C. of A. (CRI) 3/93
CRI/T/81/90

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

In the matter between:

COSTA PETER SABA — Appellant

and

R E X — Respondent

Coram: MAHOMED P
STEYN JA
BROWDE JA

JUDGMENT

BROWDE JA:

The appellant was one of two accused who were indicted before the High Court on a charge of murder. It was alleged by the Crown that on the 27th December 1988 and at or near Qholaqhoe in the district of Butha-Buthe they unlawfully and intentionally killed Tloung Mohloi. They pleaded not guilty before Lehohla J. sitting with assessors but were both found guilty of murder with

extenuating circumstances. Accused 1 (Appellant) was sentenced to two years imprisonment and Accused 2 to three years imprisonment.

Accused 1 has appealed against his conviction.

It is common cause that on the day in question the two accused, who were police officers, had the deceased in their custody. They were investigating an alleged theft of money and were apparently of the view that the deceased had hidden the stolen money at the house of his mother (PW 1). In order to cause the deceased to point out the alleged hiding place they rode there on horseback while the deceased was on foot. They arrived at P.W.1's house at about 8 p.m. This was the third occasion that day on which the deceased had been taken there. The first occasion was at 11 a.m. when three other policemen took the deceased to the house at which time he already showed signs of having injuries which indicated that he had been assaulted. At 5 p.m. the deceased was again taken to his mother's house and apparently because he failed to point out the money he was once again taken there at 8 p.m. On this occasion before leaving the house, so the evidence of PW 1 disclosed, accused 2 handcuffed the deceased and then by means of another pair of handcuffs tied the deceased to the stirrup of Accused 2's horse. It is not clear from the evidence whether this was done in the presence of

Appellant the evidence for the Crown merely being that of PW 1 whose evidence reads as follows:

"C. C. You said that Accused No.2 summoned the deceased, and then what happened from there?

- He handcuffed him to the stirrup of the horse My Lord.

C. C. Who? You should be very clear, amongst these two accused who did this?

- Accused No.2 My Lord.

H. L. You say he tied the deceased to a stirrup?

- Yes My Lord.

C. C. Can you explain to the Court how he was tied? Just describe.

- He had coupled one hand to the stirrup. He had used handcuffs.

C. C. And as he did so where was Accused No.1?

- He went behind the house My Lord.

C. C. Did he ever come back?

- He did My Lord.

C. C. And did he do anything at that particular time?

- No, My Lord, he did not do anything."

I have set out the evidence since it is relevant not only to the manner in which the deceased met his death but also to the question whether or not the Appellant knew that the deceased was tied to the horse. In regard to the first of these questions what happened was that after they left P.W.1's house P.W.1 on foot preceded the two accused on horseback, with the deceased handcuffed to the stirrup, to the chief's house. After a discussion between the chief, PW1 and Accused 2 the two accused and the deceased, tied to the horse as described, proceeded on the road towards the police station. At a point the distance of which from the Chief's house is not clear, Accused No.2 became unseated and the horse bolted dragging the deceased behind it. In this way the deceased suffered severe injuries from which he died. In the post-mortem examination it was found that there "were multiple bruises and scratches which were on the scalp, the

trunk, the arms, legs, the buttocks and the back. There was (sic) pressure marks around the neck. There was a couple of lacerations with an open depressed skull fracture on the forehead." The doctor gave evidence to the effect that the cause of death was the skull fracture which was consistent with a kick by a horse and, as a secondary cause, the strangulation which in turn was consistent with the deceased's neck having become involved with a rein.

After the horse had bolted with the deceased the two accused went to the police station and reported the incident. The police went to the scene and it is not disputed that there the body of the deceased was found in the road alongside a saddle. Both the deceased's hands were handcuffed by one pair of handcuffs and a second pair of handcuffs had been used to connect the first pair to the stirrup. Both stirrups were found to be still connected to the saddle and the deceased's clothing was stained with his blood. There were also signs on the road that the deceased had been dragged for a considerable distance.

There is, therefore, no room for doubt on the evidence that the deceased's death was caused by his having been handcuffed to the stirrup and the horse having bolted dragging the deceased along with it.

