IN THE LESOTHO COURT OF APPEAL

In the Matter between :

SETENANE MABASO	First Appellant
THABISO MOHLOUOA	Second Appellant

v

R E X	Respondent

HELD AT MASERU

Coram :

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

J U D G M E N T

Maisels, J.P.

The Appellants were indicted in the High Court on a charge of murdering one HABOFANOE RALEFU on 14th December 1981. They pleaded not guilty, but were found guilty and no extenuating circumstances having been found they were both sentenced to death. The matter comes before this Court on appeal against both convictions and sentences. The Crown case was that the Appellants, one or other or both of them, unlawfully and intentionally shot and killed the deceased who, in his lifetime, was the manager of one of Frasers Stores at Ha Mokhalinyane. There can be no doubt that he met his death as a result of his having been unlawfully shot by a person.

Shortly after 8 a.m. on the 14th December 1981 one man entered the premises of which the deceased was the manager, and shortly thereafter two others did so. It is the Crown case that

these three persons, acting together, conspired to carry out a robbery on the premises in question. All three persons were armed with guns or revolvers. As a result of certain incidents that occurred in the store, one of these three persons shot and killed the deceased. It is the Crown case that the Appellants were two of these three persons, the third one not having been found. Furthermore, it is alleged by the Crown that the first Appellant was the person who actually shot the deceased and that the second Appellant is guilty on the basis that he was a party to a common purpose.

This Court has had the benefit of a full and carefully considered judgment by the learned trial Judge, Mofokeng J. It would be a work of supererogation on my part to repeat the facts found by him. There can be no doubt on these facts that the first Appellant unlawfully shot the deceased nor, in my opinion, can the learned Judge's finding that there was a common purpose rendering the second Appellant equally guilty be faulted.

The Appellants were identified by certain witnesses at identification parades. On the 6th January 1982 the witnesses AMELIA MARAKE and MOLELEKENG MEJARO identified the first Appellant as the person who had shot the deceased. At a further identification parade held on the 19th January 1982, the second Appellant was identified by the witness MOLELEKENG MEJARO as being the person who was armed and who had ordered the personnel working in the store and other persons present to look in a certain direction whilst the robbery was being carried out.

Although certain criticisms were levelled at the manner in which the identification parades were held, I consider there is no

/substance

substance in any one of them. I am satisfied that there is no reason to believe that the identification parades were not properly held. It should however be mentioned here that at least two other persons who were witnesses to the crime, i.e. SELLOANE MPHOLO and LITABA MOETI were not apparently invited to attend an identification parade. Unless there are compelling reasons which should appear from the record why such persons were not asked to attend an identification parade, it would seem desirable in the interests of justice generally that where, as for example in this case, the defence was an alibi, as many witnesses as possible should be asked to attend identification parades. I have stated that this is in the interests of justice and by that I mean not merely looking at the case from the point of view of the defence but also, of course, from the point of view of the Crown. There may of course be cases where identification parades are not necessary but in this case they were necessary and, as stated above, those that were held were, in my judgment, satisfactorily conducted.

The witness SELLOANE MPHOLO identified both the Appellants and described their activities in Court. The witness LITABA MOETI likewise in Court identified the first Appellant as the person who had shot the deceased. Moreover, generally on the question of identification Mofokeng J. correctly in my judgment found that the witnesses had ample opportunity of seeing the Appellants.

I should mention here that the three persons referred to at the beginning of this judgment who took part in the robbery eventually left the premises, taking with them cash and blankets stolen from the store.

I have mentioned above that the defence was an alibi. As

/Mofokeng J.

Mofokeng J. correctly pointed out, the onus was on the Crown to prove its falsity. In essence, the evidence given by the Appellants was that on the day, and particularly the morning, in question, they were together and in the course of that morning they visited one MOTAUNG. MOTAUNG was not called by the defence and the learned trial Judge in pursuance of his duties in terms of Section 202(2) of the Criminal Procedure & Evidence Act, 1981, had MOTAUNG subpoenaed to give evidence. Quite apart from the statutory provisions contained in Section 202(2), having regard to the facts of this case and the evidence given by the Appellants, the learned trial Judge was perfectly entitled in the exercise of his discretion under Section 202(1) to have MOTAUNG give evidence.

Cf. R. v Hepworth 1928 AD 265

MOTAUNG, far from supporting the evidence of the Appellants as to their being in his presence on the morning the crime was committed, gave evidence which was totally at variance with that of the Appellants. The analysis by the learned trial Judge of the evidence of the Appellants, coupled with that of MOTAUNG, who was found to be a creditworthy witness, leaves me in no doubt that the alibi of the Appellants was demonstrated to be false. It was, in my judgment, correctly rejected by the Trial Court.

The sole remaining question for consideration is whether in view of the fact that the shooting was done by the first Appellant, the second Appellant who, as already pointed out, also carried a firearm, was rightly found guilty by the learned trial Judge on the basis that there was the necessary common purpose.

In S. v Mdlala 1969(2) SA 637 (A) at 640 F, HOLMES J A in a

/passage

passage referred to by Mofokeng J. said:-

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -
>
> (a) that he individually killed the deceased, with the required dolus, e.g. by shooting him; or
>
> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S. v Malinga and Others 1963 (1) SA 692 (AD) at p.694F-H and p.695; or
>
> (d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder.
>
> It is, of course, plain that, in the absence of proof of common purpose, a Court cannot convict co-accused on the footing that one or the other or both of them must have done the deed, for that basis postulates the possible innocence of one of them."

In so far as the first Appellant is concerned, there can be no doubt on the evidence, to use the words of HOLMES J A in sub-paragraph (a) quoted supra, "that he individually killed the deceased, with the required dolus, e.g. by shooting him". The circumstances of the killing of the deceased, as testified to by the witnesses for the Crown, demonstrate , in my opinion, a cold-blooded murder on his

/part.

part. In so far as the second Appellant is concerned, there is not the slightest doubt that he was a party to a common purpose to commit a crime of robbery and that he foresaw the possibility of one or other of his fellow robbers who entered the store armed with a firearm, as he himself did, causing death to someone in the execution of the plan to commit robbery and that he persisted, reckless of such fatal consequence, and that it did indeed occur. I am left in no doubt that, to put it at its lowest, the second Appellant foresaw the possibility of one of his co-robbers killing somebody in the execution of the robbery, particularly having regard to the fact that each one of them carried a firearm.

It follows from what I have said that, in my judgment, the Trial Court had no option but to find the second Appellant guilty.

The question of extenuating circumstances was carefully and fully considered by Mofokeng J. He correctly, in my opinion, stated the law on the subject of extenuating circumstances and applied the law to the facts of the present case. He came to the conclusion, as stated at the commencement of this judgment, that he was unable to find any extenuating circumstances.

In my view there are no grounds whatsoever for interfering with the learned trial Judge's finding. This was a premeditated robbery, an innocent person was murdered, the two Appellants, the one who actually shot and the other who has been found guilty of acting in common purpose with him, were intent on carrying out this robbery making use of firearms, and the public is entitled to be protected against conduct such as that of which the Appellants have

/been

been found guilty. I am unable to find any factor which in any way justifies a finding of extenuating circumstances. It follows therefore that, in my opinion, the appeals of both Appellants must be dismissed.

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

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

Delivered on this 25th day of April 1984 at MASERU

For Appellants : Mr. Snyman

For the Crown : Mr. Kamalanathan with him Miss Nku