CRI/T/16/2000

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

MOLISE MATŠEO

Judgment

For Crown : Ms L Maqutu

For Accused: Miss H Thabane

Gentleman Assessor: Mr. G. Motsamai

Delivered by the Honourable Mr. Justice T. Monapathi
on the 26th day of March 2002

The Accused was said to be 27 years old when he was committed in 1998. The Accused and one Mojalefa Khanya (who was the second Accused) (Mojalefa) both of Ha Mohlokaqala in the district of Leribe were charged with murder of Khotso Mataoe (Deceased) a fellow villager. It was alleged that upon or about the 28th March 1997 and at or near Kolonyama in the district of Leribe the accused unlawfully and intentionally killed the said Khotso Mataoe. The Deceased had died on the evening of the 28th March 1997.

Before the indictment was read Miss Maqutu for the Crown informed the Court that the charge against the second Accused was withdrawn and the case would henceforth proceed against the other accused. I accordingly recorded the intended withdrawal and that accused was accordingly released. The remaining Accused pleaded not guilty after the charge was read to him.

A Preparatory Examination (PE) had been held. The PE record contained the depositions of six witnesses. They were Makhotso Mataoe (the deceased's mother) who was PW 1 at the PE. She became PW 1 at the trial. Mamontšeng Matšeo (Accused's mother) was PW 2 at the PE. She became PW 3 at the trial. Next was No. 7795 Trooper Kumi of the Lesotho Mounted Police Service. He was PW 3. He became PW 4 at the trial. Motjetje Mofubetsoana was PW 4 at the PE. He became PW 2 at the trial. He was chief's messenger or village chairman at Ha Mohlokaqala village where the events of the fateful day took place. Khoete Mataoe was PW 5 at the PE. His deposition was admitted by consent, read into the machine and admitted as evidence at this trial. PW 6 at the PE was Trooper Mojaki of the Lesotho Mounted Police Service. He had since died before this trial began.

There was no dispute that the Deceased had died a violent death through an assault committed by the Accused who struck the Deceased with a stick. A number of injuries were found on the body of the Deceased. The Crown would however contend that a garden spade was also used by the Accused in the said attack. The use of a spade would be denied by the defence. Incidentally a spade was later recovered at the home of the Accused. It was said by the police that he pointed out the spade. Indeed the salient question that remained was whether the

Accused had in assaulting the Deceased, had the requisite subjective intention to kill. The Defence would say that the Deceased was killed in self-defence.

Khoete Mataoe's admitted deposition was to the effect that he resided at Ha Mohlokaqala with the Accused and the Deceased. The latter was his son. He recalled the incident of the day of the Deceased's death. He identified the body of his son at the mortuary where a post-mortem examination was done on his corpse. He later buried the Deceased's body.

PW 1 testified that she knew the Accused before Court. She was born and bred at the village of Ha Mohlokaqala where the witness resided. She is Deceased's mother as aforesaid. Accused's parents are her neighbours. Their house is just at the back of hers. The neighbours homestead had been about 12 - 13 paces from where the witness was. On the 28th March 1997 she was at her home. There had been a death in the village.

It was early in the evening when she came out her house. She suddenly heard PW 3 (Accused's mother) shout: "Khotso what do you want at my place? She again heard someone say "Shoot him and kill him." The witness then heard a sound like that of corrugated iron sheets hitting against something. She had heard Accused say that people must come and see Deceased at the forecourt. She then cried out, raised an alarm and went to report to her husband to and solicit his help. She thought her son (Deceased) was being assaulted. After reporting to her husband as aforesaid she went back into her house where she remained. That was the last day that the witness had seen Deceased alive.

Cross examined by Miss Thabane about her intention to go to a wake and

such like nothing revealed the witness as untruthful and or dishonest. Except hearing things said and sounds there was nothing that the witness saw. Charged with a contradiction that she had changed to say Accused and Deceased relationship was bad while at the PE she had said it was cordial I thought the witness did not fare well on this aspect. I deduced that Accused and Deceased must have been friends. Her suspicion that the Deceased was a man of bad ways could not change this observation in my view. All in all I found no good reason to doubt her evidence. Most importantly her evidence established that alarm was raised following on what was taking place concerning the Deceased at the homestead of PW 3. This led to her giving of report to her husband.

