

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

VS

LISEBO MOKHORO

JUDGMENT

**Delivered by the Hon. Mrs Justice K.J. Guni on the
24th day of November, 2000**

Charge: Murder

The accused in this case is charged with the crime of murder. It is being alleged, that on or about 12th October 1994, at or near LESOBENG HA PETEROSE, in the district of THABA-TSEKA, the said accused did unlawfully and intentionally kill LEFULESELE MAHLOMOLA by stabbing her on the chest with a knife and thereby commit the said crime.

The accused has pleaded not guilty to this charge. The said plea, was said by Mr

Ntlhoki, the defence attorney, to be in accordance with his instructions. After entering the said plea on behalf of the accused, her attorney indicated to the court, that all the facts contained in the depositions made at the Preparatory Examination by PWs 4,5,6,7,8 and 9, are admitted. Further admissions were made as regards the medical evidence contained in the postmortem report. As a result of these admissions by the accused, those depositions made at Preparatory Examination by the witnesses indicated above, were read into the machine and made part of the record of this trial. The post mortem report was produced before court by consent and marked EXHIBIT A. It was also read into the recording machine.

Briefly, the admitted facts as contained in those Preparatory Examination depositions are as follows:- PW5 and PW6 were in the vicinity of the scene of the crime at the time the alleged offence was committed, although both of them were out of sight. PW5 is MATHABISO SEATLANA. She was in the KHALOLI river where she was doing her laundry. When she finished her washing, she ascended the river bank in order to go and hang up her laundry. While she was hanging up her laundry to dry, she heard a child cry out her name. Immediately there arrived another child to her, named LIMAKATSO who made a report and an indication. MATHABISO SEATLA followed them up. She arrived at the scene of the crime. There she found the deceased laying down and bleeding profusely from the wound

next to her left breast. PW6 is MAMAKHALA MAPHATHE. She was collecting firewood in the neighbourhood of the scene of the crime. She responded to a call and report made to her by some school children in the same manner as PW5. She also went to the scene of the crime. These are the first adults to arrive at the scene of the crime. Their observations of the deceased are more or less the same. MAMAKHALA MAPHATHE, was requested by MATHABISO SEATLANA to send some messengers to the village to raise further alarm.

PW4, T'SOSA MOKONE, is an uncle of the deceased person. He heard and also saw the deceased person's mother cry as she proceeded on her way to KHALOLI. There these two (Pw4 and deceased's mother) adults found the deceased already dead. T'SOSA MOKONE's evidence shows this court that he observed the blood stain near the left breast of the dead body of LEFULESELE MAHLOMOLA. The accused reported to PW3 - LILAHLOANE SELLO, her friend and class mate, that she stabbed LEFULESELE on the chest with a knife. The actual stabbing was witnessed by Pws 1 and 2. In her evidence the accused told the court that she stabbed the deceased on the chest with her brother's knife which she took from the suitcase where it is kept at their home. The accused pointed out to the court that she returned the said knife to a place where she got it, immediately after stabbing the deceased with it.

At the time the first two adults arrived at the scene of the crime, the accused was nowhere to be seen. PW4, T'SOSA MOKONE, who must have been proceeding from the village to the scene of the crime, had seen the accused whom he tried to follow and catch up with, after receiving the report of the incident which led to the deceased's death; This accused in her evidence told this court, that some men gave chase after her, as she ran away from the village. The accused and her brother, the owner of the alleged murder weapon, resided in the village of HA PETEROSE with their grandmother. Their mother lived in another village where this accused was running to when she left her grandmother's residence. The accused told the court that she out ran those men who chased after her. T'SOSA MOKONE, in his evidence, shows the court that when he failed to catch up with the accused he returned home.

It is in the common cause that both the accused and the deceased attended the same secondary school, together with PW1 and 3. PW1 and the deceased were classmates and friends. PW3 and the accused were also classmates and friends. PW1 was almost always in the company of the deceased. The accused and PW3 were similarly always together. In that village PW3 and the accused's homes are also close together in the same neighbourhood. PW2 attended the primary school which was at the same place as the secondary school. She lived in the same

village where both the accused and deceased and all other witnesses who rushed to the scene of the crime at the time the alleged offence was being committed.

