

## IN THE HIGH COURT OF LESOTHO

In the Matter of :

✓ R E X

v

LIRA MOLELEKI

J U D G M E N T

Delivered by Hon. Mr. Justice F.X. Rooney on the  
14th day of November, 1980.

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The accused stands indicted for murder. It is not in dispute that on the 9th December, 1979 near Ha Makoetje, he caused the death of Ts'eliso Moleleki. Much of the evidence submitted on behalf of the Crown remains unchallenged. Most of the depositions taken at preparatory examination were admitted as evidence by Counsel for the accused. The accused, who gave evidence in this Court does not dispute that he killed the deceased.

The background of the dispute is as follows:- The accused and the deceased were cousins. The accused worked in the mines while the deceased carried on certain businesses in Lesotho. The accused claimed that he had assisted the deceased financially in the establishment of his business. There does not appear to have been any formal arrangement between the parties and it is not clear whether the moneys given by the accused to the deceased from time to time were intended to be loans or investments. Early in December the accused approached his brother Leqoboko (P.W. 3 - PE) and asked him to call a gathering of the Moleleki family. At the family meeting the accused said that he was in partnership with the deceased in a cafe business. He said that he had sent the deceased R60 from Johannesburg to enable him to build a cafe and a further R200 for stock. The accused alleged that when he came home, he found that Tseliso has bought a motor vehicle which was registered in his own name. He found that he controlled the two cafes. The deceased told the gathering that he knew nothing about the account's money and said that all that he ever received from him was 20 cents. The deceased left the meeting and the family were unable to make any decision.

'Malineo Moleleki (PW 4 - PE) the widow of the deceased was also at the family meeting. She agreed in general with Leqoboko's account of what took place. She said that the cafes belonged to her late husband as far as she knew. The accused had contributed R200 for stock in June 1978. At the meeting she heard the accused say that he would kill the deceased if the latter failed to kill him. However, I am advised that this remark should not be taken too literally in its context, and that what it amounted to was a declaration of enmity and a challenge to the deceased.

The medical evidence was given by Dr. Chale Moji (PW 3). He performed a post mortem examination on the body of the deceased at the Queen Elizabeth II Hospital, Maseru, on the 11th of December. He found that death was due to head injuries. There was a depressed fracture of the left parietal temporal region and another depressed fracture on the right frontal temporal region. These were the fatal injuries. In addition, there were three sharp edged wounds on the right scalp varying in size from 2 to 3 inches. There was bruising on the scalp on the left parietal occipital area with extracranial haematoma. The witness said that the depressed fractures were probably caused by a blunt object such as a stone. As to the three sharp edged wounds, Doctor Moji described them as clean incised wounds with clear edges. They were not ragged wounds and he believed that they had been made with a knife or an axe or a sword. When it was suggested to this witness by Counsel for the accused that the cut wounds could have been caused by a stone with a sharp edge, Doctor Moji replied that in his experience sharp stone wounds had ragged elements, unlike the wounds observed on the body of the deceased.

The 9th of December, 1979 was a Sunday. The deceased attended morning Mass at St. Roderigue's church. On his way home from the service he was accompanied by two young girls, Lisebo Khathabe (PW 1) and Lipolelo Lets'oala (PW 2) who were both in his employment. Lisebo said that the accused came upon them from behind. He was carrying a stick Exhibit 1 and a clasp knife with a brown handle. The accused struck the deceased with his stick on the shoulders. The deceased ran on ahead and the accused hit him again. She saw the deceased turn back, at which point the witness decided to make off for her home and she did not witness subsequent events.

Gross examined by Mr. Ramolibeli, this witness said that she had worked for the deceased as a domestic servant for two months before he met his death. She was questioned closely about the knife which she said the accused held in his hand. She maintained that she saw it and was able to describe it. She did not hear the accused saying anything to the deceased before he attacked him.

3/ Lipolelo told .....

