

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

BOTHATA MOHOLO

R U L I N G

Delivered by the Hon. Mr. Justice B.K. Molai
on the 21st day of August, 1991.

This is a ruling on the admissibility or otherwise of a confession allegedly made by the accused who has pleaded not guilty to a charge of murder.

It is common cause that on 5th February, 1990 the accused appeared before a magistrate and made a statement the gist of which was that one evening he had an altercation with the deceased, Mpho Mafela. He subsequently went to the house of a woman by the name of Mohanuoa. He found the deceased in bed with Mohanuoa who told him that she no longer loved the deceased. At the request of Mohanuoa the accused assaulted the deceased by hitting him a blow on the head with a stick. The deceased fell to the floor as a result of the blow. The accused and Mohanuoa then carried and placed the deceased outside one of the latter's houses. He was still alive.

According to him, the accused turned down Mohanuoa's suggestion that he should abscond and said he would rather go and report the incident (to the police) at Mohale's Hoek. However, he later learned that the deceased had passed away.

In the contention of the crown counsel the statement was freely and voluntarily made by the accused before the magistrate. It was, therefore, admissible confession. The defence counsel disputed the contention and pointed out that at the Preparatory Examination proceedings the accused had told the presiding magistrate that when he went to make the statement before the magistrate who recorded it he had been assaulted by the police in Mohale's Hoek. The accused had in fact been schooled by the police to say what he told the magistrate. That being so, the statement was not freely and voluntarily made. It could not, therefore, be admissible confession.

In the circumstances, the assessors were asked to step down while the court proceeded to hold a trial within a trial to determine whether or not the statement admittedly made by the accused before a magistrate amounted to admissible confession.

In support of its contention that the statement was freely and voluntarily made by the accused and, therefore, admissible confession, the crown adduced the evidence of P.W.1, D/Tpr. Hlaele, who told the court that on 31st January, 1990 he was on duty at

Mohale's Hoek police charge office when the accused came and surrendered himself. Following an explanation made by the accused and a certain information he had earlier received P.W.1 cautioned and charged the accused as aforesaid.

On the following day 1st February, 1990 the accused took him (P.W.1) to his house in the village of Ha Khitsane, where he produced a stick from underneath his bed. He handed the stick to P.W.1 who took possession thereof. Whilst at his home the accused was allowed to drink some soft porridge (motoho) and ask for a clean skipper from his mother.

According to P.W.1 after he had surrendered himself to the police at the charge office the accused tried to make a statement to him. He, however, stopped the accused from making the statement to him as a police officer and advised him that he could make it before a magistrate if he wished. the accused accepted the advice and arrangements were then made for him to go and see a magistrate. As there was no magistrate available in Mohale's Hoek at the time, the accused was taken, in a police vehicle, to the magistrate court in Mafeteng. P.W. 1 was, however, not the police officer who escorted the accused to Mafeteng.

P.W.7, D/Tpr Masoabi, testified that on 5th February, 1990 he and L/Sgt Matoetoe were the police officers who escorted the accused to the magistrate court in Mafeteng. P.W.1 was not there.

After the accused had seen the magistrate they escorted him back to Mohale's Hoek.

Both P.W.1 and P.W.7 testified that before he surrendered himself to the police in Mohale's Hoek the accused was unknown to them and they had not been to his home at Ha Khitsane. They specifically denied the suggestion that whilst in the custody of the police in Mohale's Hoek the accused was ever assaulted or in any manner illtreated. They told the court that as the accused has surrendered himself to, and was cooperating well with, the police there was no reason why the police would have illtreated him.

E.M. Lentsoe, the magistrate, gave evidence as P.W.6 and confirmed that on 5th February, 1990 the accused was brought to him. He was alone with the accused in his chambers when the latter informed him that he wanted to make a confession. In the observation of P.W.6 the accused was in his sound and sober senses. He then took the Official Form for recording confessions. In accordance with the procedure therein prescribed P.W.6 administered a warning to the accused and asked him the preliminary questions, the replies to which he recorded on the form. From the accused's responses to the preliminary questions P.W.6 was satisfied that he freely and voluntarily wished to make the statement. He accordingly allowed the accused to make the statement which he recorded in Sesotho, the language in which it was made.

The accused gave evidence on oath and told the court that one morning he went to a neighbouring village to obtain bewyses for his goats. When he returned home he learned from his mother that P.W.1 and another policeman had been looking for him and had left a message that he should report at Mohale's Hoek police charge office without fail. He accordingly proceeded to the charge office. The accused denied, therefore, that he went to Mohale's Hoek police charge office to surrender himself to the police.

