

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

LIRA MAROJANE
KHOPISO MAROJANE

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 29th October, 1984.

The accused are charged with the murder of Rebamang Moloi (hereinafter called the deceased) on the 15th December, 1982 at or near Maphutseng in the district of Mohale's Hoek.

The accused pleaded not guilty.

The case for the crown depends almost entirely on the evidence of two small boys of about 9 or 10 years of age. They are the only two eye witnesses who allege that when the two accused were killing the deceased they were about 50 to 100 yards away from the scene of the crime. Because of their age and the fact that they are illiterate herdboys I merely admonished them to speak the truth after I convinced myself that they understood what it is to tell the truth. I shall presently give a full summary of their evidence.

It is common cause that on the day in question the body

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of the deceased was found behind the house of accused 1. A flat iron rod about one and half feet long, had been stuck into his head. The entry wound was just in front of the right ear, it went through the brain and came out just behind the left ear. According to medical evidence death was due to extremely severe head injury with a stick going right through the brain.

The first crown witness is Jopo Koenyana who testified that on the day in question the deceased asked him and Moitaeli Bolae (P.W.3) to accompany him as he was going to fetch a horse which was grazing near the home of accused 1. They were about 50 paces from the home of accused 1 when he (the witness) and P.W.3 stopped while the deceased went to where the horse was grazing behind the house. Accused 1 caught the deceased and threw him to the ground, he took the iron rod which was attached to the tether and hammered it into the head of the deceased with a stone. While accused 1 was hammering the iron rod accused 2 was holding the deceased by his feet. The witness admitted that at the preparatory examination he had said accused 2 held the hands of the deceased. He explained that just before he came into Court to give evidence P.W.3 told him that accused 2 held the feet and not the hands.

As the accused were hammering the rod into deceased's head the two boys ran away and joined the others who were herding some horses near the poplar trees. P.W.1 said that the deceased was crying as the iron rod was hammered into his head but nobody came and they did not raise any alarm except to report to the other herdboys what they had seen.

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Although he was a bit far from the accused 1 and the deceased he saw the iron rod, it was a plough shoe. He also saw the stone very well.

Under cross-examination P.W.1 admitted that one 'Matsokolo had asked him to implicate the accused and advised him not to go to accused 1 when he saw him. He said prior to this incident he had been staying at the home of 'Matsokolo, but his mother has removed him from there because she (his mother) said 'Matsokolo had bad influence on him. When asked what accused 1 was wearing that day he said he was wearing a white jacket, a brown pair of trousers, a brown pair of shoes and a white shirt and a hat. He denied that accused 1 was wearing a green overall with patches at the knees. He later agreed that accused 1 was wearing a green overall and a pair of gumboots with white soles.

After the accused had murdered the deceased accused 1 chased them from the poplar tree plantation up to the stream. He then went up to the mountain where his cattle were grazing. P.W.1 says it was P.W.3 who told him that accused 1 was going to the mountain and that accused 2 was going to Motsemocha. The killing took place in the afternoon.

Moiteli Bolae (P.W.3) gave evidence more or less similar to that of P.W.1 but there are some contradictions. P.W.1 said that when the accused started to hammer the iron rod into the head of the deceased, the latter was still standing on his feet, but P.W.3 says that when accused 1 got hold of the deceased he slapped him and felled him to the ground and then started hammering him with the iron rod.

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I have already referred to the contradiction concerning what part of the deceased's body accused 2 was holding P.W.1 said he was holding the hands while P.W.3 said the feet. This discrepancy may appear to be unimportant but when one takes into account that P.W.3 told P.W.1 to change his story just before he entered into Court to give his evidence, this point becomes significant.

Again P.W.3 denies that after they had finished to kill the deceased accused 1 chased them to as far as the stream.

P.W.1 said accused 1 was wearing some clothes when they killed the deceased; P.W.3 says accused 1 was naked and was not even wearing a blanket. He later retracted from this statement and said he was wearing a trousers but no shirt.

P.W.3 denied that the deceased cried when the accused started to pierce his head with an iron rod. Both witnesses affirmed that the killing took place in the afternoon. But under cross-examination said when the assault took place 'Mathabo was on her way from the fields for her lunch. This means that the assault took place before midday because according to custom hoeing must be stopped before midday and be resumed in the afternoon. As most of the people living in rural areas are illiterate and have no watches they estimate time by looking at the shadows of objects. They know that at midday all the shadows are directly under the objects when it is summer.

