C. of A. (CRI) No. 1 of 1983

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

KHATAMPI RAMONYATSI Appellant

and

R E X Respondent

HELD AT MASERU

Coram:

MAISELS P
SCHUTZ J.A.
VAN WINSEN J.A.

J U D G M E N T

Schutz J.A.

The appellant was indicted in the High Court on a charge of murder together with his younger brother. The appellant was accused No. 1 and his brother No. 2. The victim (to whom I shall refer as the deceased) was one LETSOLOANE PAUL KHOLOANE. The murder was alleged to have occurred outside the Maluti Hotel, Mohale's Hoek on 21st March 1981. Both accused were convicted of murder by Mofokeng J sitting with assessors. Extenuating circumstances having been found the appellant was sentenced to twelve years imprisonment and the second accused to ten. Only the appellant has appealed to this Court, against both conviction and sentence.

The cause of the deceased's death was given as haemorrhage, caused by three wounds, two stab wounds high on the back, which

/penetrated

penetrated the chest cavity, and a bullet wound on the front of the chest. The medical evidence does not isolate any one of these injuries as being the sole cause of death. At the trial it was common cause that all three of these injuries were inflicted by the second accused. The case against the appellant was, accordingly, that he had acted together with the second accused, with a common purpose to kill the deceased.

Broadly two different versions were given of the events leading to the death of the deceased, that of the Crown, and that of the defence. The defence evidence was rejected by the trial Court, and in my opinion correctly. It therefore becomes unnecessary to consider that evidence in any detail. But that in no way relieves the Crown of the onus of establishing the appellant's participation in the crime or his intent to kill.

The facts have already been set out in the judgment of Mofokeng J and it is not necessary to repeat them at length. The trouble started outside a wall surrounding the Maluti Hotel, which the two accused had been visiting. The witness MOTHAE MATHAHA was in the vicinity in the course of performing his duties as a night watchman. The appellant came out of the hotel and an argument broke out between him and the deceased. Accused No.2 then also came out and on reaching the two he said, "Why do you let this man make us fools?" He (No.2) then hit the deceased with his fist. The deceased (who was a member of the P.M.U.) retreated and took out a firearm and threatened to shoot. The two accused got hold of him and beat him with their fists. MOTHAE and another or others

/sought

sought to intervene. At a stage he said that the deceased no longer had his pistol, but he gave no account of how he lost possession of it or where it got to. The deceased then ran away but No.2 tripped him. The deceased again succeeded in running away and No.2 caught him yet again. At this point the witness states that the appellant and he were trying to separate the deceased and No.2. At a later stage both accused again hit the deceased with their fists. The deceased again ran away. Accused No. 2 followed him and shot him, near an entrance to the hotel, upon which the deceased fell. When the shot was fired the appellant had fallen some distance behind and was still outside the outer wall abovementioned. Accused No.1 then ran away, shouting to the appellant that he had shot the deceased and calling to the appellant to drive the car so that they could get away. Both accused then drove off. A conspicious feature of this witness' evidence is that, although the deceased was stabbed twice, he made no mention of a stabbing or even of a knife. Indeed he said that he saw no knife, and that he was not aware that the deceased had been stabbed.

The witness MOHALE TALEJANE appears to have arrived on the scene at a relatively early stage, as he heard the deceased threaten to shoot. To the question, "Did you see how it (the firearm) looked like?" he answered "I did not see it because it was dark". After the deceased had fallen (at which stage?) he saw both accused get hold of him and hit him with their fists. Then he heard the firearm report. This witness seems to have been keeping a safe distance from fray, and is unable to give a detailed account of events, whether for

/the reason

the reason aforementioned, or because it was dark, or both. He also saw neither the stabbing, the knife, nor the firearm.

The witness TSIBOLE SEBOHAI went outside and found three persons fighting. He saw accused No.2 make movements as if stabbing someone in the back. While this was going on the appellant was holding the deceased by both his arms. Later TSIBOLE heard the firearm report. This witness is the only one who says that he saw the appellant participate in a murderous attack. Unfortunately it is not clear at what stage this participation occurred, or where the firearm was at the particular stage.

Mr. Masoabi for the appellant has concentrated his attack on the question whether it has been established that the appellant had an intention to kill. He points out that the appellant did not himself inflict any of the injuries, and rightly emphasizes that where more than one person is charged with murder the Crown must establish a subjective intention to kill against any one if the charge is to succeed against him : see Mohlalisi and others v Rex 1981 (2) LLR 394 at 398. He contends that there is no sufficient evidence that the appellant knew that accused No.2 was possessed of a knife or the pistol, or that the latter would use either. As far as the knife is concerned it is significant that only one of the three Crown eye witnesses (Tsibole) saw stabbing movements. Even he did not see the knife. None of the Crown witnesses saw the pistol until accused No.2 used it at a stage when the appellant had fallen behind; apart from the vague evidence of the night watchman that at a stage the deceased had lost possession of the pistol. As regards Tsibole's evidence that the

appellant held the deceased while No.2 stabbed him, he contends that it has not been established that the appellant knew that No.2 would use a knife before he did so. He points out that a knife could have been produced and two stab wounds inflicted within a very short space of time.

