

IN THE LESOTHO COURT OF APPEAL

In the matter between:

MOHLOLO NTSOKOLO

VS.

REX

HELD AT:

MASERU

CORAM:

Steyn JA
Browde JA
Kotzé JA

JUDGMENT

STEYN JA:

Appellant who was Accused No. 12 in the Court below was convicted in the High Court on three counts. These were:

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- Count 1 : Murder
- Count 2 : Assault with intent to do grievous bodily harm.
- Count 3 : Assault with intent to do grievous bodily harm.

On Count 1: Appellant was sentenced to 8 years' imprisonment.

On Count 2: 18 months' imprisonment

On Count 3: 18 months' imprisonment.

He appeals both in respect of his convictions and sentences.

No less than 21 accused were charged in this matter with the murder of the deceased and assault upon three complainants. These offences were committed because it was suspected that the deceased and the complainants were witches. With the use of witchcraft they were purported to have caused the death of the children of one MOTHEO MATJENE (accused No.1 in the Court below). The events are fully described in the judgment of the High Court and are only repeated insofar as they are relevant to the appeal noted by the Appellant.

The evidence establishes that the deceased died as a result of a broken neck. It is clear that this injury and the other injuries sustained by her, as well as the

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extensive injuries sustained by the complainants, were occasioned during a protracted period of detention and torture by a horde of villagers who shared the conviction that the deceased and the complainants were witches. As such, the villagers suspected that they had caused the death of accused No.1's children at a circumcision school.

During the course of the hearing, it was alleged that Appellant had been involved in the events during which the complainants had been "driven" like cattle over rough terrain over a period of two days, questioned as to their possible culpability as witches for the death of the children and seriously assaulted.

Three issues arose for decision by the Court *a quo*.

1. Was the appellant involved in the assaults and
2. Did he through his involvement in the assaults cause the death of the deceased.
3. If so, did he do so with the intention to kill?

The learned Judge *a quo* answered all three questions in the affirmative. With due reliance on the doctrine of common purpose, he found that the Appellant participated in the assaults with knowledge and appreciation that they could cause death or cause grievous bodily harm and found him guilty of murder.

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The judgment in this respect reads as follows:

"It seems to me that in the present case there is no need for the Crown to establish that any of the accused committed any particular act of assault. It is sufficient to show that they had common purpose to either kill the deceased and the regarded the complainants and the deceased as witches who had killed the children of A1 by witchcraft. They assaulted them with various weapons such as sjamboks, sticks and a knobkerrie. They chased them over a fairly long distance during which time the deceased and the complainants fell down but they were whipped with sjamboks to force them to get up and walk or run. All the accused associated with others in meting out severe punishment to the so called witches. Evidence has shown what each of the accused did. In other words Crown was able to prove particular acts done by each of the accused. It would have been enough for the Crown to have proved that the accused had common purpose."

After citing authority for the proposition that association in the common design makes the act of the principal offender the act of all, the learned Judge goes on to say:

"In the present case the accused must have foreseen, and therefore by inference did foresee, the possibility that the brutal assaults meted out to the so called witches were likely to cause death but they were reckless as to whether death ensued or not. There is evidence that at one stage A1 hit the deceased between the shoulders with a knobkerrie; at one stage the deceased fell down on that rough terrain. The fact that she broke her neck at the time that she was being driven by the accused should not come as a surprise to the accused. She fell down on that rough terrain and was severely assaulted with various weapons.

Association in the common design need not be express, it may be implied from conduct. (*R. v. Duma and Another*, 1945 A.D. 410 at p.415).

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It is a well established principle of our law that a prior agreement on a common purpose is not required, it is sufficient if collaboration began without premeditation and on the spur of the moment (*S. v. Maree*, 1964 S.A. 545 (0); *R. v. Mashotonga*, 1962 (2) S.A. 321). In the present case some of the accused, such as A7, joined the party that was escorting the so called witches and started whipping them. There was no prior agreement. Most of the accused joined in the assaults as soon as they heard that it had been established that the complainants and the deceased were witches who were responsible for the deaths of the children of A1.

For the reasons given above I have come to the conclusion that the Crown has proved its case beyond a reasonable doubt."