'Mabonang Makhethe (P.W.4) said on the afternoon of the

15th December, 1982 she was playing cards in her house with one Willie Sefako. At one stage she got out of her house and saw accused 1 behind his house. He was kneeling and hammering something on the ground. She did not see what he was hammering because "cheche" bushes obstructed her view. Accused 2 was also not there when she saw accused 1. She did not hear any scream at the time she saw accused 1 hammering something. She remained in the house for a while and then heard someone scream. She came out and saw that it was 'Makatiso who was screaming. She went to the home of accused 1 and found the deceased at the spot where she had just seen accused 1 hammer something, an iron rod had been stuck into his head. She does not believe that when she heard 'Makatiso scream accused 1 was already on the mountain which is about 1 km. away from the village because she had been in the house for a very short time after seeing accused 1 behind his house. But there is ample evidence that when 'Makatiso screamed accused 1 was already on the mountain. This fact shows that P.W.4 is not correct when she says she remained in the house for only a short time before she heard the scream. Under cross-examination she said accused 1 left for the mountain at lunch time (midday). In her evidence-in-chief she said it was in the afternoon when she saw accused 1 behind his house. This does not make sense, if accused 1 left at midday he could not have been at his house in the afternoon. This point shows how difficult it is to estimate time by looking at the shadows of objects.

When it was put to her that accused 1 was hammering a piece of iron rod he used as a peg to support the ladder he

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was using as he was thatching his house, she said she did not see the ladder. However, she admitted that accused 1 had been thatching his house that morning.

One of the most disturbing features of this case is that 'Mabonang says the police kept him at Mohale's Hoek for five days and they wanted her to say that she saw when accused 1 caught the deceased. She refused to do this. I shall come back to this point later my judgment.

'Mathabo Moloi (P.W.5) is the grandmother of the deceased. On the morning of the fateful day she went to the fields and came back at midday according to custom. She returned to the fields in the afternoon and she saw that the accused were still thatching. It was after a long time that she had been hoeing when she saw accused 1 pass near her field and went into the stream. The next time she saw accused 1 he was already on the mountain where his cattle had been grazing. He was shouting at her saying that she should go and remove her horse from his home. She sent one 'Mamorena to go and tell her daughter-in-law 'Makatiso to go and remove the horse.

The rest of the crown evidence is that:

- (a) When the alarm was raised accused 1 was on the mountain and was in full view of the people who assembled at his house but he did not come down in order to find out what was happening;
- (b) Thabo shouted at him and asked him to come down. The accused came down after a very long time;
- (c) When he arrived at the scene of the crime he did not ask who had killed the deceased and yet he was headman in the village;

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- (d) He tried to remove the blood on the ground before the arrival of the police;
- (e) He was a very troublesome and antisociable man in the village and once stabbed Koele's donkey with a spear for the simple reason that it was grazing on his lawn;
- (f) He refused to accompany the deceased to hospital;
- (g) When he went to the mountain where his cattle were, he first went into the stream and washed his gumboots, feet and hands;
- (h) Accused 1 allowed the people to use his ladder as a stretcher on which the deceased was carried;
- (i) When the chief arrived accused 1 was already ordering people to disperse and to come in the evening to keep vigil;
- (j) Prior to this incident accused 1 and 'Mathabo had some litigation in the local court. Accused 1 lost the case and was ordered to pay R30 damages; he threatened to revenge;
- (k) The stone which was used to hammer the iron rod was found hidden in a bush behind accused 1's house.

At the close of the crown case Mr. Maope, counsel for the defence, applied for the discharge of the accused on the ground that the crown had failed to establish a prima facie case. The application was refused. The accused went into the witness box and gave evidence. Accused 1 denied that he killed the deceased. He says that on the 15th December, 1982 he and accused 2 were thatching his house till midday when they stopped and accused 2 went to Motsemocha where he was going to meet his mother. He went to the mountain in the afternoon but before going there he had a bath in the stream. He denies that he washed only his feet, hands and boots. When he came to the mountain he saw 'Mathabo's horses behind his house and shouted at her telling her to go and remove them. He denied that when Thabo called him he only came down after a long time. He denied that he saw

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many people near his home while he was still on the mountain. On his arrival at the scene of the crime he sent Thabo to go and inform the senior chief about the death of the deceased. He denies that he tried to remove the pool of blood he found near the head of the deceased. His explanation is that when 'Mabonang saw him hammer something on the ground he was fixing into the ground a peg he used to support the ladder from falling. He admits that he had kept or hidden the stone in the bush he did not want people to remove it. He denied that when W/O Sekatle found the stone there was any blood on it. I think W/O Sekatle ought to have called the chief or any other people to see the blood because accused 1 challenged him on the spot that there was no blood there. The magistrate at the preparatory examination does not say he saw any blood stains on the stone. I did not see any blood stains on the stone when it was handed in as an exhibit.

The story of accused 2 was substantially the same with that of accused 1 and I do not wish to repeat it.

I am here dealing with the evidence of two small boys and I am bound to approach their evidence with extreme caution. The approach to be adopted was described by Schreiner, J.A. in the case of Rex v. Manda, 1951(3) S.A. 158 (A.D.) at page 163 in the following words:

"Nevertheless the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow

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the lines adopted in the case of accomplices
(Rex v. Ncanana, 1948(4) S.A. 399 (A.D.))."

