

CR/T/147/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

VS

MOKUNYANE

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
On the 25th Day of October, 2002

The accused is charged with the crime of murder. It is being alleged that on the 8th day of July 1997 at MPHARANE POLICE POST, in the district of MOHALE'S HOEK, the accused did unlawfully and intentionally killed THAKHISA BOTSANE. The accused is one of the members of the LESOTHO POLICE SERVICE. He was also one of the four or so members of the LESOTHO POLICE SERVICE who were

stationed at MPHARANE PLICE POST at the time of the commission of the alleged crime.

THAKHISA BOTSANE was arrested together with three others as suspects in a stocktheft case NO.CR 14/7/97. The report was made about the alleged stocktheft of two sheep of one JAPHTA on Sunday the 16th July 1997. There was only one police officer on duty at this POLICE POST of MPHARANE on that day. The officer commanding that post, instructed one of the off duty officer —trooper LESOLI to assist trooper MOHLAKOANA who was the only one on duty that Sunday. The two troopers followed up that report of stocktheft by going to the village called LIKHUTLONG, the very same Sunday the 6th July 1997.

On that Sunday three suspects were arrested at LIKHUTLONG and they were brought to MPHARANE POLICE POST. Those arrests were made by the two troopers LESOLI and MOHLAKOANA. The suspects arrested on Sunday the 6th July 1997 were:- 1) THABO MOSENOLI, 2) NKOKO PAKELA and RAMAHOTETSA MOSENOLI.

The names of these three suspects were entered in the OCCURANCE BOOK and Cell Register ON THE 6TH July 1997, in respect of stocktheft case N0. CR 15/7/97.

On Monday the 7th July 1997 these three suspects were released but taken back to their village on indications. The two troopers:- LESOLI and MOHLAKOANA continued with their investigations of that stocktheft case. Further arrest were made. The newly arrested who were entered in both the cell register and OCCURANCE BOOK for the first time were:-

1. THAKHISA BOTSANE – Deceased in our case.
2. NTALA KHABANE
3. TALE NTHAKO

(4) RAMATHESEALA MASENOLI who was arrested on Sunday the 6th July 1997 and released that Monday morning of the 7th July 1997, was re arrested and his name re-entered in those two Books (i.e. cell register and Occurance Book). These are the four suspects whom the two troopers LESOLI and MOHLAKOANA brought with them when

they returned from patrol at LIKHUTLONG village on the 7th July 1997.

All the four suspects were locked up together in one cell on the night of the 7th July 1997. As appears from the evidence led before this court that was the only cell at that POLICE POST. MPHARANE POLICE POST charge office consisted only of two rooms. One room is used as a radio room and an office for the Officer Commanding that POLICE POST. The other room is a charge office to which this cell is attached with the entrance therein behind the charge office counter.

The next morning on the 8th July 1997 one of those suspects in the stocktheft case was found dead in that cell. The deceased is THAKHISA BOTSANE described in the post mortem as an old man of sixty (60) years of age. The post mortem report shows that he died as a result of multiple ribs fractures and chest haemorrhage. The ribs perforated his right pleurae in which there was about 300 mls of blood. On the left side of his chest the broken ribs perforated the pleurae in which there was - + 200 ml of blood. The deceased's body

externally was covered all over with multiple lacerations. The left side of his face was swollen, including the jaws and eyes.

There is no direct evidence linking this accused with the death of the deceased. All evidence is circumstantial. The crown case seems to suggest that the accused was seen taking the suspects into the office of the Officer Commanding for interviews. The accused admits that he did question the suspects privately one at the time in that office of the Officer Commanding the Post.

During the interview of THAKHISA BOTSANE – deceased, PW2 is said to have heard some kind of commotion going on, in that office. He went to check. On arrival in that office he found the accused holding the deceased by his shoulders – pushing him against the door – that door went bang bang PW2 told this court that he asked the accused to stop doing that. The accused ignored him and continued questioning the deceased in that fashion. This witness waited for the accused and the deceased to move away from the door. They moved away. He opened the door and left. He did not only leave the room

he also left the premises of the POLICE POST, the camp and the village for the night. The questioning of the suspects in the stocktheft case by this accused took place for the first time between 4-4.20 p.m. Trooper LESOLI – PW1 signed on duty at 4.30 p.m. when PW2 knocked off. The interviews took place in the presence of both these troopers.

