

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

1. LEKENA MOSHEPHI
2. SEFALI LEFATLE
3. SHOAPANE RANKU
4. KHOANYANE LEKHAFOLA

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice  
T.S. Cotran on the 31st day of October, 1980

-----

The four accused before me: Lekena Moshephi(A1) Sefali Lefatle(A2) Shoapane Ranku(A3) Khoanyane Lekhafola(A4): are indicted upon a charge of murdering Ralekhooa Ntsoana "during or about the month of February 1979", at or near Qanya in the district of Qacha's Nek.

Early in January 1979 Ralekhooa Ntsoana left his home in the area of Matatiele (a town in the Republic of South Africa on the southern Lesotho borders) to search for his mare and filly (lost some time before) and also to visit a woman relative Mapitso Ntsoana (PW5) in Sekake area in Qacha's Nek district of Lesotho in order to slaughter a beast in celebration of payment of bohali for his son's marriage. The border between the two countries is not physically marked at this stretch and persons can cross through the mountains from one country to the other with considerable ease. Ralekhooa Ntsoana had borrowed a horse from a friend (Father Mpota) for this trip. According to his wife Malimakatso (PW1) he had on him M300 which he was supposed to pay out for bohali. The journey to Sekake would have taken him a day on horseback, unless that is he had to linger on in search of his mare and filly. She was expecting him back after about a week at most. He has never been seen alive since.

Malimakatso, who saw her husband off, knew what he was wearing. She described his wearing apparel and saddlery. She

/and another

and another relative, Motlatsi Chabana (PW9), testified that he was born "in the year of the flue" (1918) and was therefore aged about 60. He married fairly late in life probably when he was in his late thirties and was considerably older than his wife. He wore a full beard and had four of his front upper teeth missing.

When he failed to return home his wife Malimakatso sent their eldest son (aged 22 at the time) to Lesotho to make enquiries. When she learnt that he never reached Mapitso's home (his destination) she informed her chief and then informed the police in the Republic who in turn informed the Lesotho police in Qacha's Nek. Unfortunately the dates of these events cannot be established with any degree of certainty but it must have been between mid January and mid February 1979.

On or about the 13th March 1979 Chief Mpiti of Sekake (who lived at a place called White Hill) informed the Qacha's Nek police that rumours were rife that there was a "body" on Khamokha mountain near Qanya. At the time giving rise to these proceedings there used to be a police post at Qanya manned apparently by one policeman but the post has since been closed down. All the witnesses testified that Khamokha mountain is within Lesotho though close to the border which was estimated to be some two miles away. Troopers Khasoane (PW3) and Jonase went to search for a body on that mountain on the 15th March 1979. They spent a whole day but found nothing. I believe this evidence.

Lepoqo Masupha (PW7) testified, and I have no reason to disbelieve him, that sometime in February 1979 he had gone to Khamokha mountain to look for some missing cattle of his. Not far away from a cattle post known as Malekena's near the mountain he found a saddle bag (Exhibit 6) and a shirt which was soiled. Malekena is Al's mother. He picked them up. When he found these articles he was with another man, Puseletso, who did not give evidence. On his return he told villagers about his find. He did not however inform his chief or any of the accused persons. Some three weeks later he was again on Khamokha mountain looking for cattle and met a man called Mpusana (who also did not give evidence) and whilst they were sitting down smoking tobacco, Mpusana drew his attention to vultures in the background and told him that he (Mpusana) had seen a body there. He told Mpusana

/about

about finding a saddle bag and a shirt in the same vicinity a few weeks earlier. He did not go to see that body for himself. He panicked and when he returned home he destroyed the shirt and cut the saddle bag (Exhibit 6) into pieces and buried it. Some time later Trooper Khasoane came to his home with A1, A3 and A4. A3 told him "Bring the saddle bag it is ours". Lepoqo asked A3 in which place he had lost it to which A3 replied "Never mind it is our bag get it" or words to this effect. Lepoqo gave the saddle bag pieces to the police. It has not been established how A3 knew that Lepoqo found the saddle bag, but since this was no secret he may well have heard about it. A3 however says something different as we shall see.

