CRI/T/40/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

SEKHOBE LETSIE
NGOANANTLOANA LEROTHOLI

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 13th day of July, 1990.

For the Crown : Mr. G.S. Mdhlului, Director of Public Prosecutions;
Mr. V.N. Qhomane, Crown Counsel;
Mr. S.P. Sakoane, Crown Counsel.

For the First Accused : Mr. L. Pheko
For the Second Accused : Mr. M. Matsau

RULING

Cases referred to:

(1) R v Becker (1929) AD 167;
(2) Petlane v R (1971-73) LLR.85;
(3) R v Qobacha (CRI/T/3/87) unreported;
(4) S v Grove-Mitchell (1975)3 SA 417;
(5) R v Blyth (1940) AD 355.

Both accused are jointly charged on four counts of murder of four persons, that is, Mr. & Mrs. Montsi Makhele and Mr. & Mrs. Desmond Sixishe There are four alternative counts in which the second accused is charged with the same four murders and the first accused is charged with being an accessory after the fact in

respect of such murders. Both accused are further charged with two counts of attempted murder, that is in respect of Mr. & Mrs. Tsolo Lelala. Again there are two alternative counts under which the second accused is charged with such attempts and the first accused is charged with being an accessory after the fact of such attempts.

During the course of the evidence for the Crown a prosecution witness, a Private Soldier in the Royal Lesotho Defence Force (RLDF) adduced evidence of a verbal statement made to him by the second accused. The defence has objected to the admission of such statement on the following two grounds:

(i) that the admission of the statement would conflict with the provisions of section 228(2) of the Criminal Procedure and Evidence Act, 1981; and

(ii) that the statement was involuntary.

In view of the latter objection, a trial within a trial would be necessary for its determination. It seemed to me to be more convenient therefore to first resolve the issue under the first ground.

The provisions of section 228(1) and (2) of the Criminal Procedure & Evidence Act, 1981 read as follows:

> "228. (1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person provided the confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.
>
> (2) If a confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it is confirmed and reduced to writing in the presence of a magistrate."

The learned Attorney for the second accused Mr. Matsau submits that the word "policeman" in section 228(2) includes a peace officer, and that a Private Soldier in the R.L.D.F. is a peace officer.

It will be seen that the relevant provisions in the legislation of the Republic of South Africa, which dates back to the Criminal Procedure and Evidence Act of 1917, and upon which our legislation is based, refers to a "peace officer" rather than a "policeman".

In any event, section 2(4) of the Lesotho Paramilitary Force Act, 1980 provides that,

> "A member of the Force is a peace officer and may exercise any power exercisable by a peace officer under any law."

Mr. Matsau submits that there is further support in the provisions of section 5(b) of the latter Act. I need not determine that aspect, as it seems to me that the provisions of section 2(4) are clear enough.

Section 3 of the Criminal Procedure and Evidence Act, 1981 provides a definition of "peace officer" which includes

> "..... any officer, non-commissioned officer or trooper ... of any body of persons carrying out under any law the powers, duties and functions of a police force in Lesotho .....".

In the same section the word "policeman" is defined as including,

> "..... any officer, non-commissioned officer, trooper..... of any body of persons carrying out under any law the powers, duties and functions of a police force in Lesotho;"

Those provisions then indicate that the word "policeman" includes a peace officer. That being the case I hold, and the learned Director of Public Prosecutions very properly concedes, that a Private Soldier in the R.L.D.F. is a "policeman" for the purposes of section 228(2).

The remaining issue therefore is whether the statement made by the second accused constitutes a "confession". The test to be applied, as the Director submits, is that laid down by De Villiers A.C.J. in 1929 in the leading case of R v Becker (1) at p.171, namely that a confession within the meaning of the 1917 Act meant,

> "an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law".

The decision in Becker (1) was followed by the Court of Appeal of Lesotho in the case of Petlane v R (2). I had occasion to consider Becker (1) and Petlane (2) in the case of R v Qobacha (3) and for the sake of convenience I adopt what I said in that case. In particular I observed (at p.19) that the Court of Appeal, while following Becker (1), nonetheless qualified the decision therein to some extent in the following passage in the judgment of Milne JA. at p.90, in which Schreiner P. and Maisels J.A concurred:

> " The learned Chief Justice in ruling that the statement made by the appellant to the Sub-Inspector was admissible said that, "for a statement to be excluded as a confession, it must in itself, or taken with the surrounding circumstances, amount to an unequivocal admission of guilt which, if made in a court of law, would amount to a plea of guilty". Mr. Suttill argued that this was not a correct approach because he contended, a statement cannot be examined "semantically" and "contextually" at one and the same time. Now "semantic" is defined in the Shorter Oxford

