

IN THE HIGH COURT OF LESOTHO.

In the matter of:

R E X

v

'MATHAPELO MAPHOBOLE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 29th day of January, 1981.

The accused is charged with the murder of her husband (hereinafter referred to as the deceased) it being alleged that on or about the 20th day of October, 1979 she unlawfully and intentionally killed him. To this charge the accused pleaded guilty and Mr. Mda who represented her intimated to the Court that the plea was in accordance with his instructions. However, and because of the seriousness of the charge, a plea of not guilty was entered on her behalf.

In a nutshell, the Crown's version is simply that the accused put in a poisonous substance in Sesotho beer (at their home) contained in a plastic container. She then poured that poisoned beer into a mug and with her own hand, gave it to her husband. He drank at least a little of that same beer. He immediately complained that the beer he had just been given, and drank, tasted very bad. It had the smell of onion. He accused his wife of having put poison in it. He further complained that he felt as if his intestines were being cut. Soon thereafter, he ceased to speak and ultimately died.

The defence version also briefly, was to the effect that the deceased had previously bought medicine for killing cattle lice. It was contained in a plastic container. However, it snowed very heavily with the result that the deceased was unable to proceed to the mountains where his cattle-post was situate. Later the contents of the plastic container were emptied and the plastic container just lay there around the house unused. It was then said that when the accused put the Sesotho beer in it, she forgot to wash it. That was how the Sesotho beer got mixed with the poison. The accused's defence was put neatly as follows to Mr. Moholobela during the latter's cross-examination:

"D.C. - According to her version as given so far, she seems to say that she put beer there (in exhibit 1) unaware of its previous contents, at least having forgotten that there were some previous contents? That I do not know."

Machabe Lenka, a young herdboyc (aged about 14 years) briefly deposed that he was related to the accused. On the Saturday in question, at about dusk, he was requested by the accused to fetch her beer contained in a plastic container from another house. He brought the beer to the accused who then poured it into a mug and handed it to the deceased. The latter drank the Sesotho beer thus offered to him by his wife. He swallowed some of this beer but a certain portion remained in his mouth because he then went outside and spat it. He came back and accused his wife of having put poison in the beer. He said he could smell it. Then one Moholobela came and to him also, the deceased complained, in the presence of the accused, that the latter had made him to "drink poison there at his home because that beer smelt poison which he did not know which smelt like onion."

Machabe says that it was Moholobela who said that it might be that the container had not been properly washed. As we shall see presently, Machabe was mistaken. It was the accused who said so. After Moholobela had left, the deceased continued to accuse his wife of having put poison in the beer. Accused had then been given the mug containing the Sesotho beer by the deceased to drink. But she merely put it down next to her.

Shortly after Moholobela left, deceased began to perspire.

When asked by the witness whether he usually perspired when drinking he replied in the negative. Immediately thereafter deceased went outside and then came back. He asked that his bedding be prepared. He sat on a stool and said he felt as though his intestines were being cut. When Machabe asked the accused what the matter was with the deceased, accused said that deceased had laped into mental illness. He once had a mental illness. As the accused said so the deceased pointed a finger at her. It was at this stage that accused sent him, Machabe to go and call people. He saw the accused leave holding the deceased saying that "the deceased was going to hold her and beat her." However, when he came from raising an alarm, he found the deceased having died.

Under cross-examination he said that that medicine was bought because it was said that cattle had lice. This medicine was contained in a bottle similar to exhibit 2. He had put that medicine then on the window sill. It was then that he saw that there was an empty plastic container. He said the plastic container which contained medicine to wash sheep came with the veterinary clinic staff and after the sheep were washed they took it back with them. That container was bigger and whiter in colour. He was adamant that the medicine which was bought was "for cattle when they

were very lean because they had lice so they were coming to be dipped or washed." He never saw another container similar to exhibit 1. This exhibit belonged to the home of the deceased and

"H.L. - On that day when you were asked to go and fetch it from the other room, was it the first time you saw it being used? - It had been used for a very long time."

Machabe also mentioned in his evidence-~~in~~-chief that the deceased at one stage took a stick and said that if he was going to die he was going to die with the accused. He then placed the stick on the floor and put his feet on it. He did not actually assault her.

