

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

KHOTSO M. MOKOENA                      Appellant

v

REX    Respondent

HELD AT MASERU

Coram:

MAISELS,     P  
GOLDIN,      J.A.  
STEYN,       A.J.A.

J U D G M E N T

Maisels, P.

At the conclusion of the hearing of this matter the Court dismissed the appeal intimating that its reasons would be given later. These now follow.

The appellant appeared in the High Court before Mofokeng J, sitting with two assessors, charged with the murder on 18th April, 1979 of Ngaka Moji, the attempted murder of Trooper Mahlo and with the contravention of section 3(2)(a) of Act 17 of 1976 (Internal Security) Arms and Ammunition. He pleaded not guilty to all these charges but was found guilty. On the charge of murder no extenuating circumstances having been found, he was sentenced to death. On the charge of attempted murder of Trooper Mahlo he was sentenced to six years imprisonment and on the charge of contravening Act 17 of 1976, to one year imprisonment.

Although an appeal was noted both against the conviction and sentences, Mr. Unterhalter, who appeared for the appellant, confined himself entirely to the appeal against the convictions and made no submissions with regard to the sentences.

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It should, I consider, be stated at the outset that it is clear and indeed was common cause that if the appellant was correctly found guilty of murder, he was correctly convicted on the other charges brought against him.

The evidence establishes that on the morning of 18th April, 1979 the police, under the command of Lt Shali, undertook a tax drive in a village not far from the De Beer's Diamond Mines. The appellant, together with two companions of his, none of whom lived in this village, were found not to have paid their basic taxes. They were placed under arrest by Sgt Mpholle, who requested Trooper Mahlo to escort them to a nearby charge office. This he did, the appellant and his companions whose names are now known as Selala and Khoabane walking a few paces ahead of the trooper. According to the evidence of the latter the word "Halt!" was uttered and when he, the trooper, who had apparently been reading from a white paper, looked up, he saw a man in front of him, whom he identified in evidence as the appellant, holding a small firearm (with both hands) and pointing it at him. The trooper who was unarmed took 5 or 6 paces backwards. The appellant, according to the trooper, then fired at him but fortunately missed him. The trooper almost simultaneously fell down and began to somersault and roll on the ground. When he tried to get up another shot was fired in his direction but this also missed him. The trooper again fell down and rolled over until he fell into a ditch. He then got up and ran away. He looked back and saw the same man, i.e. the appellant, grappling with another man who it is now known is the deceased, Ngaka Moji. According to the trooper the appellant felled the deceased, then stood astride him bending over him with his right hand stretched forward holding the firearm at a very close range to the body of the deceased. The trooper says he heard two shots being fired coming from where the deceased and the appellant were. Thereafter, according to the trooper, the appellant left the deceased to join his two companions who had walked ahead of him. When he joined them all three ran away.

It is clear that the deceased died as a result of wounds caused by bullets fired from a pistol and if the trooper's evidence is accepted, there could be no doubt that it was the appellant who shot the bullets and caused the death of the deceased.

/It is

It is common cause that the appellant on the day of the killing was wearing a travelling rug, known in Lesotho as a "Scotland", a brown beret and black trousers. A witness, Thabisa Nchala, who knew the deceased, who was employed at De Beer's mine as a compound policeman or guard, happened to be in the vicinity where the shooting took place. I may mention that this witness was also employed at De Beer's. It would seem to me on a reading of the evidence that the deceased who must have witnessed what had happened between the appellant and the trooper and occupying the position that he did, was brave in that he endeavoured to wrest the pistol away from the appellant. Nchala corroborated the trooper's evidence in every material respect and was accepted by the learned trial judge, correctly so it seems to me, as a truthful and trustworthy witness. He was cross-examined at great length by the attorney who appeared at the trial for the appellant, but it seems to me to no effect. He was in no doubt as to the identity of the man who fired the shots which killed the deceased. I mention this matter at this stage because the defence was that it was not the appellant but one of his companions, Selala, who was shot at by Sgt Pekile in the circumstances which I shall presently describe, who was the man who shot and killed the deceased and who had shot at the trooper.

Another Crown witness, one Khutlisi and who also worked at the De Beer Mine and who knew the deceased as a security man at the mine, testified that he saw the three men, i.e. the appellant and his two companions being escorted by the trooper on the day in question. He happened to sit down to relieve nature at a short distance some 35 or 40 yards away from where he heard a person shout "Halt!". He then gave an account of what he saw, which completely corroborates in all material respects the evidence of Trooper Mahlo and of Nchala. But that is not all. Trooper Mahlo raised an alarm with the consequence that the police and villagers began to chase the three men, who were running away. I should have said this all happened in broad daylight.

