

In the Privy Council.

No. 28 of 1953.

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND

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

BETWEEN

(1) THABO MELI,
(2) LEKHETHO THETSANE,
(3) LIKETSO TSOENE, and
(4) KHOTSO PINDA APPELLANTS

37750

AND

THE QUEEN RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an Appeal from a Judgment and Sentence, dated the 26th March, 1953, of the High Court of Basutoland (Harragin, Ag. J., two Advisers and two Assessors), whereby the Appellants were convicted of the murder of one Ntlobiseng Lekhoee and were sentenced to death. One Adviser and one Assessor dissented on the ground that the Appellants should have received the benefit of the doubt. p. 182-191 p. 191, ll. 8-10

2.—The indictment charged the Appellants with the murder of Ntlobiseng on or about the 12th July, 1952. They all pleaded "Not Guilty." p. 41, ll. 1-2

3.—Evidence was given for the Respondent to the following effect :

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(i) Pitso Thipe said the first Appellant was a chief, and Ntlobiseng had been a headman under him. They had quarrelled over the ownership of a piece of land, and because the branding of stock by the Government had been done at Ntlobiseng's place instead at the first Appellant's. Consequently the first Appellant had threatened to kill Ntlobiseng. He had told the witness that he had arranged to do the murder at a place called Morumutso. On a certain Saturday (this was the 12th July, 1952), and the witness p. 57, ll. 7-15 p. 58, ll. 4-18 p. 60, l. 21— p. 61, l. 6

RECORD

p. 61, l. 6—
p. 62, l. 15

p. 63, ll. 5-21

p. 63, l. 22—
p. 65, l. 8

p. 66, l. 2—
p. 67, l. 17

p. 67, l. 24—
p. 68, l. 1
p. 68, l. 4—
p. 69, l. 1

p. 69, ll. 3-18

p. 69, l. 19—
p. 71, l. 2

p. 71, ll. 8-13

p. 73, ll. 15-20
p. 76, l. 23—
p. 78, l. 18

p. 79, ll. 20-21

p. 83, l. 3—
p. 84, l. 13

p. 84, l. 21—
p. 85, l. 2

p. 85, ll. 9-21

p. 86, l. 6—
p. 87, l. 12

p. 87, l. 22—
p. 88, l. 2
p. 88, ll. 6-9
p. 88, l. 18—
p. 89, l. 11

p. 89, l. 21—
p. 90, l. 15

would be there. On the Saturday the witness, on the first Appellants' instructions, met Ntlobiseng and walked with him to Morumutso. There they met the first and third Appellants, and the first Appellant told the witness to go and see to his business and then to come to Mamaretha's hut. When he came to Mamaretha's hut he found there Ntlobiseng and the four Appellants. The first Appellant told him to go away, and come back later to kill Ntlobiseng. When he came back, the four Appellants, Ntlobiseng, a man named Kampisi and three women named Mamokhantso, Mamaretha and Mathabo were at the hut. The first Appellant handed the witness a piece of an iron plough and told him to hit Ntlobiseng. The witness excused himself. The fourth Appellant then hit Ntlobiseng with the iron, and Ntlobiseng fell to the ground. Just after this the witness noticed a fourth woman, named Mamajone. When struck Ntlobiseng was sitting on a seat with his arms on his knees. It was a blow on the back of his head, and when he was on the ground the fourth Appellant hit him a second blow on the back of the head. The four Appellants and the witness then pinned him down. A little blood came from the wound, and the first Appellant told Mamaretha to wipe it up. The four Appellants, Kampisi and the witness then carried Ntlobiseng along a path, rolled him over a cliff and, on the first Appellant's instructions, arranged his body at the bottom. The first Appellant poured beer over Ntlobiseng's face, so that he should appear to have fallen over the cliff drunk. All the Appellants were related to the witness, and he had nothing against any of them. In cross-examination, he said that Ntlobiseng, when struck, was sitting with his arms on his knees and his head resting on his arms. He appeared to be asleep. He did not appear to be drunk.

(ii) Kampisi Bamo said he was a shepherd working in the Orange Free State. On the 12th July he had visited Mamaretha. When he arrived the four Appellants, Ntlobiseng, Pitso, Mamaretha, Mathabo and a girl named Mpho were in the hut. The first Appellant told him that he wanted to kill Ntlobiseng and had arranged with Mamaretha. The first Appellant then filled a pipe for Ntlobiseng, and after taking a few puffs Ntlobiseng bent down over the bed. The first Appellant tried to hand to Pitso a round piece of iron about the size of the witness's arm. Pitso would not take it, but the fourth Appellant took it and struck Ntlobiseng a hard blow on the back of the head. Ntlobiseng fell down, and the fourth Appellant hit him again on the back of the head. The first Appellant punched him over the right eye, and then all the Appellants and the witness caught hold of him. Mamajone then arrived, and the first Appellant said to her, "Please don't talk about this—you have found me in a bad position." The first Appellant told Mamaretha to wipe off the blood. The four Appellants, Pitso and the witness carried Ntlobiseng up to a pass and rolled him over a cliff. They moved his body at the bottom, and the first Appellant poured beer over his face. The witness knew

all the Appellants well, and had had no dispute with them. Cross-examined, he said that of the women Mamaretha and Mamajone saw the blows struck, and Mamakhantso and Mathabo arrived as the body was being carried away. In reply to the learned Judge, he said the iron used to hit Ntlobiseng was not like a piece of a plough, which Pitso had said was like the instrument used.

