

~~PC 182-190~~

2, 1954

No. 28 of 1953

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND

B E T W E E N :

37749

- 1. THABO MELI
- 2. LEKHETHO THETSANE
- 3. LIKETSO TSOENE
- 4. KHOTSO PINDA

APPELLANTS

- and -

THE QUEEN

RESPONDENT

UNIVERSITY OF LONDON
 W.C.1.
 24 FEB 1955
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

CASE FOR THE APPELLANTS

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pp.182-190

1. This is an appeal by Special Leave in forma pauperis from the Judgment and sentence dated the 26th March, 1953, given and passed in the High Court of Basutoland by Sir Walter Harragin, C.M.G., Q.C., Acting Judge, whereby the appellants (hereinafter respectively referred to individually, as at their trial, as "No.1 accused", "No.2 accused", "No.3 accused" and "No.4 accused) were convicted and sentenced to death upon a charge of having murdered a Mosuto male, one Ntlobiseng Lekhoee (hereinafter called "the deceased").
2. The appellants who were jointly indicted and jointly tried pleaded not guilty to the said charge. One

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of the two (European) Advisers and one of the two (Native) Assessors, who in conformity with the provisions of the law in Basutoland sat with the learned trial Judge, disagreed

pp.191.11. with the said Judgment, being of the opinion that the ap-
8-10

pellants should have been given the benefit of the doubt.

3. The main and substantial questions in this appeal arise from the conflict as regards the cause of the death of the deceased, between the evidence of the two self confessed accomplices named respectively Pitso and Kampisi upon which the case for the prosecution was mainly based and the medical evidence called on behalf of the prosecution and the finding in his said Judgment by the learned trial Judge in regard thereto.

4. The evidence given by the said Pitso and the said Kampisi as to the cause of the deceased's death briefly stated is as follows:-

Pitso stated that the

p.60 1.14-deceased was killed on Saturday the 12th July, 1952, during
p.69,1.14;

p.76,1.17-an all day beer drink at the hut of a woman named Mamaretha

p.77,1.4;

p.79,1.13-at which besides himself and Kampisi there were present,

p.80,1.21

the appellants, and three women named respectively Mamok-

p.183. hantso, Mamaretha and Mathabo (none of the said last three

1.10- p.

184.1.7. named women was called as a witness). He also stated

pp.108- that a woman named Mamajone who gave evidence for the

115.

p.185 11. prosecution was present. This was denied, however, by

12-18. Mamajone and her said denial was accepted by the learned

p.67,11. trial Judge in his said Judgment. As to the manner in

1-17 which the deceased was killed Pitso stated that No.1

accused asked him to take the weapon which was a land-side (exhibit "1" which is now at the Privy Council Office and thus available for inspection) and to hit the deceased; that he said he was weak and sick and No. 4 accused asked No.1 accused to give the said weapon to him which No. 1. accused did; and then No.4 accused struck the deceased

p.68.11. with it on the back of the head, that when No.4 accused so
4-5
p.68.1.6. struck the deceased the deceased was sitting, it so chanced,
p.76.1.23-
p.77.1. with his elbows on his knees, which were bent and apart,
17.

and his hands drooping and just touching between his knees;
his head was bowed down; his chin was on his chest and his

p.77.1.18-neck exposed, that the blow(as Pitso demonstrated) was de-
p.78.1.4
p.82.11. livered with the narrow edge of the said weapon down and
7-20.

the point forward and by bringing the said weapon down from behind the right shoulder straight down(as he demonstrated) to the ledge of the witness box; and that the blow fell on the back of the deceased's head as he was

p.68.11. bending down. Pitso stated that after the said blow had
10-18.
p.76.1. been struck which was a very hard blow the deceased fell
22. from the chair on to the ground. And that when this happened No.4 accused struck the deceased a second blow on the back of the head; that after this the deceased was dead.

p.69.11. Kampisi stated
8-14

p.83.11. that he was a shepherd employed by a farmer in the Free
3-13 State(ofthe Union) and he came to Mamaretha's on the said Saturday to fetch the money for a fowl that Mamaretha had bought from him. In addition to those present as stated

p.84.11. by Pitso, Kampisi stated that there was also a little girl na-
7-9 mod Mpho present(she was not called as a witness). Ho

