

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. CHERE SEKOTOKO KHOLOANYANE
2. 'MATIEHO MOSEBI

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng  
on the 28th day of November, 1980

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The two accused before me are charged with the murder of one Mosebi Mosebi. The Crown alleges that upon or about the 2nd day of October, 1978 at or near Matelile in the district of Mafeteng one or the other or both of them unlawfully and intentionally killed Mosebi (hereinafter referred to as the deceased). To this charge they have pleaded not guilty. The two accused, namely, Chere Sekotoko Kholoanyane and 'Matieho Mosebi will be referred to, in this judgment, as accused 1 and 2 respectively.

The Crown's version is simply that the deceased disappeared from the village. He had lived with accused 2 as man and wife. Accused 1 and 2 were lovers. They fought towards the end of 1977 or early 1978. The matter reached the village bugle where accused 2 had sought protection. It was then that their love affair was revealed. The deceased was annoyed with accused 1. After the disappearance of the deceased, accused 2 was asked by Leeto (the chief's bugle at the village) where deceased was as he wished to send him. He was merely informed, by accused 2, that he had gone to work. The matter was left at that.

2/ After a .....

After a lapse of time, she was again asked the whereabouts of the deceased. She said he had gone to work in the Republic of South Africa. Again the matter was left at that.

Then, as the witnesses described it, a strange discovery occurred. A human skull was found. This finding caused quite a stir in that community. In accordance with the tradition a watch was kept over it until the arrival of the police. Nobody dare touch it until such arrival. To the laymen it appeared as though the flesh had been burnt but the Forensic Expert simply explained this phenomenon. There had been no such burning. However, the police came to collect the human skull and asked Leeto (P.W.2), Daniel (P.W.3), Sello and Cheif T'siu to come to the police station to make statements most probably as to the circumstances which led to its finding. The following day they went to the police station and made their statements. The police then instructed Leeto to bring "all women whose husbands had gone to work on the following day." Thus he went with accused 2 to the police the following morning. Along the way to the police station with accused 2, Daniel (P.W.3) arrived. He had a talk with him while accused 2 continued her journey. Certain information was divulged to Leeto by Daniel who was told to report the matter to the police. In any event, as we shall see in a moment, he was proceeding to the police station. When Leeto and accused 2 arrived at the police station they found Daniel already there. Accused 2 has ever been incarcerated until this moment.

We now go back. On the day Daniel and others came back from making statements at the police station, the same evening, as he was preparing to go to bed, accused 1 came into his house and said that he had heard that Leeto

3/ was to escort .. . .

was to escort accused 2 to the police and he wanted to know the reason why the police wanted to take her as he knew that they were going to ask her the whereabouts of the deceased. He said she was going to reveal that "they are the people who stabbed" the deceased. Upon being asked (the witness, expressing shock as he demonstrated with his tone and facial expression) what did he say happened to the deceased, he answered "We have killed Mosebi." He said when the deceased was killed he was with accused 2, ~~and~~ her son, <sup>and</sup> the accomplice witness who has simply vanished after giving evidence at the preparatory examination. He said he could go and show Daniel where the deceased was at the cliffs of Majakaneng although he was now mere bones. He said he had fed his flesh to the dogs. He would come very early in the morning to show him where the deceased was. They then parted. Early in the morning, before sunrise, Daniel got up and proceeded to the police station. We have already said that along the way he met Leeto to whom he gave a report and also passed on to the police station where a similar report was made. When Leeto arrived with accused 2 she was arrested and she has been in custody ever since.

Leeto says that after the arrest of accused 2 the police instructed him to bring accused 1 to them. They then returned home with Daniel. Accused 1 was not in the village. Immediately upon their arrival an alarm was raised. All the village men left for Majakaneng where again a "strange thing" had "happened". Bones and clothes had been found, by boys attending a circumcision school, below the cliffs. The clothes were recognised by all as belonging to the deceased. Accused 1 arrived later with the men from the village of Rantho's. They kept watch over these "findings" while awaiting both the chief and the police. After the chief's arrival both accused 1 and Tieho (the vanishing accomplice

witness who shall be referred to as Tieho in this judgment) were asked question. (What was elicited from them was clearly inadmissible and I thought that was the end of the matter but that evidence was resuscitated by the defence later on). Having played the game of the cat and the mouse with accused 1 and Tieho, they were arrested and handed over to the police a day or two later. Accused 1 handed a butcher knife (Exh.1) to Leeto. A knob-kerrrie (Exh.2) was subsequently handed over to the police as well. Exh.1 belongs to accused 1 whereas the knob-kerrrie belongs to Tieho.

