C. of A. (CRI) No. 11 of 1979

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

HAREBATHO LEHLOENYA	1st Appellant
THABO LEHLOENYA	2nd Appellant
LETSEPILENG LEHLOENYA	3rd Appellant
TANKISO LEHLOENYA	4th Appellant
MELIDA LEHLOENYA	5th Appellant
MALONIA LEHLOENYA	6th Appellant
MALETSEPILENG LEHLOENYA	7th Appellant
MALETHENA MONTSI	8th Appellant

v

R E X Respondent

HELD AT MASERU

CORAM:

MAISELS, P.
DENDY YOUNG A.J.A.
SCHUTZ A.J.A.

J U D G M E N T

Schutz, A.J.A.

The deceased Maqabolle Ntoi was beaten to death in the course of a fracas at Lethera's in the district of Mohale's Hoek on 16th April 1978. The deceased was a chief. He died at the residence of certain of the appellants, all of whom are members of the same family. Appellants one to four are men and five to eight women.

All eight appellants were convicted of culpable homicide by Cotran C.J.. Appellants one and three were sentenced to four years' imprisonment of which to years were suspended, and appellant four was sentenced to three years' imprisonment of which two were suspended. The other five appellants were all sentenced to one year's imprisonment, the whole of which was suspended.

Originally/....

Originally only appellants one, three and four appealed, against conviction and sentence, but on the suggestion of this court that it would perhaps be desirable that the other persons should apply for condonation of the late filing of notices of appeal, such an application was made and granted, and in the result the appeals of all eight of the persons originally charged and later convicted are now before this Court. It was explained that the reason why the five applicants for condonation had not appealed was lack of means. At the conclusion of the appeal the appeals of all eight appellants were upheld and their convictions and sentences were set aside. The reasons follow.

The trouble started over certain willow wood that had been chopped down. The deceased laid claim to it as chief, and Lethena Lehloenya (the husband of appellants five and seven, who was not present at the fracas) also laid claim to it. There had been earlier litigation about willow trees which does not appear finally to have resolved the dispute. It is unnecessary to enter upon this dispute. It suffices to say that the deceased gave orders that the village women bring the wood to his place, whereas some of it was then brought to Lethena Lehloenya's residence, where the deceased later met his death.

On the morning of the day of his death the deceased, having come to hear of this, sent a party under his bugler Nyane to fetch the wood. This party failed in its mission. There is a dispute between the Crown

witnesses and/....

witnesses and the defence witnesses with regard to what was said by Nyane after his arrival at Lethena's houses. The defence witnesses who were then present say that he spoke to the effect that the wood should be removed as instructed whether this gave rise to blood-shed or not, and that one Tsekane dissuaded him from pressing the matter. The Crown witnesses deny this exchange. Resulting on this exchange defence witnesses say (and there is nothing to gainsay them) that appellant No. two sent a delegation consisting of appellants Nos seven and eight to lay a complaint with the principal chief and the police at Phamong and that this delegation left and later returned. The significance of this evidence is that appellant No. two was seeking to resolve the problem that had arisen by lawful and not by forceful means. It also goes to confirm that a threat was uttered by Nyane. Appellant No. two was an older man and the brother of Lethena, who was absent throughout. To complete the family tree, No. two was the father of appellant No. one and the uncle of appellants numbers three and four (this accounts for the four men). Appellant No. 6 was his wife. As already stated appellants numbers five and seven were the wives of his brother Lethena: and appellant No. 8 was Lethena's sister (this accounts for the four women).

The deceased's orders not having been executed, later in the day he sent a considerable party under his son Letlabutle Kheleli to collect the wood. They brought back the wood that was lying in the yard. Then one Malankene implanted in the deceased's mind the notion that not all the wood had been recovered but that some still remained inside one of the houses.

Here commenced/....

