CRI/T/69/89

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. MATHE MEJARO
2. TSITSO MAHAO
3. MORENA KHABO
4. LEPEKOLA MAKUTOANA
5. META MAHAO
6. LEFA MAPOONE
7. MASANDO TAU
8. MOJAKISANE TSOANA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 11th day of April, 1990.

Held at Quthing

The accused have pleaded not guilty to a charge of murdering one Nkane Nkane, it being alleged that on or about 1st October, 1985 and at or near Thaba-Tsoeu in the district of Mafeteng, they each or some or all of them unlawfully and intentionally killed the deceased.

This trial commenced during the criminal session that was held in Quthing at the beginning of March, 1990. I was then sitting with two assessors who, however, did not come to Maseru when, at the end of the session, the trial became part-heard. Different assessors had, of necessity, to be engaged when the hearing resumed in Maseru. The evidence of P.W.1, Ntsupi Tlelaka, and P.W.2, Nkhabe Mahasele, who

2/ testified .....

testified in their absence in Quthing has been read to the present assessors when the hearing resumed here in Maseru. The present assessors are, therefore, aware of the whole evidence that has been adduced in this trial.

It is perhaps convenient to mention at this juncture that originally there were altogether 15 accused. Before the charge was read and explained to the accused, Mr. Sakoane, the crown counsel, told the court that he was withdrawing the charge against six (6) of them. One of the accused persons had, since the holding of the Preparatory Examination, passed away. The charge was likewise withdrawn against him. The trial proceeded, therefore, only against the present eight (8) accused.

It is again, worth noting that during the course of the hearing of this trial Mr. Sakoane accepted the admissions made by Mr. Nathane and Mr. Mohau who, respectively represented A1, A3, A4, A5, A6, A7, A8, and A2 that the defence would not dispute the depositions of Makatise Nkane who was P.W.8 at the proceedings of the Preparatory Examination. In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981 the depositions of Makatise Nkane were admitted in evidence and it was, therefore, not necessary to call the deponent as a witness in this trial.

By agreement of counsels on either side, the post-mortem Examination Report conducted on the body of the deceased was handed in from the bar as Exhibit A. It was likewise unnecessary to call the medical doctor who had performed the autopsy on the body of the deceased as a witness in this trial.

3/ It is significant .....

It is significant to mention that at the close of the crown case the defence applied for the discharge of all the accused persons on the ground that the crown had failed to adduce evidence upon which the accused might be convicted. The application was opposed by the crown.

I pointed out that a distinction had to be made between two situations viz. the situation where an application is made for the discharge of an accused person at the close of the crown case and a situation where, at the close of the defence case, the court is asked to determine whether or not the accused person has committed the offence against which he stands charged.

As regards the first situation, the test to be applied is that of prima facie case i.e. all what the court is expected to do is to look at the evidence and ask itself the question whether or not the crown has adduced evidence on the face of which the accused might and not should be convicted. I am not aware of any law that compels a court of law to deal with credibility of evidence at that stage unless, of course, it could be argued that the evidence adduced by the crown was so hopeless that to decline to deal with credibility and refuse the application would amount to asking accused person to go into the witness box and help built a case which the crown had failed to establish.

As regards the second situation, the test to be applied is that of proof beyond a reasonable doubt. A court of law is entitled to reserve the question of credibility to the stage when the defence will have closed its case. It will then be bound to deal with credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the accused has committed the offence against which he stands charged.

4/ As it will .....

As it will be shown in a moment, in the instant case there was evidence adduced by the crown that the accused, together with other people who are not before the court, belaboured the deceased to death with sticks and other weapons even after the latter had fallen down and was, therefore, not posing any danger to them. On the face of it, and without going into the question of its credibility, such evidence does, in my opinion, establish a prima facie case for the accused to answer. For these reasons I came to the conclusion that the application for the discharge of the accused persons at the close of the crown case ought to be refused. It was accordingly ordered.

