

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

NCHOME KOTELO

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 7th day of October
1981

The accused, Nchome Kotelo, is indicted before me on a charge of murdering Motlatsi Letamo. The particulars state that on or about the 23rd August 1980 the accused unlawfully assaulted the said Motlatsi Letamo (the deceased) with intent to kill him and that the latter died from his injuries at Mohale's Hoek hospital on the 6th September 1980.

It is common cause that the accused hit the deceased on the head with a stick. A stick was produced in evidence (Exhibit 1). This is called 'kolitsane' in Sesotho. It is however a strong stick about 1½" in diameter. The accused says this was the stick he had used but some witnesses say it was not (one witness says he was not sure) and that the accused wielded another stick thicker than Exhibit 1 which is called 'lebetlela' in Sesotho. I do not think this matter is important for according to the medical evidence the wounds on the deceased's head are consistent with having been inflicted with a blunt object such as the stick produced.

This Court is prepared to accept that the accused who works on the mines in the Republic of South Africa but whose home in Lesotho is in the village of Makhele in Taung was labouring under a suspicion that his wife had taken the deceased as a lover. The information about her infidelity was allegedly communicated to him by one Jeromiah (apparently the deceased's "brother") who worked in the same place as the accused.

/Jeromiah

Jeremiah did not give evidence but it was said he was having an affair with the wife of one Molela who is the accused's cousin.

The accused's grandmother, who lived in the Maseru district, died some time in August 1980 and the accused came from the Republic to attend her funeral not long after the above information about his wife was passed to him. He arrived on a Friday. His wife had also travelled from Taung some few days earlier for the same purpose. The accused says that during a meal he heard a stranger remark that his wife had been "playing around" in his absence. This added to his suspicion. He confronted his wife with this in the presence of some members of his family, but his wife's own maternal uncle was also present. Accused says that his wife confessed to her association with the deceased and admitted of squandering money he had sent to her on her lover. According to the accused's aunt (Mrs. Makasa Kotelo - DW1) it was decided that upon the return of the accused and his wife home they would call on the deceased (who was unmarried) and his mother to find a solution to the problem. There is no reason to disbelieve her evidence.

The accused and his wife set off from Maseru to Mohale's Hoek on the morning of Saturday August the 23rd and got there in the afternoon. A beer party was in progress at the home of a lady called Mamolimo the wife of one Thaba Putsoa Thibiri. The accused went there.

At about 5.30 p.m., the deceased and a friend, Sello Willie (PW1), proceeded to the party. What took place there soon upon their arrival has been described by two other prosecution witnesses (apart from Willie) present at the party, both friends of the accused, Ntsane Ntsane (PW3) and Tseliso Sempe (PW6). Tseliso testifies that after the deceased had entered, indeed whilst he was still at the door, the accused got up from his seat and directed a blow with a stick at the deceased's head which felled him down. He adds that accused struck him again across the body and resumed his seat. Ntsane Ntsane testifies that his attention was drawn when he heard Mamolimo scream that a person was being killed in her house. He looked up and saw the deceased prostrate at the door. He saw accused hit deceased on the body saying "You have been treating this wife of mine as if she was yours". Sello Willie, who was the deceased's companion, was on his way out to hurry Mamolimo who had gone to another house to fetch for him grape juice (she was then on her

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way back with the juice) and says that after he got out of the door he heard a sound of a stick. He looked back and saw deceased on the ground. Accused was standing over him and before he could reach the deceased, accused struck him again on the body. Sello Willie proceeded immediately to call the deceased's mother Mamojalefa Letamo(PW4). She lived not far away (distance 200 yards pointed) and she and her younger son Motsamai(PW2) followed Sello Willie to the house where the party was being held. Both testify that on reaching the forecourt they saw the deceased getting up staggering bleeding from the nose ears and mouth making his way towards home, but whilst Motsamai says deceased walked unaided, his mother and Willie say he was supported. At this stage Sello Willie broke off to remove his cattle who were straying on some crops whilst the deceased, his mother Mamojalefa, and brother Motsamai, continued. Motsamai and his mother, on looking back, saw the accused running after them and caught up with them at their gate. Motsamai and his mother testify that though they tried to prevent the accused from inflicting further punishment on the deceased he nevertheless managed to strike him yet again with a stick on the head and body which made the deceased fall. Motsamai (a youth of 18) had thrown a stone on the accused when he was belabouring the deceased which stone landed on accused's eye. The deceased was dragged to inside the house. Soon afterwards the accused returned with his mother, his wife, and his cousin Molela (with whose wife - the deceased's "brother" - was himself having an affair) and by way of explanation shouted at the deceased's mother, and so did Molela, that she "does not marry her children". The accused then ordered his wife to confess in the presence of everyone who happened to be there at the time about her adultery with the deceased which she did.

