

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

MASUPHA MOSHOESHOE	1st	Accused
SEEMA MAFA	2nd	Accused
MOHLOMI MPHATSOANE	3rd	Accused
MAKESANA LETSOKO	4th	Accused
HALEKHETHELOE MOSHOESHOE	5th	Accused
THABANG NTHANKA	6th	Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 23rd day of April, 1990

The accused are charged with the murder of Lephoi Tsomo on the 13th February, 1987 at or near Mphosong in the district of Leribe. They have pleaded not guilty to the charge.

According to the post-mortem report, which was admitted by the defence, the cause of death was scalp laceration with skull fracture and brain damage. Externally the deceased had multiple stab wounds all over the face and the scalp.

Johny Maseli (P.W.7) testified that on the 13th February, 1987 he was grazing his father's cattle on a pasture behind his village. There were other boys who were looking after their parents' cattle. That area was not a reserved pasture at the relevant time. While the cattle were grazing A1, A2, A3, A4 and A5 arrived. A1 was armed with a stick and a sword, A2 had a stick and a sword, A3 had a knobkerrie, A4 had a stick and a battle - axe, A5 had a stick and a sword. The accused were in a fighting mood. P.W.7 says that on their arrival A1 said that they were driving away the cattle. He asked what the cattle had done. A3 said they were seizing them and taking them to the pound. A1 interrupted A3 and said he (A3) should not talk to him (P.W.7) but must catch him and kill him.

P.W.7 ran away and all the five accused chased him and left the cattle behind. He ran down into the village and when he came to 'Mamofohla's (P.W.6's) yard he jumped over the fence into the yard. At that time the deceased was also passing near P.W.6's yard. He called A1 by name and asked him what was the matter as they were chasing a small boy carrying such weapons. A3 was very close to the deceased and struck him on the head with his knobkerrie. Deceased fell down. A1, A2 and A5 jumped over the fence and continued the chase. P.W.6 intervened and stopped the three accused from chasing P.W.7. The three accused i.e. A1, A2 and A5 went to where the deceased had fallen and hit him with their weapons.

P.W.7 says that A6 joined the other accused at the time they were chasing him and before they came to P.W.6's yard. Following

the fight the cattle were never impounded because after the accused had assaulted the deceased they left him lying there and went into the village.

Under cross-examination P.W.7 said it was not correct that the deceased stayed at his parents' home because his (P.W.7's) mother was his concubine. He denied that he was grazing his cattle on A1's arable land. Before that day his cattle often grazed at that area but they were never impounded. He says that he did not carefully observed what clothes all the accused were wearing when they came to him. He only noticed that A1 was wearing a Victoria blanket and that A3 was wearing a blanket. The deceased was carrying a stick and an umbrella, he was wearing a helmet. He did not hear when A3 referred to the deceased as a silly old man before he struck him on the head with a knobkerrie. He denied that he attacked A1 and cut him on the hand with something like a sword. He denied that the deceased behaved like he was taking out a gun from his pocket before he was struck on the head. He did not see when A4 hit the deceased on the legs.

The evidence of Mamofohla Koatsi (P.W.6) is to the effect that on the day in question she was in her house at about 8.00 a.m. She came out when she heard people shouting saying, "stop him, stop him." As soon as she came out of her house she saw that the accused were chasing P.W.7 and they were near her yard. When P.W.7 entered into her yard A1, A2 and A5 also entered. Before the three accused entered into the yard the deceased had been coming up the road towards them. When he came to them he asked what was the

matter. A3 who was behind him, struck him on the head with a knobkerrie and said: "You silly old man I told you that I will get you and kill you." P.W.6 intervened and stopped the accused from chasing P.W.7. They heeded her plea and left him alone and went to where the deceased had fallen and assaulted him as follows: A1 had a sword and a stick, he struck him with the sword; A2 had a stick and a sword, he struck him with the sword; A3 struck him with a knobkerrie; A4 had an axe and chopped the deceased with it; A5 had a stick and a sword, he struck him with the sword; and A6 used a stick.

P.W.6 says that no one intervened in the fight and that the accused left on their own and went into the village.

Under cross-examination P.W.6 said that she did not know that on the day in question A1 attempted to impound her two cattle. She is not aware that there is a chieftainship dispute between A1 and one Tihabeli over the area in question. She owes allegiance to A1 and he (A1) took part in the burial of her brother-in-law who was buried in her village.

'Mateboho Koatsi (P.W.5) was in her house when she heard people making noise. She came out and noticed that the accused were chasing P.W.7. At the same time the deceased was going up the road and met the accused. He asked them what they were doing. Immediately after that A3 went to the deceased and struck him with a knobkerrie. The deceased fell down. A4 came to the deceased and struck him on the head with something like an axe. After that all the accused came and assaulted him while he was already lying on the ground. A1 struck the deceased with a sword. A2 used an iron stick; A5 used a sword; and A6 used a stick.

