

IN THE HIGH COURT OF LESOTHO

In the matter of

R E X

V

TAELO KALAILLE

J U D G M E N T

Delivered by the Hon. Acting Judge J.L. Kheola
on the 9th day of April, 1984.

The accused is charged with the murder of Moholobela Moholobela (hereinafter called the deceased). It is alleged that on or about 31st July, 1982, and at or near Bolahla in the district of Leribe, the accused unlawfully and intentionally killed the deceased.

The accused pleaded not guilty to the charge.

At the commencement of the trial Miss Moruthoane, counsel for the Crown, indicated to the Court that Mr. Tsotsi, counsel for the defence, had indicated to her that he would admit all the depositions by the witnesses at the preparatory examination. Mr. Tsotsi confirmed that the defence admitted all the depositions as evidence before this Court in terms of section 273 of the Criminal Procedure and Evidence Act of 1981. At the same time he indicated that he would like to cross-examine Sgt. Raleaka (PW.8 - P.E.).

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Under cross-examination Sgt. Raleaka explained that when he arrested one Tsepe Motoa1 who was accused No.2 at the preparatory examination, he found blood stains on his boot and he suspected that the blood had something to do with the death of the deceased. He considered it important to send the blood found on the boot for analysis in Johannesburg but declined to do so because at that time cooperation between the Lesotho Mounted Police and the South African Police was at its lowest ebb. He said that the accused was taken to the magistrate to make a confession by a police woman. He denied that the accused was assaulted in order to force him to make a confession.

In his deposition Sgt. Raleaka said that on the 4th August, 1982 he attended the scene of a crime at Bolahla River where he found the dead body of a boy in a small lake near the river. The body was wearing a cloth known in Sesotho as "Leqapa". A big stone was placed on the corpse. It had a wound above the right eye, a small laceration on the mouth and bruise on the forehead. He found three stones with blood stains some distance from the dam where he found the body. Hidden under a tree was a blanket which was later identified as that of the deceased. About 30 paces from the corpse he found a pair of gumboots which were identified by the accused as his.

The depositions which were admitted as evidence in this Court were those of magistrate Motinyane (PW.1), Letsabisa Makhibaneng (PW.2), Leeto Makhibaneng (PW.3),

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Lekhotla Moholobela (PW.4), Simon Kapane (PW.5), Mpeke Rathebe (PW.6), Rejeleng Thaate (PW.7), Merkins (Medical Officer) (PW.9), Sebakeng Mataeka (P.W.10), 'Malesema Rathuntsane (PW.11) and Lekhano Motsoene (PW.12).

Mr. Motinyane (PW.1) testified that the 5th August, 1982 the accused appeared before him in Court for the purpose of making a confession. The accused appeared to be in his sound and sober senses. He cautioned him that he was not bound to make a confession and that should he make a statement it would be taken down in writing and could be used in evidence against him at a later stage. He then investigated the intention in accordance with the questionnaire provided in the form. The accused then made a statement in which he exculpated himself but he inculpated Tsepe Motoai by saying that he killed the deceased while he (accused) and the deceased were still bathing in the Bolahla river. He says that while they were still bathing Tsepe Motoai threw a stone at the deceased and hit him on the jaw. Deceased fell down, Tsepe dragged him into the pool and immersed the body by placing a big stone on it. Tsepe hid the gumboots of the deceased amongst poplar trees after he had killed him. During the evening Tsepe arrived at his (accused's) home and asked him to keep deceased's gumboots and he promised that he would be coming to fetch them. On the morning of the 4th August, 1982 the chief's messengers arrived at his house and found the deceased's gumboots in his possession. When the policeman arrived and asked him where he got the

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gumboots he lied and said he bought them at Tau's.

Letsabisa Makhibaneng (PW.2) deposed that one day he and the deceased were ploughing the chief's field. At midday they decided to stop and they unspanned the oxen the deceased crossed to the other side of the river where his other cattle were grazing and sat down with the accused. Later on when he decided to go home he called the deceased so that they could go home together. The deceased did not come, so he went home with the accused. On the following day (Sunday) he met accused at the veld and asked him the whereabouts of the deceased. The accused said that the deceased said he was going to the cattle-post. After that accused and Tsepe said they were going to the concert and walked in the direction of Thoteng. On the following Tuesday he was returning from school when he heard the accused shouting that the deceased had fallen into the water. He says that when he saw the accused and the deceased on the other side of the river they were playing and accused was covering the deceased with a blanket, they were lying down. At that time Tsepe was not there.

