

IN THE HIGH COURT OF LESOTHO

In the matter:

R E X

VS

THABISO KHESA
SEHLOHO KHESA

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 7th Day of May, 1996

The two accused persons are charged with the crime of murder.

In that upon or about the 9th day of November, 1991 and at or near HA MOKOKOANA, in the district of LERIBE, the said accused, one or the other or both of them did unlawfully and intentionally kill LEFU MACHAKE.

On the 9/11/91 at HA MOKOKOANA, in the district of Leribe, some members of the KHESA family had a meeting; for the purpose of settling a family dispute. Those present at that meeting were:- the two accused persons, one Khafa who is the son of Accused 2's brother; and also the deceased who was the son of Accuse 2's sister. This meeting took place very early

in the morning almost immediately after sunrise. In fact Accused 2 was found still asleep by the children who had been sent to go and call him to come to his mother's house where the meeting took place.

As it emerged from the evidence, this meeting was held so early that no one of all those who attended that meeting had done any worthwhile or noteworthy activity prior to their coming to attend that meeting. The issue must have been discussed and settlement considered. Once the dispute was settled it was resolved that the deceased who seemed to have been involved in some fracas of some sort with his grandmother, should leave that village for his own home village. Deceased collected all his belongings, packed his bag ready to depart and deposited it outside his grandmother's house. Everybody involved left the grandmother's house and went back to their own places or to their engagements for that day.

According to the evidence of Accused 2, when he returned to his own house, he informed his wife that his mother needed some pain killers because she complained of being in pain as a result of the assault perpetrated upon her by the deceased last night. Accused 2's wife gave him some money to go and buy her mother-in-law those pain killing tablets. Accused 2 proceeded to the nearest clinic where he purchased some pain killers. On his return from the clinic, he met the deceased's

brother who was from Accused 2's mother's house. Accused 2 asked him if he had seen how his grandmother was. It does not seem like he got any response. If he did, he made no mention of it. With no further ado Accused 2 proceeded to his mother's house where he personally delivered to her those pain killing tablets.

Thereafter Accused 2 proceeded to his own residence. It does not appear like he ever did anything meaningful at his house. It was midday or thereabout. Accused 2 told this court that while he was at his own house he saw a flag - signalling that there is a beer drink being sold at Ha 'M'e 'Mamotintinyane. Accused 2 decided to go there and to participate in the buying and drinking of the beer.

Quite coincidentally on his way to 'M'e 'Mamotintinyane's house Accused 2 meet once again with Accused 1 who was also on his way to participate in the buying and drinking of beer at Ha 'M'e 'Mamotintinyane. It seems the two accused met again accidentally but with one thing and one thing only in their minds, that was to go for beer drinking at 'M'e 'Mamotintinyane's house. Away they both went. On their arrival at Ha 'M'e 'Mamotintinyane; who do they find amongst many beer drinkers? Their cousin Lefu - deceased - who had been given matching orders early that morning to depart from this village and go to his home village.

Even although this court was told that there were many people inside and outside 'M'e 'Mamotintinyane's rondavel, there is only one eye witness who testified in this trial. This is one 'MATHESELA PHATSISI. She is PW1 at this trial. She was PW2 at the P.E. On that day she was on her way from HA NTRANG with one PULENG. They also went via Ha 'M'e 'Mamotintinyane. It was late afternoon, approximately about 4 to 5 p.m. As the two approached the entrance of 'M'e 'Mamotintinyane's rondavel, PW1 who was walking in front of Puleng heard Puleng shout "Lefu run away, there comes Accused 2 and Accused 1". PW1 looked back. She saw Accused 2 and Accused 1 approach the entrance to the yard of 'M'e 'Mamotintinyane. The deceased's response to Puleng's warning was to the effect that those people (A1 and A2) have been chasing after him for a long time. They should do as they please. PW1 saw the deceased get out of the rondavel and go behind it. In the meantime the two accused persons entered into the rondavel. They looked around. As they did so, the deceased also re-entered into the rondavel. The two accused persons caught hold of him pushed and pulled him outside. As they pushed and pulled him Accused 1 remarked "we told you that you should go back to your home." The deceased replied "I have left your home". Accused 1 took out a knife. As he pulled out his knife Puleng cried "why do you take out a knife for Lefu (deceased)" referring to the Accused 1.

