

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

HLAKAE MAVUKA

JUDGMENT

Delivered by the Honourable Mrs Justice K J Guni  
on the 11<sup>th</sup> day of April 2001

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The death of the deceased in this case, is due to infra-peritoneal haemorrhage and exposure to the elements according to the postmortem report, dated 27<sup>th</sup> February 1995, by *Dr MASEMENE M.B.CH.B.*, The Registrar at Queen Elizabeth II Hospital , at that time. The deceased had sustained a stab wound on the left side of his chest. This wound penetrates into the body of the deceased and has resulted with the rapture of the inside parts of the body such as a spleen, stomach and one of the lobes of the liver. Externally, the deceased's body appeared to have mild swellings on the head and face according to the Doctor.

On the 20<sup>th</sup> February 1995, the deceased was assaulted by the accused who hit him first with a stone on the chest. Secondly with another stone on the cheek. The deceased fell. The accused rushed to the deceased who had fallen and twice stabbed him on the chest with the spear. When the accused pulled the spear out of the deceased's body for the second time, he succeeded to pull off the handle only, leaving the sharp end of that spear still stuck on the body of the deceased.

The facts of this case, are mostly not in dispute. The deceased, the accused and the two eye witnesses in this matter are residents of the village of HA MPELI, BOKONG in the district of THABA-TSEKA. The two eye witnesses are herdboys. That evening, after they had secured their herds in their kraal, they then relaxed by playing our type of chess on the rock thereat. While they were playing that game of "*Morabaraba*" there arrived the deceased who was smoking some tobacco. The deceased was asked for a smoke by Pw1. The deceased obliged. The deceased sat down to join the two players at that game of *Morabaraba*. While Pw1 was enjoying smoking the tobacco offered to him by the deceased, the accused arrived. Immediately as he arrived, the accused threw stones at the deceased. The accused invited the deceased to get up and fight. The first stone thrown at him missed the deceased who was hit on the cheek and fell down, by the

second or third stone. The deceased's fall was suddenly followed by a stab on the chest with a spear by this accused. When attacking the deceased the accused is said to have urged the deceased to get up and fight. According to the accused he and the deceased had had a fight at *Lebohang Ndelele's* place earlier on that same day. The two, [that is the accused and the deceased,] were amongst many of their fellow villagers who have been engaged in a communal work. As a reward for contributing their labour at this communal work, the villagers [thirty or so men and women] were served with a lot of beer. Despite having drunk one or more litres of home brewed beer each, the parties' appetites were not yet quenched. As a result, they searched for places in the village where home brewed beer was being sold. As they drank their beer at that communal work place, the deceased is said to have asked this accused to give him some cigarettes. To this request, the accused declined, on the ground that he had none. The accused says, to his surprise, the deceased took exception to his failure to supply him with some cigarettes. He left the accused and promising him that he will get him for that. The deceased, according to this accused, hurried off to *Lebohang Ndlele's* place where home brewed alcohol was being sold. The accused also in due course went there. When he arrived, the accused claims that the deceased remarked to him thus:- " You persist following after me, I shall give you what you want" By this the accused understood that the deceased wanted to fight him. The accused says he ignored

the deceased and his remarks. The accused bought his alcohol which he then took with him outside the house where he sat and proceeded to drink it.

It was while the accused was drinking his beer outside *Lebohang Ndelele's* house that the deceased armed with a "*Lebetlela*" stick, allegedly rushed at this accused. The accused went on to say that the wrestling for the possession of the deceased's stick ensued. The accused disarmed the deceased. Then the accused handed over to the owner of the premises, *Lebohang Ndelele*, the stick which he had taken possession of from the deceased. There were many people present. They also intervened and separated the deceased and the accused. The accused ran to his home and as he ran the deceased threw stones at him. The belief which the accused is trying to create here, is that he ran away for his dear life from the deceased's attacks to his own home -presumably for his own personal safety.

It is the evidence of this accused that when he arrived at his home, he searched for, found and took his stick. His wife disarmed him. He then took his spear and ran back to the place where he left the deceased. He caught up with the deceased who was then on his way home. When he found the deceased he challenged the deceased to fight. The deceased refused to take up the challenge. The deceased then ran away as the accused pelted him with stones. According to the accused the

deceased ran up the hill to hide. This seems to be the place where the two eye witness of this murder were joined at the game of “*Morabaraba*” by the deceased. This accused, claims that he asked the two herd boys (Pw1 and 2) about the whereabouts of a man, wearing a white skipper with a blanket around his arm. **LETUKA** Pw2 indicated the deceased where he was seated. It is this accused’s own evidence that he then approached the deceased and asked him why he was hiding. He then ordered the deceased to get up and fight. When the deceased got up the accused hit him with a stone on the chest. The deceased turned away from the accused, perhaps trying to run away again. As he turned away the accused hit the deceased with another stone, this time on the cheek. The deceased must have staggered because it is the accused’s evidence that even before the deceased could fall, the accused stabbed him with the spear on the chest and fell him down. This accused told the court that he tried to remove the spear after stabbing the deceased but he only managed to take out the handle - leaving the blade inside the deceased’s body.