It is an established fact that the deceased sustained a single stab wound on her chest. All the witnesses saw either the actual bleeding from the wound or the blood stain which has resulted from the said bleeding. It is also established that there was both external and internal bleeding from that wound. The external bleeding was observed by PW 1,2,3,4,5, and 6. The post mortem report shows that this stab wound which resulted in both external and internal bleeding, is the injury which caused the deceased's death.

Although the body of the deceased was transported to and from various places after her death, no further injuries were caused on the corpse during such periods of transportation according to the evidence of PW4. There is admitted evidence of PW8 LITLAMA MOSOLLO, to the effect that he directed that the corpse be removed from the scene to the deceased's parents home. The police officers transported the body of the deceased from her home to MANT'SONYANE mortuary from hence they further moved it to QUEEN ELIZABETH II Hospital Mortuary where post mortem examination was carried out. In all material respects, the evidence of the police officers who conveyed the deceased's body to

the two mortuaries, is supported by that of PW4, who identified the body of the deceased to the Doctor who performed the postmortem examination. The post mortem report shows that there was still only one stab wound,[described, at the portion of the report, which shows the external appearance of the body as; 7cm wound LT upper chest].

CAUSE OF DEATH

The evidence of PW4,5,and 6 shows that LEFULESELE, died immediately, there on the spot, after sustaining a stab wound. There are no intervening factors between the accused's act of stabbing the deceased and her resultant death. It is the accused's act of stabbing, the deceased on the chest with a knife which resulted in the deceased's instant death. There is evidence of eye witnesses as regards the actual stabbing of the deceased on the chest by this accused. PW5 and 6 saw the deceased die as she laid bleeding there at the scene of the crime.

What was the accused's intention when she stabbed the deceased with the said knife on the chest? The intention to kill is seldom express S V SIGWAHLA 1967 (4) SA 5 66(AD). In almost all the cases, the intention is gleaned from the surrounding circumstances of each case. Rex v THABISO LEJOETSA 1971 - 73 LLR 177 at 180B.

The accused's story is to the effect that the deceased and other three big girls wanted to or had threatened to assault her. On the day this accused stabbed to death the deceased, the deceased with those three others had waylaid her. The deceased in particular stopped the accused and challenged her to a fight. The deceased delivered the first fist blow which this accused dodged. For that miss and apparent intention to deliver the second blow, the accused retaliated by delivering that fatal stab on the chest of the deceased. According to this accused there was an animosity between herself and the deceased because the two shared a boyfriend, one MOFANA MAPHATHE. The deceased wanted the accused to quit the love game she was playing with this MOFANA MAPHATHE. For some time these four girls, [LEFULESELE deceased, PW1 MOLELEKENG, MONICA and MOSELANTJA] had been touting this accused about her desperate desire to be married. At times this accused was afraid to go to school, for fear of these four big girls. She reported the matter to her grandmother who did not take such report seriously. Accused could not appeal for assistance to the teachers at school because she felt that might make matters worse.

This village of LESOBENG HA KOKOANA PETEROSE is inhabited by people who from the facts of this case, appear to be related by blood and marriage. Accused's aunt [her mother's sister] is married in the deceased's family. PW1 and

2 have, since they left school, married into the deceased's family. The accused was asked if having failed to use the teachers at school to intervene in the matter between her and the deceased [if it is true that it was causing her the alleged discomfort,] did she then consider using the good offices of her own aunt who was married into the deceased's family? The accused answered that it never occurred to her to use her aunt to intervene. The decision to arm herself with that dangerous weapon, according to her, was not a solution to her problem of fear to go to school for touting by four big girls.

This is the accused's defence on this charge of murder. What is murder? It is defined in *The South African Criminal Law and Procedure, Volume 11 - [Common Law Crimes,]* third edition, by J R L Milton, at page 310, as consisting in the unlawful and intentional killing of another living person. At page 401 *CRIMINAL LAW, Snyman, third edition*, murder is defined as the unlawful and intentional causing of the death of another human being.

