

CRI/T/80/91IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

TEFO KHEMI

Accused

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice  
J.L. Kheola on the 29th day of March, 1996

The accused is charged with the murder of 'Mamosele Taoana upon or about the 22nd day of September, 1990 and at or near ha Marakabei in the district of Butha Buthe.

The accused pleaded not guilty to the charge. However, the defence admitted all the depositions made by the Crown witnesses at the preparatory examination except the depositions of Thabang Motinyane who was the magistrate before whom the accused was alleged to have made a statement. His evidence was never led before this Court because the Crown conceded that it was inadmissible.

The only witness whose evidence was led in this Court was one Bulara Elliot Khomohaka who is a forensic biologist. I shall deal with his evidence at a later stage in this judgment. I shall presently give a summary of the admitted evidence.

The evidence of Detective Trooper Motlatsi was to the effect that on the 23rd day of September, 1989 he went to the house of the deceased at ha Marakabei. Inside the house he found the body of the deceased on a bed: it was wrapped in a blanket. He examined the body. It had a deep wound between the vagina and the anus. From there he went to the home of the accused accompanied by other police officers. They searched the accused and seized a trunk and a lumbar jacket. Both articles had blood stains. They asked the accused about the origin of the blood found on his own clothes. He explained that it came from the wounds inflicted upon him by one Makhata with whom he had fought on the previous day. The witness says that they also seized the clothes of the deceased which were covered with blood. The accused had explained that the trunk in question belonged to his brother one Tau Khemi but that on the previous day he (accused) was wearing it.

Det. Trooper Motlatsi decided that the accused's blood found on the clothes he was wearing should be compared with the blood of the deceased and that of his brother Tau. For this purpose he sought the assistance of the doctor at the Government Hospital. The doctor took blood samples from the accused, his brother Tau Khemi and from the deceased. These samples of blood and the blood stained clothes of the accused and the deceased were sent to the laboratory where a forensic biologist analysed them.

'Mamokhele Selone is the daughter of the deceased. Her

evidence is that on the morning of the 23rd day of September, 1989 she went to her mother's house. It was at about 8.00a.m. At that time she was living at her brother's place and the deceased was staying. On her arrival at her mother's place she noticed that the door was open. She knocked but there was no answer. She entered and found the deceased lying across the bed on top of blankets. She spoke to her but there was no answer. She saw that her clothes were covered with blood. She ran out of the house and raised an alarm. She knew later that her mother was dead.

This witness testified that she knows the accused. He lives in the same village with her. He was not used to visiting the deceased, but at times he went to the deceased's place in order to cause trouble. On one night she went to her mother's place and found the accused sleeping on her (mother) bed. The latter was not present. She called her elder brother Malefetsane and an old lady 'Makhabo. They came and expelled the accused.

The evidence of 'Mahabarielle Selone is to the effect that on the day in question 'Mamokhele reported to her that her mother was lying on the bed and bleeding and speechless. She rushed to the house of the deceased and found her lying on the bed. The cardboard she used as a mat was covered with blood and there was blood in the night chamber. There was blood on the towel she had wrapped her waist with. She was still alive but later died on the same day.

The witness confirms the incident when the accused was found sleeping on the bed of the deceased at night in the absence of the owner. Malefatsane and the accused's grandmother 'Makhabo were called and the accused was driven out. The matter was reported to Chief Mojela Joel who ordered that Malefatsane should arrange a meeting between his family and that of the accused in order to discuss the untoward behaviour of the accused to the deceased. The accused failed to attend that meeting. His father suggested the accused be sent to the police. This was apparently never done.

'Mahabariele says that on another occasion the deceased called her at night and reported that the accused was again sleeping on her bed. She went to the deceased's house and found the accused sleeping on her bed. She fetched Malefatsane who punched him and drove him out.

The evidence of Malefatsane Selone confirms what has already been said about him by his sister and his sister-in law.