Leeto Makhibaneng (PW.3) testified that he was the head of the group that went to search the home of the accused. They found deceased's gumboots in his house but accused said he bought them on Saturday. When later accused's gumboots were found near the scene of the crime accused said he knew nothing about them. It was Tsepe who said he had been with the deceased.

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Lekhotla Moholobela (PW.4) deposed that he is the father of the deceased. One day he bought gumboots for himself but when he came home he found that they were too small. He gave them to the deceased.

Simon Kapane (PW.5) testified that on the 31st July, 1982 he was at the veld with some herdboys when Tsepe came to them. He was shaky and frightened. When asked why he appeared to be frightened he denied that he was shaky and frightened. He says that on the same day he noticed that Lekhanoi (PW.12) was wearing new gumboots. Lekhanoi's deposition confirms that the new gumboots had been lent to him by the accused because he said they were a bit too tight. He returned them to the accused before he heard about the death of the deceased. He says that he was in the company of the deceased and Letsabisa (PW.2) when they were still ploughing and that when they went home they left the accused and the deceased sitting together on the other side of the river. He did not see Tsepe Motoai on that day.

Sebakeng Mataeka (PW.10) says that when accused's gumboots were found at the scene of the crime he (accused) denied any knowledge about them. Accused's grandmother (PW.11) denied that he gave accused R10. She says that she gave him R8 but she does not know what he did with it.

At the close of the Crown case Mr. Tsotsi 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 on the following grounds (a) the accused was the last person to be seen in the company /of the

of the deceased alive; (b) the gumboots of the deceased were found in the possession of the accused immediately after his death, (c) in his confession accused refers to a plan in which he agreed to entice the deceased to accompany him to the river so that he could be robbed of his new gumboots; (d) after the deceased had been murdered in his presence the accused made no attempt to report the matter to anybody.

After this application for the discharge of the accused was refused the accused elected to give an unsworn statement from the dock. He says that he left his home taking a piece of soap with which he intended to bathe at the river. On his way he met with Tsepe Motoal; the latter asked him where he was going to. He said he was going to wash himself at the river. Tsepe followed him. He (accused) found the deceased herding his father's cattle in the veld. He asked the deceased where he got the new gumboots he was wearing, the latter said that they belonged to his father. He then asked the deceased to give them to him and he agreed. They exchanged their gumboots. After the exchange of gumboots Tsepe Motoal arrived. He (accused) left for his home. The deceased reported to him that he was going to the cattle post.

A few days after he had been using deceased's gumboots he exchanged them with Lekhano1 (PW.12) but the latter returned them after two days. One day Tsepe Motoal came to him and reported that deceased had drowned in the river. He (accused) raised alarm and he subsequently went

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to the river and saw that deceased was drowned. He returned to his home but during the night three men came to his home and asked him whether he had any gumboots. He said he had them. They asked him where he got them from. He said he bought them at Tau's with the money given to him by his grandmother (PW.11). He lied because he was afraid that if he told them that the boots belonged to the deceased they would say that he is the one who killed him.

Accused says that he was eventually arrested and taken to Hlotse police station together with Tsepe Motoai. During the night he was taken out of his cell and assaulted by the police. They compelled him to admit that they had killed the deceased. On the following morning he was taken to the magistrate and ordered by the police to tell the magistrate that they (accused) had killed the deceased. He says that when he came to the magistrate he told him that Tsepe Motoai had killed the deceased. He said this because he left the deceased in the company of Tsepe Motoai.

At the close of the defence case I came to the conclusion that the evidence of Tsepe Motoai appeared to me to be essential to the just decision of this case and in terms of section 202 (2) of the Criminal Procedure and Evidence Act 1981 I ruled that he should be subpoenaed.

