CRI\T\20\95

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

vs

'MANTHAKOANA TLALI

J U D G M E N T

Delivered by the Hon. Mr Justice M. L. Lehohla on the
16th day of April, 1997

The accused in this case 'Manthakoana Tlali is charged with the crime of murder, it being alleged that on or about 14th day of October, 1992 and at or near Ha-Motšepa in the district of Thaba-Tseka she did unlawfully and intentionally kill 'Maphepheng Tlali. She pleaded not guilty to this charge.

There are admissions which were made on behalf of the accused through her

Counsel. These are admissions in relation to the evidence that was given in the court below at preparatory examination. These are the evidence of PW2 Moeketsi Tlali, PW4 Adoro Mosebi, PW5 Molelle and PW6 Chabeli.

The court heard the evidence of Ramphume Ntabe who testified under oath that he was sent by his chief accompanied by another to go and see what had happened at the deceased's place which is the home of the accused. It is important to know that the deceased because of her old age and failing health had been transferred from her younger son's place to the accused's place partly because the wife of her younger son had left the place and gone elsewhere.

When PW3 came to the accused's place he found the accused's husband; and the accused, he says, was present, and the husband said "here is the old lady she is ailing and she has swollen feet". This witness says this was the statement by the accused's husband although he himself saw no swollen feet at all, at all, at all. He found the old lady lying on the floor. He wanted to find out what the reason there was for the old lady's groaning. He says he touched her on the chest. When he touched her on the chest the old lady complained that where "I touched her was very painful" and this was where accused had pinned her knee when strangulating her.

There and then PW3 says "I asked the accused why she strangled my sister-in-law but she denied having done so". This makes it very clear that despite the accused's denials that she was ever confronted with the statements made (in her presence) by the deceased she is not truthful. It appears there is evidence which shows that in fact the accused was in the presence of the deceased when being asked. This appears on page 2 of my notes in this Court - my handwritten notes in this Court.

It is important also to note that the medical evidence was admitted in terms of section 223 of the Criminal Procedure and Evidence Act. All these admissions were read into the recording machine, and were translated or interpreted into Sesotho for the benefit of the accused.

As to the cause of the death the doctor indicated that this was due to severe injury on chest or suffocation by strangulation of the neck. As to the external appearances the doctor indicated that the body was of an old lady, and the second point he makes in that regard is that she had bruises on the neck and anterior chest. By coincidence this chimes in with the evidence of PW6 D\L Sgnt Chabeli whose admitted evidence shows at page 6, and as I stated this was admitted evidence. This evidence reads that the body didn't have any external wounds except nail scratch

on the throat.

It has been testified by the accused's son PW1 Lipholo, that there were around the neck area of the deceased what appeared to have been nail marks. The accused stated that there were not any such things which, as indicated and in part admitted, were observed first by her son, next by PW6 Chabeli and finally by the doctor. Of course she doesn't see or say why these people say these things. She said that she herself didn't see any such things because they were not there. Her evidence in this regard is lacking in substance, has no merit and should be rejected.

It is of importance to note that in cases of this nature it is not the multiplicity of witnesses that counts but the gravity or weight of evidence, and I find that the evidence even of the accused's son alone would have satisfied me that there were after all these nail marks or what appeared to have been nail marks on the neck of the deceased. I attach great importance to the accused's son in the sense that it is common cause that there is no ill feeling between him and the accused. He gave his evidence in a straight forward manner and didn't strain to falsely implicate his mother. He indicated, and this evidence was not challenged, that his mother didn't care for his grandmother - the deceased; and this was not challenged insofar as he indicated a very salient point that it fell to the lot of his father and himself to empty

the old lady's chamber-pot.

Living in this country where you know that there is unfair speciality of labour, one can very well imagine how men scorn the idea of emptying, especially a woman's chamber-pot. This was never put to PW1 as a way of challenging what he said, it was only denied in the afternoon of her evidence when the accused came into the witness's box. It is important - and I need not go into detail about this principle - that if a witness who is giving evidence that one finds one doesn't agree with, should be told so while he is still giving evidence under cross-examination in order to enable the court to observe the reaction of such a witness, and also to be fair to that witness lest he be said to have lied when he was not given an opportunity to improve on the story or explain his statement or even change it. Characteristic of the accused throughout this proceeding she has been evasive, shifty and inclined at almost every turn to fence with questions put to her. If dodging questions carried any premium the accused would have set today an olympic standard.

