C. of A. (CRI) No. 1-3 of 1981

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

THABANG MOHLALISI )
REFELETSOE PHATE MPOBOLE) Appellants
TSELISO JOHANNES ISAAC )

v

REX Respondent

HELD AT MASERU

Coram:

SCHUTZ, J.A.
VAN WINSEN, J.A.
ROONEY, J.

J U D G M E N T

Schutz, J.A.

The three appellants, all men in their twenties at the time of their trial, were tried before Mofokeng J on a charge of murder and a charge of housebreaking. The murder alleged was that of one Bitsamang Mafifi on or about the 8th of November 1978. The housebreaking alleged was that of a shop and a cafe. Mofokeng J convicted all three appellants of murder without extenuating circumstances and sentenced them to death. They were also, all three of them, convicted of the housebreaking charge and sentenced to six years imprisonment. On appeal there has been no attempt to disturb the conviction and sentence on the housebreaking charge. The appeal is directed against the murder convictions and the sentences of death. In appealing against the murder convictions Mr. Unterhalter, who appeared pro deo for the three appellants, did not contest that the three appellants participated in the attack on the deceased which led to his death.

As most of the findings of the Court a quo have not been attacked on appeal it is possible to state the salient facts briefly. During the day of 8th November 1978 the three

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appellants were in company. During the following night they went to a shop near Makoae's in the Quthing district. They already knew that the deceased was the nightwatchman on duty at the shop and had agreed that he was to be rendered incapable of interfering with their design of breaking into the shop. To this end each of the appellants was armed with a wire, and one of them had in his possession a cloth. After a discussion between them and the deceased, as had been previously agreed the second appellant struck him over the head with a stick. They then set upon him and ultimately tied his hands behind his back and tied his ankles. A gag was inserted in his mouth and secured. As it was this gag that caused the deceased's death, it will be necessary to deal with the manner of its application in more detail later in this judgment. The deceased was then abandoned in a rondavel and the third appellant was left outside to keep watch. The first and second appellants then broke into the shop and the neighbouring cafe. Apparently the main object of the breaking was to obtain access to the contents of a safe which was unsuccessfully set upon with axes. The appellants removed 7 or 8 blankets from the shop as also 3 bottles of Limosin brandy, some packets of cigarettes and some boxes of matches. Early the next morning the three appellants were still in company and embarked upon a drinking spree which appears to have continued during the rest of the day until they fell asleep at a beer hall where they were arrested by the police in possession of various of the admittedly stolen articles.

None of the appellants elected to give evidence at the end of the Crown case and they were convicted of murder. Thereafter each of them elected to give evidence on the issue of extenuation. During the course of this evidence each of them admitted to being present during the attack on the deceased which led to his death. The question accordingly arose during the appeal whether this Court could have regard to the totality of the evidence given in the Court a quo including that given on the issue of extenuation. The question arose most pertinently because the main thrust of the argument for the appellants was that an intention to kill on the part of any one of them had not been established. There have been conflicting decisions in the Republic as to whether evidence in extenuation has to be heard prior to a decision on the merits or whether the accused is to be given an opportunity to give evidence in extenuation after a verdict of murder has been brought in.

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It is sufficient to say that the practice in Lesotho is to allow the accused such an opportunity after verdict. This is in accordance with the decision of this Court in the case of R. v. Ntjanyana Phakoe 1963-66 H.C.T.L.R. 140 referred in Hunt South African Criminal Law and Procedure Vol. II 369. A question that arises once this procedure is adopted is whether an appeal court is confined, in deciding whether a verdict of murder was correctly arrived at, to that evidence which was before the trial Court at the stage that that verdict was entered. That question has been answered for the Republic in the case of S. v. Mavhungu 1981(1) S.A. 56 (A.D.) at 65. The answer is provided in the words of TROLLIP JA as follows :

> "It follows that, for the purpose of an appeal against that verdict, the record of the evidence of the entire proceedings must be laid before this Court for its consideration. And in considering whether the verdict was right or wrong this Court can also have regard to the evidence adduced in extenuation".

Counsel for the appellants did not question the correctness of this decision or its application in Lesotho. I am in respectful agreement with the judgment of TROLLIP JA and am accordingly of the view that in deciding whether a verdict of murder was correctly arrived at, this Court is entitled to have regard also to the evidence given on the extenuation issue.

