

CRI/T/11/99
IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX
vs
KALEBE CLEMENT MPENGE

JUDGMENT

Delivered by the Honourable Mrs Justice Hlajoane Acting Judge on 28 Day of September, 2001

The case came before me on the 18th September, 2001 only for mention. On looking at the Preparatory Examination record I learned that the alleged offence was committed in 1991, 10 years and some months ago, and the Preparatory Examination held in 1992. The Accused was committed for trial by the High Court in 1996 and the record of Preparatory Examination and the indictment only came to the High Court in 1999.

When the case was put before me for mention, the accused and his lawyer were not before court but only the Crown and one witness.

I had to stand down the case to the afternoon as the Crown thought that because of snow in the mountains witnesses from Thaba-Tseka might still be trapped by snow. The minute in the Court's file showed that the Accused was before Court on the 28th March, 2001 when his bail was forfeited to the Crown and Accused obviously must have as a result been remanded into custody.

The Registrar was therefore instructed by the Court to trace the Accused by phoning the Central Prison and also requesting the Legal Aid to appear in the afternoon at 2.30 p.m.. Apparently the Accused had been in Prison and was not informed of the date for mention.

When the Accused made his appearance in the afternoon from Prison, his lawyer and the witnesses also showed up. The case was then postponed to the next

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day, 19th September, 2001 for hearing.

The case proceeded on the 19th September, 2001, wherein the charge of murder was read to the Accused, The Accused being charged of murder of Mambango Mpenge. It being alleged that on or about the 20th day of February, 1991 and at or near Ha Boomo in the district of Thaba-Tseka he unlawfully and intentionally killed Mambango Mpenge.

The Accused pleaded not guilty to the charge and Mr Molefi for the Accused showed that the plea was in accordance with his instructions. The plea of not guilty was accordingly entered. The defence showed that he had read the Preparatory Examination record and were admitting all the evidence in the Preparatory Examination record. This he showed was by agreement with the Crown, and Ms Mofubelu for Crown told the Court that she accepted the admissions.

It was therefore not necessary for the witnesses to go in the witness box. The depositions of the six Crown witnesses at the Preparatory Examination plus the post-mortem report were accordingly admitted in evidence. The depositions were thus read into the machine.

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P.W.1's evidence, 'Masethole Mpenge was to the effect that; she lived at Ha Boomo. She knew the Accused as he was her son, and the deceased was her daughter-in-law. She received a report in January, 1991 about the quarrel between the Accused and the deceased over their newly born child. That according to the Accused the child was expected to be born in April, 1991 but it had been born in January, 1991. There had been a family meeting held prior to the child's birth. That it was on the 13th January, when deceased came to tell her of their quarrel over the child. The witnesses went and fetched the child same day.

There was a family meeting on the 14th called by P.W.1's husband. In that meeting the Accused told his father that he had no intention to fight but that the deceased had told him that she was not sure as to who had impregnated her between one Sekatana and Motanyane. That was why he assaulted the deceased. It was during the assault that the deceased told the Accused that in fact the child's father was Sekatana. The Accused then said he stopped assaulting the deceased. They then sat down and named the child Puleng.

The Accused then asked his parents to release the deceased to him as he had forgiven her. The deceased and the child were thus released to the Accused. The

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Accused went back to work on the 15th leaving the deceased still alive. On Sunday when she examined the deceased she found whip weals on her back. The deceased passed away on the 17th in her mother's presence and one 'Mathusi. The matter was reported to the Chief who in turn reported to the police. The police came same day and asked that the body be carried away. It was only carried away on the 18th. Evidence showed that the body did not incur further injuries on the way.

According to P.W.2's evidence Mohlakola Mpenge the father of the Accused and father-in-law to the deceased, Accused had asked for a family meeting in January 1991 to discuss something relating to him and his wife. The meeting was held and in that meeting Accused showed that the deceased was pregnant, and the deceased admitted and claimed the Accused to be the father. Accused admitted when deceased showed that the child would be due in April. But the child was born in January. Another family meeting was held and the deceased was questioned about the child's father and deceased mentioned Sekatana and Motanyane.

In her evidence P.W.2 showed that a letter was written calling deceased's parents who neither came nor responded. The deceased called P. W. 1 to her place on the night of the 13th to report that they had quarrelled with the accused and that

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Accused had assaulted her with a plastic whip. On examining the deceased he observed that she had weals on the arm and behind the ear. The witness here did not mention which arm had weals. P. W. 1 had also examined the deceased and confirmed that she had been whipped.