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p.85 ll. 3-8 stated that (before the deceased was killed) he was going to leave but that Mamaretha said she was preparing beer for him. As to the manner in which the deceased was killed he stated that No.1 accused asked the deceased to fill up his pipe with tobacco and give it to him to smoke; that deceased said he had no tobacco and No. 1. accused asked the deceased to give the pipe to him and he (No.1 accused) filled it and put it in his mouth and then returned it to the deceased; after that the deceased had a puff at the said pipe and then bent down(indicating by bowing his head). (The apparent significance of this evidence about the pipe and tobacco was presumably to make it appear that No.1 accused had filled the pipe with something other than tobacco with which to render the deceased unconscious . - Nothing was said about this by Pitso or referred to in his said Judgment by the learned Judge). After the deceased had bent down,Kampisi stated , the deceased after he had puffed at the pipe put it in his pocket and commenced bending(indicated by bowing his head) over the bed, that No.1 accused went outside and after a short while he entered with a group of men consisting of the appellants and Pitso; that No.1 accused asked Pitso whether they were all there, to which Pitso replied that they were; that No.1 accused then took up a piece of iron about the size of his (Kampisi's) arm and tried to hand it to Pitso but that Pitso said he was tired and could not kill a person;

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that the iron was the length of his arm and roundish; that No.1 accused tried to give it to the others(i.e. No.2 and 3 accused) but they refused to take it and that No.4 accused asked No.1 accused to give it to him which No.1 accused did; that No.4 accused hit the deceased at the base of the skull above the nape of the neck; that the blow was a hard blow and that the deceased fell down; that when the deceased fell down No.4 accused hit the deceased another blow at the back of the head, and that after the second blow the deceased appeared to be dead. Kampisi further stated that after, as he thought, the deceased was dead the said Mamajone arrived. In answer, however,

p.98 11. to the learned trial Judge Kampisi stated that of the
5-23 said women above stated by him as being present Mamaretha and Mamajone saw the said blows being struck, the rest of the said women having arrived as the deceased's body

p.95 1.21-was carried away. In cross-examination Kampisi stated
p.22.1.2 that the iron was solid and appeared to be a heavy piece

p.99.1.1.-of iron. As regards the killing of the deceased, he
p.102. stated that the deceased was sitting on a bed(and demon-
1.10 strated) that the position deceased was in was, that his knees were bent and his legs were apart, his elbows were on his knees with his hands limp and just overlapping between his knees; that his body was inclined forward, and his head bowed on his chest but not touching his arms, that the deceased had a puff from his pipe after No.1 accused had put the tobacco in and had himself had a puff and handed it to deceased; that after the deceased had had a puff at his pipe it appeared to Kampisi that

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the smoke had had some effect on him; that in the way in which, as described by Kampisi, the deceased had sat was by pure chance convenient and that it was the result of the effect of the smoke; that No.1 accused had smoked the same tobacco as the deceased and though it had not affected No.1 accused it did, however, affect the deceased as stated by Kampisi and that he (Kampisi) did not know what kind of tobacco it was and that No.1 accused had made no attempt to hide the tobacco.

Both Pitso and Kampisi as well as Mamajone stated that the deceased whom they as well as the appellant believed to be dead in consequence of- according to the said evidence of Pitso and Kampisi) the deceased having been struck the said blows as aforesaid, was carried out of the hut of Mamaretha by the appellants, and also by Pitso and Kampisi and left out in the open. The exact manner in which this was done is not material to this appeal inasmuch as having regard to the said Judgment and the said medical evidence it (that is, as stated, the manner in which it was done) had nothing to do with the death of the deceased.

pp.43-
51

The said medical evidence which was given by Dr. Smit was that he on the 14th July 1952, had carried out a post-mortem examination on the body of the deceased. The conclusion to which he had come in regard to the cause of the death of the deceased was that it was due to exposure. This is also stated by him in his report of his said post-mortem examination. In the "Schedule of observation" in the said post-mortem report he states

Exh."A".
Docts.pp.
1-2

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that he noted the following external wounds-

- " 1. An abrasion $\frac{1}{2}$ " x $\frac{1}{2}$ " over the right occipital bone at its upper margin"(the right back of the head as explained in his evidence by Dr.Smit).
2. A bruise involving the upper lid of the right eye."