This trooper LESOLI – PW1 was at the scene of the alleged offence longer than any witness. Although he was officially off duty since Sunday the 6th July 1997, he was asked to assist trooper MOHLAKOANA - PW2 to follow up the report about stocktheft. Having been involved with the initial investigations he continued the following Monday to release those arrested on Sunday. He and PW2 escorted those released suspects back to the village of LIKHUTLONG. There they made arrests. They returned with those suspects plus one RAMATHESELA MOSENOLI who was re-arrested. When PW2 knocked off at 4.30 p.m, PW1 – trooper LESOLI remained for night duty till (10.00) ten o'clock at night when he handed over to Sgt. MAHULA.

The two troopers – (PW1 and 2) returned from patrol at LIKHUTLONG having arrested four (4) suspects at about (12-1) twelve and one o'clock that afternoon of the 7th July 1997. The four suspects were given utensils, pots and foodstuff to prepare and eat their evening meal. They cooked and ate their food. Thereafter they were locked in the cell for the night. On the 8th July in the morning the deceased – THAKHISA BOTSANE was found dead in that cell.

How did the deceased die? According to the post mortem examination report, the circumstances surrounding his death are suspicions. In the autopsy report the doctor has remarked that the circumstances of the deceased's death suggest some kind of criminality or culpable neglect. There is no direct evidence to show this court that the accused killed the deceased in this case. This court is being urged to draw an inference from the surrounding circumstances of this case that the accused is guilty of this murder.

The court is entitled to draw an inference if that is the only possible inference that can be drawn from the established facts. R V BLOM 1939 AD 288 at 203, S V SETSETSE 1981 (3) SA 353 (A) at 369 –70. In this two cases two “Cardinal rules of logic” which govern the use of circumstantial evidence in criminal trial, were set out as follows:-

1. *The inference sought to be drawn must be consistent with all the proved facts.*
2. *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.*

The suggestion emerging from the evidence of the crown witness seems to be that this accused was suspected to have assaulted the deceased and the deceased has died from the injuries presumably caused by the accused. This is a bad or poor case. PW1 who is the police witness who was with the suspects, one of whom was found dead, longer than all the policemen who could have witnessed what took place at that

POLICE POST has not seen any criminal act being perpetrated by the accused against the deceased.

As PW1 entered the charge office from the outside he saw the accused trying to lock himself up in the cell with the suspects. He then observed PW2 restraining him from doing so. Apparently PW2 succeeded to stop the accused from locking himself in the cell with those suspects. PW1 then saw the accused take the suspects one by one into the office of the Officer Commanding that POLICE POST. According to PW1 the accused took out of the cell in the manner described above all the four suspects only after he had been to his residence and had taken off his uniform. This episode must have happened before 4.30 p.m., because trooper MOHLAKOANA had not yet knocked off as he had just intervened to stop the accused from locking himself up in the cell with those suspects. That is presumably why the accused now took those suspects out of the cell for questioning as indicated above.

The accused left after the first session of interrogating the suspects. It could possibly have been around five o'clock because only trooper LESOLI who has signed on duty at 4.30 p.m., was left at the charge office with the suspects in the police cell. Later on at about 6-7 p.m., when there was still no other police officer on duty or present except trooper LESOLI, THIS accused came back to the charge office.

