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Appeal No. 6 of 1949.

In the High Court of Basutoland Council. UNIVERSITY OF LONDON W.C.1	
17 JUL 1953 INSTITUTE OF ADVANCED LEGAL STUDIES	ON APPEAL FROM THE HIGH COURT OF BASUTOLAND.

BETWEEN

1. BERENG GRIFFITH LEROTHOLI,
2. GABASHANE MASUPHA,
3. MOJAUTU NONYANA,
4. MAKIONE MPHIKO,
- 10 5. SANKATANE MASUPHA,
6. MOSIUOA MASUPHA,
7. KEMAKETSE MASUPHA,
8. FUSI RAKAKALI,
9. SAFERI NTSOSO,
10. RAMABANTA MAHLEKE, and
11. MOLOI NTAI

Appellants,

AND

THE KING

Respondent.

CASE FOR THE APPELLANTS.

- 20 1. This is an appeal by special leave from the judgment and sentence of the High Court of Basutoland dated the 15th November, 1948, whereby the Appellants were found guilty of murder and sentenced to death.

2. The principal grounds of appeal are as follows:—

- (a) The chief witnesses for the Crown were four accomplices, namely Mapeshoane, Molemohi, Sothi and Sepalami. Molemohi's evidence was abandoned by the Crown and rejected by the trial Judge as that of an untruthful witness, and no reliance was placed thereon. The trial Judge held, and in so doing misdirected himself, that one accomplice could corroborate another and that the question to be considered in this case was whether the three remaining accomplices corroborated one another, and if so, whether this corroboration might be relied upon. It is submitted that this ruling was contrary to the law applicable in Basutoland as subsequently laid down by

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the Judicial Committee of the Privy Council in *Tumahole Bereng and Others v. The King* (Privy Council Appeal No. 32 of 1948).

- (b) In addition to the evidence of the accomplices, the only other evidence which referred to any of the Appellants was that of certain witnesses who deposed that they had seen or heard the Appellants Fusi Kakakali (No. 8) and Moloi Ntai (No. 11) on various occasions during the night of the alleged murder or the previous night. This evidence was not such corroboration as the law requires, since it did not implicate these Appellants in the alleged offence. 10
- (c) As regards the other nine of the Appellants, the Crown called no evidence which referred to them in any way other than that of the accomplices.
- (d) In directing himself on the issues of accomplices' evidence and corroboration the trial Judge wrongly followed certain decisions in the South African Courts and not those of the Supreme Court of Judicature in England.
- (e) There was no evidence, other than that of the accomplices, to prove that the crime of murder had been actually committed. The Appellants' conviction therefore failed to comply with the imperative requirements of Section 231 of the Basutoland Criminal Procedure and Evidence Proclamation 1938 as amended by Proclamation No. 12 of 1944. 20
- (f) In addition to the Appellants one Chief Ntoane was arrested and charged with the aforesaid murder but died in prison before he could be brought to trial. Shortly before his death he made a statement regarding the facts of the case which was shewn by some person or persons unknown to one of the assessors at the trial. The Court did not inform counsel for the Defence that the assessor had seen the said statement or afford the Defence any opportunity to comment thereon. 30

3. The Appellants respectfully submit that the learned Judge was wrong in directing himself that one accomplice can corroborate another. Section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, originally read as follows:—

“ Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice: 40

“ Provided that the testimony of the accomplice is corroborated by independent evidence which affects the accused by connecting or tending to connect him with the crime:

“ Provided further that such evidence shall consist of evidence other than that of another accomplice or other accomplices.”

By an amending Proclamation (No. 12 of 1944) the said section was amended by deleting the first and second provisos and substituting therefor the following proviso:—

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“ Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.”

Section 268 of the said Proclamation reads as follows:—

10 “ In criminal proceedings, in any case not provided for in this Chapter, the law as to admissibility of evidence and as to the competency, examination, and cross-examination of witnesses in force in criminal proceedings in the Supreme Court of Judicature in England shall be followed in like cases by the courts of the Territory and by District Commissioners holding preparatory examinations.”

Section 323 of the said Proclamation reads as follows:—

20 “ Where an act or omission constitutes an offence under two or more Statutes or is an offence against a Statute or the common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished either under Statute or, as the case may be, under the Statute or the common law, but but shall not be liable to more than one punishment for the act or omission constituting the offence.”

4. On Saturday, the 6th March, 1948, Trooper Hamilton of the Basutoland Mounted Police went to Mamathe's, to investigate a report that a body had been found. He called at the house of the Appellant Gabashane Masupha (No. 2) and was taken from there to a donga where he found the body lying on its right side, almost the whole of the right side being in the mud. He observed that in this position the nostrils and
30 mouth would not be in water and sand unless the water was three or four inches deep. He examined the body for injuries and saw that there was an injury on the left side of the mouth on both the upper and lower lips. On moving the body he saw crabs where it had been lying.

Vol. VII.,
p. 478.

Vol. VII.,
p. 480, l. 26.
Vol. VII.,
p. 481, l. 1.

5. That on the following day Dr. R. C. Ogg, a medical officer stationed at Teyateyaneng, conducted a post-mortem examination on the body, which was identified to him as being that of Melake Ntai. His report included the following passages:—

40 “ Deceased last seen Thursday evening and found lying on his right side in a donga. Head and right side found in water (there had been heavy rain on Thursday and Friday). When the body was lifted numerous crabs were seen in the water just under the body. It was noted that portions of both lips were missing and that there were abrasions on the eyelids.”

