C. OF A. (CRI) NO.6 OF 1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter of :

LETHULA LELUMA	**1st Appellant**
SAMUEL MOTAUNG	**2nd Appellant**

vs

R E X	**Respondent**

Held at Maseru:

Coram :

BROWDE, J.A.
VAN DEN HEEVER, J.A.
SHEARER, A.J.A.

J U D G M E N T

Shearer, A.J.A.

The two appellants were respectively the first and second accused in a criminal trial which commenced before Lehohla J. on the 28th April 1994, and which finally came to an end on the 29th August 1996 when, after conviction of the

two appellants, they were sentenced. There were initially three accused but the third accused died after the evidence was completed but before judgment.

The indictment charged the three on the first count, with murder: of Vitalis Tebelo Lehloenya on the 12th of December 1989 at or near Maseru Local Administration offices, in Maseru. The second count, labelled as "Armed Robbery", alleged that at the same time and place they assaulted Lehloenya "to induce his submission" and stole a safe containing M877.50, being government property then in his possession and under his care.

The two appellants were convicted on both counts and each was sentenced on count 1 to twelve years' imprisonment and on count 2 to five years' imprisonment, these sentences to run concurrently. They appeal against both the conviction and the sentences.

The trial had commenced only in 1994 although the accused had been arrested very soon after the events which were the subject of the indictment. It lasted for two years and four months with many long interruptions. Although finger prints had been lifted and photographs taken at the scene and a blood sample taken from a vehicle which may have identified one of the perpetrators of the murder, this

evidence had all been mislaid and could not be produced by the Crown at the trial.

Before dealing with the appeal itself, it is necessary to comment on gross deficiencies in the record prepared for the purpose.

Apart from an accused's right to a fair trial he has the further right of a proper hearing on appeal, and one of the most important factors in ensuring that is a complete and accurate record of the proceedings in the lower court. The record before us (some 922 pages) departs abysmally from these criteria. The record is woefully incomplete. Until the judgment at the end of the record, the identity of the Judge does not appear. It is clear that he had called in the assistance of assessors. They were not named, as one would expect at the commencement of the transcription, but on the penultimate page of the evidential record the surname of one assessor appears as declining to ask questions. There is no reliable record of the date on which particular evidence was taken, since the dates which do appear are frequently obviously wrong. Often events of importance as regards the conduct of the proceedings do not appear. When we initially received the record it was obvious that a passage of many material pages, containing evidence which might have been important, was missing and after some time these missing pages were made available. Those pages and many others in the record have no indication,

other than the context, of who the speaker was. It is clear that whoever purported to have checked the record so that the Registrar could be assured, and certify, that it was correct, had done a very superficial check, if one had been done at all: even the date of hearing of the matter according to the certificate is contradicted : 1994 in the heading, 1996 in the certificate itself.

It is also clear that the record was the product of transcriptions of audio tapes by a number of different persons, most if not all of them with a deficient knowledge of the English language. This led to the use of a number of incomprehensible words or expressions, which strain the comprehension and the ingenuity of the reader. The record abounds in manifest errors, and there is scarcely a page which does not tax the imagination.

Examples of this are legion but the following are illustrative :

"H.L.: You asked him BNP Centre is far away from the D.S's offices where you tempt again calling passed to and fro what did he say? "

"H.L.: Then you got to make more careful again because it is of paramount importance in the contact of a criminal trial, how an accused doesn't offer a witness contact himself. "

"DC: ..... Those explanations were implicating him, not so?

PW8: They were connecting him with judges my Lord".

"DC: And as an experienced C.I.D. office you know that those explanations are not at admissible? Unless produced to write by the Magistrate. I forget the section but I could really glue, but you remember it?"

These are but a few examples of portions of the record where the meaning cannot be fathomed, even with the exercise of imagination. Other similar examples are numerous. As disconcerting is the fact that the interpreter must according to the record have been unreliable. The record initially creates the impression that the presiding Judge was speaking from personal knowledge, since he put questions that could not have arisen from the record as printed; until it became clear that he was - time and again - either correcting the interpreter's English or supplementing what the interpreter had omitted to translate.

To understand the other difficulties confronting this Court on appeal it is necessary to deal briefly with the Crown case, in so far as it emerges from the evidence.

The gist of the evidence presented by the prosecutor was as follows :

In the early hours of the morning of 13th December 1989 the police, after receiving a report, discovered that there had been a forced entry into a building described as the D.S.'s office. An unlocked safe was found on a red mat outside the door. Inside there were signs that the place had been ransacked. A cash box lay open, from which, it emerged subsequently, a substantial amount of money had been removed. The deceased was lying in the room, obviously dead, with his feet on top of a stove. He was bleeding from the mouth and there were suggestive marks on his neck. A post-mortem report was handed in by consent which found, in essence, that he had died from a broken neck "following forcefully twist".

