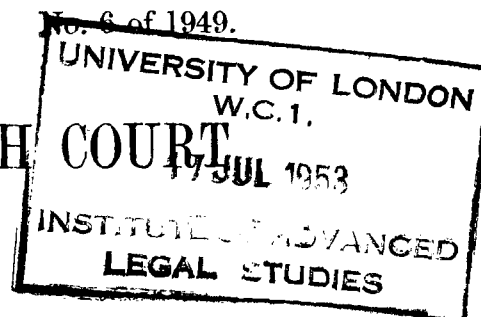


In the Privy Council.

31184

ON APPEAL FROM THE HIGH COURT
OF BASUTOLAND



BETWEEN

- (1) BERENG GRIFFITH LEROTHOLI
- (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 APPELLANTS

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT

1.—This is an Appeal from the judgment and sentence of the High Court of Basutoland, dated the 15th November, 1948, whereby the Appellants were found guilty of and sentenced to death for the murder (alleged to be a ritual murder) on the 4th March, 1948, of one Meleke Ntai, a brother or cousin of Appellant No. 11, who was alleged for £100 to have sold Meleke Ntai as “medicine.”

RECORD
pp. 785, 826

2.—On the hearing of the petition for special leave complaint was made of the participation in the trial of one of the Administrative Officers (H. J. D. Elliot, Esq.) who, with another administrative officer and two native assessors, sat to assist the Judge pursuant to Sections 7 and 8 of Proclamation No. 57 of 1938 as amended by Sections 1 and 2 of Proclamation No. 41 of 1942.

RECORD

p. 479, l. 1

3.—A certain chief, Ntoane, who was alleged to have taken part in the murder, died in hospital before the trial. It was rumoured throughout Basutoland that in delirium before his death Ntoane had talked of the murder and had told the same story as Mapeshoane, an accomplice called by the Crown as a witness at the trial. During the trial there was an inspection on Friday, the 5th November, 1948, of the scene of the alleged murder. Mr. Elliot in his motor-car drove to the inspection the Attorney-General, who was leading counsel for the Crown, Mr. I. A. Maisels, K.C., leading counsel for the Appellants other than Nos. 1 and 3, and Mr. G. Gordon, Mr. Maisels's junior. During the journey reference was made 10 to the rumours and to Mr. Elliot's knowledge of them. The circumstances are set out in affidavits sworn by Mr. Thompson and Mr. Elliot. These affidavits are printed as an appendix to this Case.

4.—After the inspection the trial was resumed, but no objection was made to Mr. Elliot's sitting as an administrative officer. Until the petition for special leave was about to be presented no suggestion was made that Mr. Elliot was in any way disqualified from sitting. The Respondent submits that there was no reason why Mr. Elliot should not have sat; and that if counsel for the Appellants had considered that their clients could possibly be prejudiced it was their duty to have raised the 20 point when the trial was resumed, and to have applied for it to proceed without Mr. Elliot, or for it to be begun again with another administrative officer replacing Mr. Elliot.

p. 788, ll. 2-10

5.—Thirty-four witnesses were called, 18 by the Crown and 16 (including each of the Appellants) by the defence. Of the Crown witnesses, four were confessed accomplices, and it is common ground that of these one was an unsatisfactory witness whose evidence could carry no weight.

6.—The case proceeded on the basis that, as laid down in a long current of South African cases interpreting precisely similar statutory provisions, the evidence of one accomplice can corroborate another accomplice, although 30 any evidence of an accomplice must be viewed with great caution. These South African cases begin with *R. v. Thielke* (1918) A.D. 373. The latest decision, where the authorities are reviewed, is *R. v. Mcanaa* (1948) 4 S.A.L.R. 399.

7.—Before 1944 the law in Basutoland was contained in the Basutoland Criminal Procedure and Evidence Proclamation, 1938, which contained the following section :

231. 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 :

RECORD

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

By an amending proclamation in 1944 this section was made identical with the South African provision, and now reads as follows :

231. 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 :

10 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.

The Respondent respectfully submits that in so amending the proclamation the High Commissioner, on the principle of *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* (1933) A.C. 402, adopted the judicial interpretation of the provision by the South African Courts.

