

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

NGAKA LEHLOHONOLO

J U D G M E N T

Delivered by Hon. Justice F.X. Rooney on the
16th day of December, 1980.

" The accused stands indicted for murder. It is alleged that on the 3rd of November, 1979 at Tsikoane in the Leribe district, he did unlawfully and intentionally kill Machankoe Monkhi. The deceased was an elderly woman and a close friend and neighbour of the accused and his mother.

It was admitted at the outset of the trial that the deceased died as a result of cardio-respiratory arrest following a cut in the right carotid artery which led to heavy loss of blood. The accused had been stabbed six times in the back. The fatal wound was on the right side of the neck. There was also admitted the evidence of Sgt. Lebasa (PW 3/P/) who stated that on the 7th of November, 1979 he was at Mononts'a's charge office at about 10.00 a.m. The accused arrived and told the Sgt. that he had quarreled with an old woman at Tsikoane and injured her with a knife. He handed over the knife which was received in evidence at this trial as Exhibit 1. The blade appears to be covered with blood.

When the accused was called upon to plead to the indictment, he replied that he did not know whether he was guilty or not. A plea of not guilty was entered and subject to certain other admissions made by his Counsel, the Court proceeded to hear the evidence.

The first witness was a young woman 'Malerato Ratsuoanyane. She was acquainted with both the deceased and the accused. Towards evening on the 3rd of November, 1979, she was visiting the home of the accused's parents at Tsikoane. This witness was with 'Malimakatso Kalake (PW 2) and other people when the accused and two companions arrived. The accused's mother 'Mangaka (PW 3) had retired to her bed as she was not feeling very well. The deceased came from her house next door calling 'Managaka. She was told that 'Mangaka was in another house. The accused stood up and asked if it was 'Machankoe who was calling outside. The deceased said that it was her. According to the evidence of 'Malerato, the accused then told the deceased to go away as he did not want her there. He closed the door. The deceased did not make any reply.

The accused reopened the door and went outside carrying a sjambok in his hand. 'Malerato heard the deceased scream and on going out to investigate, she found that the accused was whipping the deceased who protested saying "I am your mother why do you whip me". The accused persisted in his attack on the deceased although 'Malerato said that people tried to intervene.

The accused produced a knife and stabbed the deceased. 'Mangaka then came out of the house in which he was resting and asked the accused what he was doing. He pushed her away and threatened to whip her. The accused continued to stab the deceased, running away to one side if people approached, then doubling back to where the deceased was to attack her. 'Malerato saw accused strike the deceased twice in the back while the latter was kneeling near the stoep. Eventually after receiving a third blow, the deceased fell down at the gate separating the two homesteads. 'Malerato was one of the people who was sent by the mother of the accused to report the matter to the chief. She alleges that she heard the accused say that he was killing the woman because she was bewitching him. Asked about what she was doing when the accused arrived, this witness said that she was sitting down doing nothing in particular. She denied that there was any joala at the house that day and said that when the accused arrived home he appeared to be normal and spoke in a normal fashion. However, when he attacked/^{the} deceased he was wild.

Cross-examined by Mr. Maope this witness said that she had just come to the house before the arrival of the accused. She was visiting 'Mangaka. She again denied that there had been any beer drinking at the house of the accused. She agrees that the deceased had always been

3/ friendly

friendly towards the accused. The accused did not explain how the deceased had bewitched him, 'Malerato said she had no knowledge of any complaint made by him in this regard. She spoke well of the deceased and said that the attack made upon her by the accused came as a surprise.

'Malimakatso Kalake (PW 2) is the sister of the accused. She was also present at her parents' home when the accused came home with Tlala Serame (PW 5) and Tebello Mosoeunyane (PW 4). The accused spoke to this witness in a normal fashion. When the deceased came 'Malimakatso told her that her mother was sleeping in another house. The accused got up and closed the door in her face. The deceased appeared to be surprised and asked the accused what he was doing. The accused said that he did not want her at his house and she should go away. The deceased stood outside. The accused went out of the house carrying a sjambok. The witness followed him. The accused pushed the deceased off the stoep and she fell to the ground. The deceased, who was kneeling on the ground was screaming. 'Malimakatso said that she and 'Malerato pleaded with the accused, but, he did not listen to them.