P.W.5 says that none of the accused attempted to stop the others from assaulting the deceased; they were all beating him up. A3 said the deceased was a silly old man who did not respect people and that he had long said he would kill him. After the fight she noticed that the helmet which the deceased was wearing was broken.

She denied that she threw stones at A1 while he fought with the deceased.

Matsele Maseli (P.W.3) is a neighbour of P.W.6 and P.W.5. She was also in her house when she heard the alarm. Her evidence is the same on all material points with that of P.W.5, P.W.6 and P.W.7.

P.W.1, P.W.2 and P.W.4 are police officers who arrested the accused and also conveyed the dead body in a police vehicle to Hlotse mortuary. Their evidence is to the effect that they searched the homes of some of the accused and found some sticks. At the home of A5 they found nothing in the house but A5 pointed out a battle-axe which was buried in his garden. A5 denies this. The battle - axe and stick found in the possession of A5 were handed in as exhibits at the preparatory examination and were marked Exhibit 2. The deceased's helmet, walking stick and umbrella were also handed in and marked Exhibit 1. A2's iron bar and stick were marked Exhibit 3. At the time of trial all the exhibits had been lost and they could not be found after a very diligent search.

A1 testified that on the morning of the 13th February, 1987 at about 6.00 a.m. he was at the home of A3 whose father was seriously ill. A4 was also present. While he was there he saw some cattle grazing at the reserved pasture outside the village. He has an arable land in that area and had some crops in it. He instructed A3 and A4 to go and seize those cattle which were grazing in the reserved pastures and to impound them. A3 and A4 refused to go there on the ground that the cattle were actually grazing in A1's arable land and were destroying his crops. He (A1) went there alone. He was carrying an iron rod covered with a tape and used as a stick. On arrival at his field he found that Johny (P.W. 7) and one Lebuajoang were deliberately grazing three cattle on his arable land. There was great damage to the crops. He told P.W.7 that he was seizing the cattle and taking them to the pound. He ordered P.W.7 to go and tell his parents. At that time P.W.7 was carrying a stick and a sword but made no attempt to attack him. P.W.7 and Lebuajoang went away. He drove the cattle and followed them because the road leading to the chief's place passes near the home of P.W.6.

When he passed near the yard of P.W.6 he found that P.W.7, P.W.6, P.W.5 were already waiting for him. The deceased was with them and he asked him where the cattle were going. Before he could answer the deceased P.W.7 said: "Why are you asking him, why don't you shoot him and kill him?" He (P.W.7) struck him with a sword but he managed to ward off that blow with his iron rod and with the left hand. The sword cut his palm and he bled profusely. A1 says that he became confused and realised that these people were fight.....

The deceased put his hand in his pocket. He (A1) struck him on the head with his iron rod, so that he could not have the chance to take out any weapon he had. He hit him several times but he does not remember how many times. In the meantime the other Crown witnesses were throwing stones at him. He was hit on the back but sustained no visible injury.

He got a chance to run away after the deceased had fallen down. On his way to his home he met A3 and A4 who were on their way to the scene of the fight where people were making noise. They asked him what had happened. He showed them his injured hand and they helped him to drive the cattle to the pound which is at his home because he is the chief of that area. A5 and A6 were still asleep. He woke them up and instructed them to put the cattle into the kraal. A5 is his son and A6 used to sleep at his (A1's) place because of lack of accommodation at his parents' place.

A1 was subsequently examined by a doctor who found that he had a cut wound left palmar side of the left hand. He handed in a medical report which was marked Exhibit "B".

A2's version is that on the day in question he was at his house and never heard any alarm that morning. He was repairing his sewing machine. At about 10.30 a.m. he was still in his house when he heard the sound of foot steps behind his house. He came out and saw a group of about twenty people at the forecourt of his house. One of them said: "Here is one of them." He ran away and crossed

to the other side of the river. He was eventually arrested by Trooper Qobete. He denies that he had any stick or sword with which he assaulted the deceased. He does not know anything about the assault of the deceased. He was at his home when the deceased was killed. His home is about 500 metres from where the assault took place.

A3 and A4 told the Court that during the fight they were at the home of A3 attending to his father who was seriously ill. They were about 200 metres from the home of P.W.6. While they were helping their patient A3 heard some noise outside; he came out and heard the voice of a woman saying, "Stop him, we have found him." He told A4 about the noise. He also came out. They tried to go where the noise came from but met A1 driving three cattle. They noticed that he had sustained a wound in the palm of his left hand. When they asked him what had happened and what the noise was all about, he did not answer them but instructed them to drive the cattle to the pound. They complied.

