

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

BENEDICT QHELANE	1st Accused
LIMO RANKOPANE	2nd Accused
TELLO MABULA	3rd Accused
TELANG PAKELA	4th Accused
MOTIPI MPHAFI MAKHUBE	5th Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 9th day of August, 1989

The accused are charged with the murder of Nkhetheleng Mokutu (hereinafter referred to as the deceased) on the 12th day of July, 1985 at or near Ha Makhakhe - Maphutseng in the district of Mphahle's Hoek. The accused have pleaded not guilty.

When the trial started on the 3rd February, 1987 all the accused were present. On the 20th October, 1987 the third accused failed to attend and a warrant of his arrest was issued and the case was postponed to the 22nd October, 1987. On that day the third accused was still at large and the Crown counsel applied for a

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separation of trials. The application was granted and the trial continued without A3. On the 3rd February, 1988 A3 was arrested and brought before Court. His explanation as to why he failed to appear was found to be unsatisfactory and his bail deposit was forfeited to the State. He was committed to prison. The original numbering of the accused was retained throughout the trial.

The first witness called by the Crown is Dr. Letele who performed a post mortem examination on the body of the deceased on the 19th July, 1985. He formed the opinion that death was probably due to traumatic shock and loss of blood. Externally the dead body had a laceration on the right parietal region of the head, laceration on the right hip, abrasion on the right shin, laceration on the upper hip. Penis and the left testicle were missing (but were found separately); the right testicle was out of the scrotum but was still attached to the cord. He formed the opinion that the injuries were caused with a sharp object and that the injury on the head and on the upper hip could not cause death. The removal of the penis and the testicles caused a lot of blood loss.

In cross-examination Dr. Letele deposed that in the district the most important function of a medical officer is to determine the cause of death and not to pay much attention to minor injuries. He admitted that there could have been other minor lacerations on the head which he overlooked. He said that he put a question mark before "Traumatic shock" because the deceased might have been in a

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state of shock and that it may have contributed to his death but he could not be certain. He recorded his findings on a paper immediately after the examination and later transferred the information to the prescribed form (H.25) (Exhibit A).

'Mabereng Mpana (P.W.2) testified that on the evening of Friday, the 12th July, 1985 between the hours of seven and eight she was in her house in the company of Pinky, Lesaoana and the deceased. A1 suddenly pushed the door and entered into the house. He stood in the middle of the house and pointed at Pinky. He asked who he was. Pinky told him his name. He then pointed at Lesaoana and asked him his name. Lesaoana told him his name. He finally came to the deceased and asked him the same question he had asked the others. When the deceased told him his name, A1 rushed at him and grabbed him by his blankets and said: "I have been looking for you." He pulled him and forced him to jump over the fireplace where a wood-fire was still burning. At that time one Seshophe Makhube (P.W.5) came into the house and asked where they were taking his employee to. The deceased was his shepherd. A1 said that A5 had instructed them to take the deceased to him. A5 is the headman of the village of Ha Makhakhe.

'Mabereng deposed that she went out of the house and saw A4 peeping through the door. He was holding a stick. As she went out all the people who were in the house followed her. When Seshophe suggested that they should take him instead of the deceased, A1 said, "When I mean to do a thing, I do it." At that time the

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deceased told his captors that his shoes remained in the house. A4 ordered her ('Mabereng) to fetch them. She refused because she did not know where they were taking the deceased to. He had left the shoes and his stick in the house. A1 said they should go; she cried and went to the home of her neighbour one Octavia Makhetha (P.W.4). She stood behind Octavia's house and called her. Octavia came to her and she made a report to her. Octavia went to A1 and the others and asked him where they were taking the deceased to. 'Mabereng says that the people who were with A1 and A4 appeared to be many but she could not identify them because it was dark. A1 and his companions went away with the deceased. She and Seshophe went to Octavia's house. She asked Seshophe to go to A5's place and to find out if A1 had taken him there. She returned to her house and never saw the deceased again.

In cross-examination 'Mabereng told the Court that the deceased was the elder brother of her father-in-law. He had lived at Ha Makhakhe for two years and A1 and A4 knew him very well. His home was at Ha Ramonyatsi. It was the first time that A1 and A4 came to her house; she was frightened because they came at night. She did not know that the deceased had assaulted A5, nor did she know that on the 10th July, 1985 he and Seshophe had assaulted Kelebone Kotele and cut his leg. As far as she is concerned the deceased was not a dangerous man. She did not follow the group that drove the deceased to the chief's place because she had a small baby.