At this juncture it would appear that Accused 1 and Accused 2 had succeeded to get the deceased out of the rondavel. According to PW1, 'Mathesela Phatsisi, she and many other people had also come out to see what was going on. Accused 1 stabbed the deceased on the left breast. Accused 2 was holding the deceased with his overalls. As a result of the stab the deceased staggered forward towards Accused 2 who struck the deceased with his cane stick and moved backward at the same time. Accused 1 stabbed the deceased for the second time with that same knife on the shoulder this time. The witness could not say whether it was the left or right shoulder.

The deceased fell but Accused 2 who was still holding the deceased by his overalls, tried to sit him upright and not to let him fall on the side as he was leaning that way. Immediately thereafter Accused 1 left according to this witness. PW1 felt she could not bear to watch any further. She decided to leave; before she could do so, she heard one LEKHOTLA who just arrived proclaim:- "This person is finished; what are you still doing to him?"

There are discrepancies and inconsistencies in the defence story. According to Accused 1, he went to the rondavel and stood by the door from where he called the deceased who must have been inside because Accused 2 claimed that he just passed

by the door way and saw the deceased come out. According to the crown bearing in mind that the family dispute, regarding the assault by the deceased of their grandmother, had been settled that morning, Accused 1 told this court that when he called the deceased out of the house at the beer drinking party he wanted to ask him why he assaulted the old lady. Was there a need to start the enquiry all over again especially that the dispute had been settled? It is Accused 1's evidence that the deceased's response to his enquiry was that he the deceased, wants them all "Mamasilo's children". Whatever he meant and/or whatever Accused 1 understood by that, this court does not know. Second question, why have you not gone to your home village as instructed? The response was an attack. Accused 1 was assaulted by the deceased with a stick. Hit on the shoulder.

The impression which the accused persons are trying to create is that they were attacked first, they were provoked and they therefore reacted to all of that. This is a false picture. It is unsupported by the evidence adduced before this court.

It is the Crown's witness's ('Mathesela Phatsisi's) evidence that the deceased was still held by overalls by Accused 2 when Accused 1 stabbed him first on the chest and secondly on the shoulder. Accused 2 told the court that he was

holding the deceased who was leaning to fall on his side. Accused 2 prevented that fall and tried to sit the deceased upright. Although he may not have intended to support the prosecution on this point, his evidence supports that of Mathesela Patsisi on this point. It cannot be correct that Accused 2 was at some distance estimated at about 7 paces when the deceased and Accused 1 started to fight. According to PW1 there was no fight because the deceased did nothing. Both accused persons claimed that the deceased hit Accused 1 once with a stick, that is when Accused 2 moved from where he was to where the deceased and Accused 1 were. The true story, or exactly what had happened, is told by PW1. She is an independent witness. She had no reason to falsely implicate the two accused.

When the deceased succumbed to the weakness, resulting from the serious wounds inflicted on or at his heart or very close to it, he moved as if he was falling on his side. Accused 2 who was still holding the deceased by his overalls delivered a blow with his cane stick. According to the defence the deceased had delivered a blow with an iron rod upon the person of Accused 2. The deceased, and the two accused persons are all relatives, very close relatives. PW1 is not related to them. According to her evidence not even once did the deceased hit any of the two accused persons. According to Accused 1 the deceased was drunk. The accused persons were

sober. Two men against one who is drunk was no match. They did as they pleased. Ironically this was said by the deceased when he was warned to run away as the two approached the place where they ended his life. He had decided not to run away.

