

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

1. THAMSANQA ADAMS)
2. DLADLA NONGAUZA) Appellants
3. VUYO FETCHA)
4. VUSUMZI BIKO)

v.

R E X Respondent

HELD AT MASERU

CORAM:

MAISELS, P.
TEBBUTT, J.A.
VAN WINSEN, J.A.

J U D G M E N T

Maisels, P.

The four appellants were charged in the High Court with the murder of one Reggie Senkoto at or near Thibella in the district of Maseru on the night of the 1st September 1978. They all pleaded not guilty. After a lengthy trial they were all found guilty of being accessories after the fact to the offence of culpable homicide and each of the appellants was sentenced to 3 years imprisonment.

When their appeal came before this Court, counsel for the Crown, Mr. Kamalanathan, informed the Court, consistent with the attitude he had adopted in the Heads of Argument submitted by him, that he could not support the conviction. The Court agreed that on the evidence the conviction of none of the appellants could be sustained. Consequently the appeal of all four appellants was allowed and their convictions and sentences set aside, the Court intimating that its reasons for so doing would be given later. These now follow .

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That the deceased died as a result of a stab wound on the left side of the chest is clear. That this wound was inflicted at a complex in Thibella described by the learned Judge is also clear, as is the fact that the wound was unlawfully inflicted. The question that had to be decided by the Court was whether the Crown established beyond reasonable doubt that the appellants, one or other of them, inflicted the wound or were accessories after the fact to the crime.

Although it may be accepted that all four appellants were at the complex at some time on the night in question, a reading of the evidence does not seem to me, as is submitted by Counsel for the Crown, to establish conclusively the participation of any of the appellants in the attack on the deceased or even their presence at the time or scene of the stabbing.

This view is, I consider, supported by certain findings of the learned trial Judge. He found correctly that there was no evidence to support the existence of conspiracy. The learned Judge however said this :

"What I find proved is that the deceased was killed by one of the accused (it has not been proved who of them did it) or possibly (if Makena is right that there may have been six persons) by someone else but in their presence, and that they knew that same evening who the killer was. It was held in R. V. Gani 1957(2) S.A. 212 (A.D.) - and see also R. V. Victor 1965(1) S.A. 249 - that although it may not be possible to bring in a verdict of guilty on the substantive offence if the Court is unable to say which one of several accused was the killer, nevertheless it may be possible to convict the accused of being accessories after the fact to the offence if there is evidence that they have associated themselves with it".

I should say immediately that the facts in Gani and Victor differ toto caelo from those in the present case.

The language used by the learned trial Judge shows that he was not satisfied beyond reasonable doubt that it was one of the accused who did the stabbing: Nor in my opinion does the evidence establish that the

appellants associated themselves with the crime so as to make them accessories after the fact. Cf. Nteti Makamole and Two Others (C. of A. (CRI) No. 1 - 2 of 1980). Looking at the case as a whole, and particularly having regard to the generally unsatisfactory nature of the evidence as to the identity of the appellants and their alleged association with the crime I do not consider that the learned trial Judge was justified in convicting the appellants.

It was for these reasons that I agreed with the attitude of Counsel for the Crown and set aside the convictions and sentences.

Signed

..I.A. Maisels....
I.A. MAISELS
President

I agree Signed

..P.H. Tebbutt...
P.H. TEBBUTT
Judge of Appeal

I agree Signed

L.De V. Van Winsen..
L. DE V. VAN WINSEN
Judge of Appeal

Delivered this 12th day of January 1981 at MASERU

For Appellants : Mr. Mbuli

For Respondent : Mr. Kamalanathan