PW 2 was born in 1923. He did the old Standard 4. He held authority in the village as the chief's bugle. He knew both Accused and Deceased who resided in the village of Ha Mohlokaqala. On the day of the death of the Deceased he had heard a noise emanating from the direction of PW 2's homestead and he later received a report. He then went down to the forecourt of PW 2. There he found a body lying down in an abnormal position. He inquired and was informed that it was the body of Deceased. No one responded when the witness asked as to the cause of what appeared to have been an assault. Neither did the Accused respond nor explain. The witness had established that the Deceased was already dead. He had not examined the body for injuries but observed a pool of blood around the corpse. It was moments later when PW 1 introduced the issue of the presence of the Deceased at her home that A1 joined to say he was the one who struck Deceased because Deceased had provoked him.

The witness and others maintained a vigil for the whole night. On the following day the witness made a report about the death of the Deceased to Ha

Tlalinyane police post. Police later came in response and removed the Deceased's corpse. The witness had seen Accused and Deceased walking about together in the village. They had grown up together and appeared to be friends.

Miss Thabane cross-examined this witness. The witness was not shaken. This merely confirmed the testimony. He withstood the examination and answered in an honest and straight forward manner. Most particularly the witness testified that Accused had said he assaulted the Deceased with a stick.

PW 3 testified and was later subjected to a searching examination by Defence Counsel. She said that she stayed at the village of Ha Mohlokaqala and the Accused was her son. She also knew the Deceased whose parents were her neighbours. Around Easter holidays during the year 1997 she recalled well that on the day of the death of the Deceased she had been at a drinking place called Lephakong. At that place the Accused and Mojalefa had been present having arrived from a football match. They had been partaking of some soft drinks.

It was around 8.00 pm when the witness asked Accused and Mojalefa to accompany her to her home as she was now retiring for sleep. When the three were on their way the witness noticed that her bedroom was lit. She did not know who could have put on the light. She said later that her worry was further activated by the fact that she had left no one at her home. In addition her seven years old child had been left with one of her neighbours.

When the witness and her companions approached her house she saw that light being put out. She could also hear noise caused by what she thought was a movement of chairs in her kitchen. She was very concerned and curious as to what

was happening inside. Accused said to Mojalefa, who had been given matches to light with: "Please open the door". It transpired during cross examination that the Accused had at about that time had gone round the house to the back window while Mojalefa approached the door. As soon as Mojalefa opened there came out that person whose movements inside the kitchen the witness had suspected. That person struck out blows which hit against the door. This, under cross examination, the witness construed as an attempt by that person to hit someone with his stick. Mojalefa after being chased after must have got hold of that person because they began to struggle.

The witness testified further to say that during that struggle Accused had already come out from the back when Mojalefa escaped the clutch of the person Accused then got hold of the person who was attempting to pursue Mojalefa. The latter had moved away. Then in the struggle that man's stick fell off. Under cross examination it did not appear that this aspect of the struggle between Mojalefa and the person who came out of the house would not be accepted.

Accused picked up the stick and hit that person who then fell down. Accused then picked up a spade which had been lying around with that spade he dealt the Deceased with a few blows. She did not recall the number of blows but it was more than once. It is then that the witness said she had suddenly realised that it was the Deceased, a person she knew very well. It was baffling to say the least, why the witness first testified against the interest of her son regarding the use of a spade which she later reneged and denied. This can only show that she was a liar of convenience. I found it difficult not to accept her version when testifying in-chief. This was confirmed by the evidence of the police that the Accused subsequently pointed out where the spade was. To do otherwise would be to act

against common sense.