Lipolelo told the Court that she was employed by the deceased as a clerk at one of his cafes. She also said that the accused came from behind and that he was running. He held a knife in his left hand which she described in similar terms to Lisebo. She went on to say that when the accused reached them, the deceased turned and said, "where is he going?" The accused hit the deceased with his stick on the shoulders. The deceased ran ahead and turned back. This witness followed. The deceased left the path and went in the direction of a village. He slipped and fell. Lipolelo described how when the deceased tried to rise up again the accused pressed him down, and reached for a stone. The accused then proceeded to strike the deceased with the stone on the right side of the head above the ear. He hit the deceased repeatedly with the stone. He took his knife and stabbed the deceased with it.

The deceased was struggling, but, the accused stabbed him on the head about four times. While doing this he was crouched over the deceased. When the accused had finished he shook the deceased. Then he picked up some big stones and put one on the chest of the deceased, another on his shoulder and a third on the groin. According to this witness, the accused chased after her with his stick, but, she easily out ran him and set off to report what she had seen to a Police Mobile Unit stationed near St. Roderigues. When the witness returned to the scene with the police, the accused was no longer there.

In cross-examination Lipolelo did not depart from her evidence. She did not hear the accused mention money before his attack on the deceased. She did not hear any provocative words. She agreed that the accused appeared to be very angry. Although she did not run away from the scene, she screamed for help, but, none came. She thought that the deceased was struck about 5 or 6 times with the stone. She said that when the accused was using the stone in that fashion, he left his knife on the ground.

Before considering the evidence given by the accused himself at the trial, I may mention that it appears from the evidence recorded at <sup>the</sup> preparatory examination and admitted by the accused at this trial, that shortly after the assault the accused came upon Leqoboko Moleleki and told him that he had killed Ts'eliso. The accused said that he was on his way to surrender at the police station. He also met the wife of the deceased. The accused was carrying a stick under his left armpit. He appeared to be in a rage, he said to her "It is my labour or energy". When 'Malineo asked him whether there was no law to resort to, the accused replied that he could do the same to her, which the

witness understood meant that he might assault her as he had assaulted her husband.

There was evidence from 'Mamabela Makoetje (PW 8 -PE), the Chieftainess of Makoetje's. She said that the accused called at her home during the morning of the fatal Sunday and told her that he had killed Ts'eliso Moleleki. He was carrying a stick similar to Exhibit I. He asked the Chieftainess to write him a letter introducing him to the police at Morija, but, he left before she could oblige him.

The Police under the command of 2nd Lieutenant Thamae (PW 6 - PE) arrived at the scene where the body of the deceased lay. The Lieutenant found three stones placed on the body, one in the groin and two on either side of the chest. The stones could not be lifted with one hand. He examined the wounds on the body and arranged that the corpse be taken away. Unfortunately, Lieutenant Thamae did not take possession of big/<sup>the</sup> stones found on the body or if he did so he did not produce them at the preparatory examination.

The accused told the Court that he was a married man with three children. Sometime ago his wife left him and now lives with her parents. He said that in his youth he did not enjoy good health. He suffered from a fainting disease and severe headaches. He went to work in the Orange Free State mines in 1964. He had an epileptic fit while at Welkom. He and his cousin (the deceased) had a long and friendly association. By arrangement while one worked at the mines the other attended to the ploughing at their home. In 1974, at the request of the deceased, the accused returned to work

at the President Steyn Mine. The accused said that the deceased bought cattle and a horse for him and they were in partnership in a cafe business. In 1975 the accused told the deceased to apply for a business site and he promised to send money to buy stock. The deceased obtained the site for a cafe at the village of Kali. The accused gave him R60.

When the deceased informed the accused that the building had been erected the accused sent him R200. This was towards the end of 1975. The accused had saved this money and was intended for the purchase of stock for sale at the cafe. In the due course the deceased reported that the business was flourishing. In 1976 the deceased showed the accused a Savings Bank Book in which a credit of R8,000 was shown. The book was in the name of the deceased. There was some discussion about the division of this money, but, the deceased said that he had decided that they should buy a van for business purposes.

5/ The accused agreed .....