Accused 1 simply denies the evidence of the Crown witness. He says he was never at Daniel's house where he is alleged to have said he killed the deceased. He knows nothing about the death of the deceased. It is true that he was in love with accused 2 but this was a long time ago. As I have just said he denied just about everything that the Crown witness had said.

Accused 2 gave a long statement. She, at times, refused point blank to be stopped by her counsel in her eagerness to tell all to the Court. She conceded some of the evidence by the Crown and vehemently denied some. She simply said that she had left for Mpharane leaving her husband behind. When she came back, she was informed, by Tieho, that he had gone to the gold-fields. When she wished to enquire further about her 'husband' leaving during her absence, a thing he had never done before, Tieho became insolent. She ultimately thought that he had left without telling her because he did not believe that the love-affair between herself and accused 1 had, in fact, ended.

The medical evidence disclosed three important factors:

5/ (1) That all .. ...

- (i) That all the bones, including the skull are human bones.
- (ii) That the age of the deceased was 21 + years i.e. that they belonged to a person not less than 21 years
- (iii) There were crack fractures of the skull -
  - 1 (a) extending from left pre-tion backwards;  
(b) extending from the pre-tion obliquely through the base of the skull
  - 2 Extending from the right superior orbital ramus upwards into the right frontal bone

Although there were certain features which would indicate the features of a female yet the bones of one foot clearly indicated that it was that of a man. The medical report gives as the cause of death "Probably head injury." However, the report is concluded as follows:

"It cannot be estimated when these fractures occurred ante- or post-mortem"

The police evidence was admitted by the defence and read as evidence at the trial. The following facts are common cause:-

- (1) Mosebi is the alleged deceased because his clothes were found with the human bones below the cliffs at Majakaneng
- (2) That deceased disappeared from home upon or about 2nd October, 1978
- (3) That accused 1 and 2 were lovers up to about 1977 and or 1978
- (4) Tieho was the son of accused 1 and was the step-son of the deceased and has since disappeared after giving evidence as an accomplice witness at the Preparatory Examination
- (5) All villagers at He Kholoanyane are related and that the deceased was an outsider
- (6) That accused 1 and Tieho were asked questions following the discovery of the bones and clothes below the cliffs at Majakaneng.

- (7) That the knob-kerry (Exh.2) belong to Tieho and that the knife (Exh.1) belong to accused 1
- (8) That the skull was discovered at a place called Sephokong and that the bones and the clothes at Majakaneng
- (9) That the deceased's belt was found above the cliff below which the bones and his clothes were found
- (10) That the contents of Exh 4 (Tin of doom) were used by accused 2 in an attempt to kill herself because accusations had been levelled at her by accused 1 and Tieho that she was present when they killed the deceased.
- (11) That Tieho was not always friendly to the deceased.

Leeto states that on his way to the police station he met Daniel who gave him a certain report. The contents of this report could not be led at this trial because they would be inadmissible but, it can safely be assumed, that they were not meant for accused 2 to hear. It was never put to this witness that such a meeting and hence such conversation as he says took place, in fact, never occurred. It was, however, put to Daniel. It was put thus by accused 1's counsel:

"D.C. - I suggest to you that this conversation that you claim you had with the chief, that is Leeto ..... before you went to report the visit of accused No.1 never took place

H.L. - What do you say, is that so or is it not so? I say we met with chief Leeto.

D C - I further suggest to you that this conversation was invented because Tieho is not there in order to make it seem that the conversation did, in fact, take place" No. It is not a fabrication."