A3 denied that he was holding a knobkerrie and that he hit the deceased with it. A4 also denies that he was holding a stick and a battle - axe.

The story of A5 and A6 is that during the fight between A1 and the deceased they were still sleeping at the home of A1. They were awakened by A1 who instructed to drive three cattle and put them in the kraal. They deny that they participated in the killing of the deceased.

Phothetsi Fatso (D.W.7) testified that on the 13th February, 1987 he passed near A1's arable land and saw that Johny (P.W.7) was grazing his cattle in that field. A1 came and drove away those cattle.

Mr. Peete, counsel for the defence, submitted that the absence of the exhibits affects the credibility of the Crown witnesses. I agree that it affects the credibility of at least one of his clients, namely A5 who denies that any stick and battle - axe or sword were found in his possession and were eventually exhibited at the preparatory examination. The record of the preparatory examination shows that his stick and battle - axe were received by the court a quo and marked Exhibit 2. The denial by A5 that these exhibits were there during the preparatory examination proceedings tells its own tale. A5 is not a person who is prepared to tell this Court the truth. Why should the police lie that he (A5) pointed out the battle - axe where it was buried in his parents' garden? He happens to be the youngest of the accused and I see no reason ^{why} police could pick him instead of the older accused.

A2 also denies that an iron bar and a stick were produced in evidence at the preparatory examination. According to the preparatory examination record the iron bar and stick allegedly seized from him were handed in and marked Exhibit 3. It is not true that the Prosecution witnesses only talked about them without producing them. No court can give exhibits numbers without seeing them. Even where an exhibit cannot be brought before a court of law because of its bulkiness the presiding officer must conduct an inspection in loco, unless the parties agree that the exhibit is there and it is as described by the witnesses.

A1 is claiming that he is the only one who assaulted the deceased and inflicted all the injuries sustained by the deceased. This allegation cannot be true because according to the medical evidence, which was accepted by the defence, the injuries were caused with a sharp object. The doctor was of the opinion that it was possible that even the skull fracture was caused with a sharp object (See his deposition at page 1 of the preparatory examination record which is part of this record because it was admitted by the defence). A1 testified that he caused the injuries with an iron bar covered with a tape. His iron bar is not a sharp instrument and could not cause such injuries. The deceased had about six wounds which were all caused with a sharp object. There was not a single wound caused with a blunt object.

It may be argued that if that be the case then the evidence of the Crown witnesses cannot be true that A3 hit the deceased on the head with a knobkerrie. There is evidence that the deceased was wearing a helmet and that after the assault it was found to have been broken. The Court was not told what material was used in the making of that helmet. If it was breakable as alleged by the Crown witnesses, then it was capable of cutting the scalp. Even if the first blow by A3 did not actually cause a cut on the scalp, it was that blow that felled the deceased and incapacitated him. It may be that it was that blow which caused the fracture of the skull because the doctor is not quite sure that even the fracture was caused with a sharp instrument. He merely says that it is possible that it was caused with a sharp instrument.

In my view A1 is not telling the truth that he alone caused the injuries with his iron bar. He is merely trying to protect the accused who are his loyal subjects and one of them is his own son.

There is overwhelming evidence by the Crown witnesses including the police officers that after the assault a broken helmet, a walking stick and an umbrella were found at the scene of the crime. There is evidence by P.W.6, P.W.5 and P.W.3 that the above three items are the property of the deceased. There is evidence that it had been raining that morning and that was the reason why the deceased was carrying an umbrella. I find it quite improbable that if the deceased intended to fight when he came out of the house after P.W.7 had made a report to him (according to A1's version), he would have gone there holding an umbrella and a walking stick. He could have armed himself with the right weapons for such an encounter. The things he was fighting indicate that he was not fighting.

Mr. Peete, submitted that one of the Crown witnesses lied that the deceased was chopped on the legs. No wounds were found on the legs of the deceased. I am of the view that P.W.5 did not see well where the axe landed. I did not have the impression that she was deliberately telling the Court a lie or exaggerating. Such mistaken observation is not at all unlikely when it is taken into account that there was a vicious attack upon the deceased by six armed men and that the women were frightened and screaming and calling for help.

It was argued on behalf of the accused that all the Crown witnesses except P.W.3 were unable to describe the colours of the blankets the accused were wearing when they allegedly attacked the deceased. I do not think that failure to observe the colours of the blankets which the accused were wearing is of any great importance.

The witnesses know all the accused very well because they live in the same village with them. If one sees a person one knows very well it is not always necessary for one to observe the clothes that person is wearing. I find it quite normal for some of the Crown witnesses not to have cared to carefully observe the clothes worn by the accused persons. It was daytime and the accused were so very close to them that mistaken identity does not arise.