Lesaoana Makhabane is a youth of seventeen (17) years of age. He was in the house when A1 entered and pulled away the deceased. He is Seshophe's brother. He deposed that when A1 came he asked them their names before he pulled away the deceased. He contradicts 'Mabereng that A1 was alone when he entered. I think the contradiction can be explained by the fact that 'Mabereng said A4 peeped at the door and did not enter into the house. He denied that 'Mabereng cried at any stage when the deceased was dragged out of the house. He denied that A1 said he was taking the deceased to the chief's place because the chief wanted him. He also denied that the deceased was wearing any shoes when they went to 'Mabereng's place.

Octavia Makhetha's evidence was to the effect that when 'Mabereng shouted at her, she came out of her house and she saw two people who were pulling another person. She went to those people and found out that they were A1, A4 and the deceased. She asked them where they were taking the deceased to. A4 answered and said nothing or no harm was going to be done to him. She suggested to them to leave the deceased alone because it was at night and to take him on the following morning. A1 replied and said, "When I mean to do a thing I do it." She returned to her and learnt after a few days that the deceased was dead.

In cross-examination Octavia said that she did not see Seshophe that evening when she spoke to A1. She heard when A1 asked the deceased saying "where is that money". She did not know that the deceased had cut off the leg of one Kotelo.

/Seshophe.....

Seshophe Makhube (P.W.5) deposed that on the 12th July, 1985 he was returning from town and called at the home of 'Mabereng. It was at about 8.00 p.m. He passed A4 outside the house and noticed that A1 was pulling the deceased out of the house. He asked them where they were taking the deceased to. A4 said they were taking him to A5. At about 9.00 p.m. he went to A5's place to find out what was happening to the deceased who was his shepherd. On arrival at A5's place he spoke to A5 and asked him about the deceased. A5 told him that the deceased was to be taken to his chief, Hlasoa Lerotholi. He pleaded with A5 not to take the deceased to Chief Hlasoa during the night and asked A5 to release him to him and undertook to bring him on the following morning. A5 threatened to assault him and ordered him to go away. He left for his home.

Seshophe deposed further that just before he left he had been in the kitchen with A1, A2, A3, Moqekela Mabula, Jobo Mafeela (P.W.6) and A5 as well as the deceased and A5's wife and Makoeneho Mhokala (P.W.7). A5 caught hold of the deceased and pulled him into the adjoining room which was A5's bedroom. A1, A2, A3 and A4 followed A5 into the bedroom. It was dark in that room and he did not see what was happening. On the following day he went to Chief Hlasoa's place and found out that the deceased was not there. From there he went to Chieftainess 'Mabereng Lerotholi (P.W.15) to whom A5 is subordinate. She wrote a letter to A5 and gave it to him (Seshophe) to deliver it to him. He had been at loggerheads with A5 for a long time. The cause of their dispute was over the inheritance. On one occasion A5 impounded his horse and demanded

M50-00 as compensation for the damage allegedly caused to crops. The senior chief instructed A5 to release the horse on payment of only 50 cents. Seshophe says that on the day he delivered the letter to A5 for the release of the horse, A5 fought with him and hit him with a fist.

In cross-examination Seshophe denied that he said A1 and A4 should take him instead of the deceased. He did not hear the discussion concerning deceased's shoes. He denied that he and the deceased assaulted A5 when they delivered the letter to him. The deceased was at the cafe about 50 yards away when A5 assaulted him.

The evidence of Jobo Mafeela (P.W.O) was to the effect that he also followed the group of people who were escorting the deceased to the home of A5. When they arrived at the house of A5, the deceased was taken into the bedroom and ^{he} saw when A1 tied the deceased with a wire on the wrists and tightened the wire with a pliers. A3 covered the mouth of the deceased with a bandage. A5 instructed them to take the deceased to his chief, Chief Hlasoa. All the accused except A5 escorted the deceased in the direction of Chief Hlasoa's area. However, as soon as they passed the school, they left the road leading to Chief Hlasoa's place and took a different direction. Jobo says that it was at this time that he decided to return to his home. He returned to his home and slept. He never returned to A5 to report that the accused were not taking the deceased to Chief Hlasoa but were going in a different direction. He did not do so because it was at night. But he most surprising thing is that on the following morning he did not give a report to A5.