Could they (Accused 1 and 2) have been chasing after the deceased for a long time that day? If the dispute was settled in the morning and everyone went away thereafter what did they do? Accused 1 went to a building site where he was helping the builder. There was no water. There was no work to be done. He was therefore free the whole day. So he went to 'M'e 'Mamotintinyane as evidence shows, he got there in the company of Accused 2 at about 4 to 5 p.m. Accused 2 went to the clinic. Returned at about midday, so he was also free for there onward. When PW1 and Puleng arrive at 'M'e 'Mamotintinyane it was about 4 to 5 p.m. Could the deceased have heard that Accused 1 and 2 were looking for him? Anyway they were not looking for him. They were looking for beer according to the two accused persons.

Did they have anything to do with the beer once they got to the place where beer was being sold? No. Priorities have changed. Once Accused 1 had the sight of the deceased, his thirst or the quenching of it had to take the second place. He felt he must first of all ask the deceased why he assaulted the old lady. Under the normal circumstances, it was proper

for Accused 1 to make it his priority to ask the deceased why he assaulted their grandmother. But this was no longer the issue. The dispute had been long settled. Is it likely that they were anxious to get the deceased leave the village? But this does not seem to have been on their minds. According to both accused persons they were not surprised to see that the deceased is still in the village when they found him at 'M'e 'Mamotintinyane's place. This was said by Accused 1 despite his feeling of a need to ask the deceased "why he assaulted his granny and why he was still in the village after he had been told to go. If it is correct none of the accused persons was surprised to see the deceased still enjoying himself in the village, why was there a need to ask him? If they were not anxious to get rid off him, why forget all about the beer and start with the enquiry relating to a settled matter? It is probable that after what the deceased did to their grandmother, it was his back they wanted to see.

There is no medical report as the doctor who had performed the postmortem examination on the body of the deceased left this country without writing and submitting his report. There is no doubt that the deceased is dead. After he was assaulted PW1 heard someone there at the scene proclaim "This person is finished, what are you still doing to him" or words to that effect. Accused 1 left immediately. He told the court that he went to collect his rain coat because he thought it might

rain. But when he arrived at his house, he informed the lady who lived with him that he has killed a person. He was aware that the deceased was no more. Accused 1 also indicated that the deceased's fall was induced by the seriousness of the wounds he inflicted upon him. He may not have noticed the implications of his choice of words. Under cross-examination he changed and claimed he meant to say he reported to this lady that he fought with a person. According to the police officer Mchale the accused persons reported to him that they have killed a person. According to Accused 2 when he asked one of his relatives to provide a scotch cart, he was to remove the dead body from 'M'e 'Mamotintinyane's place. It is the evidence of Accused 1 that the deceased fell as a result of the seriousness of the wounds he inflicted on him. There is an overwhelming evidence that the deceased died as a result of those wounds inflicted upon him by the accused persons there on the spot - not subsequently elsewhere. Even in the absence of the postmortem report, this court is satisfied by this overwhelming evidence including that of the two accused persons that the deceased died as a result of those injuries caused to him by both accused persons.

It is perhaps the stab wounds by Accused 1 not the blow with a cane by Accused 2 that killed him. This is irrelevant to determine which of the wounds caused the deceased's death. The two accused assaulted the deceased together to further

their common purpose. Accused 2 was holding, still holding on to the deceased, as Accused 1 stabbed the deceased at least for the second time. It is the evidence of Accused 2 that he also hit the deceased with a cain stick.

The stabbing with a knife by Accused 1 was not for Accused 1 alone. It was a stabbing done for both and by both accused. S v MALINGA AND OTHERS 1963 SA 629A. Accused 2 heard Puleng cry "Why do you take out a knife for Lefu" - referring to Accused 1: A2 did nothing. Even if he had not been aware he was now told that there is a knife to be used by Accused 1 upon the deceased. He still held Lefu - deceased - with his overalls. Accused 2 saw Accused 1 pull out a knife. Accused 2 did nothing to disassociate himself with the stabbing. He did not restrain or stop Accused 1. As deceased leaned forward towards him succumbing to the loss of strength as a result of stab wounds Accused 2 still found an opportunity to give the deceased a further blow with his cain stick. Was that an act of approval of those stabs. Accused 2's participation at this stage was both actual and psychical to the cause of their victim's death. R v MAXABA 1981 (1) SA 1148. Accused 2's liability as an accessory is due to his participation in the assault of the deceased. Accused 2 must have foreseen and he in fact foresaw that the use of the knife to assault Lefu - deceased - was going to and did have fatal consequences. R v JACKELSON 1920 AD at 490. Participation in the murderous

