

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

GERARD NKHABU 1st Appellant
NTHOFEELA NTSAMAI 2nd Appellant
PAUL LEBULA 3rd Appellant

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of November, 1984.

The appellants appeared before the Subordinate Court of Mafeteng and pleaded not guilty to charges of Attempted Murder, Kidnapping and Housebreaking with intent to commit an offence to the prosecutor unknown, it being alleged:

Count I "upon or about the 1st day of November, 1981 and at or near Malea-lea at P.B.J. Jandrell's shop in the district of Mafeteng, the said accused each or both or all of them acting unlawfully and with intent to kill, did shoot at Nkopane Musi, Tseliso Musi with firearms."

Count II "upon or about the 1st day of November, 1981 and at or near Malea-lea at P.B.J. Jandrell's shop in the district of Mafeteng, the said accused each or both or all of them did unlawfully and intentionally deprive Mokone Ntobane, Halejoetsoe Motlomelo male adults, of their liberty by imprisoning the said Mokone Ntobane and Halejoetsoe Motlomelo in a car for a certain period."

Count III "upon or about the 1st day of November, 1981 and at or near Malea-lea at P.B.J. Jandrell's shop in the district of Mafeteng, the said accused each or both or all of them did unlawfully and intentionally break and enter the house of one Nkopane 'Musi with intent to commit the crime to the Prosecutor unknown."

They were all acquitted and discharged on Count I but found guilty as charged on Count II. On Count III,

2/ they were.....

they were convicted of housebreaking with intent to commit a crime of robbery. They were each sentenced to serve a period of 2 years imprisonment on Count II and on Count III.

The appeals are against the convictions on a long list of grounds which can, however, be summed up in that the convictions were against the weight of evidence.

Briefly the facts disclosed by evidence were that the complainants in Count II were taken against their will into a certain car with Registration Number DRR134T which came to the village of Malea-lea on the late evening of 1st November, 1981.

The occupants of the car forced the complainants at gun point to direct them to the house of PW.4, Nkopane 'Musi, who was the manager of Jandrell's shop in the area. The car was parked some distance away from PW.4's house and with the exception of one who remained in the car, all its occupants got out and escorted the two complainants to the door of PW.4's house, where one of them was compelled to call out PW.4 under the pretext that he needed PW.4's assistance at the shop.

When PW.4's wife replied that PW.4 was not in and refused to open the door, one of the complainants was pushed against the door so violently that it broke and fell inside the house together with the complainant.

PW.4's wife screamed out of the house. At that time PW.4 and some of his fellow villagers, who had been taking cover next to the house, attacked the intruders with sticks and set dogs on them. As the intruders scattered and ran away chased by the dogs, PW.4 and the villagers proceeded to the car.

As they approached the car, the driver, who was trying to start its engine, told them that they were being foolish for he was armed with a gun. He fired about 3 shots before running away leaving the car whose engine was still running or idling.

3/ As it was

As it was dark, the complainants in Count I merely believed that the shots had been aimed at them and their co-villagers. They, therefore, attacked the car with stones and damaged it.

On searching the car, they found police canvas belts, a bullet, an invoice belonging to PW.1 and the ignition key of the car. PW.4 took possession of and subsequently handed the articles to his wife for safekeeping. In the following morning a shoe was found next to PW.4's stable where the dogs had been chasing one of the intruders. All these articles were later handed over to the police. The villagers took guard over the car which was also later towed away by the police. PW.14, W/O Nchela, and PW.15, D/W/O Ramonate, confirmed that the articles seized by PW.4 and the vehicle were respectively handed to them.

In their defence, the appellants denied to have been the occupants of the car DRR134T which came to Malea-lea on the evening in question nor were they the people who committed the offences alleged to have been committed on that night.

From the evidence, it is clear that it was at night and dark when the person who remained in the car fired the shots. Because of the darkness none of the witnesses could positively testify that the shots were directed at any of the complainants in Count I. The shots may well have been aimed in the air merely to scare away the complainants and their fellow villagers who were admittedly approaching the car at the time. It could not, therefore, be positively said whoever fired the shots did so with the intention to kill. For that reason the trial magistrate was, in my view, justified in finding, as he did, that the evidence did not establish beyond reasonable doubt, the commission of the offence charged under Count I. The verdicts of not guilty were, therefore, rightly returned.

As regards Count II, there was undisputed evidence that the occupants of the car did force the complainants into the car and unlawfully deprived them of their liberty for some time during the course of that night. The trial

magistrate rightly found that the crime of kidnapping had been proved beyond reasonable doubt.