Jobo Lehlohonolo (PW 10) testified that he was chief Mpiti Sekake's messenger or bugle. On or about 4th April 1979 he accompanied Trooper Jonase and A1 (who was under arrest and his hands tied with a rope) to Khamokha mountain. A1 ran away from them during this journey.

On the 6th April 1979 as a result of information received, Trooper Khasoane (PW3) arrested A1 at Oacha's Nek camp and questioned him about a dead body. He then proceeded with A1 to Qanya police post. A1 was handcuffed but Trooper Khasoane testified that on the way A1 "escaped and fell down injuring his eye". A1 was rearrested within a short distance. They reached Chief Mpiti's place at White Hill and spent the night there. On the following day accompanied by Jobo (the chief's messenger) they proceeded to Qanya Police Post where they spent another night. On the morning of 8th April 1979 A1 accompanied by Trooper Khasoane, Jobo and Trooper Jonase went to the mountain. A1 "pointed" to "bones" in a cave or crevasse. The "bones" consisted of a skull and what appeared the frame of a body. This cave according to the trooper was about 100 yards from Malekena's (A1's mother) cattle post and he had not come across it on his previous search on 15th March. Trooper Khasoane took possession of the bones. The trooper added that on 10th April 1979 A1 took him (and Jobo and Trooper Jonase) to the home of A4 at Malefane's, a different village, but in the same area. The trooper did not know A4 or his home from before. He took from A4 a bridle (Exhibit 5.b) and a saddle cloth (Exhibit 8) and a saddle. If I may digress for a moment here Jobo confirmed all this but said that the saddle they retrieved from A4 was (Exhibit 5.a). Trooper Khasoane, whose evidence on this aspect I believe, said that that

/saddle

saddle was returned to A4 on or about the 25th April 1979, and that the saddle (Exhibit 5.a), which was somewhat similar, was found in A1's mother's house on a subsequent visit when Jobo was not with them. Jobo admits he did not accompany the police to A1's and A2's house on that latter visit which I will come to in a moment. The inference is inescapable that Jobo was mistaken here. This emerged later after all the accused gave evidence, where, at the instance of the Court Jobo and Trooper Khasoane were recalled to clarify certain points. They were not cross-examined. A4 is alleged to have said that the items belonged "to the person who died" and he also said that they "belonged to A1". On the same day A1 led the party to Pulo village, a mile away from Malefane's, to A3's house. Trooper Khasoane did not know A3 or his home from before. A3 brought out a blanket, Exhibit 4. According to the trooper A3 is alleged to have said that the blanket belonged "to the person who died" and also said that it "belonged to A1". Jobo however says that A3 claimed the blanket and said it was his.

On the 16th April 1980 A1 accompanied by Trooper Khasoane and other police officers, proceeded to A1's mother's home. A2 had been under her guardianship for many years and lived there. A2 is A1's uncle. A1 pointed A2 to Trooper Khasoane and his party. A2 was not known to the trooper. A2 was wearing a pair of gumboots (Exhibit 7) and those were taken away from him. A2 gave the trooper a saddle (Exhibit 5.a). A2 was asked to produce a pair of trousers. A herdsman, Rannemase Sefali (PW8), who is A2's uncle, was in the compound at the time. He produced a black trousers (Exhibit 1). Rannemase Sefali testified that A2 gave him the black trousers because they did not fit him. He added that he had stitched the trousers when its seams opened. A2 then took the trooper and his party (including A1) to the "current" cattle post, i.e. not the cattle post near which the "bones" were pointed out, and from there A2 produced a plastic container (Exhibit 3) and a purse (Exhibit 2).

Malimakatso Ntsoana (PW1) the wife of Ralekhooa Ntsoana, the missing man was called from Matatiele to Qacha's Nek. She arrived on the 18th April 1979. Trooper Khasoane saw her there but did not interview her. He proceeded on that same day with the "bones" to Johannesburg and delivered them to Hertha de Villiers (PW4) Professor of anatomy at the University of the Witwatersrand. Det. Sgt. Putsoane (PW2) the senior CID police officer at Qacha's Nek brought in Malimakatso, and in the presence

