

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

KHOABANE SELLO

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr.
Justice T.S. Cotran on 18th March, 1980

Ramatlaleng Sehloho, hereinafter referred to as the deceased, was employed as a courier by the Post Office Agent at a village called Mahuu (where he lived) some two and half hours horse ride on a dirt road (the distance in mileage was not established) from the main Post Office at Morija. The deceased delivered mail and collected mail three times a week, Mondays, Wednesdays and Fridays. He would arrive from Mahuu with the mail bag during the morning hours and would normally set off with the Morija mail bag about midday or shortly thereafter. That was his routine.

On Friday the 3rd March 1978 the deceased arrived at Morija with the Mahuu mail bag. We do not know exactly at what time. He left with the Morija mail bag to Mahuu. We do not know exactly at what time; the person who had helped him saddle his horse is dead and gave no evidence either at the trial or at the Preparatory Examination. We also do not know if he lingered in Morija village for some time before he set off or had gone straight to Mahuu.

On the following day, Saturday the 4th March 1978, it became known in Morija that the deceased had not reached his destination at Mahuu. This information was passed on to Morija Police. A Lt. Sehloho was in charge of the station at the time. He was also a relative of the deceased. Lt. Sehloho and Sgt. Polanka (PW1) set off, on horseback, to search for the deceased

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taking the Mahuu road, which in fact (it was agreed by both counsel after an inspection in loco) commenced at a junction branching off the main Morija/Matsieng road, some thirty or forty yards below the Post Office which was situate on a hillock overlooking the junction. They set off late in the afternoon. The first village after leaving Morija was Thaba-Chitja. It was pointed out to the Court and is perhaps two miles (agreed) distance from the outskirts of Morija. Lt. Sehloho and Sgt. Polanka learnt at Thaba-Chitja that a strange horse has been found grazing in the veld and that it was taken to the chief's pound at Morija. It was eventually brought to the police station, and to cut a long story short, identified as that of the deceased.

At about dusk of the same afternoon of 4th March 1978 Alina 'Maseriti Makotoane (PW3) was gathering firewood in a forest which belongs to her father not far away, but across the road (i.e. the Morija Mahuu road), from her parental home. This is the last house but one in Morija before one strikes open country. She saw a body lying under some aloes, the head facing upwards to her, with a mail bag (Exhibit 1) opened and a few letters scattered about nearby. She knew the deceased as she had often seen him passing her father's house riding his horse carrying the mail bag but she testifies that the sight shocked her, that she had not heard of his disappearance having arrived from Maseru that same afternoon to attend a pre-natal clinic at Scotts Hospital, and that she did not then appreciate it was him. She ran screaming to her mother and then to her father who ran to the charge office to inform the police. Sgt. Polanka, Lt. Sehloho and W/O Lekoa were soon at the scene, but it was by then getting dark. A torch was used to look at the body and inspect the immediate vicinity. The Sgt. recovered the bag (a large greyish-brown) - Exhibit 1 and the few scattered letters (also produced) some bearing the Morija post mark dated 3rd March 1978.

The post-mortem which was conducted at 9.30 a.m. of 5th March 1978 revealed that apart from bruises on the back the deceased had suffered 18 stab wounds on the thorax five of which penetrated the lungs and heart (and one also fractured a rib) and these last mentioned wounds were the cause of death, which the doctor says had occurred 36 - 48 hours before. All this is admitted as also the identity of the deceased whose age was given

as 46. There is no doubt that he was murdered probably on the afternoon of 3rd March 1978. The accused now before me is charged with his murder.

The accused was at one time employed by the Post Office at Morija as a messenger and when so employed had occupied a Government house nearby. He left his employment, or was sacked, it does not matter which, in September 1977. At first he moved and stayed at his mother's house also at Morija and then he rented a house near that same Post Office, but this was expensive and he found a house (but had not yet occupied it) elsewhere in Morija which he says he was in the process of repairing in preparation to moving in.

