

IN THE HIGH COURT OF LESOTHO

In the Appeal of

KHAUTA MATING

Appellant

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice J.L.

Kheola on the 3rd day of March, 1986

The appellant was jointly charged with one Mokone Mokone - it being alleged that on the 18th February, 1984 they unlawfully and negligently killed one Bafana Sebeko. They both pleaded not guilty but at the end of the trial the appellant was found guilty as charged and sentenced to three years' imprisonment, half of which was suspended for three years on certain conditions. Mokone was found not guilty and discharged.

At the trial the Crown called two witnesses who were present at the scene of the fight. The first Crown witness was David Thibeli who told the court that he saw the appellant come out of the bus and stab the deceased on the chest with a brown knife. At that time the deceased was standing near the bus. The second witness was 'Masekonyela Suhla. While this witness was giving evidence it became clear to the public prosecutor that her evidence was directly contrary to her sworn statement to the police. He then applied to the court that the witness be declared a hostile witness. The application was granted and the public prosecutor cross-examined her. She admitted that she had made a statement to the police but denied the contents of the statement that was

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shown to her. She also denied that she signed for statement she made to the police nor was it read over to her after she had made it

The statement seems to have been recorded by Police Woman Mahase and sworn to before Sgt. Monku. It is common cause that none of the two police officers was called to give evidence. It was the duty of the public prosecutor to call the police woman who recorded the statement to testify that she recorded the statement word by word and that the signature was that of the hostile witness. All what the public prosecutor did in this case was to read the statement and to cross-examine the witness. He then handed the statement to the magistrate.

Miss Ramafole, counsel for the appellant, submitted that the learned magistrate committed an irregularity by not considering the statement and yet the witness had not been properly discredited. She referred me to the case of R v. Nyede, 1951 (3) S A. 151 (T) in which it was held that if there is a denial of the authenticity of the statement and it is not proved the evidence of the witness is not properly discredited. She also referred to the case of R v Maselo 1946 (1) P H H60 (T) in which it was held that a conviction will be set aside if the evidence challenged has been rejected. I entirely agree with the points of law stated in the two cases referred to above.

In the instant case we have a situation where the learned magistrate comes to the conclusion that a witness is a pathetic liar probably on the ground that she had made two conflicting statements. He lost sight of the fact that because the first statement had not been proved, the witness had not been properly discredited. She denied that she made that particular statement which was handed in as an exhibit, so it was necessary to call the witness who recorded it. That statement is

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recorded in English but there is no indication that there was any interpreter who interpreted it from Sesotho into English. If it was interpreted by the police woman who recorded it, it would be necessary to find out how well she knows the English language.

Section 274 (2) of the Criminal Procedure and Evidence Act of 1981 requires that there should be proof that the witness previously made a statement with which his evidence is inconsistent. In the present case this was not done. Because the Crown did not properly discredit the evidence of 'Masekonyela Suhla, her evidence could not be discarded as the learned magistrate purported to do. Her evidence before the trial court was in direct conflict with the evidence of the first Crown witness. If the learned magistrate had considered the evidence of 'Masekonyela Suhla properly, there ought to have been a doubt in his mind about the truthfulness of the evidence of the first Crown witness. I agree with Miss Ramafole that where there is a conflict of evidence given by Crown witnesses the court ought to give the accused person the benefit of a doubt and acquit him (Tlelai v. Rex 1974-1975 L L.R. 304.

The appeal is allowed and it is ordered that the appeal fee be refunded to the appellant.

J.L. KHEOLA  
J U D G E .

3rd March, 1986.

For Appellant - Miss Ramafole  
For Crown - Mrs Bosiu.