

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

vs

CHABASEMAKETSE MZOLA

JUDGMENT

**Delivered by the Honourable Mr. Justice B.K. Molai on
28th day of October, 2002**

The accused person is before me on a charge of murder, it being alleged that on or about 5th May 1998 and at or near Ha Nkotoane, in the district of Mokhotlong, he unlawfully and intentionally killed the deceased, Nqoleso Mzola. When the charge was put, and explained, to him, the accused person pleaded not guilty.

Mr. Mofoka, who represents the accused, in this trial, informed the court that the plea of not guilty, tendered by the accused person, was in accordance with his instructions. The plea of not guilty was accordingly entered.

Although at the commencement of the trial, Mr. Mofoka told the court that the defence had no admissions to make, it may be mentioned that, in the course of the trial, he informed the court that the defence admitted the deposition made by

D/Trp Lekoetje who had testified as P.W.1, at the proceedings of the preparatory examination. Miss Dlangamandla, who represents the crown in this trial, accepted the admission made by the defence counsel. The deposition of D/Tpr Lekoetje was accordingly admitted in evidence and it was, therefore, not necessary to call him to testify as a witness, in this trial.

Four (4) witnesses were called to testify in support of the crown case. After the crown had closed its case, the accused person did not give evidence nor were any witnesses called to testify in support of his case. The defence simply told the court that it was also closing its case, without adducing any evidence at all, in its defence. The court has, therefore, only the crown evidence to rely upon for the determination of this case.

It may, perhaps, be convenient to mention, at this juncture, that after the testimony of P.W.1, Nowise Mzola, on the events that had taken place, on 5th May 1998, the court had a strong suspicion about the sanity of the accused person, either at the trial itself or, at the time of the commission of the offence against which he stood charged. In accordance with the provisions of subsection (1) of section 172 of the **Criminal Procedure and Evidence Act, 1981**, the court directed that the accused person be referred for observation by a psychiatrist who would report whether he (accused) was fit to stand trial or was, at the time he allegedly committed the offence, mentally sane. The subsection reads:

“(1) If on the arraignment or during the trial or at the

preparatory examination of any person charged with any offence, it appears to the judicial officer presiding at such trial or preparatory examination that such person is insane or mentally incapacitated the court before which the trial or preparatory examination is being held shall enquire into the question of such person's sanity."

For the above given reason the hearing of the trial was postponed. When, on 27th May 2002 the hearing resumed, a report compiled by Psychiatrist consultant (S.P. Shaikh) was, by consent of the parties, handed in from the bar as exh "A". According to exh. "A", the psychiatrist did attend to the accused person and formed the opinion that, at the time of committing the offence, he was mentally ill. However, he was at the time of the observation fit to stand trial.

The court was informed that the accused person, adhered to his plea of not guilty. There was, therefore, no need to ask him to plead for the second time.

The deposition of D/Tpr Lekoetje was to the effect that he was a member of the Lesotho Mounted Police Service and attached to the C.I.D. at Mokhotlong police station. On 6th May 1998, he was at his duty station, when he received a certain information following which he and another police officer proceeded to ha Nkotoane, in a police vehicle. They reported themselves at the chief's place. After they had introduced themselves, and explained their mission, to him, the chief of ha Nkotoane led them to a certain home, in the village, where they found a person covered with a canvas on the forecourt. That person was identified as Nqoliso Mzola, the deceased in this case. The deceased was still alive but

shivering with cold as he had allegedly spent the night where he was found on the forecourt of his house. In trying to talk to him, D/Tpr. Lekoetje found that the deceased was unable to speak. He, however, proceeded to examine the deceased for injuries and found that he (deceased) had sustained two open wounds on the head and some abrasions above the left eye.

In the deposition of D/Tpr Lekoetje, he and the other police officer were then shown a hut in which the accused, who was the son of the deceased, had allegedly locked himself. The two police officers then went to the house in which the accused was hiding himself. They asked the accused to open the door as they were police officers and wanted to talk to him. The accused person did not open the door, presumably because he did not believe that they were, indeed, police officers. The police officers were obliged to make a hole next to the door and through that hole show their police identification cards to the accused. It was only then that the accused opened the door and came out of the house. After D/Tpr Lekoetje had cautioned him, the accused gave him and the other police officer an explanation. He also handed over a homemade knife which the police officer took possession of. It had since been kept in the police custody and subsequently handed in as exhibit at the proceedings of the Preparatory Examination.

