

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

FRANCIS NYAKA RAMOHANOE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 18th day of April, 1989.

The dead body of deceased Makapu Mofokeng was discovered in her children's bedroom early in the morning of 5th January 1985.

Medical evidence established that death was due to a big cut wound which was on the neck. The cut wound resulted in part of the trachea being removed. There was also a fracture of the head and another wound beside the left eye.

P.W.2 Kapu Mofokeng who was only 12 years old at the time of the incident had last seen his mother in the company of accused on 4th January 1985.

Accused has raised the defence of an alibi. Namely that on 3rd January 1985 he had set out for Johannesburg where he remained until 8th of that month.

But the evidence of P.W.1 Mohlolo Kabelo puts accused at Masakale's Cafe at Levi's Nek in the forenoon of 4th January 1985. This date falls within the time frame of the murder of the deceased.

Furthermore the crown witnesses made reference to a straw hat which accused was seen wearing on 4th January 1985.

/Accused's

Accused's visit at Masakale's Cafe where he found P.W.1 and others drinking beer was very brief and prefaced by his asking if the people knew him. When they replied that they didn't he said his name. Further that he used to live at Bela-Bela and that he was then living at Ha Mokotjo.

Accused denies saying all this. But yesterday when he gave evidence he told me he used to live at Ha Mokotjo whereupon I asked him if he is aware that his counsel at page 34 of my manuscript put on his behalf to P.W.1 the question that accused would say he did not stay at Ha Mokotjo but at Kuenaneng. Accused replied that he was.

Indeed evidence showed that accused was a complete stranger to the men he found at the bar in Masakale's Cafe. Although nothing is suggested that he had in any way disguised himself, accused is insistent that contrary to the testimony of the witnesses who testified that they saw him there on that day; it was not him they saw. However accused testified that P.W.2 knew him very well. Further that accused knew P.W.2 very well too.

Accused was clearly in a cleft stick to say why a man who knows him so well would be mistaken about seeing him on that day wearing a straw hat which was shortly afterwards found in deceased's house.

The straw hat itself was sent by the crown to forensic experts in Pretoria and in the sworn affidavit of W. Oelfse the samples of hair taken from the straw hat were "comparable in all respects to the hair samples from the accused Francis Nyaka."

P.W.14 Major P.J. Joubert gave an interpretation of the tests reflected in exhibit "C" i.e. Oelfse affidavit.

He showed that the possibility of two people having the same structure of hair is one to four thousand and five hundred.

Accused said he had given the straw hat to his female cousin way back in 1984. He expected the hair on it to be

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his and that of his cousin. However P.W.14 testified that the hair of a male differs in certain characteristics from that of a female. Needless to state the affidavit made no reference to more than only one type of hair there. I have no doubt that if a female's hair was found on the hat such a distinction would have been borne out in W. Oelfse's admitted affidavit.

Credible evidence shows that on the day of the incident accused was seen wearing the hat referred to above as well as carrying a bag which he himself testified that it could easily be mistaken in colour for black.

Witnesses said it was black in colour. Accused said his bag is dark green in colour and he uses it for travelling. Asked then how P.W.1 who testified that he saw accused for the first time on the day of the incident could have associated him with this bag accused's explanation was most unsatisfactory or plainly false because no question was put to P.W.1 who gave evidence after P.W.2 that P.W.1 must have seen this bag previously or that he concocted the story about it with P.W.2 or any of the Crown witnesses who referred to it. The same applies to the hat.

Credible evidence shows that accused's defence of an alibi is false beyond reasonable doubt. The crown witnesses' story as to accused's presence in Levi's Nek at Masakale's Cafe and deceased's home respectively on 4th January 1985 between 10.00 am. and 2 pm. should be accepted as true; and it is so accepted. It is also accepted by this Court that accused was the last person seen in the company of deceased before she was discovered dead the following day in the house where she had been with accused. In the words of Rooney J. in Swazi decision CR. T. 112/88 The King vs. James Masilela (unreported) at 12

"The tenuous alibi raised by the accused comes to nothing. It is for the Crown to show that the alibi is not well founded."

The evidence of P.W.1 and P.W.2 about accused's presence at Masakale's Cafe and homestead of deceased respectively at the relevant time is acceptable to me. I reject

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accused's story that he was in Johannesburg on the day and at the time the deceased was murdered. To use P.W.1's words "Levi's Nek is not Johannesburg."

In R vs. Mlambo 1957(4) SA. 728 at 737 Malan J.A. said,

"If an assault committed upon a person causes death and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such aggravated nature that the assailant knew that death might result."

I need but state that the case before me rests on circumstantial evidence. The position regarding this type of case is outlined in R vs. Blom 1939 AD. 188 at 202-3 as follows :

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

Evidence showed that deceased remained in the house until the following morning. She might have been dead for more than ten hours. It is not known when accused left the house. Nobody saw him leave it.

There is authority for the view that an accused person who gives false evidence does by that means strengthen the inference of guilt. Accused has been proved to have given false evidence. But this principle should not be viewed in isolation because an innocent man finding that telling the truth might bring him uncomfortably close to the crime would be tempted to lie.

Without indulging in speculation: suppose after accused had left the deceased's house another man with some sexual motive came to deceased's house and found her

/dead

dead and is seen leaving the house; would he not be subject to the charge of her murder? Would he not be tempted to lie about his whereabouts in relation to the time he discovered the death? All in all such a state of affairs would only point to a strong suspicion that he committed the act.

In the instant case nothing of some circumstantial nature such as finger prints on the murder weapon has been adduced to found the inference that all proved facts exclude every reasonable inference except the one to be drawn. The bag referred to has not been placed before Court to see either; or be identified by witnesses yet it is said to be in police custody.

It is reasonable to infer that during all the period that deceased remained alone after accused had left someone could have caused her death.

Accused is therefore given benefit of doubt and acquitted of the crime charged.

J U D G E.

18th April, 1989.

For Crown : Mr. Mokhobo

For Defence : Miss Tau.