The independent evidence before this court supports totally the last part of the accused’s evidence as regards the stabbing to death of the deceased with a spear by this accused. The crown witness saw no aggression allegedly perpetrated by the deceased upon this accused. The accused called no witness to corroborate the

allegation he makes that the deceased had been the aggressor. Considering the length of the intervening period and the events which followed, the subsequent attack by the accused was revenge.

It also emerged during the cross-examination of the accused that prior to that day the two men [accused and the deceased] had had a fight. The deceased got better of the fight. The accused lost a piece of his ear cork. The accused had a love affairs with his late brother's wife. She subsequently rejected him, in preference to the deceased. On the 20<sup>th</sup> February 1995, at the "*stock fell*" at **Lebohang Ndelele's** place, this lady is said to have taunted the accused and urged the deceased to beat him up. According to this accused it was at that stage that in the presence of other fellow villagers the accused felt humiliated. The accused claims that the lady [his late brother's widow] was being derogative to him and apparently holding the view that the deceased has authority or some power over the accused. The accused resented that. There was also a personal grudge against the deceased who, according to the accused, had been given the cattle of the family of his late brother, by his widow. What made that gesture particularly abhorrent to this accused was the fact that the cattle were in the first instance in his custody. He was made jealous by his late brother's widow, who after terminating their love affair transferred the cattle together with her love to the deceased. The taunting,

if there was any, on the date of the deceased's death, was opening old wounds and hurts which this accused had been enduring.

It is the accused's defence that he was drunk and as the result of his drunkenness he could not form a requisite intent to murder the deceased. The accused is charged with the crime of murder. It being alleged that on the 20<sup>th</sup> February, 1995 at BOKONG HA MPELI in the district of THABA-TSEKA the said accused did unlawfully and intentionally kill one MOKHALI KHOTSA and thus commit the offence as aforesaid.

The fact that the deceased and the accused had fought previously, may be an indication that there was bad blood between the accused and the deceased but it cannot be used as a justification for the accused's stabbing to death the deceased on another separate occasion. Revenge is the taking of the law into one's own hands. That is not permissible.

The accused was not reacting to threats of assault or the actual assault as he would like this court to believe. As he ran to his home if at all he did, he was being pelted with stones. He took first his stick which his wife took off him. He then succeeded to take the spear and ran back to look for the deceased. Those were not

the actions of a provoked person. He had all the time to reconsider his actions. The accused by this action shows this court his determination to get back at the deceased.

After arming himself with a spear he went to look for and attack the deceased. It is the accused's own evidence that when he found the deceased, he asked him why he was hiding where he found him in the company of Pw1 and 2. The two crown witnesses do not appear to have been aware that the deceased was hiding from this accused. The accused further ordered the deceased to get up and fight. The two crown witnesses had no knowledge of the previous encounter between the accused and the deceased.

Immediately before stabbing the deceased to death, the accused does not show this court that the deceased fought him. The accused pleaded not guilty to the charge of murder and he asks this court to regard intoxication as his defence.

There was according to this accused plenty of alcohol which was consumed by him on that day. I accept that the accused drank a lot of that home brewed beer at the communal workplace. He may have been drunk considering that they went to the "stock fell" where he bought and drunk more beer. The accused may have



been drunk but he had not lost total control of his faculties. When he appeared to the two herd boys who were in the company of the deceased, he did not give them the impression which he seeks to create to-day, that he was so drunk he could not possibly know what he was doing or that it was wrong.

When the accused's wife refused with the stick which the accused had ran home specifically to fetch, the accused was then and there able to think of the alternative weapon. That is why he then took a spear which did as good a job if not better. The accused returned from his home in search of the deceased whom he found on the way to his home. He attack the deceased who ran away and went to hide. The accused searched for the deceased whom he found hiding at the hill. These are not the actions of the man who has lost his senses. It is the evidence which shows determination to pay back, in other words, to get even with the person who seems to beat him in every contest. When the accused eventually found the deceased where he was hiding, he asked him why he was hiding. The search for the deceased by the accused, was for a purpose. The pursuit of the deceased by this accused, indicates determination. The person who has lost his sense due to drunkenness would not recognise the man who was hiding. The speed with which blows were delivered by this accused upon the person of the deceased, first with stones followed immediately by a stab with a spear, show this court without a

doubt that the accused was aware of everything he was doing.