8.—The Judicial Committee of the Privy Council in *Tumahole Bereng v. The King* (1949) A.C. 253, has interpreted the amended section as precluding the trial court from convicting an accused person upon the evidence of
20 either one or several accomplices unless the court is satisfied by evidence additional to that of an accomplice or accomplices that the offence charged has been committed by somebody.

9.—In the present case, after a detailed review of all the evidence, p. 789, l. 10 to the learned trial judge made this finding with which both administrative p. 811 officers and both native assessors agreed : p. 811, l. 25

30 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 in consequence of having been thrown into the donga in the condition he was, he lost his life by drowning, and that constitutes murder.

10.—The Respondent submits that, apart from the evidence of accomplices, there was ample evidence that Meleke had been murdered.

11.—The evidence of the medical experts taken by itself was inconclusive. Meleke's body had been found on the 6th March, 1948, by Paulus Kahlolo, who at the time was being watched in suspicious circumstances by Appellant No. 8, his employer. Trooper Hamilton examined the body which was lying with almost the whole of the right side in the mud. There was, he said, an injury to both lips on the left side
40 of the mouth. When he moved the body Trooper Hamilton saw four small crabs where the right shoulder had been lying. On the 7th March, 1948, Dr. R. C. Ogg made a post-mortem examination and reported that

pp. 450-452

p. 479, ll. 3-6

p. 480, ll. 25-32

p. 481, ll. 2-12

pp. 834-835

RECORD
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p. 836, l. 5
p. 11, l. 19
p. 12, l. 10
pp. 12-13

p. 14

pp. 17-19

pp. 19-20

pp. 25-26 ; 27
p. 26

p. 101

p. 104

p. 388, ll. 5-11
p. 388, ll. 22-28

p. 391
pp. 391-392

death was due to drowning ; that the upper and lower lip was missing from below the right nostril in a semi-circle, the remains of the upper lip showing slightly jagged edges, and the lower lip a cleaner line ; that other injuries were probably caused by crabs ; and that the absence of lips was compatible with being caused by crabs. In his evidence Dr. Ogg said the body had been removed to the mortuary when he examined it ; that a man might drown in six inches of water provided he were unconscious ; that the lip injuries could have been caused by crabs but he could not say they were ; that there was far more eating from the lip area than elsewhere, and that made the view that the lips had been cut slightly more possible, as crabs go first for wounded parts ; that if the deceased had been throttled the existence of post-mortem signs would depend on the amount of force used ; that whether the gums were injured by cutting the lips would depend on how the cutting was done ; that the deceased's gums were not injured, but he (Dr. Ogg) was not prepared to say that was strange if the lips had been cut ; that if the deceased had been thrown into the donga where the body was found from a distance of 10 or 15 feet, he would have expected to find other marks, but there would be little if any bruising if the body landed in thick mud ; that if a person said he saw the lips being cut there was no medical reason to cause him (Dr. Ogg) to reject the story ; that if the deceased had been throttled in the manner demonstrated by one of the accomplices, marks on the neck would depend on the throttling continuing for a fair time with a fair amount of force ; that it would have caused unconsciousness in a comparatively short time ; and that to be drowned the deceased would have been unconscious when thrown into the donga. The body was exhumed on the 29th June, 1948, and examined by Dr. B. D. Whitworth, with the assistance of Dr. Ogg, to see if there were any signs of throttling or of a sharp instrument being forced into the nostrils. No such signs were found, but in the then state of the body this did not preclude throttling or the use of the instrument. If great violence had been used in throttling there would probably have been signs. Dr. Whitworth considered that the body could fall even 13 feet on to a stone (if it were not sharp) without bruising especially if clothed as was the deceased.

12.—The Respondent submits that, apart from the direct evidence of the accomplices, there was evidence to satisfy the court that Meleke had been murdered. The more important evidence of the independent witnesses may be summarised as follows :

pp. 71-84

(A) Meleke's wife said that on the 4th March, 1948, Meleke had left with others, including Appellant No. 11, on horseback, to attend a funeral, but although his companions returned, Meleke did not return. Next day Appellant No. 11 told her that Meleke had been left behind. Meleke's horse came back without its saddle. She then went to the house of Appellant No. 8 who said that he had not seen Meleke but he had seen a saddle. He took her to where, lying in the open, were Meleke's saddle, saddle cloth, and sjambok.