Although the door of PW.4's house was broken open, there was, on the evidence, no proof that any of the intruders actually made entry into the house. It is one of the essential elements of the crime of housebreaking that unlawful entry into the house should follow the breaking. It seems to me that in the absence of any such entry, the crime remains that of malicious injury to property. Even if, for the sake of argument, the intruders had entered into PW.4's house, there was nothing, on the evidence, to show that they did anything to justify the conclusion that it was with the intention to commit the crime of robbery. In my view, the proper verdict on Count III ought to have been that of guilty of malicious injury to property which I accordingly substitute for the verdict of guilty of Housebreaking with intent to commit robbery, returned by the trial magistrate.

It now remains to consider whether or not the appellants were the persons who committed the offences under Counts II and III. It was common cause that on 1st November 1981, No.1 appellant borrowed a car from PW.1, Hlomelang Mohale, saying he was going to use it to visit his home at Mpharane. He was to return it on the same day. PW.1 lent him the car DRR134T. However, the appellant did not return the car as promised. On the following day, PW.1 was called to the police station in Mohale's Hoek and interrogated about the whereabouts of his car. He explained that he had lent it to the appellant on a previous day. About 2 weeks later, the police brought PW.1 to Mafeteng where he identified the car which was then damaged. This was confirmed by PW.15 D/W/O Ramonate. Two months later, PW.1 met No. 1 appellant in the street in Mohale's Hoek and asked him about the car. The appellant refused to give him any explanation about the car. He merely said he was under police detention and not allowed to speak with him on the subject.

5/ The story of

The story of No. 1 appellant was that having borrowed the car from PW.1 he proceeded to Mpharane at about 11.00 a.m. On his return from Mpharane at about 4.30 p.m., he decided to go to Maseru to buy tyres. When he approached a place called Motsekuoa on his way to Maseru, No. 1 appellant was stopped by about six (6) men wearing police overalls and spoty caps. They dispossessed him of the car and drove it along the road leading to Makhaleng river, where he was ordered out of the car, fastened with ropes and left in a forest. Two of the men remained with him in the forest where they spent the night whilst others drove away in the car. On the following morning, he was released and allowed to go. He went to Mpharane police charge office where he reported to a certain Sgt. Jobo. He was later escorted back to Mohale's Hoek by a policeman he did not know. He denied, therefore, that he was ever in the company of Nos. 1 and 2 appellants at Malea-lea or anywhere on 1st November, 1981.

Nos. 2 and 3 appellants, who were police officers at Mohale's Hoek, confirmed that they were never in the company of No. 1 appellant on 1st November, 1981. According to No. 2 appellant he was off-duty on that day. At about 1.00 p.m. he boarded a bus going to Masemouse to visit his concubine. During the night he was attacked by the brothers of his concubine. He escaped and ran to the home of one Mpho Kotelo where he spent the rest of the night. Early in the morning of 2nd November, 1981, he returned to Mohale's Hoek. On the way he got a lift to Mohale's Hoek from PW.10, Mosuoane Mo-George. No. 3 appellant likewise told the court that he was off-duty on 1st November, 1981. He, however, decided, on his own, to go on patrol at a place called Mohalinyane. He returned to Mohale's Hoek on the same day and on Monday 2nd November, 1981 reported for duty as usual.

PW.3, Sgt. Lesia, testified that on 1st November, 1981 and 2nd November, 1981, he was the Seargent in charge of day duties at Mohale's Hoek. As such he had to assign Nos. 2 and 3 appellants for duty. They did not, however

6/report to him

report to him for duty as they were supposed to do on those two days. They only reported for duty on 3rd November, 1981 and he had to reprimand them for absenting themselves from work without authority. From the evidence of PW.3, it is clear, therefore, that No. 3 appellant was telling a lie when he said he reported for duty on Monday 2nd November, 1981.

According to PW.13, D/Tpr Monantsi, in November, 1981, he was on duty at Mohale's Hoek police station when No.3 appellant came to him and asked to be issued with a firearm as he was going out on patrol. He issued a .45 revolver and 3 rounds of ammunition to No.3 appellant who then left in the direction towards the Mohale's Hoek bus stop.

Shortly, thereafter, PW.13 himself had to go to the bus stop. At the bus stop he noticed the appellant boarding a car which answered the descriptions of PW.1's car. He clearly saw that, at the time No.3 appellant boarded the car, Nos.1 and 2 appellants plus a third person he did not know were in that car. No.1 appellant was the one behind the wheel.

