

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

VS

NTSANE PELEHA

J U D G M E N T

Delivered by the Honourable Acting Chief Justice Mr.
Justice J.L. Kheola on the 15th day of December, 1986.

The accused, Ntsane Peleha, is charged with the crime of murder, it being alleged that upon or about the 6th day of November, 1982 and at or near ha Lobiña in the district of Berea, the accused unlawfully and intentionally killed 'Mamonica Mareka and Mafafa Mareka. The accused pleaded not guilty to the charge.

It is common cause that on the morning of the 6th November, 1982 the dead bodies of the two deceased persons in the present case were found in two separate rooms. The body of 'Mamonica Mareka was found in the thatch-roofed house. It was sitting on the bed with a twine-woven bag tied around her neck and a scarf attached to the bag while the other end of the scarf was tied to the roof. She had no injuries on her body. The naked body of Mafafa Mareka was found in the adjoining room with a corrugated iron roofing. It was lying on the

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floor and tied with a rope around the neck; the chest was tied with a rope; there was another piece of rope hanging from the roof.

According to the doctor who performed a post-mortem examination on the bodies of the two deceased persons, death was due to asphyxia as a result of strangulation.

The evidence of the Crown is to the effect that in August, 1982 the accused and the deceased persons entered into a contract. They agreed that the deceased persons would provide a plough, a chain and a yoke while the accused would provide oxen and his labour for the ploughing of the fields of the parties to the contract. The accused took the equipment provided by the deceased persons and ploughed his fields. After he had finished ploughing his own fields he started ploughing the fields of other people for reward and forgot all about the fields of the deceased persons.

As a result of the obvious breach of contract by the accused, the deceased lodged their complaint with their chief. The accused and the deceased were summoned to appear before the chief's court. The deceased stated their complaint but the accused refused to answer the complaint on the ground that he had been brought before the chief who hated him. He said they had rather taken him to chieftainess 'Mamathe. Despite the accused's refusal to answer the accusations against him, the chief decided that the accused must go and plough the fields of the complainants. It was stated that the accused was furious when he left the chief's court. However, when they arrived at home the ^{accused} said that he would plough the deceased's fields on the 4th November, 1982 and asked the deceased, 'Mamonica, to prepare food for him for the 4th. No ploughing

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took place on that day. It is not clear what happened on that day but that was the last day the Crown witnesses saw the deceased persons.

Detective Sergeant Sakoane testified that on the 6th November, 1982 he attended the scene of the crime and found the two dead bodies in the rooms described above. He noticed that the chairs in the two rooms were scattered all over the place indicating that there had been a struggle before the deceased were overpowered. He found the bigger part of the scarf (Ex 1), a blue jersey (Ex 2), a white cloth (Ex 3), and the twine-woven bag (Ex4). All the abovementioned exhibits were found in ^{the} house in which the late 'Mamonica's body was found. In the room in which the body of the late Mafafa was found, Sergeant Sakoane found the rope that had been used to tie and hang the deceased. One piece was white (Ex 5) and the other one was red (Ex 6). Since the door of the room in which Mafafa's body was found was locked the chief gave him the key from 'Mamonica's room. When he unlocked and opened the door he found the key for that room lying on the floor. There was a dish on the table containing a small quantity of beer. The cloths that the deceased was wearing before he went to bed were near his pillow.

The evidence of Masasane Gumede (P.W.1) was substantially the same with that of the Detective Sergeant Sakoane except that this witness says that the cloths the deceased (Mafafa) was wearing before he apparently went to bed were not found in the house and that some other cloths were missing. Masasane testified that some time after the burial of the deceased persons the police came to his village and searched the house of the accused. They were accompanied by the accused. The following articles which were identified by one Monica Ramatsella (P.W.6) as those of Mafafa Mareka were found in the accused's house: four shirts, waistcoat,

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jersey, pair of trousers, shoes and a bag. the following belonged to the late 'Mamonica: a saw, an axe, an enema and a piece of scarf. He knew that the articles belonged to the late 'Mamonica because he often borrowed them from her. However, he could not point out any distinctive marks by which he identified the articles as those of the deceased. When the accused was asked to whom the articles found in his ^{house} belonged he said they belonged to the deceased persons. When he asked how they came to his house he kept quiet and never answered the question.

Sergeant Khobotha deposed that when he searched the house of the accused on the 14th December, 1982 he found the following articles which were identified by Monica as the property of the deceased persons; an axe, a grey pair of trousers, a pair of brown shoes, 2 brownish shirts, a grey shirt, a white shirt, a black waistcoat, a saw, a brown bag, a jacket, a small piece of black and yellow scarf, a black jersey and an enema. (Ex 7, collectively). He says that when he asked the accused about the articles found in his house, he (accused) said: "I hear that they are being said to be the property of the deceased persons." When asked how they came into his possession, he kept quiet. Because the defence categorically denied that the small piece of scarf was found in the house of the accused on the 14th December, 1982 when the search was made, I ordered the sergeant to bring his notebook in which he recorded the articles found on that day. The order was made on the 6th November, 1986. On the 18th November the witness reported that the notebook was lost and that he could not trace it.

