

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. TSEKO NYATSO
2. TSAKAJOE PULUNGOANA
3. PALO TS'OSANE
4. RAMAQHANAKA MOKHOMATHE

R U L I N G

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 19th day of September, 1990.

The four (4) accused are before me on a charge of murdering 'Matanki Ramothamo, it being alleged that on or about 18th September, 1988 and at or near Ha Ntlama in the district of Berea the accused, each, some or all of them unlawfully and intentionally killed the deceased.

When the hearing of this trial commenced, Mr. Thetsane, counsel for the crown, informed the court that the prosecution was going to rely on a confession which No.1 accused had allegedly made before a magistrate on 21st September, 1988. Mr. Fosa who represents the accused in this matter contended that the alleged confession had not been freely and voluntarily made by No. 1 accused. The defence would, therefore, challenge its admissibility.

2/ Consequently, .....

Consequently, it became necessary for the court to hold a trial within a trial to determine the admissibility or otherwise of the alleged confession.

It is common cause that on 21st September, 1988 No.1 accused appeared before a magistrate and made a statement, the gist of which was that his younger brother who had already been scarified in preparation for a circumcision passed away. As he died the boy complained that he was "finished" by the milk which had been given to him by the deceased. Accused No. 1 further told the magistrate that following the death of his brother, the deceased who was his paternal aunt did not even call at his house nor did she attend the funeral service held on Saturday the 17th September, 1988. On the following night, Sunday the 18th September, 1988, he (No.1 accused) and the other three accused planned to kill the deceased and accordingly proceeded to her house.

No.2 and No.3 accused had armed themselves with a long knife and a sharpened iron rod, respectively. The sharpened iron rod was in fact, No.1 accused's property which No. 3 accused had obtained from him.

On arrival at the deceased's house they knocked at the door and she asked who it was. None of the accused replied. Instead No. 3 accused started kicking on the door of the house with his booted feet. Although the deceased screamed from inside the house nobody came to her rescue. Eventually the deceased was heard saying:-

3/ I am now opening .....

"I am now opening. You will either kill me or I shall kill you".

As the deceased uttered those words, the door opened and she suddenly ran out of the house. No.3 accused chased and caught up with her at a stand pipe next to one Pholo's place. He stabbed her with the sharpened iron rod. He (No.1 accused) and No.4 accused then joined in the assault on the deceased by kicking her with their boots. No.2 accused also came and stabbed the deceased with his long knife. Thereafter the four (4) accused left the deceased and ran away.

On the following morning which was a Monday, the 19th September, 1988, No.1 accused went to a place called Masoeling. On his return from Masoeling he learned that the deceased had died. He proceeded to where the deceased's dead body was lying next to the village stand pipe. The police vehicle was already there. No.2 accused was the first to be called and questioned by the police about the death of the deceased. He denied knowledge of it. He (No.1 accused) was next called and questioned about the death of the deceased. He told the police that he was one who had killed the deceased. Asked with whom he was, he told the police that he was with the other three accused. They were then arrested and conveyed to T.Y. town, together with the dead body of the deceased.

Assuming the correctness of the statement that No.1 accused told the Magistrate that he and the other accused were the persons who had actually planned, assaulted

4/ and killed .....

and killed the deceased, it seems to me that the statement amounts to a confession which, in law, does not, however, affect his co-accused. That being so, the important question that arises is whether or not No.1 accused had freely and voluntarily made the statement which would, therefore, be admissible confession.

In support of its contention that No.1 accused's statement is admissible confession the crown has adduced the evidence of P.W.1, D/L/Sgt Seboka, who has testified that he is the investigating officer in this case. On 19th September, 1988 he received a certain report following which he proceeded to Ha Ntlama. He was in the company of two other police officers viz. D/Tpr Seboka and D/Tpr Matete. On arrival at Ha Ntlama he found many villagers already gathered next to the village tap where there was a dead body. The body was identified as that of the deceased. He found that it had sustained multiple open wounds behind the left ear, on the arms, chest, back, hips, buttocks and knees.

Following some information he cautioned and interrogated Nos 1 and 2 accused who were both amongst the villagers who had gathered at the scene of crime. According to P.W.1 when he was asked about his knowledge concerning the death of the deceased No.1 accused explained that he and the other three accused were responsible for the death of the deceased. He considered the explanation made by No. 1 accused to amount to a confession which would

5/be inadmissible .....

be inadmissible because it was made to him, as a police officer. For that reason he did not write it down. Both Nos. 1 and 2 accused were conveyed to T.Y. town together with the deceased's dead body.