Vol. XI.,
p. 834, l. 12.

“ External Appearances (10) Body covered in fine river sand. Not decomposed. Hands and feet blanched showing immersion in

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water. Upper and lower lip missing from below right nostril in a semi-circle. Remains of upper lip showed slightly jagged edges, lower lip a cleaner line.

- " Tip of left nostril abraded irregularly ... probably crabs.
- " Area 1 in. \times $\frac{3}{4}$ in. abraded midsternum ... ditto.
- " Left leg 3 areas $\frac{1}{4}$ in. each abraded ... ditto.
- " Right leg one area $\frac{1}{2}$ in. abraded ... ditto.
- " Both eyelids had superficial skin removed ... ditto.

Vol. XI.,
p. 836.

" From the appearance of the right lung particularly coupled with the very appreciable amount of river sand in larynx, trachea and bronchi and congestion of brain—death due to drowning. The absence of lips and the abrasion etc. of nose and eyelids compatible with being caused by crabs."

6. On the 29th June, 1948, the body was exhumed and further examined by Dr. Ogg and Dr. Whitworth, also a medical officer. It had been alleged by one of the accomplices that the deceased had been throttled and a sharp instrument forced into his nostrils and throat. The report of the two medical officers, dated the 2nd July, 1948, included the following passage:—

Vol. XI.,
p. 837, l. 16.

" The tissues on both sides of the neck were opened up—but no sign of bruising of the tissues was found. The incision made at the first Post-mortem was re-opened and continued upwards and through the middle of the jaw bone and the back of the throat and mouth thoroughly examined. The mucous membrane here was well preserved and showed no sign of injury. The mucous membrane of the nose was completely decomposed and it could not be said whether or not there had been any injury here."

Vol. I., p. 53.

7. That three of the accomplices, namely Sepalami, Molemohi and Sothi were arrested towards the end of May or at the beginning of June (the exact date was not given in evidence) and Mapeshoane in July. They were lodged in the same gaol and lived and slept in the same cells, though the Crown evidence was to the effect that Police officers were with them at all times to prevent them from discussing the alleged murder. Molemohi made a statement on the 9th June, Sepalami on the 2nd June, Sothi on the 20th July and Mapeshoane on the 22nd July. The Appellants, Bereng Griffith Lerotholi (No. 1) Gabashane Masupha (No. 2) Makione Mphiko (No. 4) Mosiuoa Masupha (No. 6) Kemaketse Maspuha (No. 7) and Saferi Ntsoso (No. 9) were arrested on the 13th July, and the rest of the Appellants later in the same month. Another suspect, namely Chief Ntoane, was also arrested but died before the trial.

Vol. I.,
p. 56, l. 2.
Vol. III.,
p. 466, l. 7.
Vol. I.,
pp. 54-60.

Vol. XI.,
p. 833.

8. That the Appellants were charged jointly with one Titimus Ramashamole, who was later acquitted, that on the 4th day of March, 1948, and at Rusi's in the district of Teyateyaneng they did each and all or one or more of them wrongfully unlawfully and maliciously kill and murder Meleke Ntai.

9. That the case for the Crown sufficiently appears from the following passage from the Judgment:— RECORD.

“ Shortly stated, the case for the Crown is that at a meeting on the evening of March the 3rd at Chief Gabashane’s residence a conspiracy to murder Meleke Ntai was entered into. No. 11 accused, Maloi, is alleged to have sold his brother for £100 on that occasion. Vol. XI,
p. 786, l. 2.

10 “ At that meeting it is alleged that all the accused, except Nos. 8 and 9, were present. The next day Maloi Ntai with Meleke Ntai, the deceased, Makhetha Ntai and Ntsane Ntai, proceeded on horseback to the funeral of a relative at Mahleke’s village, some four miles distant from Mamathe’s village. On the way back, on their return from the funeral, Meleke Ntai was left behind by the other three. It is alleged that he was intercepted, seized, dragged from his horse, held on the ground, throttled by No. 4 accused, suffocated by No. 3 accused and held by the other accused with the exception of Chiefs Bereng and Gabashane, who stood by. Portions of his upper and lower lips were cut off by Chief Ntoane, and the flesh handed to Chief Bereng.

20 “ He was thought to be dead and orders were given by Chief Gabashane for his body to be disposed of in a donga. He was carried to the donga by a number of the accused, assisted by the four witnesses for the Crown, Mapeshoane, Molemohi, Sothi and Sepalami, and having disposed of Meleke Ntai in the donga the persons who took part there returned to the place of the assault, reported to the Chiefs, Bereng and Gabashane, that the order had been carried out and dispersed. That, briefly, is the case for the Crown.”

10. That the case for the Crown was conducted by the Attorney-General of Basutoland (Mr. A. T. Thompson, K.C.) whose opening speech contained the following passages:—

30 “ As I was saying, the Crown case will depend very largely indeed on the evidence of the four accomplices, and the legal authorities will be given at the close of the case on behalf of the Crown that if the evidence of the accomplices is found by Your Lordship to be genuine, satisfactory and credible, that that is sufficient, and that one accomplice can corroborate another and so forth. The authorities will be placed before Your Lordship. Vol. I.,
p. 5, l. 14.

