C. of A. (CRI) 7 of 1989

IN THE LESOTHO COURT OF APPEAL

In the matter between:

NARO LEFASO — Appellant

v

R E X — Respondent

Held At Maseru

Coram:

Schutz P.
Plewman J.A.
Ackermann J.A.

JUDGMENT

Schutz P.

The appellant was convicted of murdering Mampoca Pae Pae, without extenuating circumstances being found, and was sentenced to death. He appeals to this Court against the whole of the judgment.

The murder took place on the night of 28 June 1988 at or near Bentele in the district of Butha-Buthe. The Crown relied principally upon two witnesses (PW1 'Mota Pae Pae, and PW2 Mantsoaki Pae Pae) to identify

/the appellant ...

the appellant as the murderer (identification being in issue) and to describe the circumstances of the murder.

PW1 was the son of the deceased, and PW2 is his wife. On the night in question PW1 was already in bed when he heard the deceased screaming "Oh my son Caswell the house is on fire". He woke up his wife and went out of his house, to find the deceased outside her reed house, which was on fire. The appellant, he said, was hitting the deceased with a knobkerrie. It was a moonlit night. He raised an alarm. He said that when the appellant was hitting the deceased she was already on the gound, and that she was bleeding from the nose and the mouth. Like his wife he said that the appellant was wearing a "donkey blanket". Upon arriving at the scene PW1 said to the assailant that "I am now stabbing you since you are killing my mother and have set fire to her house". For the purpose of stabbing he had taken what he called a "reed". He went on to say that the assailant, "ran away when I came near but he came back and I said I would stab him. It was then that I identified him to be Naro (the appellant)". He explained that when he ran away the first time he immediately turned back, and that it was then that he (PW1) took the reed and said he would stab him. When he ran away the second time the appellant disappeared. He stated that his house and deceased's faced one another.

/He said ...

He said that he knew the appellant "very well". The appellant conceded that PW1 had no quarrel with him, and could give no reason why he should consciously implicate him falsely. He said that both PW1 and PW2 were not telling the truth when they said they had seen him on the night in question. He did not volunteer any reason why PW2 should have implicated him falsely. Indeed the first two Crown witnesses and the appellant were part of the same community.

P.W.2 largely corroborated the evidence of her husband. She said that it was the appellant who was hitting the deceased over the head with a knobkerrie. She saw three blows struck. The deceased was just next to the door. Asked about the state of the light she said, "there was a flame light as well as the moonlight": and asked in which direction the house was burning, she said the front. One Mamoliehi Pae Pae,, who had been joined as accused No.2 with the appellant in the magistrate's court, had been the lover of the appellant, she said. She was asked if she knew a man called Phamola and she said no. The purpose of this question was not explained and it was not developed.

The learned Judge a quo believed the Crown witnesses, including the first two. The appellant's evidence was rejected as false beyond doubt.

/ The appellant...

The appellant deposed that on the night of the murder he had been in the Orange Free State to fetch his money from one Phamola. He had gone late (he did not say how late) because he was running away from the police on the other side of the river. Although he had a passport, he did not use it but crossed the river "because that farm (where Phamola was supposed to be) is very near". He failed to get his money. When he returned home he heard of the death of the deceased. He said he came back "early in the morning". The transcript of the evidence of 'Malikeleko Pheello, which had been given at the preparatory examination, and which had been put in by consent as being correct, was put to him. She had said that on the night of 28 June some people had come searching for him, but he came home "very early in the morning". The appellant denied this, saying that he arrived after sunrise. PW8 went on to say, "He (the appellant) went away during the day. Police came. Accused disappeared until I see him today (at the preparatory). The knobkerrie before court belongs to accused 1 (the appellant acknowledged that it was his). I handed the knobkerrie to Police ....". The appellant said that on the day of his return home he went back to the Free State where he stayed the night. His knobkerrie he left at home. When he again returned he found it gone. He returned at night as he was ruuning away from the South African Police. He then met his sister 'Mathabang Khoana (PW6). He told her that it was said that he was suspected to have killed 'Mampooa

/and that ...

and that he was going to Butha Buthe police station. On the way there, he said, he met a policeman in a vehicle. The policeman asked where he was going and he answered, to the police station. The policeman, he said, did not arrest him. This is to be contrasted with the admitted evidence of PW10, Trooper Khoboliso who stated that on 1 July 1988 (which seems to be the day on which the appellant says he returned from the Free State the second time) he was in a public vehicle when the appellant boarded. He arrested the appellant when they reached town, the appellant saying that he was going to surrender himself.