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When it was put to him that immediately after he had returned to his home the deceased escaped and ran away, he said he did not know that.

I clearly indicated during the trial that Jobo Mafeela was so unreliable that his evidence must be rejected by this Court in its entirety. He contradicted himself on several points and even admitted that he was confused or telling a lie. It would be very dangerous to rely on his evidence to arrive at any decision.

'Makoenehelo Mohakala (P.W.7) corroborated the other Crown witnesses that the accused and the deceased arrived at the home of A5 that night. She had been invited by A5's wife who had brewed some beer for her. She left before the deceased started his journey to his chief.

The evidence of Chieftainess 'Mabereng Lerotholi (P.W.15) was to the effect that on the 10th July, 1985 A5 and Seshophe appeared before her court and after their dispute was resolved, she ordered them to keep peace. A5 then said he had excused Seshophe but said that he would hunt the deceased day and night till he killed him. It is surprising that Seshophe, who was an interested party before the chieftainess, does not refer to this threat in his evidence. Motsie Makhube (P.W.8) says that the words uttered by A5 were, "I tell you, I am going to hunt for the deceased day and night, I shall find him and he will be carried by a skin blanket." (mokhahla). The words are slightly different but mean the same. In

/Sesotho when.....

Sesotho when one says "you will be carried by a skin blanket; he simply means that you will die.

The evidence of all the police officers who investigated this case does not carry the Crown's Case any further. It is common cause that on the 17th July, 1985 Warrant Officer Jane and Detective Trooper Letsoepa attended the scene of the crime at the top of Motlejoeng Mountain. They found the body of the deceased, it had the injuries which have been described by the doctor who performed the post mortem examination. The penis and one testicle were cut from the body and were lying near the feet of the deceased. His blanket and two woollen hats were found some distance from the body. There was a pool of blood at a distance of about seven paces. A piece of a stick was found near the body. After the discovery of the body the accused were taken to their homes where certain weapons were found and seized by the police as exhibits.

At the close of the Crown case, the defence closed their case without calling any witness.

The Crown case is based on circumstantial evidence. Their attempt to secure the attendance of one Berende Moqekela, who is an accomplice in this case, was in vain. In a proper case it is possible for the Crown to get a conviction relying on circumstantial evidence without any eye-witnesses. The question to be decided by the Court in the present case is whether this is a proper case in which a conviction can be sustained on the circumstantial evidence

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adduced by the Crown. The case for the Crown is that on the 12th July, 1985 A1 and A4 arrived at the home of 'Mabereng Mpana and dragged the deceased and took him to the home of A5. On the way to A5's place they were joined by A2 and A3. When they arrived at A5's place they were instructed by A5 to take the deceased to his chief, Chief Hlasoa Lerotholi. It was alleged that deceased was a troublesome and dangerous man who had assaulted A5 and one Kotelo.

The deceased never reached his destination. On the following day Seshophe went to Chief Hlasoa and found out that the deceased was not there. Three days later the dead body of the deceased was found at the top of Motlejoeng Mountain. It was very clear from the body and the surrounding area that the deceased had been murdered. According to the evidence of the doctor, he died on or about the 13th July, 1985 and death was probably due to loss of blood and shock. Loss of blood was mainly from the wound on the scrotum caused by castration.

The accused deny the charge and according to what was put to Jobo Mafeela in the cross-examination, is that the deceased escaped while he was being escorted to Chief Hlasoa. The cross-examination on this point was so brief that we do not know what the accused did when the deceased escaped. Did they make any attempt to recapture him? And if they did how far did they chase him? What did they do if he outran them? All these questions and many others remain unanswered because the accused elected to remain silent after the close of the Crown case. Be that as it may, the onus is on the Crown to prove its case beyond a reasonable doubt.

/In the South.....

In the South African Law of Evidence, 1st edition by Hoffmann, the learned author states the law regarding circumstantial evidence as follows:-

"All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a non sequitur, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred."

In R. v. Blom 1939 A.D. 188 at pages 202 - 203 Watermeyer referred to two cardinal rules of logic 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."

Again in R. v. Hodges (1838), quoted in Wills, Circumstantial Evidence (7th Edition) p.45 Alderson, B. said:

"The mind was apt to take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form part of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting to take for granted some facts consistent with its previous theories and reasoning to render them complete."