p. 91, ll. 18-21

p. 98, ll. 18-23

p. 107, ll. 2-4

(iii) Mamajone Phantzi said she had been to a beer-drink at Mamaretha's hut on the 12th July. She paid two visits to the hut during the day, and saw the four Appellants and Ntlobiseng there. She came to the hut a third time at dusk. There was a faint light inside. She saw Ntlobiseng lying on the floor apparently dead, and the four Appellants, Pitso, Kampisi, Mamaretha, Mathabo, Mamokhantso and Mpho standing round. She said she had come for beer, and the first Appellant said, "You have found us in this position, and you must not talk about it." The four Appellants, Pitso and Kampisi then carried Ntlobiseng out. There was a little blood beside Ntlobiseng's head, and Mamaretha wiped it off.

pp. 108-110

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p. 110, l. 2-

p. 111, l. 8

p. 111, ll. 9-12

p. 111, ll. 13-18

p. 111, l. 21-

p. 112, l. 4

(iv) Trooper Khechane said he found Ntlobiseng's body at the bottom of a cliff on the 13th July. There was a wound at the back of the head and a bruise over the right eye, and signs of beer in the nostrils.

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pp. 126-127

(v) Dr. Graham Smit said he had made a "post mortem" examination of Ntlobiseng's body on the 14th July. The death had been due to exposure. There was an abrasion at the back of the head, with a subcutaneous hæmotoma underneath it and a bruise on the upper lid of the right eye. These wounds could not by themselves have caused death, but could have contributed to death if there was exposure. The injury on the back of the head could have caused concussion. There was a quantity of what the witness took to be kaffir beer in the stomach, which would have aggravated the effect of exposure to cold. The witness was shewn a piece of a plough (which Pitso later said was similar to that used to hit Ntlobiseng), and said a direct blow with it would have needed very little force to cause the wound on the back of the head. If the blow had been dealt with a certain amount of force he would have expected to find bruising, but it was possible that, if the muscles of the neck had not been braced at the time, there would have been very little evidence of bruising. The bruise over the right eye could have been caused by a fist. Cross-examined, he said the skull was of ordinary thickness. He would have expected a hard blow with the piece of the plough to fracture it, but if it was a glancing blow it might have left the skull with no abnormality, as he found it. The injury might have been caused by the head's hitting a projecting rock when pushed over the cliff. In answer to the learned Judge Dr. Smit said that, having received the blow, Ntlobiseng would,

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p. 43, l. 23-

p. 44, l. 1

p. 44, ll. 12-13

p. 44, l. 14-

p. 46, l. 16

p. 46, l. 17-

p. 48, l. 7

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p. 49, ll. 1-11

p. 50, l. 3-

p. 51, l. 14

p. 51, ll. 19-22

p. 51, l. 23-

p. 52, l. 14

if he were exposed, have died more quickly than if he had not received it.

pp. 131-135

pp. 136-149

4.—At the close of the case for the Respondent, Counsel for the Appellants submitted that there was no case for them to answer. The learned Judge ruled that there was a case to answer. One witness was called for the defence. His evidence was in any case unimportant, and the learned Judge disbelieved it entirely. None of the Appellants gave evidence or made a statement.

p. 182, ll. 7-13

pp. 182-187

p. 187, l. 20—

p. 188, l. 12

p. 188, l. 12—

p. 189, l. 12

p. 189, l. 12—

p. 190, l. 9

p. 190, l. 9-12

5.—Giving Judgment, the learned Judge said the Court had warned itself about the evidence of accomplices. It was competent for the Court to convict on the evidence of two accomplices, but Mamajone's evidence, if believed, supplied corroboration. He then summarised the evidence. The defence relied on the fact that, if an instrument such as that described by Pitso had been used, the murder could not, in view of the medical evidence, have been committed as Pitso said it was. The learned Judge was satisfied that some weapon had been used and both the accomplices might be wrong as to what it was. This was not a fatal discrepancy, because of the evidence of Mamajone. The learned Judge believed her implicity, and her evidence was most damning. She corroborated most of the accomplices' story, so the fact that they were wrong about the weapon could not discredit the whole of their evidence. Ntlobiseng had not died of the blow ; but if the Appellants put him out thinking him dead and he died of exposure, the fact that he was only unconscious when they put him out did not acquit them of murder. The Appellants had all assembled together for the purpose of committing murder, and all were guilty. After giving all consideration to the doctrine of reasonable doubt, the learned Judge was satisfied that this verdict was right.

6.—The Respondent respectfully submits that the learned Judge weighed the evidence with all proper considerations in mind, and in the evidence fully justified his findings of fact. These findings shewed that the four Appellants were engaged on the execution of a common purpose to kill Ntlobiseng and dispose of his body, and as a result of their execution of this purpose Ntlobiseng died. They were therefore guilty of murder. Furthermore, quite apart from what had happened in Mamaretha's hut, Ntlobiseng's death from exposure was caused by the act of the Appellants in such circumstances that, in the absence of any explanation by them, they were equally guilty of murder.

7.—The Respondent respectfully submits that if (contrary to her contention) the Appellants were not guilty of murder on the facts found by the learned Judge, they were guilty on those facts of culpable homicide, and a verdict of guilty of that offence ought to be substituted. (Culpable homicide is the equivalent in Basutoland of the offence of manslaughter

in English law.) Under Section 181 of the Criminal Procedure and Evidence Proclamation (Laws of Basutoland, 1949, Cap. 16), the Appellants could have been convicted of culpable homicide on the indictment on which they were tried.

8.—The Respondent respectfully submits that the Judgment of the High Court of Basutoland was right and ought to be affirmed, for the following (amongst other).

REASONS

1. BECAUSE the learned Judge considered and weighed the evidence in the proper manner ;
- 10 2. BECAUSE the evidence justified the learned Judge's findings of fact ;
3. BECAUSE on those findings the Appellants were guilty of murder under the law of Basutoland.

J. G. LE QUESNE.

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