There is nothing sinister here as suggested. As it will appear in a moment, there is no evidence that these two witnesses put their heads together to fabricate evidence since the last time they gave their depositions at the preparatory examination. (See Regina v Mphosi, 1963 - 66 H.C T.L R. 17 at 18D - E). Not only Leeto and Daniel say they met on the way to the police station. In this respect they are supported by accused 2 in her evidence. Such a meeting did, therefore, take place. The suggestions made to the witness in this respect were totally without foundation. It was further submitted that no police evidence was called to confirm that Daniel did make a report to them. Well, Daniel had made many reports to them. All the police could say would be that Daniel made a report to us without saying which of the many reports were revealed. Just one example. He came with Diamane to make a report about the skull; He also went to the police about his own private matters. I believe that Daniel told Leeto, his senior man, about the conversation he had had with accused 1 and he also told the police about it. I also believe that Leeto also informed the police so. I have no reason whatever to doubt the veracity of these witnesses on this issue. There may be issues where witnesses differ as to matters of detail but that does not generally imply that they are liars and therefore their evidence must be rejected in toto. (Rex v Mohlerepe, CRI/T/52/78 (unreported) dated 12/4/79). I saw these two witnesses give evidence<sup>n</sup> before me. They appeared to me to be honest. They were giving evidence in which one of their kith and kin was involved in a serious charge. If anything, as Mr. Muguluma so correctly pointed out, why not give evidence in favour of a relation rather than a stranger that the deceased was? It was again

submitted that Daniel never made such a report to the police otherwise the police would have immediately come to arrest accused 1 and Tieho. But the police had said that Leeto should "Go and fetch accused 1." However, when he got home an event of great significance had occurred. The bones had been discovered. Accused 1 was not at home. Why would the police say Leeto should bring accused 1 if no information had been received about him? Police did not just fancy that accused 1 should be brought to them by the bugle, a chief's messenger and a man of responsibility in the village. It is true that when the bones were found accused 1 was not at his village but that of Rantho's - his mother's village where he does not live. As for Daniel, I do not know what more was expected of him. He had done his duty. He had informed his senior man and also the police about what took place at his home the previous evening. In fact he never waited for accused 1 to go and show him the remains of the deceased, but decided like a good citizen should do, to go straight to the police. If the police took long in coming, he was not to blame. A good example of this sort of thing, this unexplained delay by the police has recently occurred in the United Kingdom where a University student was killed by a person known as the "The Yorkshire Ripper." The police came the following day! That did not mean that an immediate report had not been made. Leeto could easily bring accused 1 to them as they had requested. It was suggested to Daniel that he ought to have entertained a fear that accused 1 would run away. Accused 1 would not run away as yet because his request to Daniel had not yet been fulfilled, namely:

"I wanted you to tell me what they  
would ask, those police; what they  
would ask that woman because I want  
to run away so that they may arrest

9/ me far ..... .



me far away .. . . . . ."  
....." I said he should go  
away we shall meet tomorrow."

It is quite clear from this piece of conversation that he would only ran away after he had heard what the police wanted from or had asked accused 2. This information he would only get from Daniel when the latter was in poses-  
sion of the information police required from accused 2  
This demonstrates the trust accused 1 had in Daniel.

Leeto in saying that he questioned accused 1 as a result of what Tieho had said must be taken in its context. He knew from Daniel what accused 1 had said about Tieho and only a verification was needed In fact, in his evidence-in-chief Leeto says that he first questioned accused 1. As far as I am concerned, Leeto had been playing a cat and mouse game with accused 1 In my view of the facts, Leeto knew that accused 1 was due to be arrested very soon. Again Leeto is corroborated by Daniel in this respect. He also says that accused 1 was asked first. To a certain extent they are also supported by accused 1 himself. He says, as I recorded him:

"As I was not paying much attention as to what he was being called for I only saw when he arrived where they were I saw them having fallen him down and beating him. They then tied him with handcuffs which are made of irons - same as the ones used by the police. They were beating him while he was fastened and I was called. When I arrived I was not asked anything, instead, I was beaten up. We were both assaulted. While being assaulted Tieho was asked: 'Where is the deceased?' He said he did not know Then they kept assaulting us What he said was that the deceased had been killed by him and me."

What is clear from this passage is that accused 1 was not called as a result of what Tieho had said. It was further submitted that Leeto and Daniel contradicted each other

about the presence of accused 2 and Tieho at the cliff. Daniel said that they left and came in the morning whereas Leeto gave the impression that they were there the whole night. From accused 1's own mouth, he and Tieho did not spend the whole night at the cliff. They went home. They came back in the morning. So after all, Daniel was correct. An eye had been kept on accused 1 and Tieho and one would ask why? It was as a result of the conversation accused 1 had with him that evening, which conversation was reported to Leeto and the police and most certainly to chief T'siu. Leeto, at the cliffs, was not looking at a scene which was static. It was a scene where there were movements all the time.

