CRI/T/42/79

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MAKHETHANG SETAI

REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 29th day of September 1980

On the 18th September 1980 the accused was found guilty of murder with extenuating circumstances. She was sentenced to one day imprisonment which ended when the Court rose. My assessors agreed with the finding and sentence. I said I will give my reasons later and these now follow :

It is common cause that Makhethang Setai(the accused) stabbed Manthofela Mamolai Agnes Moseki (the deceased) not less than twenty five times all over her body. One such stab wound perforated the right ventricle of the heart and caused her death. She pleaded not guilty to murder but offered to plead guilty to culpable homicide which plea Crown Counsel said he would accept on the ground that there was provocation by the deceased within the meaning of s.3(1)(b) and s.4 of the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959. Mr. Mda for the defence supported Crown Counsel that I bring in a verdict accordingly. That there was some degree of provocation was apparent from the face of the record of the Preparatory Examination but the law is also clear that not every act of provocation automatically reduces murder to culpable homicide. Section 3(2) of the Proclamation provides that s.3(1) shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation. I told Crown Counsel that the Court is not disposed to accept such a plea.

I had said in R. v. Tanki Moleleki CRI/T/18/78 dated

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28th November 1978 - unreported - that if on the face of the record of the Preparatory Examination, the crime allegedly committed was, or could be murder, the Court was not bound, after an accused had pleaded not guilty to the charge, to enter a plea of guilty to a lesser charge even if the prosecutor accepts it. The same applies to other charges. Mr. Maqutu, a leading attorney of this Court, was good enough to show me an article he has written for publication in a legal journal in South Africa in which he stated that my ruling was"a fundamental departure from the conventional Court practices in Southern Africa", and citing in support the later case of Tsematsi Mosolo v. R. C. of A.(CRI) No. 1 of 1979 dated 7th September 1979 - unreported - added that "the legal profession did not have to wait long for the final word to be said on the question of whether the Crown had the power to withdraw from the Judge and his assessors or Jury the determination of the factual position on a criminal trial by accepting a plea to a lesser crime or withdrawing the case altogether from the Court". I think he confused two separate issues. With respect, even at the risk that this Judgment will become longer than need be, my ruling on R. v. Tanki Moleleki, supra, (where Mr. Sello submitted that the Court was bound by the prosecutor's acceptance of the plea to the lesser charge) was in accordance with the practice of all the Judges of this High Court, with the decision of the Court of Criminal Appeal in R. v. Soanes 1948(1) All E.R. 289 and indeed with the decisions of various Appeal Courts in South Africa (R. v. Komo 1947(2) S.A. 508, R. v. Seboko 1956(4) S.A. 618 and S. v. Biljon 1964(2) S.A. 426). Furthermore when the prosecutor formally withdrew the charge against the second accused he was acquitted and discharged again following decisions in South Africa. The attention of the Court of Appeal in Tsematsi Mosolo v. R., supra, however was not drawn to comments on this subject made obiter in R. v. Tanki Moleleki, and having found that South African decisions make sense, as I originally did, unfortunately followed them. So be it but a golden opportunity for us in Lesotho to depart from an unsatisfactory state of affairs that has often led to bizarre results was lost.

There are two kinds of criminal trials, summary before the magistrates courts, and on indictment in the High Court either with a preparatory examination having been held or without. If the prosecutor in a magistrate's court, or in the

