C. of A. (CRI) No. 4 of 1981

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

MORAMANG PETJE	1st Appellant
TSOKOTSA PETJE	2nd Appellant
v	
REX	Respondent

HELD AT MASERU

Coram:

MAISELS, P.
VAN WINSEN, J.A.
STEYN, A.J.A.

J U D G M E N T

Steyn, AJA.

This matter comes before us by way of an appeal against a conviction and sentence on a charge of murder. Although the form of the notice of appeal clearly relates only to the conviction and sentence in respect of appellant No.2 (referred to herein as No.2) there is also reference in the body of the notice to the sentence imposed upon appellant No.1 (referred to herein as No.1). More especially in the absence of protest by the Crown, but particularly to ensure that the result is a just one, we intend to deal with this matter as though an appeal had been noted by both of the accused in the Court below.

Although counsel for appellant did not formally abandon the appeal on the merits, he did concede that he had considerable difficulty in persisting with it. In the circumstances it will be sufficient if I say that the appeal against the conviction is, in respect of both appellants, clearly without merit and should be dismissed.

In dealing with sentence I record the following relevant facts.

1. Although some of the evidence adduced in regard to

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the character of the deceased was highly subjective, not capable of challenge and difficult to evaluate, he was beyond doubt a man of considerable violence and was a much feared man in his community. Vivid evidence given by the deceased's father as to how his son sought to bury him alive best illustrates this finding.

2. Deceased had directed his unpleasant and indeed violent intentions toward No.2 and more especially toward No.2's wife. According to her she had been subjected to persistent harassment, most unpleasant sexual advances and indeed some direct violence. No.2 himself had suffered at the hands of the deceased over a long period of time.

3. On the very day of deceased death No.2 had once again been confronted with the consequences of the deceased's conduct towards his wife.

4. No.2 had in the past complained to the authorities both at the tribal and police level concerning the conduct of the deceased and had through these avenues as well as through the offices of an attorney sought protection against the deceased. These efforts proved to be without any success - inasmuch as the authorities either failed to act upon his complaints or such action as was initiated had no deterrent effect upon the deceased.

5. Although there is no direct evidence in support of this finding, it is an irresistible inference that on the day in question No.2 summoned No.1 to his assistance and that the two of them waylaid the deceased and killed him. The murder was to that extent clearly premeditated.

6. Throughout this matter No.2 was the principal actor. He was armed with an axe and on his own admission was the person who despatched the deceased in a most brutal and determined manner.

7. The Court a quo correctly found that there was no evidence that No.1 struck the deceased any blows with the stick he had with him. However he was clearly an accomplice of No.2, helped stalk and ambush the deceased and had a common purpose with No.2 to kill him.

8. Both appellants are first offenders.

/It was

It was against this background that both appellants were convicted of murder with extenuating circumstances. After anxiously weighing the respective degree of moral blameworthiness of appellants the Court a quo imposed a sentence of 12 years' imprisonment on No.2 and 6 years' upon No.1.

I say "anxiously weighing" because it is clear that the approach of the Court a quo is on the issue of sentence free of any misdirection. This Court should accordingly only interfere should it conclude that the sentence is indeed too severe. In evaluating whether this is so or not, it can determine what the sentence is it would have imposed and should the disparity between such sentence and that imposed by the Court a quo be substantial, only then would it interfere.

Sentence is pre-eminently a matter for the Court of first instance. It is seized with the reality of the offence and the circumstances of the offender. It has the primary responsibility of reconcilling the interests of an accused with that of society These premises may, however, in no sense be permitted to allow a Court of Appeal to escape its unquestioned responsibility to scrutinize each sentence appealed against afresh as behoves a tribunal which is appellate - also in the field of sentencing - in the fullest sense.

In the present case a great deal depends upon the weight which a Court accords to the facts which I have outlined above. It was our conclusion that whilst appropriate weight should be, and indeed was accorded to aggravating circumstances especially that of premeditation, less than adequate weight was given to the fearsome provocation endured by No.2 over a long period of time culminating in the events of the day in question.

Much has been made of the issue that an accused must not be seen to be permitted to take the law into his own hands. This is undoubtedly so. Again however, in assessing what weight must be given to this consideration regard must be had to the circumstances of each case. Here No.2 had sought to involve the law and the protection of its agencies - not only through a single avenue or on a single occasion, but without avail. Whilst counsel for appellant's statement that "society had failed him" may be somewhat dramatic it is not without some

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substance. Therefore, whilst appellants were clearly not entitled to act in the way in which they did and must be adequately punished for their unlawful conduct, the moral blameworthiness which attaches to their behaviour - and which would more particularly operate in respect of the presence of premeditation - is to some extent diminished.

It was for these reasons that this Court decided in its judgment given on the 19th instant as follows :

1. The appeal against the conviction of both appellants is dismissed.

2. The appeal against the sentence is upheld. The sentence imposed by the Court a quo are amended to read as follows :

   Appellant No.1 : 4 (four) years' imprisonment.
   Appellant No.2 : 8 (eight) years' imprisonment.

Signed: .....
J.H. STEYN
Acting Judge of Appeal

I agree Signed: I.A. Maisels
.....
I.A. MAISELS
President

I agree Signed: L. de V. Van Winsen
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L. DE V. VAN WINSEN
Judge of Appeal

Delivered this 23rd day of April 1982 at MASERU

For Appellant : Mr. Maqutu
For Respondent: Mr. Kamalanathan