

IN HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

MASANKOANA MAFA  
BOFIHLA MAKALANE

J U D G M E N T

Delivered by Hon. Justice F.X. Rooney on  
the 9th day of December, 1980.

On the 21st of January, 1980, 'Magauda Mashea (P.W.5) who is the wife of one Mofuli, was sleeping with Rafeufau Sefali, now deceased. Her husband had left for the mines in the Republic of South Africa on the previous day. The two accused entered the house and roused the lovers from their bed. They chased them outside and attacked Sefali with sticks. They struck him on the head and smashed his skull. The sticks used (Exhibit 1 and 2) are made of some hard and heavy wood. The deceased sank to the ground, never to rise again.

The two accused immediately went to a house nearby in which 'Magauda's father-in-law Ramoetsana (PW 2) was staying and they invited him to come and see what they had done. Ramoetsana went and saw the deceased thrashing about on the ground at the back of the house. He took steps to report the incident to the village chief while the two accused returned to their homes. At about mid-night the unfortunate Sefali died.

Dr. Verkuye (PW 1) who on the 22nd of January, 1980 at Mafeteng performed a postmortem examination on the body of the deceased found that death was due to brain damage. The nature of the injuries which he saw on the corpse convinced him that the deceased had been struck with a battle axe. Although this impression proved not to be correct, it underlines the severity of the damage caused by the sticks used by the two accused. There was a wound 1 centimeter behind the right ear under which the skull was depressed. There was another wound on the top of the head which appeared to have been caused by two blows which crossed each other and under this there was a depression and fracturing of the skull over a large area. In addition to the above fatal injuries, there were smaller wounds on the side of 2/chin, a broken ....

chin, a broken jaw, two small wounds in the vicinity of the right eye, bruising on the right hip, the left side of the back and abrasions on the lower abdomen, left fore leg and forehead.

On the 23rd of January, 1980 the two accused appeared before Mr. Nkuebe a magistrate at Mafeteng. They made in his presence voluntary statements which were admitted in evidence at the trial by their Counsel. These statements read as follows :

"Mafa Mashea duly S.S. :-

On the 19.1.80 there came one man called Mofuli to me during the day time telling me that there is one man troubling him at his place because of his wife then begged me to go to his place to warn that person on his behalf. When he was asking me that we were only two. Then in the night of the 21.1.80 I and Bofihla went to Mofuli's place when we arrived at Mofuli's home, we then opened the door of the house, we found Mofuli's wife who is 'Magauda still sleeping with one called Mphau, then immediately after we have entered they woke up then I and Bofihla hit that one Mphau with sticks, then Mphau tried to get out but, I went out of the house and I hit him with a stick, he fell down. When he was still lying down Bofihla also came and beat him with a stick, as he tried to rise up, he again fell down. Then we delivered several blows, it was then that 'Magauda ran away, but Bofihla went to her and came along with her. When he arrived with her, 'Magauda said to us we should not kill him, at that time we had already stopped beating him. After we finished beating Mphau, we then went to Ramoetsana. I, Bofihla and 'Magauda woke Ramoetsana and begged him to go and see what had happened at his place. Then we went back to the place where we left Mphau still lying down with Ramoetsana. On our arrival Ramoetsana asked us what had happened to Mphau, then we told him that we had found him sleeping with 'Magauda, then we hit him, then Ramoetsana went to wake the chief together with other men in the village. They came to where Mphau was still lying. After that I and Bofihla went to 'Malebohang, we then returned to our place that night. On our arrival, I reported to one called Nkutu our actions what we have done, then the following day I again reported to my mother what I did, then afternoon of 22/1/80 policemen arrived and arrested me and Bofihla and brought us to Mafeteng charge office. When we went to Mofuli's home, he was not there, having gone back to the mines on the 20/1/80."

"Bofihla Makalane duly S.S.:-

On the 19th January, 1980 Mofuli came to me with Mashea saying we should go to his home, there is one man inlove with his wife, then if we could find that man we should beat him. Then on the 21/1/80 at night we went to Mofuli's home, we found one Mphau sleeping with Mofuli's wife, who is 'Magauda, then we lashed him with sticks. After we had lashed him, we went to wake grandfather Ramoetsana, and went to show him where

Mphau was lying. Then Ramoetsana woke chief, then chief raised an alarm to other men of the village, and came to see what was seen by everybody. Then I and Mashea went to 'Malebohang's place and returned home that same night and slept. Then on the 22/1/80 afternoon there came policemen and escorted us to Mafeteng charge office. When we went to Mofuli's home, he was not there, having already gone back to the mines on the 20/1/80."

This crime was instigated by Mofuli, who has taken the precaution of remaining in the Republic of South Africa since his departure on the 20th January. The two accused are both very young men. According to Maqabelo Mashea (PW 3) the mother of the first accused her son was born on the 4th of June, 1962, while his co-accused was born on the 26th of May of the same year.