Dr. Ronde(PW5) attended to the deceased on admission to hospital. He had two wounds on the skull and several bruises on the body. He was in a very serious condition. She decided on an immediate operation to relieve pressure on the brain. She says that the operation itself was successful, but the patient did not respond and he died on 10th September from the skull fracture which had caused intercranial bleeding.

It was not suggested, and there was no evidence of, a novus actus interveniens.

The accused gives a completely different version of the incident. He says that on arrival home with his wife he

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realised the magnitude of what she did. His children were not at home (she had sent them to her parents) and the house was empty of food and bare of belongings. He went to Mamolimo Thibiri's place to have a drink, but during the session, took time off to go to the deceased's mother to tell her to leave the following day "free" to discuss the deceased's affair with his wife. He says she admitted that her children are "causing her worry". This visit and conversation Mamojalefa denies entirely. The accused adds that he returned to the drinks party and joined his friend Ntsane. Deceased arrived with Sello Willie, Tseliso, and a boy. As he (accused) was on his way out to relieve nature the deceased stretched his foot obstructing his passage. An altercation developed. The deceased refused to remove his foot until the accused found him a seat. He held the accused by the shirt but when he retreated he gripped him and it was only then that he struck deceased once on the head. Accused says that he and Ntsane decided to go to another feast. The deceased was alright then. They left together but separated on the way. As he turned a corner he was accosted by the deceased's mother who asked him in a belligerent way why he had assaulted her son. He passed her and went along some aloes overlooking the deceased's house. Deceased was hiding there armed with a stick and hit him with it but accused avoided the blow. Deceased's stick fell. The deceased tried to kick him. Accused denies assaulting the deceased there but says he turned round to go in the direction of his home when a stone, thrown by Motsamai, hit him on the eye. He complained about this to deceased's mother. Accused's wife arrived. So did Molela. A stranger also arrived and asked what was all the trouble about. His wife confessed that she had a love affair with deceased. The deceased's mother then took her two sons (deceased and Motsamai) into the house.

Mr. Maope for the defence asks the Court to accept the accused's version of the incident and to hold that he was acting in self-defence, alternatively that he did not intend to kill the deceased, alternatively that he was provoked.

There were three eye-witnesses to the incident at Thaba Putsoa Thibiri's party, and two of these witnesses are not only independent but are the accused's own friends, so if there was anything in his favour, they had no reason to suppress it. If the deceased had actually interfered with the passage of the accused by putting his foot in the way and if he had an altercation with him which ended in the deceased pulling the accused by his shirt, it is very very unlikely that this would
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have gone unnoticed by the accused's companions or others. I have no doubt whatsoever that the prosecution witnesses are truthful and that the accused is lying on this part of the episode. He was the aggressor and must have been boiling inside. There is no question of self-defence here. The witnesses who gave evidence on the second part of the incident after the deceased was escorted towards his home are his mother and younger brother but no court is bound to hold that for this reason alone their version of what happened is improbable. In my opinion they were truthful witnesses. Indeed it was accused's story that sounded inherently improbable, almost impossible of belief, and must accordingly be rejected as false.

Mr. Maope submits, alternatively, that the accused was not proved to have intended the deceased's death and that he did not foresee that the deceased would die. However the witnesses say that the deceased, consequent upon the first blow at the party, fell down and bled from the mouth, ears and nose, and that deceased though he managed to stand up and stagger home (whether supported or not matters little) he was unable to talk. The fact, which I believe, is that accused followed the deceased, in order, as one witness says "to finish" him, and this is conclusive evidence, in my view, of the subjective intent to kill.

Lastly Mr. Maope submits that there was provocation to reduce the killing to culpable homicide only.

Provocation is defined in our Criminal Law (Homicide Amendment) Proclamation No.42 of 1959 (Vol. II Laws of Lesotho), but by s.3(b) of the Proclamation it is available only if the person who did the act which causes death is in the heat of passion caused by sudden provocation and before there is time for his passion to cool. In this case the accused's wife alleged infidelity with deceased had been known to him sometime before, and at least one family meeting has been held to discuss it, to be followed by another family meeting which was to include the deceased and his mother. I do not think that the mere appearance (or the sight) of the deceased, even though it was soon after accused's return from the funeral at Maseru, his discovery of the dispoliation of his food and belongings, and the absence of his children from home, cumulatively constitute provocation as envisaged in the section, though of course the accused feelings may be taken into account at a later stage when

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the question of extenuating circumstances has to be resolved.

In my view the accused is guilty of murder and I convict him accordingly.

My assessors agree.



CHIEF JUSTICE

SENTENCE

Extenuating circumstances having been found the accused was sentenced to six years imprisonment.



CHIEF JUSTICE

7th October, 1981