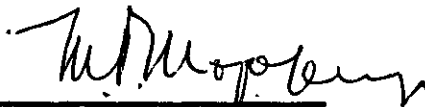


done in respect of the accused Setenane Mabaso. He could not, therefore, be joined with his co-accused in the summary trial proceedings (in terms of section 144) since in his case a preparatory examination had been held which runs counter to the very basic requirement of section 144. Setenane Mabaso cannot be charge with any offence arising out of the same preparatory examination before the High Court unless the committal is revived. If the converse had taken place i.e. if the preparatory examination proceedings against Setenane Mabaso had been irregular ab initio or in any other manner whatever as occurred in the case of Rex v Matete, 1979(2) LLR. 325 at 328-9, then as Rooney J, correctly held, in my view, "... a committal which was irregular would be insufficient for the purposes of section 92" because "committed for trial" simply means "lawfully committed and legally committed for trial." In such a case where there never was a valid committal, summary proceedings would be proper since no legal preparatory examination was ever held hence no legal committal either as required by law. But that is not the position in the present case. The mere holding of a preparatory examination is not per se a bar from the application of section 144. ~~It~~ will only be so if those proceedings were valid.

For the above reasons I came to the conclusion that Setenane Mabaso had been wrongly joined. The Crown conceded.

  
J U D G E.

14th April, 1983.

For the Crown : Miss G. Moruthane  
for the Defence : Mr. Snyman

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MOALOSI MOKAKE

RULING ON THE ADMISSIBILITY OF A CONFESSION  
(after Trial within Trial without assessors)

Filed by the Hon. Chief Justice, Mr. Justice T.S. Cotran  
on the 11th day of April, 1983

On 14th March 1983 I ruled that a confession taken down from the accused by a magistrate in Mohale's Hoek on 14th January 1981 in which the accused confessed to have murdered, or having been associated in the murder, of two persons, and robbery of the shop of one of the murdered men, was inadmissible in evidence. Mr. Kamalanathan had intimated earlier that without the confession he would not be able to proceed further and will tender no further evidence. The preparatory examination record shows he was perfectly justified in his attitude, i.e. that the case for the Crown would succeed or fall on the decision on this issue. The accused was consequently discharged and acquitted.

I said reasons for the exclusion of the confession will be filed later and these now follow :

The evidence gathered from the preparatory examination discloses in brief that on the night of 19/20th November 1980, two persons(possibly three) raided the shop of Mr. Seabatha Ramatsoho at the village of Meriting, in the area of Mekaling, in the district of Mohale's Hoek. One of the robbers appears to have ingratiated himself with Ramatsoho and his wife earlier in the evening and gained access to their cafe, ostensibly for an innocent or legitimate purpose, and the plan was for his accomplice(s) (then out of sight) to stage the robbery of the cafe whilst he would render him (or them) assistance from within.

/The

The robbers eventually managed to get away with the princely sum of about M17 at the terrible cost of the death by shooting of the two men, the said Ramatsoho the shopkeeper, and another villager who came to the rescue, one Ntanyeke Leponesa. It was a shocking and senseless robbery but the police had only two clues:-

1. That one of the suspected men (who was the one who may have ingratiated himself with the shopkeeper) was Buti Michael Lephatsoe who had escaped to the Republic. The police had circulated his name and other known details to all other police stations in Lesotho including border posts.

2. That the bullets that caused the death of the two men were of .303 calibre, widely used in Lesotho.

On the night of 15/16th January 1981, that is to say, nearly two months after the double murder at Meriting in the district of Mohale's Hoek the accused was arrested inside the shop of one Bermester in Quthing camp in the district of Quthing. Sgt Noko was in charge of the investigations of this alleged shop breaking case at Quthing. He testifies that he searched the accused's home and found :-

1. a letter (Exhibit A) on the floor of one of the rooms,
2. a jacket, in one of the pockets of which were some .303 bullets, i.e. of the same type of ammunition used in the Meriting murder.