I now turn to the question of whether the identity of the appellant has been established beyond reasonable doubt. When this question is weighed it is necessary to consider not only whether PW1 and PW2 were honest (as the learned Judge found they were), but also whether there was any reasonable possibility of their being mistaken.

There is the direct evidence of two witnesses identifying the appellant. He was no stranger to them. Accordingly those great dangers of wrong identification that exist where a witness who has had a limited opportunity of identifying a stranger, are largely absent here. The fact that the witnesses did not offer descriptions of the appellant is also by the way in a

/case like ...

case like this. Recognition of a person whom one knows is often not easily defined. All sorts of almost sub-consciously rememmered features, gestures, movements, shapes, dimensions and so on go to make up recognition. The question then is whether the two witnesses had so sufficient an opportunity of observing the appellant as to exclude the possibility of error. In my opinion their identification can be relied upon. Although it was night, not only was there moonlight, but the reed hut next to which the deceased and the appellant were was ablaze. Moreover, the witnesses could not have been far from the appellant. The huts of the deceased and PW1 face each other, and were so close to each other that he could hear her words when she cried out. Then, PW1 came close enough to the appellant for the former to address him and threaten to engage him in battle. Another small detail of PW1's evidence impresses me. He did not claim that he recognized the appellant when he first went up to him, but only on the latter's return. This is not, in my opinion, the evidence of a careless witness.

Mr. Moorosi, who appeared for the appellant, contended that the fact that the evidence did not reflect that PW1 had called out the name of the appellant when he gave the alarm indicated that he had not recognized the appellant. The answer to this contention is that there was ample evidence that the appellant was being sought during the night in question. He himself acknowledged

/that when ...

that when he spoke to his siter he knew that the police were looking for him. As the evidence was that it was only PW1 and PW2 who saw him at the scene of the murder, it must have been they who had named him.

A further factor weighing against the appellant is his second trip to the Free State after he knew that the police were looking for him in connection with the murder of the deceased. This was hardly the behaviour of an innocent man.

I turn next to the alibi raised by the appellant. The first problem with the alibi is that even if the appellant went to the Free State on the night of the murder there is no knowing at what time he went, so that it could have been after the murder. Second, even if he did go before the murder, the place to which he went was so close that he could have come back again during the night and again returned to the Free State.

But there is a more fundamental problem with the alibi, and that is that it was never put to the Crown witnesses, and first emerged during the evidence of the appellant. I have already alluded to the question about one Phamola which was put to PW2. As I have remarked it was not developed. Indeed it was not put to the two eye witnesses even that the appellant had not been at the scene of the crime. The need for the defence to put the salient parts of the defence case to

/the relevant ...

the relevant Crown witnesses has been stressed by this Court over and over again. One reason for putting the defence version is to give the Crown witnesses a chance to counter it. Another is that Crown Counsel is entitled to assume that a fact is not in issue if it has been deposed to and is not challenged in cross-examination. There is no call on prosecuting Counsel to call further witnesses to prove a fact which is not in issue. From an accused person's point of view failure to reveal his version before he gives evidence leads to the natural inference that he has concocted a version at the last minute, even though such an inference should not always be drawn. In this case the appellant actually admitted that his counsel did not know what story he was going to tell in the box. That is somewhat called into question by the defence counsel's asking about Phamola. It is difficult to see why he asked the question if his client had not told him something about the trip to the Free State or about Phamola. Either way the appellant is in trouble. Either he concocted the alibi or he was shown to be a liar for another reason.

More generally his story of his nocturnal flittings across the border does not have the ring of truth. Moreover, his counsel gave up attempts to find the witness who was supposed to support his alibi, suggesting he was in custody in South Africa. One would have thought that on a matter of such very great importance a more determined effort would have been made if a witness or witnesses actually existed. I would add that the

/appellant's ...

appellant's credibility fares no better on the extenuation issue, with which I have yet to deal.

