CRI/T/89/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

PEKANE BAKINYANA

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 15th day of May, 1995.

The Accused is charged with the crime of murder;

"In that upon or about the 8th of March 1990 and at or near Matebeng in the district of Thaba-Tseka, the said accused unlawfully and intentionally killed TIPI MOHLOKO-HLOKO."

The Accused, who was represented by Mr. T. *Hlaoli* pro-deo,

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pleaded not guilty.

P.W.1 Seepa Motlomelo in his evidence said he saw Deceased Tipi Mohloko-hloko being assaulted by the Accused. Before he witnessed this assault, Accused had passed P.W.1 who was working in his field. Accused was going in the direction of Ha Sefako. P.W.1 says he did not see Accused return, he only saw Accused chasing and assaulting Deceased. This was in the afternoon. P.W.1 was some distance away across the river. He went to where Accused and Deceased were.

When P.W.1 got there, P.W.1 asked Accused what was going on. Accused said "you have come here in order to become a witness". As Accused was saying this, he was still assaulting Deceased. P.W.1 says he told Accused to leave Deceased alone. Accused replied-

> "Now that you have seen me I will kill you, burn your house and open your animal kraal."

P.W.1 says he ran away leaving Accused there. Accused continued with the assault. P.W.1 never reported what he saw for fear of reprisals from Accused and the fear that Accused might carry out his threat to kill him.

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Under cross-examination P.W.1 admitted that at the preparatory examination he had said that although there were no people nearby, there were some people on a hillock some distance away and they could have seen what was going on. P.W.1 said he could not identify them because he cannot see and hear properly. In answer to questions P.W.1 said he was not frightened of Accused because they are now before the Court, which is a place of intervention. During cross-examination, P.W.1 further added that after assaulting Deceased, Accused himself went and surrendered to the police but later ran away from the police. It is important to note that this Court was extensively referred to the record of the preparatory examination.

Before this Court P.W.1 omitted (what he had said at the preparatory examination) that is to tell the Court that he could not even see the person who was being assaulted. Consequently P.W.1 had to ask Accused who was the person being assaulted. Accused replied it was the Deceased Tipi.

The next witness was Thatho Salemane P.W.2. He told the Court that he lives in the same village with the Accused. He had by the time the case was heard forgotten

when the events he was testifying about had occurred. The reason for this was, among other things, his illiteracy. According to him, the Chief had raised an alarm as a result of which they went to the Chief who told him and other men to go to the home of the Accused to go and arrest him. They did not find the Accused. It was already in the evening. They then went to the Deceased's body and guarded it the whole night.

On Thursday Accused had in the evening called at the home of P.W.2 and said he had fought with a man. Accused was drunk and had only laughed when P.W.2 asked him the name of the person with whom he had fought. P.W.2 was on fairly good terms with the Accused.

In cross-examination, it emerged that he learned of the death of Deceased on Friday. That was the day the chief called them. Asked how the Chief knew that Deceased had been killed, P.W.2 said the Chief said he had been told by Fonane of Tjonti. The record of P.W.2's evidence at the preparatory examination was extensively used in cross-examination.

The case was adjourned because the Crown wanted to subpoena Fonane of Tjonti. The Court entertained this

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application of leading this witness who had not given evidence before the preparatory examination. In any event no strong objection was raised. A postponement was also necessary because Thapelo Setumo and other witnesses who gave evidence at the preparatory examination had not responded to their subpoenas because he had not been served.

All witnesses that the Crown had postponed the case in order to secure their attendance did not come. The preparatory examination deposition Thamathu Soai was admitted by consent and it was made P.W.3 for convenience. Thamathu Soai had only stated that as a result of a report received, he went to where Deceased was lying dead in a field. He was there when the body was carried to the police van. The medical report was admitted by consent. It merely states that the body of Deceased had deteriorated so much that the cause of death could not be determined.

