CRI/T/16/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

LETLAMA RAMAISA **Accused**

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 8th day of March, 1996

The accused is charged with rape and murder. In count 1 it is alleged that upon or about the 6th day of January, 1991 and at or near Peka, in the district of Leribe, the said accused did unlawfully and intentionally have sexual intercourse with 'Malibuseng Liphetelo without her consent, and thereby did commit crime of rape.

In count 2 it is alleged that upon or about the 6th day of January, 1991 and at or near Peka, in the district of Leribe, the said accused did unlawfully and intentionally kill Malibuseng Liphetelo.

The accused pleaded not guilty to both charges.

The post-mortem examination report was handed in from the bar by consent of the defence without calling the doctor who made it. It was marked Exhibit "A" and accoarding to its contents the deceased was raped and the cause of death was strangulation.

It is common cause that there are no eye witnesses in this case, the only evidence the Crown seeks to rely on is that of the statements made by the accused to P.W.1 and the "pointing out" by the accused of the shoes of the deceased in the presence of P.W.2 and P.W.3 and another police officer.

P.W.1 Thabang Liphetelo is the husband of the deceased. His evidence is that on the 6th January, 1991 he and the deceased were at their home. Between 12.00 and 1.00p.m. the deceased left their home without telling him where she was going to. He did not even see the direction she took when she left. At the time of her departure the deceased left behind her one month old son who was sleeping. After some time the child woke up and started crying. P.W.1 tried to comfort him but in vain. He then decided to go out and look for the deceased. He went to the cliffs near the village and met the accused there. He asked him whether he had not seen his wife. The accused said that he saw her going towards the well. He followed her.

After saying that he followed her the witness says that there is a hillock where she disappeared on the other side of. This gives the impression that the accused was not very close to the deceased. The witness says that he later saw the deceased

get into the village above. That person was wearing a yellow shirt and a yellow hat or doek. The witness goes on to say that the accused was sitting near the path which is near his home. He estimated the distance as being from the witness box to the veranda of the main courtroom. (Usually estimated to be about 15 paces).

P.W.1 seems to contradict himself because he earlier said that he found the accused at the cliffs which are not far from the village. But he now says that the accused was sitting near the path which is near his home.

P.W.1 says that the accused asked him whether he had quarrelled with the deceased before she left without telling him where she was going. He said that it was really not a quarrel but a slight misunderstanding between them. The deceased wanted to go to the veld to collect wild vegetables. He refused to allow her to go to the veld because he wanted to go somewhere and the deceased had to remain at home attending to the baby. She became unhappy and gave him food and left. That was the last time he saw her alive.

The matter was eventually reported to the chief of the area and a search was launched. P.W.1 says that he was joined by two men, Motseki and Tlholo. When they arrived at the cliffs they found the accused standing in the path leading to the well. He asked the witness what he intended to do about the disappearance of his wife. The latter said that he was going to look for her.

The accused joined them. On several occasions during the search the accused directed them away from where the body of the deceased was eventually found. It is the belief of the witness that the accused deliberately led them in the wrong direction because he knew where the body of the deceased was hidden. At last the dead body of the deceased was found in a cave. The opening into the cave was closed by bushes growing there. She was wearing a shirt/blouse; the lower part of her body was naked and dress was tucked between her thighs; the towel she was wearing was some distance from her as well as her panty. Her shoes were missing.

Under cross-examination the witness said that his relations with the accused were not harmonious because at one time the accused stole school property. He (witness) saw the property in the possession of the accused. He reported the matter to the owner of the property. The accused accused his wife of stealing his fowls. As a result of these two allegation their relations were at a very low ebb.

P.W.2 Detective Trooper Letsoela is the investigating officer in this case. His evidence is to the effect that on the 7th November, 1991 he went to a village of ha Ralehlatsa to attend a scene of crime. He found a dead body and examined it. His description of the injuries the body had is the same with what P.W.1 and the doctor have already told us. I shall not repeat that. What is of paramount importance in the evidence of this witness is what happened to the accused while he was in

police detention. The accused alleges that he was severely tortured in order to force him to admit that he was involved in the murder of the deceased. The alleged assault will also have a bearing on the subsequent pointing out of the shoes of the deceased allegedly made by the accused. The evidence of P.W.2 is to the effect that the accused was not assaulted by the police while he was in their custody. When it was put to him that the assaults took place at night, he said he would not know that because he came to work at 8.00 a.m. and knocked off at 4.30 p.m. He denied that on one occasion he was present and took part in the assaults.

Regarding the pointing out the witness said that on the 8th November, 1991 the accused was cooking outside the cell. It was at daytime. He freely and voluntarily told the witness that he knew where the shoes of the deceased were because he had hidden them there. The witness says that during the interrogation of the accused he was never asked anything about the shoes of the deceased. Following the voluntary disclosure that he knew where the shoes were, on the 9th November, 1991 the witness and the accused accompanied by Sgt. Libe went to the village of ha Ralehlatsa to enable the accused to go and point out the shoes. On their arrival in the village they first called at the chief's place. The accused told the chief that he had come to fetch the shoes of the deceased from where he had hidden them. From there they went to the cliffs near where the dead body had been found. The accused showed them a prickly pear and asked the witness to remove it. After it was removed there was loose soil. The

accused asked the witness to dig the loose soil and there the shoes were found.