The accused's mother, 'Mapulane Moholo, gave evidence as D.W.2 and told the court that a policeman and a police woman had called at her home looking for the accused. This she told to the accused when the latter came home.

It is significant that whilst the accused says P.W.1 and another policeman came to his home D.W. 2 says a policeman and a police woman came to her home. To that extent there is a conflict in their evidence. It is to be borne in mind that P.W.1 had told the court that he never went to the home of accused before the latter came to the police charge office on the day in question. The only reasonable explanation to the conflict in the evidence of the accused and D.W.2 seems to be that they are not telling the truth in their evidence that the police officers had been to their home. They are, in my view, hiding the truth told by P.W.1's evidence viz. that he never went to the home of the accused before the latter surrendered to the police at Mohale's Hoek police charge

office.

Be that as it may, the accused went on to testify that when he arrived at the Mohale's Hoek charge office he met P.W.1 outside the office. After questioning him about the deceased, P.W.1 told him that he did not as yet want to speak the truth. He ordered him to go into the office where he would have to tell the truth. Inside the office they found 4 policemen and a police woman. When P.W.1 told them that the accused was not coming out with the story they wanted him to tell, one of the policemen jumped up from his seat and said: "You are still playing with this boy." P.W.1 then took a plastic sjambok. He (accused) was covered on the head with a plastic, which was tied around his neck, and a dun blanket. The police woman started whipping him with the sjambok whilst other police officers were hitting him with fists and telling him that he ought to know how the deceased came to be at the house of Mohanuoa. When his head was eventually uncovered the accused was told by P.W.1 that on arrival at Mafeteng he should tell the magistrate that he was the one who had assaulted the deceased.

Well, if the accused's story, that before he was sjamboked and hit with fists his head was covered with a plastic and a dun blanket, were to be believed, I fail to apprehend how he could say with any degree of certainty that it was the police woman who was sjamboking him. It is also worth mentioning that according to him the accused sustained injuries as a result of the assault

perpetrated on him by the police. Notwithstanding the injuries and the pain he was suffering he admittedly never reported to any of the senior police officers at Mohale's Hoek police station or the magistrate before whom he appeared for remands. In his own mouth the accused admitted that when he arrived at the prison he was specifically asked by the prison authorities whether there were any injuries on him and he replied in the negative. He explained this by saying he believed the prison wardens were police officers because like the latter the former put on caps.

I must say I find the explanation rather unconvincing. Before being released on bail the accused admittedly spent several months at Mohale's Hoek gaol. In his own words the prison wardens were kind to him and the other waiting-trial detainees. Until he was released on bail he never told them that he had sustained injuries as a result of the assault perpetrated on him by P.W.1 and the other police officers at Mohale's Hoek police station.

As Ogilvie Thompson, A.J.A. once put it in R. v. Mtabela 1958(1) S.A. 264 at pp. 268 et seq. :

"It is a relatively common occurrence for an accused to seek at his trial to resile from a confession by making allegations that he was assaulted or otherwise unduly influenced; and such allegations are often wholly unfounded."

Considering the evidence as a whole, in the present case, I am inclined to accept as the truth the story of P.W.1 and P.W.7 that as he had surrendered himself to the police with whom he was co-

operative there was no reason why they or other police officers would illtreat the accused whilst he was in their custody. Indeed, in reply to the preliminary questions that were put to him the accused himself told P.W.6 that he had not been assaulted or illtreated by any person prior to his appearing before him. The words of the Learned Judge of Appeal in the above cited decision are, in my opinion, quite apposite in the present case.

P.W.6, the magistrate, before whom the accused appeared for confession was enjoined by the procedure prescribed in the official form for recording confessions to investigate and describe carefully the circumstances which lead to the appearance of the accused before him. He had, under that paragraph merely written: "He seems to be in good physical and mental conditions".

It was argued, and rightly so in my opinion, that what the learned magistrate had written clearly indicated that he did not observe the requirements of the paragraph under consideration. Regard being had to the replies that the accused gave to the preceding preliminary questions there is, however, no doubt in my mind that the conclusion arrived at by the magistrate viz. that the accused freely and voluntarily wished to make a statement cannot be faulted. The non-observance of the requirements of the paragraph under consideration cannot, in the circumstances of this case, necessarily render the statement inadmissible confession. What is of importance is whether it has been established in this case, that the confession was voluntary (R. v. Mtabela 1958(1) S.A. 264 at

p.268D). This has, in my view, been established.

In the result, the ruling that I make is that the confession which the accused made before the magistrate on 5th February, 1990 was freely and voluntarily made and, therefore, admissible.



B.K. MQLAI

JUDGE

21st August, 1991.

For Crown : Mr. Lenono.

For Respondent: Mr. Putsoane.