- (B) Ntsane Ntai said that one night (3rd March, 1948), Appellant No. 11 and Makhetha Ntai had taken the witness to the house of their Chief, Appellant No. 2; that Appellant No. 11 had gone inside and on coming out after a long time had said that he found Appellants Nos. 2 and 1, the accomplice Mapeshoane and their people discussing the killing of a person, not specified. Appellant No. 11 said that if they (Ntsane and Makhetha) reported the matter they would be held responsible themselves. The witness said that next day he went with Appellant No. 11, Makhetha, and Meleke to the funeral. Contrary to native custom, they returned from the funeral at the instigation of Appellant No. 11 on the same day. On the way back Appellant No. 11 suggested that they should race, and Meleke was left behind because he was sickly and could not ride as fast as the others. Makhetha asked why they should leave him, and Appellant No. 11 replied "If you do not leave him behind you will see what will happen," meaning that they would be killed. The party then met a group of people whom Appellant No. 11 joined, while the witness and Makhetha continued on their way. Appellant No. 11 later rejoined them but discouraged their questioning. pp. 352-382
- 10
- (C) Makhetha Ntai confirmed the evidence of Ntsane Ntai, and said that on the way back from the funeral Appellant No. 11 told them that a person was required to be killed and that it was Appellant No. 2 who required it. pp. 383-387; 397-414
- 20
- (D) Kocha Kocha said that on the 6th March, 1948, Appellant No. 11 told him that Meleke had been killed by the people. When the witness suggested that Meleke had deliberately been left behind, Appellant No. 11 struck him. pp. 414-420
- (E) Moliko Khothatso said that after 10 o'clock on the night of the 4th March, 1948, he saw a number of people and recognised the voice of Appellant No. 11. Shortly afterwards a motor-car stopped at the cross-roads. He saw two or three persons going towards it, and heard the doors closed. The car went towards the house of Appellant No. 8. pp. 420-443
- 30
- (F) Manpane Mothobi lived about 700 yards from Appellant No. 8, who on a Thursday night in March (the 4th being a Thursday) asked help for a man thrown from his horse on the main road. The witness told him to go to the Headman. The witness heard a motor-car coming from the direction of Appellant No. 8's house. pp. 443-449
- (G) Paulus Kahlolo was employed by Appellant No. 8, who is a doctor in charge of lunatics. On the instructions of Appellant No. 8 the witness at an unusually early hour on the 6th March, 1948, took the lunatics to wash in the stream. Appellant No. 8 stood on the hill to watch them, a thing he had never done before. The witness then saw Meleke's body in the donga. pp. 450-453
- 40
- (H) Malineo Ramatekoa, who slept in the same hut as Appellant No. 8, said that Appellant No. 8 went out at dusk on the 4th March, pp. 467-470

RECORD

1948, and returned very late when the other inmates of the household were in bed.

pp. 470-473

(I) Mathabo Mothibeli confirmed the evidence of the previous witness.

pp. 471-476

p. 473, l. 22

(J) Pheta Mosehle said that Appellant No. 8 pointed out to him a saddle near Appellant No. 8's village and near the witness's neighbouring village. Appellant No. 8 said "... they throw this saddle here so that they must think we are killing people with you." Appellant No. 8 left the witness to guard the saddle, the sjambok found 6 feet away, and the saddle cloth found 25 feet away, while Appellant No. 8 reported to the Chief, Appellant No. 2. The witness was later joined by the Chief's messenger, Bouman; and the two guarded the saddle all night. At sunrise they saw Appellant No. 8 standing on the hill. He came and told them that his patients had discovered a body in the donga. He said that this matter had happened between them both, and most probably the Government might ask them about it. The witness said "Do you think that I can stab myself with an assegai in the stomach?" meaning "Do you think I can murder a person and then place his body in front of my house?"