of all four accused, showed her the articles Trooper Khasoane had collected. She identified the black trousers (Exhibit 1), the purse (Exhibit 2), the plastic container (Exhibit 3), the blanket (Exhibit 4), the saddle (Exhibit 5.a), the bridle (Exhibit 5.b), a saddle bag (Exhibit 6) and gumboots (Exhibit 7) as belonging to her husband. She did not identify a pistol and ammunition found in A3's house, a saddle cloth found in A4's house, and a knife, Sgt. Putsoane testified that A1, A2 and A4 remained silent but that A3 said in front of Malimakatso that the blanket (Exhibit 4) was his own. In Court Malimakatso identified the exhibits as her husband's. There were no special marks on the blanket (Exhibit 4) nor on the saddle bag (Exhibit 6) but the latter was in one piece when her husband left. She had mended her husband's black trousers (Exhibit 1) and pointed out her own stitch. There appears to be two stitch marks on this trousers. She had made a string to the purse (Exhibit 2) to enable her husband to wear it around his neck; the plastic container (Exhibit 3) was of the same size and had a dent at the bottom which she also pointed out. Her husband's saddle (Exhibit 5.a) had visible strings inside and this she pointed out as well. Chabana also identified the exhibits as belonging to Ralekhooa Ntsoana, more particularly the bridle (Exhibit 5.b) because its two reins had once belonged to him and were of different colour leather than the rest which he had given to Ralekhooa Ntsoana in his lifetime. I am satisfied that the evidence of identification is correct.

Sakoentsane Mokhatle (PW6) is a herdboys who did not know his age. The Court, with agreement of all counsel in the case, estimated it at 16 or 17. He testified that he stayed both at Al's mother's home and also worked for Al at his mother's cattle post near Khamokha mountain. He did not know how long he had been in Al's employ. He was expecting 6 sheep as remuneration after 6 months service. He said that A2 was also employed as a herdboys by Al at the same cattle post and so was another boy, one Thakaso Lekhafola. Thakaso gave evidence at the Preparatory Examination but not at the trial. The boy, who looked like 11 or 12 years old, was made available for the defence. Mokhatle testified further that one afternoon early last year whilst he was herding cattle at Malekena's (Al's) cattle post, a stranger on horseback came along and said that he was searching for his missing horses and had met Al in the veld earlier in the day who had allowed him to put up for the night at the cattle post. The witness said that he and the stranger then went to the cattle post and found Al and A2 already there. He unsaddled the strange

/horse.

horse. The stranger gave them apples to eat and shared with them beer which he produced from a plastic container. They all sat conversing normally until it became dark. Al then said to the stranger that he must be tired from his journey and suggested that he goes to bed. The stranger slept on a skin. Soon afterwards he (the witness) and Thakaso also went to sleep leaving Al and A2 chatting. He says that he was woken up in the middle of the night by screams coming from the stranger. On opening his eyes he saw A2 leaving the hut carrying an axe followed by the stranger and then dogs felled him down. Al then stopped the dogs. The witness went to the kraal nearby. The stranger got up and came and sat next to him at the kraal. The stranger said he had been struck on the head whilst asleep and showed the witness a wound. He lost sight of Al and A2 and the stranger. The witness said he decided to stay the remainder of the night out in the veld.

In the morning he saw Al saddle the stranger's horse. The stranger was also there. Al and A2 rode with the stranger (and no 3 dogs) towards Khamokha. He kept a watch. The three of them disappeared from his sight when they descended into a depression and when they next emerged, he saw 2 others join Al A2 and the stranger. He saw them hitting the stranger. From that distance (which he pointed out as from the Court room to nearly half way up the mountain lying at the rear of the High Court several hundred yards away on an estimate) he could not see their faces. Then they carried or dragged the stranger to a cave and left him there. Soon afterwards he saw Al and A2 return to the cattle post accompanied by A3 and A4 (whom he knew well and frequent visitors at the post) and the stranger's horse. They put his property in the hut. Al, A3 and A4 left immediately afterwards. The witness says that he then went back to the cattle post, and asked A2, "What were you up to with 'the stranger's property here and the stranger gone?'. A2 is alleged to have replied "We killed the man". The witness said he left Al's cattle post and went to Al's mother's house and reported to her that her son has killed a person. Al's mother said she will confront Al upon his return. Al did return the following day and his mother confronted him but Al denied the witness's allegations.

The witness says he could no longer see eye to eye with Al. He decided to leave his employ and went back to his parents home. He did not, however, tell his parents the awful secret (though he mentioned it to Thakaso at a later date) but when the police searched for him he told them everything.

