C OF A (CRI) NO. 14 OF 1989

IN THE LESOTHO COURT OF APPEAL

In the matter between:

MOSETI MATELA	1ST APPELLANT
SOBI MOKHELE	2ND APPELLANT
THABISO MORAKE	3RD APPELLANT

AND

THE CROWN	RESPONDENT

HELD AT:
MASERU

Coram:

STEYN JA
BROWDE JA
KOTZE JA

J U D G M E N T

BROWDE JA

The three appellants were indicted before the High Court on a charge of murder it being alleged that on 27th April 1988 and at or near Sefikeng Police Station in the district of Berea they each or one or all of them did unlawfully and intentionally kill Lesole Peter Molise. They all pleaded not guilty before Cullinan C.J. and assessors and were found guilty of culpable homicide. Each was sentenced to 4 years imprisonment of which 2 years were suspended.

When the matter first came before this Court it was discovered that much of the record of the proceedings in the High Court had been lost and the transcription before us was deficient and required to be corrected. As a result the appeal was postponed and counsel for the Crown and the appellants undertook to do what they could from the judge's notes and their own to reconstruct the record to a degree which they would accept sufficiently reflected the proceedings so as to enable this Court to come to a proper decision in the appeal. In the event apart from filling in gaps in the record where words where omitted, lost tapes have not been found, the judge's notes were not available and very little reconstruction has taken place. However both Mr Mdhluli who appeared for the Crown and Mrs Kotelo who appeared for the appellants agreed that there was sufficient evidence before us (the record of the preparatory examination was handed to us by consent) to enable us to do justice to the parties in the appeal. It is hardly necessary to stress the importance of records of proceedings being meticulously kept and scrupulously filed and cared for until they are no longer required. Unless this is done there are bound to be the inordinate delays which occurred in this case accompanied by the difficulties to the Court of Appeal which we have experienced.

The main witness for the Crown was Ramoooanyane Malise (PW2) who was the elder brother of the deceased. He gave evidence that on the 27th April 1988 he heard that there had been a breaking into a house accompanied by the theft of money and that his father (PW1) suspected the deceased. On the instruction of PW1

the deceased was taken by PW2 to the police station in the hope that when he was confronted by the police the deceased would produce the money. PW2's description of what took place at the police station was accepted by the Court **a quo**. He said that he told the 2nd Appellant (A2) that his father wanted the police to reprimand the deceased. A2, however, after asking the deceased a few questions got angry and, while the deceased was seated on a chair, took a whip and hit the deceased. Thereafter the first appellant (A1), who has since died, and the 3rd Appellant (A3) also whipped the deceased. The judgment of the Court **a quo** sets out in detail the evidence relating to the alleged assault and it is, therefore, not necessary to repeat it. It is sufficient for my purposes to say that it is clear that the deceased was severely assaulted and that he subsequently died from what the doctor who performed the post-mortem examination described as a "heavy head injury". There were also "bruises over body, upper leg, few in face". While A1 denied striking the deceased at all, A2 and A3 admitted assaulting him. A2 said he struck the deceased several times with his police stick while A3 said he assisted in holding the deceased down while A2 administered the hiding. There is a dispute on the record of the part played by PW2 since the appellants stated that it was he who assaulted his brother by kicking him in the face and then forcing him down to the ground to enable the appellants to administer a "chastisement". This was denied by PW2 who described how the deceased was taken behind the counter, stripped of his clothing and thrashed by the appellants. Despite what appear to be minor contradictions between his evidence at the preparatory

examination and that at the trial the learned judge was impressed with him as a witness and was "left with an overall impression of his honesty". This is in sharp contrast to the impression made on the learned judge by the appellants whom he found to be "patently evasive". No reason was advanced by Mrs Kotelo, who argued the case for the appellants with ability and thoroughness, which persuades me that this Court should not accept the findings of the learned judge regarding the credibility of the respective witnesses. It seems to be highly improbable that PW2 after being asked by his father (PW1) to accompany the deceased to the police station would, having arrived there, proceeded to carry out a serious criminal attack on his brother under the eyes of the police themselves. I believe this version of the events was correctly rejected by the Court **a quo**. A further attempt by the appellants to put the blame for the assault on other people appears from the cross-examination of PW1 to whom it was put that an assault was perpetrated on the deceased by PW1 "and the people you were with". That suggestion carries with it the implication that the deceased was assaulted before he was taken to the police station by PW2 - which was denied by PW1. Apart from the finding by the learned judge that PW1 was "an impressive witness of great dignity whose reaction ... to the suggestion that he and others had assaulted his son ... was one of clear indignation", I can find nothing in the evidence to suggest that injuries such as were observed on the deceased's body were present when he arrived at the police station.