The medical evidence was given of events which had occurred in the deponent's absence; and the doctor has indicated that death was due to either suffocation or severe injuries on the chest. But it is the function of the court to find now when dealing with the totality of the evidence that the court itself has heard,

how death could have occurred. We have been told that the witnesses came one after the other and each was told by the deceased how she got to be injured or got to find herself groaning as she was when found by these witnesses one after the other. Thus one is left in no difficulty in eliminating suffocation as the cause of death because even after such suffocation the deceased was able to relate her story. So because the two acts of injuring or causing pain or assault on the deceased were effected by one agent then it stands to reason that death was due to this severe injury to the chest.

I have been told; or it has been urged on the court that the deceased's story before she died could not amount to her dying declaration. I was told that this could neither be credible nor be taken as credible evidence because the old lady was not shown to have legitimately expected to die; further, that she did not die immediately. Well; I really wonder while faced with a situation like this what the groaning could have been due to; if, as deposed by the doctor the deceased had sustained severe injury, indeed that didn't make the old lady feel that she was in mortal fear of the real and impending end to her life. Furthermore as to the fact that death did not follow immediately, my view is that death will follow an injury but the immediacy of death is not defined. One can very well imagine a situation where a person - to take a simple example of poisoning - introduces into the cup of another arsenic

poison or cyanide which takes a long time to bring about the intended death. And in the process or in the intervening period - no matter how long - the deceased points a finger at the administrator of the poisonous stuff into her cup of tea. It cannot be said because the poison took a long time to take the intended effect the person who administered it is thereby freed from criminal liability despite the deceased having pointed an accusing finger at him earlier on as the culprit. So immediacy as far as I am concerned is a matter of circumstances.

Another thing which has to be taken into consideration when dealing with a matter of this nature, is the demeanour of the accused as a witness, and the quality of her evidence. The accused gave a very sorry tale indeed and acquitted herself very sorrowfully. The sum total of her evidence on one hand amounts to denial that when the deceased was being questioned about her predicament she herself was not there, or on the other hand; she denies evidence by anybody who says she (the accused) was there when the deceased was being interviewed and reporting to her listeners how she got to be injured. For instance, she makes a garbled account of the occasion when her son was called by her. She on the one hand says her son is not truthful (and she doesn't say so in so many words) thus she doesn't on the other hand state categorically that her son is not being truthful when he says he came into the house and asked her grandmother what was the matter.

When asked whether her son is not telling the truth when he says he and the accused were present when the son asked her grandmother what the matter was she says I called my son and directed him to his father out there in the veld.

There is a legal principle or authority to the effect that an accused who lies when testifying in the witness's box does thereby strengthen the case for the crown. Some of the things that the accused denies really go to her credibility and discredit her. These are peripheral matters but they go a long way towards discrediting her as a truthful witness. For instance, her son says after he had seen the old lady and called his father and uncle and witnessed when the uncle asked the old lady what the matter was he lingered around for a while but in the evening he went away to sleep at his own home.

The accused on the other hand says PW1 spent that night at the deceased's home. She further states that PW1 stated the same thing in the court *a quo*, namely; that he didn't spend the night at his own home but rather at the deceased's home. But the court has got the record of the preparatory examination where PW1 i.e. the accused's so states in no uncertain terms that after lingering around at the deceased's place he left and spent the night at his own place. Thus confronted with this statement the accused was clearly in a cleft stick or rather to her discredit

insisted that this is not what the son said in the magistrate's court. As I said this is a peripheral issue but it goes a long way towards indicating to the court the type of person the accused is.

Furthermore I have heard evidence where the accused stated that when she came back from collecting the dry cowdung from the kraal she found the deceased fallen on her face and that she had lain on a stone. But I have heard evidence here by her son and PW3 Ramphume; both of them say that there were no stones whatsoever on the fore court there. So it isn't true and the Court rejected the accused's evidence in the regard that suggested that the deceased must have fallen on a fist sized stone or stone about the size of accused's cupped hands, (as she indicated before Court).