All what the Crown has proved in the present case is that on the night of the 12th July, 1985 A5 instructed A1, A2, A3, A4, Berend Moqelele and Jobo Mafeela to take the deceased to Chief Hlasoa. He was subsequently found murdered. A5 had a motive to kill the deceased because he regarded the deceased as a dangerous man in his village. A few days prior to the killing of the deceased A5 had expressed his intention to hunt the deceased day and night till he killed him. As I said above there is a bit of doubt that A5 uttered those words in the presence of his senior chief. I have also stated that Jobo Mafeela was an extremely unreliable witness. He is the only one who gave evidence as to what A5 said to them before they started to escort the deceased to Chief Hlasoa.

The Crown has urged me to infer that the instructions of A5 to the accused and Jobo Mafeela were that they should go and kill the deceased on the pretext that they were taking him to his chief. That the accused actually carried out the instructions of A5. The question is whether this is the only reasonable inference that can be drawn from the proved facts; bearing in mind that the accused have indicated in cross-examination that the deceased escaped. To answer this question the Court must find that the story of the accused is not only improbable but that beyond a reasonable doubt it is false (R. v. Difford 1937 A.D. 370, at p. 373). Has the evidence of the Crown ruled out the possibility of an escape and the possibility of other people killing the deceased after his escape from the accused, more especially because A5 allegedly expressed his intention in public that he would kill him?

/The Crown.....

The Crown attempted to rule out the possibility of escape by showing that the wrists of the deceased were tightly fastened with a wire and that a pair of pliers was used to tighten the wire. This piece of evidence was challenged by the Crown on the ground that if it were true some marks ought to have been found on the wrists. I think there is some substance in this argument. In any case that piece of evidence came from a very unreliable witness, Jobo Mafeela. No marks were found on the wrists of the deceased by either the police or the doctor.

The possibility of the killing of the deceased by other people is a very remote possibility. It is remote because there is no evidence that the deceased had many enemies who were watching his movements during day and night. How ever remote that possibility might be it is a possibility which must be considered by the Court especially because A5 is alleged to have made known his intention to kill the deceased in public. The other point to be considered is that the body of the deceased was discovered after three days and the doctor estimates that he might have died about six (6) days prior to his examination which was carried on on the 19th July, 1985. Anything could have happened to the deceased between the time of his escape and the time his body was found.

during argument I was referred to the case of R. v. Dube, 1915 A.D.557. The facts of that case are distinguishable from the present one in that in the former immediately after the accused left her house it was found to be on fire and the door had been securely fastened from outside with a chain, part of the wind-screen, which was made of reeds, had been broken down. It had been

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removed and placed against the door, and was on fire too. The accused's husband was burnt to death. She was convicted of murder. In the present case the body was discovered three days after the deceased is alleged to have escaped from the accused.


Much was made of the fact that the accused failed to testify. I think the law concerning failure to testify was clearly stated in the case of S. v. Theron, 1968 (4) S.A. 61 (T.P.D.) in which it was held that 'generally, in regard to an accused's failure to testify, a useful, practical distinction can be drawn between situations in which the State's case is (i) the direct testimony of a witness or witnesses and (ii) circumstantial evidence. In (i), if the testimony is wholly credible or non-credible, no problem arises, for, in former case, the accused's failure to contradict the credible evidence must inevitably result in the prima facie becoming conclusive proof, and, in the latter case, it would be irrelevant: there would then be no prima facie proof and the accused's silence could not make or restore the State's case. It is only when the State's evidence, although amounting to prima facie proof, creates some doubt about its credibility that the accused's silence becomes important, and may be decisive, for his failure to contradict the State's evidence may then resolve the doubt about its credibility in the State's favour. In (ii), if the inference of the accused's guilt or innocence can be drawn with the requisite degree of certainty, the accused's silence is unimportant. It is only of importance if, although there is prima facie proof of his guilt, some doubt exists whether that proof should now be regarded as conclusive, i.e. that the only reasonable inference from the facts is one of guilt.

/I am of.....

I am of the opinion that in the present case the Crown has established a prima facie case but some doubt exists as to whether that case should now be regarded as conclusive. That doubt must be exercised in favour of the accused.

The accused are found not guilty and discharged.

My assessors disagree.


J.L. KHEOLA
JUDGE

9th August, 1989.

For the Crown - Miss Moruthoane
For first four Accused - Mr. Pheko
For fifth: Accused - Mr. Nthethe.