C. OF A. (CRI) NO.8/90

IN THE LESOTHO COURT OF APPEAL

In the appeal of:

LETS'OLA-KOBO LEPHOTO	APPELLANT
V	
REX	RESPONDENT

HELD AT

MASERU

CORAM:

STEYN, JA
BROWDE, JA
KOTZÉ, JA

JUDGMENT

STEYN, J.A.

The appellant in this matter appeared in the High Court on two charges of murder. He pleaded not guilty. However, he was convicted by Kheola J. on both counts. On count 1 he was sentenced to 20 years' imprisonment and on count 2, 12 years' imprisonment, extenuating circumstances having been found on both counts. The sentences were ordered to run concurrently on both counts. He appeals both against his convictions and sentences.

The facts of the matter are set out fully in the judgment

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of the Court *a quo*. I deem it unnecessary to set out these facts again except in so far as they may be relevant for the purposes of dealing with the grounds of appeal and the arguments advanced in their support. These grounds challenge the findings of the Court *a quo* -

"(a) In convicting the appellant of murder on both counts when the prosecution had not proved its case beyond reasonable doubt

(b) In placing undue reliance on P.W.1's evidence on pre-meditation to commit the crime charged yet it was evidenced it was evidently unreliable and untruthful

(c) In referring to the deposition of Jane Jane given at the preparatory examination but not admitted at the trial, to make a finding as to appellant's state of mind on the night of the killings and

(d) In rejecting accused's story when it was reasonably possibly true.

On the issue of the sentence the appeal is in general terms that the sentences "are too harsh in the circumstances".

In regard to ground (c) of the grounds of appeal referred to above the State conceded that it was not proper for the Court *a quo* to have had regard to this deposition. However, it is common cause that very little turns on the reliance which the Judge placed on this evidence.

There is no real dispute as to the fact that the appellant killed two people. One of these persons was his wife. He did so by firing several shots at her. He also brought to the end the life of a minor child by firing shots at her and killing her. In essence the defence of the appellant was that he had consumed a considerable amount of alcohol and that he had no recollection of having committed these offences. He was, so it was contended, incapable of forming any intention to kill or any appreciation of the unlawfulness of his conduct. Accordingly he could not be held legally liable for his actions at the time because of his degree of intoxication. Indeed he gave evidence to this effect at his trial and sought solace in expert evidence by way of testimony from a medical doctor who saw him some two years after the event. This witness testified that appellant had probably suffered from an alcoholic blackout. A medical report which summarises the doctor's evidence is Exhibit "B" to the record and in the relevant paragraph he states:

"as to his probable state of mind at the time of the

alleged offence I am of the opinion that the accused suffered from an alcoholic blackout as a result of intoxication and anger he probably lost control over his actions. He is unable to recall until the following morning."

In rejecting this evidence as well as the evidence of the appellant concerning the degree of intoxication to which he had been subjected, the Court *a quo* relied very significantly on the evidence of P.W.1 'Mamahali Jane who is the mother of one 'Makhotso Jane who is the deceased under count 2 on which the appellant was convicted. It was her evidence that some time prior to the incidents in which the two deceased were shot and killed by the appellant he had told her that "he would do something big to his wife" and that when he did that thing he would be naked so that the people might think he was mad. Two weeks prior to these events he had indeed expressed a desire to kill his wife when both his wife and the witness were present in the home that they shared.

Counsel for the appellant analysed the evidence of this witness and pointed to various unsatisfactory features in her evidence. He stressed particularly the fact that during the course of the trial the Court itself had commented on the tendency of the witness to exaggerate. There were also various aspects of her evidence which were not corroborated by

other witnesses who were present. He also pointed to the fact that she conceded that she hated the appellant and contended, therefore, that she had a motive for exaggerating the case against him by virtue of the fact that it was her child that he had killed. He urged us to find that it would be unsafe to rely on her uncorroborated testimony on such an important issue.

Having again carefully considered the evidence of the witness and having given due weight to the arguments advanced by Counsel for the Crown and for the appellant we are of the view that it was unsafe for he Court to have accepted this evidence concerning the state of mind of the appellant at the time that he committed the crimes in question in the sense that he had premeditated them. While there is some evidence that the marriage was not always happy, this unhappiness seem to be related only to occasions when the appellant's mother visited the appellant and his wife. There is no evidence of any long standing animosity or friction or previous assaults or other evidence that would render the kind of extraordinary statement allegedly made by the appellant probable. Indeed it is clear on the evidence - and it was so found by the Court *a quo* - that the appellant had consumed a considerable amount of liquor that evening and that he had been angered by the fact that he had been restrained from assaulting the child of P.W.1 and had lost control of himself. A careful consideration of all the

evidence before the Court *a quo* and a an evaluation of P.W.1's evidence convinces us that it would indeed be unsafe to rely on her uncorroborated testimony on this issue and that the court erred in doing so.