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High Court on a summary trial, withdraws a charge against an accused before evidence is heard there is no material upon which the magistrate or the Judge, as the case may be, can query the prosecutor's assessment and the court can assume that the decision was bona fide arrived at on the instructions of the Director of Public Prosecutions. When, however, evidence in either the magistrate's or the High Court has been heard (and a fortiori if all the evidence has been heard) or if there are depositions taken on a preparatory examination and the prosecutor, after plea, purports to withdraw the case or later stops the proceedings, a judicial officer can justifiably ask if the Director of Public Prosecutions has consented. (Indeed the Judicial officer may demand to see the written instructions: Gardiner & Landsdown, South African Criminal Law and Procedure 6th Ed. Vol. I p. 194). If he has not, opportunity would be given to the prosecutor to consult the Director of Public Prosecutions or a senior subordinate invested with his full powers. If no one is available leave of the Court must be sought. This is not tantamount to interference in the Director of Public Prosecutions's powers. After all no one obliges him to indict or prosecute. No Director of Public Prosecution(or Attorney-General or Solicitor-General) worth his salt would subscribe to the proposition that the outcome of a trial should depend on words uttered by his prosecutor, invariably without his authority or consent, sometimes in exasperation or frustration at what the prosecutor wrongly conceives to be an adverse turn of events, (as when a witness does not quite come up to this proof) and sometimes, perhaps more often, through inability to appreciate and assess all the evidence that is available to him on record. //

What follows the use of equivocal or ambiguous words by a prosecutor in Southern Africa is a judicial process almost always devoid of realism. An appeal Judge, or two or more Judges, then sit to debate, not whether justice between man and State has been administered (that aspect of it is ignored sometimes regretfully as Tsematsi Mosolo v. R. page 7 lines 11-14) but to ponder what bare words spoken in haste in the hustle and bustle of a trial were intended to mean. The record frequently does not contain those words. Affidavits are supplied or called for from the magistrate, the prosecutor, the attorney, and even spectators who were present in Court. Those of course are compiled well ex-poste facto the events and must essentially

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depend on the recollections of the various actors involved. We all know how infallible human memory can be. A word added here or omitted there becomes the vital issue. The record sometimes does contain the words but not the true atmosphere of the trial and this can seldom be gauged from the papers.

We read in the Southern African Law Reports that the Attorney-General is the "sole arbiter", or the "dominis litis" or that his powers are "unfettered" as if his basic position in criminal law and procedure is something quite different from that of the country that evolved the institution that now bears his name or something analogous to it. In a thousand years of Anglo Saxon criminal jurisprudence the Law Reports of England produced, as far as one is able to discover, two appeals: R. v. Soanes earlier referred to, and more recently R. v. Mervyn Broad(1979) 68 Criminal Appeal Reports 281, whilst (even if an allowance is made for the relatively recent reception) in only seventy years the Southern Africa Law Reports (and I include Lesotho, Botswana, and Swaziland) can boast of more than dozen on my count. How and why did it come about?

An analysis shows that Dove Wilson J set the ball rolling by some remarks he made in R. v. Kelijane 1909 NLR 435 at 445 that "stopping proceedings requires no solemn act in Court" but he was not laying down a universal proposition. In those days trials were conducted with a Judge and Jury. The Jury disagreed and were discharged and the accused was remanded in custody. The Attorney-General had two courses open to him: either to bring the accused for trial again when a fresh Jury would be empanelled or drop the prosecution altogether. One thing, however, is certain, viz, that he had to bring him at the same or the next sessions, if the written law so provided, or within a reasonable time if it did not. Our legal training and philosophy does not countenance keeping the accused hanging in the air as it were. The then Attorney-General did not bring the accused for retrial; on the contrary he ordered that he be released from the gaol in which he was kept. Two years later the accused was rearrested, incidentally at the instance of another Attorney-General. There was a most serious irregularity in that new depositions were taken before a magistrate who recommitted him for trial. The accused had already been committed, had already been indicted, and had already stood his trial. He pleaded autre fois acquit. It was held that the act

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of the former Attorney-General in ordering the liberation of the accused meant that of the two options open to him he had chosen to decline to prosecute. In the circumstances I cannot see what other decision could have been arrived at. It was the Attorney-General's own act that was in issue.

In Gillingham v. The Attorney-General and Others 1909 T.S. 572 the appellant had lodged with the public prosecutor a complaint, supported by affidavits, in which he charged the auditors and directors of a company with issuing false and fraudulent balance sheets or otherwise defrauding the shareholders of the company. The public prosecutor declined to prosecute and his refusal was confirmed by the Attorney-General who himself perused the papers and made his own decision. The application to compel the Attorney-General to prosecute at the public instance was as hopeless then as it would be now.