Finally Machabe said that the beer which was in the mug was poured into the dirty water in a basin which accused was using to wash dishes. The accused did so. He says that the container was not full of liquor that is why all the liquor from it was poured into a mug.

Moholobela Maphobole is a bugle in the village and is a relative of the accused. On the Saturday in question there had been Sesotho beer at the accused's home earlier during the day. A beast had died and they helped the deceased to skin it. The accused was present at home and was cleaning its intestines with the help of some women. Later they all drank and none of them got drunk. Late in the afternoon they dispersed. He says about accused's condition:

"H.L. - You said the accused was not drunk? Yes. Have you known her for a long time? That is so. Have you had drinks together with her? Yes. Until she got drunk? Yes. I always drank together with her but I have never seen her drunk. She drinks moderately, does she? That is so."

When he parted with them (that is accused and deceased) there

had been no quarrel or any misunderstanding between them.

He came back after sun-set. It was not dark. As he approached he heard the deceased scolding. When he entered he heard him say:

"Why do you give me such bad beer in which you have put poison. Why do you kill me so cruelly?"

Deceased was speaking to the accused. Deceased held a mug. He then gave him the mug of beer he held to him and requested him to taste it, but before he could do so, the deceased took it back again and said:

"this thing will kill you like me and cut your intestines."

He then gave the mug to Machabe with the instructions to give it to the accused who was seated on the floor washing dishes. The accused denied that she had put any poison in the beer. She further said that:

"she did not wash this plastic container when she put in beer in it. She said it was possible that it was the plastic container that was smelling, because she did not wash it when she poured beer in it."

He says that the deceased was not drunk. He was following deceased when the latter went outside. The deceased spat saliva.

Moholobela says that he was hardly at home when he was called to the deceased's home. He found deceased being attended to by Lejone. Froth was coming out of his mouth and nostrils. The deceased breathed heavily as though he were choking. Within minutes the deceased was dead.

The following day Moholobela, in the presence of the accused, explained to the family what the deceased had said. Accused said she had not put any poison in the beer. She

was then asked whether she heard what her husband had said. She said she did and that she had, in fact, put medicine, which was in exhibit 2, in the beer. She said she had found it on the window sill of another room. She said she did what she did because deceased had refused when she wanted to go to her maiden home. She then went to point the medicine out and

"C.C. - And what did she say when she pointed at it? She said she had put in the medicine which was in that bottle.

She put in what? Inside the plastic container.

And what had the plastic container contained? It contained beer.

Did you touch the bottle she pointed to? I touched it at the time we were taking it from hand to hand."

One man by the name of Seamoha, who worked in conjunction with Moholobela, and in the latter's presence, handed exhibit 2 to the police. However, exhibit 2 had been kept by Moholobela.

The cross-examination of this witness was remarkable.

After a few preliminary questions there was a short

adjournment. There was then this dramatic turn of events:

"D.C. - I can say Moholobela that after you gave evidence, I consulted my client about your evidence and she says that all that you said is true. I feel in fairness I must say that, you see, or disclose that.

H.L. - What, the whole of his evidence is the truth?

D.C. - E, (yes) that he gave a truthful evidence. I asked her, what does she say. She said no, his evidence is completely correct and truthful.

H.L. - So she admits his evidence?

D.C. - Yes, she does.

H.L. - So that is the end of your cross-examination now?

D.C. - No, no

The cross-examination of the witness continued. Accused's version of the accidental pouring of the beer into a container which had originally contained medicine for washing sheep was put to the witness as it had been put to the previous witness. Moholobela knew nothing about that. All he knew was what the accused had said; that she had put in the medicine which was in the bottle and that that medicine had been bought in order to wash the cattle because they had lice. When he first saw the bottle (exhibit 2) it was on the window sill.

The close of the cross-examination of this witness was just as dramatic:

"D.C. - I was just giving her version, for what it is worth. Then she admits that thereafter as alleged by these other witness o il'a re (she said). "Ke t'setse chefo" (I have put in poison). She says that is correct. Even in court she pleaded guilty; and she says that the latter portion she gave is correct. In other words, she does not wish to recant - she has pleaded guilty."