P.W.3 Chief Mabitle Ralehlatsa corroborates the police officer that on the day the accused arrived at his place accompanied by P.W.2 and another police officer, he said he had come in order to show the police where he had hidden the shoes of the deceased. He accompanied them to the cliffs. The shoes were found below the cliffs about twenty paces from where the corpse was found. The witness says that when they arrived at the cliffs P.W.2 ordered the accused to point out where he had hidden the shoes. He pointed out under a stone and asked P.W.2 to dig there. The shoes were under a stone and covered with leaves. They were not seen on the previous day because they were covered with leaves. On the previous day they did not see them even though they actually stood on that particular stone under which they were found. He denied that the shoes were found separately at two different places.

The defence of the accused is a complete denial of any involvement in the murder and rape of the deceased. His version is that on the 6th January, 1991 he was at his home. While he was doing some odd jobs at his place he saw the deceased. She was passing below his yard going in the direction of the well or where the villagers relieve nature. He denies that he followed her because he intended to draw water from the same well where she was apparently going. About thirty minutes after she had passed her husband (P.W.1) came to him and asked him if he had

not seen his wife (deceased). He told him that he saw her pass below his yard. P.W.1 said that on the previous day they had a minor family quarrel. He said that he intended to go to her maiden home to find out whether she had not gone there. He came back and reported that the deceased was not there. He went to her aunt's place in another village but the deceased was not there. A report was made to the chief and a search for the deceased was launched. Many villagers took part in the search. The dead body of the deceased was found in a cave where it was obviously hidden by her killer. The accused denies that during the search he attempted to direct the search party including P.W.1 away from where the corpse was eventually found.

The second part of his story relates to the brutal assaults meted out to him by the police. On one night he was taken out of his cell to the office. He was ordered by one policeman to undress all his clothes. He remained stark naked while the police allegedly searched for blood on his clothes. No blood was found because even if the accused had been involved in murder and rape of the deceased she had no bleeding wounds except some bruises. After that he was handcuffed and ordered to squat in such a way that his knees came between the arms; a timber stick was inserted infront of one elbow and it passed behind the knees to the other elbow. He was then carried and hung between two tables. That ill-treatment caused severe pain to the muscles behind the knees. He was stabbed with a red hot screw driver on the buttocks. He was stabbed with a knife on the buttocks. He continued to deny that he was involved in the offences charged.

He denied any knowledge about the whereabouts of the shoes of the deceased.

One morning he was taken to his home for the purpose of searching for a knife. I find it rather strange that the police could search for a knife when the deceased had no injuries consistent with the use of a knife. Be that as it may the accused says that his house was searched but no knife was found. From there they went to the chief of the village who suggested that they should go to the cliffs where the corpse was found and search for the shoes. His suggestion was accepted and they all went there. The shoes were found by the chief. He found one shoe first and when he went deeper into the poplar trees plantation he found another one.

As I said earlier the defence of the accused is a complete denial of the Crown Case. **Mr. Ramafole,** Crown Counsel, submitted that the evidence the Crown seeks to rely on is that of the statements made by the accused to P.W.1 and the pointing out by the accused in the presence of P.W.2, P.W3 and another police officer.

One of the statements the Crown is relying on is one P.W.1 alleges that it was made to him by the accused. He says that the accused told him that deceased passed below his yard going in the direction of the well. He followed her as he was also going to draw water from the same well. It is quite correct that in cross-examination it was not put to P.W.1 that the accused never

said that he followed the deceased as he was also going to draw water from the same well. The belated denial only came when the accused was giving evidence, even then, only under cross-examination.

Another statement was that made by P.W.2 that on the 8th November, 1991 the accused was cooking outside the cell. He called P.W.2 and told him that he knew where the shoes of the deceased were. This allegation made by P.W.2 in his evidence-in-chief was not denied in cross-examination. In other words, the defence failed to put their case to the Crown witnesses.

There are several other statements which were made by the Crown witnesses which were not specifically denied by the defence during the cross-examination of such witnesses. In **Small v. Smith** 1954 (3) S.A. 434 (S.W.A.) at p. 438 Claassen, J. said:

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

The effect of this general rule has been watered down by a number of decisions which point out that failure to put one's case to the witnesses of the other party may be due to a number

of reasons. In South African Law of Evidence by Hoffmann, 2nd edition at p.324 the learned author points out that the above rule is not absolute. The point upon which the witness is to be contradicted may be so obvious that it is unnecessary to put it to him in cross-examination, or his story may be so wildly improbable that cross-examination would be a waste of time. Allowance must also be made for the inexperience of unrepresented parties or of some legal practitioners.

In the present case I cannot establish a reason why the defence counsel did not put the defence case to the Crown witnesses. **Mr. Mathafeng** is an experienced advocate of this Court. It may be it was an oversight on his part. Be that as it may the law is that despite failure to put the accused's case to the Crown witnesses the evidence of the accused must be given proper consideration and the weight it deserves.

