

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

MOTHOBI PUSO

ACCUSED

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 9th day of April, 1997.

The accused is charged with the murder of 'Mapoloko Bolae (hereinafter called the deceased) on or about the 4th August, 1992 and at or near Khanyane, in the district of Leribe.

After the charge was read in English and translated to him in Sesotho Language, he pleaded guilty. His plea was unequivocal. In some cases a lay person often say: "I am guilty but I was defending myself or the deceased had insulted me." These words indicate that the accused admits killing the deceased under the circumstances justifying self-defence or provocation. In the instant case the plea was unequivocal and the accused was admitting having killed the deceased. This is a fact which cannot be taken lightly and requires a full explanation by the defence. It will be one of the factors that the Court may take into account in deciding the guilt or otherwise of the accused.

At the commencement of this trial the defence admitted certain depositions made by the Crown witnesses at the preparatory examination. One of such witnesses is Detective Trooper Makhele who attended the scene of the crime. He found the corpse in a building which had not been roofed. It had a wound on the forehead. It was lying on its back with the pair of panty at the feet. Apparently this witness suspected that the deceased was raped and that caused him to examine her private parts, but he did not find anything abnormal.

Another deposition is that of Mosito Moliboea who is the headman of the village in which the accused and the deceased lived. He found the corpse of the deceased in the building already referred to above. The deceased was lying on her back with her head resting on a blanket. Her panty was hanging on one foot. This witness says that he conducted some investigations and looked for the accused who never came to him.

In her deposition 'Mamollo Mollo says that on the night of the 3rd August, 1992 she was awakened by the noise being made by the accused and the deceased. It was at about 1.00 a.m. when they passed at the forecourt of her house. She heard the accused say to the deceased: "'Mapoloko, let me accompany you to your home, it is late at night, a person who is wearing mourning clothes never goes about in the village at night." The deceased refused and said: "No, I am going to Maputsoe from here or alternatively to the chief. I am going to the chief's place so that the chief may know where I died in case I may be dead to-

morrow." The accused replied and said: "You must be either a witch or a lunatic."

'Mamololo says that the accused and deceased were angry with each other and chasing each other and were taking a direction straight to the chief's place from the bus stop.

The defence admitted the report of the post-mortem examination (Exhibit A) which disclosed that the death of the deceased was due to head injury. There were bruises on the face and forehead, subdural haemorrhage right hemisphere. There was no fracture.

The first witness called by the Crown in this Court is 'Mamokete Maqacha. She testified that on the night in question she was sleeping with her grandmother in the latter's house. At about 1.00 a.m. the dog barked and she heard the footsteps of a person coming towards the door. When that person came to the door he said: "Old lady, old lady, open up." Her grandmother asked who he was. He said: "I am the chief of Sekoti-Mpate-Taba-Lia Ntena Mothobi Puso. Old lady, tell your boys to open the door. If you do not act now, the blame will remain with you." Her grandmother said that he knew well that she had no boy. The accused finally told the old lady that the blame will remain with her and that he was going to the chief. He left.

'Mamokete says that after the departure of the accused and the deceased she opened the door and saw them going in the

direction of the chief's place. She identified the accused by not only his voice but by his gait as well. He limps. Although it was cloudy and dark she saw them because of the flash of lightning. She saw that the woman with whom the accused was walking was wearing mourning clothes. Before they left the forecourt the accused had actually called the deceased by her name and said: "Mapoloko, let us go." Thereafter she closed the door and went to bed. Later she again heard the dog bark. Then the accused said: "Let us go, if you do this I will beat you up this time." At that time they were going up in the direction of the accused's home. In the morning the deceased was found dead.

Under cross-examination it was put to this witness that it was not the accused who came to her home that night. The witness insisted that it was him.

Seabata Metsing testified that on the night in question he was on duty as a nightwatchman at 'Malekena's shop. The accused and the deceased passed near his place of work going to Dampu's shebeen. It was a dark night and it was raining heavily. They remained in the shebeen for a long time. When they came out they crossed the tarred road at the bus stop. They passed near him at a distance of about twenty paces. He switched on his torch and directed its light at them. The accused called and said that he must make the light brighter because he could not see where he was going and was stumbling. The witness says that he saw the accused and the deceased very well. The latter was wearing mourning clothes.

After the close of the Crown case the defence counsel applied for the discharge of the accused on the ground that there was no case for him to answer. This application was refused on the ground that there is a **prima facie** case for the accused to answer.

The accused elected to remain silent and closed the defence case without calling any witness.

The evidence of the Crown shows that on the night of the 3rd August, 1992 the deceased was seen in the company of the accused at various places in the village of Khanyane. She was wearing mourning clothes because her husband had died recently.

During their nocturnal going round in the village they passed at the forecourt of the house of 'Mamollo Mollo, whose deposition was admitted by the defence. She deposes that the accused and the deceased were angry with each other and were chasing each other. It is very clear that they were not friendly to each other when they passed near the home of 'Mamollo. The deceased was even saying that she was going to the chief so that if she died the chief would know. The accused must have been threatening her with violence and that seems to be the only reason why she was thinking that she would probably die. I have no doubt in my mind that it was the accused who was chasing the deceased although 'Mamollo did not see who between the two was chasing another. It cannot be reasonably expected that it was the poor mourning woman who was chasing the accused.