The fact that LEFULESELE is a human being or that she is another living person is not in dispute. This accused has therefore cause the death of another human being, LEFULESELE MAHLOMOLA by stabbing her to death on the chest with that knife. The unlawfulness and the intention to kill may be established or failed

to be established by the evidence which shows the reason why the accused stabbed the deceased to death. At one breath the accused claims that she did not want to stab the deceased but she was merely threatening to stab in order to frighten her and everybody who may have intended to attack her. At another breath the accused seems to say that she stabbed the deceased in order to defend herself from the attack the deceased had already commenced upon her own person.

The position adopted by the accused presents two faces. If the stabbing of the deceased occurred while the accused was waving or brandishing the knife about, in order to frighten the girls away, it was therefore unintentional. It could perhaps be said to be accidental. If the stabbing was done deliberately in retaliation for a first fist blow delivered by the deceased upon the person of the accused and to stop the on-coming or second blow, it was intentional.

The evidence by the crown witnesses and supported in all material respects by the evidence of the accused person's own friend and classmate, LILAHLOANE SELLO, shows without a doubt, that the accused waylaid the deceased. The accused and her friend and classmate LILAHLOANE SELLO were walking home together as usual. The deceased and her classmate and friend PW1 MOLELEKENG and two others were seen across the river by accused and her

friend. They were coming from behind the accused and her friend because as they were seen across the river, they were from the shopping centre. Accused decided to wait for them. PW3 LILAHLOANE SELLO appealed to the accused to let those be. She urged her to come along home with her. Accused refused and waited for the deceased and company. It is evident that it is the accused who waylaid the deceased. The evidence of their encounter by the crown witnesses at the scene of the crime points directly to that fact. When the deceased arrived at the spot where LILAHLOANE SELLO left the accused waiting for the deceased, the accused stopped her and challenged her to a fight. The deceased enquired since she was at that time, in the company of three other girls, if the challenge is directed at her personally. The accused, according to PW1 who was there present, confirmed that it is the deceased whom she is challenging to a fight. Accepting that challenge, the deceased put down her books. It was when she was still in the process of raising up from putting down her books, when suddenly this accused stabbed her on the chest with the knife. This act of stabbing of the deceased, on the chest by the accused, was witnessed by all the school children there present, including PW1 MOLELEKENG and PW2 THANDIWE MACHABA. There is no evidence showing any exchange of blows. There is no evidence, except unsupported allegation by the accused, that the deceased ever lifted even a finger at the accused. The accused herself told this court that she did not brandish or

wave about the said knife in order to show everyone that she was armed with such a dangerous weapon. The stabbing of the deceased could not have been accidental, as a result, possibly of such show of strength or power to defend herself. It was deliberate and intentional.

If the stabbing was deliberate and intentional was it done in self-defence? The accused has alleged that there were four big girls spoiling for a fight with her. She armed herself with the said weapon for the purpose of defending herself against their intended attack. There is no evidence that there were four big girls spoiling for a fight with this accused. The accused's own close friend and classmate PW3 had never observed anything of the sort. PW1 also denied that there was such a plot or even an indication of such a possibility. Evidence point at the accused person picking on amongst the other school girls, this deceased person. The other three in the deceased's company were just the bystanders and onlookers like the rest of the school children found waiting with this accused. True, there was a crowd of school kids who waited with the accused when they heard that there was going to be a fight. Deceased was minding her own business. Together with her classmates she had gone via the shop on her way home from school. It is common to see the school children standing-by while some of them are engaged in a fight. It is a form of entertainment. Those school kids who are entertained, standby as

spectators. There is no evidence to support the allegation by the accused that the school children encircled her to block her way so that they all assaulted her. Even the accused never claimed that anyone else other than the deceased, attacked her. The suggestion that there were four big girls amongst others who wanted to assault the accused, is false. It is therefore totally rejected.

For the accused to succeed in her claim that she acted in self defence, there must be evidence showing this court that her life was in imminent danger. ***R v MIYA AND OTHERS 1966 (4) SA 274.*** The accused has claimed that the deceased delivered a fist blow, but the accused dodged that blow. In other words, the deceased missed her. The deceased was ready to deliver the second fist blow when the accused stabbed her. According to the accused the deceased was not armed. Evidence of all the witnesses who were there as the fight started and ended, supports that allegation that the deceased was not armed.