Counsel for the appellant urged us that in view of the fact that this was the finding which underpinned the decision of the Court *a quo* to convict the appellant, he should be acquitted. With this submission I disagree. It is true that the appellant gave evidence and that he testified that from the moment he was insulted by his wife and caught hold of her, this was the last thing he remembered. When he regained his senses he was in the Charge Office on the following day. This evidence, it seems to us is inherently improbable. It is extremely unlikely that alcoholic amnesia would intervene in this extraordinary manner and that it would specifically cover not only the events of the shooting itself but would extend for 24 hours after that. However when one examines the conduct of the appellant after the event, this version becomes not only improbable but incredible. The appellant is a Corporal in the R.L.D.F. Two of his colleagues a Private Kotsie and a Private Senekane testified that on the evening in question between 10 and 11 o'clock - which must have been shortly after the shootings - the appellant came to their quarters. According to Private Kotsie when he arrived he told them that he was being attacked "where he was staying". He said that he did not

know who the people were who were attacking him. In reply to the question by Crown Counsel, he went on to say "yes, that there were some people who were attacking him and he was wondering whether his wife was still alive". He also mentioned that he did not know how he escaped. The witness and his colleague decided to accompany the appellant to his home. Appellant stopped however, when they were about to go through the gate of their home. He told them that he did not want to go with them in the direction that they were going. He was going to take another direction. The witness never saw the appellant again. This is hardly the conduct of someone who is suffering from an alcoholic black-out.

In regard to his condition the witness Kotsie said Appellant was not calm and that he was shouting. Private Senekane confirms that evidence and says that he appeared to be frightened. Neither of them testified that he was in a state of advanced drunkenness.

There is some evidence that the appellant had consumed a considerable amount of beer. However, none of those who observed him during that evening either during the events that took place at the time of the shooting or thereafter, deposed that he was obviously drunk. It does not seem to me that it was necessary for the Court *a quo* to have relied on the evidence concerning pre-meditation in order to make a finding

as to the appellant's state at the time he committed the offences charged. There was ample evidence which indicates that whilst he had consumed alcoholic liquor, he was certainly not so intoxicated as to have had and suffered from an alcoholic blackout as speculatively diagnosed by the Medical Practitioner who gave evidence. Indeed we find the evidence of this witness as to the state of mind of the Appellant at the time of the commission of the offence unacceptable.

I point to the fact that the doctor in his evidence says that the probability of a blackout arises most significantly in persons "who have been drinking for many many years fairly heavily". Now not only did the appellant himself testify that he was not a heavy drinker but in evidence which was admitted in the Court *a quo,* Lt. Thahanyane stated that he knew the appellant well that he was a quiet man and that he never had any need to reproach him on account of his drinking habits.

In the circumstances I am satisfied that the Court *a quo* was correct when it convicted the appellant. The finding that the Court made that

> **"I am convinced that the beer he had taken had an effect on his mind but he was not so drunk that he did not know what he was doing"**

was correct and entirely justified.

The convictions were therefore correctly made and the appeal against the convictions is dismissed.

The finding of the Court concerning premeditation, which we believe cannot be sustained, clearly and correctly played a role in determining the sentence. The presiding Judge says the following in this regard in his judgment:

> "His taking of liquor in order to have courage to kill his wife is an aggravating circumstance. Taking all the factors into consideration the accused is sentenced as follows:
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> In Count I :- Twenty (20) years' imprisonment.
> In Count II:- Twelve (12) years' imprisonment.
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> Sentences to run concurrently."

The sentence which the Court imposed in respect of the murder of the minor child Makhotso Jane where the Court found that there was no premeditation was 12 years' imprisonment and in the case where there was, 20 years' imprisonment.

In all the circumstances the sentence on the second Count also seems to me to be appropriate in respect of the first Count.

For these reasons the sentence imposed by the Court *a quo* on Count 1 is set aside. In its place a sentence of 12 years' imprisonment is imposed. The sentence on this Count is to run concurrently with the sentence of 12 years imposed on Count 2.

In Summary:

The convictions are confirmed. The sentence on Count 1 of 20 years' imprisonment is set aside. In its place a sentence of 12 years' imprisonment is imposed.

The sentence of 12 years' imprisonment on Count 2 is confirmed.

Both sentences are to run concurrently.

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J.H. STEYN
JUDGE OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

I agree .....
G.P. KOTZÉ
JUDGE OF APPEAL

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Delivered at Maseru This 22nd. Day of January.... 1994.