

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

PITSO MATOBO

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu  
on the 14th day of October, 1994.

-----

The Accused is charged with the crime of murder

"In that upon or about the 17th day of January, 1990  
and at or near Malumeng in the district of Maseru, the  
said accused did unlawfully and intentionally kill one  
MOREBOLI PHAKOE KAMO."

The Accused had initially got bail in July, 1990 but it appears some problems arose that led to his being re-arrested. The Preparatory Examination was completed on the 15th October, 1992 and Accused was committed to the High Court for trial.

Accused pleaded not guilty. Mr. Mohapi appeared for the Crown and Mr. Mafantiri represented the Accused pro-deo.

P.W.1 Ntja Posholi told the Court that he was the chief of the village in which Deceased lived. Deceased Moreboli Phakoe Kamo, whose death is the subject of this trial was the lover of one Ntšehiseng. Ntšehiseng (now deceased) was the sister of P.W.1. The late Moreboli Phakoe Kamo, known to P.W.1 simply as Rampe Phakoe, lived with P.W.1's sister Ntšehiseng as husband and wife. Deceased Rampe Phakoe came from a different village.

One day while P.W.1 was sleeping Ntšehiseng brought an urgent report to the effect that Rampe Phakoe (the Deceased had been assaulted). Ntšehiseng refused to name the Deceased's assailant. She said she was scared to tell who the assailant was. At the time of the report Ntšehiseng was not sure whether Rampe Phakoe was still alive.

P.W.1 called people to where Rampe Phakoe was and found him dead. Rampe Phakoe had a wound between the head and the

/...

shoulders. There was a lot of blood where Deceased had fallen.

Under cross-examination P.W.1 said Ntšehiseng used to tell him who her lovers were although she was already a married woman.

P.W.2 Makoe Phakoe had his deposition at the Preparatory Examination read into the record by consent of both the Crown and the Defence. P.W.2 identified the late Moreboli Phakoe Kamo, the Deceased to the medical officer before a post-mortem was conducted. P.W.2 was the Deceased's cousin. According to him Deceased had an open wound at the side of the neck.

P.W.3 Lenka Kamo had his deposition at the Preparatory Examination admitted by consent of the Defence and the Crown. P.W.3 was Deceased's brother. He only describes the fact that Deceased was lying on his back and he had an open wound on the neck. He and the police conveyed the body at the mortuary and it suffered no injuries on the way to the mortuary.

The next witness was P.W.4 Leabua Leluma who presently lives at the Central Prison. Accused lives at Majakaneng while he P.W.4 lived at Malumeng. The events he testified about occurred four years and some months before August 1994. He estimated the year to have been 1988.

/...

P.W.4 says around 2 p.m. Accused and Ntšehiseng were drinking beer at the home of Matlaleng. They were four paces from him. Ntšehiseng introduced Accused as her boy-friend. Ntšehiseng and P.W.4 are cousins in that Ntšehiseng's father is the elder brother of the father of P.W.4. Later on P.W.4 went home. When Ntšehiseng came to the home of P.W.4 in order to ask the father of P.W.4 to allow P.W.4 to take Ntšehiseng home, as it was late in the evening, P.W.4's father agreed and P.W.4 took Ntšehiseng home. On the way they were joined by the Accused. When P.W.4 wanted to go back Accused said he would not go all the way to the home of Ntšehiseng, P.W.4 with Ntšehiseng parted with Accused at the village of Mahooana. P.W. 4 took Ntšehiseng home.

After they had got into the house of Ntšehiseng, some one knocked. When Ntšehiseng asked who was knocking, the person said "it is me". He identified the person by voice. After that Ntšehiseng opened the door. P.W.4 then heard footsteps outside. Ntšehiseng peeped outside and said people were killing each other outside. P.W.4 went outside and found two people holding each other outside the house. P.W.4 says he identified Deceased, he shone a torch at them and they moved behind the house. Deceased was a person known to him.

P.W.4 says he only recognised that it was the Accused who

/...

was fighting with Deceased when Accused pushed Deceased away and ran away. P.W.4 tried to talk to Deceased but Deceased said nothing. He noticed Deceased had a bad injury on the neck.

Some days later Accused met P.W.4 at a village called Thibella. In P.W.4's view Accused did not differentiate between him and P.W.4's elder brother. He told P.W.4 he would like to meet Leabua, meaning P.W.4 whom Accused did not know very well.

