She insisted he was. PW1 denied that when the accused came and knocked at the door where PW1 and the deceased were sleeping someone who was in there knocked him on the head. I accept PW1's denial and reject the suggestion that anyone who was in that hut hit the accused on the head. I reject also the suggestion that is a sequel to this bizarre invention that had it not been for that assault he would not have had cause to fight with the deceased.

I am not able to look with favour or accept the suggestion that Khatampi retrieved the spear from the accused. His failure to give evidence to give explanation regarding things he is said to have done cannot be explained away by questions put to Crown witnesses that the accused was not concerned that the deceased was sleeping

with PW1 as PW1 is not the wife or concubine of the accused. Nor can it avail the accused that because Khatampi had made unsavoury suggestions about eliminating the entrapped couple then he must have been the one who wielded the spear with which the deceased was stabbed.

I therefore accept as satisfactory the evidence of PW1 on essential aspects of the charge preferred against the accused.

PW2 after being recalled proceeded and informed the Court that the accused is his uncle. PW2 is the son of the woman who invited PW1 and her lover to put up at her home.

PW2 did not know the deceased. PW2 heard of the description of the deceased from PW5 and others during day time. The description made coincided with what PW2 perceived of the deceased later. PW2 was at the concert which had taken place at Mantsieng's place. This was during the night. It was during this concert that PW2 fell asleep and was awakened by a girl who indicated that people were breaking PW2's parental home. PW2 accordingly went to find out what was happening. I should indicate that PW2 at the time was aged between 12 and thirteen. He ran to his house

which is only 100 metres away. On arrival at his home PW2 found that the door had already been broken.

PW2 testified that on arrival at home he saw among people standing outside his uncle Lemena the accused, Khatampi who was at one stage accused 2 and PW4 Tanki Sello.

That PW2 mentioned that the accused Lemena was among people outside is quite significant in view of what is alleged to have been his role in this total episode. Indeed he said the three men he mentioned were standing outside. He said the accused called him aside and told him to go and fetch a spear. I am saying that this is quite significant because a spear is a weapon that is associated with causing physical harm or death. It is far-fetched and indeed inconceivable that a close relative of the accused who even stayed with him could falsely implicate the accused about the instruction he gave PW2 to fetch a spear. In my view, the instruction to fetch a spear which was later handed to the accused could not have been for any reason but, in the context of what was prevailing, for purposes of causing harm.

PW2 indeed fetched the spear from his parental home where the accused was

staying. PW2 didn't know what the spear was going to be used for. Given his age in 1988 (he was born in 1975) he could not be blamed for not inquiring what the spear was needed for. It is significant that on being handed the spear the accused snatched it from PW2. This was at the stage that PW2 saw many people come running after the one who was running ahead. At this stage the accused was no longer at the house where PW2 had left him when he first met him. The scene is clear that the situation was one of feverish urgency on the part of the man who snatched the spear from PW2 and joined in the chase.

This witness got to realise that PW4 and Khatampi had joined the chase because when the chasers returned and came upwards the two were present.

On his return from the chase the accused met with PW2 who had been lagging behind during the chase. They walked side by side the accused still holding the spear. The nearest PW2 was to the spear at any stage during the return was a foot away. He noticed nothing on the spear. But he says after a while during the chase he had heard the accused say "I have stabbed him". A short distance away he had heard Khatampi say "I have hit him". PW2 never asked who these people were referring to. But to my mind, given that no other man than the deceased had been stabbed or hit during the

chase in which the accused and Khatampi participated, I have no doubt that reference was being made to the deceased. Thus I reject as totally baseless and therefore unacceptable the suggestion that the words attributed to the accused namely "I have stabbed him" were actually an inquiry by the accused whether Khatampi had stabbed someone. I accept PW2's story that the accused uttered the words "I have stabbed him".

PW2 said on going home he joined Khatampi, the accused and PW4. He and the accused made for PW2's parental home where they slept after partying company with Khatampi and PW4.

PW2 and the accused were called to the concert hall at early dawn where they found the deceased lying on the ground with injuries.

Under cross-examination PW2 stated that he didn't see the accused drink that night. However he readily conceded that the accused had been drinking at day time. PW2 denied that the accused when telling him to go and fetch the spear had explained to this witness that someone in the house had assaulted him and that this was why the accused wanted to fight people who had assaulted him in there. Indeed this question

lacks of elementary canons of credibility. First, PW1 told the Court that she and the deceased were the only people who were in that hut and that they were sleeping. Next, nowhere did she suggest or concede that anybody opened that door before it broke due to being pelted with stones from outside. How then the accused could have been assaulted by people in there in the circumstances defies all logic and indeed escapes me. That PW2 a close relative of the accused dismisses this suggestion as totally false strengthens the notion of ill-use put by the accused to this spear. Be it remembered that PW2 said he wouldn't want anything evil to befall the accused in this proceeding. Saying so he satisfied me that he bears the accused no malice. Thus he is not bent on getting his own back on him by falsely implicating him in this trial.