40 “ Now there is a certain amount of corroboration, general corroborative evidence, not implicating any of these accused personally, by a witness who saw groups moving about in rather a mysterious fashion that evening; that witness does indicate No. 11 because he heard and recognised his voice. Then Your Lordship will remember the deceased was seized from a horse, and there is evidence that the saddle of a horse was found near the spot on the ground—near the spot where it is alleged the murder took place; clothing of the deceased and other exhibits were found near that spot on the ground and the horse itself returned to the place where the deceased Vol. I.,
p. 6, l. 7.

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was living, unsaddled and, of course, without a bridle. It will show that something happened to the deceased which was unusual to say the least of it.

Vol. I.,
p. 7, l. 34.

“ As to the wound round the lips, the doctor finds that crabs had been nibbling at those wounds and other parts of the face and body and, therefore, as there are distinct signs of nibbling by crabs, it is impossible for the doctor to say, beyond any shadow of medical doubt, that this was a cut as alleged by the accomplices. He can say that the medical finding is not inconsistent with a cut wound to some extent.” 10

Vol. I.,
p. 8, l. 24.

“ Insofar as this cut is concerned the evidence is inconclusive to this extent, because undoubtedly crabs have been nibbling at the mouth it cannot be stated for certain that there was a cut wound on the mouth. All the injuries seen by the doctor might have been caused by crabs; at the same time it is the experience of the doctor, when anybody is in the water and there are open wounds crabs are apt to go for those open wounds first and not the other parts of the body.” 20

“ However that may be m’lord—again at the proper stage of the case I shall have to convince Your Lordship that on the evidence as a whole the Crown will prove the cause of death, which it is necessary for the Crown to prove before the Crown can go further and ask Your Lordship to find these persons criminally guilty of murder.”

Vol. I.,
p. 11, l. 35.
p. 12.

II. Dr. Ogg deposed (*inter alia*) as follows:—

(a) There was a fair amount of fine river sand in the larynx, trachea and bronchi. This finding suggested that death was due to drowning and that the deceased was still alive at the time when he was in the water.

Vol. I.,
pp. 12, l. 35,
and p. 13,
l. 31.

(b) At this witness saw the wound crabs had been at it and he could not state that the lips had been cut. All the wounds could have been caused by crabs. 30

(c) In his experience crabs had a predilection to the angles of the mouth, the top of the nose, the eyelids and the lobes of the ears. If the body bore wounds on it the crabs would go first for the wounded portions.

Vol. I.,
p. 14, l. 17.

In cross-examination this witness stated that:—

(a) He found no positive evidence suggesting that an assault of any nature had been committed on the deceased.

Vol. I.,
p. 19, l. 28.

(b) If the body had been thrown into a donga from a height of say 10–15 feet before drowning took place he would have expected to find bruises, but he had found no bruises whatsoever, excepting those which were probably caused by crabs. 40

Vol. I.,
p. 21, l. 33.

(c) The condition of this body was consistent with the deceased having walked past this donga and fallen into it by accident, and having been drowned in that way.

- (d) It was also possible that the deceased had ridden on horse-back near the donga and had fallen off and slid into the donga, and got drowned in that way. The injuries were consistent with such a happening. Vol. I., p. 22, l. 12.
- (e) He had no direct evidence from his findings that a knife had been used. Vol. I., p. 23, l. 28.
- (f) Less flesh had been removed in this case than in any other of the several ritual murder cases of which this witness had had experience. As a rule flesh was removed from more than one portion of the body. Vol. II., p. 103, l. 11.

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In re-examination, this witness stated that the thick blankets and trousers which the deceased was wearing would have tended to protect his body against bruising. Vol. I., p. 25, l. 6.

12. Dr. Whitworth deposed (*inter alia*) that, when he examined the exhumed body on the 29th June, there were no signs of throttling or of any instruments having been forced into the nose or throat. Vol. V., p. 389, l. 8.

13. The four accomplices gave evidence (*inter alia*) to the following effect:—

- (2) Mapeshoans deposed that on Wednesday evening, the 3rd March, he was summoned to a meeting with the Appellant Gabashans Masupha (No. 2) which was also attended by Bereng Griffith Lerotholi (No. 1) Mojautu Nonyana (No. 3) Makione Mphiko (No. 4) Sankatane Masupha (No. 5) Mosiuoa Masupha (No. 6) Kemaketse Masupha (No. 7) and Ramabanta Mahleke (No. 10) and Titimus Ramashamole, at which the Appellant Gabashans Masupha (No. 2) stated: "There is something that I want. It is something that can be obtained from a person who may be killed and that this matter must be treated as a secret." Vol. II., p. 85.
- He then asked the Appellant Moloi Ntai (No. 11) to assist him by selling to him his brother Meleke, and he offered to pay him £100. This witness agreed to take part in the killing under the orders of his Chief and his senior brother. On the following evening the conspirators met together and divided into two parties, the Appellants Gabashane Mesupha (No. 2) and Mosiuoa Masupha (No. 6) went to a car while the others, under the leadership of the Appellant Bereng Griffith Lerotholi (No. 1) proceeded on foot in two groups towards a spot near the house of the Appellant Fusi Rakakali (No. 8). On arrival he saw a riderless horse and that a person, whom he afterwards identified as Meleke, had fallen to the ground. This witness pressed Meleke down on his knees and caught hold of his legs while the Appellants Mojautu Nonyana (No. 3) and Makions Mphiko (No. 4) throttled him. Those present took some part in holding Meleke down except the Appellants Bereng Griffith Lerotholi (No. 1) Gabashane Masupha (No. 2) and Fusi Rakakali (No. 8) who stood by. Thereafter the body

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was carried away and thrown into the donga by this witness, Sothi, Molemohi and the Appellants Sankatane Masupha (5) Mosiuos Masupha (6) Kemaketse Masupha (7) Saferi Ntsoso (9) and Ramabanta Mahleke (10).