At Mafeteng Prison P.W.4 met Accused and they talked. Accused said P.W.4 should say he knows nothing. This was in 1992. P.W.4 had found Accused already in prison.

P.W.4 says he and Ntšehiseng are descendants of Leluma. P.W.4 says Ntšehiseng had never told P.W.4 her love affairs until that day.

Under cross-examination P.W.4 says she sat down in Ntšehiseng's house in order to get refreshments. P.W.4 evidence is not in many respects similar to what he said before the Magistrate on how he identified the people who were fighting. P.W.4 explains this away by saying these differences are the result of the way his evidence in chief was led by the Public Prosecutor at the Magistrate's Court. He also says he did not

/...

say a lot because he was scared.

Before this Court P.W.4 says Ntšehiseng and Deceased were lovers when before the Magistrate P.W.4 said he is not sure. P.W.1 does not state that P.W.4 was present when Ntšehiseng made a report. This P.W.4 cannot explain. He only believes P.W.1 made a mistake. P.W.4 says Ntšehiseng who is his cousin/sister is a married woman and is a widow. Towards the end of the cross-examination P.W.4 speaks of Accused having had a shining object in his hand when he shone a torch at him. This fact was not disclosed to the police because in P.W.4's view it was not important, furthermore the police officer did not ask P.W.4 what Accused had in his hand. P.W.4 denies he could be Deceased's killer.

Under re-examination P.W.4 says he is the one who reported to P.W.1 of the condition of Deceased while Ntšehiseng was with her grandmother.

The Crown then called P.W.5 Mamahlelebe Makara who resides at Thabaneng, Mafeteng. P.W.5 is related to the Accused by marriage. It is the husband of P.W.5 who is the blood relation of the Accused, because Accused's mother is the sister of the husband of P.W.5. P.W.5 says the day she came from Mpharane she

/...

found Accused at her home. Accused told her that he had come to the home of P.W.5 because he had killed Rampe at Thabana Morena. P.W.5 was so shocked that she went straight to the police. The police came and arrested Accused who was still at the home of P.W.5. P.W.5 said she had not asked Accused any questions when he volunteered this information.

P.W.5's original home was at Thabana Morena but she and her husband had removed from there and now resided at Thabaneng, Mafeteng. Although P.W.5 knew the late Rampe (the Deceased) he did not know at the time Accused told her that Deceased was dead. P.W.5 said she had never clashed with Deceased.

Cross-examined P.W.5 said she liked the Accused very much because he is her nephew. P.W.5 was not in a position to deny that on the 17th January, 1990, Accused was already at the home of P.W.5 at Thabaneng because she spent several days at Mpharane. Although she knew Rampe (Deceased) P.W.5 said she was not used to Deceased. P.W.5 said she rushed to the police to tell them to come and get Accused because she did not want it to appear as if she hid the Accused.

P.W.6 was the next witness. He says Accused was playing a game called "Morabaraba" in the village of P.W.6 when he went and

/...

asked him what his name was. He did this because Accused was the only one he did not know in that group. P.W.6 is the headman of the village. Deceased who was Ntšehiseng's lover and cohabited with Ntšehiseng gave him a report. As a result of the report he went to Liponchong's drinking place and talked with him. Ntšehiseng and Matselane, the wife of Liponchong.

Later that evening Ntšehiseng came to ask P.W.6 to ask the son of P.W.6 to escort her home. P.W.6 asked his younger brother's son to take Ntšehiseng home. The following day he learnt of the death of the Deceased.

Under cross-examination P.W.6 says Accused told him his name was Pitso. This was on 17th January, 1990. Pitso is Pitso Malobo the Accused. On 24/8/92 when P.W.6 made a statement before a magistrate he had said he really does not know the Accused except what he found out from the Accused. P.W.6 said he cannot deny that on the 17th January, 1990 Accused was at Thabaneng, Ha Sempe, Mafeteng because he does not know. P.W.6 said he saw the Accused for the first time that day.

P.W.7 Detective Sergeant Ramokepa says he went to Thabaneng as a result of information given and arrested Accused at the home of P.W.5 Mamahlelebe Makara. It was on the 25th January, 1990.

/...



He had also gone to collect the body of Deceased on 18th January, 1990. He found a deep wound behind Deceased's left ear. Accused had given him a brown Okapi knife Exhibit 1.