Following the explanation, which the accused person had made to the police officers, D/Tpr Lekoetje arrested and charged him with the crime of assault. The accused and the deceased were then taken, in the police vehicle, to Mokhotlong police station and Mokhotlong hospital, respectively. D/Tpr. Lekoetje assured the

court that the deceased did not sustain additional injuries whilst he was being transported from his home, at Ha Nkotoane, to the hospital.

However, on the following day, 7th May 1998, D/Tpr. Lekoetje received a report that the deceased had died at the hospital. He then called the accused person from the police cells to his office at Mokhotlong police station, where he informed him that his father (deceased) had passed away at the hospital. He then changed the charge of assault, he had earlier given him, to that of murder, as aforesaid.

The court heard the evidence of P.W.4, Dr. Tholoana Daniel Bolibe, who testified that he was the medical doctor stationed at Mofokeng Government Hospital. However, in May 1998 he was stationed at Mokhotlong Government Hospital. He was the doctor who had compiled the post-mortem examination report following his examination of the dead body of the deceased. He adhered to its contents and handed it in as exh "B" and part of his evidence, in this trial.

According to exh. "B" at about 14:00hrs on 14th May 1998, P.W.4 examined a dead body of a male African adult. The dead body was identified by Motubaki Bula as being that of Ngoleso Mzola. The external examination of the dead body revealed that the deceased had sustained two 3cm long wounds on the frontal region of the head, "O" shaped depression on the forehead and superficial skin bruises above the left eye. On opening the body the examination revealed that the deceased had a skull fracture on the forehead resulting in subdural

haematoma. On the above findings, P.W.4 formed the opinion that the deceased's death was due to subdural haematoma resulting from the head injuries he had sustained.

I can think of no good reasons why the opinion of the medical doctor that the deceased's death was brought about by the injuries inflicted upon him should be doubted. The salient question that arises for the determination of the court is whether or not the accused is the person who inflicted the injuries on the deceased and, therefore, brought about his death.

In this regard, the court heard the evidence of P.W.1, Nowise Mzola, who testified that she lived at ha Nkotoane in the district of Mokhotlong. She was illiterate. She knew the accused and the deceased in his life time. The deceased and the accused were her own husband and son, respectively.

According to P.W.1, the accused ordinarily stayed at the cattle posts where he looked after the livestock of one Hlakane Kao. However, some days before the incidents of this case, the accused came home, from the cattle posts. On arrival at home, the accused did not appear normal. He reported that he had had a dream in which some people attacked, and wanted to kill, him. When he woke up from the dream, he realised that he had fallen from his bed and was lying on the floor in the cattle post hut. Asked whether he had recognised any of the people who had attacked, and wanted to kill, him in his dream at the cattle posts, the accused replied in the negative. He, however, complained that ever since that dream, he

was living in fear. He also complained that his father (deceased) had sold him to Chinese people. According to P.W.1, the accused was violent and there was no peace in the family since he returned home from the cattle posts. He barricaded himself in one of the huts which was used to store the food staff for the family. He was assaulting anyone who tried to go into that hut. P.W.1 was afraid to go into that hut to get food staff for preparing meals for the family. Attempts to take the accused for mental treatment at Mokhotlong government hospital were to no avail because he was violent and refused to be taken there. Eventually, P.W.1, the deceased and a certain Zenzile Khasimen succeeded in persuading the accused to agree to be taken to "Mametsi" (Apostolic Church Healer) for treatment. As a treatment, "Mametsi" prayed over some water which she said should be given to the accused to drink.

However, the treatment did not work. One morning she (P.W.1) and a certain Sema, a son of her younger sister, were sitting and chatting outside one of her (P.W.1's) huts when the accused came to them. On arrival the accused asked P.W.1 and Sema whether they were talking about him. When Sema replied in the negative, the accused, who was holding a knife, told P.W.1 that he was hungry. According to her, P.W.1 told the accused that the food staff was in the hut in which he (accused) was staying. She then asked Sema to go to that hut and bring some mealie-meal so that she could prepare food. She was afraid to go to that hut herself because on the previous day the accused had been very violent fighting her and the deceased in the family.