About the treatment she had received and whether she had complained to Sgt. Moonyane about it, the evidence went thus:

"C.C. - (To Sgt. Moonyane), I am taking you back a bit on the day you went to the village, when you first met the accused. Did she at any time complain to you about any ill-treatment, or pressurising in respect of this case, that is at the hands of the family and relatives of the deceased? No.

D.C. - May it please you My Lord. I want to make it clear that accused will never complain either by the family or by the police. None at all."

Everything she said to the family was free and voluntary. The position at the pointing out was further clarified as follows:

"H.L. - She went and showed you the medicine she had put in the beer? She did. She pointed it out to you? She did. Is that the bottle now before Court? It is similar to it."

The evidence of accused's own son at the preparatory examination was admitted and read into the record and thus became evidence at this trial and the same procedure was followed in respect of all the other depositions which were subsequently admitted.

Molefi Maphobole merely stated that he had been fetched from the cattle-post and on his arrival home his mother informed him that she had killed his father by putting poison in his Sesotho beer. She did not say why she did so. He said, when asked by defence counsel, that the medicine contained in exhibit 2 had been bought by him from a veterinary clinic. He had been sent by the deceased and the medicine was to be used for washing horses.

Lejone Maphobole stated that he is related to the accused. He had been called by Machabe to go to the deceased's home. On arrival he found the accused kneeling in front of the deceased who was seated. He then asked the accused what the matter was. She said she did not know. Deceased was then sweating but was no longer speaking. Froth came out of his mouth and nostrils. He then died. The following day he went to buy a coffin. He saw exhibit 1 being produced by the accused saying that she had put Sesotho beer into it and added poison. When questioned by the Court he said that he had been drinking together with the accused and other people. She was drunk.

Sgt. Moonyane received a report as a result of which he went to the house of the deceased. He smelt the contents of exhibit 1 and the smell was bad. The smell from exhibit 2 was nasty. These exhibits were handed over to Trooper Ntsane who in turn handed them over to Sgt. Liphamamo. There is not dispute about this. Sgt. Liphamamo in turn handed

handed certain specimen to Dr. Moteane at the Maseru Agricultural College: Department of animal disease laboratory. These were a sample from deceased stomach and a few drops of the medicine from exhibit 2. However, Dr. Moteane has left the country. His findings do not matter because the accused admits that the medicine she put in the beer was a portion of exhibit 2. It does also seem as though the specimen forward to Dr. Minne were not the right ones emphasising how careful one should be with this type of case. However, even with the preliminary findings by Dr. Moteane which were admitted, endosulphane is a very poisonous substance as deposed to later by Mr. Minne in his evidence. Sgt. Liphamamo kept exhibit 1 and 2.

Sgt. Liphamamo deposed briefly that when he was handed exhibits 1 and 2, he smelt them and his evidence runs as follows:

"C.C. - That liquid (in exhibit 2), did you smell it? I did though I could smell it without bringing it to my nostrils. What did it smell like? From my knowledge, it smelt like certain substance which is used for washing the ticks from cattle. Have you ever smelt that medicine used for ticks? I use that substance very often on my cattle so I know it smells."

When he opened exhibit 1 he observed that the contents were drying up. The odour was that of Sesotho beer plus the substance in exhibit 2.

Mr. Minne is a research chemist in the department of Agriculture at the Verterinary Research Institute at Ondersterpoert, R.S.A. He is also a specialist toxicologist i.e. he specialises in poisons. He corresponds with Dr. Moteane. He was often sent numerous specimen. A report which he purported to have written in connection with this case, in fact had nothing to do with it. Exhibit 2 and its

contents had been brought to his notice when he was about to give evidence in this Court. He quickly carried out experiments and came to a tentative conclusion that the poison contained therein could be Parathinon. This poison was really two poisons in one. The first was Parathinon which is a very poisonous substance and the other is Endosulphane. It is also very poisonous. According to him the beer must have had a very bad smell and taste. The taste of onion complained of is characteristic of Parathinon because it has garlic taste. The froth coming out of the mouth and nostrils was typical of poisoned people. However he needed to carry out further tests just to be more positive as the facilities at the local laboratory were not up-to-date.

However, the smell, the symptoms described by the witness, the rapidity of death all these fitted well with a very poisonous substance "of which Parathinon fits the case exactly."