Bearing in mind that no motive for the crime has been proved, which is always a cause for concern, and that the appellant bears no onus to prove his alibi, I am of the opinion, taking into account what I have said above that the identity of the appellant as the murderer has been proved beyond all reasonable doubt.

Accoringly I find that the appellant was correctly convicted of murder.

I turn to the question of extenuation. Extenuating circumstances are such as reduce the moral, if not the legal guilt of the accused. The onus of proving them, on a balance of probability, rests on the accused.

Mr. Moorosi urged on us that a direct intention to kill had not been proved, only dolus eventualis based on recklessness. I do not accept accept that submission. The appellant was delivering a murderous assault upon the deceased when she was already on the ground, and this assault was interrupted by the arrival of PW1 and PW2. The medical evidence showed that the deceased's skull had been stove in, with an extensive fracture on the left of the head, the skull bones having been deeply depressed down on the brain.

/The appellant ...

The appellant led no evidence on extenuation. The judgment on extenuation reflects that the appellant's counsel argued as follows: "A woman 'Mamoliehi whose name appeared time and again in this case is said to have been in love with the accused. She is also said to be the deceased's close relative. The court was asked to take into account that in the absence of this woman's husband the deceased had a high degree of care over her. Accused through his counsel maintains that 'Mamoliehi has caused the breakdown of accused's own marriage in the sense that he and she lived virtually as man and wife. 'Mamoliehi played on accused's feelings to the extent that she urged him to get rid of the deceased who seemed to be interfering in their illicit love affair. It was projected as accused's weakness or human failty that he failed to appreciate that deceased was entitled to live also; and thus fell to the temptation of putting her away at the instigation of his lover 'Mamoliehi."

The first difficulty with this argument is that in his evidence the appellant said that he had loved 'Mamoliehi long ago, but that when the deceased died they were not in love. The second difficulty is that there was no evidence to support the artument. It had been open to the appellant at the extenuation stage to give evidence again, contradict his former evidence of innocence, and try to persuade the Court that extenuating circumstances existed. This would have involved admitting guilt. But this the appellant did

/not do. ...

not do. He tried to ride two horses, protesting his innocence (as his argument in this appeal shows), whilst contending in the alternative that if he was guilty his guilt was extenuated by facts that supplied the motive for the murder that he in fact committed. This is generally a fifficult posture, and in this case, I think, an impossible one. He cannot have it both ways. If he had given evidence anew, admitted guilt and sought to prove extenuating circumstances, he would have been subject to cross-examination, in which his subjective state of mind, a matter of great importance, could have been tested.

This leads to the third major difficulty. Even if the version argued were to be accepted, it is far too general, in my view, to establish extenuation. The mere fact that a person stands between another and a desired object does not mean that the murder of the former by the latter is extenuated. If it were otherwise a wife who murders her husband in order to encash the insurance policies he has taken out on his life in her favour could be said to have her moral guilt lessened because of the fact of the husband's "obstruction". For the argument raised to succeed it would be necessary to probe the state of mind and feelings of the appellant and this presupposes evidence.

During the course of the appeal there was considerable debate about the status, if any, of the argument referred to above, and in particular as to whether the

/Crown ...

Crown had accepted it as being factually correct. The debate ended inconclusively. I would stress that in a matter as vitally important as extenuation, if the defence counsel wishes to rely on an ex parte statement not based on sworn evidence he should ascertain clearly whether the Crown admits its factual correctness. If the Crown does not, defence counsel must consider whether he will lead evidence or not. Needless to say I am not referring to an argument which seeks to derive inferences (that extenuate) from proved facts, but an argument that asserts facts as facts without proof of them themselves.

In the light of what I have said above I am of the opinion that the trial court was correct in finding that extenuating circumstances had not been proved.

In the result the appeal is dismissed.

(Signed) .....
W.P. SCHUTZ
PRESIDENT

I agree (Signed) .....
C. PLEWMAN
JUDGE OF APPEAL

I agree (Signed) .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at MASERU this 26th day of January, 1990.

For the appellant: Mr. S. Moorosi

For the respondent; Mr. Mokhobo