P.W.1 told the court that, when Sema stood up and proceeded to the hut where the accused was staying, she noticed the latter following the former. She then decided to follow the accused so that she could see why he was following Sema. After Sema had entered into the hut, P.W.1 noticed the accused also entering into that hut and closing the door behind him. She went to the door and tried to open it. It could not open. P.W.1 then went round the house and peeped inside through the window. She noticed that the accused, who was armed with a knife in his right hand, was holding Sema by his blankets around the neck. Sema was, at that stage, holding in his hands a dish of mealie-meal. P.W.1 then shouted at the accused, through the window, and asked him what he was doing to Sema. The accused then let go of Sema who placed down the dish of mealie-meal he had been holding.

At that time, the deceased and one Ramanale Ntsing were outside the latter's home which was not far from P.W.1's home. She (P.W.1) signalled, with her hand, to the deceased and Ramanale to come. When they came to her, P.W.1 told the deceased and Ramanale what she had seen happening between the accused and Sema inside the house. The deceased and Ramanale then went to the door and tried to open it. It could not open. They, however, stood at the door and pleaded with the accused to open the door. Eventually the door did open. The accused and Sema came out of the house. P.W.1 told the court that, at that stage, she was behind the house. She did not, therefore, see whether it was the accused or Sema who had opened the door. She, however, heard Ramanale saying: "Why are you hitting me Chabasemaketse?" When she heard that, P.W.1 moved from the back

of the house to the front. As she emerged to the front of the house, the first person P.W.1 noticed was the accused who was holding something she could not clearly recognise what it was. With that object, the accused was, however, delivering blows at what she could not see. It was only when the front of the house came to her full view that P.W.1 noticed that the accused was fighting with Ramanale and the deceased. She clearly saw that the object with which the accused was delivering blows, at his combatants, was a knife. She actually saw the accused going to the deceased and stabbing him with the knife on the head. When the accused thus stabbed him with the knife, the deceased fell to the ground. According to her, P.W.1 immediately ran away in the direction towards the chief's place, in the village. As she was running away, P.W.1 kept on looking back and could see that while the deceased was still lying on the forecourt of his house, the accused was throwing stones at Ramanale, who was just below the forecourt of the house. After she had run to the chief's place, P.W.1 did not return to her home until the following day when she learned that the deceased had passed away at Mokhotlong government hospital.

Ramanale Ntsinyi testified as P.W.2 and told the court that he lived at ha Nkotoane, in the district of Mokhotlong. He was illiterate. He knew the accused person and the deceased in his life time. The deceased was his elder brother whilst the accused was the son of the deceased.

According to him, P.W.2 remembered that, on 5th May 1998, he was at his home when P.W.1 came running to him and asked him (P.W.2) to go to her home

which was about 100 paces (ind.) away. P.W.2 complied. He denied, therefore, the evidence of P.W.1 that she had beckoned at him and the deceased from where they had been standing outside his (P.W.2's) house. He told the court that on his arrival at the house of P.W.1, he first went to the window, through which he peeped inside and saw the accused person, who was holding an unclashed knife in his hand. Thereafter, P.W.2 proceeded to the front of P.W.1's house where he found the deceased standing at the door. He (deceased) was pleading with the accused person to open the door. When the accused failed to do so, P.W.2 joined the deceased in pleading with him to open the door. In reply the accused asked what he (P.W.2) wanted at his (accused's) parental home. He told the accused that he had come to intervene between him and Sema. The accused then opened the door slightly and invited P.W.2 to enter into the house. However, P.W.2 declined to enter into the house, telling the accused that he had not opened the door widely enough so that he (P.W.2) could see if he were armed with any weapon. The deceased then tried to enter into the house but P.W.2 stopped him from doing so, telling him that it was unsafe as they (P.W.2 and deceased) did not know with what the accused was armed, in the house.

In the mean time P.W.2 could hear Sema talking inside the house. He was pleading with the accused to leave him alone. P.W.2 then called at the accused to come out of the house so that he (P.W.2) and the deceased could solve the problem between him (accused) and Sema. When there was no response from the accused P.W.2 decided to leave the door and stand some distance away on the side of the house. He (P.W.2) eventually decided to return to his house. To do so he

had to pass in front of the door of P.W.1's house. As P.W.2 was passing in front of the door, the accused threw a stone at, and hit, him on the right shoulder. When P.W.2 asked the accused why he was hitting him with the stone, the latter again asked the former what he wanted at his (accused's) parental home.