Here commenced the fatal wood recovery expedition, this time led by the deceased in person. There is evidence from both sides of some reluctance to follow the deceased's lead, a reluctance, if it existed, which may well explain the defeat in the field of the deceased's considerable cohort by four men and four women. On the Crown side, the deceased's bugler, Nyane, deposed that he did not encourage the deceased in his expedition but rather sought to persuade him to resort to legal process. The deceased's rejection of this advice stands in clear contrast to the conduct of appellant No. two already described. On the defence side there is Lehlohonolo Chaka, the brother of one of the three Crown eye-witnesses to the deceased's death and the one described as the most reliable of the three, namely, Motsobeng Chaka. The defence witness describes how he refused to go with the deceased's son's expedition because of talk of violence, and of the reluctance of men later to follow the deceased himself, they following him only "because they fear the chief". Significant also is the evidence of another of the three Crown eye-witnesses of the deceased's death, Mayaza Daele, who deposed that the deceased had said that, "these women had gone to collect this wood several times so he needed this army of men to go and help carry the wood". There is some dispute on the record as to the size of the deceased's party, but it appears to have numbered about thirteen including the deceased, and that is what the learned Chief Justice found.

The defence evidence is that whilst the deceased's party was approaching unseen a copy of the judgment regarding the willow trees was being sought for use before the principal chief at Phamong the next day.

At the point/....

At the point of the arrival of the deceased's party there commences a fundamental divergence of version between the three Crown eye-witnesses and the eight appellants, both factions showing a considerable if not complete consistency of version. I use the word factions advisedly because the record clearly shows that both groups of witnesses must be regarded as not only having been once locked in battle, but as having carried that battle forward into the courts. I turn to a description of the salient features of the two versions and their differences.

According to the Crown witnesses the deceased's party was at least largely unarmed (the degrees of description or exaggeration vary). The defence witnesses describe the party as being armed with one or two sticks, or with stones and say that the deceased's son carried a "sword". The learned Chief Justice gave no clear finding on this question other than finding that there was a conflict on the "sword" and that some of the deceased's party may have carried sticks.

According to the Crown witnesses war was commenced with an almost diplomatic exchange. Appellant No. two is supposed to have asked whether the deceased was invading, to which the response was that this was not so but that the deceased had come to collect the fire-wood. The defence version has more of the ring of prelude to war. Twice appellant No. two said, "why do you invade your children?" At some stage he raised his arms. The deceased was the while advancing ahead of his party. Appellant No. two raised the reference to Phamong. The

deceased asked/....

deceased asked him if he was the one to talk, asked where the wood was and told him to stand aside. According to the Crown witnesses the deceased was not angry: according to the defence witnesses he was aggressive or angry.

At this point arises a fundamental difference in version. The defence witnesses say that the deceased produced a knife and lunged at appellant No. two. On this issue the learned Chief Justice found: "Nevertheless in spite of the bias of Letlabutle and possible bias of Mayaza, I am satisfied deceased did not produce a knife to attack A2. The interests of the accused demand that they put deceased's behaviour in the worst possible light and they could easily have thrown a knife before they left their homes to go to the caves". No particular reason is advanced for the conclusion that the deceased did not produce a knife.

It is common cause that appellant No. one then struck the deceased on the head with a stick. The Crown witnesses say that he then fell not to rise again. Some of the defence witnesses say that he did not fall at all, others that he fell but soon got up again before he was finally felled. The Crown witnesses say that either appellant No. one or No. three ordered No. three to shoot. This is denied by the defence witnesses. However, some of the defence witnesses, including No. three, state that at a stage No. three fetched a firearm (apparently a single barrelled shotgun) and hit the deceased with it on the head with the result that the deceased fell and the gun was broken. The Crown witnesses say that this blow was struck after the deceased was already prostrate

or trying to rise, the defence witnesses saying that he was standing. No. three concedes that he pointed the gun at the deceased's party but without effect.

By this time a general fracas had developed with stones being thrown back and forth, and several persons were injured, including one member of the deceased's party who suffered a broken leg. All the appellants participated in the fracas.

The Crown witnesses say that while the deceased was prostrate he was hit with stones all over the body and head. The deceased's son says that he saw his father being chopped with an axe. This evidence is not supported by the evidence of the doctor who performed the post-mortem. He found only two injuries, one above the nose which led to multiple fractures of the skull and severe damage to the brain and a much less serious one at the back of the head. The former injury was regarded as the cause of death. Trooper Matsie, who later recovered the body described more injuries, but I do not see how I can reject the doctor's evidence. It is perhaps appropriate to stress the importance of recording <u>all</u> abnormalities and injuries when a post-mortem is performed.