Another Deposition from the preparatory examination was that of a policeman Trooper Lithebe. This was admitted and called P.W.4. It shows Deceased had eights cuts on the head with a sharp instrument. The body was carried to Sehonghong mortuary and did not receive any injuries on

the way. Then the deposition of a policeman Trooper Pitso was admitted and it was treated as P.W.5. It shows how the Accused was arrested and charged with murder after having been cautioned following the explanation he gave. The deposition of the wife of Deceased Makalimo Mohloko-hloko was also admitted as P.W.6. She says her husband left home on the 8th March, 1990 but did not come back. She learned of his death on the 10th March, 1990. He had been in good health. Chopho Mohloko-hloko was the one who identified the Deceased and his deposition was also admitted by consent and made P.W.7.

It seems there is only the evidence of P.W.1 that directly links Accused with the death of Deceased. The Court can convict on the evidence of a single witness, see Section 238 of the *Criminal Procedure and Evidence Act* of 1981. Such evidence has to be scrutinized with care because there was no corroboration that might have provided an insurance that a wrong conviction might not take place. That is how the cautionary rule was born. Its purpose is nothing else but to give the court a feeling of certainty that the Crown has proved its case beyond reasonable doubt. In *R v Mokoena* 1956 (3) SA 81 at page 85 Fagan JA quoted with approval the following passage from the case of *R v Mokoena* 1932 OPD 79 at page 80 where

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De Villiers JP said:-

> "In my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where for instance,...he made a previous inconsistent statement,...where he has not had proper opportunities for observation, etc."

Fagan JA was at pains to emphasise that De villiers JP's judgment should not be "read as laying down a requirement of law that must be strictly complied with" he was:-

> "uttering what may be a useful warning that the right to convict on the evidence of a single witness, stated without qualifying words in the section, should not be regarded as putting the evidence of one witness on the same footing in regard to cogency as the evidence of more than one." *R v Mokoena* 1956(3) SA at page 86.

What the courts are saying is "The court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respects not a satisfactory witness". In that event the court may convict. See *R v Abdoorham* 1954(3) SA 163 at page 165. This the Court can do so, so long as it has warned itself of the dangers of convicting on the evidence of a single witness. The evidence of a single witness has to be satisfactory in material respects. Such evidence does not have to be satisfactory in each and

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every respect.

What has come to be known as the cautionary rule is seen by Holmes JA as a requirement that the Court insists upon, realising the danger inherent in the evidence of a single witness. They

> "Require some safeguard reducing the risk of wrong conviction, but if corroboration is relied upon as a safeguard, it must go to the length of implicating the accused in the commission of the crime." *S v Artman* 1968(3) SA 339 at 340 H.

Although there is a tendency to regard failure by a court to expressly caution itself of the dangers of convicting on the evidence of a single witness as a misdirection, that approach is not strictly correct. It happens time and time again that lip service is paid to the cautionary rule when in fact the trial court has not exercised that caution. Holmes JA crisply stated there is no rule of law requiring that courts should caution themselves on evidence of a single witness. "There is a cautionary rule of practice". See the case of *S v Artman & Another* 1968(3) SA 339 at 340. All that Section 238 of the *Criminal Procedure and Evidence Act* of 1981 provides is that

> "any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness."

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What is required by the courts is only that the evidence be satisfactory in all material respects.

P.W.1 gave his evidence well and his demeanour was highly satisfactory. Accused on the other hand lied in a detectable manner throughout. He denies he was anywhere near where the Deceased could have been nor did he see Deceased that day. He denies saying to P.W.2 that he had fought with anybody P.W.2 like P.W.1 had a very satisfactory demeanour and gave his evidence well.

The Court in this case as in all cases is always obliged to carefully analyse evidence of identification. In this case there is this additional reason that P.W.1 is the only witness who gives evidence linking Accused with the assault of the Deceased. As an evidenciary requirement this Court is obliged to exercise a great deal of caution.