The accused agreed to this. While he was working at Welkom the accused looked around for <sup>a suitable van.</sup> a Ford van with canopy. He asked the deceased to come and inspect this vehicle but, the deceased maintained that the price required for <sup>the</sup> van was too high. The deceased wanted to purchase a Toyota available at Ladybrand, for R3,600. When the accused returned to Lesotho in 1977 he saw the van which the deceased had bought. The deceased told him that his wife, children and sales staff had helped themselves to money and stock from the business and that he had removed a sum of R150 from the accused's own savings account at the Standard Bank. The accused produced to the Court this account book which showed that on the 9th January, 1978, R170 had been drawn from his account by the deceased without his authority. The accused remonstrated with the deceased. When the accused asked the wife of the deceased about the alleged thefts from the business she denied all knowledge of it.

The accused gave a further R120 to the deceased in 1978.

The accused said that the deceased never attempted to repay any of the money that has been advanced to him. He refused to allow the accused to make use of the van. Gradually relations between the two men became strained. It was because of the attitude adopted by the deceased that the accused called the family meeting already referred to. At this meeting the deceased told the gathering that all he had ever received from the accused was 20 cents. The accused was most unhappy at what he considered to be a provocation. The deceased would not answer further and left the meeting.

The accused said in evidence that some days after the family meeting he spoke to the deceased at his home. He told him that they should now separate and that the deceased should take his belongings and depart from the family house. The deceased did so. The two men were no longer on good terms. The accused maintained that he was entitled to R4,000 and the vehicle as his share in the enterprise.

In his account of the events of the Sunday 9th December, 1979, the accused told the Court that he did not know that the deceased had gone to Mass that morning. The accused was on his way to his cafe at Kali's village. It was by chance that he met the deceased returning from the church with the two witnesses Lisebo and Lipolelo. As he approached, he heard the deceased say "Where is this one going with a stick?" This to the accused was a clear reference to him and he felt that he was being referred to contemptuously. The two girls laughed at the remark. The accused said that he then addressed the deceased

6/ and asked ,.....

and asked him if he was seriously refusing to give him the money he owed. The deceased asked him what he meant. The deceased was laughing and the accused felt that he was provoked. He tried to strike the deceased who warded off the blow. The accused denied that he was carrying any other weapon, but, the stick. He said that the deceased pushed at him and there followed a struggle for possession of the stick. The accused retained his hold on the stick and the deceased ran away. The accused chased after him. When he caught up with him he hit him and knocked him down. The accused went on to say ' I picked up a stone and hit him on the head with it. The stick had fallen. I hit him three times. I had nothing else to use. I found myself doing it. I admit I killed him. It was not intentional. I deny I held a knife or I stabbed him. I did not chase Lipolelo. I did not place stones on the body of the deceased."

Cross examined by Mr. Mdhludi for the Crown, the accused said that he was provoked because the deceased refused him his money. He wanted a promise from the deceased which he had failed to obtain at the family meeting. He subsequently ejected him from the family home. The accused denied that he had intended to satisfy himself by assaulting the deceased. He claimed that he only hit the deceased on the right side of the head three times with the stone. He used only one hand with the stone which had a sharp edge on it. He agreed that the injuries inflicted were extensive. He was unable to explain all the injuries mentioned in the post mortem report. He agreed that before he was assaulted the deceased did not have any injuries. Eventually the accused acknowledged that he must have hit the deceased on both sides of the head. He continued to deny that he inflicted the sharp wounds described by Doctor Mofu. He suggested that these wounds were caused by the stone.

The accused told the Court that when he left the deceased, the latter was prostrate on the ground, but, he appeared to be still alive. He did not look for assistance for his victim. He went to report what he had done as he knew that Ts'eliso would die on account of the assault. He denied placing stones on the body and he said that he disputed the evidence of Lieutenant Thamae. Pressed on this point, the accused was unable to deny that the Lieutenant found the stones. He was unable to explain where they came from. He agreed that there was no one else in the vicinity. In regard to his state of mind at the time of the assault, the accused maintained that he was not aware that he was inflicting serious injury upon the deceased. However, he agreed he thought he was killing him because he had provoked him and he would not give him back his money. He agreed that he had a grudge against the deceased. The accused admitted that

7/ he could have .....

he could have gone to Court to claim the money which the deceased owed him. He laid the blame for death of the deceased on the latter's arrogance. He agreed that when he reported what he had done, he said that he had killed the deceased and not that he had merely injured him.