Mofuli had fought with the deceased in 1979 because of the latter's affair with his wife. In proposing to the two accused that they should endeavour to solve his problem, Mofuli knew that they were two impressionable young men anxious to defend the honour of the family. In this connection, it should be stated that the first accused is the son of the younger brother of Ramoetsana and the second accused is the son of one of Ramoetsana's uncles.

The position of Ramoetsana in this affair is not above suspicion. He was aware that his daughter-in-law was in love with the deceased, he had discussed the matter with his son Mofuli before his departure for the mines and it was to him that the two accused reported as soon as they had carried out the mission entrusted to them by Mofuli. Ramoetsane did not apprehend the two accused and allowed them to go to their homes. He suggested that when the two accused reported to him they were drunk.

In her evidence 'Magauda said that she was struck several times on the shoulders and on the waist by accused No. 2 as she ran away from the house.

Both accused gave evidence. They were frank with the Court and they did not deny that they assaulted the deceased. The first accused said that Mofuli asked him to frighten the deceased away from his home. Mofuli proposed that they should do this by beating him up so that he would fear to come visiting 'Magauda again. The first accused agreed with the suggestion because he regarded Mofuli as an elder brother and a senior member of the family in both age and status. Mofuli's approach to the two men was made on the day before he

left for the mines. The first accused spent the following day threshing wheat. He and his co-accused went to a place near their village to drink joala. When they both thought that they had had enough to drink, they decided to go and deal with 'Magauda's lover. The first accused said that although he was staggering a little on account of the beer consumed he could see well and his mind was clear.

In cross-examination the first accused admitted that he knew the deceased fairly well and that he was friendly with him. The decision to go and visit 'Magauda's house where the deceased was expected to be, was made after they had had their drinks. The first accused admitted that he hit the deceased twice. The deceased fell down after the first blow and the second blow was struck as the deceased tried to rise up again. Both blows landed on the middle of the deceased's head. All this was done to frighten the deceased. The first accused also admitted striking the deceased on the body.

The second accused said that Mofuli told them that they should beat up the deceased and scare him so that he would not longer visit his wife. He denied that Mofuli said that they were to kill the deceased. They agreed to oblige Mofuli, but they did not fix any definite time for the enterprise. The second accused took the line that in beating up the deceased so severely they had exceeded their instructions. He said that the liquor they had consumed had caused them to go too far.

The second accused alleged that he knew about the affair between 'Magauda and the deceased. On one occasion he had come upon the couple in the bush having sexual intercourse.

The second accused said that he and the first accused discussed the project on the Saturday afternoon. The two young men planned to beat up the deceased and tell him not to come to Mofuli's place any more. They did not decide as to when precisely they would carry out this operation. That decision was made on the Monday, before they set out to have a few drinks. However, the second accused denied that they drank to seek courage. The deceased was a sturdily built man. The second accused admits having struck the deceased only once behind the ear. He did not aim at this spot. He struck out at the deceased in a general way and the man turned his head away and so he was struck in that region.

As there is no dispute as to what the accused did, the main purpose of this inquiry is to consider their intention at the time they attacked and killed the deceased. They appear to have acted in concert and with a common purpose. They were acting at the request of Mofuli to defend the honour of their family and expel an intruder. They fortified themselves with a quantity of liquor. They came in the middle of the night to a house in which they knew the deceased and his mistress would be found. This circumstance rules out of consideration any possibility that the conduct of the deceased amounted to a sudden provocation. Having found the deceased where he was expected to be, the two accused hit him with heavy sticks and inflicted upon him serious injuries from which he died shortly afterwards. Both accused saw that their intention was merely to beat up the deceased and thereafter warn him to desist from his love affair with 'Magauda. But neither man said anything to the deceased. They beat him about the head with their heavy sticks. They must have known that they were using dangerous weapons to inflict blows on the deceased and that there was a possibility that one or other of the blows struck by either of them could prove fatal. I do not think, having regard to the evidence adduced at the trial, that there is any reasonable possibility that the accused did not foresee that they might kill the deceased. I am quite satisfied that when they attacked the deceased they knew that there was a risk that he might be killed, but, they were reckless of the consequences of their joint action.

When the accused saw what they had done, they did not attempt to render any assistance to their victim. Instead they went at once to report to Ramoetsana.

I am satisfied that both accused in this case are guilty of murder as charged and I bring in a verdict accordingly. My assessor agrees.

The Court found extenuating circumstances for the following reasons :

- (1) That the accuseds are young and immature.
- (2) That they were incited to commit the crime by an elder member of their family.
- (3) That they may have considered themselves obliged to comply with the wishes of the wronged husband of 'Magauda.

- (4) That their motive was to defend the honour and dignity of the family.
- (5) That both accused had consumed liquor which may have impaired their judgment

Findings

That the first accused was born on the 4/6/62

That the second accused was born on the 26/5/62.

Sentence :

Both accused are sent for detention in a Juvenile Training Centre subject to the provisions of the Prisons Proclamation.

F. X. ROONEY

JUDGE

9th December, 1980.

For Crown : Miss Surtie

For Defence : Mr. Mda.