It is when the evidence of P.W.1 is carefully scrutinised that hairline cracks begin to appear. P.W.1 has a bad eye-sight. He claims he saw the fight. P.W.4 says wounds were consistent with a sharp instrument. P.W.1 does not say much about the nature of weapon used at the trial and he was not led on this. It is significant

that at the preparatory examination and in his evidence-in-chief he did not say his eye-sight was bad. He only said so when it emerged during cross-examination that P.W.1 had said people at the hills could see this assault on the Deceased that he himself witnessed. At the preparatory examination he was specific that a stick was used in the assault.

At the preparatory examination P.W.1 says he could not identify the person that Deceased was assaulting, he had to ask Accused who that person was and Accused said the person was Tipi, the Deceased. This difference between what was said here and at the preparatory examination makes me worry whether P.W.1 is telling us what he really know.

There is something suspect about the story that the Accused (who did not want that there should be any one (who would give evidence about this assault) volunteered the name of the victim. P.W.1 who was at pains to emphasise his timidity possibly might have witnessed the assault at a distance but avoided going nearer. At the preparatory examination he said this was the Accused and that it was Accused who told him that his victim was the Deceased. Before this Court he improved his version

further by saying he went near enough to identify both the Accused and the Deceased. I consider this aspect of the case to be one of the material aspects of the evidence of P.W.1.

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It does not help for P.W.1 to say at the trial that Accused surrendered to the police when the police do not corroborate this story. Perhaps if they had attended trial they could have helped to corroborate P.W.1 on the fact that this did in fact happen. At the preparatory examination P.W.1 does not say that he saw Accused at the police station. Indeed his presence at the police station cannot be explained because P.W.1 says he kept what he saw to himself and told what he had seen to nobody. Nowhere does he say he unburdened himself to the police. It remains a mystery how he came to be a witness at all. Surprisingly he was asked the question whether he told

anybody that he saw Accused assault Deceased several times. If he told anybody about this assault, even to the police he should have said so.

P.W.2 also, for the first time at the trial, says when the chief had called them, he told him and the men he was with to go and arrest Accused. He never said this at the preparatory examination. P.W.2 at the preparatory examination said Accused came to his home on the same day Deceased died. At the trial it seems the Accused came on Thursday while an alarm was raised on the evening of Friday. It is therefore apparent that P.W.2 is not really certain about this. He kept the whole incident to himself, according to his evidence. It is therefore clear that it is hard to be certain when Accused said he fought with someone. It may or may not be on the day Deceased died. Even if he did that does not connect him to the death in any significant way. If Accused was from the very beginning a suspect and when the alarm was raised the chief ordered his arrest, why did P.W.2 not say so at the preparatory examination? In raising this query I am mindful of the fact that evidence is sometimes badly led and badly recorded at the preparatory examination.

Accused says he was arrested for the first time after

two years from the possible date of death of Deceased. The year of remand is 1992. He said he never surrendered to the police. There is nothing concrete that could be relied upon to suggest that the did surrender. Even if he had surrendered himself to the police, that would not necessarily connect him with the death of Deceased.

It is trite law that the Crown has the onus of proof. The Crown has to discharge this onus. Accused should not be convicted merely because he is a liar as this one appears to be.

He is usually treated as if he has not given evidence at all, if he lies. In *R v Nel* 1937 CPD 327 at 330 Davis J dealing with the lies of the accused said:

> "It was no doubt reprehensible and foolish for the accused to have tried to make his case better in this way, just as it was to tell untruths... But there is always a possibility that his conduct in both respects may have been caused by fear, notwithstanding his innocence of the present charge."

As Hoffman in *South African Law of Evidence* 2nd Ed. at page 431 has put it; "But the court is not entitled to say that because he has been proved a liar, he is therefore likely to be a criminal". There are situations in which

the Accused's lies can lend the evidence of Crown witnesses a certain complexion. For an accused person to lie is therefore a dangerous thing.

With the evidence such as I have before me, I feel that this is a case in which the Accused should be given the benefit of the doubt.

The Accused is therefore found not guilty and is discharged.

My Assessor agrees.

W.C/M. MAQUTU
JUDGE

For the Crown : Miss N. *Mokitimi*
For the Accused: Mr. H. *Hlaoli*