

**IN THE HIGH COURT OF LESOTHO**

In the matter of:

**REX**

**VS**

**MALEHASA MALAKOANE  
LEHASA MALAKOANE**

**JUDGMENT**

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

---

The two accused are charged with the crime of murder. They are a mother and her son. At the time of the commission of the alleged offence, the mother was a young lady of thirty-three years of age. Her son was about sixteen years old. They have both pleaded not guilty to this charge.

On the 3<sup>rd</sup> March 1996, there was a feast commonly known as a farewell party for the dear departed relative. This farewell party was held at the home of one

MAMOROESI JANFEKE - Pw2 of PEKA HA MAKHAKETSA in LERIBE district. This sort of parties are attended by many people who are invited and the uninvited. Pw2 had invited her mother Pw1 who resided at HA MAKHOA which is another village in that area of PEKA. Pw1 was accompanied to this feast by a number of her friends. They were seven or so in number. These special guests were accommodated in one abandoned and derelict homestead in the neighbourhood of Pw2's home. This homestead consisted of two, one roomed houses, situated almost side by side separated by a few paces between them. A door and windows were missing from one of those houses. In other words it was vandalised and left open. Some of the guests who had come to the farewell party were kept over night in the other house which was habitable.

At about 7.30 pm there was a knock at the door of the house where the guests were resting for the night. Pw1 was already lying down, ready to retire for the night when she heard this knock at the door. There were five guests in all in that house at the time. They were awaiting two or so of their number to come in. They were also expecting those who were taking care of the guests to come in with their last meal for the day.

The knock at the door was therefore expected at the time it happened. What was

not expected is the person who rushed in after knocking. It was neither the remainder of the invited and expected guests nor the waitresses with the evening meal for the guests. It was the deceased in this case. As she rushed in, she jumped over Pw1 and proceeded to punch herself on Pw1's travelling bag which was placed at the corner against the wall.

Almost simultaneously with the deceased, the accused in hot pursuit entered just as Pw1 was enquiring from the deceased what was the matter. Before the deceased could answer A1 had knelt in front of the deceased and partly on Pw1's right side and was delivering blows upon the person of the deceased with what appeared to be a knife to Pw1. A2 stood astride Pw1 and was also delivering blows with a stick upon the person of the deceased. According to Pw1, each accused delivered more than five blows. It is Pw1's evidence that the deceased successfully warded off with her right hand most of those blows. Pw1 saw all those blows land on the deceased's right arm. Post-mortem examination report varies markedly from this assertion. The difference will become apparent when I deal with that report.

Although Pw1 claims that the assault upon the deceased by the accused was protracted, none of those present intervened to stop the assault. Pw1 told this

court that they all screamed in fear of their own safety. They felt that the accused will assault them when they finish with the deceased. However this feared eventuality never materialised. According to A1 she stopped assaulting the deceased when she heard the screaming. The accused matched out without laying their fingers on anyone else therein. The deceased also followed them out.

As A1 came out of that house, in the forecourt she met Pw2 who had been alerted and had come to witness what was taking place. Pw2 did not see A2. A1 reported to Pw2 that she [A1] has had a fight with the deceased whom she [A1] had stabbed with a knife. A1 went on to say that she had caught red handed the deceased having sexual intercourse with her [A1's] husband. Pw2 entered into the house. A1 re-entered the same house and repeated her accusation that she caught red handed her own husband and the deceased in the act of committing adultery.

The next day the two crown witnesses [i.e. Pw1 & 2] had an opportunity to go and see the deceased. The deceased invited them to examine or inspect her body. They declined. Pw1 said she saw three wounds. On the right side of the neck on either side of the collar bone there was a wound. She further saw a wound on the shoulder. Pw2 was so very scared of the sight of blood, that after observing a blood stain on the deceased's shoulder, she could not look any further.

The evidence of the investigating officer, contained in his [P.E] Preparatory examination deposition, was admitted in terms of section 227 *CRIMINAL PROCEDURE AND EVIDENCE ACT 1981*. The investigating officer was present at the post-mortem examination. He observed eight stitched up wounds on the body of the deceased. The post-mortem examination report confirms the existence of those eight wounds whose lengths vary from 2cm to 4 cm. There were two cuts each 2 cm long on either side of the collar bone on the right side of the neck. There were further two cuts each 2 cm long on the right hand forearm. One 4cm long wound on the lower side of the abdomen, on the left hand side. At the back, on either side of her backbone, there is a wound. The one on the left hand side of her backbone is 3 cm long; The one on the right hand side of the back bone is 2 cm long. Another wound which is 4cm long is on the right hand shoulder blade. There is no indication of the depth of all these wounds. Presumably they are all superficial. There is only one penetrating wound which goes through into the abdominal cavity.

The deceased died after two days of this alleged assault. The cause of death according to the postmortem report, was due to severe blood poisoning or septicaemia. How is this connected to the alleged assault? There was no Doctor called to testify. The postmortem report was produced and admitted as evidence

against the accused by agreement of the parties. The connection between the cause of death as septicaemia and the assault perpetrated by the accused on the deceased is not made out. The real question for determination that should link the actions of the accused to the death of the deceased is the following: Is there a direct casual relationship between the assault and the death of the deceased? In simple terms, the question should be:- Did the deceased die as a result of the injury inflicted on her by the accused? From the evidence before this court the answer is "no". *Rex v. SEKATI 213 LLR at 215.*