Now it is clear from the above that in this case there is little dispute about the facts. The difference between the Crown case and that of the accused is a narrow one. In particular the accused disputes the evidence that he had in his possession or that he used a knife, that he shook the deceased after the assault to satisfy himself that he was dead and that he placed stones on the corpse. There is no reason why I should not accept the evidence of Lisebo and Lipolelo as to the knife they both saw in the possession of the accused. No knife was subsequently found. But, the presence and the use of the knife is supported by the testimony of Doctor Moja who found wounds which were clearly inflicted by a sharp instrument such as knife and which could not in his view have been caused by a stone. There can be no doubt that the accused placed the stones on the corpse of the deceased. This action is not easy to explain, but, it could have been symbolic. It supports the view that when the accused left the scene he knew that he had killed his man. Immediately afterwards, the accused told people that he had killed Ts'eliso. I am satisfied that he knew that he had killed the deceased.

The prosecution has to prove not only that the accused killed the deceased, but, that the killing occurred in the absence of such provocation as would reduce the crime to one of culpable homicide. It must further prove that the killing was intentional. As to provocation the position in Lesotho is governed by the Criminal Law (Homicide Amendment) Proclamation 1959. This provides in Section 3 (b) that a person is guilty of culpable homicide only if he does the act which causes death in the heat of passion caused by sudden provocation, as defined and before there is time for his passion to cool. Section 4(a) defines provocation as any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

The behaviour of the deceased at the family meeting held a few days before his death may well have been considered by the accused to be provocative. However, I am satisfied that in the interval there was sufficient time for his passion to cool. I used the word "may" above advisedly as I am not at all

satisfied that the mere refusal to acknowledge a debt or other obligation coupled with the refusal to listen would in normal circumstances amount to provocation in law.

The only immediate action of the deceased which need to be considered in the light of the law is the remark which he made when he first saw the accused approach. This was to the effect "Where is this person with a stick going?" Even if his words were spoken in a sneering manner which the accused might well have found offensive, I am unable to hold that they constituted a wrongful act of insult of such a nature as to be likely to deprive the accused of his power of self-control. The attitude of the deceased was no more than could be expected in view of what had gone before. I am satisfied therefore on the evidence that no provocation was offered by the deceased to the accused before the attack.

There remains to be considered the intention of the accused at the time he had assaulted the deceased. I have found that he was in possession of a stick and a knife. During the course of his assault he used both the stick, the knife and a stone. It is clear from the medical evidence that the fatal injuries were inflicted by the stone. It is unfortunate that no stone was produced to this Court which ought to have been identifiable in view of the amount of blood shed by the deceased. The blows were aimed at the head with sufficient force to lead to fractures of the skull. The accused admitted that he had a grudge against the deceased because of the refusal of the deceased to repay him money which the accused says the deceased owed him. The accused was the aggressor throughout and the deceased showed no resistance. He tried to get away from his attacker. Before leaving his victim, the accused satisfied himself that he was dead and placed the stones upon the corpse as if he were being buried. The accused reported his killing of the deceased very soon afterwards without making any attempt to procure assistance. Although he said that he only thought that he had injured the deceased he admitted he knew that he had injured him fatally.

The overwhelming effect of the evidence is that it leaves me in no doubt that the accused assaulted the deceased in a brutal fashion. He was consumed by hatred and a desire for revenge. His intention was to have done with the deceased once and for all. I have no doubt whatsoever that the accused intended and did in fact achieve the death of the deceased. The only possible verdict is one of the murder as charged and I find him guilty accordingly.

F.X. ROONEY  
JUDGE

14th November, 1980.

For Crown, Mr. Mdhludi  
For Respondent: Mr. Ramodibedi  
Postponed to 24th November, 1980.