Vol. II.,
p. 105.

In cross-examination this witness stated that he was certain that Meleke was dead at the time that they took him from the place of the attack. The body was cold at the time. He further admitted that after his arrest he had made a statement to the Police officer in charge of the case (Mr. Castle) and that the statements of the four accomplices had been read over to them in the presence of one another, shortly before the preparatory examination. Since the preparatory examination he had discussed the evidence with the other accomplices. 10

Vol. II.,
pp. 115-116.

Vol. II.,
p. 116, l. 1.

Vol. III.,
p. 209.

(b) Mohamoli gave no evidence as to the meeting on the 3rd March, but deposed to substantially the same effect as Mapeshoane regarding the events of the 4th March. He stated that he seized Meleke by the legs while he was being throttled, that Meleke was dead after the attack, and that he had assisted to carry the body to the donga. 20

Vol. IV.,
p. 272.

(c) Sothi also gave no evidence as to the 3rd March but similar evidence as to the 4th March. He alleged that when he learned that a person was to be killed he announced his intention of going back and running away but the Appellant Makione Mphiko (No. 4) said: "If you return, we shall kill you." Thereafter he proceeded to the scene of the attack and seized the legs of Meleke. He too was of opinion that Meleke was dead before he was carried away and had assisted to carry the body to the donga.

Vol. IV.,
p. 290, l. 19.

Vol. V.,
p. 318.

(d) Sepalami gave no evidence as to the 3rd March, but similar evidence as to the 4th March. He held Meleke's legs while Mojautu Nonyana (No. 3) and Makions Mphiko (No. 4) throttled Meleke until he died. He then assisted to carry the body to the donga. He added: "I heard the body fall and there was a sound as if there was either mud or water. As if it had been raining." 30

14. The Crown called four witnesses, who gave evidence with reference to the Appellant Molio Ntai (No. 11) as follows:—

Vol. V.,
p. 232.

NTSANE NTAI deposed that one night Makhetha and the Appellant Moloi Ntai came and knocked at his (the witness's) door and said "I am Moloi. I have come to wake you up. Your grand-uncle, Makhetha, is also here, outside. Both of you are wanted by the Chief. He said the Chief was Chief Gabashane." The witness then accompanied the Appellant and Makhetha to the Chief's house. The Appellant then went inside, while the witness and Makhetha waited outside. After a long time the Appellant returned and said, 40

“let us go back home.” He added that he had found Chief Gabashane, Chief Bereng, Mapeshoane and their people in the house and that they were discussing the killing of a person. The witness added: “He said that it not specified who was to be killed” (*sic*). On the same day the witness heard of the death of one Tlatsinyane and on the following day he accompanied the Appellant Moloi Ntla (No. 11), Meleke (the deceased) and Makhetha to the funeral. After the funeral the same four started to go home, but the other three left the deceased because he was a sickly man and could not race his horse as fast as his companions. The suggestion that they should race came from the Appellant Moloi Ntla (No. 11). The witness and Makhetha asked why they should leave Meleke behind, and the Appellant replied: “If you do not leave him behind you will see what will happen.” Later the party met a small group of people whom the Appellant joined, while the witness and Makhetha continued on their way. Some time afterwards the Appellant caught them up and Makhetha asked him who those people were. The Appellant replied: “What do you want to do with them?” The witness was asked what else the Appellant said, and replied: “He said we continued wishing to know other people’s affairs.” In cross-examination this witness admitted that he had been in custody for three days before he made any statement to the Police, and in re-examination he alleged that the Appellant Moloi Ntai (No. 11) said to him: “If you report this matter you will be held responsible yourselves.”

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MAKHETHA NTAI, the uncle of the previous witness, confirmed the evidence of Ntsane Ntai regarding the summons to the house of Chief Gabashane. He further deposed that on the way back the Appellant Moloi Ntai (No. 11) “told us that a person was required to be killed” and it was the Chief who required it. He also confirmed the story about the return from the funeral and that the Appellant Moloi Ntai had said that if they did not leave the deceased behind, they would see what would happen.

Vol. V.,
p. 383.

COCHA COCHA deposed that on the Saturday after Tlatsinyane’s funeral the Appellant Moloi Ntai (No. 11) told him that Meleke had died. The witness asked what had killed him and the Appellant replied that he had been “killed by the people.” The witness said: “But where were you?” and the Appellant replied: “We left him behind and galloped our horses . . . we were in a hurry and he refused to gallop his horse.” The witness then said: “You deliberately left him behind.” The Appellant then struck him with a clenched fist and said that he was speaking badly. In cross-examination this witness said that he had asked the Appellant who killed Meleke and the Appellant replied: “I don’t know—he was killed by the people.” The witness did not ask him what people.

Vol. VI.,
p. 414.

MOLIKO KHOTHATSO deposed that after ten o’clock at night on Thursday, the 4th March, he went out of his house and saw a number

Vol. VI.,
p. 420.