The fracas ended with the deceased's party retreating from the field, leaving his body behind. It lay in the open until the next morning. The appellants and the children with them, so the appellants say, then withdrew from the scene and spent the night in some caves. Their reason for doing so was fear of the deceased's party returning with re-inforcements.

The Court/....

The Court a quo was therefore faced with two irreconcilable stories. In resolving the dispute the learned Chief Justice did not particularly rely upon credibility or demeanour findings. The findings on the three Crown eye-witnesses were not favourable to them. The deceased's son (Letlabutle) was found to have been "lying outright" on some points. The learned Chief Justice proceeded, "I think that of the three Crown eye-witnesses, Chaka who said he went closer to assist the deceased to stand up is more reliable in most respects than either Letlabutle or Mayaza". This finding indicates that Chaka was not regarded as wholly reliable, and that Mayaza was regarded as falling somewhere between Chaka and Letlabutle. Moreover, the Court a quo found that the appellants' version that the deceased was angry was "more probable", and that his purpose was to intimidate. The Crown is not therefore supported by findings of the general acceptability of the Crown's witnesses. Nor does the record support such a finding. The probabilities are that the deceased was angry and that the arrival of his band must have conveyed menace. Once that is so, and bearing in mind the inherent bias of the Crown eye-witnesses I do not think that the Court a quo was in the circumstances justified in accepting other parts of their version, particularly with regard to the production of a knife, unless at least there was corroboration or the defence witnesses could not be believed. I can find no corroboration of the Crown eye-witnesses. Indeed there is corroboration the other way. When Trooper Matsie inspected the body the next day he found a knife lying between the deceased's body's legs. The Court a quo found that the appellants could easily "have thrown a

knife"./....

knife". No doubt this could have been done but I can see no basis for finding that it was done. Also, Trooper Matsie found near the body a part of the butt of a gun. This corroborates the defence version that No. three's gun was broken in the fracas. If the appellants had remade the scene of battle one might have expected that this piece of incriminating evidence would have been removed as the rest of the gun was.

Nor did the learned Chief Justice give any particular reason for rejecting the defence witnesses. It is true that No. 5 was found to have been lying on a point, and that certain parts of the defence version were by implication rejected because of the findings of fact.

In the absence of credibility findings against the appellants this Court must attempt to form its own view of the defence evidence. Although there are some points of criticism, I am of the view that on the whole the defence witnesses were more convincing than the Crown eye-witnesses. On the whole the defence witnesses give an impression of much greater frankness, in not minimising their roles. This is so particularly of Nos. one and three, two principal actors on the defence side.

In the light of those conclusions I am of the view that the defence version may well be true, and that it cannot be said that the Crown has proved its case beyond reasonable doubt.

There remains the question whether the means used in resisting the deceased's party were not excessive, whether the means have been proved not to amount to reasonable self-defence. On the assumption that the

deceased did lunge at No. two with a knife, I cannot fault No. one, the son of No. two, in using a stick as he did. The deceased did not retreat and must be assumed to have retained his knife until he finally fell. In the meantime the deceased's party were using stones with some effect. I cannot find that No. three, the nephew of number two, was necessarily acting unreasonably in using the gun as a blunt instrument. It must also be remembered that the appellants were outnumbered so that even the women joined in. Also, that they had their backs to a wall, as several said, that there were children inside the houses, and that they fled as soon as they had gained a temporary command of the field of battle. I think that it would be an instance of adopting an armchair critic's view to weigh the actions of the appellants too finely in the circumstances in which they were precipitated by the deceased's unlawful action. It must also be remembered that certain of the appellants had already sought to achieve legal resolution rather than violent confrontation.

It was for these reasons that the convictions and sentences of all eight appellants were set aside.

Signed: W.P SCHUTZ
Acting Judge of Appeal

I agree

Signed: I.A. MAISELS
PRESIDENT

I agree

Signed: J.R. DENDY YOUNG
Acting Judge of Appeal

Delivered on the 10th day of January 1980 at MASERU.

For Appellants: Mr Maqutu
For Respondent: Mr Peete