P.W.2 told the court that after the accused had hit him with the stone on the shoulder, he stood at some distance away from P.W.1's house. He then noticed the accused coming out of the house in which he had barricaded himself and Sema. As he went out of the house, the accused was holding an iron rod normally used for branding horses. He went towards the deceased, who was just standing on the forecourt directly opposite the door of his house. When he came to him, the accused hit the deceased a blow on the head with the iron rod. The deceased fell to the ground. Before he could hit the deceased another blow with the iron rod, P.W.2 rushed at, and caught hold of, the accused. They struggled till they both fell in front of the cattle kraal. The accused was the first to get up from where they had fallen. He (accused) returned to where the deceased had fallen, picked up his (deceased's) stick which had dropped to the ground when he fell and hit him several times on the head, and the ribs.

After he had thus assaulted the deceased, the accused turned to P.W.2 and threw stones at him. One of the stones thrown at him by the accused, landed on P.W.2's left side ribs. The accused then returned into the house. Eventually, his (P.W.2's) wife came and assisted him to his house leaving the deceased alone where he was lying prostrate on the forecourt. P.W.1 was nowhere to be seen at

that stage. She had run away.

P.W.2 testified that in the morning of the following day, a police vehicle arrived in the village. He and the deceased were then transported in the police vehicle to Mokhotlong hospital, where they were both admitted. Whilst they were at the hospital, on the day in question, 6th May 1998, P.W.2 learned that the deceased had passed away.

P.W.3, Nkotso Patrick Mabitle, testified that he was 33 years old and lived at ha Nkotoane in the district of Mokhotlong. He knew the accused and the deceased in his life time. They both lived in the same village as he did. The distance between his house and that of the deceased was approximately 100 metres (ind.).

In his testimony, P.W.3 remembered that one day during May 1998, he had just arrived home when he heard the deceased calling him from his (deceased's) home. After he had unsaddled his horse, P.W.3 proceeded to the home of the deceased. As he approached the home of the deceased, he heard some noise as if the deceased were scolding some one. On arrival at the home of the deceased, P.W.3 noticed the deceased, the accused, Sema and P.W.2 on the forecourt. The accused, was holding an iron rod used for branding horses whilst the deceased was holding a stick. According to him, P.W.3 then noticed the accused suddenly hit the deceased a blow on the head with the iron rod he had been holding in his hand. He confirmed, therefore, the evidence of P.W.2 that the weapon with which the

accused had assaulted the deceased was the iron rod used for branding horses and not a knife, as P.W.1 wished the court to believe. Indeed, even exh. "B" made no mention that any stab wounds were found on the deceased by P.W.4, the medical doctor who had performed the post mortem examination on the dead body of the deceased.

I am prepared to accept, as the truth, the evidence of P.W.3 corroborated by P.W.2 and, in a away, exh. "B" that the weapon with which the accused had assaulted the deceased was the iron rod used for branding horses and reject, as false, the uncorroborated evidence of P.W.1 that it was a knife.

P.W.3 confirmed the evidence of P.W.2 that, when he was hit the blow on the head with the iron rod, the deceased fell to the ground. Before the deceased could be hit the second blow, P.W.2 immediately rushed at, and caught hold of, the accused. They both physically struggled till they fell next to the kraal. When he got up, the accused returned to his father (deceased) who was still standing on the forecourt.

It is to be observed that P.W.3 told the court that before P.W.2 started struggling physically with the accused, the latter had delivered a blow with the iron rod on the deceased who fell to the ground. That the deceased fell to the ground when he was hit the blow with the iron rod was confirmed by P.W.2. The evidence of P.W.3, that the deceased was still standing on the forecourt when the accused got up and went to him, did not make sense. The deceased was, in all

probabilities still lying on the forecourt.

Be that as it may, P.W.3 went on to testify that when he came to the deceased, the accused picked up his (deceased's) stick which had dropped on the ground and belaboured him. Thereafter, the accused uttered the words **"I have killed the devil."** He then returned into the house, leaving the deceased lying prostrate on the forecourt.

