CRI/S/1/80

IN THE HIGH COURT OF LESOTHO

In the Matter of :

REX

v

QHOLOFA SEKATI

Reasons For Judgment
Filed by the Hon. Judge Mr. Justice M.P. Mofokeng
on the 14th day of February, 1980.

The accused was charged in the Subordinate Court, with the crime of culpable homicide it being alleged that

> "upon or about the 29th day of September, 1978 at or near ha Ramokane in the district of Maseru the said accused unlawfully assaulted one Malefetsane Makafane and inflicted upon him certain injuries which caused the death of the said Malefetsane Makafane on the 4th day of October, 1978, the said accused did thereby ngligently kill the said Malefetsane Makafane and commit the crime of culpable homicide."

He pleaded not guilty. The evidence, as adduced by the Crown, was briefly as follows:

On the 29th day of September, 1978, the accused, together with other men, attended a circumscision ceremony for boys. It is in accordance with custom, on such an occasion, for the men to engage in a game of playing with sticks. The accused and the deceased did indulge in such a game. There were no injuries or hurts caused. Twice they were so engaged and with the same result. Thereafter the deceased was engaged in a game as already described, with one Mafompho. It was while the deceased was so engaged that the accused came and hit him on the side of the head with his stick. Deceased fell down. He was then removed a distance away. The accused on being asked why he hit

/the deceased .....

the deceased in that manner, did not reply. There was a swelling of the area where the deceased had been hit. Then the witnesses tried to "bleed" the swelling by making little cuts i.e. scarifying it. Blood did not come out as anticipated. The deceased was removed to a certain house where he took some porridge and then slept.

The following morning, that would be on the 30th September, 1978, the deceased was taken to

"Fatima for medical treatment."

Thereafter, he was transported to Roma hospital where he was admitted as a patient. He remained at the said hospital until he died on the 4th day of October, 1978 i.e. about four days after his admission. The doctor who performed the post-mortem examination said, in his opinion, that death was caused by "acute subdural haematoma."

According to the record of the proceedings before me, the accused hardly said anything in his defence. In fact all he said is recorded as follows:

> "Has been in prison for over 3 years, this is the 4th year. Is helping parents. Asks to be allowed to pay compensation."

Needless to say, the accused was found guilty "as charged". On production of accused's record, it was discovered by the Court that accused had a previous conviction. It was for culpable homicide. It was for that reason that the accused was remitted to this Court for sentence in terms of provisions of section 288.

The question for the decision is: Did the deceased die as a result of the injury inflicted on him by the accused on the 29th day of September, 1978? In other words, was there a direct causal relationship between the assault (and hence the injury inflicted) and the death of the deceased?

The problem of causation has presented itself in our Courts as follows:-

(1) Where X plans (together with others) to kill Y. In execution of the plan, Y is invited for a drink and while so drinking he is assaulted. Thinking that Y is dead, he is then taken away by X and his associates and thrown over a krantz to fake an accident. The medical evidence disclosed the injuries Y received while drinking were not sufficient to cause death and the final cause of death was exposure when he was left unconscious at the foot of the krantz. The Court held that X and his associates were guilty of murder. Their act was a continuous transation. There was therefore, no novus actus intervienes. Such a case is that of Thalo Heli and Others v. The Queen (Privy Council) 1954 H.C.T.L.R. 21.

(2) Where X assaults Y and causes him serious injuries. Y is then taken to a local dispensary for treatment (it was very cold) and is allowed to return and on the very same evening, Y dies and the dominant cause of death is consequent upon the injuries suffered by Y. It was held that X could not be held responsible for the death of Y as "it may well have been the exposure after treatment at the dispensary which was the cause of death." Such a case is that of Sello Taole & Others v. Regina, 1963-66 H.C.T.L.R. 210; Rex v. Ratia, CRI/T/3/76 (unreported) dated 15th September 1976.