The cause of the deceased's death, according to the doctor performing the post-mortem was suffocation, which was caused by applying a piece of tissue into the mouth. The piece of "tissue" was a cloth which was an exhibit before the Court and which was of such a size that when folded up it constituted a considerable wad. The doctor stated that

> "This piece of cloth had a certain bulk, had a size which was more than sufficient to stick deep into the mouth and to prevent the possibility of breathing".

He also found swelling of the mouth and the upper part of the throat, that is inside the throat. He did not find any injuries on the outside of the throat.

The manner in which this wad of cloth had been inserted and secured was described by Detective Sergeant Liphamamo and to a lesser extent by Detective Sergeant Mara, who were brought to the deceased's still trussed up body on the 9th November. On the outside was another piece of cloth that had been tied around the mouth and which had been knotted at the back of the

head. Tied over this cloth was a wire that had been twisted tight, as if with a pair of pliers. Not only was the wire tight, but the mouth was open with the wire apparently passing over the corners of the mouth. Once the wire and the piece of cloth wrapped round the mouth had been removed, the cloth which caused suffocation was found right inside the mouth behind the teeth. It was 42 inches in length.

On appeal it was conceded, and in my view correctly, that the person responsible for stuffing the cloth into the throat in the manner that it was, and for then securing it, had the intent to kill because death was clearly foreseeable. The argument proceeded, however, that it was not possible to determine beyond reasonable doubt which of the three appellants was this person, and, further, postulating therefore that each appellant had to be treated as if he were not that person, that it had not been proved beyond reasonable doubt that any of the appellants was aware of the insertion of the cloth in the particular manner that it was inserted.

In deciding whether the essential elements of the crime of murder, namely intention to kill has been established against the appellants it is necessary to consider the state of mind of each separately. Unless an intention to kill has been established against any particular appellant, he cannot be convicted of murder. Although the necessary intent may be inferred, there is no substitute for actual intent in the crime of murder. The principle of versari in re illicita to which reference will be made below has never, in modern practice, had application to the crime of murder.

It therefore becomes necessary to consider the case against each of the appellants separately and to inquire in the case of each one whether he may have been the one who stuffed the cloth into the deceased's throat, or whether he not being that one, was aware that one of the other appellants had done so.

I shall deal first with the case against the first appellant. In his evidence in chief he said that his intention

> "was not to kill a person, it merely was to steal money. I had the misfortune of tying that person badly when I was tying him so that he could not be able to speak before I went to the shop".

It will be observed that in this passage the first appellant

/himself

himself assumes the responsibility for having tied the cloth over the mouth. In the course of a confession made by him to a magistrate, which was not contested on appeal, he had laid the responsibility for this act at the door of the second appellant. Under cross-examination he reverted, for a time, to this version, stating that it was the second appellant who had tied the cloth over the mouth. Later in his cross-examination the first appellant reverted to what he had said in chief, namely that it was he who had tied the cloth over the mouth. Under further cross-examination on these contradictions he claimed forgetfulness and again tried to blame second appellant for the act. Notwithstanding his attempts, at times, to shift the blame for this act on to the second appellant, I am of the view that the first appellant's admission that he tied the cloth over the deceased's mouth must stand against him. This conclusion is of importance because it is impossible to believe that the person tying the cloth over the deceased's mouth was unaware of the cloth that had been stuffed into his throat. Other passages of the first appellant's evidence that point to intention, at least in the sense of dolus eventualis, relate to a conversation that he describes between him and the third appellant when the appellants were leaving the shop. He says that he asked the third appellant whether the deceased was still alive. This led to questions which elicited answers that he was afraid that the deceased might die. His attempt to wriggle out of these answers by suggesting that he really meant that the deceased might die of cold or of having his ankles tied are quite unconvincing. In the result I am of the opinion that the Crown has proved beyond reasonable doubt that the first appellant did intend to kill. I would add that in arriving at this conclusion I do not rely on the evidence of the second appellant to the effect that he saw the first appellant place the cloth in the deceased's mouth. I regard the second appellant as being too unreliable a witness to base any finding beyond reasonable doubt on his evidence. I would add that the first appellant stated that he did not know who placed the cloth in the mouth, but for the reasons already given I am not prepared to accept that evidence.