According to him, P.W.3 believed that the deceased was dead. He rushed to the chief's place where he reported that the accused had killed his father. The chief detailed him (P.W.3) to go and report the incident at the police station. The police did not, however, go to the scene of crime as it was already late. After he had reported to the police, P.W.3 himself returned home where he arrived at dusk. He went to where he had left the deceased lying prostrate on the forecourt of his home. When he came to him, P.W.3 realised that the deceased was breathing and, therefore, still alive. He alerted the other villagers to that fact. However, as the doors of all his huts were closed, P.W.3 and the other villagers could not assist the deceased into any of the huts. He was left where he had been lying prostrate on the forecourt of his home for the night.

In the morning of the following day, 6th May 1998, the police did arrive in the village and attend the scene of crime after which they transported away both the accused person and the deceased who was still alive.

As stated, earlier in the judgment, the accused person advanced no evidence in his defence. The evidence of P.W.3, P.W.2 and P.W.1 that, on the day in question, 5th May 1998, he assaulted the deceased remains unchallenged. I find no reason why it cannot be accepted as the truth. The question I have, earlier in the judgment, posed *viz.* whether or not the accused is the person who assaulted the deceased and inflicted upon him the injuries, that brought about his death must, therefore, be answered in the affirmative.

The next question that arises for the determination of the court is whether or not in assaulting the deceased, as he did, the accused person had the requisite subjective intention to kill. It is worth noting that, in her evidence, P.W.1 told the court that when the accused person went out of the hut in which he had been barricading himself and Sema, she herself was behind that hut. She had, therefore, no personal knowledge as to what took place when the accused person went out of the hut. It was only when she emerged on the forecourt from the back of the hut that P.W.1 noticed that the accused person was fighting with P.W.2 and the deceased. However, in his evidence, P.W.2, who was admittedly with the deceased in front of the hut at the time the accused came out, denied that there was any fighting at all, at that time. He told the court that when he came out of the hut the accused person walked to the deceased who was just standing on the forecourt and delivered a blow on his head with the iron rod he (accused) was holding in his hand. That was witnessed by P.W.3 who had just arrived at the home of P.W.1.

I am inclined to accept, as the truth, the evidence of P.W.2 corroborated by

P.W.3 that the accused person simply walked to the deceased as he stood on the forecourt of his home and hit him a blow on the head with the iron rod. I reject as false the uncorroborated version of P.W.1, on this point.

Assuming the correctness of the evidence that he hit the deceased a blow on the head with as lethal a weapon as the iron rod, I find that the accused must have been aware that death was likely to occur. He, nonetheless, acted reckless of whether or not it did occur. That being so, it must be accepted that in assaulting the deceased, as he did, the accused had the requisite subjective intention to kill, at least, in the legal sense. In the present case there is, however, the evidence of the Psychiatrist (exh. "A") that at the time he assaulted the deceased and inflicted upon him the injuries that brought about his death, the accused was insane. Now, subsection (3) of section 172 of the **Criminal Procedure and Evidence Act, 1981** provides:

"(3) when in any criminal proceeding, any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible, according to law, for his action at the time when the act was done or the omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged, but was insane at the time when he did the act or made the omission -

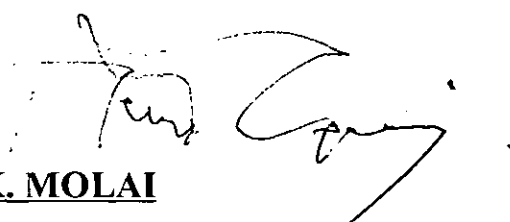
- (a) the court shall return a special verdict or finding to the effect that the accused is guilty of the act or omission charged against him, but was insane at the time

- when he did the act or made the omission,
and
(b) the judicial officer presiding at the trial
shall there-upon order the accused to be
kept in custody in some prison pending
the signification of the King's pleasure."

On the authority of the above cited subsection (3) of section 172 of the
Criminal Procedure and Evidence Act, 1981 I come to the following
conclusion:

1. The accused is guilty of murder as charged, but was, at the time he
killed the deceased, insane.
2. It is hereby ordered that the accused be kept in prison, at the Maseru
Central Prison, pending the signification of the King's pleasure.

My assessor agrees with the finding.



B.K. MOLAI

JUDGE

28th October, 2002

For Crown : Miss Dlangamandla
For Defence : Mr. Mofoka