

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOHAPI FELEMANE

J U D G M E N T

Delivered by the Hon. Acting Judge, Mr. Justice J.L. Kheola
on the 19th day of September, 1983

The accused is charged with the crime of murder. It is alleged that on or about the 17th July, 1981, at or near Khukhune in the district of Butha Buthe, the accused unlawfully and intentionally killed 'Mamokete Folojeng (hereinafter called the deceased). He pleaded not guilty.

By agreement the depositions at the preparatory examination of the following witnesses were admitted as evidence in this Court : p.w. 2 Chief Joele Molapo, p.w.3 Rankara Folojeng, p.w.5 Dr. Moorosi and p.w. 7 D/Sgt. Mokhele.

Dr. Moorosi's evidence is that on the 21st July, 1981 he performed an autopsy on the dead body of the deceased. There were multiple bruises on the body and a ragged wound, internal surface of the upper lip 1 x 5 cm.

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towards the right, torn left labia minora, few sub-junctival haemorrhages. There were congested brain vessels with the presence of petechial and subconjunctival haemorrhages. He formed the opinion that death was due to suffocation.

D/Sgt. Mokhele's evidence is that on the 19th July, 1981 he went to Khukhune village. On his arrival there he went to a donga on the eastern side of the village and above the donga he found a shawl and a woollen cap. In the donga he found a brown belt and further down the stream he found the dead body of the deceased; it was in a sitting position leaning against the bank of the donga with her legs stretched and she was naked, her head was covered with a light brown dress, a torn brassiere was lying near her feet; and her lips were torn, her labia minora was also torn.

I think it will be convenient at this stage to diverge and comment on the evidence of Dr. Moorosi and D/Sgt. Mokhele. Taking their evidence together there is no doubt in my mind that the death of the deceased was not due to natural causes but that she was brutally murdered by some person or persons. There were bruises all over her body and some of them were around the neck clearly indicating that the deceased was strangled. The wound inside the upper lip and the multiple bruises on the body are a further proof that deceased was assaulted; if she had accidentally fallen into the donga her body would not have been naked and her cloths would not have been scattered all over the place. In my view the Crown
/has

has proved beyond a reasonable doubt that the deceased was murdered; but the question is: who murdered her?

P.W.1 'Matlou Lelosa gave evidence that one day in July, 1981 she was attending a stockfair at the home of one 'Mamootleng. The deceased was one of the many people who were in the house and she was carrying her small baby on her back. At about 5 pm the accused entered into the house in which the stockfair was going on and asked the deceased to come out and meet someone who wanted to see her. When the deceased asked who wanted to see her the accused said that person said she would know him/her. The baby was left in the care of p.w.1 and deceased and the accused left together. P.W.1 says that was the last time she saw the deceased because she never returned to the stockfair while she (p.w.1) was there.

P.W.1 left the stockfair later that evening and went to the home of the deceased to find out why she had not returned to the stockfair but the deceased was not at her home. She left the deceased's baby in the care of her mother and went to her home. On the following morning she again continued her inquiries about the deceased but in vain. She went to the accused's home but found that he was also not there. The body of the deceased was later found in the donga and it had the injuries I have already described above. A few days later the accused was found and arrested in the village of Ha Molapo. He appeared to be mentally deranged according

/to D/Sgt. ...

to D/Sgt Mokhele and he had fresh scratches on the face. I may add here that it is not clear how fresh the scratches were but one witness (p.w.3) said they had fresh blood clods. It is also not clear when the accused person was arrested because D/Sgt Mokhele says on the 19th July he found the dead body of the deceased and that "a few days" after that he arrested the accused in a village some distance away.

P.W.3 Mofihli Mohaotsane was arrested in his village for stock theft and taken to Ha Molapo where he met the accused who was also under arrest. He says that when they were transferred from Molapo's to Qalo police station he was in the same van with the accused and he asked the accused what had scratched him on the face. The accused said he had been scratched by a woman he had killed. At the time the accused was telling him this the police officers were in the driver's cabin and they heard nothing about this. He further says that about three weeks later he was in the same cell with the accused at Butha Buthe charge office where he continued his conversation with the accused who told him that he killed the woman because the doctor had asked him to kill her for him. The accused had originally said he killed the woman because she had taken his R3. Under cross-examination the witness was reminded that at the preparatory examination he had never mentioned that accused said he killed her for his R3. The witness could not remember. He further said accused appeared to be in his sound and sober senses when he told him about the killing of the woman at Khukhune.

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At the close of the case for the Crown Mr. Addy, who appeared for the accused, applied for his discharge on the ground that no prima facie case had been established and that p.w.3 had been shown to be a very unreliable witness. For obvious reasons the application was refused. The accused elected to remain silent and the defence case was closed.

The question to be considered therefore is whether the Crown has proved beyond a reasonable doubt that the accused is the person who murdered the deceased. In my view the case for the Crown depends on circumstantial evidence and the confession the accused made to Mofihli. As far as circumstantial evidence is concerned I must approach that problem in the light of the well known principles set out in the case of R. v Blom 1939 A.D. 188 at pages 202/3 where Watermeyer, J.A. said:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:-

- (1) The inference sought to be drawn must be consistent with all proved facts. If it is not the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought 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."

There is no doubt in my opinion that when all the proved facts are taken together an inference can be drawn that the accused is the person who murdered the deceased. But before the accused can be convicted of murder all other reasonable inferences must be
/excluded ...

excluded. The proved facts are:-

- (a) the deceased was last seen alive in the company of the accused,
- (b) the deceased never reached her home that evening and the accused never reached his home,
- (c) the accused was found at Molapo's far from his home a few days after the murder and he had fresh scratches on the face.

In my view these facts do not exclude other reasonable inferences which may be drawn. It cannot be excluded that the accused did show the deceased the person who wanted to see her, and immediately went to Molapo's for personal reasons. We have not been informed where exactly at Molapo's the accused was found. Was he found aimlessly going up and down the village or was he staying with his relatives? And if no reliance is placed on the so called confession it cannot be excluded that the accused could have sustained the scratches some time after the deceased was killed because some witnesses say the scratches were still fresh and could be two days old. The accused was arrested a few days after the 19th July while the deceased was murdered on the 17th July. It seems to me that the scratches were too fresh to be connected with the events of the 17th July. Moreover, there was no proof that the scratches were caused by human nails and no evidence that any human tissue was found in the finger nails of the deceased. The accused have never shown any animosity towards the deceased which could be a motive why he should desire her death.

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The second part of the inquiry is whether the so called confession made by the accused to Mofihli is admissible. In order that a confession can be admissible it must be proved that it was freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto. (See Section 228(1) of the Criminal Procedure and Evidence Act 1981). D/Sgt. Mokhele says that the accused appeared to be mentally deranged when he arrested him a few days after 19th July, on the other hand Mofihli says accused appeared to be in his sound and sober senses. In the light of this conflict in the evidence of the Crown the Court must give the benefit of the doubt to the accused.

There is no doubt that in a proper case the fact that the accused person has failed to give evidence to rebut a prima facie case against him, is a factor which the Court must take into account in determining his guilt. But in the present case where the Crown is relying wholly on unsatisfactory circumstantial evidence, failure by the accused person to give evidence cannot take the Crown's case any further.

For the reasons I have attempted to summarise above I formed the opinion that the Crown has failed to prove its case beyond a reasonable doubt. The accused is found not guilty and he is discharged.

S. H. Hleah
ACTING JUDGE
19th September, 1983

For the Crown : Mr. Kabatsi
For the Defence : Mr. Addy