There is no doubt, and this is admitted, that the accused knew the deceased and also knew his routine and, living in a house near the Post Office, he could have seen him there on the 3rd March, but so could many other postal employees, or indeed other villagers, for Morija is a small place from what we have seen of it. Sgt. Polanka's suspicion fell on him alone probably because he was told that the accused did not leave his employment "nicely", or was expelled. On the afternoon of the 5th March the Sgt. proceeded to the accused rented house near the Post Office. The accused was not there but his wife was. A search revealed nothing. The Sgt. was told that the accused had a girl friend called 'Malebohang who lived in another part of Morija. The Sgt. visited her house, found him and 'Malebohang there, and after some objection on the part of 'Malebohang, searched him and her premises. He found nothing incriminating.

We have learnt from the Postmaster Mr. Letlafuoa Nthabane (PW2) that when packing mail bags a distinction is drawn between ordinary letters on the one hand, and "registered" and "express" letters on the other. The latter two categories are listed and numbered and are placed (with the list) inside a small bag, usually green in colour which is then tied with a string and sealed in lead. The small bag is then placed in the larger bag (the greyish-brown (Exhibit 1) which in turn is also tied and sealed.

Sgt. Polanka knew of the existence of the green small bag from either the Postmaster himself or other staff at the Post Office after he recovered the large one Exhibit 1. Alina 'Maseriti

/(PW3) who

(PW3) who first discovered the body did not see a small green bag lying around. There is little doubt that the accused, from his experience at the Post Office, must have known that inside the big postal bag there is usually one smaller inside containing the registered and express mail. This knowledge, needless to say, is also shared by other Post Office officials but probably not the world at large.

Sgt. Polanka testified that he kept the accused in custody and interrogated him closely from the 5th March 1978. On the 8th March 1978 the accused took him and another officer, Trooper Ntongeni (PW4) to the outskirts of Morija and pointed the spot where the deceased's body was found, and from long grass nearby, he pointed to a piece of string with a bit of lead (Exhibit 4) attached to it. Then he took them to the forest proper traversing or avoiding ~~dongas~~, and pointed to a green bag (Exhibit 5) which was lying under a pine tree with thick dangling branches. The house of the accused's mother is within the vicinity of the forest. The string (the piece of lead was lost between the Preparatory Examination and the trial) was identified by the Postmaster as similar to strings Post Offices use to tie and seal postal bags. The green bag was found to contain registered and express letters all torn open and empty except for one envelope that contained R1. The registered and express letters list prepared by the postal staff at Morija and date stamped 3rd of March was produced and identified. One registered envelope addressed to the postal agent at Mahuu contained R210 which was a reimbursement made by the Morija Postmaster (Mr.Nthabane) to the agent at Mahuu. It was open and the money was not there. This envelope was also identified by the Postmaster. There is therefore no doubt that that green bag (Exhibit 5) was taken away by the killer or killers from the larger bag and the contents of the registered and express envelopes emptied. In August 1978, the accused appeared before a magistrate for remand probably at Maseru. He took advantage of a short break in supervision to slip away. He got to Alina 'Maseriti Makotoane's parental home in Morija. Alina is in fact married to the accused's younger brother. He saw her in the garden. He sat next to her and said these words "I heard that you are saying I killed a person. I am happy because I met you. I will now die satisfied". I am not familiar with the Sesotho language but my assessors inform me that such words constitute an admission of responsibility for the deceased's

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death. If so my clerk was transliterating rather than interpreting. I shall not myself consider it to be an admission.

It will be seen that the only evidence of substance (apart from evidence of opportunity - which others had - and an equivocal statement to Alina his sister-in-law) implicating the accused with the offence is evidence of "pointing out" admissible under Section 224(2) of the Criminal Procedure and Evidence Proclamation as amended.