The Witness testified that as soon as she had realized that it was the Deceased who had been assaulted she called out loudly to his parents who were neighbours, and thus raised alarm. As a result people came over to the witness forecourt. One of these people was PW 2 and Mahlomola Mahlomaholo. PW 2 was said to have made a report of this incident to the chief.

On entry into her house the witness checked. She found her wardrobe lay open, a radio and a table cloth were missing. She did not know what Deceased had gone to do at her house but Deceased was reputed to be a thief and broke into people's houses. That was why she suspected that the Deceased had gone into her house in order to steal. The witness said however she had been on cordial terms with the Deceased.

When cross-examined by Miss Thabane for the Defence the witness confirmed as correct the time of about 8.00 when the events took place. This was the time she had referred to at the PE. It was dark all over. She could not see clearly therefore. The witness referred to the fact that Mojalefa was first chased after before Accused wrestled with that man (Deceased). She was able to see the happenings because there was moonlight. That was why she had been able to see the Deceased chase after Mojalefa.. This in my view was contrary to the impression given during examination- in- chief. The issue of visibility had been emphasised by Counsel. This was so in relation to the question whether the witness would still have been able to see things clearly.

The witness reiterated that she was able to see Mojalefa being chased. She

did not see Accused chase Deceased. What happened was that Accused collided with Deceased because both had been running. This aspect was however not corroborated by the Accused himself. The witness continued to say none of them (Accused and Deceased) had fallen. They immediately wrestled. But before then Accused had been hit with a stick by the Deceased on the knee. Before the struggle she had not known that it was a stick but an object like a stick.

The witness agreed with what, as suggested, would be the Accused's version. It was that when Accused came from where he was (from back of the house) it was at about that time when Mojalefa was running away. The witness had clearly seen the Accused come from that side of the house. What the witness suggested was that the Accused was not then in possession of the stick until after he wrested it away from the Deceased. Instead of running away the Deceased approached the Accused because he still wanted to fight on despite having been disarmed. It was at that time when the Accused hit Deceased with a stick. After that blow Deceased fell down. Accused delivered yet another blow when Deceased had already fallen down.

The witness agreed that there could have been a mistake as to whether the second blow was delivered after Deceased had already fallen down. But she was sure that the Deceased had been hit twice. There had indeed been confusion as she explained. She could not herself have fully concentrated on what was happening. She could make mistakes "here and there." What could have added to the confusion was that she had already even been thinking of raising an alarm. She could have been not completely focussed.

The witness testified that after an alarm was raised people came. She

recalled that at that time or around (that night) police had not yet been called. She recalled that when Deceased fell she even fell against a wall which he hit before going down. She came to know that the Deceased died on the same date. She had not known if a spade was used to assault the Deceased. This was contrary to what she had said in her evidence-in-chief. She recalled that there was a search for a spade afterwards. This can only be consistent with the alleged pointing out of a spade by the Accused.

It is convenient to note that before commencement of the defence case Gentleman Assessor L. Mochochoko had died. May His Soul Rest In Peace. I remained with one assessor.

When asked to clarify things by Gentleman Assessor Mochochoko the witness insisted that it had been about 8.00 in the evening. She was sure that Accused and Mojalefa had been from the football ground. They had even been drinking soft drinks at the shebeen. When she looked around in her house she found that the table cloth and radio were missing. They were never recovered. She connected Deceased with the loss of those her household items. That was the end of her testimony.

The evidence of Khoete Mataoe PW 5 at the PE was admitted as evidence by consent of Counsel and read into the machine. His deposition was to the effect that he was illiterate. He resided at Ha Mohlokaqala in Leribe. He knew the Accused before Court. He resided in the same village as the Accused. He knew the Deceased who was his son.

The deponent still recalled the incident of the day the Deceased died. The

deponent went to a mortuary on the date that a post-mortem examination was done on the Deceased's body. He identified the body as that of the Deceased before a doctor who did the post-mortem examination. He was with Maepho Mataoe. The corpse was released to him after the post-mortem examination was done. He later buried the Deceased.