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p. 474, l. 21

pp. 477-478

(K) Mamasela Thothe said that on Friday afternoon she saw in the open, along a frequented path, the saddle with the inside upwards, the saddle cloth, the sjambok and a handkerchief. She told Appellant No. 8 of them.

pp. 478-497

(L) Trooper Hamilton gave evidence of his examination of Meleke's body in the donga, and of taking possession of the saddle, saddle cloth, sjambok and handkerchief which Appellant No. 8 pointed out. The body had only one boot on it, and the other boot with Meleke's hat was found in the veldt on Sunday the 7th March, 1948. The witness found spoor of people on the steep slope of the donga. He said there was little water in the donga, but Meleke's body had acted as a dam, causing water to collect. The witness also saw marks of a motor-car near the house of Appellant No. 8, showing that the car had turned round. The witness had found no bloodstains on the blankets or body.

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p. 611

p. 613

pp. 615-616

pp. 617-621

13.—Each of the Appellants gave evidence denying all knowledge of the offence. On the points upon which independent witnesses had given evidence incriminating some of the Appellants, there was a direct conflict. Thus Appellant No. 11 denied that on the night of the 3rd March he had called for Ntsane and Makhetha and had left them outside the house of the Chief, Appellant No. 2. Appellant No. 11 said Ntsane and Makhetha were lying when they said he warned them not to stay with Meleke, and that it was all a lie that he spoke to a group of people on the way back. He said that Moliko was lying and that he had not told Kocha Kocha that Meleke had been killed. One of the native assessors asked Appellant No. 11 many questions about his failure to look for his brother (Meleke) when he learned

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that his horse had come back without a saddle. Similarly, Appellant No. 8 denied that he had gone to Manpane Mothobi's house asking for help for a man thrown from his horse. He said that it was a lie that he was on the hillside early on Saturday morning (6th March, 1948). He was not on the hillside when the body was found, and Paulus was lying when he said that Appellant No. 8 had given a special instruction about taking the patients down to wash. Appellant No. 8 also denied the evidence of Mathabo, and said that on the night of the 4th March he did not go out at all. He also denied that he had said anything to Pheta about the possibility of a person having been killed.

RECORD

p. 595

p. 596

pp. 596-598

pp. 598-599

14.—The Respondent submits that quite apart from the evidence of any of the accomplices, the evidence establishes that Meleke was murdered. He was on his way home from a funeral, but instead of arriving in due course his body was found drowned in circumstances in which, according to the medical evidence he must have been unconscious or he would not have drowned in so little water or mud. His horse did not return until after his wife had enquired of Appellant No. 11 on Friday ; but his saddle and other articles including one of his boots, could not have been where they were found unless Meleke had been attacked. When all the evidence other than that of the accomplices is considered no conclusion is reasonably possible, the Respondent submits, than that Meleke was attacked pursuant to a plan to which Appellants Nos. 8 and 11 were parties. If so the evidence of the accomplices, if accepted, clearly established the guilt and warranted the conviction of all the Appellants.

p. 12, l. 10 ;

p. 104, ll. 17-22

p. 73, l. 29

15.—The learned Judge carefully reviewed the evidence and explained why he accepted or rejected each part of it, especially why he thought Dr. Ogg mistaken in saying that the injuries to the lips were on the right side and not on the left as Trooper Hamilton and three accomplices stated. After carefully weighing all the evidence the learned Judge, with the concurrence of the administrative officers and the native assessors, found all the Appellants guilty of Meleke's murder.

pp. 785-811

p. 802

p. 811

16.—The Respondent submits that each of the Appellants was properly convicted, and that this appeal should be dismissed for the following, amongst other,

REASONS

1. BECAUSE no valid complaint can be made of the constitution of the Court or of the conduct of any of its members.
2. BECAUSE the evidence established, in accordance with the law of Basutoland, the guilt of the Appellants.
3. BECAUSE the offence charged has been proved by competent evidence other than the evidence of accomplices.
4. BECAUSE there has been no miscarriage of justice.

FRANK GAHAN.

APPENDIX

AFFIDAVIT of ARTHUR CLEMENT THOMPSON.

I, ARTHUR CLEMENT THOMPSON, hereby make oath and say :—

1.—That Your Deponent is ARTHUR CLEMENT THOMPSON, an Advocate of the Supreme Court of South Africa, and the Attorney-General for the High Commission Territories.