The letter (Exhibit A) purported to have been written by "Michael Lephatsoe" who gave his address as Box 88 Boksburg East 1460 in the Republic of South Africa. The name Buti does not appear on this letter. According to Sgt Noko the accused told him that "Michael Lephatsoe" was Buti who was a friend of his in the Republic and he explained that the bullets in his coat had been acquired by a girl friend of his, who was also the girl friend of a member of the Lesotho Paramilitary Force. Sgt Noko, who says he had previous information about Buti being a suspect in the murders of the two persons at Meriting and that the said Buti had escaped to the Republic, suspected the accused of being involved with Buti in the two murders at Meriting. He apprehended the accused on the charge of the Quthing shopbreaking and rang up (on the 16th January 1981) Sgt Letsie, who was in charge of the investigations of the two murders at Mohale's Hoek, to come to Quthing. Sgt Letsie duly arrived at Quthing on 17th January 1981, was shown the accused, and on the 18th January 1981 he took him to Mohale's Hoek to interrogate him about the

/murders

murders at Meriting. They got there about noon. Sgt Letsie testifies that after about half an hour of interrogation the accused told him that he wanted to see the magistrate. Sgt Letsie testified further that the accused, who was earlier asked to account for his movements on the night of 19/20th November 1980, had said that he was at Quthing at the time, i.e. nowhere near the scene of the murders at Meriting (in Mohale's Hoek) so the inference surely is that the accused was denying, at any rate during the interrogation, that he had anything to do with <sup>the</sup> murders. Sgt Letsie says he was completely taken by surprise when the accused told him after the brief interrogation that he wanted to see the magistrate, allowed the accused to go back to the cells to think it over, and when he called back for him a short while later, the accused insisted on seeing the magistrate and arrangements were accordingly made.

Two pages (Nos C6 and C7) from the Police Investigation Diary were made available by the Crown to defence counsel and very properly too. Two entries at page C6 are dated 19th December 1980 in which Sgt Letsie had minuted that he had gone out on investigations to Mekaling, Holy Cross, and Maphutsaneng (the area where the two murders were committed) and he found that the suspect "Buti" had "never" been seen in that area. That could mean:

1. that Buti was not seen with reference to the date of the murders, or
2. that he was not seen on or about the period of 19th December 1980 when Sgt Letsie had gone to look for him having heard he was there.

The ~~use of the~~ word "never" if grammatically used however could mean both 1 and 2 supra, i.e. that Buti had not been seen there at any time.

Nothing occurs in the diary save a minute that Sgt Letsie had gone to Mohale's Hoek on 17th January 1981 accompanied by a Det. Trooper Monontsi, and a minute on the 18th January 1981 at 1500 hours that "through questioning" the accused "wanted to confess". At 1515 hours of the same day a minute was noted that the accused was arrested on this charge and at 1700 hours a minute to the effect that the letter (Exhibit A) from Buti allegedly found in the accused's house (by Sgt Noko) was filed. At 0755 hours of 19th January 1981 the accused was sent to the magistrate. At

10.35 of the same day the confession was in Sgt Letsie's hands. It was a confession with so many details therein that not all could possibly have been prompted by the police.

The accused's story is different. He says that the letter from Buti which the police produced was in effect a fake. It was not found on the floor of one of the rooms in his house in Quthing and he knows nothing about it. The police found his own jacket with some .303 bullets in the pocket and he explained to the police (Sgt Noko in fact) that that jacket had been borrowed by Buti, who was a friend, but not a great a friend, and he (accused) had not known about the bullets. The accused says that at Quthing police station later that day he passed to them the information that Buti, before fleeing to the Republic of South Africa, had confessed to him (the accused) that he (Buti) and a white man had gone to Meriting to recover a debt from a shopkeeper, Seabatha Ramatsoho, and that the white man shot Ramatsoho and the other villager. The accused says he kept this information to himself and divulged it to no one before except when the police interviewed him at Quthing. He felt no compulsion to repeat it to anyone since the person who did the shooting was the "white man" and not Buti.