The crucial issue which has next to be decided is whether the Appellant knew that the deceased was tied to the horse by means of the handcuffs. From the evidence of PW1 which I have set out above Lehohla J. came to the conclusion that despite the statement that the accused "went behind the house," he must have observed how the handcuffing took place. Although that inference is one which might reasonably be made it is not the only reasonable interpretation of the evidence and consequently I agree with Mr. Mohau's submission on behalf of appellant that if the statement that "[appellant] went behind the house" is capable of several meanings, one of which would indicate Appellant's lack of knowledge, then the Court *a quo* ought not to have adopted the meaning that was adverse to the appellant. I am of the opinion that in the circumstances the facts must be approached on the basis that there is no direct evidence that the deceased was tied to the horse.

Before I turn to the circumstantial evidence there is an observation I should make regarding an implied criticism of Counsel's cross-examination by the learned judge a quo. In his judgment Lehohla J. said,

> "Finally and more importantly on this question of Accused 1's knowledge that the deceased was tied to Accused 2's horse regard is to be had to the fact that no attempt was made to put to PW1 accused 1's defence on the point. More significantly regard is to be had to the absence of any attempt to put to PW1 the

version that it couldn't have been in the presence of accused 1 that the deceased was tied to accused 2's horse's stirrup for by then accused 1 had gone behind the house to pass water. The suggestion in argument and in accused 1's version that he had by then gone behind the house is taken out of context because in the unchallenged version of PW1's testimony nothing indicates for a fact that when the deceased was tied to the stirrup accused 1 was at that time behind the house. It is not denied that accused 1 went behind the house. But without an attempt to establish at what stage he did so it cannot be construed that such stage was coincidental to the deceased being tied to the stirrup. Even at the cost of being repetitive I find it profitable to go back to the text which on this point is as follows:

Accused (2) tied the deceased to a stirrup. He had coupled one hand to the stirrup. He had used handcuffs to couple the hand to the stirrup. The other accused went behind the house"

Surely if accused 1 sought to rely on this as indicating that he was absent from the scene at the time he should have indicated that PW1 said of me [sic]

> "I couldn't have seen the tying to the stirrup because I had gone behind the house at the time".

It seems to me that once the only eye-witness gave evidence which could reasonably mean that his client did not see the tying of the deceased to the horse, Counsel (Mr. Nthethe) was fully justified in leaving the evidence as it stood. Indeed it would have been poor advocacy to embark upon cross-examination which may well have led to an explanation of the evidence inimical to the interests of the appellant.

I turn then to consider the circumstantial evidence on which the Crown relies for the proposition that the Appellant knew that the deceased was tied to the horse. That evidence can, I think, fairly be summarised as follows:-

(i) The Appellant had ample opportunity of observing the deceased in relation to Accused 2's horse between the home of PW 1 and the Chief's house.

(ii) At the chief's house Accused 2 and PW1 (who, as I have said, preceded the two accused on foot) entered the house while Appellant remained seated on his horse and the deceased stood alongside the horse of Accused No.2. Crown Counsel submitted that not only must the Appellant have seen that the deceased was tied to the horse, but must also have realised that Accused 2 would not have left the deceased free to escape from custody by running away, since the deceased had previously escaped from custody while handcuffed - a fact which was known to both accused. In this regard the Appellant gave evidence to the effect that between P.W.1's house and that of the chief he travelled behind Accused 2 and the deceased and that he was about 5 to 6 paces behind them when they arrived. He also said that he thought that the deceased was left

outside the chief's house "holding the horse," but gave no logical explanation for this alleged act of Accused 2.

(iii) It was sufficiently light that night to enable appellant to see how the deceased was aligned with No.2's horse as they moved along particularly as the position of the deceased as he walked or ran alongside the horse must have been patently an uncomfortable one with both hands tied to the horse.

In regard to each of the above points I should add the following:

(i) There is no clear evidence of what the distance was between PW 1's house and that of the chief. This is relevant to the question of the opportunity for observation which was available to the appellant. We do know, however, that the chief was a "neighbour" of PW 1 and that PW 1 arrived at the chief's place on foot before the two accused on horseback. It seems, *prima facie* at least, that this opportunity for observation was, at best for the Crown, short lived.