/Prof.

horse. The stranger gave them apples to eat and shared with them beer which he produced from a plastic container. They all sat conversing normally until it became dark. Al then said to the stranger that he must be tired from his journey and suggested that he goes to bed. The stranger slept on a skin. Soon afterwards he (the witness) and Thakaso also went to sleep leaving Al and A2 chatting. He says that he was woken up in the middle of the night by screams coming from the stranger. On opening his eyes he saw A2 leaving the hut carrying an axe followed by the stranger and then dogs felled him down. Al then stopped the dogs. The witness went to the kraal nearby. The stranger got up and came and sat next to him at the kraal. The stranger said he had been struck on the head whilst asleep and showed the witness a wound. He lost sight of Al and A2 and the stranger. The witness said he decided to stay the remainder of the night out in the veld.

In the morning he saw Al saddle the stranger's horse. The stranger was also there. Al and A2 rode with the stranger (and 3 dogs) towards Khamokha. He kept a watch. The three of them disappeared from his sight when they descended into a depression and when they next emerged, he saw 2 others join Al A2 and the stranger. He saw them hitting the stranger. From that distance, (which he pointed out as from the Court room to nearly half way up the mountain lying at the rear of the High Court several hundred yards away on an estimate) he could not see their faces. Then they carried or dragged the stranger to a cave and left him there. Soon afterwards he saw Al and A2 return to the cattle post accompanied by A3 and A4 (whom he knew well and frequent visitors at the post) and the stranger's horse. They put his property in the hut. Al, A3 and A4 left immediately afterwards. The witness says that he then went back to the cattle post, and asked A2, "What were you up to with 'the stranger's property here and the stranger gone? ". A2 is alleged to have replied "We killed the man". The witness said he left Al's cattle post and went to Al's mother's house and reported to her that her son has killed a person. Al's mother said she will confront Al upon his return. Al did return the following day and his mother confronted him but Al denied the witness's allegations.

The witness says he could no longer see eye to eye with Al. He decided to leave his employ and went back to his parents home. He did not, however, tell his parents the awful secret (though he mentioned it to Thakaso at a later date) but when the police sent for him he told them everything.

/Prof.

Prof. Hertha de Villiwer's report is Exhibit A She gave evidence viva voce. Only the highlights of her findings (in plain language) need be detailed:

- (1) That the skull and "other bones" could have belonged to a single individual,
- (2) That they were of a male person,
- (3) That he was one of the "negroid" peoples of Southern Africa,
- (4) That time and cause of death cannot be determined,
- (5) That the person was "probably" not older than 25 years of age,
- (6) That there were four upper front teeth missing and this had occurred anti mortem since the sockets have been resorbed,
- (7) That there was a fractured jaw that had also occurred before death,
- (8) That there was loss of other teeth which were caused post-mortem.

As I said earlier Malimakatso (Ntsoana's wife) and Chabana (his relative) testified that Ntsoana had no upper front teeth. Neither knew of an old fracture of the jaw. Professor de Villiers however was in no doubt about the existence of a healed fracture of the jaw. We know that Ntsoana married late in life and wore a beard. It is therefore possible that if this fracture occurred in early adulthood that he did not tell his wife and relatives about it. The Professor was not dogmatic about age. She explained that she said "probably" because it is difficult to make an estimate. She had based her tests on research (the only one of its kind in the world) made by American professors on skeletons of American negro soldiers brought home from Korean War cemeteries long after that war ended but whose ages were more or less known from their army records. From the sum total of the Professor's evidence, particularly the anti mortem missing four upper front teeth, combined with the evidence of the herdboyc Mokhatle, Trooper Khasoane, Malimakatso the missing man's wife, and his relative Chabana (I will analyse the evidence of the first two further) I am in no doubt whatsoever that the bones found in Khamokha mountain are the mortal remains of Ralekhooa Ntsoana whom I will hereinafter refer to as the deceased.

