

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

MAREHTABILE MBEKA  
MAMABONYANE LETSIE

1st Accused  
2nd Accused

JUDGEMENT

Delivered by the Honourable Chief Justice Mr. Justice  
J.L. Kheola on the 3rd day of March, 1997

The accused are charged with the murder of 'Matau Motsoane on the 1st day of August, 1990 and at or near Likhutlong in the district of Mohale's Hoek.

They pleaded not guilty.

The first witness called by the Crown in this case is one Nkuebe Jankolo. He testified that in August, 1990 he worked at Osman's Store in Mohale's Hoek. On the 1st August, 1990 he saw two women going up the street towards the home of one Thabiso who is the husband of A1. The two women were walking normally until they entered into Thabiso's house. Thereafter he (the witness) went to Thabiso's place. On arrival there he heard a scream coming from the bedroom. He knocked at door of that bedroom.

They asked who he was and refused to open until Thabiso went to the charge office to call the police. The police eventually arrived but at that time the person who was crying had stopped.

The women inside the bedroom agreed to open the door when the police ordered them to do so. Policeman Mpopo went in and Nkuebe says that he saw A1 and A2. He did not know them. There was another woman lying down in the bedroom. Her body was covered with blood. There were broken bottles and a knife on the floor. There was a pair of shoes. He did not know who had been crying before the police arrived. He did not see a panty near the woman who was lying on the ground.

The second Crown witness was one Motseki Tlaitlai. On the evening in question he had been in the company of Thabiso. They were travelling in a motor vehicle. They visited various places and bought beer. They finally went to Thabiso's place. They sat down and drank the beer they had bought. As music was being played they danced and enjoyed themselves. A certain Applekos arrived about five minutes after they had arrived. Thereafter the deceased arrived and talked to Thabiso before they both went into the bedroom and closed the door. They remained in the bedroom for about two or three minutes before Thabiso came out and rejoined them in the room where dancing and drinking were still going on.

After about twenty minutes the two accused came in through the kitchen door. They were walking fast. A2 was carrying A1's

baby on her back. They appeared to be going straight into the bedroom. At that time the deceased was still in the bedroom. Motsek1 says that as soon as the accused came in he rose and literally ran out of the house because he was afraid of the consequences. Asked what consequences he had in mind, he said he was afraid that the accused would fight with the deceased. As he went out through the back gate he heard the noise of someone crying in the bedroom. He did not go back to find out what was happening to that person who was crying.

In cross-examination he admitted that the deceased and Thabiso had an adulterous association of which he had known for about six months. The cross-examination went like this -

Equally you would not be in the position to dispute the fact that accused No.1 was only embarrassed to find this concubine lying in there with a panty beside her?

- I don't know that.

- If this be correct you would agree with me wouldn't you that then she must have found this woman and her husband in extremely compromising circumstances?

H.L. - Was the husband in the bedroom?

D.C. - No My Lord I will come to that I have just said the wife lying in the bedroom a panty lying next to her.

H.L. - What do you say about the husband.

D.C. - Let me start with a wife. You would agree with me or wouldn't you that if then this be correct accused No.1 must have found the deceased in extremely compromising circumstances?

I don't know.

Yah but you wouldn't dispute if she be correct that you wouldn't you wouldn't?

- No I don't know.

D.C. - An equally Mr. Tlaitlai not only in compromising circumstances but in circumstances which are highly provocative not so?

- Tseno ha ke li tsebe.

- Mr. Tlaitlai be serious with His Lordship and Gentleman Assessors, would you not be provoked if you found a man who has an

adulterous affair with your wife lying on your bed with his under pants next to him, would you not be provoked, or is that common with you?