The defence of the accused is that he knows nothing about the offence and nothing about the string and green bag. He testifies that when Sgt. Polanka came to 'Malebohang's house on the 5th to search it and she had refused, he took advantage of the temporary absence or inattention of the police (some of whom had gone to call her own chief or his messenger to witness the search) and learnt from some one that the deceased was found dead at a spot on the outskirts of the village and that he knew that spot well. The police, after arresting him and taking him to the charge office, began torturing him incessantly mainly using the "apollo" method. He described this to the Court. On the 8th March the police took him to the spot where the body was found, a spot which he knew, and they showed him and then picked up the string and then took him into the forest where they showed him and then picked up the green bag from under a pine tree. He recollects escaping from police custody when he went for a remand. He says he felt homesick and went to see his children. He also drank a lot. He did go to Alina's parental home but does not remember what he had told her. He was rearrested shortly afterwards on the same day.

The police, as usual, deny that they had tortured the accused.

An examination of the evidence in the case before me suggests that if not actual violence was used by the police there was pressure of a very strong kind. On two days (the 6th and 7th) he was taken out of the Police Station and pointed out nothing. If no assaults or strenuous interrogation was used it is pertinent to ask what else made him point out on the 8th. On the other side of the

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coin the accused, according to the evidence, was seen by his family while in police custody at Morija. He does not appear to have made a complaint to them, and if he did they do not appear to have taken it up. He did not complain to the magistrate when he appeared on numerous occasions for remand and showed me no traces of any scar or injury on his body when giving evidence.

The courts are wary of convicting on evidence of "pointing out" standing on its own and Judges are uneasy when they feel or suspect that the "pointing out" came about as a result of questionable methods but the problem of admissibility has been resolved by the legislature in clear terms. (see R. v. Tsatsane CRI/T/15/74 and R. v. Potlaki CRI/T/57/79 - unreported - both confirmed on appeal). What weight to be attached to "pointing out" is however a different matter.

The authorities are clear that if the Court is satisfied that it was the accused who pointed out, and if further satisfied that the police had not themselves "planted" the thing pointed out, or that they knew before hand the place where the thing has been secreted, the methods used on the accused to get him to point the place or thing, however shameful or even illegal, does not effect the inferences that may be drawn therefrom (Tebetha 1959 (2) S.A. 337; S. v. Ismail & Others (1) 1965(1) S.A. 446; S. v. Bruvve (1) 1974 (1) S.A. 206(R)). There is dicta in R. v. Moyo 1967 (4) S.A. 613(R), that the Court has a discretion to exclude such evidence (of pointing out) if there was serious breach of "propriety and fair play". It has been said by Hoffmann in South African Law of Evidence end Ed. p. 161 footnote 9 that Schreiner JA in R. v. Nhleko 1960(4) S.A. 712 at 720 supports this view, but in fact (at 721(C)) the learned appeal Judge specifically refrained from deciding the issue, later resolved in South Africa in Ismail supra, and in Rhodesia in Bruvve, supra. In Nhleko, the "pointing out" (of a place where a body was alleged to have been dumped) was made but in fact no body was found at all and no person was reported missing. There is no doubt that a conviction can be sustained in the absence of a body; Nhleko was an example where the difficulty facing the Crown in such cases could not really be resolved in their favour simply by evidence that the accused pointed out a place.

As I have earlier intimated the court held in inception in loco and was shown where the body and the grey bag (Exhibit 1) were found, and also where later, on the 8th March the string (Exhibit 4) and the green bag (Exhibit 5) were pointed out. The spot where the green bag was pointed is in a very bushy area (agreed) and unless someone knew where the place is, it would not have been possible for a person to see it, unless that person came across it when for example chopping the tree or one of its branches. The accused mother's home is close to the forest area and no more than 120 yards uphill (agreed) from that place where the bag was pointed out. This in turn is some 300 yards (agreed) from the place where the body was found. The body was some 200 yards (agreed) from the last inhabited house at Morija before the open country starts on the road leading to Mahuu. The police, unless they got hold of the green bag earlier and planted it there, or unless they had found the green bag earlier during the 3 days between the 5th and 7th March when they had the opportunity to search the area and kept the discovery to themselves, they could not have known where that green bag was. The situation is no where near the facts in Tebetha, supra. There the police had already been apprised of the place where the tins that contained the money had been buried. If, in the case before me, the police had discovered the hiding place of the green bag earlier and then the allegation was made that the accused pointed it out, the nature of the pressure or violence exercised upon the accused by the police would have put me on double guard because if the police did assault or put pressure on an accused, they could also have "framed" him up. It has been suggested that the police had combed the forest area thoroughly and must have found the green bag. Sgt. Polanka and Trooper Ntongeni deny this. Sgt. Polanka's evidence was that he searched the immediate area where the body was found by torch light on the evening of the 4th. On the 5th or 6th he searched it again, probably when other C.I.D. officers came to the scene from Maseru but found nothing. I am convinced both officers are truthful here. The forest is very dense in places, covers an area of several acres and the police could not have known where the murderer or murderers had taken the green bag. It could just as easily have been taken to a house or a car or even to another village and emptied of its contents. Combing a thick forest thoroughly to the extent of 300 yards (or more) radius