Subsequently, Mr. Minne, a man of considerable experience behind him, returned to give evidence. He had carried out extensive investigations. The substance in exhibit 2, following his findings, was a well-known poison called diazinon. It is used as a fluid for dipping sheep, and cattle to kill the ticks. In the present case the substance had undergone a change which made the original diazinon even more poisonous. This occurs if it is mixed with a little moisture. It then degenerates and becomes very poisonous. However, what he described under Parathinon still held good in this instance because these two substances are like a brother and sister.

Accused elected to give evidence under oath. She told the Court how she got up early that Saturday morning; cleaned the house; prepared herself in readiness to go to her maiden home as previously agreed. But then her husband discovered that one of his cattle was dead. He refused her to leave for her maiden home. She remained, with a sore heart, attending to the cleaning of the intestines of a dead beast. She was helped by some women. In addition to the scale of Sesotho beer she had early that morning, she shared Sesotho beer with the women who were helping her. She felt by the end of the day that she had had much to drink but she still knew what she was doing. She gave the women who helped her part of the intestines and stomach of the dead beast. This caused a row with the deceased. He said that she had been sulking the whole day because he did not allow her to go to her maiden home. He said she would go to her maiden home on a stretcher. Deceased had on numerous occasions, over a long period, assaulted her. She had first ran for help to her neighbours but the deceased would then fight them. She ran to her maiden home but was there told that a woman should not ran away from her difficulties. She must learn to persevere. She was frightened that afternoon and more so that she had had a drink. Deceased asked for beer. She then asked Machabe to bring it in a plastic container from another house. He did. She poured the beer in a mug and as she did so she took exhibit 2 and poured part of its contents into the mug and then placed exhibit 2 on the rug where she had grabbed it. She then poured back the beer in the mug into the plastic container. Then again into the mug. When she was thus engaged in this exercise, Machabe did not see her as she gave her back to him and moreover he was eating. She then gave deceased the mug containing poisoned beer. He

drank it and she thought he would just become sick. She was afraid to tell him the truth because he would beat her up. In fact at one stage, thereafter, he had taken a stick and threatened to hit her. But then he just put it down and put his feet on it. She did not know that the medicine she had put in the Sesotho beer could do more than make the deceased sick. When she saw that her husband was dying, she became afraid.

The events took a dramatic turn under cross-examination:

"C.C. - You intended to cause some harm to him? Yes.
You didn't care what happened to him? I didn't care.
And you didn't care whether he died or not? Yes.

H.L. - What was that medicine for? I say it was for dipping the animals.
Was it kept in the house? It had just come. It was still on the rug, he had not removed it yet.
It had just come? Yes.
About how many weeks? I think it could be about one week or two. It wasn't a long time.
In what was it contained? It was still in this very same little bottle."

About her version which had been put to the Crown witnesses, she said that she had in fact instructed her counsel so but

"it is not the truth".

Pressed further she said that she found herself having instructed him so

"whereas the actual truth is that I poured in the medicine."

There was no

"medicine contained in a plastic which was to be taken to the cattle-post, which was subsequently spilled."

About whether she knew as to whether the medicine she had put in the deceased's Sesotho beer was fatal the evidence went thus:

"C.C. - Right, 'M'e (mother), this medicine when you poured it in the beer, you realised that it was fatal? I was aware that it was fatal because it washes the animals; they are never made to drink it.

* * * * *

You said you knew it was fatal? Yes.

According to you then, at the time you gave the beer to your husband you knew it would kill him? Yes.

And you in fact intended to kill him? I was killing him at that time."

She tried desperately to say that Mcholebela had not told all the truth but this did not avail her. She had revealed all.

The accused pleaded guilty but the Court recorded a plea of not guilty. This simply meant that the Crown had to prove its case against her beyond reasonable doubt. She had deliberately pleaded guilty and this was confirmed by Mr. Mda, Counsel of considerable experience. She was fully alive to the consequences of such a plea and I have absolutely no doubt in my mind whatsoever, that Mr. Mda drew her attention to it. There is, therefore, a judicial confession before this Court which the accused said she would not recant as indicated earlier in this judgment. (See Thabang Mchlalisi & 2 Others, CRI/T/17/80 unreported).