And there is therein stated under the heading of "Additional Observation" as follows:-

" Death from exposure was predisposed to by alcoholic intoxication and possible concussion resulting from a fall in which the external injuries noted were sustained."

p.45.11.
7-9

In his evidence in regard to the said external injuries Dr. Smit stated that in his opinion these would not on their own have caused the deceased's death.

p.46.11.
8-16

He also stated that apart from the exposure and the said external injuries he observed that there was a quantity of what he took to be kaffir beer in the deceased's stomach when it was opened, and that if the deceased was intoxicated as that discovery suggested, it would have aggravated the effects of the exposure to the cold(as it

p.45.1.16

was that time of the year). Other than that he was unable to find any other injuries. He further stated that the

p.48,11.
8-17

body of the deceased had been exhumed on the 11th March, 1953, and that although he looked for signs of injury to

p.50.
11.7-9

the bony structure he found nothing. He also stated that if (as above stated by Pitso and Kempisi) a hard blow had been struck with the landslide(exhibit "1") he

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would have expected a fracture of the skull. The skull
p.50.11. of the deceased he stated was an intermediate one being neither
3-5 an "eggshell" one, nor a particularly thick one and that
p.51-11. he had examined the whole of the deceased's skull and the
4-18 whole of the contents thereof at the post-mortem examination
he had carried out and found no abnormality; that since
he could find no abnormality the only conclusion he could
come to he stated was that it was a glancing blow(both
Pitso and Kampisi stated that two blows were struck) and
the full weight of the instrument (the said landside ex-
hibit "1") was not imparted to the skull and because of
that fact therefore the injury was not proportionate to
the weight of the instrument but assuming, however, (as
stated as aforesaid in their evidence by Pitso and Kam-
pisi) it was a hard blow, that is a direct blow and not a
glancing one he (Dr. Smit) could not explain it. In re-
gard to the effect as regards the death of the deceased of
p.51.1. the said external injury to the back of the head, Dr.Smit
23 -
p.24.1. stated, in answer to the learned trial Judge, that taken in
10 conjunction with the possibility that the deceased was
intoxicated, and therefore more liable to the effects of
exposure, and thereby the fact that if he was still alive,
after the blow had been inflicted, and he was exposed to
very cold weather, for most of that night(12th and 13th
July 1952) it would effect him more quickly. The effect
of shock would be more marked and presumably would become
apparent more quickly.

The appellants here would submit that the said
evidence of Pitso and Kampisi left no room for any supposition

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that the blows delivered with the weapon as described by them were such as could be regarded as glancing or otherwise than such as would, as stated by Dr. Smit, cause the deceased's skull to be fractured. The only alternative (as the appellants submit) is that the evidence of Pitso and Kampisi is quite untrue and ought therefore to have been disregarded in toto.

p.186
11.7-23

4. In his said judgment the learned trial Judge as regards the cause of the deceased's death and the responsibility of the appellants therefor found as follows:-

" The only other witness of importance"(ie. apart from Pitso, Kampisi and Mamajone) to whose evidence the learned trial judge had already in his said Judgment referred)"and of great importance to the defence, is the Doctor, and the significance of his evidence is in the fact that he says that the deceased died of exposure and not as one would have thought of a cracked skull. He only saw two wounds, one very minor one on the eye and the other wound at the back of the head, there is only evidence he says, of one blow at the back of the head, although it is possible that there were two if they landed in the same place. But the importance of his evidence is this, that if the weapon used had been in fact a part of a plough share similar to the one produced as exhibit 1 in Court, the doctor would have expected, and so would every other normal human being, that the skull would have been cracked which it certainly was not, though the doctor says, that if it was a glancing blow it might have produced the wound that he saw at the back of the head without cracking the skull."

p.189.
11.12-
21

"It is true that the deceased did not die of the blow, but if those people thought him dead and placed him out in the cold night on a slab of stone and he died from exposure the mere fact that they were wrong and he was only unconscious when they put him there does not acquit them of the crime for which they are charged. If you carried a little child and put it on the top of a house on a cold night and it died you would be guilty of murder, even if you didn't strip it and even if you didn't strike it."

