Privy Council Appeal No. 2 of 1954

Khotso Sephakela - - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF BASUTOLAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JUNE, 1954

Present at the Hearing:
EARL JOWITT
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD KEITH OF AVONHOLM]

The appellant is one of eight persons who were indicted for murder in the High Court of Basutoland. One of the accused was acquitted and the other seven were convicted after a trial held in July, 1953, before Chief Justice Willan and four assessors. The appellant was granted special leave to appeal against this conviction and the appeal has now been heard by their Lordships' Board.

The broad outline of the crime of which the appellant was convicted can be shortly stated. The murder was a medicine murder planned a short time before the event and carried out on a selected victim. The plan was conceived by certain of the accused and others of the accused (among whom was said to be the appellant) were brought in to help to carry out the purpose. At a meeting held in the house of one of the accused on 13th August, 1951, at which the appellant was said to be present, the plan was disclosed and preparations made for the murder which was committed on the following Monday, the 20th day of August. On that date the victim was waylaid after dark at a place called Red Path, seized and struck two blows with an axe on the head, pierced between the legs with the sharp end of the axe while he was held down on the ground, from which wound blood was drawn off into a can, and died at the locus of the murder as a result of his injuries. The body was afterwards removed to the home of one of the accused where it was concealed for some days and was afterwards taken and deposited at the foot of a cliff.

The appellant in defence pleaded an alibi which was rejected by the learned Chief Justice with which view the four assessors agreed.

The appeal is based on misdirections by the Chief Justice to himself in fact and in law. In the first place it is said that he misdirected himself in fact as regards the presence of the appellant at the meeting on the 13th of August. Two witnesses, both accomplices who gave evidence for the Crown, spoke to the appellant's presence at this meeting. One Ranthene Molala, however, qualified his evidence in cross-examination to the extent of saying that he was not absolutely certain about the appellant being present because this thing happened so long ago.

He added: " It is also possible that they " [i.e. the appellant and another of the accused] " may have eventually arrived ". Ramatsepe Seoli, the other witness, when it was pointed out to him in cross-examination that he had not said at the preparatory examination held 18 months before that the appellant was present replied: " That is quite possible but it should be remembered that this matter took place long ago ". The cross-examination continued: " But 18 months ago at the preparatory examination your memory should have been much better than it is to-day and if No. 3 accused " [the appellant] " had been present you would have remembered it at the preparatory. I ask you again was No. 3 accused present or was he not present? " to which the reply was, " I say he was present ".

It would appear from the judgment of the Chief Justice that he accepted the evidence that the appellant was present at the meeting on the 13th August. He does not however examine the evidence on this point or advert to any of the inconsistencies or absurdities in the evidence of the two witnesses, though he warned himself generally on the danger of accepting accomplice evidence. He held the accomplices to be witnesses to truth. If this evidence had been crucial to the case it might have given their Lordships some difficulty. But there is clear evidence that whether the appellant was present or not at the meeting on the 13th, he was present at the scene of the murder on the 20th of August. That he was so present was clearly the view of the Chief Justice who also expressly rejected the alibi defences for the accused and their Lordships would find it impossible to advise that this finding should be disturbed.

It is next said that the learned Chief Justice misdirected himself on a defence that the appellant acted in the murder under compulsion. The evidence in this matter stands thus. Ranthene Molala says: " At one stage immediately after the deceased was caught No. 3 accused tried to run away. Q. Was he stopped from running away? A. Yes he was stopped from running away because it was feared he would make a report. Q. Do you know who stopped him? A. I am not certain about that because there was confusion. Q. So, as far as No. 3 accused is concerned, he held blankets and he tried to run away. Is that all that he did? A. Someone said there is a man running away ". Ramatsepe Seoli, after explaining how the murdered man was pierced with the spiked end of the axe in order to obtain his blood, says: " Then No. 1 accused came and collected the blood which flowed from that wound. Q. With the same receptacle? A. Yes. Then it appeared that No. 3 accused was frightened and wanted to run away and No. 2 said the thing to be done was to make him drink the blood. Then No. 1 accused made No. 3 accused drink the blood ". Motsoenkana Motlalehi, another accomplice, gave this evidence in chief: " Q. Did you notice anything else before the carrying? A. I do not know who that person was but that person ran away. Q. Did he run away completely? A. He was stopped from running away and made to drink the blood ". In cross-examination he was asked, " You have told us about a certain person who tried to run away? A. Yes. Q. Have you any idea why he was made to drink blood? A. It was said he should be made to drink blood in order that he may not be frightened. Q. How would that stop him from being frightened? A. I believe it did because he did not try to run away again ".

With reference to this defence of compulsion there appears this passage in the judgment of the trial judge—

> " In my view such a suggestion is untenable because, first, this accused did not rely on it in his evidence—he said he was not at the killing, and, secondly, there is not sufficient evidence that he took part in the killing because he was in fear of his life or of serious bodily injury. Further, there is the evidence for the Crown that he attended the meeting when the plot was hatched to kill the deceased; if he wished to withdraw he could have done so after that meeting and never gone to the Red Path on the night of the 20th August, 1951 ".

This was relied on by the appellant as showing misdirection in fact and in law. If the first part of the passage means that the trial judge felt himself precluded from considering the defence of compulsion because the appellant had pleaded a defence of alibi, their Lordships think this would be a misdirection in law. They are not satisfied, however, that the learned judge meant more than that as the appellant had not himself said that he acted under compulsion the judge was deprived of the advantage of evaluating what was at best somewhat equivocal evidence in the light of the appellant's own evidence as to his actings and motives. Their Lordships are prepared also to assume for the reasons already given that the judge erred in fact in holding that the evidence established that the appellant was present at the meeting on the 13th of August. There remains however the question whether there was any evidence on which it could be held that the appellant acted under compulsion. In their Lordships' opinion the evidence falls far short of what is necessary in law to establish such a defence. They consider it clear that the appellant was present on the night of the 20th August as a participant in what he knew was to be an act of murder. That he himself struck none of the fatal blows, or indeed none of the blows at all, is nothing to the point. He was one of a party engaged in the common purpose of murder. There is nothing to suggest that he dissociated himself from that purpose by attempting to escape before the attack on the deceased had begun and the plot had passed from preparation to perpetration. Whether when he did attempt to run away he did so from fear, or from repentance, or for some other reason, their Lordships do not know, because he gave no evidence in that matter. But on any view there is nothing in the evidence relied on to show that the appellant was brought to the scene of the murder under compulsion or came to the scene accidentally and was made to take part in the attack on the deceased under compulsion. Whether the restraint used upon the appellant could have been relied on as dissociating him from the murder if exercised before the act of murder had been entered upon is a matter upon which their Lordships find it unnecessary to express an opinion. In their Lordships' view there is nothing in the evidence on which it could be held that the appellant was in such fear of death or serious bodily injury as to establish the defence of compulsion. Even if the appellant's attempt to escape proceeded from repentance it came when the murder had reached a stage of perpetration and too late to dissociate the appellant from the consequences of the criminal design.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

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In the Privy Council

KHOTSO SEPHAKELA

v.

THE QUEEN

DELIVERED BY LORD KEITH OF AVONHOLM

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