The evidence of Tsepe Motoai amounted to a total denial of any involvement in the killing of the deceased. On the Saturday in question he went to Londo to fetch a horse which had been ridden by his father. When he returned

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from London he tethered the horse on the other side of Bolahla river before he went to the concert. On the following Monday he heard a woman raise alarm that a person had drowned in the river. He says that as they did not hear well what the woman said accused explained that the deceased had fallen into the river. He denied that he went to the concert with the accused. He also denied that on Saturday he was shaky and frightened when he met Simon Kapane (PW.5). He explained that the blood found on his boot came from the bird ~~he~~ he had killed because at one stage he put its gizzard on the boot. Part of the blood came from the wound on his left ear lobe which he sustained when the chief's messengers who arrested him assaulted him. There was blood on his blanket as well but the police did not ask him anything about the blood on the blanket.

Having considered the position of the defence after Tsepe Motoai had given evidence Mr. Tsotsi applied that he should be allowed to call the accused to give evidence on oath in order to rebut what the witness called by the Court had said. The application was granted. (See R. v. Simelane 1958 (2) S.A. 302(N). In his sworn statement the accused repeated most of what he had already said in his unsworn statement. He said it was Tsepe who told him that the deceased had drowned in the river.

The case for the Crown depends entirely on circumstantial evidence and on the ground that the accused lied when he was asked to account for his possession of

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deceased's gumboots. As regards the approach of the Courts to circumstantial evidence I shall quote the well known words of Watermeyer, J.A. in the case of R. v. Blom 1939 A.D. 188 at pages 202-3 where he 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."

In the present case the proved facts are

- (a) The last person to be seen in the company of the deceased is the accused. At the time he was seen the accused was playing with the deceased and covering him with a blanket,
- (b) The gumboots of the accused were found near Bolahla river where the dead body of the deceased was immersed in a pool,
- (c) The gumboots of the deceased were subsequently found in the possession of the accused,
- (d) When asked to account for his possession of the deceased's gumboots accused lied that he had bought the gumboots at Tau's with the money given to him by his grandmother;
- (e) The accused made a "confession" to the magistrate that the deceased was killed by one Tsepe Motoai.

The accused person has admitted that on Saturday (31st July, 1982) he was in the company of the deceased near Bolahla river but he says that when he left for his

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home the deceased was in the company of Tsepe Motoa1. None of the Crown witnesses, particularly Letsabisa (PW.2) and Lekhana1 (PW.12) saw Tsepe Motoa1 at the time the accused was playing with the deceased on the other side of the river. It is clear to me that Tsepe Motoa1 was not there at that time because the two Crown witnesses would have seen him. They were only about 200 yards away from where the deceased and the accused were. Letsabisa says that before he went home he called the deceased and said that they should go home. The deceased did not come so he went home with the accused. The impression I get from the evidence of Letsabisa is that when he went home with the accused the deceased remained alone. On this point his evidence conflicts with that of Lekhana1 who says that they left the deceased with the accused.

If the accused went home with Letsabisa, was he already wearing the gumboots of the deceased? If he was already wearing them this would confirm his story that he exchanged his gumboots with the deceased. If he was still wearing his own gumboots when he went home with Letsabisa then that would mean that after parting with Letsabisa he returned to the deceased at the river. This crucial point has not been clarified and the fact that the accused was the last person to be seen with the deceased does not help the Crown case in any way because he subsequently left him (deceased) alone when he went home with Letsabisa. If the Crown realized that there was a conflict in the evidence of Letsabisa and Lekhana1 it was their duty to subpoena the two witnesses to come and give viva voce

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evidence before this Court because one of them could be mistaken. It is not the work of the Court to call witnesses to come and support the case of any of the parties before it. It was with some great reluctance that I decided to call Tsepe Motoai whose evidence appeared to be very essential for the just decision of this case. That witness ought to have been called by the Crown because the defence of the accused as it appeared in the "confession" was that Tsepe had killed the deceased. The Crown did nothing about that even after the Court had made some insinuations about the sudden disappearance of Tsepe who was accused No.2 at the preparatory examination.