I think that there is substance in these submissions. It is by no means clear that the appellant did in fact know that a knife or a pistol might be used, or that he knew that the pistol had passed from the possession of the deceased to that of accused No.2. Even the effect of the evidence of TSIBOLE is ambiguous because it is clear neither that the appellant knew that a knife would be used, or, even if he did, that this occurred at a stage after the pistol had passed to accused No.2. On the evidence it is quite possible that the stabbing that TSIBOLE saw occurred at a stage when the appellant thought that he was contending with an armed man who had threatened to shoot, after a quarrel the rights or wrongs of which are uncertain.

Accordingly I am of the view that it has not been established beyond reasonable doubt that the appellant had the intention to kill. Mr. Peete, who appeared for the Crown, to my mind very fairly and correctly, conceded that position in his heads of argument and in his argument before this Court.

The appellant's appeal against his murder conviction based on the events at the Maluti Hotel accordingly cannot stand. Nor do I think that it is open to us to substitute a lesser conviction based on those events. Even a conviction of common assault is not in my view appropriate because it is uncertain whether when the appellant was striking the deceased with his fists he did not have some justification for doing so.

But the matter does not end there. According to Sergeant Sehlabo,

/after

after receiving information about the killing he went to the appellant's home. He was not there. He then met the appellant at gate and took him to the charge office. Because the deceased's pistol had not been traced he asked the appellant about it. The appellant gave him an explanation as a result of which he volunteered to take out the pistol at his home. The pistol was shown by the appellant on the roof of his house under an old tyre. Incidentally, the appellant stated in his evidence that after he and accused No.2 fled from the scene of the shooting he took possession of the pistol from the latter. The appellant's version as to how the police found the pistol differed entirely from that of Sergeant Sehlabo. He said that he set out for the charge office on foot, and met the police on the way. After some conversation the police asked him where the pistol was, and he then produced it from his person and handed it to them. The appellant was disbelieved, as I have said, and in my view rightly so.

The position then is that the appellant well knowing that accused had used the deceased's pistol to shoot him then placed the same in a place of concealment, and lied to the Court about having done so.

The question then arises whether this does not make the appellant guilty of being an accessory after the fact to the murder committed by accused No.2. A conviction on that crime is a competent verdict on the charge in terms of S.182(2) of the Criminal Procedure and Evidence Act 9 of 1981. The main legal principles governing the crime of being an accessory after the fact to a crime committed by another were discussed by Maisels P in Nteti Makamole and others v Rex C. of A. (CRI) No.1-2 of 1980 at pp 9-10. I adopt that discussion.

/Put

Put shortly, the necessary actus reus is present if the person after a crime "intervenes to help the perpetrator to evade justice". The necessary mens rea is supplied if the accused associates himself with the crime knowing of its commission, regardless of whether his purpose is to benefit himself or the principal offender. In that case Maisels P in convicting the second accused said of him: "He knew what A1 had done and he assisted in the cover up attempt to which I have referred ..... ".

In my opinion that is exactly what the appellant in this case has done, however unsuccessful his attempts have been, and whether or not there was any real prospect that his attempts to conceal would succeed. Accordingly I am of the view that the appellant should be convicted of being an accessory after the fact to the crime of murder.

There remains the question, what is the appropriate sentence for this crime? It suffices to say that the appellant has already been in custody for over three years. Mr. Peete concedes, and quite rightly in my view, that this is a sufficient punishment. The case must be approached on the basis that the appellant did not commit the crime of murder but subsequently succumbed to a temptation to aid his younger brother in distress. His attempt to conceal the pistol did not last long and does not appear to have been very seriously persisted in. By acting as he did he nonetheless made himself guilty of a serious crime, but I think he has already been sufficiently punished for it.

In the result I consider that the conviction of murder with extenuating circumstances and the sentence of twelve years imprisonment

/should

should be set aside and the following substituted : The appellant is found guilty of the crime of being accessory after the fact to the crime of murder. He is sentenced to be detained until the rising of this Court.

W.P. SCHUTZ
Judge of Appeal

I agree

I.A. MAISELS
President

I agree

L. VAN WINSEN
Judge of Appeal

Delivered this 25th day of April 1984 at MASERU.

For Appellant : Mr. Masoabi
For Respondent : Mr. Peete