C. of A. (CRI) No. 8-10 of 1979

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

SELLO LEMPHANE	1st Appellant
NTSANE MPHAHAMA	2nd Appellant
MOKALANYANE MOKALANYANE	3rd Appellant

and

THE KING	Respondent

HELD AT MASERU

Coram:

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

J U D G M E N T

Dendy Young, A.J.A.

The three appellants were charged firstly with the murder of one Monyake Hlalele (hereinafter called the deceased) on the 17th day of September, 1977 at or near Mekateng - Lower Qeme in the district of Maseru; secondly with the crime of Housebreaking with intent to steal and theft at or near Mekateng - Lower Qeme in the Maseru district. It is alleged that on the same day they broke into Fraser's shop Limited (hereinafter referred to as the shop) and stole the property listed in the indictment as amended.

The appellants pleaded not guilty to both counts. They were however convicted on both counts and sentenced : on Count one each was sentenced to death, on Count 2 accused 1 was sentenced to 8 years' imprisonment appellants 2 and 3 to six years' imprisonment each.

They have now appealed against conviction and sentence on both counts. In point of fact the appeal has

/not been .....

not been pursued in respect of count two. The contest in the appeal relates to count 1 only. It is argued for the appellants that the Crown failed to prove intent to kill and that the correct finding should have been guilty of culpable homicide. Alternatively if there was in law an intent to kill the proper verdict was murder with extenuating circumstances. The finding that the appellants unlawfully killed the deceased is not challenged.

The main pillar of the Crown's case was the evidence of the accomplice (Botsi Shakhane) which was in skeleton as follows : On the evening of the 17th September 1977 the three appellants together with the accomplice set out with the common objective of gaining access to the shop and stealing money therefrom. It appears that the scheme was to force the manageress of the shop to co-operate with them in getting hold of the money. However they found her already back in her home with the doors locked. This caused a change of plan. The four thieves, as I shall call them, so as to include the accomplice, decided to break into the shop. But first the nightwatchman had to be dealt with to prevent his raising the alarm. They waylaid the deceased, overpowered him and carried him struggling and shouting to a spot some 100 yards outside the village. There was much noise being made in the village that night due to singing and the beating of drums related to the presence in the village of diviners and no one heard or heeded the deceased's shouts. By the time the thieves reached the spot, deceased had for some reason ceased to shout but was apparently still resisting. The four thieves pinned the deceased down on the ground and the first appellant tied him up with copper wire brought along by the first appellant for just such an eventuality. Having tied up the deceased the thieves left him lying down and then went on to break into the shop. Large bundles of goods were taken from the shop and carried away.

The deceased died that night and his body was found next morning still tied up. It will be convenient

/at this .....

at this point to introduce another pillar of the Crown case, namely, the medical evidence. A post-mortem examination was carried out on the 20th of September 1977. The schedule of observations in the doctor's report reads as follows :

> "External Appearances (9) Copper wire twisted extremely tightly around neck, running from there over the back to the wrists of both arms, that were bent on the back. The wire was tied so many times that it was impossible to untie them without help from outsiders: Around the ankles there was the same copper wire also tied extremely well. A small wound on the left ear, bruise on the occiput.
>
> Age of deceased: Apparent 45 - 50 Reputed 42
>
> Skull and its contents (10) Subconjunctival bleeding in left eye, the head was extremely congested."

No other observations were made. In a sketch attached to his report the doctor shows a single loop of wire round the neck of the deceased with the end extending down the back and attached to another piece of wire securing the wrists. The ankles were tied with a third piece of wire. The medical report concludes that death was due to asphyxia due to strangulation and under "Remarks" the report has this -

> "The victim was strangulated by means of copper wire. This wire was buried in the skin since it was tied with great force (only at one place I could push my little finger between wire and skin). The way this was done makes it very likely that more than one murderer was involved".

Incidentally the doctor in evidence retracted the word 'murderer'.

In evidence the doctor said he inferred from the fact that there was little or no swelling of the feet that deceased had died within a few minutes. Asked to indicate how the wire was tied round the neck the doctor said :

/"It was .....

> "It was just a sort of a loop around the neck which went down to the hands and it was tied there and the hands were also tied with another piece of wire.".