Under cross-examination P.W.7 was unable to say whether or not the Accused handed the knife to him or P.W.7 took it from the table where Accused was cutting vegetables. All he could say was that Accused gave him the knife. He does not know where the Accused took the knife from. The Medical evidence to the effect that Deceased died from intra-cranial haemorrhage was admitted by consent. There was according to medical evidence a skull fracture on the left retro-auricular portion of the head.

Counsel for Accused indicated that he wished to apply for the discharge of the Accused. I told Counsel for the Accused that with the evidence on record I would not be able to grant the application.

Accused's Counsel closed the case for the Accused.

When in terms of *Section 175 (3) of the Criminal Procedure and Evidence Act, 1981* an application for the discharge of the Accused is made, it is because in the view of applicant the Crown has not made a *prima facie* case. In other words the Accused as

/...

the applicant is saying that at the close of the prosecution case, the Crown has failed to present evidence upon which a reasonable court might convict. *Vide R v Herholdt & Ors* 1956 (2) SA 722. Mapetla C.J. in *Matsobane Putsoa v Rex* 1974-75 LLR 201 at page 202 BC agreed with South African authorities which, in a nutshell state that

"when considering an application for the discharge of an accused person at the close of the Crown case, the test which the Court should apply is whether there is on record evidence on which a reasonable man acting carefully might - not should - convict."

In other words the Court at this stage is not going fully into the merits and does not fully consider questions of credibility.

In *Rex v Kritzinger and Others* 1952 (2) SA 401 at 406 Roper J. dealing with the exercise of the judge's discretion to discharge the accused said:

"He is quite entitled to refuse to discharge if he considers there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence."

In my view this passage is open to misinterpretation because the Court is not entitled to expect the Accused to build the case for

/...

the Crown. Put at its lowest all the Court has to determine is whether there is any evidence on record. If there is none in my view the Court is obliged to acquit the Accused straight away. It is only in some brief and cursory assessment of the quality of the evidence has to be made that the discretion of the Court comes into play. If the Court feels there is some evidence but its quality is of such a nature that proceeding further would be a waste of the Court's time and the Accused's money with no possibility of conviction in sight then the Court might decide to discharge the Accused straight away. If the Court cannot see its way clear at that stage it might feel obliged to refuse the Accused's application for discharge. Nevertheless as Mapetla C.J. in *Matsobane Putsoa & Ors. v Rex* at page 203 added:

"The exercise of the discretion vested in a judge must be founded upon proper and relevant considerations and unless such considerations exist the discretion should ordinarily be exercised in favour of the accused."

These circumstances which should be taken into account Bekker J. in *R v Herholdt & Ors.* (supra) at 723 could not mention in detail save to say:

"It is of course, beyond question that in a particular case the attendant circumstances, which I do not propose to circumscribe or define, might be

/...

such that a failure of justice could possibly result if the accused were discharged at the close of the case for the prosecution."

Cotran C.J. in *Rex v Teboho T. Ramokatsane*, 1978 LLR 70 at 73 succinctly put the matter when he said:

"the courts, it has been held, should not at this stage, embark upon the final assessment of credibility and should leave the question in abeyance until the defence has closed its case and then weigh the two together."

This was what I had in mind when I told Counsel that an application for the discharge of the accused would be most opportune and would be in fact ill-advised.

The Accused closed his case after what the Court said. The Court is no more determining whether the Crown has made a *prima facie* case. To put it in another way, has the Crown proved its case beyond reasonable doubt? In doing this we have to scrutinise the Crown's evidence because Accused offered no evidence in his own defence.

While the Accused has a right to remain silent, Hoffmann and Zeffertl, *The South African Law of Evidence* 6th Edition at page 176 say,

/...

"Silence may amount to a damaging admission when it suggests that a party is unable to explain suspicious circumstances."

in Lesotho the right to silence remains. The difficulty arises where the evidence of Crown witnesses stands unrebutted. It is trite law that evidence ought not to be accepted merely because it is uncontradicted. It becomes a problem when the Court is invited to reject evidence which on the face of it is credible when the Accused himself has chosen not to give evidence in rebuttal. Holmes J.A. in *S v Snyman* 1968 (2) SA 582 at 588 G put the position as follows:

"But where there is direct evidence that the accused committed the crime, in general his failure to testify (whatever his reason therefor) *ipso facto* lends to strengthen the state case, since there is no testimony to gainsay it and therefore less occasion or material for doubting it;"

The evidence of P.W.1 is accepted insofar as it discloses that he came to know of the death of Deceased through Ntšehiseng. The full circumstances of how the report came to be made are shrouded with mystery and contradictions. Ntšehiseng is dead, she cannot tell us what happened. We have some difficulty in accepting that Ntšehiseng introduced Accused to P.W.1 as her lover while she was cohabiting with Deceased. That is possible, but we have not

/...

taken it as a factor in deciding this case.