The chase went on for a distance of about 2 - 2½ miles. Sgt Mokata, one of those who joined in the chase, appeared to be the fastest runner and was gaining on the three men. One of these disappeared from his sight but he continued to chase

/the other two.

the other two. He shouted to them to stop. Only one did so - the other continued to run. The one who stopped was ordered to raise his hands and he was arrested. He wore a Scotland rug, a dark pair of trousers and a brown beret. (The other persons who had accompanied him were differently clad). The witnesses I have so far mentioned all stated that this was how the appellant was dressed, and this was the person before the Court as the accused. Another police officer who joined in the chase was Sgt Pekile. He had followed Sgt Mokata and when he arrived where the appellant had been stopped by Sgt Mokata he retrieved a pistol and a plastic piece of paper which contained bullets of different size from the ground. These articles, according to the evidence of Sgt Mokata, had been placed there by the appellant on the orders of Sgt Mokata. Sgt Pekile unloaded the magazine of the pistol and found bullets in it of different size. Sgt Pekile reloaded the pistol and left in pursuit of the other man, who was running away, taking the pistol and bullets with him. This man we now know was Selala.

Sgt Pekile passed a trooper, Phakoe (who has since died) and tried to fire at Selala with the pistol, but it jammed. He obtained a .303 rifle from the late Trooper Phakoe and fired at Selala, killing him. A knife was found where Selala had been seen hiding prior to his being shot.

At the post mortem examination of Ngaka Moji a bullet was found. This was examined by a ballistics expert, a Mr van der Merwe, and it was proved beyond doubt that this bullet was fired from the pistol which Sgt Mokata stated he had found in the possession of the appellant.

On this evidence given by the witnesses for the Crown the case against the appellant would seem to have been proved beyond any reasonable doubt. The appellant's case is really that this is a case of mistaken identity. It was not he who killed the deceased but Selala. It was not he whom the police took the pistol from which the fatal shots were fired. It was not Selala near whose body a knife was found. It was found near the appellant. Put quite shortly, the defence is that the Crown witnesses, independent observers, as well as the police must have conspired wickedly to put the blame on him, an innocent man. Indeed, as was put to Crown witness after another, "Everything you have told the Court is a figment of your imagination".

/Mr Unterhalter

Mr Unterhalter correctly in my opinion stated the three central issues (as he called them) in this case. They are :

- (a) Whether it was the appellant wearing the brown travelling rug (described as a "Scotland") who fired the shots at Trooper Mahlo and who killed Moji, as the Crown alleges.
- (b) Whether it was the appellant in whose possession Sgt Mokata and Sgt Pekile found the pistol and bullets, as the Crown alleges.
- (c) Whether the person concerned in the killing was not the appellant but Selala wearing a greyish and red travelling rug, as the appellant alleges.

Mr Unterhalter also correctly pointed out that this Court will interfere with the finding of a lower court, where the probabilities of the case or other factors in favour of an accused have clearly been lost sight of. He then suggested certain alleged probabilities and factors in favour of the appellant of which the learned trial judge was said to have lost sight. I have examined each one of these alleged probabilities and factors - they consist in the main of minor discrepancies in the evidence of certain of the Crown witnesses. None of these, nor a compound of them, appears to me to be of any real substance, and certainly not of such a nature as would justify interference of this Court with the findings of the learned trial judge in his carefully and fully reasoned judgment. The observations that I have just made apply equally to certain alleged improbabilities in the Crown case.

There are two arguments put forward by Mr. Unterhalter to which I should refer. Mr. Unterhalter submitted, as indeed he was obliged to, in the face of the Crown evidence that there was a conspiracy between the villagers and Nchala and Khutlisi on the one hand, and the police on the other to implicate the appellant. Quite apart from the fact that there is in my opinion not the slightest ground of any value upon which this argument can be based, Mr. Unterhalter, in reply to a question by my Brother Steyn as to when this conspiracy was hatched, was not surprisingly unable to deal with this point. This was not surprisingly in view of the fact that on the evidence, the conspiracy must have occurred on the same day between the disparate participants. I say on the same day

/because

because the defence elicited testimony that on that day Sgt Mokata recorded in the occurrence book the items he found on the appellant and which were then in his, the witness' possession. These include three bullets and a pistol holster, but not the pistol, Exhibit 1, which was in the possession of Sgt Pekile. However, again in support of his submission that there was a conspiracy, Mr Unterhalter stated, and I quote :

"That, as with accomplice evidence, a convincing corroborative account was given by the Crown witnesses of the attack on Mahlo and the killing of Moji and that it was the simplest of stratagems to substitute the accused(appellant) in a brown travelling rug for Selala in the greyish and red travelling rug, as the person committing the crime".

I regret to say that the logic of this argument escapes me. One knows that an accomplice sometimes or perhaps frequently attempts to shift the blame for his own conduct upon the shoulders of an accused, or shift the blame of one accused upon another. How it can possibly be suggested that this can apply to the evidence of any of the Crown witnesses I simply cannot understand. In my judgment the finding of Mofokeng J cannot be faulted. A reading and re-reading of the record satisfies me that the Crown proved the guilt of the appellant beyond all reasonable doubt - the evidence against him was overwhelming and in my judgment there could not possibly have been any other verdict than that he was correctly convicted and sentenced on all counts.

I.A. Maisels  
Signed: .....  
I.A. MAISELS  
President

I agree Signed: ~~for B. Goldin~~ .....  
B. GOLDIN  
Judge of Appeal

I agree Signed: ~~for J.H. Steyn~~ .....  
J.H. STEYN  
Acting Judge of Appeal

Filed this 8th day of May 1982 at MASERU

Mr. Unterhalter for Appellant  
Mr. Kamalanathan for Respondent