(3) Where X assaults Y and causes him innuries. Then Y is admitted at a hospital where he eventually dies. X on a charge of murder contends that the death of the deceased had not been caused by the injuries he had inflicted upon Y but by the medical treatment which Y received after his admission at the hospital. There was medical evidence as to the treatment Y received at the hospital; there was evidence, also, as to Y's cause of death. It was held that X who inflicts injuries is not entitled to expect that Y will receive medical attention or such attention as is available, he is not entitled to escape responsibility for Y's death if that attention is unsuccessful in saving Y's life. However, there must be evidence to exclude the

> "possibility of incompetence or negligence or dereliction of duty of professional medical men....." per Mapetla C.J. in Rex v. Tlali and Others, CRI/T/27/74 (unreported) at page 17.

(See Rametse V. Rex, 1967-70 L.L.R. 76; R. v. Ndlovu, 1970-76 S.L.R. 389 at 390D.)

/(4) .....

(4) Where Y is assaulted by X and is found the following day far away from the spot where the assault took place. He died later on that day. There was no medical evidence before Court. It was held that although it was unlikely that Y did not die from any other cause, however, what was required was proof beyond reasonable doubt that Y did, in fact, die from those injuries and that evidence must be such as to rule out the probability that Y died from some other cause. Or as Mapetla, C.J. put it in the case of Rex v. Tlali and Others, (supra) at pages 17 and 18:

> "It is on the details of injuries, where those are material, as they are in this case, that I need the independent evidence that could have afforded a guarantee that there is absolutely no possibility of mistake, for the doctor who did the post-mortem ..... could not have predicted the story of ..... which emerged, piece meal, several weeks or months after the macabre events allegedly witnessed at ..... hut". (It should be mentioned that although there was no medical evidence the Court found it incumbent upon it, to call for the post-mortem report to inform itself since the Court sat on judgment upon the liberty of the individual.)

(See also Rex v. Leshoboro Masupha, CRI/T/12/74 (unreported) dated 28th June 1974 at p. 2; Letuma v. Rex, CRI/A/44/75 (unreported) dated 27th January, 1976.

(5) Where X assaults Y and causes him serious injuries. Y is then firstly, taken to a local clinic and then admitted at a hospital. There was no evidence of the nature of the treatment, if any, which Y received at both the clinic and the hospital. It was held that in such a situation it could not be said that the injuries inflicted by X were the direct cause of Y's death. Such cases are those of Rex v. Ntloana 1967-70 L.L.R. 48; Rex v. Malineo Ntsere, Review Order No. 48/79 (unreported) dated 14th December, 1979; Rex v. Tlali and Others, (supra) at page 17.

(6) Where X assaults Y and causes him injuries. Y's legs and hands were then tied with metal wires. The house in which Y was left was then locked. The following day Y was found dead, in the same place and in exactly the same position as X had left him after beating and tying him up. The doctor who performed the post-mortem examination found evidence of "more than 50 lashes, wire-marks on the arms and legs, an open wound on the scalp and one

/behind the .....

behind the left ear, and a small laceration on the upper jaw." The doctor, however, was unable to ascertain the cause of death. X, in his evidence, admitted that he inflicted the injuries that caused Y's death. It was argued on behalf of X that "if medical evidence is available, and if the medical evidence does not establish, beyond reasonable doubt, what the cause of death is, X could be found guilty of either assault with intent to do grievous bodily harm or common assault." It was further submitted that X was not a medical man but a layman who thought that his beating of the deceased resulted in death; however, the medical evidence failed to prove that that was so. In such circumstances it was held that a Court of law is not precluded from coming to a conclusion about the cause of death by reason only that no medical evidence was available, or if available, was not satisfactory or not "scientifically" conclusive. Such cases are those of Tsomela v. Rex, CRI/A/27/74 (unreported) dated 3rd September, 1974; Rex v. Mokone, CRI/T/10/75 (unreported) dated 11th March, 1976 at page 3; Rex v. Leshoboro & others (supra).

(7) Where X is charged with the murder of Y, a young girl. In his evidence X (who had made a confession which was not challenged in evidence) admitted killing Y because the latter threw stones at him. X also admitted sexually assaulting Y. There was no medical evidence as to the cause of death nor in respect of Y's injuries. In a similar case it was held that "apart from the confession there was sufficient circumstantial evidence to connect the accused with the events that may have led to the girl's death." per Cotran, C.J. in Rex v. Mabote, CRI/T/9/75 (unreported) dated 18th November, 1975. (But see Rex v. Leshoboro & others (supra) at page 2 for the use of "may" and "must").