We then come to Willis v. The Solicitor-General 1926 EDL 321. The accused was tried on a charge of theft with Judge and Jury. The Jury disagreed and were discharged. Counsel withdrew the indictment so far as that session was concerned until the Solicitor-General decided whether or not the accused was to be retried before a fresh Jury. Three weeks later the Solicitor-General informed the accused that he did not intend to bring him to trial again. The Solicitor-General reneged and later argued, when challenged, that he was entitled to do that. "In other words" Graham J.P. asked himself at p. 324 "although the accused has been indicted, arraigned, pleaded, and has been before a Jury, the charge against him may be indefinitely postponed at the whim of the Solicitor-General, notwithstanding that this officer has determined that the accused is not to be tried". He held that the Solicitor-General was bound by his undertaking and I cannot see how any other court could have come to any other conclusion. The act was the Solicitor-General's own.

These were the major cases before R. v. Sikumba 1955(3) S.A. 125 which was described by the learned Judge as of "trivial nature" (at p.127) and which contained, apart from an entirely new set of circumstances, another irregularity concerned with final addresses. There were remarks by the prosecutor during the trial that he was "not pressing" for conviction and that there were "discrepancies" in the testimonies of the Crown

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witnesses. All the evidence had been heard. The magistrate had a different view. De Villiers J held that these words amounted to withdrawal of the charge by the Attorney-General. In support he quoted passages from the above three cases, with respect, completely out of context. The cases had nothing to do with ex tempore utterances or comments by a prosecutor, obviously without consent of the Attorney-General, made during the course of a trial, nor did they cover the question of authority of his representative. In the Kelijane and Willis cases, supra, the liberty of the subject was at stake after the Attorney-General and Solicitor-General had taken steps which they were enjoined by law to take; solemn steps indeed, but did not require the solemnity of an accused person being hauled before the Court to be solemnly told that he is free. That is all what Dove Wilson J and Pittman J had meant. In Gillingham, supra, the undoubted power of the Attorney-General to decline to prosecute was challenged but the case is no precedent on whether this power necessarily applies to all his representatives in court. The aggrieved party could of course have instituted a private prosecution.

In Willis we see at p 323 that when the Jury disagreed the prosecutor asked for postponement to the next session in order to enable the Solicitor-General, not himself, to make a decision, an indication surely that the power to withdraw or not to prosecute again could not be taken by him without consent or consultation of his Solicitor-General. In Gillingham Curlewis J was speaking (at p. 575) about the powers of the Attorney-General himself and so was Mason J at pp 574-577. The point, however, did not escape Innes C.J , who at p. 573, left the matter of representatives rather open. He said

> "It is not necessary to consider under what circumstances, if any, the Court would interfere with the direction of the public prosecutor under s.54 because in this case his refusal is the refusal of the Attorney-General. The papers have been submitted to the Attorney-General, who took the same view, and intimated that the matter was one in which he was unable to take any steps on behalf of the Crown".

In Scott v. The Additional Magistrate Pretoria and Others 1956(2) S.A. 655, Rumpff J (as he then was) appears to have finally bestowed upon a court prosecutor all the powers given to the Attorney-General Authorities which had dubious applicability to different facts thus became enshrined as a principle. The

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Courts were then invited to extend it to other situations as can be seen from such cases R. v. Seboko and S. v. Biljon, supra; and S. v. Ishmail 1970(2) S.A. 409.

A judicial reaction was bound to follow. Lip service was of course paid to the learned Judges but in R. v. Bopape 1966(1) S.A. 145 where almost the same words were used by the prosecutor as in R. v. Sikumba, supra, it was held (per Banks and Corbett JJ) that the intention of the prosecutor must be made "perfectly plain" and that what conduct amounts to stopping of the prosecution is a "question of fact". What is perfectly plain to one Judge may not be perfectly plain to another. In S. v. Suliman 1968(3) S.A. 219 we see in the use of the following words of Boshoff J at p. 224 a glimmer of light :

> "Section 8 (of Act 56 of 1955) empowers the Attorney-General or with his consent any person delegated by him to conduct any prosecution, to stop any prosecution commenced at the public instance at any time before conviction. Whether or not the Attorney-General or the prosecutor acting with his consent has in a particular case stopped the prosecution is essentially a question of fact depending on all the circumstances of the case."