P.W.4 Leabua Leluma was in many respects an untruthful witness. Whether he did see the fight or not we are uncertain. In any event P.W.1 does not mention P.W.4 as having reported the fight to him along with Ntšehiseng. Whatever P.W.4 says about actually identifying the Accused as the Deceased's Assailant we seriously doubt, and consequently we take the view that P.W.4 may not be telling the truth. We have great difficulty about his statement that for no apparent reason Ntšehiseng introduced Accused as her lover. Ntšehiseng a married woman who was a widow might have lovers but it strikes us as strange that she should introduce Accused as her lover while they were drinking in the presence of other people while she was known to be openly cohabiting with Deceased. This could have happened at the time P.W.4 was taking Ntšehiseng home. We accept the evidence of P.W.4 where he says Accused accompanied P.W.4 and Ntšehiseng for a short distance before he excused himself and went away.

There are no grounds for doubting that P.W.5 is telling the truth when she says Accused told her when she found Accused at her home that he had killed Deceased. She was not shaken in cross-examination nor was any motive to lie about this fact discerned. She honestly admitted that she did not know whether

/...

Accused was already at her house on the 17th January 1990 because she was not there.

We have no grounds for disbelieving P.W.4 and P.W.6 about the fact that Accused was seen in the village where P.W.6 resided. Accused's movements that day are not explained by the Accused. The suggestion that was made in cross-examination that he was already in Thabaneng, Mafeteng, when Deceased met his death is not evidence.

Medical evidence that Deceased died of skull-fracture with intra-cranial haemorrhage is accepted. The skull fracture on the left retro-auricular side corresponds with the wound by a sharp object that caused a wound at the base of the skull behind the left ear.

Having come to the conclusion that P.W.5 is a truthful witness whose merits are beyond question, we are largely of the view that she is the single reliable witness on whose evidence our conclusion revolves because the other witnesses may be trying to supplement the Crown case with facts of which they are not sure and at places lie outright as we believe P.W.4 may have done.

/...

Where the Court convicts on the evidence of a single witness, it has to satisfy itself as Broom J.P. held in *R v Abdoorham*, 1954 (3) SA 163 at 165 as a matter of common sense that there is no room for error in convicting on the evidence of a single witness. The reason being simply that the Court has nothing to check the testimony of the single witness against. This rule of common sense has become virtually a rule of law in that as *R v Mokoena*, 1956 (3) SA 81 at page 85 shows. Despite this danger, we are satisfied that the evidence of P.W.5 has no demerits.

There are two witnesses who claim to have seen Accused in the village the day Deceased was killed. These are P.W.4 and P.W.6. We also have the policeman who says the knife before Court is the one P.W.7 says he got from the Accused. These facts provide some circumstantial material that convicting on the single evidence of P.W.5 is not a mistake. We do not accept the eye witness account to the killing given by P.W.4 because it strikes us as being supplemented by facts he did not see but merely adds on in an attempt to be helpful.

We are satisfied the Accused killed Deceased. Despite the absence of evidence from the Accused, we do not believe the Accused had the requisite intention to kill. It seems Deceased

/...



had problems with Ntšehiseng that day at the time Accused was in the village of P.W.6. That is why he went to P.W.6. We do not have the full information about what was going on at this place where P.W.4 says Accused and Ntšehiseng were drinking. That Accused and Deceased fought over the lover Ntšehiseng, whom they shared, is obvious. The killing happened at the house of Ntšehiseng. It seems to us this killing occurred during a heated quarrel and fight that must have occurred between Accused and Deceased. P.W.4 says he heard that there was fighting while he was still in Ntšehiseng's house. This must have happened when Deceased found Accused outside the house of Ntšehiseng where Deceased was living at the time. Accused has chosen not to shed any light on the details of the fight.

We have come to the conclusion that Accused is guilty of Culpable Homicide.

My Assessors agree.

  
.....  
W.C.M. MAQUTU  
JUDGE

For the Crown : Mr. Mohapi  
For the Accused : Mr. Mafantiri