From what 'Mamollo heard the accused and the deceased were obviously on the verge of fighting. On the following morning the deceased was found dead and the accused was nowhere to be found. This witness estimates that it was at about 1.00a.m. when the accused and the deceased were at her place. But early that morning when the corpse of the deceased was found the accused had vanished into thin air. He was found about a month later on the 9th September, 1992.

The sequence of events of that fateful night is not very clear. But at one stage the accused and the deceased were at the home of 'Mamokete Maqacha (P.W.1). This is where the accused asked the old lady of the house to open the door or to instruct her boys to open. When the old lady failed to do so on the ground that she had no boys, then the accused said that if she refused to open the blame will remain with her at her home. What blame did the accused have in mind? What was he going to do that will put the blame on the old lady? Later when they passed again near the old lady's house the accused said; "Let us go, if you do this I will beat you up this time."

After uttering all these words threatening the deceased with violence she was found dead having been obviously assaulted by hitting her with a hard object which caused bruises on the face and forehead with subdural haemorrhage right hemisphere. She was apparently also indecently assaulted because her panty had been dragged down to her feet and actually hanging on one foot.

I have set out above the circumstances which point to the accused's involvement in the murder of the deceased. The Crown case entirely depends on circumstantial evidence and the accused has decided to remain silent and to close his case without calling any witness.

In *R. v. Blom* 1939 A.D. 288 at p. 202 Watermeyer, J.A. referred to two "cardinal rules of logic" which govern the use of circumstantial evidence in a criminal case:

- "(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save to one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In the present case I have already set out above all the proved facts from which the inference of guilt of the accused can be drawn. I wish to repeat them for the sake of emphasis. They are very short and are as follows:

- (1) On the night of the 3rd August, 1992 and during small hours of the 4th August, 1992

the deceased was seen in the company of the accused at various parts of the village;

- (2) They were quarrelling and chasing each other;
- (3) At one time the accused was threatening the deceased with violence because he said: "Let us go, if you do this I will beat you up this time" ;
- (4) The deceased had uttered words to the effect that she was going to the chief so that if she died he might know;
- (5) On the following morning the deceased was found dead having been obviously assaulted;
- (6) The accused was no where to be found when the body was found and an alarm was raised. He used to live in that village.

I have come to the conclusion that the only reasonable inference which can be drawn from the proved facts is that the accused intentionally killed the deceased. I am of the view that this is a case of **dolus eventualis** because the evidence seems to suggest that the accused only wanted to have sexual intercourse with the deceased and apparently the latter resisted and violence

was applied resulting in her death.

In *S. v. Theron* 1968 (4) S.A. 61 at pp 63 - 64 Trollip & Trengove, JJ said:

"Generally, in regard to an accused's failure to testify, a useful, practical distinction can be drawn between situations in which the State's case is (i) the direct testimony of a witness or witnesses, and (ii) circumstantial evidence. In (i), if the testimony is wholly credible or non-credible, no problem arises, for in the former case the accused's failure to contradict the credible evidence must inevitably result in the **prima facie** becoming conclusive proof, and in the latter case, it would be irrelevant: there would then be no **prima facie** proof and the accused's silence could not make or restore the State's case. It is only when the State's evidence, although amounting to **prima facie** proof, creates some doubt about its credibility that the accused's silence becomes important, and may be decisive, for his failure to contradict the State's evidence may then resolve the doubt about its credibility in the State's favour. Of

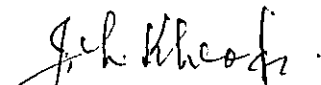
course, if the accused adduces other evidence to contradict the State's, his silence would then usually lose much, if not all, of its importance. Similarly in (ii), if the inference of the accused's guilt or innocence can be drawn with the requisite degree of certainty, the accused's silence is unimportant. It is only of importance if, although there is **prima facie** proof of his guilt, some doubt exists whether that proof should be now regarded as conclusive, that is, that the only reasonable inference from the facts is one of guilt. His silence then "becomes a factor to be considered along with the other factors, and from that totality the Court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances of each case" (per Holmes, J.A., in **S v. Letsoko and Others**, 1964 (4) S.A. 768 (A.D.) at p. 776 C-E). See also **R. v. Ismail**, supra at p. 210; **S v. Masia** 1962 (2) S.A. 541 (A.D) at p. 546 E-H)."

The accused exercised his right to remain silent despite the fact that the Court had already held at the close of the case for the prosecution that there was a **prima facie** case. At the end of trial the question was whether that **prima facie** case should

be now regarded as conclusive. I took into consideration his silence together with other factors and drew an inference of his guilt.

For the reasons stated above the accused is found guilty of murder.

Extenuating Circumstances having been found the accused is sentenced to Five (5) years' imprisonment.


J.L. KHEOLA
CHIEF JUSTICE

9TH APRIL, 1997.

FOR CROWN - MISS MOTANYANE
FOR ACCUSED - MR. LEHANA