Trooper LESOLI saw with his own eyes this accused open the cell door and took out the deceased. According to this witness, the accused this time was in possession of a sjambok. The accused put the deceased on the chair next to the cell entrance. This witness observed that the deceased was experiencing difficulties to speak. This witness is one of the troopers who arrested and brought the deceased to the POLICE POST charge office that very same day. He had not observed at any time that this suspect – THAKHISA BOTSANE had any difficulties to speak. The deceased had been speaking very well that day until this time 6-7 p.m. as the witness observed. The only question the accused is alleged to have asked the deceased at this juncture was, "where are JAPHTA'S sheep?" The deceased could not

Speak. The accused attempted to force the deceased to speak. He orders him to speak. He tried to assault him. Presumably using that sjambok! But this witness intervened and stopped him. The accused returned the deceased back into the cell and he there and then left the charge office. He did not return till the next morning when the alarm was raised about the death of the deceased.

It would appear that each time the accused took out of the cell the deceased he attempted or actually assaulted him. Every time there was someone who witnessed what actually took place. The first time when the accused was allegedly assaulting the deceased in the office of the Office Commanding, PW2 intervened. According to the evidence of PW2, the accused held the deceased by the shoulders and he was pushing him against the door. By knocking the deceased against the door that caused the door to bang. How did the witness go in and out while the door was being used in that manner – accused banging the deceased against it? The witness conveniently found the opportunity to open that door each time when the accused and the deceased moved away from it. The accused however denies that

anything of that sort happened. He denies assaulting the deceased. He denies that PW2 intervened. He denies manhandling anyone of those suspects including the deceased.

The accused told the court that all the suspects admitted the charge of stocktheft. He interviewed them separately. He did so in order to determine the propriety of their intended tender of plea of guilt to the charge of stocktheft as reported by the two troopers. The stocktheft Unit there at MPHARANE POLICE POST consisted only of two members of the Lesotho Police Service. Of those two members the accused was the most senior. He told the court that as the officer responsible for Stock-theft Unit, he wanted to satisfy himself about the propriety of the accused's tender of a plea of guilty. He wanted to find out from the suspects if perhaps they had been improperly influence to plead guilty. The accused said there was no need to assault the suspects who were only waiting for the next morning to tender their plea of guilty before court. On this point the accused and the two troopers who investigated the stocktheft case and arrested these four (4) suspects agree. All four suspects had admitted theft of

JAPHTA'S two sheep. Only two of those suspects testified against the accused in this case. According to both PW3 and 4, they never admitted theft of JAPHTA'S sheep. It seems all the suspects denied that charge. According to the investigating officer of this murder charge, the docket in respect of that case CR 15/7/97 was closed due to lack of evidence. The two troopers PW1 and 2 were certain in their evidence that the suspects were ready and waiting only for the next day to tender their plea of guilty to the charge of stocktheft regarding the disappearance of JAPHTA'S sheep. How on earth can the docket in respect of the same case be closed for lack of evidence?

There are a lot of discrepancies in the facts of the case against this accused. According to the evidence of two of those suspects who were in the cell that night with the deceased, they were locked in there by this accused. His conduct was very rough and abusive of their rights. PW4 – RAMAHOTETSA MOSENOLI testified to the effect that this accused arrived at the POLICE POST MPHARANE while all the four suspects were still sitting outside the office. They had finished cooking their meal. They were now eating or preparing to

eat when the accused arrived. He kicked their food and kicked them too. He pushed them into the cell at the same time punching them with fists. He ordered them to stand against the cell wall. He punched TALE who was in front of them all as they ran into the cell. As they stood against the wall the accused asked PW4 "What's put you here?" where is JAPHTA'S sheep? " and ordered him to speak up. He was obviously not getting any replies to his questions. PW4 replied that he knows nothing regarding JAPHTA'S sheep and their disappearance. The accused then grabbed hold of PW4 by his blanket around his neck and pushed him against the wall. The accused said to PW4 "you do not want to tell the truth." He hit him with a fist on the lip. The accused pulled this witness out of the cell and put him in the office of the Officer Commanding while in there he asked the witness, "where are JAPHATA'S sheep? The accused insisted that this witness – PW4 has eaten JAPHATA'S sheep and must disclose the place where he ate the sheep. It would appear that PW4 had been taken out of the cell when those questions were asked to him. The manhandling of this witness by the accused is denied.

