

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTSOSI MAHLEKE	1st Appellant
SEISA NAILANE	2nd Appellant
NTSALA PITA	3rd Appellant
SEBAPALA MAHLEKE	4th Appellant
SELLO THAKALI	5th Appellant

v

R E X	Respondent
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J U D G M E N T

Verdict
was given by the Honourable Acting Mr. Justice
M.L. Lehohla, on the 24th day of June, 1986
and undertook to submit reasons for judgment.

Here do they now follow:

The above appeal came before this Court on 24th
June, 1986.

A preparatory examination was held at Teyateyaneng
following the death of one Kolisang Molise.

At the close of the Preparatory Examination the
accused were committed for trial to this Court on a murder
charge but later the Director of Public Prosecutions gave
directive that the case be remitted to the subordinate court
on a charge of Culpable Homicide.

The case for the Crown rested on the evidence of
six witnesses. However, Mr. Ramodibedi for the appellants
chose to cross-examine only P.W.2 Detective Trooper Seboka,
P.W.3 Khoase Pita and P.W.4 Lekhotla Mahleke.

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The facts of the case reveal that the deceased Kolisang Molise had had some differences with one Molele Mahleke resulting in the death of the latter.

The appellants who were fellow-villagers of both the deceased Molise and Molele Mahleke were also closely related to the latter.

P.W.1 'Maseabi Mahleke gave evidence which showed that on 6th January, 1985, he in his capacity as a chief received a report following which he went to Khoase's home where he found Molele Mahleke dead. Thereupon he started looking for the alleged killer Kolisang Molise

the deceased. He had apparently locked himself up in Khoase's house. The chief remained at the door and sent for the police.

Before the police could arrive, all the appellants told P.W.1 that they wanted the deceased who had killed their brother. The chief refused to open the door but was removed therefrom by force amidst his protestations that their actions were unwise as enough blood had been spilt already.

Appellant 1 was at the door trying to break it in order to gain entry. Appellants 2 and 3 were digging at the side of the wall the house built of mud, while Appellant 5 was on the roof removing the thatching from the rafters. Appellant 4 is said to have been present at the door while all this was taking place. The appellants then started throwing stones through the hole opened on the roof. Later the deceased was heard saying "Ichu, you have finished me!"

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At that time Appellant 1 was seen at the top of the roof. He afterwards came down, opened the door, dragged the deceased out and belaboured him with a stick until he died. The other The other appellants did not participate in the assaults at this stage for they are said to have just stood by armed with sticks.

Through cross-examination Mr. Ramodibedi was able to establish that P.W.2 was not telling the truth when he said Appellant 1 said: "I am killing this person because he has killed my brother" as this statement was not borne out in the Preparatory Examination record. Asked why he lied like that P.W.2 said it was because he is illiterate!! The witness admitted that he had lied and further he had no reason to expect the Court to rely on his evidence. The witness said he was frightened by what he had seen and ran away. He was related to the deceased and had been too far to hear what the deceased said nor could he see well what happened. He could not gainsay a statement that deceased was attacking Appellant 1 with a knife which he had just used to kill Molele Mahleke. Nor could he gainsay the statement that Appellant 1 was defending himself by hitting the deceased about twice with a stick, nor that the aim of Appellant 1 was to arrest deceased for killing Molefe. This knife was later found at the scene of crime.

In keeping with the story advanced by the eye witnesses for the Crown that Appellant 1 was belabouring the deceased P.W.2 Trooper Seboka said he observed numerous injuries on the body of the deceased. In sharp contrast to this

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evidence was the medical evidence given by P.W.6 Dr. Gotink who performed the post-mortem examination. In his report he was adamant that the deceased only had a wound on the left side of the back of the head plus two small wounds on the right upper leg. This cannot consist with the alleged belabouring of the deceased and numerous wounds; observed on him.

P.W.4 for the Crown pointed out deceased was a dangerous man fighting Appellant 1 with a knife and that he was intent on killing any of the Mahlekes. The deceased had been heard earlier by this witness saying "Your mother's front passages Bafokeng. I have been long telling you that I will kill you." While uttering these words he was carrying a stick and opening a knife and making for P.W.4 in a threatening manner with the result that P.W.4 ran away.

The Crown's attitude as indicated in the heads of argument is that "this is not a case in which it could press for confirmation of the finding of the Court a quo". The Crown further conceded that there are a lot of serious discrepancies in the prosecution's evidence which ought to be decided in favour of the appellants. The Crown further submitted that "it is quite clear that the accused's story might probably be true.

In its supplementary heads of argument the Crown submitted that the sentence of three years' imprisonment was too harsh in the exceptional circumstances of the case and that the learned magistrate erred in imposing a uniform sentence upon

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each of the appellants regardless of the degree of the alleged participation by each and personal circumstances of each. With this submission I agree.

However, Appellant 1 in re-examination told the Court as follows:-

"Where had you hit the deceased as the result of which he fell? On the head.

You said when he fell you hit him twice. What I ask is you hit him twice while he was on the ground? While he was on the ground.

Where did you hit him? I was confused I did not see.

Tell the Court where you hit him? On the thigh."

It is with regard to the statement contained in the above quotation that I feel that Appellant 1 exceeded to some extent the bounds of self-defence.

All appeals against conviction and sentence for Culpable Homicide are upheld.

The verdict in respect of Appellant 1 is altered to read "guilty of common assault". Appellant 1 is sentenced to one and half years' imprisonment the whole of which is suspended for two years on condition that he be not convicted of a crime involving violence committed during the period of of suspension.

(M.L. LEHOHLA)
ACTING JUDGE

7.7.1986.

For Appellant - Mr. Ramodibedi
For Respondent - Mr. Seholoholo