Monica Ramatsella was referred to by the Crown as their star witness. I agree that Monica is a star witness because the case of the Crown depends entirely on circumstantial evidence. The Crown case is that the accused had a quarrel with the deceased a few days before the 6th November, 1982.

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on the 6th November, 1982 the deceased were found dead in their houses. About a month later on the 14th December, 1982 the articles and clothing alleged to be that of the deceased were found in the accused's house. He failed to explain how articles came into his house. It is, therefore, important that the evidence of identification of the articles as those of the deceased persons should be established beyond any reasonable doubt.

Monica identified the clothing by their colours and the holes they had due to wear. She identified the saw by the green point on its handle. Her story was that her late mother 'Mamonica painted the handle with the green paint because she wanted to distinguish it from other similar saws in the village. She regularly came to her maiden home to do the washing for her brother Mafafa who had no wife. She was therefore familiar with his cloths. She identified the white shirt because it originally had six buttons but at the moment it has five buttons.

The accused admitted that he entered into a contract with the deceased. He denies that at one time he and the deceased had a quarrel which led to their appearance before the chief. His version is that they had a small talk about his failure to plough their fields; but when he explained to the deceased that he had no one to help him in the ploughing during weekdays and that he could plough only during weekends, they clearly understood his difficulties. He did not plough the deceased's fields because he was arrested and kept in gaol. He also pointed some holes on the clothing before court and claimed them as his property taken by the police from his house. He denied that the small piece of scarf before Court was amongst the clothing taken from his house by the police. He denies that he ever admitted that the clothing/

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articles found in his house belonged to the deceased. It was quite clear to everybody in Court that the accused was in great difficulties when he looked for identifying marks on the clothing. However, it must be borne in mind that the accused last saw these articles in November, 1982. In April, 1985 when the preparatory examination was conducted no one paid any particular attention to the articles.

The accused said that some articles were given to him by his sister, 'Masefatsana Pelea, living in Germiston. He said that some articles were sent to him by post and that they were received on his behalf by one 'Mamafu Pelea who is the wife of his elder brother. This witness was called by the Court but she denied that she ever received any articles from 'Masefatsana at the post office.

The weakness of the Crown case is due to the fact that at the preparatory examination Monica was not asked by what distinctive marks she identified the articles before the magistrate as the property of the late 'Mamonica and the late Mafafa. She merely said "I identified them as the property of deceased 1 and 2." The accused cross-examined her at length putting it to her that the articles before the magistrate were his property. Monica ought to have given a full detail of the distinctive marks by which she identified the articles at that stage so that when she appears before this Court and gives a detailed account of how she identifies the articles, she may not be accused of fabrication.

It is common cause that on the morning of the 18th November, 1986 just before Monica entered the witness box, the Crown took her into the court-room where she thoroughly checked and examined the clothing and articles she identified as her late mother's and late brother's property. This procedure by the Crown was not only unfair to the

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defence but totally destroyed the evidence of their star witness by allowing her to scrutinize the exhibits just before she gave her evidence. If the witness had given a detailed account of the distinguishing marks at the preparatory examination the defence would probably have had no cause for complaint. I am unable to reject the submission by the defence counsel that the purpose of allowing Monica to scrutinize the exhibits just before she went into the witness box was to enable her to look for the so called identifying marks.

In any case her evidence would still not carry the Crown case any further inasmuch as identification of clothing by the fact that it is torn at some place due to ordinary wear, is most unsatisfactory. Regarding the paint on the handle of the saw, the Court found that that type of paint was very common in that village. The door of the house of the accused's parents was painted with the same paint.

The reliance by the Crown on the fact that articles alleged to be the property of the deceased persons were found in the house of the accused immediately after their deaths, is shattered by the negligence of the investigating officer, detective sergeant Khobatha. Regarding the articles found at the accused's home he attempted to give his evidence from his memory without reference to his notebook. Police officers often ask the Court to allow them to refresh their memories by checking their notebooks because they deal with many cases. Sergeant Khobatha did not do so and as a result of this his evidence at the preparatory examination conflicts with his evidence before this Court. At the preparatory examination he said he found one white shirt; he did not mention three other shirts he is now saying they were amongst the articles found. He never mentioned the small piece of black and yellow scarf. If this piece of scarf was found at the home of the accused, not even an inexperienced policeman would not have realised that it (scarf) was strong link connecting the

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accused with the crime. It appears that the killer who strangled or hanged the late Mamonica found that one end of the scarf was too thick to allow him to tie a knot, so he cut off a piece about 1 foot long. I doubt very much that Sergeant Khobatha would not have seen the importance of this piece of scarf and forgot to mention it in his evidence. Be that as it may the Court cannot reject the Crown case on the single ground that the investigating officer was negligent. There are other disquieting features of the case.