The accused gave his evidence very well and in a straightforward manner. He withstood cross-examination very well except that at one stage during cross-examination he said he was inventing things. I doubt whether he fully understood the meaning of the word "invent" because he was unable to say what part of evidence he was inventing.

Mr. Mathafeng submitted that the Courts accord an accused person some latitude of mendacity on the rational ground that he is testifying from the shadow of the gallows. In any event, so he submitted, lying on one issue or more does not warrant a

finding that the accused lied throughout his testimony (See **Buta Phalatsi v. Rex** 1971-73 L.L.R 92 at p.92).

On the other hand **Mr. Ramafole** submitted that although an accused cannot be convicted merely because he is considered a liar, but as was held in **Broadhurst v. R. (1964)** A.C. 441 at 447 "----- a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all." I agree with the above submissions but the Court must also bear in mind that it is possible that an innocent person may put up a false story because he thinks that the truth is unlikely to be sufficiently plausible. (See **Maharaj v. Parandaya** 1939 N.P.D.).

I shall now deal with the law regarding pointing out which is found in section 229 (2) of the Criminal Procedure and Evidence Act 1981. It reads as follows:

> "Evidence may be admitted that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against him on such trial."

The above section was recently interpreted by the Court of Appeal in **M.P. Mabope and others v. Rex** C. of A (CRI) No.5 of 1986 (unreported) in which they quoted with approval **S. v. Sheeham** 1991 (2) S.A. 860 (A) in which the Appellate Division of the South African Supreme Court had occasion to reconsider the

provisions of s.218 (2) in the case of an involuntary or forced pointing out. The English headnote of the case at p.861 (which is a correct reflection of the judgment of FH Grosskopf, J.A. delivered in Afrikaans and concurred in by the other four members of the Court) reads as follows:

> "A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by an exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which **prima facie** operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of s.219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily. It is also a basic principle of our law that an accused cannot be forced to make self-incriminating statements against his will, and it is therefore inherently improbable that the Legislature, with a view to sound legal policy, could ever have had the intention in s.218 (2) of Act 51 of 1977 to authorise evidence of forced pointing out."

The most important issue to be decided by the Court is whether the accused was assaulted in the manner he has described above before he went to ha Ralehlatsa and pointed out the shoes of the deceased. If he was assaulted the evidence that he pointed out the shoes will be inadmissible and that might be the end of the Crown case because the pointing out is the most important piece of evidence on which the Crown relies.

The accused has testified that he was tortured by the police and that P.W.2 played a dominate role in the torture. He even

invited the Crown and the Court to see the scars on the buttocks caused by the red hot screwdriver and the knife. However this invitation was turned down by the Crown for the simple reason that even if there were such scars, they would not know where he got them from, neither would they be in a position to identify them as having been caused by the screwdriver and the knife.

It was unfortunate that the Crown turned down this invitation because if no scars were found that would have threngthened the Crown case. It would have proved that the accused is liar. The accused had another scar on the hand which he alleged was caused with the red hot screwdriver. I saw that scar. It is difficult for the Court to reject the story of the accused outright because as I said earlier he was not a bad witness and gave his evidence in a straightforward manner.

In **Rex v. Mokhopi** 1976 LLR. 263 it was held that where the police witnesses were unable to prove that the accused's scars were not the result of their assault on him the prosecution had failed to establish that the confession was free and voluntary and hence it was inadmissible in evidence. The facts of that case were similar to the facts of the present. The police had given evidence that they did not assault the accused while he was in their custody. The accused said they did and showed the Court the scars. He was examined by a medical practitioner who said the injuries could be from a sjambok.

At page 265 of **Mokhopi's case** (supra) the learned Chief

Justice said:

> "With respect, it is possible and fairly easy to prove that an accused person has not been assaulted by the police if the police do their job properly. I do not wish to circumscribe all the steps that could be taken, suffice it to say that immediately upon the arrest of a person by the police he can be taken to a doctor for examination in order for him to certify what injuries he or she has, if any, or the nature of those injuries, and then immediately after seeing a magistrate, he or she could be examined again and a certificate obtained. In this way the police themselves are able to illiminate phoney allegations, if such be the case, and prove it. Furthermore, if they wish to rely upon such evidence they must always come well prepared torefute possible contrary allegations, and not take it for granted that a statement before a magistrate is **ipso facto sacrosanct.**"

It seems to me that the same procedure should be followed when the evidence to be led is that of pointing out.

In the result I have come to the conclusion that there is a possibility that the story of the accused is reasonably possibly true. The Crown has therefore failed to prove its case beyond a reasonable doubt.

The accused is found not guilty on both counts.

I wish to thank both counsel for the most detailed heads of argument which were of great assistance to the Court.

My assessor agrees.

J.L. KHEOLA
CHIEF JUSTICE

8th March, 1996

For Accused: Mr. Mathafeng
For Crown : Mr. Ramafole.