The doctor did not know how many times the wire was wound round the neck. He had not made a note on that point. Asked whether the strangulation could have been due to deceased's efforts to loosen the wire the doctor replied:

> "No. He had no chance to loosen anything. It was so tight."

Unfortunately the medical evidence leaves unexplained certain important features relating to the mechanism of death. In the first place it does not explain whether death was due to obstruction of the air passage or to cardiac arrest by compression of the carotid sinus. Then again it leaves unexplained the function (if any) of the attachment of the wire to the neck and from there to the wrists behind the back; that is to say, whether or not the fatal constriction of the neck could have resulted from the deceased's own struggle to free himself. This matter was of importance because it seems clear that the thieves did not desire the death of the deceased. Otherwise why the trouble of taking him away from the village and why the laborious process of tying him up. It would have been much simpler to have killed him out of hand, had death been intended. The wire around the neck was obviously intended to have some function: probably to prevent the deceased shouting for help but that conclusion suggests that it was not the intention to kill him. This point was seized upon by Mr. Kuny who appeared for the appellants and it formed the basis for his contention that the Crown had not established beyond reasonable doubt the intention to kill.

Reverting now to the account given by the accomplice. Right at the spot outside the village where the deceased was being constrained, a discussion took place as to what was to be done about him. The accomplice and appellant 3 were in favour of leaving two of the number

/to guard .....

to guard the deceased whilst the remaining two broke into the shop. On the other hand appellants Nos. 1 and 2 were for tying him up. Appellant No.1 produced the copper wire he had brought with him and, the other three helping to hold down the deceased, appellant No.1 tied him up in the manner described in the medical report. Deceased resisted. The accomplice saw how he was tied. He says the deceased continued to struggle; he was kicking; but it appeared to the accomplice that the deceased was suffocating.

The following extracts from the evidence of the accomplice reflect what he observed -

"You now saw that he had tied wire around the guard's neck and that the guard was choking? - That is so My Lord. I asked Sello why he was choking that man.

C.C. Yes? - He then asked me who I wanted to have died. I said this person would die and he said that doesn't matter, Ntsane also said the same thing.

What eventually happened? - We then went to the shop.

H.L. Did you leave this man there? - That is so.

C.C. What was the man doing when you left him? - I saw as if he was already dead".

The accomplice went on to say that the housebreaking and theft was then carried out. His evidence continues :

"Then after you had then removed these goods what did you then do? - We rested after we had come out of the shop.

Yes, all of you? - Yes.

While you were resting did you have any, did you talk to each other? - Yes.

Yes, who talked to who? - I said to them, we should go and see if that person has not died.

Then what was their response? - They refused.

All of them? - That is so.

And what did you then do? - I went alone and left them there.

/Proceed? .....

Proceed? - When I got to that person I found that he was dead.

What did you do then? -

H.L. When you got to this person what did you do? Did you light him with a torch, did you touch him? - I lit him with a torch My Lord.

Yes? - I said are you still alive. I repeated that four times. I found that he was dead.

I want to know how did you find out that he was dead because he didn't reply to your questions? - I was afraid to touch him but he was not making any movement at all.

C.C. Then? - I went back to my fellow men. I told them I found that person having died. Sello replied me.

Can you tell the court what he said to you? - He said it was not his first time to kill a person.

H.L. When you returned from the body? - That is so My Lord.

C.C. After that what did each one of you do? - We left from there and went on our way.

Did you leave together or did you at any stage part with any of the accused? - When we left there we left Ntsane still struggling with his bundle.

Then? - I asked Sello why it was that he killed a person so cruelly".

Within a week or so the police had traced the goods stolen from the shop to the four thieves and they were arrested. At the trial the three appellants gave evidence on oath. They denied all knowledge of the events that night. However the evidence that the three appellants and the accomplice were the culprits was overwhelming and the learned trial Judge so found. This finding has not been questioned on appeal.

On the murder count the learned Judge found a common purpose on the part of the thieves to assault the deceased by overpowering him and tying him up. He held that the method of tying the deceased was particularly dangerous from the point of view of strangulation he said:

/"This dangerous .....

> "This dangerous type of assault must have been realised by the others that it could have fatal results, (R. v. Lewis, 1958(3) S.A. 107 (A.D.) at 109) yet they were reckless as to whether death would ensure or not. I am of the view, therefore, that they must have foreseen that there was a possibility of accused 1 causing the death of the deceased and yet despite the deceased's resistance they pinned him down and persisted in their plan reckless of the fatal consequences.".