PW 4 was at the material time a police officer stationed at Ha Tlalinyane police post in the district of Leribe. On or about the 1st April 1997 he found Accused and Mojalefa at the police post. There had already been a report about the death of the Deceased. When the witness received the report and resumed duty in the afternoon Trooper Mojaki had gone to the scene of the crime in connection with the reported death. Trooper Mojaki later arrived at the police post in a government vehicle that carried the Deceased's corpse, Accused and Mojalefa. The vehicle was on its way to the mortuary at Hlotse. The Accused and Mojalefa were left at the police post when the vehicle passed on to Hlotse to deliver the corpse.

The witness said after arrival of Accused and Mojalefa Accused's mother also reported at the station. It had not been clarified when exactly she arrived at the police station. The witness said he (witness) became part of the investigating team. In that regard he had had occasion to speak to the two accused persons. He had warned and cautioned them before they gave him certain information. That is to say they were warned to speak on condition that what they said would be used as evidence against them. They had volunteered to give statements. I thought there was no need to delve into the following statement or to this effect: "Because our police station was remote and we had no transport and Mojaki having arrived late after lunch I was not able to take the Accused to the confession." There must

have been a misunderstanding which this Police Officer explained even though Defence Counsel attempted on cross-examination to re-visit the matter with some fervour.

The witness continued to say that the Accused and Mojalefa were later taken for remand a few days later. It was after the Accused and Mojalefa had given an explanation which the witness followed. This was by way of going to their village on the following day. The witness, Trooper Mojaki and the accused person proceeded to the latter's village. The Accused before Court handed over from his home a spade that was later exhibited to this Court. Mojalefa handed over to the police officers, a silver backed okapi knife which was also exhibited. The two objects were exhibited as 1 and 2 respectively. I have already made my remarks concerning inferences on the use of the spade.

The witness then referred to a brown timber (lebetlela) stick which was before Court. The witness then referred to another timber stick which had been brought by the late Trooper Mojaki and registered together with other exhibits at the police post. The witness was shown a timber stick which was before Court. He denied that it was that stick which had been produced by the late Trooper Mojaki. He described the proper stick as having had five wire bands and was broken much lower down towards the end than the one before Court. In addition the one before Court had only one wire band. The witness had not known where particularly Trooper Mojaki has got that stick. He did not know what happened to the proper stick. It had been kept in the exhibit room at the police post. A mistake could have happened, for example, that the proper stick was left behind and could still be found.

Much was made by Defence Counsel about the issue that the witness had been part of the investigating team. A myrid questions were asked in that regard. Answers by the witness thereto appeared to be nothing but honest. This included the fact that the Defence contended that the Accused had been kept in custody well beyond the forty eight hours statutory period. This the witness was able to concede inasmuch as he said he did not recall the day when the Accused and another were sent for remand he did not deny that it could be on the fourth day when (only then) the Accused and another were sent for remand. He denied that any of the arrested persons had visible injuries or injuries at all nor bandages. He said he was satisfied that since the first day when he came on duty in the afternoon he was in good and close contact with the case. That was why in my view, he gave his evidence in an honest and straightforward manner.

The witness further conceded that he could have been mistaken about reference to sending the arrested people for confession inasmuch as they had not made such a request. Despite the searching cross examination most of which could have resulted in the witness disclosing more than he should have he remained honest and truthful. On occasions he was taxed to reconcile explanations made to him with testimony of other witnesses. I repeat that he told his evidence in a clear and straightforward manner. I accepted his testimony as truthful.

Miss Maqutu applied for handing in of a post-mortem report as evidence in this proceedings in terms of section 223(7) of the Criminal Procedure and Evidence Act 1981. This was on the ground that the doctor who had performed post-mortem examination and prepared report no longer available within the jurisdiction of the Court. The application was opposed by Miss Thabane for

Defence on the ground that the proper application was section 227(1) of the Criminal Procedure and Evidence Act 1981. And that even then the application should be supported by a statement on oath explaining the circumstances upon which the doctor was said to have been unavailable.