I turn next to the case against the second appellant. As already stated, the second appellant said that it was the first appellant who tied the cloth over the mouth. In cross-examination the following passages appear:

"There is evidence that there was a piece of

> cloth inside the mouth of the deceased; if you saw the deceased being tied over the mouth, you must have seen the person who pushed that other piece of cloth inside the mouth of the deceased? - Yes.
>
> Who pushed it in? - It is accused No.1 himself".

And later:

> "You asked Thabang (No.1) why he pushed the cloth into the deceased's mouth? - Yes.
>
> And what was his reply? - He said it does not matter".

These passages establish that the second appellant was well aware of the cloth stuffed into the deceased's mouth. Mr. Unterhalter has argued, both in relation to the evidence of appellant No.1 and appellant No.2 that they are such unsatisfactory witnesses that no reliance can be placed even on their admissions. I do not agree with that argument. The fact that a witness is unsatisfactory in trying to ward off the case being sought to be made against him does not mean that admissions that are extracted from him are to be ignored. On the basis of his knowledge of the cloth stuffed into the mouth, I am of the view that it has been proved beyond reasonable doubt that the second appellant intended to kill.

I do not think that it can be found with certainty who stuffed the cloth into the deceased's mouth, but I have concluded that both the first and the second appellants knew of its use. The finding of intent is based on their association with the perpetrator's act both negatively and positively, negatively in not removing the gag, and positively in their continuation of their unlawful design which had been facilitated by the incapacitation of the deceased. An additional positive act on the part of the first appellant was the tying of the cloth and wire round the mouth. If either of them was the one who stuffed in the cloth then his intent would follow from that act.

The other elements of the crime of murder being clearly established I therefore come to the conclusion that the first and second appellants were rightly convicted of murder.

I turn now to the case against the third appellant, again with particular reference to intent. In his evidence in chief, he said that he did not know about the cloth in the mouth and that the first time that he learnt of it was at the

preparatory examination. In cross-examination he admitted that he saw the cloth being tied over the deceased's mouth at the stage that he was at the deceased's waist. He denied, however, that he saw the cloth that was placed inside the mouth. I have grave suspicions as to the truth of this denial particularly in the light of what the third appellant did admittedly see. I also suspect that the third appellant had knowledge of what was done to the deceased because I think it likely that the deceased's struggle for breath after the cloth had been applied would have been observable to any bystander. However, there is a lack of medical evidence on this score. In the result much as I suspect that the third appellant had the intent to kill just like the other two appellants, I am unable to find that it has been proved beyond reasonable doubt that he so intended.

If the third appellant is not to be convicted of murder, the question arises, what is the proper verdict? The Crown contends that the verdict should be culpable homicide. For the appellant it is contended that the verdict should be no more than assault with intent to do grievous bodily harm. For the appellant it was contended that a verdict of culpable homicide could only be based upon the versari in re illicita doctrine, that this doctrine had been overthrown in the Republic - S. v. Van der Mescht 1962(1) S.A. 521 (A.D.) and S. v. Bernardus 1965(3) S.A. 287 (A.D.) - and that the same should be done in Lesotho. The line of decisions in the Republic has not gone uncriticised - see the majority judgment of Schreiner P. in Annah Lokudzinga Mathentwa v. R. 1970-1976 Swaziland Law Reports 25. In the light of the conclusion which I have reached on the facts, I find it unnecessary to find whether the versari doctrine still forms part of the law of Lesotho, or more exactly, whether what has been called the traditional definition of culpable homicide, namely death caused by an unlawful act, but without intent to kill, should be accepted, or continue to be accepted, in Lesotho.