I, however, pointed out that the fact that the court had turned down the application did in no way compel the accused persons to go into the witness box and testify in their defence. The defence were perfectly entitled to tell the court that in that event the accused were closing their cases without giving any evidence in their defence. Indeed, Mr. Nathane, counsel for Nos 6 and 7 accused, told the court that the accused had, as they were entitled to do, decided to close their case without going into the witness box to testify in their defence. However, both Mr. Nathane and Mr. Mohau told the court that the rest of the accused persons would go into the witness box and testify in their defence.

The defence having closed their case, I shall now proceed to deal with credibility of evidence and apply the test of proof beyond reasonable doubt to determine whether or not the accused have committed the offence against which they stand charged.

In as far as it is relevant, the evidence heard by the court was that adduced by P.W.5, D/Tper Lephoto, who testified that on the day in question, 1st October, 1985, he was on duty at Mafeteng police

5/ station when .....

station when he received a certain report following which he proceeded to a place called Thaba-Tsoeu. He was shown the dead body of the deceased in the veld. On examining it for injuries he found that the body had sustained multiple weals all over the back, multiple open wounds on the head, shoulders, back and ribs. He conveyed the body to the mortuary at Mafeteng Government hospital. It sustained no additional injuries whilst it was being transported from Thaba-Tsoeu to the mortuary. I shall return to his evidence later in this judgment.

According to Exhibit A. the post mortem examination report of 2nd October, 1985, a medical doctor performed an autopsy on a body of a male African adult at the mortuary of Mafeteng Government hospital. The body was identified as that of the deceased, Nkane Nkane, by Tanki Nkane and Makatise Nkane.

This is confirmed by P.W.6, Tanki Nkane, who testified that the deceased was his own son. It is also confirmed by Makatise Nkane whose depositions at the Preparatory Examination proceedings were, as it has already been stated earlier, admitted as evidence in this trial in terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981.

The findings revealed by the examination of the medical doctor were that the deceased had sustained multiple injuries e.g. six (6) open wounds on the head of which one wound was very big, a stab wound on the shoulder, at the back of the neck, at the lower back and in the middle. From these findings the medical doctor formed the opinion that death was due to the multiple injuries.

I can think of no good reason why the unchallenged expert opinion of the medical doctor that the deceased died as a result of the multiple injuries which had been inflicted upon him

should be doubted. That being so, the salient question for the determination of the court is whether or not, the accused are the persons who inflicted upon the deceased the multiple injuries that brought about his death.

In this regard, it seems to be common cause that on the day in question, 1st October, 1985, the accused and many other men who are not before court now, set out to impound animals that were grazing along the slope of Mathebe mountain in the area of Thaba-Tsoeu. According to the accused the area was reserved from grazing, a fact which is, however, denied by P.W.1 Ntsupi Tlelaka and P.W.2, Nkhabe Mahasele. The evidence of the accused that the area was reserved from grazing was corroborated by P.W.3, Putsoa Seo, and P.W.4, Koporala Motanyane.

I must say I fail to understand why the accused would have gone out to impound those animals from the mountain slope if the area were, indeed, not reserved from gazing, as both P.W.1 and P.W.2 wish this court to believe. It seems to me reasonable to accept as the truth the evidence of the accused corroborated by that of P.W.3 and P.W.4 that the area was reserved from grazing and reject as false the evidence of P.W.1 and P.W.2 that it was not.

According to him, on the day in question, P.W.1 was outside his house in the village of Manganeng when he noticed a large number of men from the neighbouring village of Ha Masetlokoana passing about 150 paces below his house. The accused were definitely amongst those men. As the men were heavily armed with spears, swords and sticks, P.W.1 became curious as where they were leading to. He followed them at some distance of about 170 paces away. He saw them going to the spot where animals were grazing along the slope of Mathebe mountain. On arrival they went straight to the

deceased who was herding his animals. A stone throwing fight ensured between the accused and the deceased who was joined by many other herdboys. When the stones got finished A1 and A2 were the first to rush at and attack the deceased with sticks. In the process the deceased fell to the ground. The other herdboys then scattered and ran away whilst A1 and A2 together with many others continued to belabour the deceased where he was lying prostrate on the ground. According to him, P.W.1 saw A1 actually stabbing the deceased with a spear after the latter had fallen to the ground.