The accused further testified that he made a confession after having been beaten and tortured first at Quthing charge office by Sgt Letsie and Sgt Noko on the night of 17/18th January 1981 and later at Mohale's Hoek charge office by Sgt Letsie in the presence and participation of some 5 or 6 other CID officers. He says the interrogation was continuous and not spasmodic as Sgt Letsie maintains. He adds that his hands had been handcuffed from Quthing to Mohale's Hoek and thereafter. The **type** of torture allegedly carried out consisted in the main of inserting a hard object between the handcuffs and twisting his wrists, and general assaults on the back. He says the police told him at Quthing and Mohale's Hoek there was no "white man" involved and that he (accused) was that man. He was to go to the magistrate to confess substituting himself for the "white man" and this is what he did i.e. give Buti's story with himself as the person who shot in order to escape police punishment.

As far as stories go the version of Sgt Noko is certainly more superior than that of the accused who struck me as a very shift~~y~~ and tricky witness and I suspect that his story of a "white man" being involved with Buti was extremely far fetched and the

/accused

accused probably invented it after the wife of the shopkeeper who was shot testified at the preparatory examination that she saw the gun when being fired at her husband held by a "white hand".

The accused assertion of torture lacked candour. If what he says is true, i.e. that the police kept at him day and night even preventing him to sleep, he would have reached the magistrate's chambers in the early morning of 19th January 1981 as a physical wreck or in mental collapse. The magistrate had certified, and the accused admits, that he told the magistrate he was in his full and sober senses, admits that the magistrate asked him all the usual questions on the form, and admits that at no time did he tell the magistrate about beatings or coercion in some other form, to induce that confession. The magistrate (Mr. Kotey) was an expatriate magistrate with long experience, and if he had noticed that the accused was physically harmed or under great mental or psychological strain, it is most unlikely that that condition would have escaped his notice. The magistrate had unfortunately gone to Ghana and could not be cross examined but his deposition was admitted in evidence after the Court was satisfied that the Crown complied with the provisions of section 227(1)(b) of the Criminal Procedure and Evidence Act. The Crown of course was aware that admissibility was one thing and weight was another, and called the Court clerk who interpreted between the magistrate (who was none Sesotho speaking) and the accused to testify. He confirmed all what had taken place. I gather from his evidence which is also admitted by the accused, that there was nothing untowards in that interview and that nothing happened therein that tends to suggest that accused was anything but a normal person making a statement to the magistrate. The accused says that though his wrists were injured and swollen, he did not stretch them out for the magistrate to see. He appended his signature on the form. This looks quite normal to me with nothing therein to suggest physical infirmity of the wrists, or nervous agitation.

The position then is that the accused made no impression on me that his story of Buti "confessing" to him, and of torture and harassment at Quthing and Mohale's Hoek was true. His explanations smack of those of a liar attempting to wiggle himself out of a difficult situation.

Unfortunately for the Crown, in questions of confessions, it is not sufficient for it to demonstrate that the accused is a

/liar,

liar, it must go further and persuade me, not on balance of probabilities, but beyond reasonable doubt, that the accused's confession was free and voluntary (R. v Nhleho 1960 (4) SA 712). And as we said in this High Court, time and time again, the fact that the police have in their possession a confession is not per se the be all and the end all of the matter (R. v Ndoiyama & another 1958(2) SA 562), and when it is the only, or the main evidence available against the accused, they must come to Court completely prepared to rebut the usual allegations which accused persons who confessed make after being in custody with other more experienced prisoners for even a short while. We have in this High Court suggested ways and means of rebuttal of those assertions which the police ought to adopt as a matter of routine. If they do not listen to what we say they have only themselves to blame. (See Ruling in R. v Pesa Mokhopi CRT/T/19/76 dated 26th November 1976 - unreported).