Concerning the conversation which took place between Daniel and accused 1 the Court has a situation where Daniel says emphatically that it did take place and accused 1 denies that it ever took place. It is a situation in which the Court must be satisfied on adequate grounds why it should accept one version and reject the other. (Rex v Mohlerepe, (supra) at p.17) To put it in another way. The Court must be satisfied on adequate grounds that the story as told by the Crown is the truth and that by accused is false. No onus rests on the accused.

I am satisfied

- (1) That Daniel and accused 1 are closely related. Indeed, all family ceremonies were attended by Daniel as one of the senior members of the family. This was also confirmed by accused 1.
- (2) That accused 1 often visited Daniel's place being a close relative, This was confirmed by accused 2. I have cautiously warned myself about accepting some of the evidence of this accused. They were lovers with accused 1

and she had been severely humiliated by him and she might be settling old scores That is why I have to approach her evidence with great caution Moreover, as between herself and accused 1 her evidence is that of <sup>an</sup> accomplice.  
(Hoffman: 3 A Law of Evidence, 2nd Ed. p.126)

- (3) There has been no real animosity shown to exist between Daniel and this accused The Trivial story of the tethered horse in the yard was revealed much later There was nothing to it
- (4) That before Daniel had even arrived home to perhaps verify the truthfulness of accused 1's story that the bones of deceased were below the cliffs at Majakaneng, the discovery had been made in his absence at the spot or vicinity which was named by this accused. It has not been suggested that Daniel possessed that knowledge because he was one of the deceased's killers
- (5) Accused 1 can only be described as a first class liar. How he pretended he had never seen the deceased's clothes. He lied in evidence from the beginning to the end. He said he had no children but it transpired he had one. He never mentioned the violent quarrel he had with accused 2 about a blanket
- (6) His demeanour in the witness box was shocking. He gave most of his evidence looking at the ceiling On the other hand Daniel gave his evidence confidently. In his facts he was either corroborated by Leeto or accused 2 or by both Despite some of his weaknesses (which were few and minor) I believe his evidence. I was impressed by him. On the other hand the accused cut a very sorry figure

- (7) Daniel is a simple man from my observation. I cannot imagine him and Leeto sitting down and concocting the conversation which he says took place in his house. The totality of their evidence will reveal that they are not sophisticated people at all. They are pure and simple country people whose whole purpose was to tell this Court the truth to the best of their ability.

In this respect Daniel is a single witness. (Koko v Rex CRI/A/58/76). He has impressed me favourably. I have approached his evidence most cautiously and can honestly say that I found him to be a witness endeavouring to tell the truth. I could detect no evidence that he was fabricating evidence in order to put his closest relative in trouble of this magnitude. I accept that accused 1 came to Daniel and as, his closest relation, sought his help - to tell him what police wanted with accused 2 and what they would ask her. After all, he was his closest relative who had been to the police station that day. Perhaps he could confide in him. I have detected no motive whatever why Daniel would concoct such a story against accused 1. The bones of the deceased, as indicated by accused 1, were found at the locality indicated by him. Voluntarily and in his sound and sober senses he related how he killed the deceased. Accused 1 stated that he stabbed the deceased. He produced a formidable looking butcher knife. The blade is long and sharp. One criticism levelled against the Crown is that the doctor was not asked if a knife could have been used to kill the owner of the bones. There were few bones left, most probably others had been washed away. How the doctor could detect whether the owner of the bones had been stabbed is difficult to comprehend. If on the other hand the defence submits that the cracks on the skull were consistent with the application of the

knob-kerry with great force and Tieho was responsible, then it does not exonerate accused 1. He said he was together with him when deceased was killed. He might have used a knife and Tieho a knob-kerry. However, the fact remains that this was a joint venture i.e. common purpose. The confession does not stand alone. There is evidence allunde showing the commission of the offence. There is other evidence supprting the facts stated in it. The conversation which took place the morning after the bones were discovered although previously ruled to be inadmissible Mr. Maoutu introduced it later when accused 1 gave his evidence. The whole of that inadmissible evidence became admissible through the act of the defence. This was not inadvertendly done. It was deliberate.