On the 6th November, 1982 the accused was on parole. Immediately after the murder of the two deceased the prison authorities took him into custody and kept him in prison. It is not clear when the accused was taken into custody but on the 8th December, 1982 when the police decided to arrest him he was already in prison. On the 14th December, 1982 when the police decided to go and search his house the accused did not have its key in his possession. There is evidence that the key was kept by his landlady. This lady was legally in possession of all the articles in the house. She is the one who knows which people entered into the house during the absence of the accused and what they took or put into the house. She was not called by the Crown to clarify this point. That some other people had access to the house during the absence of the accused is confirmed by the evidence of Sello Lebina at the preparatory examination and that of Sergeant Khobatha that the bag, the enema, saw and an axe were left behind on the day the search was made. The accused was absent when they were subsequently fetched. Who unlocked the door for the person who fetched them?

All the Crown witnesses except Sergeant Khobatha say that when the accused was asked to whom the articles found in his house belonged he said they belonged to the two deceased persons, but when he was asked

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how they came into his house he kept quiet. Sergeant Khobatha says that the accused said: "I hear that they are being said to be the property of the deceased persons." This statement differs from an outright admission that the goods belonged to the deceased. There is, therefore, a conflict in the evidence of the Crown as to exactly what the accused said about the articles. This conflict has created a doubt in my mind the benefit of which I must give to the accused.

I have admitted that the accused told lies on a number of occasions during the trial. He lied when he denied that he ever had any quarrel with the deceased which led to their appearance before the chief. It is possible that an innocent person may put up a false story because he thinks that the truth is unlikely to be sufficiently plausible (see Hoffmann: South African Law of Evidence, 2nd ed. p. 431). I agree with the suggestion that if an accused lies about a particular incident which has been conclusively proved, then it must be held that he has something to hide, and this may add an element of suspicion to facts which were previously neutral. It may well be that the accused was under the wrong impression that if he admitted that he had a quarrel with the deceased two days before they were murdered, the Court would infer that he killed them. He therefore decided to give the court the impression that he was on good terms with the deceased until they died.

The accused again lied when he said he could identify the clothing before Court by certain marks. When the clothing was given to him he spent a very long time looking for what he called a "burn mark", especially on the white shirt. It was clear to the Court that he was looking for something he did not know. He ultimately just pointed a small dot of dirt on the shirt and claimed that it was burnt by cigarette. It may be

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that after seeing the star witness for the Crown point out what she regarded as identifying marks, the accused felt that if he merely said the articles are mine without pointing out something to confirm his story the Court would find his story not sufficiently plausible and would convict him. But most of us can identify our shirts, saws, spanners, axes, jackets etc. merely by their colours or their shapes or types. If there is a dispute about the ownership of such property then one has to give a detailed description which is likely to impress the court.

In this connection I refer to the warning in Wills on Circumstantial Evidence. 7th edition, pp. 138 to 142 which was referred to in R. v. Gani, 1958 (1) S.A. 102 at p. 113. It reads:

"In an endeavour to discover the truth, no legitimate evidence should be excluded; but great care should be exercised to prevent an undue importance being given to circumstances not necessarily irreconcilable with innocence although they may create suspicions. Circumstances of such character are mere makeweights, and nothing can be more dangerous than to eke out a weak case by attributing to them an importance which they ought not to possess."

The lies that the accused in the present case has told create suspicions but these suspicions should not be used to build a non-existent Crown case. The ownership of the articles found in the house of the accused was not conclusively resolved, there is a reasonable doubt that they belong to the two deceased persons. The other unfortunate thing about the case was that there was no evidence that on the night the deceased were killed the articles were still in their possession. Even if the ownership had been established beyond a reasonable doubt, there would still be a probability that the accused stole the articles long before the deceased were

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murdered. I say this because when the house of the accused was searched a number of articles belonging to other villagers were found and it was clear that he had stolen them. Monica had not been visiting her maiden home for about a week because the river between her marital home and her maiden home was in flood. She could not positively say that the articles in question were still in the possession of the deceased when they were murdered.

The accused may have behaved in very suspicious ways or even lied but that cannot build or improve the unsatisfactory Crown case against him. The Crown has failed to prove beyond a reasonable doubt that the accused murdered the deceased.

The accused is found not guilty and he is discharged.

My assessors agree.

C.L. KHEOLA
ACTING CHIEF JUSTICE.

15th December, 1986.

For Crown	-	Mr. Thetsane
For Defence	-	Mr. Kambule.