Incidentally the case of R. v. Lewis is not in my respectful view, a satisfactory decision and should not be followed in this country: compare S. v. du Preez 1972(4) S.A. 584. However on the view I take of this case it is not necessary to pursue this matter further.

Later in his judgment the Judge said:

> "I am quite aware, and have already cited an authority that the test is whether each socius criminis foresaw the possibility that his socius would commit the act in question in the prosecution of their common purpose. (See S. v. Malinga and Others, (supra) p. 264). In my view, the accused foresaw this possibility and were reckless whether death resulted or not."

It will be seen, therefore, that the learned Judge negatived a direct intention to kill but found what is called dolus eventualis.

Before this Court Mr. Mdhluli for the Crown contended that the learned trial Judge had been over-generous to the appellants and that the evidence established a direct intention on the part of each appellant to kill the deceased.

On the other hand Mr. Kuny, as already stated, argued that, short of knowing what caused the constriction of the neck and the mechanism of death, it was not possible to say which, if any, of the appellants subjectively realised the danger to life.

In my view it is unnecessary to determine whether during or immediately after the tying up operation, the minds of all three of the appellants adverted to the danger to the life of the deceased involved in the method adopted

/to prevent .....

to prevent him from calling for help. If the evidence of the accomplice is accepted then there is in my view, no reason to think that the virtually immediate distress of the deceased was not apparent to all of the thieves. If they did not realise the danger before or during the tying up operation they realised the danger immediately afterwards. Yet the attitude of mind was one of callous disregard of the possible consequences to the life of the deceased. To them the possible death of the deceased was irrelevant when weighed against the attainment of their immediate objective which was to break into the shop. In my judgment this attitude of mind provided the necessary dolus i.e. the intention to kill for the purposes of the crime of murder.

I have anxiously considered whether the evidence of the accomplice in regard to the distress signs exhibited by the deceased can properly be relied upon having regard to the natural suspicion attaching to the evidence of an accomplice. However the learned trial Judge was fully alive to this aspect of the case. He accepted the evidence of the accomplice. In his judgment he said:

> "I am satisfied that the evidence of the accomplice was by far superior to that of the accused who lied unashamedly. (Rex v. Makanana and Others, 1971-73 L.L.R. p. 122 at 128). They even lied against their own counsel. I am satisfied with the evidence of the accomplice. He was not shifty and restless like the accused. I am convinced that he endeavoured to tell the court the truth. I am fortified in coming to this conclusion because his evidence does not stand alone. It has been corroborated; not by just mere corroboration but corroboration which implicates the accused.".

It is true that the corroboration the Judge had in mind related to the housebreaking and theft and not to the signs of distress on the part of the deceased. However some corroboration on the crucial aspect of the distress exhibited by the deceased is to be found in the medical evidence which was to the effect that the deceased must have suffocated to death within minutes.

On the whole I am of the opinion that it cannot be said that the verdict of murder against each of the three appellants by the trial court is not supported by the evidence

/within the .....

within the meaning of section 9(1) of the Court of Appeal Act 1978. No other ground of interference with the verdict has been suggested.

In my judgment the appeal against conviction must be dismissed.

On the question of extenuating circumstances, Mr. Kuny submitted that there was room for differentiation between the 1st appellant who did the tying up and the other two whose parts consisted in holding down the deceased. Alternatively he said the case of appellant No.3 was at any rate distinguishable; he had shown reluctance to participate in the proposal to tie up the deceased and this said Mr. Kuny indicated a lesser degree of moral blameworthiness. The appellants did not choose to give evidence on extenuation. Although it is not noted on the record we were very properly informed by Mr. Kolisang who appeared for the appellants in the court a quo that the decision not to testify was taken deliberately. On the evidence the three appellants callously went off to steal from the shop leaving the deceased in his state of distress. The learned trial Judge was fully alive to the features emphasised by Mr. Kuny. There is no misdirection on his part. In the circumstances I do not think that this Court would be justified in interfering with the sentence.

In my judgment the appeals must be dismissed.

(Signed) J.R. Dendy Young...
J.R. DENDY YOUNG
Acting Judge of Appeal.

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