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of persons. He did not recognise them but heard one of them speak to the rest. The voice was that of Moloi Ntai (No. 11). The witness did not see in which direction these people went. He further deposed, however, that shortly afterwards there came a motor-car which stood still at the cross-roads, but he did not recognise it. He saw two or three persons going towards it and heard the sound of the doors being closed, so he took it that they must have got into the car. The car then proceeded in the direction of Fusi's. The next day this witness met Moloi Ntai (No. 11) who said he was going to look for Meleke, who was missing. At first Moloi Ntai denied having met a group of people the previous night, but, when taxed by the witness, admitted it. 10

The examination of this witness then proceeded as follows:—

Vol. VI.,
p. 424, l. 21.

“ And then ? What passed between you ?—Then I asked him, ‘ Who were those people ? ’ He said he did not recognise them. He said that he had mentioned to those who were with him that if this group meets people they might kill them. I then asked him where he had met the motor-car. He said he had not met the motor-car.

“ Yes ?—I said: ‘ You must have met the motor-car before you reached your home ? ’ 20

“ Yes ?—He then changed and I could see that he was frightened. He said he was going away.

“ Anything else happen ?—Then I left.

“ And is that all you know ?—Yes.”

In cross-examination this witness said that after the Appellant Moloi Ntai (No. 11) had gone past he saw the motor-car.

15. The Crown called the following witnesses who referred to the Appellant Fusi Rakakali (No. 8) who is a doctor and who at the material time had charge of lunatics. 30

Vol. XI.,
p. 143.

MANPANE MOTHABI deposed that he lived about 700 yards from Fusi's house. He remembered an incident on a Thursday night in March which he described as follows:—

“ A man arrived. I did not know who it was. He knocked at the door. I asked, ‘ What is it ? ’ he said ‘ Father, come out and help me, here is a man on the main road.’ A man had been thrown by a horse, he is drunk. He said, ‘ These people have left him behind.’ I asked, ‘ Where is his home ? ’ He said, ‘ His home is at Lebina's.’ I asked him again, ‘ Who are you ? ’ He said, ‘ I am Fusi.’ 40

“ All right. He said he was Fusi ?—Yes.

“ And then ?—I said, ‘ Go to the Headman.’ I said I had no power.

“ By the way, are you a Headman or in any position of authority ?—No, I am not a Headman.

" You told him you had no power and you told him to go RECORD.
to the Headman ?—Yes.

" Did you say anything else ?—Then he left.

" You didn't see this man, of course ?—I didn't see him,
I spoke from inside my hut.

" When this man said he was Fusi, did you believe him or
did you not believe him ?—I believed him.

" At what stage did you recognise him to be Fusi, before he
told you or afterwards ?—I recognised him when he spoke.

10 " Before you asked him who he was ?—Yes.

" So you knew his voice well ?—Yes.

" On that evening of the visit from Fusi, when you heard
him speaking, did you hear anything else ?—Yes.

" What did you hear ?—I heard a motor-car.

" From what direction ?—I heard a motor-car as if coming
from the direction of Fusi.

" Of Fusi's Village ?—Yes.

" That is, you heard a motor engine in motion ?—Yes.

20 " Is it usual for motor traffic to be about on that road in
the middle of the night, or late at night ?—Yes, motor-cars
often go past there."

PAULUS KAHLOLO deposed that he worked for the Appellant Fusi Rakakali (No. 8) and used to look after the lunatics so that they should not run away. On a Saturday morning he discovered the body of the deceased lying in the donga and reported it to Fusi who was at that moment " appearing on the top of the mountain." Fusi said that he was going to raise the alarm at the Chief's place. Vol. VI., p. 450.

30 MALINEO RAMATEKOA deposed that on Thursday, the 4th March, he slept in the same hut with Fusi Rakakali (No. 8), that the Appellant went out at dusk and that he returned after a long time when other inmates of the household were in bed. Vol. VI., p. 467.

MATHABO MOTHIBELI was also staying in Fusi's household during the week in question and deposed that on the Thursday, the Appellant left the hut at dusk and came back at night when the others were in bed. Vol. XI., p. 470.

40 PHETA MOSEHLE deposed that one morning the Appellant Fusi Rakakali (No. 8) pointed out a saddle near the village and said " Look here, brother-in-law, they throw this saddle here so that they must think we are killing people with you." " Guard this saddle while I go raise the alarm to the Chief." This was on a Friday. The witness guarded the saddle until dusk. The next day Fusi told him that his mental patients had discovered a body in the donga. The examination of this witness continued as follows:— Vol. VI., p. 473.

" Did he say anything else ?—He said, ' You, brother-in-law, Pheta, should consider yourself and Nonyane.

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"What did he mean by that?—I said, 'What should I consider?' He said that this matter has happened between us both, most probably the Government may ask us about this. I said to him, 'Do you think that I can stab myself with an assegai in the stomach?'"

"What does that mean?—By that I meant, do you think I can murder a person and then place his body in front of my house. Can't I be arrested if I do a thing like that."

"Did you see a sjambok and a saddlecloth in the same place?—Yes."

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"Did you guard them with the saddle?—Yes."

"When you saw Fusi standing on the hill on the Saturday morning, was it early in the morning or late. Or what time was it?—It was early in the morning as the sun rose."

Vol. VII.,
p. 477.

MAMASELA THOTHE deposed that he went to the Appellant Fusi Rakakali (No. 8) for treatment, and while there saw a saddle, a handkerchief, a saddle-cloth and sjambok lying on the veldt.

Vol. VII.,
p. 478.
p. 480, l. 17.

p. 481, l. 21.
p. 482, l. 5.