'Malimakatso saw the accused strike the deceased twice with the knife, between the shoulders. She asked the accused why he was doing this. He did not reply, but, chased the witness away. She saw the accused stab the deceased twice more. When people approached the deceased, the accused went towards them and when they retreated, he returned to the deceased still stabbing her with his knife. When the accused's mother asked him what he was doing he replied "your friend during the day and the night rides on top of me". 'Malimakatso claimed that she did not know what the accused meant by this expression, but, I am advised that it intended to convey that he had been bewitched by the deceased. 'Malimakatso said that the deceased and her mother were close friends and that the deceased was a much loved woman who never had any reputation for being a witch. She knew of no cause for a quarrel between the accused and the deceased, who regarded the accused as her child. It was a surprise to 'Malimakatso that her brother should have killed the deceased. The two men who came with the accused did nothing to prevent the attack. She had never known the accused behave in such a fashion before. She said that the accused gave no indication that he was acting under the influence of liquor.

The accused's mother, 'Mangaka (PW 3) was also a witness at the trial. She said that her son was born in 1956. He is the eldest of the family. For many years the deceased had been an intimate friend of 'Mangaka. She was not quarrelsome and had no evil reputation. In regard to the accused,

4/ 'Mangaka said

'Mangaka said that he was an obedient child and that he was not troublesome even in drink. She said that he was not aggressive and that normally he was a reserved type of person.

On the day in question 'Mangaka went to bed early because she had a headache. She was awakened by noise and screaming from the women outside. She heard her daughter 'Malimakatso shout that her brother had stabbed 'Machankoe. When she went out, she found the deceased seated next to the house. She had already been wounded. Her son was in the middle of the yard. He ran towards the deceased and stabbed her. 'Mangaka was shocked. The deceased got up and tried to walk towards her home. The accused ran around the yard. The deceased fell at the gate. The accused came up to her once more and stabbed her as she lay on the ground.

The accused paid no attention when 'Mangaka asked him to stop attacking her friend. She asked him what the deceased had done and in reply the accused said "I am not going to be ridden day and night by this woman, I will soon kill you together with her". 'Mangaka would not say that she knew what these words meant, but, she conceded that they may suggest witchcraft. However, her son had not at any time complained to her about being bewitched by the deceased.

'Mangaka knew nothing about her son suffering from any mental illness. Although he might from time to time drink beer, she would not describe him as a drunkard. He had not been home all that day. The accused had married someone whom his mother did not know very well but the woman had left him.

In cross-examination 'Mangaka said that there had been some beer in the house that day, but, it had all been finished except for one scale. She said that both her daughter and 'Malerato had been drinking beer, which was being sold by her daughter. She did not know if the accused drank beer before he left that morning. She said that there was a certain feast going on at the village but not at her house. She agreed that her son was aggressive on that occasion, but, she did not consider that it was on account of drink. She said that she really did not know why the accused had behaved in that fashion that day.

The two men who accompanied the accused, Tebello and Tlala also gave evidence. Tebello (PW 4) despite his name is not a Mosotho. He said that his father was Mosotho, and his mother "coloured". He does not speak

Sesotho. He gave his evidence in poor quality English and said that he would have preferred to speak in Afrikaans.

He met the accused at the feast in the village earlier in the day. They consumed some beer together and on the invitation of the accused he came with him to the latter's house where there was a small quantity of beer available. While they were sitting together with the women the deceased came to the door. The accused slammed the door in her face. This witness, probably sensing trouble, went out. He saw the accused push the deceased and beat her with a sjambok. The accused was wild and Tebello was unable to stop him. This witness made off having done nothing to prevent the events which followed.

Tebello said that the accused was dancing at the feast. They were with Tlala. This witness said that nobody was drunk. He heard the accused say something to the effect that there were three people he wanted to kill. Tebello made no inquiries into the matter.

In cross-examination, this witness revealed that he spent about three hours at the feast and that the accused was both drinking and dancing. He could not say how much liquor the accused consumed. Tebello gave the impression that he had drunk a lot more than he was prepared to admit during the day. By the time the trouble broke out in the evening he could think of nothing better to do than to remove himself from the scene. He could not be described as a very satisfactory witness.

Tlala Serame (PW 5) is a cousin of the deceased. He was more forthright than Tebello in making the admission that he was drunk that day. He met the accused at one of the feasts in the village where there was dancing and singing. Tebello, Tlala and the accused left together. The accused told them that they should go to his house as he had left some beer there. At the house the accused produced a scale of beer for his visitors. This witness felt someone catch him by the hand, it was the accused's sister, 'Malimakatso. She said "My brother is killing 'Machankoe". The witness stood up and went outside where he saw someone wearing a white shirt at the gate. It was already dark. As he approached the person in a white shirt, the latter ran away. He saw the deceased lying on the ground. Tlala went to fetch a stick. He saw people running about and afterwards he joined in an unsuccessful search for the accused.