For the accused to run away to hide in the river after failing to extricate the whole of his spear from the body of the deceased, and to proceed straight to report himself at the police station the next day, is a clear indication that he knew he did something wrong. The accused is the one who told this court that he ran away to the river to hide.

The legislature by Proclamation N0.6 of 1938 has enacted to limit the liability of intoxicated persons and provided intoxication as a defence to a criminal charge:-  
only

- (1) When a person charged did not know at the time of the commission or omission of the act complained of, that such act or omission was wrong or did not know what he was doing.  
[Proclamation 60 of 1938. CRIMINAL LIABILITY OF INTOXICATED PERSONS N0.60 OF 1938 Chapter 21.

The accused in his evidence related the events clearly without any difficulty at all. He cannot therefore be said to have not known what he was doing.

The evidence of the accused to the effect that the transfer from the accused of his late brother's family cattle by his widow to the deceased, was the last straw, clearly shows that the accused had harboured hatred against the deceased. The

accused was waiting for the right moment to take advantage over the deceased who seemed to have been more drunk than this accused on 20<sup>th</sup> February 1995. If he had beaten the accused on the previous occasion when the accused lost an ear lobe, it is strange that he did nothing when he was attacked first with stones and thereafter stabbed with a spear.

Considering:- (a) the choice of weapon used,

(b) the speed with which the accused carried out the attack,

(c) the places on the deceased's body to which the attack was directed, this court is satisfied that the accused had formed the intention to kill or did not care if death of the deceased was to result from his actions. **Rex v THABISO LEJOETSO 1971 -**

**3 LLR**

The intention to kill is seldom expressed. It is always gleaned from the facts and surrounding circumstances of each case. **Rex v THABISO LEJOATSO** [Supra].

The accused must have foreseen that stabbing the deceased in the manner he did, twice or even once, on the chest, will possibly result in death. **S.V. SIGWAHLA 1967 (4) SA 566 at 570 B-C**. Evidence in this case establishes *dolus eventualis* beyond reasonable doubt. The accused is therefore found guilty of murder caused

by his reckless actions. He is found guilty of murder not with direct intent to kill but with *dolus eventualis*.

### EXTINUATION

The accused had claimed intoxication as a defence against the charge of murder which he faced. Intoxication was rejected as a defence. Nevertheless it must be considered as a factor in extenuation of his crime. His hatred or resentment of the deceased person must have been exaggerated, to some degree by his condition under the influence of alcohol. The rejection of his affection by his late brother's widow coupled with the transfer of her love from him to the deceased, hurt the accused's pride. The injury to his pride is also a factor which must operate to abate the blameworthiness of the accused. The removal from him, of the cattle belonging to his late brother's family, and the transfer of the same to the deceased was another hurt to him. His failure to see and appreciate that there are other ways of recovering both the loss of his dignity and pecuniary benefit of having physical control of his late brother's family cattle, is a weakness that if I am satisfied that he suffered from it, it must be considered in extenuation of the blameworthiness of his crime.

### MITIGATION

All those factors which have been considered in extenuation, form part of

mitigation. Having the effect of abating the accused's blameworthiness, they must necessarily also affect the severity of the sentence which is to be meted out to this accused. Even though the accused ran off from the scene of the crime and hid himself in the river for the night after committing this offence, he handed himself over to the police the very next morning. His cooperation with the law enforcement agencies must earn him a reduction of the severity of the sentence that is called for, by the seriousness of the crime he has been convicted of. Apart from handing himself over to the police, the accused attended remands as required by the law. He waited patiently and faithfully for a period of approximately six years for this trial. When it became apparent that the trial was going to continue over a long period of time, the accused who was on bail volunteered to be remanded in custody so that he remains in Maseru within easy reach whenever he should appear before court for the continuation of the trial. The worry and anxiety which he endured during this long period awaiting this trial, the accused suffered some kind of punishment.

The deceased, is the accused's own brother-in-law. The accused's own sister is the widow as a result of her own brother's action. His own nephews and nieces are without their father. They are now members of a single parent family because the accused has taken away their father's life. The accused is going to be regarded

as the person responsible for bringing the hardships that will now befall the deceased's family because of his death. This fact must burden his soul even though he is going to continue with his own life: He lives in the same village with those people whose bread winner's life he untimely terminated: He must sincerely regret what he did. He has his own wife and children. His children are said to be all minors. He is illiterate. He is a simple unsophisticated man. He demonstrate some degree of immaturity by allowing himself to be set up against the deceased by his ex-lover.

For these reasons he is sentenced to five years imprisonment.



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K.J. Guni  
JUDGE

For Crown: Mr Rantsane  
For Defence: Mr Fosa