✓  
RULING ON EXTENUATING CIRCUMSTANCES

I have felt obliged to take time to consider the question of extenuating circumstances in this case. I have received full submissions from both Counsel on this question. The fact that Crown Counsel, as well as Counsel for the defence, argued that extenuating circumstances exist has not relieved me from the burden of making a specific finding on the issue. In Matsoai and Others v Rex 1967 70 L.L.R. 70, the Court of Appeal held that when extenuating circumstances are found to exist the trial judge must specify what the extenuating circumstances are.

This was a revenge killing in which the accused murdered the deceased because the latter refused to pay the accused monies which he believed was owing to him. It has been said that the question of extenuating circumstances is a moral rather than a legal one (R. v Biyane 1938 EDL 310, R. v Fundakubi 1948 (3) SA 810. Lawyers in general do not normally possess the training which qualifies them to make moral pronouncements. The validity of a moral judgments must depend upon the knowledge available to the person who makes it. In a court of law the knowledge of a judge of a case is circumscribed by the law of evidence, and the frailty of human testimony. The best that can be achieved must fall far short of perfection

The problem can be demonstrated by the following example. In R. v Hugo 1940 WLD 285 Schreiner J. (as he then was) said "I think I should add this, that a sense of injustice, even though well founded, cannot by itself constitute an extenuating circumstance. Grievances must be remedied in lawful ways and must not be set up as an excuse, however slight for violent acts." In R. v. Von Zell 1953 (3) SA 303 at 313 Van den Heever J.A. said about the above quoted statement. 'Schreiner J was not expounding the law, but passing what was essentially a moral judgment and in doing so eliminated certain considerations". Thus, the views of one judge on the moral considerations to be applied do not necessarily bind another. It is not possible to say that because the accused in this case was motivated by a sense of injustice and had less drastic remedies at his disposal, his action was entirely blameworthy.

That is not to say that all precedents should be excluded from consideration. It is for instance well established that a belief in leads/ witchcraft which/to the commission of the murder may be considered an extenuating circumstance. (R. v. Fundakubi (supra)). In the same case it

was held that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration. The essential problem remains that it is not easy to apply legal principles to moral considerations.

The accused in this case could have sought redress for his grievances against the deceased by resort to the courts. But, he did not choose to do so. In the case of Jomina Mofubelu v. R. CRI/T/5/76 (unreported) the appellant was found guilty of murdering her parents-in-law by poisoning them. Her crime was described by Milne J.A. as most wicked and terrible. It was a premeditated murder. She had suffered at the hands of her victims to the extent that she was expelled from her home and one of the deceased persons refused to return to her certain kitchen utensils. The family was unsympathetic to her complaints but, she could have taken her case to the Basotho Courts. Nonetheless, the Court of Appeal, taking into account the subjective state of mind of the accused, found that there were extenuating circumstances and that those related to the injustices to which she had been subjected at the hands of the people she had killed.

Over a number of years, the accused in this case worked in the mines and achieved modest savings. These he entrusted to his cousin, the deceased, with whom he had an informal business arrangement. On his return from the mines he found that the deceased, who was a younger man, was running two cafes and was making use of the van. Despite their former friendship, the deceased appeared to the accused to be enjoying the exclusive benefit of the businesses he has established and was unwilling to make any account to the accused. The accused called a family meeting to express his grievances and to obtain redress. At this meeting the deceased adopted a contemptuous attitude towards the accused which the latter resented. Because of the manner in which he was treated, he expelled the deceased from the common home.

The accused said in evidence that he came upon the deceased who was returning from church, quite unexpectedly. The deceased passed a remark which the accused found offensive. When he attacked the deceased and beat him to death, the accused on his own testimony was consumed with anger and resentment because of what he believed the deceased had done to him. It was in that frame of mind that he committed this crime. Immediately afterwards he surrendered himself to the authorities.

3/ I am persuaded .....

I am persuaded by the circumstances that notwithstanding the brutal nature of the attack which he made upon the deceased, the accused's moral blameworthiness for what he did is in some degree lessened. There are therefore extenuating circumstances in this case which obviate the necessity of passing upon the accused a capital sentence.

SENTENCE

Fourteen years imprisonment.

F. X. ROONEY

JUDGE

1st December, 1980.