The word "consent" however, appears nowhere either in the South African Act of 1955 nor in the Lesotho Act. I read Boshoff J's passage to mean that the representative must have the Attorney-General's consent to both acts, i.e. to prosecute and to stop the prosecution. Decisions of South African Courts are not binding on us needless to say and we are not placed in the same constraints as their own Judges. Bad decisions do not make good law. Furthermore the text of the two Acts are not the same. The legislature in South Africa, in its wisdom, decreed that the Attorney-General is subject to directions of the Minister of Justice, that is, that when the chips are down he can be controlled by the Executive. Not only have we rejected such a provision in Lesotho but on the contrary, in two of the Director of Public Prosecutions' powers our legislature, in its wisdom, has asserted the supremacy of the law over both the Executive as well as the Director of Public Prosecutions. Section 7 of the Criminal Procedure and Evidence Proclamation (as amended by Act 4/1975) confers upon the Director of Public Prosecutions three powers, viz,

> (a) to institute and undertake criminal proceedings against any person before any court (other than a Court-Martial) in respect of any offence alleged to have been committed by that person;

/(b).....

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority including any proceedings instituted before the commencement of this section; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority".

Subsection 5 of s.8 provides that in the exercise of the functions vested in him by subsection (3) - i.e. functions (b) and (c) of s.7 - he shall not be subject to the direction or control of any other person or authority. What do the underlined words, and particularly the word "any", mean or which person or authority does the legislature refer to? Surely not the Courts because this will make nonsense of the proviso immediately following which reads:

"provided that nothing in this subsection precludes a Court from exercising jurisdiction in relation to any question whether the Director of Public Prosecutions has exercised those functions (i.e. (b) and (c) of s.7) in accordance with law".

The word "any" when used in statutes, need not necessarily mean any. (See 1 Hawk Pleas of the Crown c 65 s.45; The Peerless 184 1QB; R. v. Cheltenham 1841 1QB 467; Re Ives (1886) 16 QBD 665 and a score of other cases cited in footnotes 9-13 in Maxwell on Interpretation of Statutes 11th Ed. p.79 and p.80, and also Selanus Mokubung v. L.E.C. - CIV/APN/86/80 dated 18th July 1980 - unreported). It is abundantly clear, at least to me, that the word "any" used in subsection 5 of s.8 refers to the Executive and its organs or other authorities, a situation quite in accordance with Constitutional practices and Conventions we have inherited from another country; which we have chosen to adopt; and which we have attempted to put into words, viz, that when the Attorney-General (or Director of Public Prosecutions) as a member of the executive, has to make a decision on a criminal matter touching upon the freedom of the citizen, he stands in an independent position vis-a-vis the Executive or any other person or authority. In Lesotho we have extended the citizen's rights further to enable him, if aggrieved by a decision of the Director of Public Prosecutions exercised under subsections(b) and (c) of s.7 to come to Court and have it reviewed (Tsematsi Mosolo, p.5).

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We have seen from the Judgments of de Villiers J in R. v. Sikumba and Rumpff J in Scott v. The Additional Magistrate for Pretoria, supra, that they have extended by default of argument or submissions, (the matter having been left rather open by Innes C.J. in Gillingham), the powers vested in the Attorney-General, to his representatives in Court, and other Judges followed suit until that is Boshoff J in R. v. Suliman, supra, tried (as I understand his passage already quoted) to put the brakes on. If the matter had been argued the submission no doubt would have been made that the Attorney-General (or the Director of Public Prosecutions under Lesotho legislation) cannot conceivably do everything himself, and he must perforce, delegate all his powers, as he is entitled to (s.6 and s.10 of the South African Act 56 of 1955 and our s.8(1) and s.13(1) as amended of our Criminal Procedure and Evidence Proclamation) to officers subordinate to him or to counsel or to public prosecutors. It could also I suppose, have been argued that Attorney-General's (or Director of Public Prosecutions's) court representative is his agent and possesses the "ostensible authority" to bind his principal. There is a fallacy in these arguments. The relative provisions of the 1955 South African Act do not warrant the inference that every representative has the implied power of the Attorney-General to initiate or to stop proceedings. (For an example of the former see R. v. Van Altena 1929 TPD 62). Section 8 speaks of the Attorney-General himself and s.10(1) which deals with the position of public prosecutors in inferior courts gives them power to prosecute but otherwise act on his instructions. In the United Kingdom the Attorney-General's roll has been put by Smith L.J. in R. (on the prosecution of J.D. Tomlinson) v. The Comptroller-General of Patents and Trade Marks (1899) 1 QB 909 at p. 914 as follows :-(quoted in R. v. M.Broad, supra):