I have already shown what contradictions there are in the evidence of the two small boys; however, the most important thing which cannot be overlooked is that P.W.1 told this Court, in no uncertain terms, that 'Makatiso asked him to implicate accused 1 in this horrifying murder. In other words, what the witness told this Court is what was suggested to him by 'Makatiso. Such evidence can under no circumstances be relied upon by the Court. I have come to the conclusion that it would be extremely dangerous to accept any part of the evidence of this young boy. It will be recalled that the teaching of what he had to say in Court went on until he was at the doorsteps of this Court when P.W.3 told him what part of deceased's body accused 2 held during the gruesome murder. P.W.1 struck me as a young boy whose intelligence leaves much to be desired. He is not a very observant person as he rightly admitted under cross-examination that he had poor memory. Let us take his description of what clothes accused 1 wore that day. He gave a very detailed description, i.e. a white jacket, brown pair of trousers, white shirt, brown pair of shoes and a hat. When it was put to him that accused 1 wore a greenish overall, he initially denied this but later admitted it. This shows that his memory and observance are not good enough to be relied upon; or he is imagining things; or as he told the court all he has told the court is a result of a suggestion made to him by 'Makatiso.

P.W.3 appears to be a very imaginative lad. He said accused 1 was naked when he killed the deceased. What a

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fantastic thing. But we know that accused 1 was wearing a green overall and gumboots that day. He said the deceased did not cry when the iron rod was hammered into his head. This is impossible, even an adult would have screamed.

I have come to the conclusion that the evidence of ~~these~~ two young boys must be rejected in its entirety because they are unreliable. They denied that the police taught them what to say in their evidence but such a denial does not impress me at all. The police attempted to force 'Mabonang to implicate accused 1 falsely, now where should I draw the line. Did they not take advantage of the age of the young boys and taught them what to say? If they were bold enough to teach an adult what would stop them from teaching these boys? It is strange that P.W.1 totally denies that he came to Mohale's Hoek charge office for interrogation or interview with the police in order that his statement could be recorded. On the other hand, P.W.3 says they spent more than one night at Mohale's Hoek where the police were asking them what had happened. He says 'Mabonang was present but she says she never saw the boys. These contradictions on a very innocent meeting of witnesses for a normal interview by the police tell a tale.

Mr. Maope has submitted that as the evidence of P.W.1 and P.W.3 is not worthy of credit, then corroboration does not apply, and the evidence must be rejected from the onset. He referred me to the case of D.P.P. v. Hester, 1972(3) ALL. E.R. 1056 (H.L.) at p. 1065 where Lord Morris said:

"It is for the jury to decide whether witnesses are

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creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible, and corroborative evidence will only fill its role if it itself is completely credible evidence."

I entirely agree with the above remarks. I have serious doubt that even if P.W.1 and P.W.3 had been creditworthy witnesses whether there is any corroborative evidence from the rest of the Crown witnesses. Mrs. Bosiu, for the Crown, has referred me to certain circumstantial evidence she regards as corroboration. 'Mabonang (P.W.4) saw accused 1 hammering something behind his house and that the dead body was later found on the same spot. If accused 1 had been hammering the deceased she ought to have seen accused 2 who is supposed to have been holding the feet of the deceased. She did not see accused 2; she did not see the deceased; she did not see the two horses one of which was still pulling the tether to which the piece of metal found stuck into the deceased's head was still attached. Accused 1 said he had been hammering a peg when P.W.4 saw him. The fact that the body was found there does not in any way incriminate him. In my view there is nothing in P.W.4's evidence which corroborates the boy's story.

Mrs. Bosiu submitted that accused 1 attempted to remove the blood at the scene of the crime. She refers to the blood as a very important piece of evidence. I totally disagree with her that this can be interpreted as an attempt to get rid of important piece of evidence. Human blood is

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not something that people usually leave lying around for dogs to lick. Accused 1 denies that he attempted to remove the blood; however, I see no sinister design in the removal of the blood and I do not see how it is important piece of evidence. I do not wish to go on with the so called circumstantial evidence or conduct of the accused 1 which tended to corroborate the evidence of the Crown because the witnesses (P.W.1 and P.W.3) were so unworthy of credence that their evidence cannot be corroborated at all. Accused 1 may have behaved in a suspicious way but an accused person cannot be convicted on suspicion; the Crown must prove its case beyond a reasonable doubt. There is no doubt that accused 1 is a hated man in his village and there is a likelihood that his fellow villagers are biased against him and want to get him into trouble. A very great part of the Crown witnesses was devoted to showing that as accused 1 is a bad man is likely to have committed the murder. That evidence is entirely inadmissible because the accused never "lifted the shield" in terms of section 249 of the Criminal Procedure and Evidence Act 1981.

As far as the case against accused 2 is concerned the only evidence implicating him is that of P.W.1 and P.W.3.

I was also referred to South African Cases and Statutes on Evidence, by H.J. May, 4th Edition, page 50 paragraph 86. I entirely agree with the learned author that the court may accept part of a witness's evidence only, even though it does not attach credence to all of it. In the present case I did not believe the whole of what the children said.

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For the reasons I have attempted to give above I came to the conclusion that the Crown has failed to prove its case beyond a reasonable doubt. The accused are found not guilty and discharged.

My assessors agree.



ACTING JUDGE.

29th October, 1984.

For the Crown : Mrs. Bosiu

For the Defence: Mr. Maope.