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from the spot where the body was found, may have been considered by a police investigator as a time wasting exercise since (the motive was clearly robbery) ^{there} could have been - so many other places where the bag could have been taken after the murder. When I asked Sgt. Polanka why did he not bother to take with him a civilian on the 8th March his answer, which came spontaneously and naturally, was that the accused had on two previous days taken them to places in Morija but had pointed to nothing! Furthermore if the police wanted to "frame up" the accused and had the green bag or knew where the bag was, there was no reason to involve themselves in, as he maintains, torturing him, with all the attendant risk involved to themselves in such an undertaking.

I am, in short, satisfied, beyond reasonable doubt, that:-

- (a) the police did not know the place of secretion of the green bag and could not therefore have planted it, and
- (b) the police did not come across the place of secretion of the bag and left it there when they searched the area, and
- (c) the police could not have learnt of the hiding place from someone else, and
- (d) the accused himself pointed out the green bag to them.

There are irresistible inferences (see S. v. Gwevu & An. 1961 (4) S.A. 536) that must follow. In the case before me the inferences are :

1. That the accused, acting alone or with another or others murdered the deceased and robbed him of the postal bag, or
2. That the accused saw another person or other persons murdering the deceased and rob him of the postal bag and saw him or them secreting the green bag at the place he later pointed out to the police, or
3. That the accused did not see the murder of the deceased but saw a person or persons secreting a green postal bag in a place which he pointed to the police a few days later.
4. The accused did not see the murder and did not see the place of secretion but that someone else told him of the place a green postal bag was hidden which place he later pointed out.
5. The accused, previously to the pointing out, had come across the green postal bag by accident and kept quiet about it for a while but later pointed it out to the police.

/Inferences

Inferences No. 3, 4 and 5 are extremely remote possibilities. The accused himself has not put forward anyone of them as a defence. In Ismail(2) supra, at p.457 Milne JP is reported to have said:-

"If the accused gives evidence and does not say that he saw others committing the offence, the second alternative need not ordinarily be given very serious consideration. If, in giving evidence, he says that he acquired the knowledge because of what others told him but there is acceptable evidence that there were details in the pointing out which he does not thus explain (because he denies the pointing out of those details) the only reasonable inference may well be that his knowledge was due to his taking part in the commission of the offence. If he says that he acquired his knowledge of the place, including the details pointed out by him, because he had visited the spot on an innocent occasion or occasions, the triers of fact are entitled, and bound, to consider all the circumstances and to decide whether there is any reasonable possibility that the accused, in taking the police to the spot and pointing out the place or places there, did so otherwise than because he had knowledge of such place or places in consequence of his own participation in the relative offence".

In S. v. Kanyile and An. 1968(1) S.A. 201, another "pointing out" case, Milne JP at p.202 and p. 203 considered the various inferences, and came to the conclusion that if they are fanciful or remote "the commendation of reasonableness cannot be properly accorded" to them. An invitation by counsel to find the accused guilty as an accessory after the fact was similarly rejected (at p. 203). It is true that the accused there did not give evidence whilst in the case before me he did. But his evidence that the police themselves "pointed out" the bag was palpably false and the other possibilities, in the circumstances of the case, are too remote or fanciful (he himself has not put them forward) to be worthy of serious consideration.