Still in opposition to the application Miss Thabane submitted that inasmuch as the PE record showed at the time of admission of annexure "A" the deponent was "away on holiday overseas" it did not necessarily mean that:

> "The deponent is kept away from trial by means and connivance of the accused or is outside the jurisdiction and his attendance cannot be procured without considerable amount of delay or expense and the deposition offered in evidence is the same which was sworn before the magistrate without alteration." (My underlining)

See section 227(1) (iv) of the CP&E. In addition the circumstances shown and underlined in the above section could only be proved by sworn evidence. Defence Counsel decided to withdraw her said objection even before the Court's ruling. The Court had not been able to resolve on the sustainability of the said objection. Counsel indicated however she would only attack the contents of the report that is, concerning its merits as against its admissibility. That doctor's report was therefore allowed in as Exhibit "A" and was read into the record to become part of the evidence in this proceedings. This report showed that death was due to "Haemorrhage, shock and blood loss due to a head injury." There was to be observed a multiple wounds which I need to spell out as follows:

> "Head: left parietal laceration. Right: Tempo-parietal laceration

middle posterior laceration. Neck: left double line bruised area, left shoulder bruised, left elbow open wound left knee lateral wide open wounds."

The doctor further observed on the Deceased's skull "multiple deep and long lacerations." He finally recorded additional observations of "severe laceration on head and open wound elbow knee; wide and gaping." The Court had therefore during argument put it to Counsel that these injuries could only have been caused by both a blunt and sharp objects in a severe, concentrated, determined and all out assault on the Deceased. If not an equally effective weapon was used. To conclude otherwise would be against plain common sense and would be fanciful in the extreme.

Defence Counsel while conceding that the extent of the injuries was unchallengeable and that death was due to blood loss "secondary to a head injury" complained that the doctor had however failed to outline the nature of the laceration of the head injury. Counsel said it was incumbent on the doctor to have checked the extent of the damage of the lacerations by checking the contents of the head eg whether the skull fracture had affected the brain. If this had been done as she further contended it would give a clue as to the extent of the damage and would thus "give an idea on the force used." This was obviously without merit. If I accepted this approach it would equate this inquiry by the Court to a scientific investigation and a judgment on the guilt of the Accused to an academic discourse which this Court however does not claim it to be.

Again Counsel charged that according to the doctor's evidence there were wounds on the knees and elbow was not corroborated by any other evidence. This

was not clear to me in the circumstances that there had not been any suggestion that the Deceased received any other injuries except those received on the scene. The inference became irrestible to me that there was only one person who assaulted the Deceased at the same occasion during one incident. I found it difficult to put the challenge in issue. The Crown then closed its case.

Miss Thabane indicated immediately, after close of Crown's case that she would apply for discharge of Accused on the ground that the Crown had failed to establish a *prima facie* case. Counsel had prepared heads of argument on the following day when they addressed the Court.

The Court dismissed the application for discharge on the following grounds. And said once a Court at the end of the Crown case was seized with a case where certain circumstances should be explained and could be explained by the accused and those circumstances were relevant the accused could and should be called upon to answer. See **R v Herholdt and Three Others** 1956(2) SA 722 at 728. As it was held in last mentioned case such circumstances should afford the necessary grounds upon which the Court's discretion can be exercised. The learned judge opined further that this was so: "..... even though it has failed to present a necessary degree of evidence." Meaning that in that case the Crown could well have not demonstrated a *prima facie* case. I however doubted this in the light of what the learned judge has said at page 728 thus:

> "But the attendant circumstances in such event should in my opinion at least be of such a nature to afford the necessary grounds upon which that discretion could be judicially exercised." (My underlining)

As Lord Mansfield said in **R v Wilks** 1770, 4 Burns 2527 at 2530 (98 ER 327 at 334:

> "..... discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rules not arbitrary, vague and fanciful but legal and regular."

