

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

VS

TAHLEHO LETUKA

J U D G M E N T

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 20th day of August 1997

This accused is charged with the crime of murder. It is alleged that on 18th March 1989, at HA LESHOELE in the district of Leribe, the accused did unlawfully and intentionally kill one SEPHULA MAKEPE.

The facts of this case briefly are that the deceased SEPHULA MAKEPE was seen walking along the footpath which passes by the yard of PW 7 MABATHO KHOANYANE. Deceased was travelling in the direction of Hlotse which is across the river which the deceased was walking towards. PW 7 was doing her laundry outside her house in the fore court. She sent a child to go into the house and fetch her some more water. She was standing up while waiting for more water when suddenly she saw the accused person hurriedly walking through her yard. Accused was trespassing on PW 7's property PW 7 was about to ask the accused person

why he was trespassing when she realised that the accused person was terribly in a hurry. She just looked at him when he walked passed without even greeting her. It is customary in Sesotho tradition to greet a person you walk passed. According to PW 7 her yard was fenced initially. The fence has fallen down at some points where fencing poles have been removed by vandals. The accused jumped out of PW 7's yard. Accused walked straight to the deceased who was still travelling along the footpath. On arrival to where the deceased was this accused immediately, without uttering a word, attacked the deceased by hitting him with a stick. The accused aimed his blows at the head which the deceased shielded or protected with his arms together with the handbag which he carried. Accused person hit the deceased many times while the deceased persistently shielded his head. Deceased took out of that bag a small axe which he used to continue shielding and protecting his head against the blows of a stick from the accused. That axe fell away from the deceased when it was hit with a stick by the accused. Accused hit the deceased with the stick on the knees. The deceased fell down. The accused now belaboured the deceased who was then lying flat on his face on the ground. The accused proceeded to pick up that axe which he had hit out of the deceased's hand after the deceased had produced it from his bag and used it to ward off the blow the accused directed at his head. Armed with the axe now the accused proceed to chop indiscriminately on the head area of the deceased's body. PW 7 raised the alarm by screaming for help while at the same time she appealed to the accused person to refrain from his actions. PW 7 saw PW 5 riding passed at some distance. She called out to him by his name and asked him to come to help. PW 5 heard the cry and looked in the direction it came. He saw two men; one in white overalls and the other dressed in blue top and khaki or darkish farmers trousers. These men appeared to be involved in a fight. PW 5 also heard the crackling of the stick or sticks. He saw blows as sticks or stick flew into the air. Although PW 5 was

sufficiently close to make those observations, he had to go around other people's yards to get to the scene of the crime. He hastened. He was still riding on his horseback.

When PW 5 approached the scene of the crime the man in white overalls hurriedly left the scene. PW 5 thought that he was running away. He alighted from his horse and attempted to apply first aid to the deceased because he noticed that the deceased was bleeding profusely and lying on his face sloping downwards. PW 5 instructed the little boy he saw there to ride on his horseback into the village and raise the alarm as he went. PW 5 was under the impression that the man in white overalls had run away after killing the deceased. PW 5 instructed this little boy to ride into the village and request the people to apprehend this man in white overalls.

PW 5 was attempting to assist the deceased by turning his head up the slope direction so that he could slow the flow of blood so that he could try to stop the bleeding. This accused arrived at the scene again. PW 5 had recognised the deceased as he turned his head that he is SEPHULA MAKEPE, the fellow villager. When the accused arrived PW 5 recognised and identified him as another fellow villager and more over that he is a grandson of his called TAHLEHO LETUKA.

At this juncture the accused was armed with a knife in one hand and the stick in the other. The accused unclaspd or opened the knife which was held in his right hand. He then approached the deceased and PW 5 who was standing astride across the deceased as he was attempting to raise the deceased's head a little higher in order to slow and stop the flow of blood from his head wounds which were bleeding profusely; PW 5 reprimanded the accused. Perhaps thinking he could command some respect from this accused PW 5, pointed out to him that he cannot do bad

things even in his presence. The accused persisted to come close despite the reprimand and appeals not to assault the deceased any further. PW 5 tried to use his horse whip to stop him. The accused hit away that whip with his stick. It fell far away from PW 5. The accused then came and stabbed the deceased with a knife at the back. This deceased after receiving a stab wound at the back turned on his back, exposing his front which the accused repeatedly stabbed with the same knife. As if he had not done enough damage on the deceased's body, this accused changed weapons, he now held the stick in the right hand and once more belaboured the head and face of the deceased. Thereafter he once again left. He returned after a little while. According to PW 5 the accused seemed to be persisting in his actions. PW 5 picked up a stone with which he threatened to hit the accused. He pointed out to the accused that he regarded the accused to be fighting him and not the deceased anymore. The accused explained that he is coming there only to retrieve the small axe. PW 5 allowed him to retrieve it. PW-5 had not seen this axe as it was covered completely by the deceased's blood. PW 5 saw it for the first time when this accused picked it up. According to the eye witnesses there was a pool of blood where the deceased and that weapon were lying. The accused person went away, this time for good. Those people who had gathered came and assisted PW 5 to take the deceased to the motor vehicle which transported him to the hospital.