The only inference that can properly be drawn is that the accused, either alone, or with others, murdered the deceased. I find him guilty as charged.

My assessors agree.

CHIEF JUSTICE
18th March, 1980

For Crown : Mr. Mdhluli

For Defence: Adv.Molisaana

EXISTENCE OR OTHERWISE OF EXTENUATING CIRCUMSTANCES

The accused has resiled from the position he had taken up at the trial and now testifies as follows :

On the Wednesday prior to the Friday (of 3rd March 1978) he approached a notorious criminal in Morija called Thompo and suggested to him that the deceased be waylaid and robbed of a postal bag which he knew the deceased would be carrying and which he knew (from his experience at the Post Office) would contain a smaller bag of registered letters in some of which there could be money. Thompo agreed to go along. Thompo did not know the deceased. Accused disclosed to Thompo his name. The scheme that was arranged between them was to wait for the deceased at a spot on the outskirts of Morija. The accused himself was to be out of sight because the deceased would recognise him from their previous association at the Post Office. Thompo was to call out the deceased's name as he passed and when the deceased would respond Thompo would force him down from his horse. Thompo was to dislodge the deceased of the postal bag and ensure that his horse would be set free in order to delay the deceased from reporting to the police for a sufficient span of time to enable them to get away. The accused adds that he concealed himself in the forest and was at a distance of 150 yards (pointed) and could partially see what was happening although he could not hear what was being said. He saw Thompo and the deceased struggling. He saw the deceased being felled to the ground. After a short while Thompo arrived with the small green bag. It was open and it contained the registered mail. The accused suggested to Thompo that they should not empty the envelopes because if people saw them spending too much money in the shebeens they might suspect them of the robbery. They hid the bag in the forest and arranged that the envelopes be emptied (and contents shared no doubt) at a later date. He saw Thompo on the Saturday (that would be the 4th) but they did not go to the hiding place. On Sunday he was arrested. He now agrees that he showed the police the hiding place of the green bag on the 8th March. The envelopes had been opened ^{and} emptied. I suppose the accused suggests that Thompo had beaten him to it and swindled him of his share. The police got hold of Thompo and confronted them. Thompo apparently denied any knowledge of what the accused allege. Thompo was told to sit outside the police station. The accused then heard a woman shout that Thompo had escaped. He had not seen him since.

/The Court

The Court recalled Sgt. Polanka who confirmed that the accused did tell him about Thompo and that he did arrest or cause the arrest of Thompo. He also confirmed that Thompo had not been seen in or around Morija since. Over two years have elapsed.

What the accused now says about Thompo may or may not be true. The probabilities are that the deceased would have stopped for a person he knew but unlikely to have stopped at the call of a stranger. But the fact of the matter is that even if true it does not alter the legal position for he was on his own admission the instigator to the robbery and having encouraged the use of force, is a full socius criminis with the offence actually committed. The accused says he expected the deceased to put up resistance but thought Thompo with a stronger built would overpower him. He did not anticipate that Thompo would kill him. He did see the struggle between the deceased and Thompo but saw no knife. If the police are telling me the truth that the accused pointed to them the string (with which the bag was tied) in the long grass not far away from the spot where the body was found (and I believe the police that he did) then he must have been present near the place of the struggle and knew the spot where the large postal bag was opened to extract from it the small green bag containing the registered mail and hence the place where the string was likely to have been left. The accused says that the police came across the string by accident when he went with them to the scene on the 8th March. I do not believe him. If Thompo did the killing alone, and there is only the accused's word for it, he was close enough and must have witnessed the carnage.

This was a carefully planned and premeditated murder.

I am not able to find extenuating circumstances.

The accused is sentenced to death such sentence to be carried out as provided in section 292 of the Criminal Procedure and Evidence Proclamation.

My assessors agree.

CHIEF JUSTICE
19th March, 1980