The Accused left for work on the 15th. P.W.2 visited deceased's home on the 16th and found her seated and suckling her child. Deceased's mother also came the same day in the afternoon. He heard of deceased's death on the 17th and he went to deceased's place to confirm the information. Police arrived same day but since it was already late the dead body was taken away the following day, the 18th Police had examined the body before it was taken away.

P.W.2 was the one who identified the dead body to the doctor. The witness handed over a whip to the police which had been shown to him by the deceased who also explained about it.

The sister to the deceased 'Mathusi Mateka who was P. W.3 at the Preparatory Examination had shown that, she had received a report in January 1991 from the accused and following that report she went to deceased's place. The deceased gave birth to a baby girl when she was there and Accused was informed about the birth of the child. On being asked about the child's father, deceased mentioned a man from

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Matebeng as the father. Accused then expelled the deceased from home and the deceased with P. W.3 went to P. W.2's home. The witness went back to her home only to come back when the deceased had gone back to her home.

Her evidence showed that, as she examined the deceased when she arrived she noticed weals all over the deceased's body at the back. The record shows the deceased was unable, which in Sesotho is (o ne a hloleha) meaning very sick. The witness went back home to report to deceased's parents. She came back the following day with deceased's mother. The deceased had asked her and their mother to help her wake up to get her seated. She passed away in the process. Prior to her passing away, the deceased had told her that the accused had assaulted her. The fourth witness at Preparatory Examination was 'Matiisetso Feane, the deceased's mother. She had gone to deceased's home following the report from P.W.3 in January, 1991. When she got there she noticed that deceased had been badly injured at her back, on the knees and foot, though not stated which foot. She had arrived on Wednesday evening and the deceased passed away on the morning of the following day.

Further evidence of P. W.5 Mafehlo Mpenge, the Accused's brother, was to the

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effect that indeed deceased and the Accused were man and wife. He had been to the family meeting concerning the deceased and the Accused on the invitation of P. W.2. The quarrel was about a child already born between them. They failed to talk the accused over into accepting the child. The following day as he was getting himself ready to visiting the deceased he heard someone crying from deceased's place. When he got to the place he learned that the deceased had passed away. The matter was reported to the chief and to the police. On police arrival the body was examined and he learned of injuries on her body at the back. He too identified the dead body before the post mortem was performed. P.W.1 handed over the plastic whip to police. The body was only transported the following day and did not incur any further injuries on the way.

The Police Officer who attended the Scene of Crime was No.4745 D/Trooper Ramone as he was then stationed at Thaba-Tseka attached to C.I.D. branch. He showed that following the report he visited the scene in January, 1991 and found a dead body of a woman in a rondavel. On examining the body he noticed weals all over the body which seemed to have been caused by a whip. He carried the dead body to Sehong-hong Mortuary. Accused was not there and the chief handed over to him a green plastic whip. The body did not sustain any further injuries on the way

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to the mortuary. Evidence of another Police Officer was that of No. 2711 Lance Sergeant Chakache, who showed that he was working at Mashai in 1991 and that on the 3rd February, 1992 whilst on duty Accused surrendered himself to him. He had already received some information about him prior to his surrender. The accused handed over to him a green plastic whip and explained about it. Following his explanation he was given a charge of murder and then arrested.

Unfortunately even at the Preparatory Examination state the sjambok was never handed in as the witness could not find it in the exhibit room.

In terms of Section 223 of the Criminal Procedure and Evidence Act, the Crown had applied to hand in the medical report since the doctor who performed the post mortem had since left for his home. The Application, was accordingly granted. According to the doctor, cause of death was due to severe burns caused by rods, and was handed over from the bar and marked Exhibit "A".

After the close of Crown case, the defence closed its case as they chose not to lead any evidence. The Crown at this juncture submitted that the Accused should be found guilty of Culpable Homicide.

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From the admitted evidence it has not been very clear as to who actually handed the green sjambok to the Police. According to P. W.2, the Accused's father, was the one who claimed to have handed the whip over to the police. But evidence of the Police Officer, Chakache, was to the effect that as the Accused surrendered himself to him, he also handed over a green sjambok.

Be that as it may, there is no dispute in that in fact the Accused did assault the deceased, a woman who had just recently given birth to a babe girl. The quarrel was a result of the birth of that child. The defence conceded that the evidence admitted was a true reflection of what exactly transpired but that the accused should be found guilty of assault common as the weapon used was never found, also that negligence has not been proved. After the accused had assaulted his wife, the deceased, he did not bother to seek any medical help by either taking her to the doctor or even leaving money to pay for the doctor, instead he left for work.