I have therefore no doubt that this case being a circumstantial one where nobody saw anybody do anything factors are irresistible that the accused and the accused alone is accountable for the death of the deceased. She is found guilty as charged.

My assessors agree.

JUDGE
16th April, 1997

EXTENUATING CIRCUMSTANCES

These are factors which the court has to take into account in order to avert the extreme penalty, in other words the punishment by death. Such factors are many, drunkenness is one of them, senility could be one of them, youth is another, existence of bad blood generated by the deceased could be another. The list of factors to be taken into account as Holmes JA in ***S vs Letsolo*** 1970(3) SA 476(A) at E to 477 B indicated is not exhaustive.

You have been given an opportunity by your counsel and the court to show by evidence why the death sentence should not be imposed. The court paid keen interest and did to a large measure sympathise with your counsel who went out of his way to try and lead you to the view that if what you had told the court in the evidence in the main trial is rejected as false then you could perhaps resile from that story and make a clean breast of things, but to his greatest disappointment you insisted that you are not going to resile from the story that was rejected by the court as false. Well the risk was all on you when you insisted that you didn't kill anybody and that it is all lies. The court couldn't bother your counsel anymore. It fell to the lot of the crown therefore to assist the court in making a fair decision on this matter.

And very properly *Ms Nku* for the Crown indicated that relations between you and your mother-in-law, - and taking into account the evidence that was given by your son - could hardly have been good or healthy at all in view of the fact that you were projected as not really taking care of the old lady. So it is not difficult to see the old lady on her part not being too kind towards you. It is not difficult to think that naturally she may well have reciprocated your ill will towards her, and may have paid you back in your own coin of unkindness. There is no doubt that your husband was in sympathy with her but at the same time he found himself in the difficult position where he had to advise you to take care of her. I have no doubt that his mother was reporting things to him behind your back, and in your attempt to have your own back at her you mistreated her. As I indicated the existence of this type of ill blood between mother-in-law and daughter-in-law can strain relations to an extent that one could regard yours as an understandable even though not excusable reaction.

It is for these reasons, therefore, that the court, indebted to both counsel, finds that there are extenuating circumstances in your case. My assessors agree.

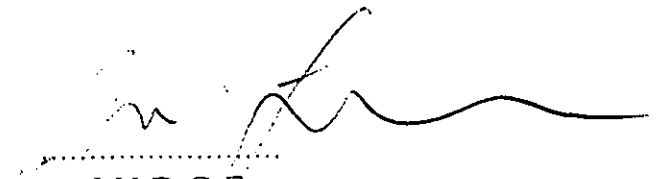
MITIGATION

I have been told of the fact (which is obvious) that you are an unsophisticated old lady coming from a rural area. And that a long period of sentence would not serve much purpose. I do really sympathise with your husband who has to live with the stigma of a wife who is a murderess, who has killed his own mother.

I have observed in the record the role that he tried to play in shielding you, claiming that the old lady was suffering from swollen feet thus suggesting that this could have caused her death. As I indicated Ramphume saw that there weren't any swollen feet at all and the old lady in any event was saying what had gone wrong with her.

I also have been told that you have three children including your very devoted granddaughter; and that long separation from her would deprive her of guidance in this world. I don't think I would agree with that submission at all. True enough I can only hope she will regard you as her grandmother and that she would be happy if after a while you are reunited with her. Saying this I am trying to indicate that the law makes it necessary for me to deal firmly with you. In other words I will be failing in my duty if I do otherwise than send you to jail. My assessors are not in agreement as to the length of period that should be served, but at the same time they indicate that you have got to serve a period for your offence in jail. I agree with the

assessor who has suggested seven years. But for your benefit I will reduce it to six years. You are therefore sentenced to six years' imprisonment. It so happens that the law doesn't allow any suspension in a case where somebody has been convicted of murder. *See Schedule III of Criminal Procedure and Evidence Act 7 of 1981 read with section 314.*



JUDGE
16th April, 1997

For Crown : Ms Nku
For Defence: Mr Putsoane