It was also argued on behalf of the accused that at the preparatory examination proceedings the Crown witnesses never said that A3 said to deceased, "You silly old man, I told you that I shall get you and kill you." It is true that those words do not appear in the preparatory examination record. What appears in the preparatory examination record depends to a large extent on the questions put to the witnesses by the public prosecutor. There are some public prosecutors and Crown Counsel who lead a witness in such a way that a witness is bound to answer only those questions put to him. It is often not surprising that at the trial witnesses say much more than what appears in the preparatory examination record. It would be unfair to conclude that a witness is telling a lie because what he says at the trial does not appear in the preparatory examination record. It will always depend on whether or not the point raised is so material that it changes the whole picture. In the present case the point complained of appears to me to be unimportant.

Mr. Peete, submitted that the blemishes in the evidence of the Crown witnesses should not be ignored and that their evidence should be rejected. I do not agree with that submission. Whatever conflicts there are in their evidence do not go to the root of the matter. They are minor points which are common in cases of fights especially where many people are involved. Six people were involved plus the deceased and it is normal for witnesses not to observe minor things in the same way or with the same accuracy. We were highly impressed by the Crown witnesses. Their demeanour suggested truthfulness. They were not at all shaken by cross-examination which was very thorough and searching.

On the other hand the accused did not by any means impress us as witnesses. I have shown above that some of the accused have lied on a very neutral point i.e. that certain things were exhibited in the court a quo and given identifying marks. This denial of a proven fact greatly affects their credibility.

I shall now deal with the alibi raised by A2 to A6 inclusive. It is trite law that the defence must put their case to the Crown witnesses and if the defence is one of alibi it must be put to the police so that they may check it. So it is permissible for a court to take into account that a defence such as an alibi may be considerably weakened if it was disclosed too late to give the police an opportunity for checking it. (R. v. Mashelele 1944 A.D.571 at p. 585). In the present case the accused have not actually raised a proper defence of alibi because they were in the same village in which the deceased was murdered. According to their allegations they were only a few hundred metres from the scene of the crime.

I have believed the evidence of the Crown witnesses and reject the evidence of the accused for the reasons I have given above.

The accused have alleged that the Crown witnesses lied because they are biased against them due to a chieftainship dispute between A1 and one Tihabeli. This was denied by all the Crown witnesses who claimed that A1 is their chief and that they pay allegiance to him. I have no reason to disbelieve the story of the Crown witnesses and note that if the defence seriously wanted to challenge the truthfulness of the Crown witnesses on this point they would have called their senior chief.

Mr. Lenono, for the Crown, submitted that there was common purpose. It is trite law that when two or more persons act in consort with the intention of doing an illegal act, each may be liable for the criminal act of the other, although the co-operation commenced on an impulse and without any prior consultation (R. v. Mkize, 1946 A.D. 197; R. v. Dhladla, 1962 (1) S.A. 307 (A.D.); S. v. Maree and another, 1964 (4) S.A. 551). In the present case the accused did not have any prior consultations but as soon as A3 struck the deceased with a knobkerrie and felled him, the rest of the accused came and hit him on the head with their weapons. In my view the Crown has proved common purpose.

I have come to the conclusion that the story of the accused persons cannot be reasonably possibly true. The accused had intention to kill in the form of dolus eventualis in the sense that the accused foresaw the possibility that their acts of hitting an old man of

70 years of age on the head with their dangerous weapons was likely to cause death but they were reckless as to whether death resulted or not.

I find all the accused guilty of murder.

My assessors agree.

J.L. Kheola
J.L. KHEOLA

JUDGE

23rd April, 1990.

EXTENUATING CIRCUMSTANCES

I have found that the accuseds' intention in the commission of this offence is one known as dolus eventualis. In R. v. Sigwahla, 1967 (4) S.A. 566 at p. 571 the Appellate Division held that

"(a) Trial courts, in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is case of dolus eventualis."

I have found that there was no premeditation. In Rex v. Taylor, 1949 (4) S.A. 702 at 705 Schreiner, J.A. said:

"If a killing is intentional it is none the less murder because the intention has only been formed immediately before or at the time of the act, though the time factor may be of crucial importance where questions of provocation or self-defence are raised and be relevant to the issue of extenuating circumstances."

I found that there are extenuating circumstances.

SENTENCE: A1, A2, A3 and A4:- Eight (8) years' imprisonment each.
A5 and A6:- Eight (8) cuts with a light cane to be administered by a prison officer at Maseru Central Prison.

J.L. KHEOLA
JUDGE

23rd April, 1990.

For Crown - Mr. Lenono
For Defence - Mr. Peete.