According to the Post-mortem report death had occurred some days prior to the examination. It has not specified exactly after how many days yet the form provides that he provides the approximate time in terms of days, hours etc. The external appearance showed, according to the doctor signs of decomposition and that maggots

were present. It further shows that the body was covered with burns which were iron shaped on the chest, back, arms and legs. The report also shows that deceased's uterus showed 12 weeks ovulation after delivery. Twelve weeks is roughly three months. But on looking at the date of the Post-mortem report, it is dated 25th January, 1991, so that it would be hard to believe the 12 weeks ovulation period.

The Crown conceded that the decomposition might have been a result of lack of medication after sustaining the severe injuries. The report further showed that the injuries on the deceased were "burns caused by iron rods and ironing device, probably during torturing." Here the doctor was forming an opinion, considering that he had mentioned that the body already showed signs of decomposition, it would therefore be very doubtful whether to consider his evidence as conclusive.

As it was, the plastic whip which the accused used was not brought before Court to have allowed the Court to have formed an opinion about it. Be that as it may, the fact of the matter is, that the accused was the one who assaulted the deceased with a green plastic whip, the deceased who had recently given birth.

The deceased had weals all over her body, according to the evidence of P.W.1,

2, 3 4 and 6, from whipping of course. As was held in *Thabiso Tsomela vs Rex* 1974 75 LLR at 99, I too am unable to subscribe to the view that the Court of Law is precluded from coming to a conclusion about the cause of death by reason only that, though the medical evidence is available is not satisfactory or scientifically conclusive. The Post-mortem report shows that cause of death was due to severe burns caused by iron rods and ironing device probably during torturing. There had been no evidence or suspicion that the deceased might have been tortured safe to say that she had been assaulted by the accused.

In cases of this nature what the state is expected or required to prove is that in fact the death of the deceased was caused beyond reasonable doubt by the hand of the accused. And reasonable doubt according to *Miller vs Minister of Pensions* [1947]2

AH E.R. 372 does not mean any shadow of doubt. Denning J had this to say in that case, "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable, the case is proved beyond reasonable

doubt, but nothing short of that will suffice."

The defence wanted the Court to put much reliance on the Post-mortem report about the alleged burns on the dead body. When the body was examined it was already showing signs

of decomposition and maggots were already present. The deceased was the Accused's wife so that when the report showed burns instead of weals, further investigations ought to have been conducted in order to get what exactly could have happened to the deceased. We only have been told of the assaults by the accused and nothing more.

In *Rex vs Tsomela*, Supra, Cotran J had this to say, "Law is not science or mathematics, and in the field of human relations a definite conclusion can nevertheless be drawn from a given set of circumstances, and that cannot be invalid by reason only that such a conclusion is incapable of being defined in the same way as if it were a mathematical formula which calculates with exact and irrefutable precision the right answer to every combination of figures". *Sibanda and Others vs The State* 1969 (1) P.H. 122 Wessels J.A. had this to say, "that the state was not required to demonstrate the cause of death with scientific exactness and as medical fact beyond dispute."

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The defence contended that the Accused could not be the one who could be held liable for the death of deceased considering the opinion by the doctor as shown in the Post-mortem. *Tsomela's* case above has answered it all.

The next issue was whether the conduct of the Accused could be considered to be unlawful, intentional or negligent. Though the plastic whip has not been handed in but there was no dispute that the Accused assaulted the deceased with a green plastic whip prior to her death and that the deceased had sustained injuries all over her body. The accused has been negligent in assaulting a woman with a plastic whip, and not just a woman, but a woman who had recently given birth. The deceased had been assaulted all over her body, because she had given birth on a date and month earlier than what the accused had expected so that he could be certain that he was the father of the babe girl. Accused ought to have seen that his conduct might cause harm.

The defence further contended that Accused was not obliged to assist the deceased in seeking medical help. They are saying the Accused was only under a moral duty to assist. I would consider that he was under legal duty to assist the deceased as his wife. In the absence of any other intervening cause from the day the

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deceased was assaulted, it could not be said to be speculation that the deceased had been healthy prior to the assaults. Evidence has shown that she had been severely assaulted.

In the result, the Court finds that death of the deceased was a result of Accused's negligent acts as he had severely assaulted her with a whip, and did not thereafter bother to take her to the doctor. Accused is therefore found guilty of culpable Homicide.

My Assessors agree.

Sentence:- After hearing addresses in mitigation of sentence –

The accused having been found guilty of culpable Homicide is sentenced to five years imprisonment of which 3 years are suspended for a period of three years on

condition that he is not convicted of a similar offence which involves violence during the period of suspension.

A.M. HLAJOANE
ACTING JUDGE

For Crown: Ms Mofubelu
For Defence: Mr Molefi