The cross-examination of this witness revealed that he had spent the previous night at a vigil following the death of a villager. This witness admitted that he had been drinking, not only during his vigil, but, during the day at the feasts in the village. He had fallen asleep at one of the feasts. He alleged that Tebello was so drunk that he actually refused to drink any more.

When Tlala reached the house of the accused, he saw the two women 'Malerato and 'Malimakatso seated there. They had an empty scale of beer before them. The accused offered them a drink. He said that the women must have seen that the three men were drinking at that place. As for the accused this witness said that he did notice that he had taken some drink.

I can place little reliance upon the evidence of either Tebello or Tlala as to the state in which the accused was in that day, because I am satisfied that both these men were themselves drunk at least to the extent that they were either incapable or too cowardly to intervene to protect an old woman against the assault made upon her by the accused.

The accused gave evidence. He said that he was born in 1956. He stated that his recollection of the events of the day upon which the deceased was killed is as follows :

In the morning he breakfasted on porridge and beer. At about 10.00 a.m. he went to assist the herdboys of one Mohale to bring wood in an ox-waggon to a feast taking place in the village. After delivering the wood the accused stayed all day at the feast which was being held in connection with the death of a villager. A beast was slaughtered for the occasion and there was beer available. At the feast he met Tebello and Tlala. These two men left at about 5.00 p.m. stating that they are going to another feast in the village, but, the accused remained behind. Although he had drank a considerable quantity of beer, he said that he could see clearly where he was going.

After sunset the accused set out to join his companions at the second feast where more beer was consumed. It was Tlale who suggested that they should leave as it was now dusk. The accused had been dancing at the first feast, but, not at the second. He said that all three of them had had enough to drink. He said of himself that he was able to walk normally. After some discussion as to where they should go after leaving the second feast it was

7/ agreed that

agreed that they should go to the house of the accused where there was some beer left over from the morning. The accused denied making any statements to the effect that he wanted to kill people. The accused said that in addition to the two women who were witnesses in this case there were two young men at his house drinking beer.

The accused obtained beer from his sister. He was told that his mother was sick in bed. He got some beer for himself and for the two men who were with him. While he was drinking he heard the voice of the deceased outside calling for his mother. 'Malerato told her that 'Mangaka was in bed in another house. The deceased came into the house where the accused and others were and opened the door. The accused went on to say "I felt a shock. I was frightened for no reason. I felt as if I was asleep, yet, I was sitting there. At the time I realised I was not asleep at all. I heard noise from the people drinking beer there. In the noise I heard them say that I was killing 'Machankoe.

At the time I found I was stabbing the deceased. I was already outside the house. When I came to I found I was holding a knife. The deceased had fallen in front of me. People asked me why I was killing her. After that I realised what I had done. I wondered at it and I again got frightened so I fled. I ran away because I had stabbed. I found I was holding a knife"

In regard to subsequent events the accused told the Court that having run away from the village, he wandered about for three days without knowing where he was going. He stayed each night at a different place with people some of whom were his relatives. He found food at initiation schools in the mountains. On the third day he came over what he described as the Natal pass. At that place he sat down and found that his fear had subsided. He decided not to proceed further but, to look for Lesotho Police and give himself up. He did so at Mononts'a to Sgt. Lebasa. When the Sgt. asked him for the knife, he produced it.

The accused said that although he was not related to the deceased the latter considered himself and his brothers and sisters as her own children. He said that he was her favourite. She had invited him to eat at her home at any time without asking. That relationship had never changed up to the time of the death of the deceased.

8/ The accused said

The accused said that he had consumed much beer that day, but, that he was walking on his own and did not need to be supported. He said "I say I was drunk"

The accused claimed that he had no knowledge that he had lashed the deceased with a sjambok. He said "There is nothing to deny. I found myself holding a knife. I admit I stabbed her as I found my knife bloody and she was bloody on the ground. I do not know how I stabbed her". The accused said that he had never quarreled with the deceased. He agreed that he stabbed the deceased because others say that he did so. He does not know how it all came about and he does not remember speaking of witchcraft.