Even if the court accepts the allegation that the deceased was the aggressor, and that she attacked the accused first by hitting her with a bare hand be it fist or open, the accused is obliged in law to repel the attack with more or less the same measure. By resorting to the use of a dangerous weapon in order to repel an attack by the deceased who was according to the accused using bare hands, was

definitely excessive. The accused also must have appreciated that the means she used by far exceeded the limits of private defence. **GIDEON LETELE V REX CRI/A/149 of 1968**, that is why she further claims that she just threw the knife in the dark. She is attempting to shift the blame by indicating that she did not know nor see what she did. There is no claim for blackout. This knife throw in the dark was just made mention of by the way.

The requirements which when fulfilled entitle an accused person to an acquittal, when pleading private defence, are succinctly stated in the case of **Rex V ATTWOOD 1946 A.D. 331 by Watermeyer CJ** [as he then was), at 340

First of all, there must have been an unlawful attack or that the accused had reasonable grounds for thinking that she was in danger of death or serious injury. This accused does in no way claim that she was in danger of death or serious injury. She does not claim that she feared that the second fist blow would cause her a serious injury.

Secondly, the means of self-defence which she used must not be excessive in relation to the danger. There is no evidence that this accused was in any danger of any kind. Even if this court accepts that there were four big girls threatening

to assault her, (which I do not accept) or that the deceased hit the accused with a fist, the use of a dangerous weapon in those circumstances was excessive.

Thirdly, the means used by the accused should be the least dangerous or the only means readily available at the time. Evidence have shown this court that the accused postponed the fighting from 11th October 1994 to 12th October 1994 on the grounds that she was not ready to engage the deceased for a fight on that day. When asked what will she bring to make herself ready to fight, she told the crowd, in which the deceased and accused's friend and classmate LILAHLOANE SELLO were present, that she will bring a knife. The accused brought the knife specifically to fight. She concealed it under her clothes until the moment she produced it to stab the deceased. It is the accused's own evidence which shows this court that at no state did this accused suspect the deceased to be armed. The decision to arm herself with a knife was not justified. The decision to resort to the use of the said knife, against the deceased's bare hands was even more unjustified.

The accused is therefore found guilty, as charged, of murder of LEFULESELE MAHLOMOLA with a direct intent.

EXTENUATION

The accused was 16 years of age at the time she committed this crime. Her youthfulness is an extenuating factor. S v SIGWAHLA 1967 (4) SA 566. The extenuating circumstances may be found anywhere in the body of the record. R v MALOPI 1954 (1) SA 390. There may have been some not so open conflict between the accused and the deceased as a result of sharing this boyfriend called MOFANA MAPHATHE. There is an indication of fear to lose the said boyfriend by the accused. What she seemed to have been eager to protect was her interest in the love affair with MOFANA MAPHATHE. The feeling that the deceased and her friend P.W.1 may have been desirous of the accused's break-up with that boyfriend, seems to have been reciprocal between those two girlfriends of MOFANA MAPHATHE. The act of arming herself with such a dangerous weapon clearly indicates the accused's intent to stand her ground and stay in the relationship which she felt was being removed away from her grip. Her fear to lose a boyfriend they shared with the deceased, is also an extenuating factor. They may have been some touting although nobody witnessed it. The fact that the deceased paid the accused a visit on 10th October 1994, to enquire about her intended departure time from the school on that day, shows that they may have been some sort of conflict between those two girls. On their way home on that same day, they were heard shouting abuse and threats to fight to each other. This

was confirmed in the evidence of PW3, who when she noticed that there was going to be a fight between the deceased and the accused, tried hard to discourage her friend and classmate, the accused to let go off the personal grudge which she apparently harboured against the deceased. PW3's efforts to persuade the accused, not to carry out the objective to fight with the deceased, failed. This factor, the existence of conflict between these two girls, is another one that goes to extenuate the gravity of this offence.

Mitigation for Sentence

All the factors discussed in extenuation, apply equally in mitigation as well. They shall be so considered. The offence for which this accused was charged and convicted is a very serious one. The address in mitigation by the defence counsel dealt mostly with the factors which took place after the commission of this offence. Immediately after stabbing the deceased, this accused took off from the scene of the crime. She ran to her home where she returned the knife into the suitcase perhaps reported to her grandmother what she had done. She continued in her flight from the village where she returned the next day. She had hid in the forest where she spent the night. But the next day she handed herself over to the appropriate authority. This self surrender to the authorities contributes towards the realisation and acknowledgement of the wrong she had committed. The sense of

regret was gripping into her mind if it was not already therein settled.