I believe the evidence of the Crown witness that the deceased made accusations against the accused in her face that she had put poison in his beer. In fact, their evidence was never seriously disputed. At the end of the day it was admitted as being the truth. On the other hand the accused

deceived both her counsel and this Court about her story of not having washed the container before she put beer in it. This, in any event, was highly improbable for a Mosotho woman to do. However, it must be quite a difficult exercise to lie consistently. Ultimately, she had to tell the truth. She deliberately put what she knew to be a fatal medicine into her husband's beer and, with her own hands, gave the beer to him to drink. According to the evidence, he swallowed just a little of that poisoned beer. The medicine she had put in the beer had become very poisonous having absorbed moisture and generated within the space of time it was inside that house covered, as it was, with a loose paper. There is no doubt in my mind, whatever, that the accused administered the poison intentionally and unlawfully to the deceased and as a result of which he died. The symptoms described by the Crown witnesses accord with poisoning and the particular poison being of Diazonnel family; the medicine which she poured into deceased's beer. That exhibit 2 was poisonous at the time of administration is confirmed by the expert whose evidence I believe. The deceased, therefore, did not die a natural death but did so as a result of the act of the accused. (See Jeminah Mofubelu v Rex CA./CRI/5/1976 (unreported)).

In my view, and my assessors unanimously agree, the Crown has discharged the onus upon it with proof beyond reasonable doubt that the accused is guilty as charged. In fairness to Mr. Mda, I must state that he conceded that the accused was guilty as charged. The Court is greatly indebted to him in his fairness in such a serious case. He displayed a high standard of professional ethics as behoves a true officer of this Court.

For the Crown: Mr. E. Muguluma

For the Defence: Mr. P. Mda.


J U D G E.

29th January, 1981.

EXTENUATING CIRCUMSTANCES AND SENTENCE.

Extenuating Circumstances.

The onus of proving the existence of extenuating circumstances rests on the accused and it is discharged on a balance of probabilities. What an extenuating circumstance is has sufficiently been described in the case of Rex v Botso Mashalle and Others, 1971 - 73 L.L.R. 148 at 164, quoted recently by this Court in the case of Rex v Chere Sekotoko Khcloanyane and Another, CRI/T/41/79 (unreported) dated 5th December, 1980 and need not be repeated here. However, in deciding whether there are extenuating circumstances in a case of murder no factor, not too remote or too faintly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled from consideration (R v Mfoni, 1935 O.P.D. 1919 at 195). It is also trite law that in determining whether extenuating circumstances exist, the subjective test of the accused's state of mind is not only a factor to be taken into account but is indeed a more important one to consider than the objective test of the factual basis for that state of mind. (Mokola Ramone v Rex, L.L.R. 1967 - 70 p. 31 at 37).

There is evidence that the accused and the deceased did not live a peaceful life. There were constant fights. This evidence finds support from the evidence of Machabe. This is how it went.

"By assessor Chief Dyke Peete - From what you observed, were they leading a peaceful life or were they always fighting? In fact, they are not very much in good terms because every time they have drunk they fight. They were troublesome people when they were drunk."

Even a young child such as Machabe saw that there was no peace in this family. On the very Saturday, deceased had spoken to the accused very harshly. He said she would not go to her maiden home where, according to her, and important ancestral ceremony was to take place. As though this was not enough, he threatened her that she would go to her maiden home on a stretcher. There would only be one reason why she would go to her maiden home in that fashion. He would have thoroughly beaten her up.

The refusal by the deceased for the accused to go to her maiden home was hurtful enough without any additional provocative remarks. Accused strongly believed that if she did not attend the ancestral feast at her maiden home made specifically for her sister who was sick, she would never **recover** if she, the accused, did not also place her hands on her. Her husband knew this but acted indifferently, out of sheer spite. The question is not whether her belief was reasonable or otherwise. The crucial question is: What was her state of mind, subjectively speaking? It is with her mind that we are concerned. This belief, in my view, is on the same par as a belief in witchcraft which the Courts of law have always taken into consideration in determining the existence or otherwise of extenuating circumstances. (R v Blyana, 1938 E.D.L. 310; R v Betty Motsa, 1970 - 76 S.L.P. 200 at 202) Moreover this is what her community believes in and by section 291 this Court is enjoined to take into consideration, at this stage of the proceedings, the standards of behaviour of an ordinary (not a reasonable) person of the class of the community to which the convicted person belongs. The ordinary person in the accused's community still believes that the gods must be appeased

otherwise a relative who is ill will surely die. The refusal by the deceased for the accused to attend this important ancestral feast was not only hurting to her but was an act of abandonment on her sister's part by the deceased. He was, in her mind, adopting the attitude of I-could not-care-whether-your-sister-dies.