Cross-examined, the accused admitted that he recalled all the other events of the day. In particular he remembered what happened when he was told that he had killed the deceased. In other words he could recall events up to the time the deceased arrived at his home and those which occurred after he was told that he had stabbed her. While the accused maintained that he was drunk that day he admitted that his mind was clear. He heard the deceased speak from outside. He was aware of the people around him and all was normal. He suddenly felt this great fright and thought that he was sleeping.

The accused said that he fled from the village because he did not know what he was doing. He just felt like fleeing and found that he was doing so.

The accused was unable to deny that he was moving away from Lesotho towards the Natal Border during the next three days. He was going higher in the mountains. Nothing untoward happened to him during his flight. He agreed that he was not then acting in any way like a person who was mad.

The accused was unable to explain his sudden forgetfulness. He had had no experience like it in his past. He claimed that he was in a sort of trance and that he did not know what he was doing or where he was. He did not hear voices telling him that the deceased was a witch. When it was put to him that he might have been possessed by the devil, the accused was inclined to agree.

The accused admitted that he occasionally smoked dagga. However, he did not suffer from any abnormalities as a result of this habit. He did not

experience hallucinations or depression. However he went on to say that during the whole of the week prior to the killing of the deceased, he did not have any dagga in his possession.

Pressed in cross-examination to account for his actions the accused said "I do not suggest that it was the drink that caused me to behave in this way. I do not know what had gone into my mind" and later "I have at times drunk more than I consumed that day. What I drank was within my limit". It was put to the accused that although he has been in prison since November of last year, it was not until the 15th of November last that he communicated with the family of the deceased. He wrote a letter asking for parton. He said that he was frightened to do so at an earlier date. In the letter (which was admitted in evidence as Exhibit B) the accused said that he did not know what he was doing when he killed the deceased. The letter concludes with the words 'I am not supposed to write to you for it may be my innate nature that caused it. It remains with the omniscience of God'.

The accused said that he did not believe in witchcraft, but, he was unable to deny its existence. He had no other explanation to offer the Court. He denied that the story of his amnesia (if that is how his condition should be described) is a recent fabrication.

It was submitted by Mr. Mape for the accused that the case before me stands on all fours with the case of R. v Mohloma (1971-73 L.L.R. 57). There are certain similarities between the two cases. The head note of the report reads as follows .

A Where an accused person unlawfully kills another whilst suffering from amnesia induced by voluntary intoxication, he is guilty of culpable homicide.

The accused was charged with the murder of his grandmother who died from head injuries inflicted by the accused with a knobkorrie. On the day of the deceased's death, the accused had been drinking at a threshing feast, after which he went on to the home of a friend where he had more to drink. He then went to his mother's home, where he caused a commotion and behaved in a strange manner, ignoring his mother when she tried to speak to him. It appears that the accused then went on to his grandmother's hut where he pushed open the door, cried "mother, mother" and going straight to where the deceased was sleeping struck her several times with a knobkerrie. Following the assault, the accused mistook a 10 year old girl who was well known to him and sleeping in the same hut as the deceased for a grown-up woman. He told the child to wake the deceased, but when she tried to do so there

10/ was no response.

was no response. The accused then struck the deceased again. When the village headman arrived at the hut, the accused was found lying next to the deceased and after his arrest he kept on repeating "It is a good thing the old lady dies because she has killed many people by bewitching them".

C The accused give evidence that after he had left the home of his friend on the evening in question, a strange feeling came over him as if a cloud was descending on him and that thereafter his mind was a complete blank. He stated that he was fond of both the deceased and his mother and that he had no reason to suspect that they were involved in witchcraft. There was no evidence that the accused was mentally disordered.

Held: (1) Taking into account all the surrounding circumstances, and in particular the strange behaviour of the accused on the evening in question, the accused should be believed when he stated that he was suffering from amnesia when he killed his grandmother.

D He could not, therefore, have had the mental capacity to form an intention to kill

(11) Since the accused had brought the amnesia upon himself by voluntarily consuming intoxicating liquor, he should be held criminally responsible for his acts. Accordingly the accused was found guilty of culpable homicide (S. v. Johnson 1969 (1) S.A. 201 (A.D.) followed).

In Mohlomi's case Jacobs C.J. found as a fact that "the accused suffered from amnesia when he committed this deed and did not know what he was doing".