The accused, attended the trial which went on slowly but sure, very faithfully. At the commencement of the trial, the accused was accompanied by her husband together with the mother and father-in-law. It is a great pity that criminal matters are not brought to trial promptly. This offence was committed in 1994. In the intervening period from that date to this date when the trial is concluded a lot of things had happened and changed the person and circumstances of the accused drastically.

For example, she was sixteen (16) years old when she committed this crime. Now she is twenty-two (22) years of age. She was a school pupil in 1994. Now, she is a married woman. There is no explanation from the crown why such a long time was taken before this matter was brought to court. The accused was arrested and must have been in custody until she was released into the custody of her mother MAMORENA MOKHORO, on 19th November 1994. The burden of waiting for this trial to take place for these many years must have weighed very heavily on her conscience . She started the new married life in those circumstances. The revelations made during the trial, have affected her new life adversely. As a result the short life of just two decades, have under gone many drastic changes.

The life which she led when she resided with her grand mother came to an abrupt end. It would appear that there was bad feeling between the members of the family of the deceased and the accused. It emerged in evidence during the trial that the grandmother of the accused was man-handled during the fracas at "*KHOTLA*" where the matter concerning the death of the deceased was being discussed. It was repeatedly suggested to all the witnesses that the deceased's members of the family wanted to retaliate. The altercation which took place at "*KHOTLA*" when the matter of the death of the deceased was being dealt with, is used as a ground to support the said suggestion for retaliation. The accused run away or her parents removed her from that village. Her grandmother subsequently died. It is suggested that she died as a result of the killing of the deceased by her grand daughter, this accused. Although no member of the deceased family has been arrested for the killing of the accused's grand mother, the accused, sought to put the blame on the members of the family of the deceased.

It is being argued on behalf of the accused that at present she has no where to go. Although she met and married her husband while she was at the place where she had gone to hide from the members of the deceased's family, that newly found refuge presently has no vacancy for her. She has been thrown out

Earlier on I had mentioned that her in laws came to court to give her support. Unfortunately as the trial progressed and evidence brought to light the events which led to the charge this accused was facing, those in laws stopped coming to court. We now came to know from the accused's Counsel that her husband threw her out. In that marriage which she secured while on the run there seems to be problems. The accused sought and obtained refuge with her sister and her husband. It was pointed out that despite being homeless and having her marriage on the rocks, she faithfully attended as required this trial till the last day. This, she did with the help and support of her sister and brother-in-law.

At the time this offence was committed the accused was sixteen (16) years old. There is a statutory provision governing the treatment of young offenders before court. That is CHILDREN'S PROTECTION ACT 1980. In Section 1 of the said Act, the child is defined as "an unmarried person under the age of 18 years". At sixteen (16) years the accused in this case is therefore a child. The section 26, which deals with punishment of the "child offender" specifically provides at subsection (1) that "No child shall be punished by imprisonment" (My underlining). Sentencing is the most difficult part of any trial. The Statutory provision which are applicable in this case, limit the options open to court in the exercise of its discretion. As a female offender this accused cannot, under any

circumstances be sentenced to whipping. Section 309 CRIMINAL PROCEDURE AND EVIDENCE ACT N0.9 (2) 1981, prohibits whipping of females.

There are other sections in the CRIMINAL PROCEDURE AND EVIDENCE ACT N0.9 of 1981, which exclude from certain punishments such as caution and discharge or reprimand, from being meted out to the accused persons who are convicted of serious offences. There seems to be no options worth considering in order to pass sentence in this case. Therefore even though postponement of the passing of sentence is also prohibited in cases where the accused has been convicted of offences specified in schedule 111, I find myself compelled to postpone the passing of the sentence for the simple reason that there is no appropriate sentence that I could possibly pass presently.

Therefore it is order that the passing of the sentence in this case is postponed for a period of three years on condition that the accused do not within that period commit any offence involving violence to a person of another for which she is sentenced to imprisonment for a period in excess of six (6) months.


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JUDGE

29th day of November, 2000

For Crown: Ms. Nku
For Defence: Mr. Ntlhoki