(ii) When they were approaching the Chief's place the Appellant not only had an opportunity of seeing

the deceased's position alongside the horse (they arrived in single file) but admits seeing him. He denies however that he saw the handcuffs at that time. Counsel for Appellant has made the point that the position of the deceased's hands would have been dictated by the length of the stirrup which, if long, would have permitted the deceased to walk with his hands in front of him and that this might reasonably have hidden the true position from the Appellant. It seems to me that there is substance in this submission. The question of the light that night is a moot one - PW 1 said it was a moonlit night but her evidence in this regard was of poor quality and she finally conceded in cross-examination that she could not remember whether it was a moonlit night or not. In his evidence appellant states there was no moon that night and in the absence of better evidence to the contrary than that of PW1 I think it must be assumed that it was a dark, Moonless night.

(iii) In my opinion the evidence of the appellant that he thought that accused 2 would leave a prisoner who is known to have escaped from custody "to hold the horse"

> is unacceptable. The learned judge was sceptical of this evidence and asked the appellant "Didn't you wonder what the hell he was doing next to this horse which is reputed to be quite wild?" Although expressed in language unbecoming of a judge it is a fair question which was not satisfactorily answered by the appellant who merely said that he believed that the deceased was holding the horse. How this could successfully be done by a manacled man was not explained

Regrettably I must refer to two further examples of language which fell from the learned judge which was intemperate and most inappropriate to Court proceedings. I quote from the record:-

> "His Lordship (addressing the interpreter) No, My God Almighty. Listen, this witness gave evidence at P.E. understand?"
>
> And, once again in an exchange with the interpreter
>
> "Interpreter : My Lord I don't understand he says that ....
>
> His Lordship: Well but you should have stopped him and let him give it to you bit by bit, Christ oh Lord ... O. K. tell me that I will translate it, Christ."

It need hardly be stressed that this type of language is calculated to taint the image of a judge in the eyes of the public, and consequently is inimical to the interests of the

administration of justice.

There remains to consider what occurred when the trio, the 2 accused and the deceased, left for the police station. We do not know the length of time that elapsed before the horse bolted but for some distance, which appellant stated was about 50-60 paces they were in single file with the accused 2 in the lead. Thereafter, according to the appellant, they moved along the "main road" with accused 1 on the left side of the road and the appellant on the right side. The deceased was on the right side of accused 1's horse and would, therefore, subject of course to the general visibility, have been in a position which was visible to appellant. According to the appellant they proceeded in this manner for about 1km when accused 2's horse suddenly unseated its rider and bolted.

Thereafter, according to appellant, he searched for accused 2 with aid of light from matches and in so doing came across the deceased. He said in evidence,

> "..... I proceeded to the spot where I saw the dark thing and used matches and I found that it was the deceased and not accused No.2. I tried to inspect and I eventually found that there were some other handcuffs which were connected to the stirrup ..... the deceased's hands were handcuffed and the other pair was connected to the stirrup which was connected to the saddle, and the deceased was lying [in the road]".

During cross-examination the appellant was pressed on the question of what he could see. Thus:-

> "CC Where exactly in relation you and accused No.2 who obviously were on horseback [sic]
>
> - They were at the front of me and the deceased was next to the neck of the horse.
>
> CC No, no, no we should get it clearly now. Next to the neck of the horse, in front of the front legs of the horse or where in particular? What was the position?
>
> - He was walking next to the horse near the front legs, My Lord."

The appellant then went on to demonstrate how far from the hoofs of the horse that was. This was at the stage when they were leaving the chief's place and it appears that then, at any rate, it was not so dark that the appellant could not see the deceased in relation to the horse from a distance estimated by the appellant to be about 4 paces. In fact the appellant conceded that if "it was a big object" one's visibility on that night could extend for about 15 paces. It seems to me to be a fair inference therefore that from that distance at any rate the appellant would have been able to see the deceased not only walking close to the horse but maintaining the same speed as the horse always in about the same position.

It is difficult to believe the appellant, therefore, when

he says, as he did in evidence, that it never occurred to him that there was anything unusual about the deceased's constant position vis-a-vis the horse, particularly since he said that on the main road already referred to above "we were travelling side by side with A1 (meaning accused 2) on my left hand side" with the deceased between them.