- I agree that it should be like that.
- Stop saying I don't know. stop running away. I am now coming to the husband you did, let me refresh your memory. You saw the husband Thabiso try to plead with the accused persons as they went into the bedroom didn't you?
- No.
- But you wouldn't dispute that he infact did?
- I don't know.
- You wouldn't dispute that he did?
- I would not deny.
- Infact he even tried to plead with accused No.2 indicating that look there is a woman in my bedroom please, he tried to plead with accused No.2 explaining that he had already been caught?

- I don't know.
  
- So you would not be surprised that when she looked into the bedroom and saw the set up naturally she lost her temper. That would not surprise you?
  
- It would not surprise me.
  
- And equally you would not be surprised that when she so lost her temper the concubine who was found in these circumstances tried herself to fight?
  
- Yes.
  
- She used to work at Ha-Gendral the Hardware department.
  
- As far as you knew she was a woman, wasn't she a woman of easy virtue?
  
- I don't know.
  
- I am told she was and that is one of the things which made accused No.1 loose her temper and control altogether to find that here is this woman that I know to be a prostitute in my bedroom on my bed. You

wouldn't have difficulty with that would you?

- Yes I knew that she is staying with the children.
  
- Pardon me if you did give me an answer I didn't get you clearly, what did you say to my suggestion that amongst the things that made accused No.1 completely to lose herself control and temper was the realization that not only is here a woman lying in my bed but it is the prostitute that I know her to be in this town?
  
- I don't know.
  
- But you wouldn't dispute that?
  
- Naturally she might have done it.

The summary of what was put to this Crown witness as the defence case is that when A1 came into her bedroom and found the deceased who was known to be a prostitute or a woman of easy virtue, she was extremely provoked and lost her power of self-control.

It was also suggested that the deceased tried to fight when she was found in the bedroom. It was not explained what she did

to the two accused. To say that she tried to fight is very vague and does not help the Court in any way.

The evidence of P.W.3 Applekos Mojaje must be completely ignored because he finally admitted that he could not remember the events of the 1st August, 1990 when he was at the home of Thabiso. Applekos is a very old man and had not been well for a very long time before or during this trial. The case was postponed several times because of his illness.

At the close of the Crown case the defence applied for the discharge of the accused on the ground that the Crown had failed to establish a **prima facie** case. That application was refused because:

"In our law intentional killing of a person while the killer is under provocation does not entirely exonerate the accused. The provocation merely reduces murder to culpable homicide. (See Criminal Law Homicide (Amendment) Proclamation No.42 of 1959)."

The defence closed their case without calling any witness.

As I have said above the defence case that was put to the Crown witnesses was that accused 1 was provoked when she went into her bedroom and found the deceased lying on her bed with a



panty beside her. She (A1) concluded that the deceased had just committed adultery with her husband. It seems to me that both accused already knew even before they arrived there that the deceased was in that bedroom and committing adultery with A1's husband. I say this because when the accused arrived at the house they headed straight for the bedroom and entered. They closed the door and locked it. They refused to open it when one of the Crown witnesses asked them to open it because a person was crying in that bedroom. There is evidence that when the accused passed in the sitting-room and headed for the bedroom they were walking fast. That tends to show that they already knew that the deceased was in that bedroom. Furthermore, Thabiso informed them when they passed in the sittingroom that there was a woman in the bedroom and he confessed that they had caught him. This was an admission that he had just committed adultery with the deceased.

Section 3(1) (a) and (b) of the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959 read as follows:

"(1) A person who -

(a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by

sudden provocation as hereinafter  
defined and before there is time  
for his passion to cool,

is guilty of culpable homicide only.

Section 4 (a) and (b) of the above Proclamation read as follows:

- (a) The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.
  
- (b) For the purposes of this section the expression "an ordinary person" means an ordinary person of the class of the community to which the accused belongs."

There is no doubt that the behaviour of the deceased was very provocative especially to A1. Adultery with someone's husband is a very bad thing, but it is worse when it is committed in someone's bedroom. In this case it was worse in that there were guests in the sitting-room and A1's husband and the deceased openly went into the bedroom to commit adultery. After they had satisfied their lust the deceased remained lying on the bed with her panty beside her.