16. Trooper Hamilton gave evidence of the matters set out in paragraph 4 hereof and in addition deposed as follows: There was only one boot, but the witness later discovered the other boot lying in the veldt as a result of a report from the wife of the Appellant Fusi Rakakali (No. 8). On the following day, Sunday, he made an inspection for the spoor, and found what appeared to be the spoor of people on one side of the donga. There had been much rain and there were no foot-prints. But the grass had been trodden down. There was no grass at the top of the donga and he saw no marks. Near the house of the Appellant Fusi Rakakali (No. 8) he found tracks showing that there had been a motor-car standing there some days ago. He did not follow these tracks along the road.

Vol. VIII.,
p. 593.

17. That each of the Appellants gave evidence and denied all knowledge of the offence. Fusi Rakakali (No. 8) deposed (*inter alia*) that he had received a report from a woman in his village that she had found a saddle, a sjambok and handkerchief, and that he reported this matter to the Chief. He denied knocking at the door of Manpane Mothobi and Makalothe Mathobi late at night or telling them that anyone had been thrown from his horse. He further denied that on the Saturday morning he had been out on the hillside very early in the morning. As regards the conversation with Pheta, he did not say that "the saddle might draw suspicion that a person had been killed." He said: "This saddle, handkerchief, saddle-cloth and sjambok are suspicious and therefore we should report them to the Chief." He did not mention the possibility of a person being killed.

Vol. VIII.,
p. 604.

The Appellant Ramabanta Mahleke (No. 10) deposed that he had attended Tlatsinyane's funeral and had seen the Appellant Moloi Ntai (No. 11) Meleke, Ntsana and Makhetha leave together.

Vol. VIII.,
p. 510.

The Appellant Moloi Ntai deposed that he had ridden home from the funeral with Meleke, Ntsane and Makhetho and that Meleke had said that

he was not going to gallop his horse. He and the other two galloped off and left Meleke behind. It was not true that he warned the others not to stay with Meleke. On the Saturday morning he did not see Moliko but he did see Cocha Cocha and told him that Meleke was dead, adding that he refused to gallop his horse. Cocha Cocha accused the Appellant of doing it deliberately so as to cause his death. The Appellant replied that Cocha Cocha spoke badly and a fight ensued.

18. In his final address the Attorney-General referred to Clause 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, and said:—

“Strictly speaking, of course, the section does not come into play in this case because the Crown is not asking for a conviction on the unconfirmed evidence of an accomplice—it is asking for a conviction on the evidence of four accomplices, and the submission, of course is that the accomplices corroborate each other.”

The Attorney-General then referred to *Rex v. Thielke's* (1918 A.D. 373) and *Rex v. Noanana* (S.A. Law Reports, 1948, IV., page 399).

The Attorney-General continued:—

20 “So on the authorities may I say the basic principles are as follows: firstly, one accomplice may corroborate another. Secondly, the corroborating evidence need not directly implicate the accused (in this case it does) but the corroborating evidence must tend to show that the accomplice is a reliable witness. Thirdly, it is not necessary that an accomplice's evidence be accepted a hundred per cent. A portion of the evidence may be accepted and a portion rejected. Finally m'Lord, if, as his Lordship Mr. Justice Schreiner says, the danger of accepting accomplices' evidence is always borne in mind, there is really no difference, particularly where there are three or four accomplices, between an accomplice's evidence and any other witness.”

30 With reference to Molamohi, the Attorney General admitted that he had been proved to be an unsatisfactory witness, and continued:—

“Now if he were the only accomplice, m'Lord, and that were a fact, I would have no Crown case to argue, because he would have been shown to be unreliable, so one of these accomplices is, in one respect, unreliable, and I shall not ask Your Lordship to accept his evidence—save in so far as it is corroborated by the other three.”

As regards the cause of death, the Attorney-General said:—

40 “The balance of Doctor Ogg's evidence is entirely negative. It can be summed up in his evidence in re-examination, there is nothing in his observations which would lead him, as a medical man, to reject a story such as that told by the accomplices.”

The Attorney-General then referred to the circumstances in which the body and the saddle, saddle-cloth, sjambok, boot and hat were found, and continued:—

“All these factors, in my submission, lead one to the irresistible conclusion that that body was carried and placed in the position in

RECORD.

Vol. IX.,
p. 632, l. 30.

Vol. IX.,
p. 633, l. 13.

Vol. IX.,
p. 634, l. 23.

Vol. IX.,
p. 636, l. 4.

Vol. IX.,
p. 637, l. 22.

Vol. IX.,
p. 638, l. 15.

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which it was found. Even by stretching one's imagination as far as possible, one cannot conceive any reason whatsoever why the deceased should voluntarily have dismounted his horse, unsaddled it, removed the reins, and then gone down this steep, almost precipitous slope, wandered around that donga and suddenly collapsed and died at the place where his body was found."

19. The Judgment of the learned Trial Judge included the following passages:—

Vol. XI.,
p. 787, l. 29.

"The principal witnesses for the Crown were four accomplices, Mapeshoane, Molemohi, Sothi and Sepalami, and Ntsane and Makhetha Ntai. Molemohi's evidence was extremely unsatisfactory and it was obvious that he was an untruthful witness. Not only did he deny important statements that he had made at the Preparatory Examination, but he made one remarkable statement to Lieutenant Castle which he denied in evidence in this Court. It was that an umbrella stay had been pushed up the nostrils and into the throat of the deceased at the time of the alleged assault. The Crown has accordingly abandoned his evidence, and places no reliance thereon. 10

Vol. XI.,
p. 788, l. 18.