On the way to T.Y. they met A.4. P.W.1 cautioned and interrogated him about the death of the deceased. Following an explanation made by A.4, P.W.1 joined him with A.1 and A2 on their way to T.Y. town. After they had come to T.Y. the three accused were taken to the police station where they were later joined by A.3. The accused were again cautioned and interrogated by P.W.1. When A1 repeated the same explanation that he had given at the scene of crime viz. that he and the other three accused were the persons who had killed the deceased, P.W.1 asked him whether he would be prepared to make the same explanation even before a magistrate. The reply was in the affirmative.

According to him P.W.1 then arranged for a uniformed police officer to take A1 before a magistrate. He assured the court that before he went to the magistrate A1 had not, in any way, been assaulted, threatened or unduly influenced to make a statement.

Accused 1 himself gave evidence on oath as D.W.1 and his version was, however, slightly different. According to him, on 19th September, 1988 he was amongst the people who had gathered at the spot where the dead body of the deceased was found lying next to a village tap. After

/ they had .....

they had arrived at the scene P.W.1 and the other police officers questioned A2 about his knowledge concerning the death of the deceased. He (A1) was next called aside by the police officers who without administering any caution, interrogated him about the death of the deceased. As he was still shocked about the death of the deceased who was his paternal aunt he told P.W.1 and the other police officers that he and the other three accused had killed the deceased. The police then started assaulting him. Whilst one of the police officers was violently pushing him P.W.1 whipped him with a plastic sjambok on the shoulders and thighs saying he did not want to speak the truth and should produce the weapons that had been used on the deceased.

He was whipped for a distance of about 80 paces viz. from the scene of crime to A2's house where the latter went behind the house and dug out two swords. From A2's home they went to his house and the police officers were still assaulting him in the manner already described. At his house he was told to take off his trousers which the police took possession of on the ground that they had blood stains on the buttocks. He confirmed that from Ha Ntlama he, Accused 2 and Accused 4 were conveyed in a police vehicle to T.Y. On the way P.W.1 suggested that they should be taken to a place called Sefiking from where he would ride on a horse and make them run to T.Y. The driver of the police vehicle, however, declined the suggestion and drove straight to

T.Y. On the following day 20th September, 1988 A3 joined them at T.Y. Police charge office.

After they had come to the police charge office he (A1) was again assaulted by P.W.1 and other police officers. This time an iron rod was used to assault him on the buttocks and knees. As a result he sustained lacerations. The reason for the assault perpetrated on him by P.W.1 and other police officers was that he did not admit to have killed the deceased.

I must say I fail to understand the reason that Accused 1 advances for the assault on him. The purpose of P.W.1's investigations was clearly to establish who had killed the deceased. In his own evidence A1 had told P.W.1 that he and the other accused had killed the deceased. It seems incredible, therefore, that P.W.1 would have assaulted A1 after he had told him what he was looking for.

In any event, A1 went on to testify that following the assault on him at the police charge office he was simply told by P.W.1 to go before a magistrate and make a confession. He was escorted to the magistrate's chambers by a police officer who stood next to him whilst he was talking to the magistrate. He was frightened as he spoke to the magistrate because he had been told that from the magistrate's chambers he would be taken back to the police charge office. Before he made the statement the magistrate merely asked him whether or not he was

8/ married and .....

married and to whom he was responsible. She neither administered any warning or asked him the usual preliminary questions. The statement itself was not correctly recorded by the magistrate. For example he never told the magistrate that he and A4 had assaulted the deceased. What he told the magistrate was that he and A4 ran away at the time the deceased screamed inside the house and called out the name of one Rabelete. He only learned from A2 that the deceased had been killed. He denied to have told the magistrate that early in the morning of the day on which the deceased was found dead next to the village tap he had gone to Masoeling. According to him, A1 does not know where the magistrate got some of the things she wrote in the statement he had made before her on 21st September, 1988. In any event he was unduly influenced to make the statement which could not be regarded as admissible confession.