The accused started drinking early that morning. She was in a happy frame of mind. But within a short time that happiness was turned into bitterness. She continued to drink that day. She was not however, incapable of forming an intention to kill. We are not here concerned with that. The degree of intoxication may depending on the circumstances of the particular case, be sufficient to reduce the moral guilt of a convicted person. (Rex v Chere Sekokoto Kholoanyane and Another (supra)). Here the accused's condition is best described in this evidence.

"Assessor Chief Dyke Peete - Actually why did you do this? Was it because you were not happy or was it because you were drunk? I did this because I was hurt for a very long time but beer also played a part."

The accused is also corroborated by Lejone that she was subjected to a severe scolding by the deceased. The deceased had apparently made an issue of the women who had entered one of his houses. This, despite the fact that they had helped his wife, the accused, to clean the intestines of a dead beast. The evidence went thus

"H.L. - And what happened? What did you see? What did you hear? I heard them speak to each other. What were they saying to each other? The husband was scolding. I did not know because I was arriving. Scolding who? The wife.

What was he saying to her? He said he saw two women come into his house."

Finally, it has not been established that she sat and brooded over what she would do to her husband. There was, therefore, no premeditation in the commission of this murder. It was not an accident either. Lack of premeditation in the commission of murder is a factor to be taken into consideration whether extenuating circumstances exist.

Life was one continuous hell. She was continuously subjected to humiliation such as being chased with a spear; being assaulted in the presence of their neighbours; refused her to attend funerals. Now her husband's refusal for her to go to her maiden home had shown her he did not care about the health of those nearest to her. In her eyes he wished the death of her sister for she believed that her sister would die if she did not also lay hands on her. Her husband had turned into a killer. He also said on that same afternoon that he would kill her. The emotional storm which had been building within her erupted under this severe strain, of being subjected to continuous humiliations and provocations. The emotional volcano burst that Saturday evening while her husband was issuing threats of going to kill her and using words of unnecessary harshness. She struck and killed him.

The above-mentioned factors have been found by this Court in this particular case to be extenuating circumstances as described earlier in this judgment.

The views that there are present extenuating circumstances in this case are shared also by Mr. Muguluma on behalf of the Crown, and fully canvassed in his helpful heads of argument on the point.

Sentence.

The accused has committed a most wicked and terrible crime for which she must be heavily punished lest women who are troubled by their husbands get it in their heads that the Courts have created a charter for them whereby they could poison them with the believe that they will not pay the supreme penalty. The Courts have established nothing of the sort. Each case is dealt with according to its own facts. However, in this particular case, a heavy sentence is called for in order to stamp out this menace.

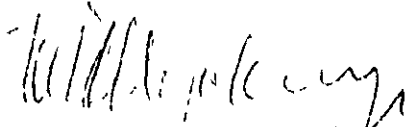
I have always said that an accused person, who freely admits his guilt and helps all those concerned with the investigations of his crime, to such an accused, this Court will extend a hand of mercy. However, this should not be understood to mean that the Court will handle such a case with maudling sympathy. There is a virtue, in certain circumstances, to sentence an accused person to a long term of imprisonment even though he might be a first offender. This case is such an one.

I have taken into consideration what accused's Counsel has said on her behalf. I particularly take into consideration that she made a clean-breast of her crime; that she co-operated fully with the investigating authority. She tried to lie but she could not sustain it as it is not in her nature to do so.

The least possible sentence in her case, taking all the circumstances of her case into consideration, is one of 13 (thirteen) years' imprisonment.

My assessors unanimously agree.

I am most indebted to both counsel for the thorough manner in which they prepared their arguments which were of tremendous help to this Court in preparing its judgment.



J U D G E