C. of A. (CRI) NO. 10/90

IN THE LESOTHO COURT OF APPEAL

In the matter between:

MOLATOLI TSIBELA — APPELLANT

V

REX — RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN, J.A.
BROWDE, J.A.
KOTZÉ, J.A.

JUDGMENT

STEYN J.A.:

This matter comes before us on appeal from a decision of the High Court (Molai J. and Assessors presiding). The

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Court found Appellant guilty of

(1) Murder with extenuating circumstances and

(2) Assault with intent to do grievous bodily harm.

On the murder charge Appellant was sentenced to 8 years' imprisonment and on the assault charge to 5 years' imprisonment. The sentences were ordered to run consecutively.

The Crown - in my view quite correctly - conceded that:

(1) The appellant should not have been convicted of murder but only of culpable homicide;

(2) the sentences should not have been ordered to run consecutively but concurrently; and

(3) this Court, as a Court of Appeal was at large to determine sentence afresh on both counts.

Although in his heads of argument Counsel for the

Appellant had urged the Court to uphold the plea of self-defence, he abandoned this contention at the hearing of the appeal. In adopting this approach he was more than justified. Appellant's evidence in this regard was not only improbable and contradictory, but was in conflict with the evidence of several eye-witnesses who observed the incidents associated with the stabbing of the deceased and that of the complainant on the second charge. Moreover Appellant had ample opportunity to advance this defence to the Chief before whom he was summoned shortly after the event. However, he declined to proffer it, falsely averring only that he used a different (a clasp) knife and not the formidable (fixed blade) knife he in fact wielded in order to kill the deceased and wound the complainant.

It is clear however that Appellant acted under considerable provocation on the day in question and that he was in a blind rage as a result of not only the trespass and destruction of crops by cattle belonging to the deceased's family, but also at their attempts to frustrate him in his efforts to impound the cattle concerned.

into the appellant's field damaging three maize crops.

(f) that the appellant having realised that there was damage occasioned by this trespass decided to impound the three cattle.

(g) that as the appellant was attempting to impound the cattle the deceased and PW2 prevented or obstructed him from doing so.

(h) that the appellant indeed had a right to do so.

(i) that the appellant was naturally offended by this act.

(j) that consequent upon this act the appellant who was already wielding his knife stabbed the deceased and the complainant.

(k) that the deceased person was not armed with any weapon and the same went for the

complainant.

(l) the learned trial Judge made a definite finding that the appellant was provoked by the deceased and PW2 preventing him from impounding the animals that had trespassed into his field and damaged the maize crop.

(m) that the deceased met his death at the hands of Appellant (and indeed this was not disputed by the Appellant).

(n) that the deceased died of haemorrhagic shock resulting from the injury he had sustained on the neck.

(o) that the complainant had two stab wounds; namely on the thorax and elbow."

It is clear from the judgment by the Court *a quo* that it rejected the Crown evidence regarding how the impounding of the cattle was effected by Appellant and that it preferred his version in this respect. In regard to the provocation to which Appellant was subjected the

learned trial judge made the following finding:

> "" I am prepared to accept the evidence that it was the accused who first used a knife to attack the deceased who was not armed with any weapon simply because he (accused) was provoked by the deceased and PW2 preventing him from impounding the animals that had trespassed into his field and damaged the maize crop." (My underlining)"

The Court went on to record the following concerning the events leading up to the attempted impoundment of the cattle and Appellant's response thereto:

> "...the deceased and P.W.2 went to prevent him from doing so (impounding the cattle). They had no right to do that. Naturally the accused must have been offended by the action of the deceased and P.W.1"

Counsel for the Crown referred to the provisions of Sections 3 and 4 of the *Criminal Law (Homicide Amendment) Proclamation* 1959.

These read as follows:

"3(1) A person who -

(a) unlawfully kills another under circumstances which but the provisions of this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool;

is guilty of culpable homicide only.

3(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation".

4(a) The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

4(b) For the purposes of this section the expression "ordinary person" means an ordinary person of the class of the community to which the accused belongs."

Counsel for the Crown pointed to the failure of the Court *a quo* to apply its mind to the provisions of this

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Proclamation and contended that this was a misdirection. Without finding that this is the case, but applying our minds to its provisions and their relevance to the present case we are of the view that Counsel are right when they (both of them) urge us to find that the Court *a quo* erred in returning a verdict of murder rather than one of culpable homicide. The verdict of guilty of murder with extenuating circumstances must therefore be set aside and a verdict of guilty of culpable homicide substituted therefore.

The cumulative effect of the penalties imposed by the Court *a quo* (8 + 5 years i.e. 13 years' imprisonment) therefore falls to be reconsidered. Indeed, as a point of departure the Crown contended that the sentences should be ordered to run concurrently as the stabbings were done within "a single chain of intent".

The taking of the life of a fellow human being - albeit pursuant to significant provocation and in the heat of the moment - remains a most serious offence and must be punished adequately. This also applies to the serious wounding of the complainant in this matter. These facts must always be borne in mind; however we must also not

lose sight of the following:

(a) The offences were committed on the spur of the moment and without any premeditation.

(b) The Appellant was legitimately incensed by the fact that the cattle had trespassed on his property and damaged his crops.

(c) His anger was further fanned by the conduct of the deceased and the complainant obstructing him from the exercise of his lawful rights to impound the cattle concerned.

(d) There is a history of bad blood between Appellant and the deceased and the complainant and their families.

(e) The Appellant is a first offender.

In my view appropriate sentences would in these circumstances be the following:

1. on the charge of culpable homicide: 5 years'

imprisonment

2. on the charge of assault with intent to do grievous bodily harm: 18 months' imprisonment.

It is ordered that these sentences are to run concurrently.

In summary:

1. The conviction on a charge of murder is set aside and a conviction of culpable homicide is substituted therefore;

2. The conviction on the charge of assault with intent to do grievous bodily harm is confirmed.

3. The sentences of 8 years' and 5 years' imprisonment respectively are set aside and sentences of 5 years' and 18 months imprisonment respectively are substituted therefore. It is

ordered that these 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.C. KOTZÉ
JUDGE OF APPEAL

Delivered at Maseru this 13th day of January, 1995.