"The Crown in this case alleges a case of conspiracy to murder and in such a case anything said or done by any of the conspirators in furtherance of the conspiracy is evidence against all of them. The Crown relies in this case largely on the evidence of accomplices. The three witnesses, Mapeshoane, Sothi and Sepalami, were accomplices. According to their own evidence they took part in the commission of this crime, indeed they were in it up to their necks. The law is that the evidence of an accomplice must be corroborated. One accomplice may corroborate another. The question to be considered in this case is whether these three accomplices corroborate one another, and if so whether this corroboration may be relied upon. 20 30

Vol. XI.,
p. 802, l. 1.

"The evidence of Moleko, Trooper Hamilton and the other witnesses for the Crown to whom I have referred, satisfies me that there was a car at the times and places referred to in evidence on March 4th. It doesn't satisfy me that the car was that of the accused, Chief Gabashane."

Vol. XI.,
p. 805, l. 4.

"The witnesses for the Crown who testified to the throttling all thought the deceased had been killed. They were mistaken, because it is clear that he was still alive when taken to the donga. He appears to have put up little resistance, and in such circumstances it would not be necessary to use much force. The circumstances that there were no signs of an assault on the deceased, cannot outweigh the evidence of the witnesses I have referred to that an assault did actually take place. The story told by them is a terrible one and as I have said, it is inconceivable that it should have been concocted. . . . 40

“ There is some evidence that I have omitted to refer to. There is the evidence of two women who resided at Fusi's, Malineo and Mathabo, that on the evening of March 4th Fusi left their huts where he had been with them and returned late at night, and asked for food. This is to show that he was out that night. There is also the evidence of Mampane Mothobi who said that he lives 700 yards away between Fusi's and his village, and he said on a Thursday night in March a man arrived whom he didn't know, knocked at the door and he asked, 'What is it ? ' The man said, ' Father, come out. There is a man on the road. The man has been thrown from his horse. He is drunk. His people have left him behind.' He asked who he was and the man said he was Fusi. He said ' Go the to the headman.' He said he had no power. Then the man left.

Vol. XI.,
p. 805, l. 19.

“ That evidence is to show that Fusi was out that night on a somewhat curious mission, and that for reasons best known to himself he wished to get Mampane Mothobi out of his hut that night. . . .

“ As to the events of the evening of March 4th, he (Mapeshoane) was corroborated in material respects by the evidence of the witnesses Sethi, Sepalami and Moleko. It is true that Sothi's evidence is, in many respects, at variance with that of Mapeshoane. He is an unintelligent man of weak character, but in my opinion, he tried to tell the truth to the best of his recollection and ability. Sepalami's evidence was substantially in agreement with that of Mapeshoane. As I have said, they told a circumstantial and terrible story with a wealth of detail and I cannot believe that it was concocted. The deceased Meleke was dragged from his horse, throttled, suffocated, his lips were cut, and when he was thought to be dead he was carried to and deposited in a deep donga, containing mud and water, and as a consequence of having been thrown into the donga in the condition he was, he lost his life by drowning and that constitutes murder.”

Vol. IX.,
p. 811, l. 4.

20. The Appellants crave leave to refer to the decision of the Judicial Committee of the Privy Council in *Tumahole Bereng and Others v. The King* (Privy Council Appeal No. 32 of 1948). The Reasons for Report of the Lords of the Judicial Committee therein were delivered on the 14th February, 1949, and included the following passages:—

“ If the Section (Section 231) applies where the prosecution depends on a number of accomplices they remain an indivisible group for the purposes of the proviso and some proof that is not subject to the taint attaching to their testimony must be adduced to meet its demands.

“ As has frequently been pointed out the functions of this Board in criminal cases are not those of a court of criminal appeal and grounds of appeal going to the weight of the evidence are not

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readily entertained. In the present instance, however, their Lordships feel that the question under discussion stands on a special footing. There was no proper corroboration of any material part of the evidence of the accomplices which, in itself, was not by any means free from blemish. Before accepting that evidence the learned judge sought corroboration and found it in circumstances which, as already held, ought not to have been regarded for the purpose, and it cannot be assumed that he would have arrived at the same conclusion had he directed himself correctly. Indeed, the terms of the judgment go some way to suggest that he would not have disregarded the cautionary rule of practice had he held, as he should that its requirements were not fulfilled. In the circumstances their Lordships are disposed to treat the misdirection as a matter of grave consequence and would, were it necessary to do so, advise that the appeal be allowed on this ground also. 10

“ Before leaving this aspect of the case their Lordships desire to refer to a sentence in the judgment of the learned Judge which reads: ‘ It has been frequently laid down that the evidence of one accomplice is corroborative of the evidence of another so far as the commission of the crime is concerned.’ From its context it would seem that this passage was intended to refer to the requirements of the proviso to Section 231. So understood it has already been dealt with. But, lest it might be taken as referring to the rule of practice just discussed, their Lordships think it well to state plainly that for the purposes of that rule the evidence of one accomplice is not corroborative of the evidence of another.” 20

21. The Appellants presented a petition for Special leave to appeal to His Majesty in Council. On the 15th March, 1949, the Appellants’ attorneys in Johannesburg despatched a cablegram to the Appellants’ solicitors in London a copy of which is annexed hereto (Annexure “ A ”). 30

22. Special Leave to Appeal to His Majesty in Council was granted by Order in Council dated the 29th day of March, 1949. A copy thereof is annexed hereto (Annexure “ B ”).