Mr. Matlhare, who represented A1 and A2, did not cross-examine the Crown witnesses at great length, but one could discern from his line of cross-examination that A1 and A2 would deny that they had anything to do with the deceased's death. He

/questioned



questioned Malimakatso about the exhibits which she claimed were her husband's and was able to extract from her that the boots (Exhibit 7) and the blanket (Exhibit 4) were common articles. The same with the plastic container (Exhibit 3) except that she knew that this one belongs to them as it had a depression at the bottom which she pointed out on the exhibit. It was also the same size as theirs. He cross-examined Trooper Khasoane on the possibility that Khamokha (where the bones were allegedly pointed out by Al) was situate in the Transkei or the Republic and was told that his investigations revealed that the assault took place within Lesotho and the bones were in Lesotho as well. It was not put to the trooper that Al had not led him to the mountain and had not pointed out the skeleton. It was suggested to Mokhatle that Al was not at the cattle post and that he was simply repeating a story taught to him by Trooper Khasoane which was denied. The witness denied he was jailed or molested by the police. Lepoqo Masupha was asked whether the place he found the shirt and saddle bag were within Lesotho and he replied in the affirmative. Rannemase Sefali(PW7) was asked no questions. From Jobo (PW 10) he illicited the information that both of Al's eyes were good when he saw him on the first occasion (4th April 1979) but when he saw him again with Trooper Khasoane one of them had an injury. (This was on the 6th).

Al's defence in the box was that he had never employed Mokhatle to herd at his (or his mother's)cattle post which is situate in a different place than that the witness mentioned. He said Mokhatle's evidence was a fabrication from beginning to end. Mokhatle had come to him for a job saying his father had sent him. He later learnt from the witness's father that his son steals so he sent him back home packing. He denied that he had ever pointed out a skeleton on Khamokha mountain or anywhere else indeed he denied that he had gone or was taken there at all. He lost an eye when Trooper Khasoane sjamboked him but this was in connection with an allegation made by Jobo about his horses. This incidentally was not put to Jobo in cross-examination. He knows nothing about a stranger. The saddle (Exhibit 5.a), and the plastic container (Exhibit 3) are his. He bought the gumboots (Exhibit 7) for his uncle A2, and he also presented him with the black trousers (Exhibit 1), which he bought new, on the occasion of A2's circumcision which had taken place in 1977. The purse was also A2's and was bought for him by one Salemane for the same occasion. He knows that the bridle belongs to A4. He did lead

/the police

the police to A4's home but only because they asked him about his saddles and he said he had three but that one of them was at A4's home and he took them there because they said they wanted to see it.

A2 testified that he herded at A1's mother's cattle post with one Salemane and Thakaso but not with Mokhatle who had never gone there. The saddle (Exhibit 5.a) was A1's. The gumboots were his and they were taken away from him by the police because they thought they were bigger than his feet size. They were given him by A1. So too were the black trousers but they did not fit him and so he gave them to his uncle Sefali (PW7). The plastic container was A1's and the purse was given to him by Salemane. He attributed Mokhatle's allegedly false evidence to his jealousy as he, A2, was circumcised whilst the witness was not. Since he was a circumcised person and the witness was not he(A2) used to beat him and (the witness) did not like it.

A3 testified that he was in no way involved and that Mckhatle was a liar because Mokhatle once stole his sheep. He said that early in January 1979 he was looking for his missing cattle in Quthing nowhere near the area where the skeleton was found. The police came to his house and took the blanket (Exhibit 4) away. It was his own and said so. He bought it from a shop and produced papers purporting to be receipts for the same. The police beat him up when taking him to Lepoqo's place and it was they (the police) who ordered him to tell Lepoqo to produce the saddle bag. As I said earlier, Lepoqo could only produce the pieces.

A4 testified that he is related to A1 and knew his mother's cattle post but had been there only once. The bridle (Exhibit 5.b) and the saddle (Exhibit 5.a) were found in his possession. This was before the trooper was recalled. The saddle was A1's. He and A1 had exchanged saddles because his (A4's) fitted A1's horse better. It was his bridle and it had a missing stud. He agreed that the reins were of different colour leather than the rest but it was he who had fitted them.

The Crown case against the four accused, if believed, consists of the eye witness evidence of the herdboy Mokhatle, the "pointing out" of the skeleton of the deceased by A1, and the recovery of articles belonging to the deceased, in the homes or in possession of A1, A2, A3 and A4 to whence the police were led by A1.

