

19, 1954

No. 2 of 1954.

IN THE PRIVY COUNCIL

ON APPEAL

37688

FROM THE HIGH COURT OF BASUTOLAND

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

BETWEEN

KHOTSO SEPHAKELA ...

Appellant

and

THE QUEEN ...

Respondent

CASE FOR THE RESPONDENT

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Record.

1. This is an appeal from a judgment, dated the 15th July, 1953, of the High Court of Basutoland (Willan, C.J. and four assessors), whereby the Appellant was convicted of the murder of one Tieho Matsora and was sentenced to death. The Appellant was indicted and tried for the said murder jointly with seven other men, of whom six were convicted and one acquitted.

pp.85-92.

pp. 1-2.

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2. On the Crown evidence, accepted by the learned Chief Justice, this was a medicine murder, being committed at the instigation of the first accused in order that he might get medicine from the body of the deceased. On Monday, 13th August, 1951, a number of the accused men met and planned to kill the deceased on the following Monday. On that following Monday (20th August), the deceased was waylaid by the accused men on his way home after dark and hit on the head twice with an axe. He was then stripped of his clothing and wounded in the

p.87,1.38-

p.89,1.17.

Record.

scrotum, and the first accused collected in a can blood both from the scrotum and from the head. The deceased died on the spot. His body was carried to the hut of one of the accused. The following Thursday night it was taken thence and put at the bottom of a cliff, where eventually it was discovered.

3. The following evidence was given against the Appellant:

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p.4,11.26-41, (i) Ranthene Molala (an accomplice) said the
p.9,11.9-10. Appellant was at the meeting on the 13th August and
the ambush on the 20th August. Immediately after
p.12,11.9-32. the deceased had been caught the Appellant tried to
run away, but was stopped. The other members of
the party then took off their blankets, and the
p.15,11.16- Appellant looked after them. On the following
22,39-41. Thursday the Appellant helped to carry the body
from the hut and put it at the bottom of the cliff.
p.22,11.1-5. In cross-examination, Ranthene said he was not
absolutely certain that the Appellant was at the
meeting on the 13th August.

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p.36,11.29-31. (ii) Ramatsepe Seoli (an accomplice) said the
p.38,11.9-14. Appellant was at the meeting on the 13th August
p.40,11.7-11. and the ambush on the 20th August. While the
first accused was collecting blood from the
deceased's wounds, the Appellant seemed to be
frightened and wanted to run away. The first
accused made him drink some of the blood.

pp. 50-52. (iii) Mabitla Mohlotsane said that in the
evening of the 20th August, when he was in his hut,
he heard a scream. He went out, with two boys
named Khoto and Thabo, stood behind a bush, and
saw a group of people, including the Appellant,
moving about doing something. He then went back
to his hut and went to sleep. Some time afterwards,
being awoken by the barking of dogs, he went outside
and saw the same group, including the Appellant,
carrying something like a person into a hut. The
following Thursday night, being awoken from sleep
by the dogs, he went outside and saw the group of
people, including the Appellant, carrying the person

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Record.

out of the hut.

(iv) Khoto denied that anything unusual had happened in the night of the 20th August. pp.60-61.

10 (v) Mamojela Sello said that in the night of the 20th August she heard a scream. She went out of her hut, and saw the Appellant, with one of the other accused and two of the accomplices, passing. They were not going in the direction of the Red Path (where the ambush took place). Mamojela's daughter, Mankhoaba Molongoana, gave evidence to the same effect, save that she saw only two men, of whom the Appellant was one. pp.61-62.
pp.63-65.

20 (vi) Motsoenkana Motlalehi (an accomplice) said that, before the body was carried away from the scene of the murder, someone tried to run away but was stopped and made to drink blood. In cross-examination, he said he had never seen the Appellant before. p.69,11.36.40;
p.77,11.33-42.
p.71,1.42-
p.72,1.1.

30 4. The Appellant gave evidence. He denied having been at the meeting on the 13th August, the murder on the 20th August, or the disposal of the body on the following Thursday. On all three occasions he had been at home with his wife. As regards the 20th August and the following Thursday, his wife gave evidence to the same effect. Thabo Morolong, one of the two boys mentioned by the Crown witness Mabitla Mohlotsane, also gave evidence for the Appellant. He denied ever having gone out at night with Mabitla and Khoto to the Red Path. pp. 78-81.
pp. 81-83.
pp. 83-84.

40 5. In his judgment, the learned Chief Justice summarised the medical evidence, in the light of which he was satisfied beyond doubt that the deceased had been murdered, and the case for the Crown. He then dealt with the evidence against each of the accused separately. He summarised the evidence of pp. 85-89.
p.87,11.32-34.

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p.89,1.21-
p.90,1.16. the three accomplices and Mabitla against the Appellant, and the defence of an 'alibi'. It had been suggested that, on the evidence that he tried to run away, the Appellant could rely on the defence that he acted under compulsion. This suggestion was untenable, because the Appellant had not relied on it in his evidence, and there was not sufficient evidence that he took part in the killing through fear of his life or of serious bodily injury. Further, had he wished to withdraw he could have done so between the 13th and the 20th August. Against six of the accused (including the Appellant) there was accomplice evidence, independent evidence and the medical evidence. The discrepancies in the Crown evidence did not go to the root of the case. Having warned himself and the assessors of the danger of accepting accomplice evidence, the learned Chief Justice believed the evidence of the three accomplices; he also believed that of the independent witnesses, and rejected the 'alibi' defences. Accordingly, he convicted the Appellant (among others) of murder, and sentenced him to death. 10

p.90,11.17-24.

p.90,1.39-
p.91,1.14. 20

p.91,1.21-
p.92,1.8.

6. The Respondent respectfully submits that, under the law of Basutoland, the defence of compulsion in criminal proceedings is not made out unless the accused proves that his conduct was dictated by threats inspiring in him, on reasonable grounds, fear of immediate death or serious bodily injury. The evidence on this point shewed only that when the deceased had been caught, or, according to other witnesses, the blows had already been struck, the Appellant tried to run away but was stopped. The Respondent respectfully submits that this evidence falls short of the high standard of proof required to establish a defence of compulsion, and the learned Chief Justice was right in holding that it did not shew that the Appellant participated in the killing through fear of death or serious bodily injury. 30

7. The Respondent respectfully submits that it 40

10 appears from the findings of the learned Chief Justice that the Appellant attended the meeting on the 13th August, rejoined the murderers on the 20th August, and thereafter did not dissociate himself from them but helped to dispose of the body on the following Thursday. On no view is there any evidence of compulsion on the 13th August, at the time of the meeting on the 20th August, or on the Thursday following. Furthermore, the Appellant in his evidence did not say he had acted under compulsion, but told quite a different story which was found to be untrue. The Respondent respectfully submits that the proper inference to be drawn from all this evidence is that the Appellant took part in the murder of his own will and not as a result of compulsion.

20 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)

R E A S O N S

- 30 (1) BECAUSE on the evidence the Appellant was rightly found to have taken part in the murder of the deceased:
- (2) BECAUSE the evidence shewed that he acted so of his own will:
- (3) BECAUSE the evidence did not shew that he acted so on account of threats inspiring in him fear of immediate death or serious bodily harm.

J.G. LE QUESNE.

19, 1954

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FROM THE HIGH COURT OF BASUTOLAND

B E T W E E N

KHOTSO SEPHAKELA Appellant

and

THE QUEEN ... Respondent

C A S E F O R T H E R E S P O N D E N T

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