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5. As regards the beer drinking the learned trial
p.183,11. Judge in his said Judgment found that at Mamaretha's on the
14-16 day of the alleged murder of the deceased beer drinking had
pp.108- been going on all day. The said Mamajone whose evidence
115 was regarded by the learned trial Judge as corroborative
p.112.11. of that of Pitso and Kampisi stated that beer had been im-
16-22 bibed freely by everybody(i.e. the appellants as well as
p.114.11. Pitso, Kampisi and the deceased), including herself; that
7-8 so much so she went back to Mamaretha's no less than
p.110. three times that day. She stated that the third time
1.2- she came to Mamaretha's, which was at dusk, and entered
p.111,1. 18- she saw the deceased who appeared to be dead lying on the
floor; that she did not notice anything else; that it
was night and there was only a faint light from a lamp.
Those she found there were she stated, the appellants,
Pitso, Kampisi, as well as the three women- Mamaretha,
Mathabo, Mamokhantso and the little girl Mpho; No. 1 ac-
cused she stated asked her what she wanted and she replied
that she wanted beer and then No.1 accused said:-

"You have found us in this position and you must
not talk about it."

p.185. These words were taken (erroneously as the appollants
11.12-21 would submit) by the learned trial Judge as meaning that
p.188. the deceased had been murdered and that it was not pos-
11.15- sible to put any other meaning on them.
22

Mamajone stated that after the said words were spoken
by No.1 accused Mamaretha said that they should take
out the deceased and the appellants together with Pitso
and Kampisi did so.

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p.187.
l.20-
p.188
l.22

6. The learned trial Judge in his said Judgment in regard to the said conflict between the said evidence of Pitso and Kampisi and that of the said medical evidence says:-

" It is clear that the defence rely entirely on one fact and one fact only which is that if the instrument used was similar to the instrument produced in Court by Pitso, in view of the doctor's evidence it is impossible that the murder could have been committed in the way described by Pitso. With that on the face of it one must agree. I very much doubt whether the instrument that Pitso saw in the hand of "(No.laccused)" in the gloom of the hut on that night was similar to the piece of iron I see in Court to-day, but I am not forgetting that it might have been as it could have been a glancing blow as the doctor says: It might have been something longer as Kampisi tells us. It has not been suggested that Pitso examined the instrument or that Kampisi was in close contact with it. I am satisfied that some weapon was used and that both the accomplices may be wrong as to what it was. The Defence suggest that that is a fatal discrepancy and that"(the appellants)" are entitled to be acquitted. There might have been great force in that argument if there had been no such witness as MamaJone; whom I may say I believe implicitly whatever I may think about the two accomplices..... Her evidence alone is most damning and particularly easy to believe in the absence of any evidence from the accused as to what the true story is. I can think of no answer to her story save the answer of murder."

7. The said main and substantial questions are therefore as follows:-

(1) Whether having regard to the said medical evidence as to the cause of the deceased's death (in contradiction to that as given in evidence by the said Pitso and Kampisi) and the said finding of the learned trial Judge particularly as set forth and underlined in paragraph 4 hereof, the appellants could in law be guilty of and convicted of the murder of the deceased(as the

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learned trial Judge has found and done) inasmuch as none of the appellants had any animus occidendi or mens rea in regard to the death of the deceased or the way, as according to the said medical evidence and the said finding of the learned trial Judge it was caused and took place.

(2) Whether, in law the learned trial Judge could, in face of and contrary to the evidence given by Pitso and Kampisi as to the weapon with which and the way it was used as stated by them, substitute a theory or mere conjecture of his own and not based on the said or any evidence given and in fact contrary thereto as to the weapon which was used or that the blow with which the deceased was struck therewith was merely a glancing one and not a direct and hard one as stated by Pitso and Kampisi.