Mrs. *Kotelo* for the Appellant contended that in formulating his approach as outlined above, the Court *a quo* misdirected itself on the facts. In this regard, she pointed to the fact that there was a considerable body of evidence which confirmed the version of the appellant which he gave in evidence that he had on numerous occasions intervened on behalf of the "witches" in order to prevent them being seriously assaulted. Thus for example P.W.1 said that appellant intervened on behalf of the complainants when they were being lynched. This witness also confirmed that the deceased was placed on Appellant's horse prior to her death. P.W.5 says Appellant stopped the lynch party - and more particularly Accused No. 1 - from seriously assaulting the complainant Popotoana. At this stage accused No.1 was about to use a stone to strike this complainant. (See pp. 264 and 266 of the record).

P.W.6 was even more explicit as to the protective role that appellant played.

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At pp. 341 - 343 the witness says that the Appellant stopped the assault saying that "please people are never treated in this manner" and that "people should not be killed". P.W.9 also gave evidence to this effect saying that he saw P.W.1 and Appellant "intervening on behalf of these four people (the deceased and three complainants) who were being assaulted. They succeeded in intervening. He also says that he saw Appellant putting the deceased, who appeared to be tired, on his horse. "A1 was leading the horse and A12 (Appellant) walking along supporting Mamvulani (the deceased)". The witness says that "when they were some distance (away) I saw Mamvulani on the ground near the horse". The next day he found that the deceased near this spot. she was dead. She had been moved. Her eye had been removed as well as part of her ear. Subsequently he also saw that the deceased's vagina was missing - "the whole of it was cut out with a sharp instrument...."

Mrs. *Kotelo* relied very heavily on the evidence of P.W.12 for her contention that Appellant had, far from belaying the complainants and the deceased, actually prevented the assaults from being life threatening. Thus for example at p.637 of the record this witness deposed to the fact that A1 levelled a blow with a stick at one of the complainants (Popotoana) but the blow did not land "as he (No.1) was stopped by A12".

The role that Appellant played in the events at the stage this witness was

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introduced into the events is described by her as follows:

- "C.C. Yes, you said you got to Moiketsi's place you found house full of people please go on from there.
- P.W.12 I was ordered to go in sit with the other witches.
- C.C. Yes, who were the other witches go on what happened?
- P.W.12 It was Popotoana, Mamvulani, 'Mantsane then it was me.
- C.C. Yes, there were many people in the house?
- P.W.12 There were many people in the house.
- C.C. Yes; did you recognize the people please tell His Lordship if you knew some of them?
- P.W.12 I recognized some I did not.
- C.C. Who did you recognize?
- P.W.12 I recognized A1, A8, and then Jobo thus A11 then A12 and A11's father.
- C.C. What is the name of A11's father?
- P.W.12 Moiketsi my Lord.
- Interp That will be A16 he has passed away.
- P.W.12 Then I recognized A10 then I also recognized Moroke.
- C.C. Yes, if you don't remember or if that is all then by all means say so.
- P.W.12 I also recognized Khupiso, I also recognized A19 well I did not recognize the others, I also remember Mankanke.
- C.C. Yes, you are told to join the other witches.
- P.W.12 The person who talked to me is Mohlolo.

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- H.L. A?
- Interp. A12 My Lord.
- C.C. Yes, what did he say to you please proceed?
- P.W.12 A12 asked me to tell he truth.
- C.C. Yes, what did he say, did he ask you anything so that you could tell the truth? Please go on
- P.W.12 When he asked me to tell the truth he asked me whether I knew those people.
- C.C. Yes, tell us who are those people?
- P.W.12 'Mantsane, Popotoana and the deceased Mamvulani
- C.C. Yes, go on.
- P.W.12 I told him in reply that I did not know them I saw one Popotoana and Mamvulani I also saw her once 'Mantsane was my first time to see him he asked me whether I know Motheo's children, in reply I told him that I did not know them there after he kept quiet, he said that he was leaving that he was tired he is going to sleep.
- C.C. Yes, he went what happened please go on?
- P.W.12 He left and Moiketsi came in when A16 got in he asked, "have they told the truth?"

There was evidence of a damning nature against Appellant. This was given by P.W.11 who alleged that the Appellant assaulted her the whole night. He was the person who beat the complainants very severely and ordered them to undress. This witness denied that Appellant ever intervened in order to protect anyone. Indeed accordingly to her "He was out to kill. He never intervened.."