In his evidence P.W.2 told the court that on the day in question he, the deceased and many other people were herding animals on the slope of Mathebe mountain. He confirmed that the accused and many other men from the neighbouring village of Ha Masetlokoana arrived and a stone throwing fight took place between the deceased on one hand, and the accused and the other men from Ha Masetlokoana on the other hand. He was not, however, aware of how the fight had started. In the course of the stone throwing fight P.W.2 noticed some of the men rushing at, and attacking, the deceased with sticks. A1 and A2 were definitely amongst the men who assaulted the deceased with sticks. As he was thus assaulted the deceased fell to the ground and was belaboured by his assailants even after he had fallen to the ground. At that stage P.W.2 drove, and ran away with, his animals chased by some of the men from Ha Masetlokoana.

P.W.2 further told the court that P.W.1 was one of the people herding animals on the slope on that day. He was in fact looking after his horse some distance away from the place where he (P.W.2) and other people were herding their animals but still on the mountain slope. P.W.2 denied, therefore, P.W.1's suggestion that, on the day in

8/ question, ...

question, he was not herding animals in the veld and had merely followed the accused from the village.

It may, perhaps, be mentioned at this stage that P.W.1 had told the court that after he had seen, at a distance, the accused brutally assaulting the deceased he returned home but on the way met the deceased's father to whom he reported what had happened to his son. The deceased's father returned home whilst he (P.W.1) went back to the animals that the deceased had been herding. This is, however, denied by the deceased's father who told the court that he never met P.W.1 on that day.

I must say I find it difficult to understand why P.W.1 and not the deceased's father would go to look after the deceased's animals after the latter had been assaulted and rendered incapable of looking after his animals. I am inclined to accept as the truth P.W.2's story that P.W.1 was, on the day in question, herding his horse on the mountain slope and reject as false the latter's version that he merely followed the accused from his village.

Be that as it may, the evidence of P.W.4, Koporala Motanyane, was to the effect that he lived in the same village as the accused did. On the day in question he, the accused and many others from the village of Ha Masetlokoana proceeded to impound animals that were trespassing on the slope of Mathebe mountain which was an area reserved from grazing. The area was within the jurisdiction of Chieftainess Masetlokoana. As they went to impound the animals P.W.4 and his party were carrying sticks with which to drive them (animals).

On arrival at the reserved area P.W.4 and his party started rounding up the animals. As they were so doing, there appeared from

9/ the upper .....

the upper side of the mountain slope several men and boys who threw stones at them. P.,W.4 and his party left the animals and ran away chased by those men and boys who were apparently the owners thereof. In the course of the chase the owners of the animals caught up with one Tsoene Mahao and assaulted him. P.W.4's party stopped running away and returned to rescue Tsoene. A stone throwing fight then ensured between the owners of the animals and P.W.4's party. During the course of the fight P.W.4 noticed the deceased already fallen on the ground, obviously injured. He did not know who had actually injured the deceased.

P.W.4 and his party were unable to impound the animals that were grazing on the reserved area and eventually had to return home. They went to the chief's place and reported the incident to Chieftainess Masetlokoana who was, however, not called to testify in this trial.

The evidence of P.W.3 was, in all material respects, identical with that of P.W.4, save that in addition the former told the court that when he noticed the deceased fallen on the ground he and A4 went to, and assaulted, him.

It is significant to observe that both P.W.3 and P.W.4 were declared accomplice witnesses. There is, therefore, the need to approach their evidence with utmost caution. As Schreiner, J.A. once put it in the leading case of Rex v. Ncanana 1948(4) S.A. 399 at p. 405:

> "an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

It will be remembered that in their evidence P.W.1 and P.W.2 have told the court that A1 and A2 were definitely among the people who actually attacked and assaulted the deceased even after the latter had fallen down. In his testimony before this court, P.W.4

10/ seems to .....

seems to claim ignorance of this fact. It is worth noting, however, that when, on 13th October, 1987, he testified at the proceedings of the Preparatory Examination, P.W.4 told the presiding magistrate in no uncertain terms, that during the stone throwing fight he actually saw the deceased coming forward and meeting A2. The two exchanged blows with sticks and one of the blows delivered by A2 landed on the head of the deceased who fell to the ground. At that stage A1 came and stabbed the deceased at the back of the head with an iron rod. He, Tsokolo and A4 then delivered blows on the deceased who was still lying prostrate on the ground whilst the rest of the accused were busy chasing after the owners of the animals. P.W.4's evidence at the Preparatory Examination proceedings that A1 and A2 did assault the deceased is, therefore, corroborated by P.W.1 and P.W.2. There is no doubt in my mind that P.W.4's denial before this court that he saw A1 and A2 assaulting the deceased is an afterthought which I have no hesitation in rejecting as false.