The evidence of Captain Khomohaka is that he is a forensic biologist. He holds a B.SC. and a Diploma in Forensic Science. On the 12th day of October, 1989 he received the following items from Det. Trooper Motlatsi;

1. Purple dress
2. White towel
3. Red lumbar jacket

4. Pair of short pants
5. Blood sample from Tefo Khemi
6. Blood sample from Tau Khemi
7. Blood sample from 'Mamosele Taoana

He examined the above items with the following results:

The purple dress was tattered badly and had a nasty odour. The stains on it were found to be of human blood. These were grouped and found to be blood group B.

The towel was heavily stained with human blood. These stains were grouped and found to be of blood group B.

The red jacket had few stains and these were found to be of human blood. These stains were grouped and found to be of blood group B.

The pair of short pants were heavily stained with what was found to be human blood. These stains were grouped and found to be of blood group B.

The blood from 'Mamosele Taoana was grouped and found to be of blood group B. The blood samples from Tau Khemi and Tefo Khemi were both found to be of blood group O.

The witness came to the conclusion that the blood on the dress, towel, jacket and short pants could not have originated

from either Tefo Khemi or Tau Khemi, but could have originated from 'Mamosele Taoana.

According to medical evidence the death of the deceased was due to "suspect of sepsis after penetrating wound from the vagina into the abdomen. Externally there was a 3cm laceration lateral of right labia majora not penetrating (subcutan) blood out of the vagina. Penetrating wound left vaginal fornix into abdomen-right adnate tumor with pus filled.

The defence of the accused is a complete denial of the charge. It really amounts to an **alibi** because he says that on the night the deceased was murdered he was at his home and never went anywhere until the following morning when he went to work. His evidence is that on the 22nd day of September, 1989 he was at his work place for the whole day. He works at Mpaka's restaurant. While he was at work he fought with one Makhata Maketjane who was causing trouble in the restaurant. Makhata wounded him on the forehead with a bottle. That wound bled profusely. He also sustained a wound on the left eye. It was swollen but not bleeding. He bit his lower lip during the fight and bled.

Makhata also bled profusely from the nose. Finally they wrestled and both fell down before they separated on their own without any intervention of any other person.

The deceased was his lover and he often visited her. He

which is of the same blood group as that of the deceased? At the time he was arrested he was asked about the origin of the blood on his clothes. His answer was that it was his own blood coming from the wound or wounds which he sustained when he fought with one Makhata on the previous day. His blood is of blood group O.

It is strange that when the blood found on his clothes was examined and analysed by the expert no trace of his blood i.e. blood group O was found. If his story were true that the blood on his clothes was his own blood, it ought to have been found by the expert.

I am satisfied that the story of the accused that the blood found on his clothes was his is false beyond any reasonable doubt. He says that he bled very heavily and that the blood stained not only his clothes but his shoes as well. However not a single drop of his blood was found on those clothes. The reason why his blood was not found is because it was never on those clothes at all. His fight with Makhata, if such a fight ever took place, it must have taken place on a different and earlier date and not on the 22nd September, 1989.

The fact that on about three occasions the accused was found sleeping alone on the bed of the deceased at night cannot by itself be proof that he murdered the deceased. It is one of the factors that have to be taken in consideration because it tends to show that he is the person likely to have caused this grisly crime. It is likely that on this occasion the deceased was

overpowered and was unable to raise an alarm like she did on the previous occasions.

According to Sgt. Motsokane who was P.W.2 at the preparatory examination and whose evidence was admitted by the defence, there was a lot of blood on the floor and on the bed: things like utensils and other property were scattered on the floor. This is an obvious sign of a struggle before the deceased was overpowered and stabbed into the vagina with a sharp object which went deep into her abdomen.

In **R. v. Mtembu** 1950 (1) S.A. 670 (A.D.) at pp. 679-680 Schreiner, J.A. said:

"I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be tested by the test of reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties."