I have already alluded to the deficiencies in the record

which is available to us. It must be remembered however that all the evidence was available to and analysed in great detail by the learned judge **a quo** (with whose findings the assessors agreed) and that unless we find a misdirection of some materiality - which I have not found - there is no basis for differing from the court **a quo** on its factual findings. Mrs Kotelo has attacked the judgment because she submitted that the "theories" formulated by the court **a quo** as to how the head injury was sustained were not based on proven facts. That criticism may well be justified and I assume that it is for that reason that Mr Mdhluli, wisely I believe, did not ask us to find that culpable homicide had been proved beyond all reasonable doubt. He has asked us to find, however, that the appellants were all guilty of assault with intent to do grievous bodily harm.

Mrs Kotelo has also levelled criticisms at the evidence of PW2. I do not propose to deal with them in detail. They amount in my view to comparatively minor contradictions relating to what precisely occurred in the police station. When it is borne in mind that PW2 brought his brother to the police to have them reprimand him and that there ensued a severe beating which ended with the deceased in an unconscious state (perhaps because of an epileptic fit or perhaps because of the beating) it is hardly surprising that some confusion may exist concerning the exact course of events.

With all the aforegoing in mind I can find no reason why this court should not follow the court **a quo** in its acceptance

of PW2's evidence. It follows that the following evidence is to be accepted:-

"He asked him (the deceased) questions he denied that he took money and then Morake (A3) took a whip and beat him.

- Morake, this Morake is he in court as well?
- Yes he is present.
- Can you accordingly point him out as well"

  The third accused.

- And after Morake had whipped him,

  carry on what was happening?

- It happened that afterwards Mokhele (A2) also took a whip and they both whipped him then Matela (A1) took a whip that Morake was using and he together with Mokhele whipped the body".

The witness then described how the three appellants took off the deceased's clothes and behind the counter continued to beat the deceased.

There appears to me to be no reason why the finding of the Court **a quo** that PW2 was a totally satisfactory witness should be rejected in this Court. It does not stand alone. PW6, an old woman who saw the deceased and his brother arrive at the police station in the company of another, said that she heard that "the child (the deceased) had been brought for reprimand" and that on arrival they seemed "to be in good health to my observation". So much for the suggestion that he had been assaulted before he

left for the police station.

In my opinion the court **a quo** was fully justified in accepting the evidence of PW2 supported as it was by the other evidence and finding that all three appellants assaulted the deceased. Mrs Kotelo has urged us to accept however that A1 did not participate in the actual physical assault on the deceased. Even if this were so, however, (and I do not accept the proposition for the reasons already stated) I agree with Mr Mdhluli's submission that in any event A1 was guilty of being an accessory to the offence committed by A2 and A3. He was the warrant officer in charge of the station and was therefore in a position and under a duty to prevent the assault on the deceased. In **Rex v. Letsie and another** Criminal Trial No.40 of 1990 Cullinan CJ quoted with approval the following passage from Prof. Snymous work on Criminal Law 2Ed.

> "According to general principles mere passivity is not sufficient to render a person liable as an accessory after the fact; there must be some act by which he protects the other from liability. An omission is regarded as act if the person concerned has a legal duty to act positively".

In my view A1, as the warrant officer in charge of the station, clearly had the legal duty to stop the persons under his

command (A2 and A3) from committing the assault on the deceased and even if had not participated actively (which the evidence proves that he did) he was guilty as an accessory.

In my judgment, therefore, the three appellants were all guilty of carrying out on the deceased an assault of serious dimensions and that accordingly they should all have been found guilty of assault with intent to do grievous bodily harm.

I now turn to the question of sentence. Because there is no record before us relating to mitigation we gave the appellants an opportunity to lead evidence before us. However because they were not disputed Mrs Kotelo addressed us on the facts which she submitted should be taken into account. Among such faacts is that the appellants will automatically lose their jobs as policemen and will now be forced to look for employment elsewhere.

Apart from that, however, there is the consideration that this case has been hanging over the heads of the appellants for about six years. Much of the delay has been caused by administrative deficiencies which were not of their making. In the circumstances, although they betrayed their responsibilities as the custodious of law and order by criminally assaulting the deceased and for which, in the ordinary course they would cetainly have been sent to gaol, we have decided that the proper and, if I may say so, the humane sentence in this case should be a sentence of imprisonment which is wholly suspended.

We have decided, therefore, that -

(1) The appeal succeeds to the extent that the verdict of guilty of culpable homicide is set aside and a verdict of guilty of assault with intent to do grievous bodily harm is substituted in respect of all the appellants.

(2) Appellants 2 and 3 are each sentenced to 18 months imprisonment suspended for three years on condition that during that period they are not found guilty of an offence involving violence to the person of another and sentenced to imprisonment without the option of a fine.

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J. BROWDE
JUDGE OF APPEAL

I agree .....
J.H. STEYN
JUDGE OF APPEAL

I agree .....
G.P.C. KOTZE
JUDGE OF APPEAL

Delivered on the 27th **day of October, 1995.**