> "Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a Judge a prosecutor may not ask the Judge to allow the case to be withdrawn, and the Judge may do so if he is satisfied that there is no case, but the Attorney-General alone (now the Director of Public Prosecutions) has the power to enter a nolle prosequi, and that power is not subject to any control".

It is absurd in my view, to assume, (with all my respects to de Villiers J and Rumpff J) that the Attorney-General has

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abdicated his responsibility to his local public prosecutors or other court representatives indiscriminately throughout the breadth and length of his province. In the vast majority of cases it is also factually incorrect The wide powers vested in the Attorney-General are delegated, I should imagine, wholly to only a selected few of his senior subordinates in the districts or counties or areas under his jurisdiction. These are the people who examine dockets, give directions to the police, sift witnesses statements, and decide, as they must in the first instance, whether sufficient evidence is at hand to bring an accused to trial. In borderline cases, no doubt they may collectively confer, or ultimately perhaps, refer the matter personally to the Attorney-General. When a decision to prosecute is taken however, the docket usually goes to other subordinates lower down the hierarchy, prima facie, only with instructions to prosecute. No other powers can be implied, unless the Attorney-General himself, or one of his senior subordinates invested with these powers is appearing personally. An Attorney-General, or a senior subordinate invested with all his powers, will never I hope say "my case is weak", or "my case is poor" or "I do not press for conviction" or "I don't think I should go on". If he is convinced his case is hopeless (or there is some other reason) he will tell the Court that he is withdrawing or stopping the prosecution altogether. When another prosecutor expresses the above sentiments in Court they constitute an admission that he has in fact no instructions to withdraw but is inviting the Court to approve a course which the Court may or may not accede to.

In Mervyn Broad v. R., supra, prosecuting counsel invited the Judge (Mars-Jones J) not only to accept the plea of not guilty of the accused and acquit him but went further and told him that he (counsel) held the view that the evidence at his disposal was insufficient to secure a conviction. The Judge queried counsel's assessment. Then followed this exchange(p.283):

Mr. Rogers : Well, my Lord I have made my views known on behalf of the Crown but it is subject obviously to your Lordship's view.

Mars-Jones J : Is this the Director of Public Prosecution' view?

Mr. Rogers : No, my Lord it is not. It is the Chester Prosecuting Solicitor. My Lord I have discussed it with the solicitors concerned and also with the officer in this case.

/Mars-Jones

Mars-Jones J . Yes but I must confess, having read the papers myself in some detail and analysed the evidence, I would be very reluctant to accede to the course you are proposing. I mean, after all is said and done, he is the oldest of these three defendants. He was no chicken. The other two are 19 years of age and they are driving through the night with this valuable bloodstock in a horse box and his defence is "I was just going for the ride". It is something that the jury ought to consider, it is not for you or me to decide whether there should be a prosecution.

Mr. Rogers : Yes my Lord, would you just allow me a moment? My Lord may I just say this, that I too had considered all the papers. I had taken a view. Your Lordship takes a different view.

Mars-Jones J thus refused his consent to no evidence being offered on behalf of the Crown against Broad. He had expressly been invited by counsel for the Crown to approve that course and he refused to do so. The accused was convicted. I have no doubt that in South Africa the appeal would have been upheld after this exchange.