The accused does not deny any allegations made against him by these two eye witnesses PW 5 and PW 7. The stick the first weapon used by this accused against the deceased is the property of the accused. Accused was seen by PW 7 walking fast through her yard and immediately attacking the deceased by hitting him with that stick. It was claimed by his counsel by questions to crown witnesses that accused acted in self defence. Defence counsel seemed to suggest that the deceased was the aggressor. The deceased attacked the accused who acted in defence of his

person. There is no evidence whatsoever to show this court that the accused was attacked at any time by the deceased or anyone. The evidence led before this court showed us that the accused was the aggressor and attacker. According to PW 7 who witnessed this assault from start to the end, the deceased was assaulted like a child. The deceased was receiving the blows. Not even once did the deceased deliver a single blow to the accused. The "lebetlela" stick used by the accused to deliver blows on the deceased's head, arms and hands which the deceased used to protect his head, is a dangerous weapon. Death was due to "head injury with brain injury" according to the report of post-mortem examination. The eye witness saw the accused hit the deceased repeatedly on the head area with that stick. Those head injuries are the result of the use of that stick and an axe. The Report of Post-mortem examination is very sketchy and lacking in details but nevertheless, consistent with the evidence of the eye witnesses.

Very belatedly, the defence counsel suggested in his address at the conclusion of the case, that the accused feared that the deceased had a gun in his handbag or pocket book. The accused therefore mounted this vicious attack to defend himself against the possible use of a gun which he believed to be in the deceased's pocket book. What could possibly have given him that belief was never put before this court. Beliefs especially the ones that instil fear in a person's mind, must be founded on actions or words of another person. They cannot be just plucked from the passing wind. There is no one who testified to the effect that this accused was in anyway threatened by the deceased or anyone. The accused person's fears about the use of a gun are unfounded and we totally reject the suggestion that he was defending himself.

For private defence to succeed the accused must satisfy the court that there

was eminent danger to his life. The accused did not give evidence. He had a right to remain silent. He exercised that right. No one testified on his behalf about any eminent danger that was posed by the deceased person or anyone. That small axe which easily got completely covered by the blood flowing from the deceased's wounds was by its nature and size no threat. The accused was not even aware of it until it was produced. It is totally ignored by the defence and correctly so if I may add. The accused was already armed with a "lebetlela" stick which he used to launch the attack on the person of the deceased. That axe was no match. **R v VAN VUUREN 1961 (3) SA 305 (E) at 308; REX v POQA 1979 (1) LLR Page 161 at 169.** The axe was hit only once and it fell. The strength of the person who was armed with that axe was minimal compared with the power and force of the stick which hit it away. This would be relevant when it comes to the consideration of the amount of the force used in self defence. The weapons used by this accused and the force applied should be commensurate with the force and weapons feared. **R v ZIKALALA 1953 (2) SA 568 (A).** It was never suggested to crown witnesses that this accused feared an eminent attack with an axe. Perhaps the defence counsel felt the gun is a superior weapon to the ones used by the accused. Throughout the cross-examination of the crown witnesses, it was never suggested that the accused feared that the deceased was armed with a gun. The overwhelming evidence by eye witnesses showed the deceased was a helpless victim who even failed to protect himself. Deceased had no gun in his possession. It was PW 5's evidence that while he reprimanded the accused in an effort to stop him from perpetrating further assault on the deceased, the deceased after receiving a stab wound at the back, turned over - exposing his tummy and chest - upon which the accused inflicted more stab wounds.

Another defence that was raised on behalf of the accused is provocation. In

terms of Section 3 (1) (a), (b) and (2) of CRIMINAL LAW (HOMICIDE AMENDMENT) PROCLAMATION 42 of 1959, the crime of murder may be reduced to the crime of culpable homicide if the court is satisfied that death was caused in the heat of passion by sudden provocation. The significance of the underlining is for emphasis. First of all it must be established that there was provocation. The nature of the assault perpetrated by the accused on the deceased as described by the eye witnesses, gives one the impression that the accused was very angry. PW 5 specifically claimed to have seen signs of extreme anger on the face of the accused at the time he returned to the scene of the crime armed with a knife and a stick. The rage which possessed this accused must have been self induced. No one testified before this court to show us how this accused came to be so extremely angry. There is a very faint suggestion that there was a dispute about the piece of land between the families of the deceased and the accused. Nothing was ever said by the accused or his counsel in the cross-examination of the crown witnesses regarding this land dispute. Whatever provoked the accused was never put before this court. The existence of land dispute if this accused was settling it, merely shows the motive for the accused to take the law into his own hands. It cannot be regarded as the cause of provocation which could operate to reduce the crime of murder to culpable homicide. There is no mention of a specific date on which the deceased successfully sued the parents of the accused for the possession or use of the residential site in question. There must not be a cooling off period between the time the person receives provocation and the time that person takes a murderous action as the result of that provocation. **REGINA V MASAKALE MPHOSI 1963 - 66 High Commission Territory Law Report at 17; REX v HLOARLE 1967-1970 LLR Page 121 at 128 E-F.**

The accused does not deny that he had the requisite intention to kill the

deceased. He vaguely sought to be excused from his action by claiming he was provoked. The accused should have testified before the court to show the court the type of provocation which he received. No evidence was led on behalf of the accused to show the court how he was provoked, and by whom. The court was therefore in no position to make a finding as to the existence of provocation. It was suggested to crown witnesses at the time of cross-examination that the deceased provoked the accused. PW 7 who witnessed the encounter between the accused and the deceased from the beginning to the end denied vehemently that the deceased provoked the accused in any manner whatsoever. What PW 7 witnessed was the attack by the accused of the deceased without anyone of them saying anything or doing anything.