Now coming back to his evidence P.W.5 told the court that after he had conveyed the body of the deceased to the mortuary, he continued with his investigations of this case. He returned to Thaba-Tsoeu where he met, amongst others, all the accused before court. He was given certain explanations by the accused and other people who are not before court now. Accused 1, 4 and 2 handed over to him their sticks. He took possession thereof and handed them as Exhibits 1, 2 and 3, respectively. He cautioned, arrested and charged the accused as aforementioned.

As it has already been pointed out earlier, A6 and A7 have elected to remain silent and close their case without giving evidence in their defence. However, A1, A2, A3, A4, A5 and A8 went

into the witness box and testified in their defence.

In his evidence D.W.1, Mathe Mejaro, told the court that on the day in question he noticed animals belonging to the deceased and others trespassing on an area reserved from grazing. He reported the incident to Chieftainess Masetlokoana. On the instructions of the chieftainess he and others went to impound those animals. As they were rounding up the animals the owners thereof attacked them with stones. They ran away chased by the owners of the animals. During the chase one Tsoene got injured. They stopped running away and went to rescue Tsoene. A stone throwing fight ensued between his party and the owners of the animals. In the process Tsoene managed to escape and run away. However, the stone throwing fight continued during which he noticed the deceased already fallen on the ground and injured. He did not know how the deceased had got injured and denied, therefore the evidence that he had stabbed the deceased after the latter had been knocked down with a stick by A2.

The evidence of D.W.2, Tsitso Mahao, and D.W.6, Mojakisane Tsoana was, in all material respect, identical with that of D.W.1 save that according to him, D.W.6 lost his stick whilst he was running away chased by the owners of the animals, so that during the stone throwing fight he did not have a stick with which he could have assaulted the deceased.

In his testimony D.W.3 Morema Khabo, confirmed the evidence of D.W. 1 save that he was, on the day in question, carrying a sjambok and not a stick. He could not, therefore, have belaboured the deceased with a stick as suggested by P.W.1 and P.W.2.

D.W. 4, Lepekola Makutoane, testified that on the day the deceased met his death, he was herding his animals some distance

12/ away from .....

away from where the deceased and others were herding theirs on the slope of Mathebe mountain. He denied, therefore, the evidence that he was amongst the accused and others when they left home to impound animals. According to him, D.W.4 only saw the stone throwing fight between the accused and the owners of the animals they were trying to impound from a distance and never participated in it.

The evidence of D.W.5, Meta Mahao, was to the effect that whilst at home, on the day in question, he noticed people chasing each other on the slope of Mathebe mountain. He reported the incident to Chieftainess Masetlokoana from whom he learned that rangers had been detailed by the Chieftainess herself to go and impound animals that were trespassing on the area reserved from grazing. As it has already been stated earlier, Chieftainess Masetlokoana did not testify in this trial. What she is alleged to have said to D.W.5 is hearsay and, therefore, of no evidential value.

However, D.W.5 went on to tell the court that on the instructions of the Chieftainess he went to tell the rangers that they should leave the animals that were trespassing on the reserved area if the owners thereof were fighting them (rangers). According to him, D.W. 5 did not reach the place where the stone throwing fight was taking place for he met the rangers on their way back home and one of them (Tsoene) had already sustained injuries. D.W.5 denied, therefore, to have participated at all, in the fight in which the deceased was killed.

Considering the evidence as a whole I am convinced that on the day in question a group of men from the village of Chieftainess Masetlokoana set out to impound animals that were trespassing on what they considered an area reserved from grazing. Assuming the correctness of their consideration that the area on which the animals were grazing was reserved from grazing it seems to me those men were going about their lawful duty. They were, however, fought by the deceased and other

13/ owners of .....

owners of the animals. The deceased and his party had no right to do so. That granted, it must be accepted that the men from Chieftainess Masetlokoana were entitled to repel the unlawful attack on them i.e. the defence of private defence availed them.