attack on the deceased even where the conduct of the accused was not shown to have contributed causally to the deceased's death the accused is liable. S v KHOZA 1982 (3) SA 1019 (A). The attack mounted by both accused persons in one present case against the deceased was such a murderous one. Accused 1 had okapi knife. Accused 2 had a humble cain stick; but he held on the deceased, as Accused 1 stabbed and delivered a blow in between Accused 1's stabs on the body of the deceased. To these findings my brother assessors agreed.

Both are guilty as charged.

This court has found that the extenuating circumstances do exist in this case.

As extenuating circumstances this court found that the two accused persons have a specially close blood relationship with the deceased. The deceased had assaulted his grandmother who is the mother of A2 and grandmother of A1. She was a very old lady. The assault upon her perpetrated by the deceased must have been a cause of pain and anxiety on the part of the two accused. Despite having settled the matter and instructing the deceased to depart for his own home, the deceased did not go to his own home. The deceased's continued presence in the village must have caused the two accused persons more anxiety and worry for the safety of the old lady.

SENTENCE

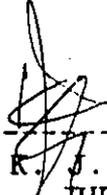
This court has been urged to treat the two accused persons differently:- Firstly because of the difference in their age. Secondly because of the mitigating features present in this case. A2 is 56 years old. The greater part of his useful years in his life has passed. As the evidence led in this court shows, he is a retired miner. The stick he used in the assault of the deceased is in fact the stick he uses to support himself because of his age and also as a result of the injury he received in his mining operations in the Republic of South Africa. Due to the closeness of the relationship between the accused persons and the deceased, the accused are not only burdened with the shame of being convicted murderers. The burden becomes even heavier than it would be normally because the person you have killed is your very close relative. Therefore the impact on your consciences of this tragedy is double. You have to deal with the normalisation of the strained relationship with the other members of your family who may have not succeeded to appreciate the cause of the loss you brought about. This to some extent is a punishment. The loss of your relative even though it has been brought about by yourselves, nevertheless it is still a loss and as such a punishment to you. Since 1991 you have been waiting for this trial. The worry must have been too long to bear, but had to be borne because you had no choice. That strain of waiting

should also be considered as part of punishment that you have suffered. A2 took steps to ensure that the body of the deceased is removed from the beer party to his grandmother's house. It is A2 who requested the assistance of those relatives who provided you with the scotch cart and the animals that pulled it to take the deceased to a place of safety. A2 was the first person to go to the chief to report himself and the tragedy that had befallen them. Although there was no immediate help from the chief's office A2 persisted to seek that assistance until he approached the senior chief who wrote him a referral letter to take with him to the police. You cooperated with the police in all respects from the beginning to the end of the investigations. You have not attempted to run away at any stage until you stood this trial.

The use of an okapi knife has been found as an aggravating factor. This type of a knife is notoriously known for its efficiency to stab to death when so used. It has a very long and sharp blade. I do not accept that A1 initially had this knife in his possession for the purpose of going to slaughter a cow. When he was asked what activities he intended to carry out on that day, the slaughter or skinning of a cow was not one of his activities intended or already carried out.

A1 - 4 years imprisonment without an option of a fine

A2 - 2 years imprisonment without an option of a fine. One year is suspended for a period of 3 years on condition that the accused does not commit murder during that period.



R. J. GUNI
JUDGE

For the Crown : Ms Motanyane

For the Defence : Mr. Lehana