In the present case I had considered that: First, there were a number of serious "severe" wounds as shown in annexure "A". Secondly, having wrested off the stick from the Deceased with which the Accused admittedly said he hit the Deceased he had to make an explanation against the background that one witness referred to a spade having been used in the assault. Thirdly, the investigating officer said that one of the murder weapons (exhibits) shown to him was a spade which he took in as an exhibit. And lastly, one witness is said to have heard the sound of corrugated iron as at or around the time the Deceased and Accused were fighting. I thought the Accused had to explain all these in the interest of justice or there could be failure of justice if Accused was discharged at the end of the Crown's case.

It surely did not mean that when the Accused was called upon to explain it was a requirement geared at bolstering, in the end, a weak Crown case nor as the cliche goes that he would merely have to tell the Court how the crime was committed. The Accused still reserved an option to close his case. If he did so it did not necessarily mean that where the Court ought not to convict, it would perforce convict by mere reason that the Accused remained silent. In the circumstances the application was declined. Mojalefa and Accused thereafter gave evidence as (DW 1 and DW 2) respectively on behalf of the defence.

DW 1 agreed that PW3's house was approached as PW 3 had said and that they made a similar observation on approaching the house. Specifically that he also entertained a suspicion that there might be an intruder (who he had not yet come to know). On reacting to the suspicion the Accused gave him a match box and a knife. He instructed him to light a match stick and enter the house to see what was going on. The Accused then went to the back of the house to "waylay" the intruder from the back window.

DW 1 then lit the match and pushed the door slightly but did not go inside. The intruder (a tall person) came out and in an attempt to hit him missed but hit the door frame. He was chased by the tall man but hid behind aloes. The intruder went towards PW 3. DW 1 emerged to see what was going on. That intruder again appeared and gave chase. DW 1 again hid behind the aloes. After sometime he heard what sounded like a stick hitting a person. He was able to see from where he was hiding that that tall man who had attacked him fell down after the hitting. Significantly (in my view) DW 1 thereafter saw Accused hit the fallen man. He rushed and stopped the Accused from hitting the man any further. It was then that the Accused remarked: "Man what are you doing here at my home?" It is those words which PW 1 had also heard. DW 1 then left after he had come down to Accused. He could not know what later happened at the scene.

I found as corroboration that the intruder attacked whoever he met as he came out. Indeed the version suggested during the Crown case differ from this version of DW 1 about the intruder having collided with Accused and there having been a struggle for a stick. It is said he even chased after PW 3. I believed that the Accused did not have a stick with him originally. That he hit the intruder who turned out to be the Deceased at least twice with a stick was not denied by DW 1.

He ended up to say that the Accused did not have a spade with him.

DW 2 (Accused) said he was in the company of PW 3 and DW 1 when they approached the former's house. He made similar observation as he approached the house. He then gave DW 1 a box of matches and a knife. With a match he was to light when gaining entrance to the house so that he might see what was going on inside himself. DW 2 went to the back of the house to await the intruder in case he decided to go thorough the window. The intruder did not. The next thing he heard instead were his mother's screams and when she raised an alarm as well. He then rushed to the forecourt. On arrival at the forecourt DW 1 said he was hit with a stick on the knee by a person who was unknown to him. That person attempted to hit him again but he managed to pull the stick from the intruder. This seemed to be consistent with the Crown version that a struggle over the stick did take place.

Accused testified furthermore that despite being disarmed the assailant moved forward suggesting a further attack. He again hit the intruder with intention to stop him from further attacking him. This in my view was necessary to avert an unlawful attack by someone who had no good reason to be where he was, after having broken into PW 3's home. The intruder fell. He then hit him again when he realized that he was attempting to stand. He had by that time become angry. I failed to see how necessary this attack was. As I concluded, this could not have been be the last attack from the Accused considering the injuries found on the Deceased.

Accused said he was later arrested and tortured by the police who put it to him that he used a spade. This he said he originally denied but later admitted due

to the assault. I have earlier commented about the recorded testimony that not only stated that a spade was used but also that the spade was pointed out and recovered by the Accused. I said I found the evidence inherently credible.