It was contended on appeal that the Judge was wrong in law in directing the prosecution to proceed against the appellant despite prosecuting counsel indication to offer no evidence.

The Court of Appeal (per Roskill L.J.) after referring to R. v. Soanes, supra, said at p. 284:-

> "Mr. Carlile did not seek to challenge what Lord Goddard had said in that case. But he sought to distinguish it by saying that there the question was whether or not a more serious charge should be reduced to a lesser charge, whereas here the position was whether or not a charge, on which the Crown had shown themselves reluctant to proceed - to put it no higher - should nonetheless be proceeded with by reason of the learned judge's refusal to give consent for the charge to be withdrawn. Mr. Carlile submitted that the judge had no right to take the course which he took.
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> The Court invited him to cite any authority in support of that submission, but, not surprisingly, he was unable to find any and he had to accept in the end that his argument, if pursued to its logical conclusion, would produce a strange result. He accepted, if I understood him correctly, that if counsel for the Crown could be shown to have been obviously wrong in not proceeding, the judge could refuse his consent.

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"But he submitted that if it were arguable that counsel for the Crown were right, then even if it could be shown - viewing the matter objectively - that he was wrong, the learned judge, for some reason which I confess I could not understand, lost his right to veto the course proposed by counsel for the Crown.

We can see no logic in that submission. There is no authority for it. It seems to us to be against all principle. When counsel for the Crown invites the judge to give approval to some course which he wishes to take, the seeking of that approval is no idle formality. The judge in such circumstances is not a rubber stamp to approve a decision by counsel without further consideration, a decision which may or may not be right, and which, in the present case, in the view of each member of this Court, with respect to the experienced counsel concerned, was not one with which this Court agrees".

The learned Judge added (at p. 285) :

"In those circumstances to suggest that there was no evidence of dishonest handling seems to each member of this Court to be quite unreal. With all respect to Mr. Carlile's argument, we can see nothing wrong in what the learned judge did. On the contrary we think that the interests of justice required him to do that which he did. As Lord Goddard once observed some years ago, the interests of justice are not always necessarily synonymous with the interests of the defendant, and for the judge to have sanctioned the withdrawal of the charge at that stage would, in the light of the jury's subsequent verdict, undoubtedly have led to the injustice that a guilty person, as the jury thought, participating in an offence of this gravity, would have escaped conviction altogether. A judge's task is to hold the scales of justice impartially and to see that justice is done evenly and impartially between the Crown and the accused person.".

It is clear then -

(a) That counsel for the Crown does not merely by his appearance automatically assume the powers of the Attorney-General (or Director of Public Prosecutions)

(b) That the Attorney-General(or the Director of Public Prosecutions) alone (or possibly someone specifically delegated to exercise all his powers) can withdraw or discontinue proceedings,

and

(c) That the Judicial officer is entitled in the absence of this authority to withhold his consent from a prosecution being dropped or withdrawn if the circumstances warrant it.

Now back to this case before me.

Mr. Mda for the defence admitted all the evidence adduced

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at the Preparatory Examination including the accused's confession and thus the record therein becomes the trial record. Mr. Mda said he wishes to call the accused into the box to elaborate certain statements she made to the magistrate and this was allowed.

The crux of the problem before me, as agreed by both counsel, is whether on the facts as admitted and as elaborated further by the accused in the witness box amounted to murder or culpable homicide only. What emerged was as follows :-

The accused, some two years previously to the incident giving rise to these proceedings, was abducted from her home, Basotho fashion, by a man whose name we do not know, who took her to his own parental home built her a house there and lived with her as man and wife. Both his parents and her parents commenced negotiations and agreed to convert the abduction into a marriage. If I may digress here for a moment such an arrangement is quite common in Lesotho. The accused testified that her "husband" had not paid 'Lobola' or money in lieu of 'Lobola', not even a part thereof. There is thus, in Sesotho customary law, one element of a valid marriage missing (s.34(1)(c) Part II Laws of Lerotholi). She did, however regard him as her legal husband. We do not know whether he regarded her as a "wife" or merely as a mistress. He certainly treated her as if she was the latter as will be presently demonstrated. I will assume, in the accused favour, that he was in fact her husband. He used to work in Hlotse and had rented a room in a house in that town paying only occasional visits to his "matrimonial" home in the village. He did, however, send the accused house keeping money to maintain herself.