The principle laid down in Bernardus's case (supra) is that it is not sufficient in order to prove culpable homicide to establish that death was caused in the course of an unlawful assault. It is necessary in addition to establish that the accused ought as a reasonable man to have foreseen the possibility of death. In my view as against the third appellant that test has been satisfied. There was not merely an unlawful

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attack but a violent one to the third appellant's knowledge. To the knowledge of all the appellants the deceased was to be struck with a stick, which was done. Thereafter two of the appellants in turn throttled him. There is no evidence that there was any agreed limit to the violence to be employed in subduing and silencing the deceased which was essential to the common purpose that the appellants had formed. Once that was so the third appellant ought, as a reasonable man, to have foreseen the possibility that the attack might end in death, particularly after the deceased offered strong opposition to being subdued. I am therefore of the view that the necessary culpability on the third appellant's part has in any event been established, and that he should be convicted of culpable homicide.

It was submitted on behalf of the appellants that despite the finding of the trial Judge to the contrary certain extenuating circumstances existed in the case of first and second appellants. It was argued that he had misdirected himself in concluding that appellants directly intended and desired to kill the deceased and that he should have found that the encompassment of the death of the latter was not contemplated by either of these appellants. The evidence in my view discloses an intention on the part of the appellants to neutralize the possibility of any intervention by the deceased in their plan to break into the shop and cafe. The method decided upon by them to achieve this object was to bind the deceased's hands and feet with wire procured by them for this purpose and to place a gag over his mouth by means of a cloth in the possession of third appellant. There is no evidence that appellants premeditated the pushing of a cloth down the throat of the deceased. Had the appellants decided to kill the deceased there would have been no reason to tie his feet and hands and gag his mouth. The evidence does not exclude the reasonable possibility that the act of putting the cloth down the throat of the deceased was undertaken by one or other of first and second appellants when it appeared that they were not succeeding in silencing him. This action, as was said earlier in this judgment, was undertaken regardless of the fact that the perpetrator must have and therefore did know that this would result in the death of the deceased even though this result was not desired by appellants. Such being the circumstances the Court a quo should have found that the

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perpetrator acted dolo eventualis and that it was with a similar intention that the other appellant, be it first or second appellant, identified himself with such act.

I find therefore that there was no direct intention on the part of first or second appellant to kill the deceased. The question accordingly to be considered is whether the fact that appellants did not premeditate the killing of the deceased but acted dolo eventualis constitutes, in the context of the circumstances of this case, an extenuating circumstance. It is trite law that a finding that a murder was committed with only a constructive intent does not by itself and without more establish an existence of an extenuating circumstance. See S. v. Sebiko 1968(1) S.A. 495(A.D.) at p. 497 B-D; S. v. De Bruyn ed 'n Ander 1968(4) 498 (A.D.) at p. 500 E-G. On the other hand such a finding may correctly be had regard to and in conjunction with other relevant circumstances present in a particular case in order to determine whether there are factors rendering the conduct of the appellants less blameworthy. The other relevant circumstances present in this case are that the killing of the deceased took place as a consequence of a decision by appellants to break into the shop and cafe and the attack on the deceased by appellants, one of whom as armed with a stick, was one which regard being had to the former's age, put his life at risk. Despite this risk the appellants did not hesitate to put their plans into execution and first and second appellants acted in callous disregard of the life of the deceased in their determination to gain their ends. Regard being had to such circumstances the absence of dolus directus on their part cannot avail them as an extenuating circumstance. Compare S. v. Nkosi 1980(3) S.A. 825 (A.D.) at p. 829 A-B; Sello Lemphane v. R. 1980(1) L.L.R. 57 (C. of A.).

In the light of the aforegoing the appeals of the first and second appellants against their convictions for murder without extenuating circumstances and their sentences of death are dismissed. The appeal of the third appellant against his conviction for murder without extenuating circumstances succeeds, and there is substituted therefor a conviction of culpable homicide. The appeals of all three appellants against the housebreaking conviction and the sentence of six years imprisonment are dismissed.

In respect of his conviction for culpable homicide

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the third appellant is sentenced to ten years imprisonment, such sentence to run concurrently with the aforementioned sentence of six years imprisonment.

I agree Signed: W.P. Schutz
W.P. SCHUTZ
Judge of Appeal

I agree Signed: L.de V. Van Winsen
L.DE V. VAN WINSEN
Judge of Appeal

I agree Signed: F.X. Rooney
F.X. ROONEY
Judge of the High Court

Delivered this 13th day of October 1981 at MASERU

For Appellants : Mr. Unterhalter
For Respondent : Mr. Kamalanathan