I accept the defence story that the deceased's behaviour was so provocative to the accused that it deprived them of the power of self-control and induced them to assault her. Having lost their power of self-control they assaulted her so severely that the doctor who performed a post-mortem examination found multiple lacerations all over the body especially extremities, face and skull. There was a fracture of the skull, the nosesaddle and the face. There were fifteen lacerations on the head and face. He formed the opinion that the cause of death was brain oedema left ~~and blood loss of multiple~~ wounds and straight intracerebral bleeding.

The extent of the injuries proves beyond reasonable doubt that the accused had the intention to kill the deceased. However because they were extremely provoked they can only be found guilty of culpable homicide in terms of the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959.

Mr. Phafane, counsel for the defence, submitted that the

Crown case depends entirely on circumstantial evidence. The circumstances are that the accused went into the bedroom, a person was heard crying in that bedroom and the deceased was later found dead in that bedroom. He submitted that the circumstances in this case do not lead to any single reasonable inference (See **R v Blom** 1939 A.D. 188). He further submitted that there is no evidence as to who between the two accused killed the deceased. He submitted that there is no evidence that the accused exceeded the bounds of self defence.

I do not agree with all the above submissions. Our law is that where two or more persons are concerned in the furtherance of a common purpose which is unlawful, every act and statement of each of them made in pursuance of the common purpose is, in law, the act or statement of them all (**R v Levy and others**, 1929 A.D. 310, **R v Cilliers**, 1937 A.D. 285). When two persons act in consort with the intention of doing an illegal act, each may be liable for the criminal act of the other, although the co-operation-commenced\_on\_an\_impulse and without any prior agreement or consultation (**R v Mkhize**, 1946 A.D. 197, **R v Dhladla**, 1962 (1) S.A. 307 A.D.).

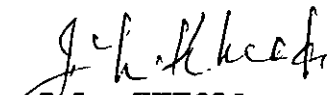
From the facts of this case only one reasonable inference can be drawn. The deceased and A1's husband had just committed adultery in A1's bedroom. She remained lying on the bed when A1's husband left. Thereafter the accused arrived and rushed into the sitting-room and went straight into the bedroom. They closed and locked the door. A person was immediately heard

crying and they refused to open the door when a plea was made to them to do so. If only one of them was involved in the killing or the assault of the deceased, why did the other accused not open the door when asked to do so. They both rushed into the bedroom despite the fact that A1's husband confessed to them that they had caught him. None of them stopped the other from assaulting the deceased. The above facts point to only one reasonable inference that the two accused had a common purpose to kill the deceased.

The question of self-defence does not arise because it is clear that as soon as the accused entered into the bedroom they immediately overpowered the deceased and brutally assaulted her until she died. The evidence that the deceased was lying comfortably on the bed when the accused arrived comes from the questions that were put to the Crown witnesses in cross-examination. It is therefore untrue that she subsequently attacked the accused in such a way that they could justly defend themselves. Even if that was the case, the Court would be justified to come to the conclusion that they immoderately exceeded the bounds of self-defence and would be found guilty of murder had it not been because of the provisions of the above Proclamation.

I find the accused guilty of culpable homicide.

My Assessors agree.

  
J.L. KHEOLA  
CHIEF JUSTICE

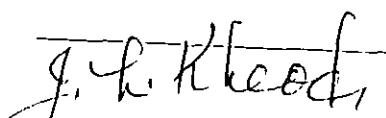
3rd March, 1997.

For Crown : Mr. Qhomane  
For Defence : Mr. Phafane

Sentence:

A1 - Three years' imprisonment.

A2 - Four years' imprisonment. All the sentences are suspended for three years on condition that during the period of suspension the accused are not convicted of any offence involving violence to another person committed during the period of suspension.

  
J.L. KHEOLA  
CHIEF JUSTICE

3rd March, 1997.