2.—That I prosecuted at the trial of the above-named Appellants in the High Court of Basutoland in November, 1948.

3.—That on the Court deciding to hold an inspection *in loco*, I travelled to the inspection in the car driven by Mr. J. Elliot, one of the 10 Administrative Officers appointed in terms of Section 7 of Proclamation 57 of 1938 as amended by Proclamation 41 of 1942 to assist the Judge. Also passengers in the car were Mr. I. A. Maisels, K.C., one of the leading Counsel for the Defence, and the Junior Counsel for the Prosecution and the Defence respectively.

4.—That during the journey there was some conversation about the size of the areas for which individual Police Officers are responsible. In the course of that conversation, and, as far as I can recollect, in answer to some remark by Mr. Maisels, I mentioned that CHIEF NTOANE, while suffering from delirium preceding his death in hospital, after his arrest, 20 had spoken about the alleged murder.

5.—That I have discussed this matter with Mr. Maisels, who says that his recollection is that he said that he wondered how the Police had got on to the accused in this case ; and that I then mentioned that Chief Ntoane had talked in his delirium and that I understood he had told the same story as MAPESHOANE, the witness ; and that Mr. Elliot then said “ Oh, yes, we know all about that. The Police are pretty quick not to miss anything,” or words to a similar effect. The matter was then dropped.

6.—That I myself do not remember the exact tenor of my words, 30 but as I did not then know nor do I know today, the details of what Ntoane said, I could not have mentioned any details. The names of the accused were certainly not mentioned.

7.—That there was obviously no question at any time as to Ntoane having made a dying declaration, as he was an accused, and the manner of his death was never the subject of an enquiry.

8.—That I have asked Mr. Elliot to complete an affidavit setting out his recollection of the conversation.

9.—That I have submitted to Mr. Maisels K.C. the draft of this affidavit, and he has informed me that he has no criticism to make.

A. C. THOMPSON.

Sworn to at JOHANNESBURG on this the 31st day of March 1949, the
10 Deponent having acknowledged that he knows and understands the contents of this Affidavit.

L. L. LESUEUR,
Notary Public.

Stamp

[L.S.]

AFFIDAVIT of HERBERT JOHN DRUMMOND ELLIOT.

HERBERT JOHN DRUMMOND ELLIOT, District Commissioner,
stationed at Mafeteng, in the Territory of Basutoland sworn states :—

I remember the day on which the Court went to Mamathe's for an inspection *in loco* in the case *Rex versus Chief Bereng and Others*. I used
20 my own private motor car on that occasion and my passengers were Messrs. Thompson, Maisels and Gordon.

I do not remember a statement made by Mr. Thompson that Ntoane had made a dying statement to the effect that he, Chief Bereng and the other accused were implicated in the murder for which they were standing trial. I do not deny the fact that I had heard a rumour to the effect that "Ntoane had spoken out of turn" in the Maseru Hospital before he died. I do not deny the fact that this rumour may have been mentioned before Messrs. Maisels and Gordon during the long drive to and from Mamathe's. I heard the rumour during the course of my administrative duties in
30 Basutoland and I would be very surprised if the rumour had not been heard by many of the Administrative Officers in Basutoland. It was mentioned to me by Chiefs and commoners alike.

I have been stationed in Mafeteng since November, 1947. During that period I did not visit the Maseru Hospital, nor did I see Ntoane. The rumour I heard appeared to be circulating throughout Basutoland.

I sat as an Administrative Officer assisting the Judge in *Rex versus Chief Bereang and Others*. At no time did I mention the rumour to the Judge.

I knew Ntoane well but I did not see him after his arrest.

Sworn to before me at MASERU this 14th day of April, 1949.

H. J. D. ELLIOT,

“*Signature,*”
First Assistant Secretary.

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MASERU, Basutoland.
14th April. 1949.

In the Privy Council.

No. 6 of 1949.

ON APPEAL FROM THE HIGH COURT OF
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- (11) MOLOI NTAI ... APPELLANTS

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT

BURCHELLS,

9 Bishopsgate, E.C.2,

Solicitors for the Respondent.