After No.3 appellant had gone into the car, it drove first to the local hotel from where it took the road towards Mafeteng. The evidence of PW.3, therefore, gave a lie to the appellant's story that they were never together on 1st November, 1981. His evidence was supported by that of PW.8, Phinda Phinda, who told the court that he was a saddler at Mohale's Hoek police station and knew the three appellants very well. During the week ending Sunday 1st November, 1981, he was on duty at Mafeteng. Towards sun set on that day he met the three appellants next to International stores in Mafeteng. They were in the company of a fourth man he did not know. They were fitting a spare wheel to the car in which they were travelling. The car answered the descriptions of PW.1's car. PW.8 greeted and actually assisted the appellants to fit the spare wheel on their car before parting with them.

7/ The evidence of

The evidence of the two complainants in Count II was that PW.6, Mokone Ntobane, was the first to be kidnapped into the car. PW.7, Halejoetsoe Mohale, was later met in the village and also ordered into the car. Because of insufficient light in the car PW.6 and 7 were unable to identify clearly the four occupants of the car. However, after PW.7 had been taken into the car, there was a time when the light was switched on in the car and PW.7 told to look at the back seat to see if he recognised PW.6. It was at that time that the two witnesses clearly identified the driver as No.1 appellant. He was of a lightish complexion, had a small beard on the chin and was putting on neither a shirt nor a vest.

It is common cause that an identification parade was later conducted by PW.11, W/O Sempe, and PW.12, Sgt. Letsie, in Mohale's Hoek where PW.6 and 7 positively pointed at No.1 appellant as the person who was driving the car into which they were kidnapped on the night of 1st November, 1981.

P.W.10 told the court that he was an employee of Mobile Service Station in Maseru and posted in Mohale's Hoek. He knew the three appellants very well. On the early morning of 2nd November, 1981 at about 5.30 a.m. he left Maseru for Mohale's Hoek. He was travelling alone in his combi. After crossing Makhaleng river about 12 or 15 kilometers from the village of Malea-lea, he noticed No.2 appellant who was wearing a short sleeved shirt and trousers only. He had no shoes on and appeared frightened. PW.10 confirmed that he stopped his combi to give No.2 appellant a lift. When he asked him why he appeared so frightened, the appellant replied that he was nearly killed by people who found him with his concubine. He had also heard a gun report and feared that No.3 appellant might have opened fire. According to PW.10 he dropped the appellant in Mohale's Hoek at about 8.00 a.m. on 2nd November, 1981. Although he conceded that PW.10 gave him a lift to Mohale's Hoek, No.2 appellant denied that he was going barefooted. There is no apparent reason why

8/ PW.10 could

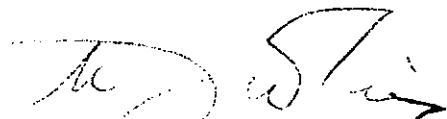
PW.10 could have fabricated against the appellant on this point.

The trial magistrate before whom all witnesses appeared and testified accepted as the truth, the Crown version that No.1 appellant was positively identified by the two complainants in Count II as the person who was driving the car into which they were kidnapped. He rejected as false the defence story that the appellant neither drove the car nor was at Malea-lee on the night of 1st November, 1981. I am not prepared to quarrel with this finding. Likewise the magistrate concluded on the evidence, that Nos.2 and 3 appellants plus a fourth person who was not charged were the people who committed the offences under Counts II and III together with No.1 appellant.

Considering the evidence of PW.13, PW.8, PW.10 and the complainants in Count II which was, in my view, rightly accepted by the trial magistrate, I am of the opinion that the conclusion arrived at by the magistrate was the only reasonable one in the circumstances of this case.

In the premises, I take the view that the answer to the question whether or not the three appellants were the persons who committed the offences under Counts II and III must be in the affirmative. In my view, these appeals ought not to succeed and are accordingly dismissed.

As indicated earlier, I have substituted for "House-breaking with intent to commit robbery" on Count III a verdict of "guilty of malicious injury to property" which is a lesser offence. The proceedings are, therefore, returned to the trial magistrate who must cause the appellants to appear before him and consider what would be the appropriate sentences on Count III on the basis of the substitute verdict.


B.K. Molai

30th November, 1984.

For Appellants : Mr. Monaphathi,
For Crown : Mr. Peete.