In June 1979 trouble between them started when he formed an association with the deceased. The deceased, who was a married woman, moved into his room at Hlotse, and he stopped remitting money to the accused. She proceeded to see him at Hlotse on or about the 28th October, 1979. She found the deceased there. She was not welcome. She tried to persuade her husband, in vain, to give up his association with the deceased. He told her on one occasion that the deceased gave him more sexual satisfaction than she did. As for giving her money for the fare back he replied that she managed to raise money to pay for the fare to come to Hlotse and she must herself find some to return home. To add insult to injury, during the three nights

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which she spent there, her husband slept with her on one side and the deceased on the other. It is clear that the accused found the situation intolerable.

Before sunrise on the 31st October 1979 the husband left for work leaving the two women in the room. Only the accused is alive. She says that when the deceased got up she started singing "mocking" sesotho songs, which included one called "Some women are born with a vagina on the left" and "I will kill a stillborn child and go to gaol". I accept my assessors advice that these songs are highly offensive and revoltingly indecent. The accused says that it was these songs that provoked her, not his adultery although she was annoyed with that as well. She grabbed a knife which she saw before her for food purposes. The knife was open. She got hold of it and as the deceased was bending to wash her face she started stabbing her. She does not remember how many times. She adds that the deceased turned back and tried to take the knife from her. (I doubt if this is true for she suffered no injury and complained to no one of any). She continued stabbing. When she finished she washed her hands and proceeded immediately to the police station and surrendered herself.

That is her version and she says she did not kill intentionally. She was consumed with rage which she was unable to control. But there was a man living in the room next door. He is Makalo Qalo (PW2) who testified that as he was still asleep he heard a sound from the room occupied by the deceased and the accused. The deceased was shouting for help. He rose and since the door between the rooms was open he saw the accused stabbing the deceased. He ordered her to stop. When he emerged at the doorway the accused left the deceased for a moment and slammed shut the door in Qalo's face. He begged her to open it but she refused. He ran to the charge office to inform the police but by the time he and the police returned the deceased was dead.

On these facts it does not seem to me that the subjective intent to kill was lacking. Assuming the accused was a wife in a customary law sense, she has certainly not come upon the infidelity of her husband suddenly. She knew about it as she admits in June 1979. In the four nights that they spent together she knew she had been rejected finally. Whilst no doubt the "mocking" songs did provoke her, it was merely a continuation of something that she knew about for sometime. The songs were merely

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the match that ignited fire already within her. It is an understandable fire, but she has not, in my Judgment, acted in such great heat of passion as to negative the specific intent (mens rea) to kill. She ignored all entreaties to desist, finished the job, cooly washed her hands, and proceeded to report herself to the police. The number of wounds inflicted in an indication that her act was quite out of all proportion to the provocation great as it was.

The law, at any rate since R. v. Krull 1959(3) S.A. 392, seems to be clear, viz, that provocation does not reduce an intentional killing to culpable homicide. Upon a charge of murder where there is evidence of provocation only one inquiry need be made, viz, did the accused subjectively intend to kill? If the answer is in the affirmative it will be murder, possibly with extenuating circumstances. If the intention to kill was negatived by the provocation, it may be culpable homicide. (See Berchell & Hunt South Africal Law and Procedure Vol. II p. 243 and p.245 and p.246 and compare S. v. Dlodlo 1966(2) S.A. 401).

For the reasons that I have endeavoured to explain and applying the principles enunciated in the above cases, we found the accused guilty of murder with extenuating circumstances. Extenuating circumstances are apparent for the text of this Judgment and I need say no more about the subject.

T S Potter

CHIEF JUSTICE
29th September, 1980

For Crown: Mr. Mdhluli
For Defence: Mr. Mda