The factors which have been taken together in determining the guilt of the accused are:

1. On the morning of the 23rd day of September, 1989 when the deceased was found dead or dying the clothes of the accused which he was wearing on the previous day were found to be bloody.
2. The blood which was found on his clothes was of blood group B which was the blood group of the deceased's blood.
3. The accused gave a false explanation that the blood which was found on his clothes was his own blood following a fight which he had with Makhata. The expert found that there was not a single drop of the blood of the accused on those clothes.
4. On about three occasions the accused had been found sleeping on the bed of the deceased without her consent. It is obvious that he wanted to have unlawful sexual intercourse with her or to commit any other offence upon her person. He never gave any explanation to the deceased and her family why he was behaving in that manner.

As I have stated above the accused's explanation to the police when he was arrested was that the blood on his clothes was his own. He never mentioned that during their fight Makhata also sustained any injury from which he bled profusely. At the trial he first said that he did not know whose blood it was that was on his clothes. He later changed and said it could be his or that of Makhata.

Is there even a remote possibility that the blood of Makhata could be on accused's clothes following the alleged fight? I

have already concluded that even if there was such a fight, it must have been on an earlier date. In any case it is impossible that the blood from the nose of Makhata could have reached the underpants of the accused. It is necessary to describe how the accused was wearing his clothes. He wore what they call a trunk or short pants. On top of that was a normal long pair of trousers. He wore a shirt on top of which was a lumbar jacket. We all know nosebleeding. The blood from the nose is not spurted out in jets like air from a jet-engine or from severed main blood artery. It flows out or oozes in such a way that it cannot go far from the person who is bleeding.

I am convinced that even if the accused did fight with Makhata, there was no way in which the blood from his nose could have reached the pair of short pants the accused was wearing under his long pair of trousers. It is an afterthought and a lie that Makhata ever bled. There was no Makhata's blood or accused's blood on the latter's clothes at all. All the blood on those clothes was the deceased's blood. It seems to me that when the accused attacked the deceased he put off the long pair of trousers because there was very little blood on the latter. The short pants was heavily stained with blood.

The degree of proof required by the criminal standard was stated in many case.

In **R. v. Difford** 1937 A.D. 370 at 373 Greenberg, J. said:

"..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Similarly in *R.v. M.* 1946 A.D. 1023 at 1027 Davis, A.J.A. said:

"..... the court does not have to believe the defence story, still less does it have to believe it in all its details' it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

Another exposition of the criminal standard is by Lord Denning, J. in *Miller v. Minister of Pensions* (1947) 2 All E.R. 372 at 373 where he said:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

I have come to the conclusion that the Crown has proved its case beyond a reasonable doubt in that the accused subjectively foresaw the possibility of death resulting from his assault on the deceased, but persisted therein, reckless whether such

possibility became fact (S.v.P 1972 (3) S.A. 412 at p. 416). I find the accused guilty of murder as charged.

My assessors agree.

  
J.L. KHEOLA  
CHIEF JUSTICE

29TH MARCH, 1996

For Accused : Mr. Matabane  
For Crown : Miss Nku

EXTENUATING CIRCUMSTANCES

In **S.v. Sigwahla** 1967(4) S.A. 566 at 571 the Appellate Division held that

- "(a) Trial courts in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of **dolus eventualis**.
- (b) While it cannot be said that this factor must necessarily be an extenuating circumstance, in many cases it may well be so, either alone or together with other factors, depending on the particular facts of the case."

In the present case I have come to the conclusion that the fact that it is a case of **dolus eventaulis** is an extenuating circumstance.

**Sentence:** In passing sentence I took into account that at the time of the commission of this crime the accused was still a fairly young man. He was not mature enough to fully appreciate the gravity of what he was doing. But his youthfulness is outweighed by the cruelty involved in the killing of a woman who was said to be old enough to be his mother. He stabbed her most delicate part of her body and left her to die a slow death through loss of blood. The pain suffered by the deceased must have been terrible. The accused is sentenced to fifteen (15) years' imprisonment.

My assessors agree.

*J.L. Kheola,*  
J.L. KHEOLA  
CHIEF JUSTICE

29th March 1996

For Accused - Mr. Matabane  
For Crown - Miss Nku.