When it came to the crunch I found that Sgt Noko had made no note in his police book at the time of the search of the finding of this letter (Exhibit A) on the "floor of the room" in the accused's house, nor did he make notes, if only in brief form, of the accused's explanation about the letter and the bullets either at the time or shortly thereafter or indeed at any time before he came to testify. Sgt Noko adds that "he thinks" he wrote something in a written statement that he filed in the police docket at Guthing, but this was not available with him at the trial (within trial) and he did not appear to have refreshed his memory prior to coming to Court to give evidence. He was speaking of events that had taken place more than two years earlier. The letter (Exhibit A) incidentally looks to have been written on the kind of paper that is found in any Government office (also probably available from bookshops) and that by itself must require the Judge to insist on strict proof before it can accept Sgt Noko's evidence and this cannot be supplied by oral testimony not supported by his own written records of the event.

Sgt Letsie was not in a better situation. He depended entirely on memory without refreshing, or even requesting to refresh his memory, either from notes he made at the time, or even looking before hand at his own police docket. The result was that he was giving evidence dogmatically, only to be shown, by reference to his own or other CID officers minutes in the diary that his "sure" answers were false. It matters not this

/falsity

falsity was deliberate or negligent. An example can be cited about his denial that Det. Trooper Monontsi accompanied him to Quthing. He answered definitely that Monontsi was not with him, not once, but several times. When Monontsi's entry was shown he shifted his stance and said that Monontsi may have been in Quthing on some other business.

If the Court assumes that the accused, when describing to the magistrate his role in the murders, was truthful, the Court must also assume that his answers to the magistrate's questions, before the latter agreed to take the statement down, were also truthful. One of the matters which the magistrate is enjoined to do is this : "Investigate and describe carefully the circumstance which led to the appearance of the deponent before you".

The magistrate did make such investigation and his interpreter confirmed that from the witness box. The magistrate recorded the following answer:

"Deponent says when he was arrested he told the police all he knew of the matter on being questioned. The police told him that what he was saying could only be recorded by a magistrate so he should come and say it to the magistrate".

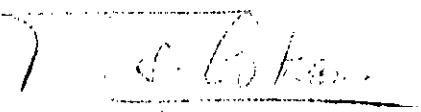
This statement does not strike me as if it was untrue and yet Sgt Letsie says that the accused told him nothing during the interrogation. I ask myself how many laymen know that whilst, in the course of interrogation or investigation, the police are entitled to record in writing any statement from any person whom they think can help in their enquiries and that they are further entitled, after an arrest and after administering the usual caution, to take down a statement even if that statement tantamounts to a confession (if the person charged is willing to give it) that that statement becomes admissible only if recorded by a magistrate, and then only if proved later to the satisfaction of the Court to have been freely and voluntarily given, taking into account not the isolated magisterial encounter, but all what had gone on or transpired before his appearance? Barring lawyers, those engaged in the administration of the law, some police officers and experienced criminals, I should imagine very few. Was this accused one of those? Very very unlikely. The chances are, therefore, on balance, that when Sgt Letsie says the accused told him nothing of the story he eventually detailed to the magistrate the Sgt is lying on a material aspect.

/With



With all this lacuna in the police evidence, even though the accused may not have been tortured, in the manner described, and also that he has lied, something may have occurred by way of duress or pressure which the police were unwilling to divulge. If they had been forthcoming it may have enabled the Court to determine whether what happened did or did not offend the general rule on admissibility.

The Court is unable to come to a conclusion one way or the other, and that being the case (see S. v. Dlamini 1973(1) SA 144 et seq and cases cited) it follows that the party that bears the onus of proof had not been able to discharge it and the confession, as I stated in open Court, was inadmissible.

  
CHIEF JUSTICE  
11th ~~March~~<sup>April</sup>, 1983

For Crown : Mr. Kamalanathan )  
For Defence: Mr. Sappire ) with copy of the Judgment