This ill treatment of the suspects according to PW4 went on against all four of them. PW4 was grabbed hold of by his blanket around the neck. He was pulled and shafted back into the cell. The other suspects asked PW4 what was happening. PW4 said to them “my country man, this man is fighting.” Just as PW4 spoke those words, the accused re-entered the cell. This time he grabbed hold of TALE by his blanket also. He then tried to punch TALE with the fist. TALE dogged the accused’s fist and grabbed the accused’s hand. TALE ASKED THE ACCUSED THUS:- “Are you fighting? Why are you not telling me the wrong that I have done?” At this juncture the accused let go of TALE. It appears from this evidence by the cell-mates that TALE was never taken out of the cell. According to the POLICE witness - PW2 and 2 all the four were taken out of the cell one by one until all four had been interviewed by the accused.

When the accused dropped TALE he is alleged to have proceeded to grab hold of NTALA. He held him by his blanket at the neck area and pushed him against the wall. He was hitting NTALA’S head against the wall. Ntala appealed to the accused not to do that.

He pointed out to him that he has a steel plate or metal piece in his head and if his head is banged against the wall that plate will be displaced. The accused asked NTALA if he is a thief. Ntala persisted to tell the accused to desist from banging his head against the wall. The accused dropped him and proceeded to the next man. So this one was not taken out of the cell according to this evidence.

The next and last person the accused grabbed hold of was the deceased – THAKHISA BOTSANE. The accused pulled THAKHISA BOTSANE out of the cell. He went to the Office of the Officer Commanding the Police Post. He left the rest of the suspects locked up in the cell. After a while they came back and the accused shaft THAKHISA BOTSANE into the cell. THAKHISA BOTSANE fell on his knees. The accused went perhaps after closing and locking the cell door behind him. Shortly thereafter the accused returned. THAKHISA BOTSANE had just got up from his knees. The accused pulled him out again and locked the cell door after closing the rest of the suspects there in. There is hardly any considerable interval as the deceased has just sat down. Comparison must be made on the time

factor between the evidence of the cell-mates of the deceased and the policeman on duty at the time - PW1. PW4 claims to have heard THAKHISA BOTSANE cry out once saying! "father you are killing me. There is a huge discrepancy. Mind you according to PW1 the only eyewitness of this episode, the deceased could not speak. PW4 estimated that something like five minutes passed. During this five minutes interval there was absolute silence. Then they (suspects) heard the cell door open. THAKHISA BOTSANE who was being pulled on the floor was naked except for his underpants. The accused threw him into the cell and went away. He left the cell door ajar. He returned in possession of THAKHISA BOTSANE'S clothes. He threw them into the cell. It was his pair of trousers and his blanket. There is no talk of shirt or jacket. In winter and in those mountains the suspect seemed to have worn an underpant, a pair of trousers and blanket only.

PW4 – deceased's cell mate claims that THAKHISA BOTSANE told them that this man has finished him, he asked MOKETE to assist him by putting on his clothes. Ntala assisted by Mokete put

THAKHISA BOTSANE'S clothes on him. They laid him down to sleep and support his head with a blanket. They all slept the whole night until the morning of the 8th July 1997.

There are a few strange happenings in this episode. According to PW4 during the night THAKHISA BOTSANE was groaning. Mokete asked the other suspects if they are aware. Ntala replied that they are but because of darkness there is nothing they can do. So they slept on till the morning. In the morning they shook THAKHISA BOTSANE to wake up. Realising that he does not wake up they knocked at the door – claiming that they need to use the toilet. The door opened. Three suspects went out. Sgt. MAHULA asked them about the 4th one. They replied that he is in the cell but was not moving. He ordered them to wake him up. NTALA went back. He shook THAKHISA BOTSANE. He came back and told Sgt. MAHULA he thinks that THAKHISA is finished. MAHULA went into the cell. He came back and asked the suspect what happened. They claimed that they do not know but there is a policeman whom they can identify, who should know what happened. This is incredible. The pretence of ignorance is

obvious. There is no cohesion in the facts alleged. Why did they knock at the door when they could not wake up the deceased? Could they have wished to assist the deceased? Why do they lie?