8. In regard to the said questions the appellants submit that as to (1) they clearly ought not to have been and were wrongly in law found guilty of having murdered the deceased and ought not to have been convicted but should have been acquitted. According to the Roman Dutch law which is to be applied in Basutoland in accordance with the provisions of the General Law Proclamation (Chapter 26, Laws of Basutoland, 1949, Revision, Vol.1, p.408) a fundamental and essential requirement in the proof of a charge of murder is an animus occidendi or intention on the part of those charged therewith to kill, and the killing, in pursuance of such intention of the person murdered, that is to say that in the case of the

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appellants they could not by the said law have murdered the deceased, inasmuch as the death of the deceased, as caused according to the said medical evidence and found as aforesaid by the learned trial Judge, was not and could not have been intended by them since they believed (according to the evidence and as found as stated by the learned trial Judge) that the deceased was already dead when he was left out in the open, and his death by exposure, therefore, was, so far as the appellants were concerned something unintended by them or which they could not have expected even as the remotest possibility to have happened.

The statement as to the law contained in the said part of the learned trial Judge's Judgment as underlined in paragraph 4 hereof, is accordingly a clear misdirection in law of himself and he ought therefore to have acquitted the appellants.

9. The appellants in regard to the said question (2) submit that according to the said law in force in Basutoland the learned trial Judge ought to have totally rejected the evidence of Pitso and Kampisi and acquitted the appellants, and was not entitled to substitute his own said theory or conjecture therefor, since according to the said law as laid down in the case of R.v Blom 1939 AD.188 at page 202 per Wattsmeyer J.A.

" In reasoning by inference there are two cardinal rules of logic which cannot be ignored-

(1) the inference sought to be drawn must be consistent with all the proved facts- if it is not the inference cannot be drawn.

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(2) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn- if they do not then there must be a doubt whether the inference sought to be drawn is correct."

and the said theory or conjecture of the learned trial Judge's own was not based upon or consistent (but on the contrary it is submitted the said theory or conjecture was inconsistent) with the proved facts and, moreover, the said facts did not exclude every inference from them save the one drawn by the learned trial Judge, namely that the appellants had murdered the deceased. The said statement of the law in the case of R. v. Blom (supra) was reiterated in the case of R.v Magatuse 1941 AD.201.

9. The appellants respectfully submit that the learned trial Judge has misdirected himself in a respect gravely to the prejudice of the appellants in the statement in his said Judgment (set out in paragraph 6 hereof) that the evidence of Mamajone was particularly easy to believe in the absence of any evidence from the accused "as to what the true story is." This it is submitted is a violation of the fundamental principle of the administration of the criminal law applicable as aforesaid in Basutoland in that it puts the onus of proving their innocence upon the appellants instead of upon the prosecution to prove their guilt beyond a reasonable doubt.

10. The appellants therefore submit that the said

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Judgment and sentence were erroneous in law and that the said Judgment conviction and sentence ought to be set aside and quashed and they ought to be held to be not guilty and acquitted for the following amongst other

R E A S O N S

(1) BECAUSE they had in regard to the death of the deceased as caused according to the said medical evidence and the said finding of the learned trial Judge no animus occidendi or mens rea.

(2) BECAUSE they could not be held guilty of having caused the said death of the deceased.

(3) BECAUSE under the law applicable as aforesaid upon the said finding of the learned trial Judge they should have been found not guilty and accordingly acquitted.

(4) BECAUSE under the said law the learned trial Judge could not as he did substitute his own said theory or conjecture.

(5) BECAUSE the learned trial Judge in view of the medical evidence and his own finding in regard thereto ought to have disregarded the evidence of both PITSO and KAMPISI in toto and accordingly have found the appellants not guilty and acquitted them.

(6) BECAUSE the evidence against them as given by Pitso and Kampisi and allegedly corroborated by Mamajone amounted at the most to mere suspicion and was not such proof as is required in law to convict them.

(7) BECAUSE they were not guilty and ought to have been acquitted.

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(8) BECAUSE for the above and other good and sufficient reasons the said Judgment, conviction and sentence ought to be set aside and quashed.

S. N. BERNSTEIN.

A.HUGHES CHAMBERLAIN.

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CASE FOR THE APPELLANTS

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