The intention to kill is seldom expressed. Almost at all times, the intent to kill is gleaned from the surrounding circumstances of the case.

The factors which help the court to determine the existence of the intent to kill are the weapons used; the seriousness of the injuries inflicted and the place on the body selected to inflict the injuries. The use of the "lebetlela" stick shows the accused's determination to cause serious injury. Even after the deceased was rendered useless and was lying helplessly on the ground, the accused went to fetch a knife which he used to stab the deceased more than once. According to the eye witnesses the accused stabbed the deceased many times both at the back and front of his body. Those present at the scene of the crime pointed out to the accused that he should stop what he was doing. This was said many times even prior to his attack using a knife. To PW 5 the accused expressed his intent to kill the deceased although not in so many words. The witnesses pointed out to the accused that he should stop assaulting further this deceased. The accused is alleged to have said,

“ke batla ho ts'oareloa ntho e phelang” translated literally as “I want to be arrested for something substantial or more serious”. This is a common saying by violent people who resist restraining by those present and who try to restrain them from perpetrating violent actions. In the case of murder as in our present case the accused was understood to mean that he should be arrested for murder. Apart from clearly demonstrating his intent to kill by his savage and brutal assault of the deceased this accused expressly said he wanted to kill the deceased. The resort to the use of the knife against the person who was lying prostrate on the ground and therefore posing no danger to anyone clearly indicates intention to kill plus positive desire to kill **SELLO LEMPHANE and Others V REX (1) LLR (CA) 1980 at page 58**. This accused as I have pointed out earlier on, he did express his desire to put an end to the deceased's life.

The deceased was placed on the empty grain sacks which were used to convey him from the scene of the crime to the road where the motor vehicle was waiting to carry him to the Hospital. It is suggested by the defence counsel that by putting the deceased on those sacks and sail at the back of a bakkie contributed to the cause of death. On the post-mortem examination report the cause of death is clearly spelt out as due to “head injury with brain injury”. How the carrying of the deceased on the empty sacks and laying him on the sail at the back of the van contributed the “head injury with brain injury” was not clearly spelt out by Mr. Mafantiri. There was massive bleeding. The eye witnesses spoke of a lot of blood pouring out of the head wound at the back. There was a puddle of blood in which the axe which was later retrieved by the accused, was immersed. No doubt the deceased lost a lot of blood. That cannot be the fault of those who assisted the deceased to go to the hospital. It is totally unreasonable to suggest that by carrying the deceased on the empty grain bag caused more bleeding. The sacks and sail were

used according to the witnesses to protect the floor of the van from the blood. Those sacks were intended to absorb the blood. They did just that. As the result they were soaked in deceased's blood. There was no way, shown to this court, that the sacks caused more bleeding. Although there is evidence that the deceased lost a lot of blood, the cause of death is not the loss of blood.

The death of the deceased was caused by the accused. That is why he was found guilty of murder.

On the question of Extenuation the court found no facts that could possibly be regarded as constituting extenuating circumstances. This accused was therefore found guilty of murder without extenuating circumstances.

The manner in which the deceased was assaulted was so brutal that it demonstrated the highest degree of cruelty. The pleas of mercy and appeals to stop fell on accused's deaf ear. He was so determined to kill he made sure he left the deceased no chance to survive. To sentence this accused to anything than death would be doing him a disfavour. Accused would not only be surprised and shocked, he will be disappointed as it appears from his savage assault of the deceased that he wanted and desired nothing short of death. The brutality demonstrated by the accused in the manner he assaulted the deceased exhibit only aggravating features. Launching unprovoked assault on an unarmed old man with dangerous weapons are an aggravating circumstances. Pounding with a heavy stick such as "lebetlela" on the head of a human being must be an aggravation. Worse still when such pounding is carried on while the victim is lying prostrate on the ground. Our search in this whole record disclosed only aggravating factors. That is why this accused was found guilty of murder with no extenuating or mitigating circumstances.

It is ordered that he be returned to custody and that he be hanged by the neck until he is dead.

I agree : 1st Assessor : *[Handwritten signature]*
2nd Assessor: *[Handwritten signature]*

I do not agree : 1st Assessor :
2nd Assessor:

[Handwritten signature]

K.J. GUN^T
JUDGE

For Defence : Mr. Mafantiri

For Crown : Mr. Qhomane