Accused 2 said that at the time of the disappearance of the deceased she was away at Mpharane. Her defence was thus/<sup>an</sup>alibi. The onus is on the Crown to prove its falsity and in my view it has failed to do so. It is true that accused 1 says that she was present when he and Tieho killed the deceased but he does not say what part she played. He is the one at the police station, on their arrrival, who pointed at her as having been present when he and Tieho killed the deceased. She says she denied. The Crown had led no evidence that her evidence is a pack of lies. Leeto might have misunderstood her when she said that her husband had gone to work. I must mention, in fairness to the Crown, that Mr Muguluma stated that in the Crown's view there had been no sufficient evidence against this accused. Immediately this was said, Mr. Moorosi who had not prepared any argument whatsoever, submitted that accused 2 was therefore entitled to be 'discharged' forthwith 'unless the law had since changed.' I had no idea what he was talking about. If he thought that the Crown was discontinuing

its prosecution against this accused, he was mistaken. All the Crown did was to express an opinion, which opinion, obviously, is not binding on the Court but might be persuasive. That such an opinion is not binding on the Court is sheer common sense. What happens if the Crown's assessment of the evidence is wrong? In any event the assessment of the evidence is the sole function of the trial Court and nobody else. The trial Court may request assistance but such a request can never be binding upon it. In the case of Tsupane Monkhi v Rex, CRI/A/34/77 (dated 10/3/78) this Court said:

"Assuming the Crown had indeed made such a concession; what would be its importance? It is not binding on the trial Court. It is not one of the functions of the prosecution to assess evidence before Court. That is the prerogative of the trial Court."

The facts in the above-mentioned case and the present are quite different from those in the case of David M. Masupha v Rex, 1974 - 75 L.L.R. 309. In that case the prosecutor specifically told the learned magistrate that he did not seek conviction thereby indicating discontinuance of the prosecution in terms of s.7 (2)(c) and 8 of the Proclamation 59 of 1938.

I have gained the impression that accused 2 was a much more superior witness than accused 1. She was very eager to tell all. She was more eager to help the Court to arrive at the truth than she was allowed by her counsel. As I said earlier, there were times when she became visibly shaken when her counsel restrained her when she wished to tell the Court who were the people who had alleged that she had a hand in her "husband's" death. Ultimately, she was allowed by her counsel to tell. It was accused 1

and her son. She mentioned her son, as she explained because she used the plural and these two people came together and they spoke. In fact, only one person spoke and that was accused 1 and she took it that he spoke on behalf of both of them. That is how I also understood her. She did not shield her son. It was contended that the evidence of accused 2, on this aspect of the conversation at the police station, was not admissible. Firstly, it was only admissible against accused 2 who introduced it and not against her co-accused. But her co-accused made use of that evidence quite freely. He cannot now complain

From the above evidence I am satisfied that the deceased is dead and that his death was brought about by accused 1 who had a motive to kill him. Although both accused say their love affair had ended by the end of 1977 Mr. Moorosi put it to Leeto that he presided over accuseds' case in 1978. If this is so, and the witness agreed, they were still in love during 1978. Accused 2 was candid about this. Although both accused say that their love affair had ended, the deceased, and other people, did not believe it. The inference is strong that accused 1 still loved accused 2 and would not accept the idea that their affair had come to an end. Deceased did not want to see accused 1 and 2 together nor did he want to see accused 1 at his home. It was so understandable. Deceased had to be got rid of. Tieho did not like him very much either. They teamed up together and got rid of that stranger. They planned and killed him and disposed of his body by throwing it over the cliff at Majakaneng where, in the bones form, was subsequently found. I have no hesitation in finding that accused 1 intentionally and unlawfully killed the deceased. He is, therefore, found guilty of the crime of murder.

After considering the evidence adduced by accused 2 the Court comes to the conclusion that her explanation may reasonably be true and she is, therefore, found not guilty and she is acquitted.

My assessors unanimously agree with my findings in this case.

*Handwritten signature*

J U D G E

28th November, 1980

For the Crown: Mr. E Muguluma

For the First Accused. Mr. C. Maqutu

For the Second Accused: Mr S. Moorosi