C of A (CRI) 7/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

PHUMO PHUMO

V

REX

Held at Maseru

Coram

Mahomed P.
Ackermann J.A.
Browde J.A.

JUDGMENT

Browde J.A.

The appellant, a 43 year old man from Ha Khoro in the Mafeteng District was indicted on a charge of murder, the Crown alleging that on 29th March, 1987 and at or near Ha Khoro Village, he unlawfully and intentionally killed Tsokoli Phafoli. Lehohla J. Sitting with two assessors in the Circuit Division of the High Court at Quthing found the appellant guilty of murder with no extenuating circumstances and sentenced him to death.

The events which led to the death of the deceased were deposed to by various Crown witnesses. It appears that at about 2 p.m. on the day in question the witnesses Malefa Phafoli, the daughter-in-law of the deceased, and her sister Mamokhongoane Hlalele were together with the deceased's son Seabata Phafoli at the latter's house. They heard a noise, which they described in evidence as "an alarm", coming from the vicinity of a nearby stream. They went outside and saw the deceased being assaulted by the Appellant. Malefa Phafoli stated that she saw the appellant beating the deceased with a stick, and this was confirmed by her sister. The reason for the assault was not clearly established but Malefa Phafoli stated that when they approached the scene her sister asked the appellant why he was assaulting the deceased. He replied that "he (the appellant) is the one who had blown off my roofs". This apparently related to an incident during March when roofs had been blown off several houses in the vicinity. The appellant denied having said this and gave evidence to the effect that the incident occurred because the deceased had attempted to prevent him (the appellant) from driving the deceased's donkey "to the Chief's place" - this in order to have the animal impounded after it had damaged the appellant's vegetable patch.

For the purposes of this judgment it is not necessary to decide precisely what motivated the appellant to assault the

deceased. We have seen the stick which the appellant used and it appears to be, and indeed it was common cause between counsel before us that it was the kind of stick traditionally carried by men in the area. It is a heavy stick carved and decorated as one would expect a traditional article to be. It was further not disputed that the deceased was a frail man of 70 years of age and it seems that from an objective point of view a single blow with that heavy stick to the head of the deceased, delivered with sufficient force, could reasonably be expected to cause his death. Although the witnesses referred to the appellant "belabouring" the deceased the cause of death was medically established as "a fractured skull and haemorrhagic shock" which Dr. Prempe, who carried out the post-mortem examination, found could have been caused by "a blow" from a blunt object.

There were certain lacerations on the left arm of the deceased and abrasions of the wrist which the doctor found could have been caused by a sharp object. As I have noted, the stick was carved and it may well be that the lacerations were also caused by it. In the view I have taken of the matter, however, it is not necessary, nor on the evidence is it possible, to come to a definite conclusion as to the cause of the lacerations. The fatal injury was the fracture of the left temporal bone and all the indications are that that could have been caused by a single blow with the stick. This could have accounted for the "laceration of

the left ear and left post auricular region" as well as the "haematoma on the left side of the neck and post auricular region" which were found at the post-mortem and all of which we understand to be on the left side of the head in the vicinity of the left ear.

The issue crystallises, therefore, into the question whether a verdict of murder is justified if one blow only has been proved to have been delivered to the deceased's head.

In S v Sigwahla 1967(4) SA 566 (AD) at 570 Holmes J.A said:

> "... the following propositions are well settled in this country:
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> 1. The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused objectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.
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> 2. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.
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> 3. Subjective foresight, like any other factual issue, may be proved by inference. To

> constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.
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> See S v Malinga and thers. 1963(1) SA 692 (A.D.) at 694 G - H; and S v Nkombani and Another 1963(4) SA 877 (A.D.) at pp.883 A - C, 890 B, 895 F."

The test in essence therefore is what did the appellant intend and what did he foresee would be the result of his attack on the deceased. In his able argument before us Counsel for the Crown contended that in the light of the reason advanced by the Appellant for assaulting the deceased (he refers here to the appellant's expressed belief that the deceased was responsible for the blowing off of his roof which he fairly conceded could give rise to extenuating circumstances) the inference was irresistible that the assault was premeditated and that if the appellant did not deliberately set out to kill the deceased when he assaulted him he did foresee that his assault might result in the deceased's death and was reckless as to whether death ensued or not. In submitting this, Counsel correctly jettisoned the learned Judge's finding in the Court *a quo* that "the accused ought, as a reasonable man, to have realised that assaulting a man of slender frame so advanced in age, would result in fatal consequences ....." As pointed out above, the test is what the subjective intent of the appellant was, and the foresight of a reasonable man is inappropriate to the intent required for murder.

As far as premeditation is concerned there is insufficient evidence on record to find this proved beyond reasonable doubt. There is no evidence that the appellant sought the deceased out on the day in question and the fact that he was carrying the "traditional" stick is not necessarily indicative of a murderous intent. Nor is it the only reasonable inference that can be drawn from the single blow to the fatal area of the deceased's skull that the appellant intended to kill the deceased.

From the evidence as a whole it seems to me that it is also reasonable to infer that the appellant, in anger engendered by his belief that the deceased had caused him harm, intended only to deliver a thrashing to the deceased without killing him. The appellant should, therefore, not have been found guilty of murder. The attack on the deceased was clearly of such a nature that the appellant should reasonably have foreseen that it might lead to the death of the deceased and for that reason the appellant should have been found guilty of culpable homicide.

In regard to sentence it must be borne in mind that the assault on the deceased was a brutal one. The evidence was that the old and frail deceased was knocked to the ground and various blows with the heavy weapon were delivered by the appellant. It was a callous and cowardly attack. The sentence that this Court imposes is one of seven years' imprisonment.

The conviction and sentence of the Court *a quo* are therefore set aside and the following substituted:

The accused is found guilty of culpable homicide and sentenced to serve a term of imprisonment of 7 years.

.....
J. BROWDE
JUDGE OF APPEAL

I agree .....
I. MAHOMED
PRESIDENT OF THE COURT OF APPEAL

I agree .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at Maseru this 26th day of July 1991.

For the Appellant:
For the Crown :