The flimsy suggestion that it is Khatampi who used this spear probably to harm the deceased does not absolve the accused from liability for its use because he is the one who ordered that it be fetched. PW2's evidence on the issue is of crucial importance because he says when making this order the accused was shouting in anger. No wonder then that PW1 from inside the hut regarding the spear heard that order which was laced with feverish urgency for its no doubt, immediate use. I may even surmise that the accused because he and his company had entrapped the deceased in there felt he could not risk the deceased escaping in his absence were it to fall to his

own lot to fetch the spear he so earnestly needed, his nephew come to his aid by fetching it.

PW2 in re-examination denied that the accused asked Khatampi if Khatampi "had stabbed him". I accept PW2's evidence in this respect and accordingly reject the suggestion made to him on the score of falsity. I may indicate that the evidence of PW2 as it stands is of good quality, untainted with exaggerations or downright falsities. He didn't seek falsely to put his uncle in bad light. He readily indicated his ignorance of things alleged to have happened in his absence even where these tended to conflict with his evidence. This is where astute re-examination by a lawyer who is familiar with his brief came to good use. On the whole PW2's evidence remained unshaken. It is corroborated in material respects by that of PW1.

The evidence of PW3 is not reliable insofar as he indicated that he had been drinking too much on the day in question. I decide therefore to overlook it in favour of credible evidence so far given. Moreover, I think PW3's evidence is bedevilled by the fact that he wishes to distance himself from events which put him among people who were in the company of the accused pelting with stones the door to the hut where PW1 and the deceased were sleeping. Not only so, but he was seen among those who

chased the deceased after his escape from the hut and finally; though not directly charged by the deceased with having assaulted him, he bears the shameful responsibility of having sided with the deceased's tormentors as a result of which the deceased denounced him as the man whose acts made the deceased see no point in trying to save his life. It should be remembered that PW3 is the deceased's cousin who ordinarily should have tried to defend him instead of joining with those who were bent on injuring and harming him.

The same goes for PW4 who though not a relative of the deceased his evidence is in sharp contrast with that of PW2 to the extent that PW4 said that the deceased ran into the concert hall hotly pursued by the accused. I am not going to make any use of the evidence which is unreliable in some patent respects for fear that even where it conforms with some aspects which are admissible there is always fear for treating with favour some portions of such a witness's evidence because of the uncertainty to know where the lies end and the truth begins and vice-a-versa.

I take solace in the statement of our criminal law that where there is *prima facie* evidence of criminal liability at the end of the Crown case, then if the defence closes its case, as in the instant matter without leading any evidence, the *prima facie*

evidence becomes conclusive.

Indeed Mofokeng J in CRI/T/32/78 ***Rex vs Makhethe and 2 Others*** (unreported) at p.13 succinctly put the point across in the following words :

> "It was argued that at the close of the Crown case there was *prima facie* evidence on which a reasonable court might convict and that when the defence closed its case without leading any evidence whatsoever, the *prima facie* evidence became conclusive evidence. The position as I understand it is this : at the close of the Crown case but before the defence has closed its case the question to be decided is : is there evidence against the accused on which a reasonable court might find the accused guilty. But when the defence has closed its case without leading evidence, the question to be decided is; has the Crown established the charge beyond a reasonable doubt....."

In CRI/T/1/92 ***Rex vs Masupha Seeiso*** (unreported) at p.10 and delivered on 3rd August 192 the Court had this to say :

> "It does seem possible that generally speaking though at the end of the Crown case it is found that an accused person has a case to answer, if he in turn closes his case without leading evidence he could be acquitted if it is found that the Crown has not discharged the *onus* cast on it to furnish proof beyond a reasonable doubt that an accused person is guilty. This might be a risky step for an accused person to take for in a majority of cases the *prima facie* case becomes conclusive as in such instances other considerations... come into play including the accused's failure to discharge evidential burden where it is shown to exist after the totality of the evidence has been weighed".

The invaluable works of S.E. van der Merwe *et al* styled Evidence at page 417 provide a fund of pertinent material in a passage reading :

> "The State will have established a *prima facie* case; an evidential burden (or duty to adduce evidence to combat a *prima facie* case made by his opponent.....) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State, but, if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt....."