However, there is evidence that after the deceased had fallen down and was, therefore, posing no danger to them, some of the men from the village of Chieftainess Masetlokoana continued to belabour him whilst others were chasing after the owners of the animals. In belabouring the deceased in the manner described by the evidence, the men from the village of chieftainess Masetlokoana exceeded the bounds of self-defence. The important question is who of the men from the village of Chieftainess Masetlokoane continued to belabour the deceased after he had fallen to the ground and, therefore, exceeded the bounds of self-defence. In this regard it is important to bear in mind that the accused who are before me were in the company of many other men who are not before the court now. There is, therefore, the need for evidence that positively identified each of the people who were involved in the assault that was perpetrated on the deceased after he had fallen to the ground. There is, in my view, not an iota of such evidence in respect of accused 8,7,6,5 and 3. The only evidence that connects accused 4 in this regard is that of P.W.3 who as has been stated is an accomplice. P.W.3 is however, not corroborated by any other witness and I consider it unsafe to convict accused 4 on uncorroboted evidence of an accomplice witness.

It has been argued that in this case all the accused have acted in concert and are, therefore, criminally equally liable on the well known principle of common purpose. I am not persuaded. There is evidence that at the time some of the accused were belabouring

14/ the deceased .....

the deceased after he had fallen down others were chasing away the herdboys. I am not convinced that those of the accused who were busy chasing away the herdboys could have been aware that the deceased was being belaboured after he had fallen down. That being so, they cannot, in my opinion be held to have associated themselves with the act of the accused who were belabouring the deceased after the latter had fallen to the ground.

It is, however, to be observed that although A1 and A2 denied to have assaulted the deceased after he had fallen to the ground, The evidence of P.W.3 that they did is corroborated by P.W.2 and P.W.1. The evidence of P.W.2 and P.W.1 on this issue has been consistent both at the Preparatory Examination and before me in this trial. I am prepared to believe them on this point. The evidence that A.1 and A2 did assault the deceased after he had fallen down and thus exceeded the bounds of self-defence is, in my view, simply overwhilming against them.

Regard being had to the fact that the assault on the deceased occurred in the course of a fight which was, in my finding, initiated by the deceased and his party, I am not convinced that it can properly be held that in assaulting the deceased as they did and inflicting upon him the injuries that brought about his death, A1 and A2 had the requisite subjective intention to kill.

In the result, the view that I take is that A1 and A2 ought to be found guilty of culpable homicide. I accordingly convict them. A3,, A4, A5, A6, A7 and A8 are, however, found not guilty and discharged.

Both my assessors agree with this finding.

B.K. MOLAI
JUDGE
11th April, 1990.

For Crown : Mr. Sakoane
For Defence : Mr. Nathane for all the accused except A2)
Mr. Mohau for Accused 2.

SENTENCE:

Coming now to the question of what punishment would be appropriate for A1 and A2 in the circumstances of this case, I have taken into account that the crown counsel informed the court that they have no record of previous convictions. They are, therefore, first offenders.

The court was invited to consider a number of factors in mitigation of the accused's sentence. The factors have been eloquently tabulated by the defence counsels. There is, therefore, no need for me to go over them again, save to mention that I take them all into consideration.

In particular, I am concerned by the fact that when they were unlawfully attacked by the deceased and his party the accused were going about their lawful duty i.e. to impound animals that were trespassing on an area reserved from grazing. The only wrong that the accused did was to belabour the deceased after he had fallen down and was, therefore, no longer posing any danger to them.

In the circumstances of this case, I am of the opinion that the justice of the case will be met by imposing, on each of the accused, a fine of M300 or 3 years imprisonment in default of payment of the fine. I accordingly sentence the two accused.

Both my assessors agree.

B.K. MOLAI
JUDGE
8th May, 1990.

For Crown : Mr. Sakoane
For Defence: Mr. Nathane (for Accused 1)
Mr. Mohau (for Accused 2)