(8) Where a witness sees X stab Y many times and sees Y die immediately thereafter. Despite the absence of medical evidence as to the cause of death there is no difficulty in inferring that X's injuries are the direct cause of Y's death where shortly before Y was hail and hearty. To put it in the words of Lupetla, C.J. in the case of Rex v. Tlali and others, (supra) at page 17:

> "It is not the cause of death that is giving me doubts, for when a person's skull is smashed, a child of seven is as likely to be correct in his opinion on cause as that of a medical man, who may put it in a more delicate language."

/(See also .....

(See also Rex v. Mokone (supra) at page 3.

(c) Where Y in escaping from the unlawful conduct of X, kills himself. It was held in a similar case that once there is mens rea there is no "difference in principle between providing one's agonized victim with a loaded gun or pills or manoeuvring him towards a whirlpool or room with an open window on the 10th floor of an office block" per Cotran, C.J. in Rex v. Mahomole and Others, CRI/T/18/79 at page 10.

The legal position in Lesotho, therefore, seem to be mainly as follows where the problem of causation is encountered:-

(i) Where Y received treatment either at a clinic or at a hospital and he subsequently dies. In such a case, there must be evidence as to the nature of the treatment received in order to exclude the possibility of novus actus intervienes.

(ii) Where Y was hail and hearty and shortly thereafter was seen being mortally wounded by X, and dies immediately thereafter without any interference with the cause of events by a third party. In such a situation "it is competent for a Court, in the absence of medical evidence, to make a finding from other available and credible evidenceas to the cause of death," per Mapetla, C.J. in Rex v. Lesholoro Masupha & Others (supra) at page 2. In such a case there is no novus actus interviences.

(iii) Where X with premeditation proceeds to kill Y and thinking that Y is dead (but in fact is still alive although only unconcious) and disposes of Y's body and Y thereafter dies, these are not two separate acts but one continuous transaction. Hence there is no novus actus interviences.

(iv) Where X assaults Y. When Y is later found dead and there is neither credible evidence of what happened to Y in the interim period or any medical evidence as to the cause of death. The onus is on the Crown to exclude the possibility that Y might have died from some other cause. There is here a novus actus interviences.

(v) Where the unlawful conduct of X directly causes Y to kill himself. In such a case, despite the absence of medical evidence as to the precise cause of death, the Court can infer from the circumstances of the case that

X directly caused the death of Y.

There may be other combination of circumstances than those mentioned here. Whatever the nature of such combination of circumstances, the underlying principle remains and that is: it is for the Crown to exclude the possibility of the existence of novus actus intervienes. If it fails to discharge that onus then it will not have proved its case beyond reasonable doubt and the accused will benefit by that doubt.

The present case, it seems to me, falls in (i) above. There is evidence that the deceased was taken to Fatima clinic for treatment. But there is no evidence of any kind as to what treatment, if any, the deceased received at the said clinic. There is also credible evidence to the effect that the deceased was admitted at the Roma hospital for treatment of the same injury. He remained at the said hospital for a period of, at least, four (4) days. There is absolutely no evidence whatsoever as to the kind of medical treatment he received at the said hospital. A doctor from a different hospital performed the post-mortem examination, on the same deceased, at a different hospital and came to the conclusion that the cause of death was "acute subdural haematoma." In the absence of evidence excluding the possibility of novus actus interviens by the treatment the deceased received at the said hospital what then purports to be the cause of death, becomes speculative because no account is taken of what took place at the hospital and once that happens, it simply means that the Crown has not discharged its onus.

Since, therefore, the death of the deceased could not be attributable to the direct action of the accused, he could not be found guilty of the crime of culpable homicide. In law he had not caused the death of the deceased. There was, however, overwhelming evidence that the accused had committed the crime of assault with intent to do grievous bodily harm. He was accordingly so found guilty. I must just add, in fairness to Mr. Peete who represented the Crown that he entirely agreed with the Court's findings.

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Accused was sentenced to undergo imprisonment for a period of nine (9) months.

JUDGE.
17th day of February, 1980.

For the Crown : Mr. Foote
For the Accused : In Person.