The late Moqibi indicated that the deceased stated that the accused had stabbed him. PW1 and PW2 also said as much before this Court. Since the accused came to the hall in company of PW2 then no reason can impress on this Court why the accused could not have heard such words uttered in his presence. His attempt to suggest through questions put to Crown witnesses by his Counsel on his behalf that he couldn't have heard those words is a mere charade. Furthermore credible and therefore acceptable evidence shows that the accused said within PW2's hearing "I have stabbed him". Needless to say no one else within the vicinity of that utterance was stabbed with a spear during that night besides the deceased. The accused's pretence, put through his counsel to the Crown witnesses that it might be Khatampi who stabbed the deceased cannot avail the accused because in the light of the fact that the accused had earlier been heard to say if it was Nako who was with PW1 in the hut

he was going to slaughter him like a goat, and in the light of the fact that he ordered for the spear to be fetched while he was keeping watch to ensure that the deceased didn't escape; or if he did, from the entrapment it would not be with any success, further in the light of the fact that within a short while of the end of the chase he was heard to say I have stabbed him, and finally in the light of the fact that the deceased laid the blame on him for the stabbing; no way can the accused hope to escape criminal liability for the death of the deceased. Even assuming it is Khatampi who stabbed the deceased, the accused had done more than enough to show he associated himself with Khatampi's acts hence his resort to a lordly sleep in the comfort of his bed even though he had earlier heard Khatampi's wicked suggestion that it would be better to kill PW1 too if the deceased is killed, so as to suppress and render evidence of the sordid deed obscure and incapable of detection. Not that I believe any bit of this calculated herring across the trail; but in case Khatampi is also liable it does not render the accused innocent because clearly he made common cause with Khatampi were I to take it that Khatampi did the stabbing which, I do not.

As in CRI/T/75/79 ***Rex vs Peter Kenene Mahase*** (unreported) at p.39 I wish to reiterate the phrase reflected therein to the following effect as it is apt in the instant case as well :

"The Court formed an opinion at the close of the Crown case that a sufficiently strong *prima facie* case existed to warrant the accused's answer. What I mean is that standing on its own the Crown case was enough to secure the accused's conviction" for the crime charged.

I may add that in a criminal case it is important to establish, where possible, motive for the offence committed. In the instant case the only form of motive I have been able to discern is the accused's resentment at the deceased sleeping with a woman at night at his own brother's household.

Use of the lethal weapon in the form of a spear driven through the upper part of the human body can always lead to one thing i.e. criminal intent to commit the offence charged.

The accused is accordingly found guilty of murder of Nako Selone as charged.

My assessor agrees.

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JUDGE
15th May, 2000

For Crown : Mr Ntaote
For Defence : Mr Matooane

EXTENUATION

During the extenuation phase of the trial the Court benefitted from the agreement made between counsel as to what appear to me truthfully to be two important factors which could be considered in an attempt to find whether or not there are extenuating circumstances in this case. The first is that the accused is an unsophisticated illiterate. The next is that the element of intoxication is a factor which is worth considering at this stage of the proceedings.

Indeed, extenuating circumstances where established serve to palliate the accused's moral blameworthiness and in the result enable him or her to avoid the ultimate penalty of death. The onus is on the accused on a balance of probabilities to establish the existence of extenuating circumstances. The test is subjective.

The existence of extenuating circumstances can be proved by evidence not too remotely related to the case that

(a) the accused was drunk

(b) the accused is immature

(c) the background and social milieu of which he is a product does not frown

upon a certain form of conduct.

The list is not exhaustive. But even if one factor standing alone might not avail an accused person, indeed a combination or accumulation of two or more factors might just be enough to fit the bill.

Thus taking into account also factors which are not part of the agreement between the respective counsel; the situation revealed by facts gathered from evidence is such that the combination of drunkenness and illiteracy subjectively could have moved the accused to think that he justifiably had a bone to pick with the deceased for sleeping with a woman in his brother's household and that the form of intent reflected is one known as *dolus eventualis* as opposed to *dolus directus*, as reflected by the fact that there was a hue and cry after the deceased thus showing it couldn't be said there was direct intent to kill. While not meaning to be understood to say that the existence of *dolus eventualis* necessarily helps avert the ultimate penalty, I should indicate that put side by side with *dolus directus* the form of intent known as *dolus eventualis* would more readily help the accused avert the ultimate sentence than would *dolus directus* do. Thus I feel that the accused has adequately discharged the *onus* cast on him and do find that extenuating circumstances in this case exist.

MITIGATION

The Court has taken into account that the accused has no previous convictions. Further that he was relatively young and aged 25years at the time of the commission of the offence. Further that the case has been hanging over his head since 1988 and that he has had to forfeit his bail since 1995 when he mistakenly thought that the law had gone on retirement. He is married and has two children.

However the Court would be failing in its duty if it could be blinded by these factors to the fact that an innocent life has been lost; and that the accused tended to over play his hand where it was not his business to interfere as the authorised person 'Mamongoli had given permission to the couple to put up at the place which is hers and not the accused's.

The accused is sentenced to 12 years' imprisonment

My assessor agrees

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JUDGE

15th May, 2000

For Crown : Mr Ntaote
For Defence : Mr Matooane