It is significant that although he allegedly sustained weals and lacerations as a result of the assaults on him, by P.W.1 and other police officers, A1 admittedly never reported the incident to any of the senior police officers at T.Y. police charge office, the magistrate before whom he appeared to make the statement, on 21st September, 1988, or the prison authorities following his remand. He, however, told the court that on arrival at T.Y. prison he was unable to walk properly and a certain prison officer by the name



of Mohlabi even asked him what was wrong with him. He explained to Mohlabi that he had sustained injuries. Notwithstanding his explanation that he had sustained injuries he was not referred to a doctor for examination nor was he afforded any medical treatment.

It is perhaps convenient to mention at this juncture that after the defence had closed its evidence on a trial within a trial C.W.1, No. 4211 A.P.O. Mohlabi, was called by the court to testify in this matter. In his testimony C.W.1 told the court that in September, 1988 he was stationed at T.Y. prison. He recalled that during that period the four accused were inmates at his prison.

According to the procedure followed at all the prisons in Lesotho when a person is brought to the prison he is examined for injuries. If such person were found to have any injuries he would be referred to a medical doctor for treatment before he could be accepted into prison and the fact of his injuries and medical treatment would be reflected in his committal warrant. According to Accused 1's committal warrant he was received into T.Y. prison not by him (C.W.1) but another prison officer who attached his signature thereto. There is no indication on his committal warrant that A1 had injuries on his arrival at the prison. C.W.1 denied that after his arrival at the prison he noticed that A1 was unable to walk properly and had had to ask what the matter was with him.

.10/ If it .....

If it were true that A1 had sustained injuries as a result of assaults allegedly perpetrated on him by P.W.1 and some other police officers, as he wishes this court to believe, he would, in my view, have reported the matter to either a senior police officer at T.Y. police station or the magistrate before whom he appeared for a confession and/or remand. In his own mouth he has not. His story that on arrival at T.Y. prison he reported his injuries to C.W.1 who had noticed that he was unable to walk properly is not supported by the latter's evidence. By and large, I am convinced that A1's story that when he went to make a statement before a magistrate he was frightened and had been assaulted by P.W.1 and other police officers is a lie which I have no hesitation in rejecting as falsehood.

In her evidence P.W.2 'Mants'eho Machaha, testified that she had been a magistrate since 1985 and in the course of her duties had taken numerous confessions prior to September 1988. She confirmed that on 21st September, 1988 A1, who was in his sound and sober senses, appeared before her wishing to make a statement. She observed that A1 had some wounds which were, however, already healing, on his face.

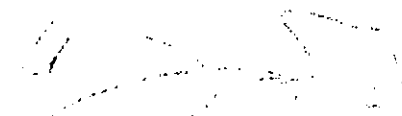
It is worth mentioning that in his evidence A1 conceded that about 3 weeks prior to 21st September, 1988 he was involved in a fight at a circumcision school when he sustained the injuries on his face. According to

P.W.2, A1 was introduced into her chambers by a police officer who then left her alone with the accused. She asked A1 the preliminary questions the replies to which she recorded on the usual roneoed form for confessions. Judging by A1's answers to the question that were put to him P.W.2 was satisfied that he freely and voluntarily wanted to make a statement and accordingly allowed him to do so. The statement which has, earlier in this judgment, been outlined was made and recorded in the Sesotho language as per exhibit "A" before this court. Under cross-examination P.W.2 assured the court that before she asked the preliminary questions and allowed A1 to make the statement she had administered the usual warning to him.

It may be mentioned that according to Exh"A" P.W.2 does not appear to have completed the paragraph requiring her to investigate the circumstances under which A1 had appeared before her. Her evidence was for that reason subjected to criticism, and rightly so in my opinion. However, the answers which A1 gave to the preliminary questions coupled with the evidence of P.W.1 leave no doubt in my mind as to the circumstances leading to A1's appearance before P.W.2, the magistrate. The irregularity that may have occurred in this regard is, in my view, not such that it can render the statement inadmissible confession.

12/I accordingly .....

I accordingly come to the conclusion that the statement which A1 made before P.W.2 on 21st September, 1988 was freely and voluntarily made. It is therefore, admissible confession. I however, repeat that the confession affects only A1 and not his co-accused.



B.K. MOLAI

JUDGE

19th September, 1990.

For Crown : Mr. Thetsane

For Respondent: Mr. Fosa.