> Dictionary as "relating to signification or meaning", and it seems to me that whenever words are used in order to signify something, they should *prima facie* be given their ordinary, natural meaning, and that the words themselves must necessarily be the prime guide to the meaning of the person uttering them. Where the surrounding circumstances at the time the statement is made are neutral, then the ordinary, natural meaning of words will provide a proper guide to the meaning of the person using them. But I cannot see any reason, if the statement made by an accused person is ambiguous, why it should be improper to examine the surrounding circumstances in order to resolve the ambiguity. Although Mr. Suttill urged that this court should not follow R. v Becker (1) and the many causes which followed it, he has not, as I understood him, suggested any alternative approach, beyond saying that the surrounding circumstances must be considered in deciding what was meant by the words used, i.e. that although the words used by themselves might not be the equivalent of a plea of guilty, they could be equivalent to a plea of guilty when the surrounding circumstances are taken into account. He contended that the facts that on the night the deceased was killed, a report about it was made to the charge office and that a search was made for the appellant in connection with the killing, are part of surrounding circumstances to be considered in deciding what the appellant meant by the statement he made to the Sub-Inspector the next morning."

In Petlane (2), when producing a blood-stained knife to a police officer, the appellant had said, "This is the knife. I have killed a person the previous night". Milne J.A in deciding whether those words constituted a confession, did in fact take into account the surrounding circumstances. He held nonetheless that those words did not in such circumstances constitute a confession. In Qobacha (3) I observed that the surrounding circumstances were not

neutral, and therefore took them into account. Faced with much the same statement as that in Petlane (2), I considered nonetheless that in the particular surrounding circumstances the facts of Petlane (2) could be distinguished, and that the particular statement constituted a confession.

Mr. Matsau urges me to do likewise in this case, and also to distinguish the facts of S v Grove-Mitchell (4) and R v Blyth (5), to which cases the Director refers. The facts of those cases are in no way similar to those of the present case. In Blyth (5) in particular the words "I murdered my husband by arsenical poisoning" were held to constitute a confession, because the word "murder" is a technical term, importing the necessary *actus reus*, and in particular the *mens rea*. As I see it everything depends on the facts of each case.

In the present case I do not see that the surrounding circumstances were neutral and I propose to take them into account. In doing so I observe that the evidence before me at this stage of the trial is but *prima facie*: I wish it to be understood that I am not called upon to make, nor do I make any finding of fact or credibility at this stage. Indeed it is solely in the interests of the accuseds that I consider the evidence.

I am of the view that it is most undesirable however to recount the evidence in any detail at this stage. Suffice it to

say that I have considered it carefully. It proves necessary however to recount that part of the evidence immediately preceding the alleged making of the statement.

The Private Soldier in the R.L.D.F., a bodyguard of the first accused, testified that between midnight and 2 a.m. on 16th November, 1986 the second accused, a Sergeant in the R.L.D.F., accompanied by another Sergeant in the R.L.D.F., the latter also a bodyguard of the first accused, arrived at the gate of the residence in Maseru of the first accused, a Colonel in the R.L.D.F., and a Military Councillor at the time.

The Private Soldier went outside the gate of the residence and spoke to the second accused and his companion. They requested to see the first accused. The Private Soldier enquired as to whether it could be left to the morning, particularly as one of the Sergeants was also a bodyguard of the first accused: the latter said the matter was urgent. The witness then testified as follows:

> "Then the second accused said something to me. He said they wanted to see the first accused. He said that they had come to tell the first accused that they are from Bushmen's Pass: they had gone there to kill Mr. Makhele and his wife and Mr. Sixishe and his wife and others."

The question is whether that amounts to "an unequivocal

acknowledgment of guilt, the equivalent of a plea of guilty before a court of law?" The prosecution has adduced evidence of a transaction sometime after 11 p.m., earlier that same night, at Bushmen's Pass, in which it is alleged that the four deceased were shot, by unidentified assailants, and in which Mrs. Lelala was wounded and Mr. Lelala escaped. I have, as I have said, carefully considered all of such circumstances.

I observe that the statements in the relevant decided cases invariably reveal a completed actus reus. In the present case there is but a statement of intent. There is a statement of having been present at Bushmen's Pass. Taking into account all of the evidence so far adduced in the trial I cannot see that such statement, combined with the statement of intent, constitutes an admission of having participated in any offence. Again I do not see that there is any admission of complicity in a lesser offence: the statement does not reveal that the particular intent was ever furthered in any way and that any attempt was made.

In all the circumstances I hold that the statement did not amount to "an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law" and did not constitute a confession. It is not then affected by the provisions of section 228(2)

There remains however the issue of voluntariness. I proceed

therefore to conduct a trial within a trial.

Dated at Maseru This 13th day of July, 1990.

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B.P. CULLINAN
CHIEF JUSTICE