I think what I have set out represents a fair summary of the evidence on this aspect of the case. In my view each of the points traversed is not so strong in itself to prove beyond reasonable doubt that appellant knew that the deceased was tied to the stirrup. But in considering the effect of circumstantial evidence the question is whether the evidence as a whole furnishes sufficient proof of guilt. Schreiner JA in R v Mtembu 1950(1) SA 670 (AD) put it thus at pp 678-680

> I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt ..... But that does not necessarily mean that every factor bearing on the question of guilt must be treated as a separate issue to which the test of reasonable doubt must be distinctly applied ....."

The question therefore is, does the evidence as a whole exclude the reasonable inference that the appellant asks us to draw,

namely that he did not know of the tying of deceased to the horse? In my opinion the evidence as a whole does exclude that inference. If one bears in mind that the deceased had already escaped once, that this was known to the appellant whose handcuffs were used to tie the wrists of the deceased, that over a substantial distance of more than 1 km he must have seen the deceased's never-changing position in relation to the horse and, because of both his hands being secured to the stirrup, walking to some extent and at some times (depending on the length of the stirrup) in an uncomfortable position, and above all that at the chief's house the deceased was left alone alongside the horse then the inference is in my view inescapable that the appellant must have known that the deceased was tied to the horse. All this apart from accused 2's evidence that he and appellant agreed to handcuff the deceased to a stirrup.

I would just add in the words of Lord Denning

> "Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."
> Miller v Minister of Pensions (1947)2 All ER 372

Lehohla J, having come to the conclusion that the appellant knew of the handcuffing to the stirrup said that "this whole episode seems to me to smack of utter recklessness on the part of both accused to the safety and well-being of the deceased." So far

so good. But then the learned judge states a proposition which is legally quite untenable, namely,

> It is the rule of law that when an accused's recklessness results in another's death then the accused's act is murder."

This overlooks the fundamental requirement that in order to bring home a charge of murder against an accused person the prosecution must prove that there existed a subjective intention to kill. In S v Madlala 1969 (2) SA 637, Holmes JA said that if a party to a common purpose to commit a crime foresees the possibility of death being caused to someone in the execution of the plan, yet persists reckless of such total consequence and it occurs then he may be convicted of murder.

The question therefore is whether, in handcuffing the deceased to the horse, the appellant foresaw the possibility of the deceased being killed. Even bearing in mind that the horse of accused 2 was known to be "wild". I am not satisfied on the evidence that there was such reckless conduct on the part of the appellant that proved he intended to kill the deceased. There is no doubt in my mind that reasonable men in the position of the accused would have foreseen the possibility that their conduct might cause bodily injury, if not death, to the deceased and would have guarded against it. There was clearly a reasonable

possibility that the horse might suddenly take fright and bolt. It was, therefore, negligent to create a situation in which the deceased could be dragged by the horse. In my judgment because the appellant made common purpose with accused 2 to create that situation he is and should have been found guilty of culpable homicide.

I have already mentioned that the accused were sentenced to 2 years imprisonment (appellant) and 3 years imprisonment (accused 2). In view of the fact that they were found guilty of murder I think that Crown Counsel was fully justified in submitting before us that the sentence was derisory. It is difficult to imagine a crime which is more reprehensible than police officers intentionally and unlawfully killing a person in their custody. The police force is the unit to which the public looks for protection. If it were true, therefore, that the appellant was party to the deceased being tied to a horse with the intention that the horse should bolt and thus cause lethal injuries to the deceased an appropriate sentence would have been in the vicinity of 20 years imprisonment. The sentence of 2 years imprisonment can, in my view, only be explained on the basis that Lehohla J, although he found the appellant guilty of murder sentenced him as if he was guilty only of culpable homicide.

No good reason has been advanced for a reduction in the sentence which I would therefore confirm.

The order I would make is that the conviction for murder is set aside and the appellant is found guilty of culpable homicide and the sentence is confirmed.

Delivered at Maseru this 13th day of January, 1995

Signed : .....
J. BROWDE
Judge of Appeal

I agree and it is so ordered:

.....
I. MAHOMED
President

I agree: .....
J.H. STEYN
Judge of Appeal