23. The Appellants respectfully submit that this appeal should be allowed and their conviction and sentences quashed for the following, among other,

REASONS:—

1. Because the learned Judge wrongly held that the evidence of an accomplice could be corroborated by the evidence of other accomplices, and failed to apply the rule of law laid down by the Judicial Committee as aforesaid, namely that the evidence of one accomplice is not corroborative of the evidence of another. 40
2. Because the learned Trial Judge wrongly applied the decisions in the South African Courts and not the law of England.

3. Because there was no evidence implicating the Appellants Bereng Griffith Lerotholi (No. 1) Gabashane Masupha (No. 2) Mojautu Nonyana (No. 3) Makione Mphiko (No. 4) Sankatane Masupha (No. 5) Mosiuoa Masupha (No. 6) Kemaketse Masupha (No. 7) Saferi Ntsoso (No. 9) Ramabanta Mahieke (No. 10) other than that of the four accomplices.
4. Because the evidence of those witnesses other than the accomplices who referred to the Appellants Fusi Rakakali (No. 8) and Moloi Ntai (No. 11) did not furnish such corroboration as the law requires.
5. Because it was not proved by evidence other than that of the accomplices that the offence charged had been actually committed. The requirements of Section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, were not, therefore, fulfilled.
6. Because one of the assessors whose duty it was to advise the Judge had been shown a statement purporting to be a confession by a co-accused and the Court afforded the defence no opportunity to comment on the said statement.
7. Because the convictions were wrong and should be set aside.

DINGLE FOOT.

BARROW, ROGERS & NEVILL,
Whitehall House,
41, Whitehall, S.W.1,
Appellants' Solicitors.

ANNEXURE " A ".

Copy Cablegram

from Appellants' Attorneys in Johannesburg
to Appellants' Solicitors in London.

15th March, 1949.

LC APPEALS LONDON

EN ROUTE INSPECTION LOCO ASSESSOR ELLIOTT IN PRESENCE MAISELS GORDON AND ATTORNEY GENERAL ADMITTED KNOWLEDGE TO ALLEGED CONFESSION BY NOTWANI (SIC—NTOANE) WHILE DELIRIOUS IN TERMS SIMILAR TO CROWN EVIDENCE STOP THIS NOT RAISED AT TRIAL STOP MAISELS HAS DISCUSSED MATTER WITH ATTORNEY GENERAL WHO AGREES WITH THESE FACTS STOP AUTHORISE YOU MAKE THIS STATEMENT BEFORE APPEAL BOARD AFFIDAVITS COUNSEL WILL BE SOON FORTHCOMING—

BAMMELI

ANNEXURE " B ".
AT THE COURT AT BUCKINGHAM PALACE

The 29th day of March, 1949

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

SIR ALAN LASCELLES

LORD PRIVY SEAL

MR. HALL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd day of March 1949 in the words following, viz.:—

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" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Bereng Griffith Leretholi (2) Gabashane Masupha (3) Mojautu Nonyana (4) Makione Mphiko (5) Sankatane Masupha (6) Mosiuoa Masupha (7) Kemaketse Masupha (8) Fusi Rakakali (9) Saferi Ntsoso (10) Ramabanta Mahieke (11) Moloi Ntai in the matter of an Appeal from the High Court of Basutoland between the Petitioners Appellants and Your Majesty Respondent setting forth (amongst other matters): that the Petitioners pray for special leave to appeal to Your Majesty in Council from the Judgment and sentence of the High Court of Basutoland dated the 15th November 1948 whereby the Petitioners were found guilty of murder and sentenced to death: that the Petitioners were charged jointly with one Titimus Ramashamole who was later acquitted that on the 4th day of March 1948 and at Fusi's in the district of Teyateyaneng they did each and all or one or more of them wrongfully unlawfully and maliciously kill and murder Meleke Ntai: that the case for the prosecution is that at a meeting on the evening of March 3rd at Chief Gabashane's residence a conspiracy to murder Meleke Ntai was entered into: that it is alleged that Meleke Ntai was intercepted seized dragged from his horse held on the ground throttled by No. 4 accused suffocated by No. 3 accused and held by the other accused with the exception of Chiefs Bereng and Gabashane who stood by: that portions of his upper and lower lips are alleged to have been cut off by Chief Ntoane (who died before the trial) and the flesh handed to Chief Bereng: that it is further alleged that his body was carried to a donga and there disposed of: that the Petitioners submit (*inter alia*) that the learned Judge wrongly held that the evidence of an accomplice could be corroborated by the evidence of other accomplices and failed to apply the rule of law laid down by the Judicial Committee in *Tumahole Bereng and Others v. The King* that the evidence of one accomplice is not corroborative of the evidence of another: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment and

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sentence of the High Court dated the 15th November 1948 or for such other Order as to Your Majesty in Council may seem meet:

10 “ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Basutoland dated the 15th day of November 1948:

 “ AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

 HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed
20 obeyed and carried into execution.

 Whereof the High Commissioner for Basutoland the Bechuanaland Protectorate and Swaziland for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Appeal No. 6 of 1949.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF BASUTOLAND.

BETWEEN

BERENG GRIFFITH
LEROTHOLI AND OTHERS *Appellants,*

AND

THE KING - *Respondent.*

CASE FOR THE APPELLANTS.

BARROW ROGERS & NEVILL,
Whitehall House,
41, *Whitehall, S.W.1.*
Appellants' Solicitors.