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It is apparent that this evidence is in direct conflict with the testimony of P.W.12 not only on the question as to whether Appellant intervened or not, but also as to whether he stayed in the house and participated in the assaults. The problem is, as Mrs. *Kotelo* pointed out, that the learned Judge nowhere in his judgment deals with this conflict, neither does he evaluate the merits of the competing and irreconcilable versions deposed to. Certainly it would be difficult for us, in the absence of such an evaluation and a reasoned finding, to reject the evidence of P.W.12 on these issues, more particularly as her evidence is confirmed by other Crown witnesses. In fact, a reading of the evidence leaves us as a Court of Appeal with a clear impression that P.W.11 was in material respects an unsatisfactory witness.

The Court *a quo* did make a credibility finding in respect of the Appellant.

It says the following in this regard:

"A12 Mohlolo Ntsokolo's evidence is to the effect that during the ordeal of the complainants and the deceased he played the part of a benefactor. At various times he stopped many people from assaulting or attempting to assault the complainants and the deceased. He says that he does not know how they sustained the injuries which they had. I have formed the opinion that A12 has told this Court nothing but lies. There is overwhelming evidence by not only the complainants but by independent witnesses that he severely assaulted the complainants and the deceased. There is no reason why so many witnesses can implicate him for no apparent reason. I am satisfied that A12 participated in the assaults of the complainants and the deceased."

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The finding that "there is overwhelming evidence..... that he severely assaulted the complainants and the deceased"..... appears to some extent to rely on the evidence of P.W.11 which has however not been critically evaluated. As stated above it was never contrasted with the evidence of P.W.12 or with the evidence of the other Crown witnesses concerning the protective role played by Appellant. That appellant did assault some of the complainants with a whip and that he participated in "driving" them along does seem to have been established beyond doubt. However, his behaviour to protect them whenever an attempt was made to use weapons which could cause their death, is inconsistent with a state of mind that he either deliberately sought their death or was reckless as to whether their death could result from his own conduct or that of his colleagues and to which he was proved to be a party.

Counsel for the Crown conceded that the failure to advert to the evidence concerning the Appellant's intervention in protecting the complainants amounted to a misdirection. However she said that the other evidence concerning appellant's participation justified a finding that he was guilty of culpable homicide.

The difficulty in this regard is however, that it would not appear that such conduct as could be attributed to Appellant and which could justify such a finding was proved to be causally related to the death of the deceased. It was not established when she died or how she came to break her neck. Indeed the

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probability is that when she was placed on Appellant's horse she was still alive. She appeared "tired" at this stage and was supported by Appellant. Sometime later she is seen lying on the ground. Subsequently she is found to have died. If for example her neck was broken as a result of a fall from the horse, which is certainly not impossible, there would be no causal link between the whipping administered by the Appellant and her death.

As indicated above, we are satisfied that by participating in driving the deceased and the complainants over rough ground against their will and by seeking to elicit the truth from them by whipping them, Appellant assaulted them and did so with the intent of causing them serious bodily injury. We are however not satisfied that in doing so the Crown established that he intended to kill her or that the evidence establishes that he can be held criminally liable for her death.

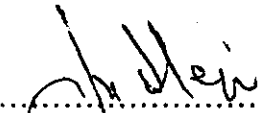
It follows that the verdict of guilty of murder recorded in respect of the Appellant on Count 1 cannot be sustained. A verdict of guilty of assault with the intention to cause grievous bodily harm is substituted therefore. The sentence of 18 months imprisonment imposed by the Court *a quo* in respect of the assaults on the two other charges seems to us also to be appropriate in respect of this Count (Count 1).

In the result, the appeal succeeds to the extent that Appellant is found not

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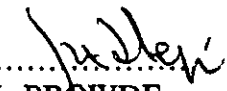
guilty of murder, but guilty of assault with intent to do grievous bodily harm on Count 1. The sentence of 8 years' imprisonment is set aside. In place thereof a sentence of 18 months' imprisonment is substituted. This sentence is to run concurrently with the sentences of 18 months' imprisonment imposed on Counts 2 and 3 both of which sentences are also ordered to run concurrently. The convictions and sentences on these Counts are confirmed.

The Appellant has already served 18 months' imprisonment and should therefore be released immediately.




 J.H. STEYN
 JUDGE OF APPEAL

I concur



 J. BROWDE
 JUDGE OF APPEAL

I concur



 G.P.C. KOTZÉ
 JUDGE OF APPEAL