/The evidence

The evidence of Mokhatle is overwhelming and he gave it with confidence and conviction. It was suggested that the story he told the Court was fed to him by Trooper Khasoane. This Mokhatle denied. Trooper Khasoane did not take a statement from the witness; another officer took it down. Unless Mokhatle is a first class liar, which he did not strike me to be so, it is difficult to imagine how he was able to make up a story with such vivid details which tallies so much with the evidence of witnesses whom he did not know, for example, that the stranger was looking for his lost horses and was wearing two blankets as the deceased's wife said he was though only one was recovered. He identified Exhibits 1 - 7 as having been the stranger's property although he was unable to particularise the individual characteristics of each of the items. It is somewhat perturbing that he did not tell his parents but I can understand the difficulties: all the accused persons were at large and 3 of them (A1, A3 and A4) were considerably older than him; the area was in a rugged and remote corner of Lesotho. The accused had killed a stranger with no qualms, and although (after a pause of a moment or two) he said he was not "afraid" of them this assertion should be taken with a pinch of salt. It was never put to this witness by counsel for A2, A3 and A4 in cross-examination that he was fabricating evidence because he stole sheep or cattle or animals "bells".

It is true that he did not recognise the faces of two other persons who joined A1 and A2 in belabouring the deceased from the place he was standing but he did recognise the horses they rode and blankets they wore. His conclusion that A3 and A4 were the two other persons who were assaulting the deceased is perfectly justified by his seeing them come back with A1 and A2 and the stranger's horse and property.

It is not necessary for me to decide whether A1 fell when escaping and was injured in the eye, or whether, as A1 says, Trooper Khasoane sjamboked him for some reason unconnected with the skeleton. The legislature has decreed that evidence of "pointing out" is admissible however questionable are the methods of getting the person to do it. (s.224(2) - as amended by Order 2/73: R. v. Tebetha 1959(2) S.A. 337; S. v. Ismail & Others(1) 1965 (1) S.A. 446; S. v. Bruvve(1) 1974(1) S.A. 613(R); R. v. Tsatsane CRI/T/15/74; R. v. Potlaka CRI/T/57/79; R. v. Sello CRI/T/22/79 - unreported). What weight to be attached to such evidence is however a different matter. In this case the place


/or the

or the vicinity where the body or skeleton was lying was known to at least Mokhatle, Mpusane, and Lepogo. The police however did not know the actual place. I believe Trooper Khasoane and Jobo that they did not know where it was and that A1 did in fact point this out. A1's denial strengthens my belief that he participated, as Mokhatle said he did, in committing the offence (S. v. Kanyile & Another 1968(1) S.A. 201 and R. v. Ismail, supra).

A3 and A4 allegedly gave Trooper Khasoane when he recovered the exhibits two explanations one of which was that the articles "belonged to the man who died". On this point of Trooper Khasoane's evidence I am a little skeptical and will ignore it as an item of evidence implicating the accused.

The evidence of the accused persons carried no impression at all. In the face of the formidable evidence adduced by the Crown they really have no defence and the one they advanced is so fanciful that I am convinced beyond any shadow of doubt that they are guilty of murder and I convict them accordingly.

My assessors agree.

  
CHIEF JUSTICE  
31st October, 1980

For Crown: Mr. Mdhluli

For Defence: Messrs Matlhare and Jobodwana

EXTENUATING CIRCUMSTANCES

Two points were made: (1) that there was no premeditation and (2) that all the accused are young offenders. A1 gave his age as 22, A3 and A4 are at least 24 and 22 years respectively. A medical examination was ordered for A2 and the doctor's report gave it as between 17 - 19 so at the time of the commission of the offence he was in all probability under the age of 18.

I am by no means persuaded that there was no premeditation. On the contrary, as far as A1 and A2 are concerned, foul play was on their minds from the previous night as it is clear from Mokhatle's evidence. A3 and A4 perhaps came in towards the last stage but I do not find anything in their conduct that makes them less blameworthy. Except for A2 they are not so very young. On the other hand it was a horrible cold blooded murder of an innocent man going about his lawful business.

A1, A3 and A4 are sentenced to death to be carried out in accordance with s.292 of the Criminal Procedure and Evidence Proclamation. Under the second proviso to s.291 A2 will be detained during His Majesty's pleasure.

CHIEF JUSTICE  
3rd November, 1980