The facts which this court is urged to draw an inference from are unreliable. The accused is alleged to have taken the deceased – THAKHISA out of the cell twice on that day. In the first instance PW2 heard a lot of commotion going on in the Officer Commanding's office. He went to check. He was the policeman on duty. PW1 although official off duty he was still present at the charge office because he was the one instructed by their superior officer to assist. Despite his presence there it does not appear in his evidence that he heard the alleged noise of something banging against the other. Those suspects who were left in the cell did not hear the commotion. They heard a single cry the second time when this accused had taken the deceased into that office of the Officer Commanding.

From the evidence of the only policeman on duty when the accused took the deceased out of the cell the second time, the accused

did not take the deceased into the office. He places him on the chair just outside the cell by its entrance. That's why then they could hear him cry, "father you are killing me." But according to PW1 the deceased could not speak. How did he utter the cry if he could not speak? According to the fellow detainees or suspects the accused and the deceased were gone for a long time – longer than before. Estimated as about (7) seven minutes. He was brought back naked and unable to walk. According to PW1 he was on that chair long enough to be asked just one question. Which he did not answer. The accused tried to force the deceased to speak. He attempted to assault him but he was stopped by PW1. Immediately he returned the deceased back into the cell. He does not talk of the deceased being pulled back into the cell naked. PW1 does not talk about the removal of the deceased's clothes. Where, when, and how were the deceased's clothes removed?

Those mature adult Basotho men claim that they slept with the deceased groaning and grieving until he died without them noticing because there was nothing they could do in the dark. This is

improbable. Although the accused was seen in possession of a sjambok, he was never seen using it upon the deceased or anyone. According to PW1, the accused left immediately PW1 stopped him from questioning the deceased and attempting to force him to speak. Where and how did the deceased get lacerations all over his body. It should be there in the cell during that night.

The fellow detainer testify to the deceased's inability to walk. He was pulled into the cell. According to PW1 the deceased was returned into the cell from the chair which he was sitting on outside the cell. There was disability which the deceased suffered. The police witness PW1 puts the disability in the deceased's mouth. He could not talk or could talk but not walk. Which is which? The confusion and contradictions paint the most unclear picture. I am unable to put these pieces of evidence together. There is totally no cohesion in the facts. *LEBOHANG LETLAKA V THE CROWN C of A (CRI) NO.3 2000*. In the circumstances the court is not entitled to draw any inference.

The accused admitted taking the deceased for questioning. There is no evidence that he assaulted him. I reject the alleged assault in the evidence of PW2. Apart from saying that the accused was pushing repeatedly the deceased against the door there is no evidence of serious assault that could have resulted in multiple rib fractures – multiple laceration all over the body.


There was handover take over between Sgt. MAHULA and trooper LESOLI AT 22.00 HOURS. According to the detainees he the deceased could not move from approximately 7p.m. when the accused last took him out of the cell. According to the police at 10. P.m. when Sgt. MAHULA took over and signed for duty he was handed all the detainees in healthy condition. PW1 told him about the deceased's difficulties to speak. It was nothing major. They did not seek help. The bleeding wounds were not seen by those policemen who were with the detainees at MPHARANE POLICE POST charge office all the time. They never testified to the disarray of dockets and files in the office of the Officer Commanding. They work at that station all the time. They should know better the condition of their office. Although

PW2 testified as to the commotion he heard therein, he never testified about seeing blood or wounds on the deceased. Could that have occurred after he left. Why did he not report to the superior who could have arrested the accused?

There is a doubt as to who cause the deceased the injuries he died from. There is no evidence supporting the allegation that the accused could have caused such injuries. The suggestion that the other detainees especially considering their attitude – playing not just innocent but ignorant to detect when a person is dead raises suspicion that they are the ones who assaulted the deceased.

I find no evidence on which to convict this accused of the offence charged or any other offence.

He is found not guilty and discharged.

K.J. GUNIA
JUDGE 

Assessors	-	Messrs. Motsamai and Loko
Ms. Maqutu for	-	Crown
Mr. Mafisa for	-	Accused