This suggestion that there could have been a struggle over the stick between the Accused and that intruder is affirmed by the Accused. While admitting that he assaulted the intruder while the latter was unarmed he said he did that in self-defence. Accused however continued to deny that he could have further assaulted that intruder with a spade. He suggested no reasonable scenario that could have allowed for intervention of someone else who could have (besides him the Accused) used a spade at the scene.

I became convinced that a spade was used by the Accused immediately after the intruder was overcome. This inference was irresistible. That assault was nothing but as earlier described. It was uncalled for, unnecessary and excessive, even if it were to be said to have been in self-defence, which it was not. This is more so when it was with good reason suggested that the further assault could have been avoided and the Accused was neither rendered helpless nor without any avenue for escape.

Mr Thabane referred to the three requirements which the defender must show in private defence as enunciated by the learned authors J Burchell and J Hunt in **Principles of South African Criminal Law** (1st edition) page 112. Counsel submitted that in the present case there was an attack on the Accused by the Deceased, the Accused was protecting himself and finally that the attack was unlawful the Deceased having been an aggressor who had earlier broken into accused's home.

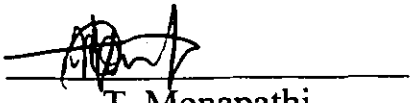
The next question to decide was whether the Accused had exceeded the bounds of his private defence. That is whether or not he did use excessive force. As Counsel contended further:

> "The objective test of private defence has due consequences that the Court may decide that although the defender believed that he was entitled to engage in a defensive attack objectively reviewed the situation was not one in which he was justified in resorting to a defence or, if he was, the steps taken in defence exceed what was necessary to repel the attack." See **Principles of South African Criminal Law** Burchell and Milton (2nd Edition) page 127.

I however found it difficult to see any basis upon which the response by the Accused to Deceased's original attack could be defined in any manner other than that it was excessive. The basic facts which agreed with the Defence's own version (refer also to PW 3) (beating with a stick only twice) suggest on their own that it had been easy on the part of the Accused to overcome the Deceased with one blow of a stick. What was it therefore that could explain the pulverizing that the Deceased's head received except excessiveness on the part of the Accused? Accused's assault, along the way, had ceased to be a mere over-reaction. See **Julius Pone v Director of Public Prosecutions** 1999-2000 LLR 214.

The court concluded that the Crown had made out a case that the Accused killed with the requisite subjective intention to kill in the nature of *dolus eventualis,* having exceeded legitimate bounds of self-defence.

The Accused was therefore found to be guilty as charged. My assessor agreed.



T. Monapathi
Judge

26th March 2002

Extenuating Circumstances and Sentence

Having found the Accused guilty of murder (as charged) I proceeded on to the next step. That was to find out if there were extenuating circumstances.

In determining the existence of extenuating circumstances the Court is guided by section 296 of the Criminal Procedure and Evidence Act 1981. Section 296(1) spells out that the Court is enjoined to state if in its opinion there are extenuating circumstances. Furthermore if the Court is of the opinion that extenuating circumstances exist it must specify them. I realized that the applicable words are "may specify".

Secondly, in terms of section 296(2), in deciding whether there are such existing extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class in the community to which he belongs. I have found the Accused to be a peasant Mosotho man in a semi-rural setting and of that behaviour

I may generalise to say that such extenuation in general has to be such moral considerations, factors that make accused's behaviour less blameworthy. Indeed the learned late author of **Criminal Law and Procedure Through Cases** (Hon. M.P. Mofokeng) speaks about some principles applicable in determining such extenuating circumstances. One of them being that extenuating circumstances may be found from the body of the record of proceedings. This is one of the factors mentioned on page 242-243 of the mentioned work.

To go back to one of the principles it is that an accused need not state such extenuation under oath or by way of evidence. The learned author of the last mentioned work goes on at page 166 to explain what the extenuating circumstance are. Included in those are facts which are associated with the crime which serve to diminish the moral blameworthiness of an accused person among which is an intention normally called *dolus evantualis* as I have found as the intention in the present killing. Counsel agreed that there had been no pre-meditation or planning on the part of the Accused.