I can make no comment on this finding which was no doubt justified by the evidence before the learned Chief Justice. The decision on the law which followed that finding can have no application to the present case unless this Court is satisfied that there is a reasonable possibility that the accused in this case was similarly afflicted at the time that he stabbed the deceased to death. Jacobs J.C. at pages 59 and 60 of the report considered the South African authorities. He defined three categories of cases. The first of these included cases where it could be said that the accused had acted involuntarily and automatically and could not therefore be criminally responsible for his actions. The second category comprised cases where as result of the consumption of intoxicating liquor a person's mind deteriorates to such an extent that he becomes temporarily insane. In defining the third category Jacobs C.J. referred to the cases of S. v. Johnson 1969(1) SA 201. He said "where in such a case the charge against the accused is murder he cannot be found guilty of that crime because he clearly could not have had the mental capacity to form an intention to kill. In such a case the proper verdict is one of culpable homicide".

In deciding R. v. Mohloma the learned Chief Justice did not refer to the Criminal Liability of Intoxicated Persons Proclamation 1938. This sets out in section 2(1) the following proposition: "Save as provided in this section, intoxication shall not constitute a defence to any criminal charge" Sub-sections (2) and (3) read as follows:

"(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under the preceding sub-section is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in case falling under paragraph (b) the provisions of sub-section (2) of section one hundred and sixty-nine of the Criminal Procedure and Evidence Proclamation⁽¹⁾ shall apply.

Finally sub-section (4) reads:

"(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the particular offence charged."

Sub-section (4) above introduces into the law of Lesotho a principle derived from the law of England. This has been very recently restated in Regina v. Garlick Times Law Report (2nd December 1980) when " the Court of Appeal Lane L.C.J. stated "In R. v. Sheehan (1975) 1WLR 739 and R. v. Pordage (1975) Crim L.R. 575 the Court had pointed out that when the question of drunkenness arose it was not a question of the capacity of the defendant to form the particular intent which was an issue. What was an issue was the question simply whether he did in fact form such an intent".

From my reading of the Proclamation of 1938 I am satisfied that the onus of establishing the defence of intoxication in terms of section (2) rests upon an accused as it does in the case of insanity. However the burden of proving intention rests on the Crown as in all other cases.

As Schreiner J.A. said in the R. v. Tallor 1949 (4) S.A. 702 and 713 "..... the decision of the question whether in fact he had that intent will ordinarily proceed along the same lines as if he had been sober".

To return to the facts of the present case, while it is accepted that the accused had been drinking Sesotho beer during the day, his behaviour up to the time that he attacked the deceased has not been shown to be in anyway abnormal while his behaviour following the assault is in a like position. He said himself that he had not consumed more liquor than was within his capacity. Although the accused said that he was drunk he did claim that the killing of the deceased was the result of drunkenness. The possibility that his inhibitions may have been dampened by the liquor he had consumed is not a defence relieving him of criminal responsibility. There is no evidence at all to show that the accused by reason of intoxication was insane temporarily or otherwise at the time that he killed the deceased.

The accused ran away after stabbing the deceased and made off into the mountains taking with him the blood-stained knife which he had used. He did not disclose to anyone whom he met what had taken place. He moved through the mountains in the directions of Natal without mishap or difficulty in seeking food and shelter. When he eventually reported to Sgt. Lebasa he told him that he "had quarreled with an old woman at Tsikoane and injured her with the knife." This statement, which was admitted in evidence without challenge, is wholly inconsistent with his evidence in Court which was to the effect that he did not know what had happened.

There is evidence that when the accused attacked the deceased he accused her of having bewitched him. He has asked this Court to believe that he was overcome by some extraordinary experience which deprived him of the capacity to know what he was doing. His evidence as to the nature of his experience stands alone unsupported by any extraneous testimony. I have no difficulty in rejecting it as a fabrication which could not reasonably be true.

While it is not necessary for the Crown to prove in any case of murder a motive for the killing, one is supplied in the evidence that the accused, when he stabbed the deceased complained that she had been riding him by day and night. This was an imputation of witchcraft. Why the accused

should have formed such a belief about an old and trusted friend of the family, it is not possible to say. I reject his evidence that he did not believe in witchcraft or understand its implications.

The Crown has proved that the accused killed the deceased by stabbing her six times with a knife. I am satisfied that in doing so he formed the intention of killing her and I therefore find him guilty of murder as charged. My assessors agree with this verdict.

This Court finds that extenuating circumstances exist in this case as it has been shown that :

- (a) The accused acted without premeditation.
- (b) The accused had been drinking and was affected to some degree by intoxicants.
- (c) The accused believed that the deceased had bewitched him.

Sentence: Ten (10) years imprisonment.

F. X. ROONEY

JUDGE

16th December, 1980.

For Crown : Mr. Mdhluli
For Defence : Mr. Maope.