All the injuries suffered by the deceased consisted of flesh wounds. On the postmortem report it is stated that the deceased was an obese young lady. There is no indication of how deep all these wounds were. Were those wounds serious enough to cause the deceased her life? There is no such evidence. Is the blood poisoning some other cause or is it brought about by the injuries sustained by the deceased? There is no clear answer which leaves no doubt in my mind that it is *Rametse v Rex 1967 - 70 LLR 76, R v Ndlovu 1970(1) SA 389.*

The two accused have different defences. A1 pleads criminal incapacity due to extreme emotional stress brought about by extreme provocation. Legislature saw it fit to provide provocation as a defence on charges of murder: CRIMINAL LAW

HOMICIDE AMENDMENT PROCLAMATION 42 of 1959 - at page 995 LAWS OF BASUTOLAND volume 11. Provocation in terms of section 3. (1) (a) of the CRIMINAL LAW (HOMICIDE AMENDMENT) reduces the crime from that of murder to culpable homicide. The relevant portions of the said Proclamation read as follows:- 3. (1) a person who -

- (a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and
- (b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of culpable homicide only.

The word provocation is defined in section 4 (a). It “ means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered”.

Catching the deceased right under her [accused’s] husband was the provocation to the accused, as defined above. That act of committing adultery with her husband before her very own eyes was the worst insult to her as a wife of that man. Adultery is not just an offence against the marriage and parties to the said marriage, but it is also an insult to those same parties. The existence of provocation must be determined from the evidence. *Rex v Thabiso Lejoetso LLR 1971 - 73 at page 177. MANTAOTE NTAOTE v REX [CRI/A/20/91]* unreported. The uncontradicted evidence of the accused is that she was looking for her

husband and the missing money from her house. Earlier on, that day, the accused's husband who on his arrival from Welkom - RSA where he works, gave the accused some money for maintenance for herself and children, later on demanded that money back; The wife - A1 refused to hand the said money back to her husband. He surreptitiously removed part of the money from where his wife, the accused had placed it. When he demanded the money back the day he was due to return to RSA the wife refused to return it. There was an altercation between them as a result. He insisted that because he is the one who worked for that money, he must get it back. She refused. The wife also promised him that he will get it back over her dead body. When A1 realised that her husband might have taken that money, that is later at about 7.30pm, she looked for him. Because they fought over that money earlier on that day, A1 decided to arm herself with a knife. As she searched in the neighbourhood for her husband and the missing money, she heard and recognised his voice in that dilapidated house in the homestead where some guests to the farewell party were accommodated. To her shock and horror which made her very angry, she found her husband and the deceased in the act of committing adultery. She said when her husband saw her he got up and the deceased and her engaged in the struggle. The deceased held her by her waist. She wriggled free. The deceased ran and she pursued her. She caught up with her in the next house where the special guests were resting for the



night from their entry into that house, the story continues as told by Pw1 and A1. The fact that the accused assaulted the deceased until they left her on their own volition without any intervention, shows that the assault was not as protracted as Pw1 would like this court to believe. There are in all, eights cuts on the body of the deceased. A1 said she assaulted her with a knife. It must be the knife which inflicted those cuts. That very same knife is said to be homemade. It was not exhibited before this court. Pw1 saw five or more blows delivered on the right arm of the deceased who was using it to ward off those blows. These blows must have been delivered in quick succession one after the other. There is no evidence showing any break or breathing space in the process of the said assault. That manner of assault too shows that A1 was very angry.

A1 told this court that she did not aim at any particular part of the body of the deceased. A1 said she just threw blow after blow without even looking where those blows landed. She must have been “mad”. The emotional stress under which she was labouring had overwhelmed her. As in the case of *S v ARNOLD* 1985 (3) SA 256 at 263 (c) her “conscious mind was so “flooded” by emotions that it interfered with her capacity to appreciate what was right or wrong”.

A1 is an ordinary housewife totally dependant on her husband. Her husband was

not only betraying her but had at the same time taken the money from her. The wife is entitled to her husband support, financially and morally. she has a claim of right to both [i.e. moral and financial support]. The deceased who was caught abusing or usurping A1's conjugal rights, must have been perceived as threatening even her rights to the missing money. Finding him over another woman immediately after quarrelling with him over the money which he had brought home to her must have devastated her thoughts. Could that be the place where the missing money is gone? Because of her emotional state, she must have lost the capacity to exercise control over her actions. Therefore it is not only well established mental disorders, such as youth or intoxication which lead to a state of criminal incapacity, but also there is incapacity caused by other factors such as extreme emotional distress, S V. ARNOLD 1985 (3) SA 264. It cannot be said that in this circumstances the crown has proved that the accused appreciated the wrongfulness of her action which presently she said she very much regrets. It cannot therefore be said that she acted in accordance with such appreciation.

A2 denies being present with A1 at the time and place of the commission of the crime. Pw2 who resides with both accused did not see him there. The two crown witnesses who claim they saw him belabouring the deceased with a stick did not even know him. They had not even seen him before. There was no identification

parade held in order to identify the man the two crown witnesses saw assault the deceased. Therefore there is no reliable evidence which connects this accused to the commission of the alleged offence. Pw1 was lying down on her side. A1 had knelt on Pw1's blanket. There was someone allegedly A2, standing astride over Pw1. There must have been an obstruction for her to see clearly what was going on. She claimed that all the blows landed on the deceased's right arm. Post-mortem examination shows wounds at the back of the deceased and one wound at the lower part of the abdomen. Her inaccuracies indicate that she did not see everything as she claims.

They are both found not guilty and they are acquitted.

  
.....  
K.J. GUNI  
JUDGE

Mr. Ntaote for : Crown  
Mr. Mathafeng for : Defence