There had also been no bad blood between this Accused and the Deceased. And the circumstances themselves speak for this Accused. That is to say that he could not have had original intention to do mischief. As I said the whole train of events in the said killing of the Deceased was started by the Deceased himself which can only said to have been bad or unfortunate for absence of a better words. I therefore found extenuation.

The consequences of that finding are well known. One of them is that one may not speak of the sentence of death because "the Court may impose any sentence other than death sentence." See **Criminal Law Through Cases** (supra) page 341.

Sentence

Now I move to the stage of mitigation of sentence of the Accused who was a first offender.

In this I was given many indicators of why I should impose a lenient sentence. My approach is that a sentence must be reasonable. It must not be too lenient as to amount to a travesty of justice. It must not be too harsh as to appear inhumane. If it is in the extreme in either way it becomes outrageous and becomes nonsensical. It may suggest also that the Court is irresponsible. It may also suggest that the Court is angry with the accused if it is too harsh. It may suggest, if it is too lenient, a disregard the feelings of the community towards crime which is invariably that of repugnance.

A sentence must take into account that the society expects that people who have committed crimes must be punished. Punishment of offenders should support and motivate offender's rehabilitation, reformation and re-integration into the community, taking into consideration the rehabilitative needs of the offender, the protection of the society and the interests of the victim. It is because, in relation to the latter, if a sentence is unreasonable it disregards the sensibilities of the relatives of the deceased person.

Another aspect to consider is that as a result of there having been a death or a crime those of the deceased become victims in a way. In most instances deceased leaves relatives and dependents. And most importantly the deceased does not come back but an accused person will sometimes be sentenced to imprisonment and he will still come back from prison and re-order his life.

It goes without saying that it is just unfortunate that sometimes it is even suggested that the accused people who are punished to imprisonment are being sent to hotels. Then it is when the feeling or perception is that imprisonment is some advantage to an accused. While a person is sent to imprisonment as punishment the modern trend is that he must be rehabilitated. So that in emphasising rehabilitation other aspects of imprisonment or punishment are brought to the background. One of them is retribution. Retribution and deterrence are brought to the background in the circumstances when rehabilitation is emphasised.

I repeat that a sentence must be reasonable. It must not look nonsensical or outrageous. At the same time I go back to the charge and say that this accused has committed a serious offence resulting in death of a human being. I have already spoken about the circumstances in the record of proceedings. In particular I need to emphasise that the facts reveal that this deceased was severely assaulted and it was a concentrated and severe kind of assault. This cannot be ignored

I needed not investigate the question of whether this accused was drunk. It was said the accused took some soft drink only. This was not gainsaid. Indeed to sum it all the situation was just unfortunate and it is difficult to say that it was a situation that could be controlled except to say that the assault was rather severe. My other remark on this aspect would be that one is often reminded that one must always judge things according to the standard of the people that is in their life in their community. This should not be by way of condoning anything. I need not over-emphasize certain things such as to say that: "Oh! this man if he had assaulted this man twice he should have stopped." That is to be subjective. This is my attitude towards sentencing the Accused.

I will also bear in mind that it was Accused he was a breadwinner, it was said he had no previous convictions, he was the only child, his father passed away, he has dependants including his family and a ten year old child, and his mother is unemployed.

In addition the elements of what happened at the scene show that there was provocation by Deceased. That is as I have said the train of events was started by the Deceased himself. I still recall well that the Deceased was said not to have been a very good character. This I will bear in mind in my sentence. I will retire and come back after a short adjournment.

I have considered that this gentleman (the Accused) has been attending his trial faithfully at all times and it has been since some time that he was indicted. I am forced to impose a term of imprisonment and as I have said killing of a human being is a serious thing. I must reiterate that there are so many other things that speak on your behalf. You Accused, I will sentence you to a term of imprisonment of six (6) years. I suspend three (3) of them for a period of three (3) year on condition that you do not commit any crime involving violence.

T MONAPATHI
JUDGE

26th March 2002