When the gumboots of the deceased were found in his possession the accused said that he had bought them at Tau's, he repeated the same story to the police (PW.6). In his so called "confession" he said the gumboots were given to him by Tsepe Motoai. In his evidence before this Court he said he exchanged gumboots with the deceased. The first two explanations have been proved to be false. The question is what inference is to be drawn from a false statement by an accused person? It has been held in a number of cases that such a false statement is not proof of guilt, but it may show disbelief in his own innocence and throw light on his credibility. (See R. v. Simon, 1929 T.P.D. 328; R. v. Makobu, 1938 T.P.D. J/C. 184/38). In R. v. Nel, 1937 C.P.D. 327 it was held that

"In a criminal case the question is not whether the evidence is consistent with the accused's guilt but whether it is wholly inconsistent with his possible innocence. Where, therefore

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in a criminal case evidence is led of acts of conduct of the accused which have been committed after the alleged offence and which are apparently incompatible with innocence, care must be taken not to allow such evidence to have an exaggerated effect because there may always be the possibility that the conduct of the accused may have been caused by fear owing to the consciousness that appearances have been suspicious even where suspicion has been unwarranted."

The accused in this case has been proved to be a liar but that does not necessarily mean that he is guilty. He has explained all along that he lied because he thought they would hold him responsible for the death of the deceased.

The fact that he has lied should not be over-emphasised. Despite the fact that he has lied it is still the duty of the Court to find if there is any other evidence implicating the accused. In Tumahole Bereng and Others vs. The King 1926 - 1953 H.C.T.L.R. 123 at page 138 Lord MacDermott said .

"Corroboration may well be found in the evidence of an accused person, but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said. It is, of course, correct to say that these circumstances - the failure to give evidence - or the giving of false evidence - may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight." (My underlining).

In the present case there is practically no other material sufficient to sustain a conviction of the accused if his false and conflicting statements are not used as a

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make-weight.

The correct procedure is that if the defence intends to object to the admissibility of a confession the Crown must be notified at the commencement of the trial so that arrangements for a trial within a trial may be made. In a trial within a trial the issue of the admissibility of a confession or admission by the accused should be decided by the judge in the absence of the assessors (See R. v. Dunga, 1934 A.D. 226). In the present case Mr. Tsotsi formally admitted the evidence of the magistrate who recorded the confession but he indicated that he would like to cross-examine Sgt. Raleaka (PW.8). He did not indicate what aspect of Sgt. Raleaka's evidence he was challenging. The first part of the cross-examination concerned Tsepe Motoal and the last part showed that the accused would say that the police assaulted him and compelled him to go and make a statement to the magistrate in which he should incriminate himself. Sgt. Raleaka denied this. Mr. Tsotsi has submitted that even if he did not follow the usual procedure the Crown must have realized when he cross-examined Sgt. Raleaka that he was challenging the admissibility of the statement and that they should have called rebutting evidence. In any case, he says, the statement was an exculpatory one and not a confession governed by section 228 of the Criminal Procedure and Evidence Act 1981. I agree that the statement is not a confession. Miss Moruthane has submitted that the confession "places the accused at the

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scene of this crime." In other words, the accused was present when Tsepe killed the deceased, he was the person who enticed the deceased to go to the river so that he could be killed and his gumboots taken. In deciding the guilty or innocence of the accused the 'confession' should be taken as a whole, in the sense that the portions favourable to the Crown and the portions favourable to the accused should be taken into account (See S. v. Bruce 1972(4) S.A. 547). The statement made by the accused is a lie as it is not consistent with the proved facts. The gumboots of the accused would not have been found at the scene of the crime if the statement were true. Tsepe was not at the scene of the crime that day according to Crown evidence.

Lastly, I would like to commend on the evidence of Tsepe Motoai. He struck me as being a very untruthful witness who denied almost everything about the death of the deceased.

Some of the things he denied had been well proved by the Crown, for instance, that on the fateful day he came to a group of herdboys at the veld and that he appeared to be so frightened that his body was shaking. In his evidence he first denied that he was anywhere near Bolahla river on that fateful Saturday, but later it appeared that when he returned from London he crossed Bolahla river and tethered the horse beyond the river. It is improbable that the police could see the blood on his boot and say nothing about the blood that he alleges

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was on his blanket. If he ever had a wound on the ear, in my opinion, there would have been more blood on his blanket than on his boot. His whole account of the presence of blood on his boot seems to me to be a figment of his imagination and far-fetched.

For the reasons appearing above I am of the opinion that the circumstantial evidence upon which the Crown has relied is totally unsatisfactory. The Crown has failed to prove its case beyond a reasonable doubt. The accused is found not guilty and he is discharged.

My assessors disagree with me.

ACTING JUDGE.

9th April, 1984.

For the Crown : Miss Moruthane

For the Defence: Mr. Tsotsi