The Crown attempted to establish the identity of the person(s) responsible for the death of the person, by evidence concerned with events which followed some time after the incident during which the deceased met his death. According to two accomplices accused No.3, driving a blue Toyota Hilux van with an open back picked up the second appellant and the fourth prosecution witness (PW4). There was talk of assistance in moving a safe. Accused No.3 then drove to where the third prosecution witness (PW3) was staying and persuaded him to assist in this task. He (PW3) got in the cab and one of the others into the open rear. At a certain point, the three passengers were dropped off and the blue van drove on. The three of them

then proceeded to the D.S's office, apparently led there by the second appellant. There they found the premises as described but with the safe still in the room and the red mat concealing the body of the deceased. The mat was removed, the safe placed on top of it and it was dragged to the position in which it was subsequently found. At some stage the persons there became aware that someone was approaching and all fled. The witnesses did not place the first appellant at the scene but one of them said that after they had run some distance they were "joined" by him.

The crime scene was then photographed. Fingerprints were taken. Various blood stains were observed and the police took possession of certain exhibits; but as already stated, none of this was available to the Crown by the time of the trial.

The appellants were apprehended and the van was taken into police possession and kept there for years. One wonders why. There was blood on the left hand passenger door of the van and a white panama hat, a red "cap", and a balaclava were found in the van. It is not in dispute that the red cap was that of the first appellant. The other two items of headgear were not associated by the evidence with any of those arrested.

The Crown also tendered the evidence of a relative of the deceased, that at some stage after the offences, the second appellant met up with him and told him that he and others had killed the deceased and taken money. I return below to the actual content of this alleged confession to PW7, which of course was not admissible against his co-accused. The second appellant had also allegedly confessed to participation in the crimes, but the attempt to put this before court was shrouded in irregularity, a matter to which I return below.

The defences tendered, were alibis. The appellants gave evidence flatly contradicting that of the accomplices. The first appellant's version was that he and a colleague (both being policemen), had on that evening gone to buy cigarettes and then to a resort where they started drinking; where they saw, and joined, second appellant and the third accused. He was dropped off at his home very drunk, before midnight by accused No.3. He says he must have taken off the red cap he was wearing, in the van.

The second appellant corroborated the first about their drinking spree, denied that he had confessed to prosecution witness No.7 that he and five others "had killed a person in the course of a theft" and said that the Crown witnesses were all implicating him falsely. He too had been dropped off at his home by the third

accused, and had not been anywhere near the scene of the crime.

Neither of them fared well under cross-examination.

There were a number of irregularities committed during the course of the trial. There are many passages in the record which indicate that Crown Counsel bullied defence witnesses, and several where the learned Judge appeared to do the same. Despite frequently saying that he sought "not opinion but evidence", the Crown Counsel was allowed to pressurise the accused to express a view about others' actions and reactions about which the accused, who in their evidence placed themselves elsewhere, were in no position to express an opinion. Counsel's alleged failure to put certain things to witnesses was laid at the door of the accused, ignoring the privilege of communication between lawyer and client. The objection on this basis by defence counsel was ignored.

The record makes it clear that, where the Judge *a quo* had called in the assistance of assessors, one dropped out of the matter at some stage, returned or attempted to return, but apparently took no further part in the proceedings. It appears from the judgment that when the trial came to an end only one assessor remained. Only his agreement with the verdict was recorded. Now it is true that,

while according to the High Court Act No.5 of 1978, the assessors are summoned by the trial Judge in an advisory capacity the Judge alone deciding guilt, the judgment must record their agreement or disagreement. This necessarily implies that that requirement must have some significance. In the Republic of South Africa, where the assessors act in a judicial capacity on the facts, it is fatal to the proceedings if one is absent (see ***R vs Price*** 1955(1) SA 219 at 224) and the position is the same in other Commonwealth countries (see the cases referred to therein). To the same effect is the Appellate Division judgment in ***S vs Malindi and others*** 1990(1) SA 862 at 976. In those matters the participation of two assessors was compulsory and the reduction in their number deprived the accused of the right to be tried by the tribunal which commenced the trial.

The absence, temporary or otherwise of one assessor may not, by itself, in Lesotho be fatal to the proceedings; particularly where the Judge seeks advice in regard to a limited issue, where an assessor might well be excused once that issue has been dealt with in the evidence, and advice given. But where assessors are summoned for general advice, wise advice may well persuade the trial Judge that his *prima facie* view on any one of a number of matters is not incontrovertible. And under those circumstances if there is a general custom, as we were informed from the Bar, that assessors drift in and out or are excused during the course of the

proceedings, such custom *prima facie* conflicts with the High Court Act and deprives the accused of a right accorded him by that Act and the decision of the Judge to summon assessors; which surely would not be motivated by a desire merely to afford pocket-money for a friend or two.

It is not necessary to decide in this matter whether the absence of one of the two assessors was a fundamental irregularity; since there were a number more. Exhibit A, does not appear to have been formally placed before the court save indirectly, if one may call it that, in that the second appellant was cross-examined about it. In the process this highlighted a factor which must have prejudiced the defence, that one counsel represented all three of those charged where there was a clear conflict of interest, since the second appellant seems to have implicated the first during the proceedings relating to his bail application.

The affidavit forms no part of the record before us; but the trial Judge who had handled the bail application itself, apparently relied on his memory of its contents. Whether or not that is so, he took into account the affidavit evidence the correctness of which the second appellant had disputed, against the first appellant;

> "This being a summary trial it wouldn't have been wrong for the prosecution to give accused forewarning of the type of evidence it had against him, emanating from accused No.2 in the form of the affidavit;

> instead of, so to speak piling Pelion on Ossa in regard to a man whose difficulties in this proceeding are in any event almost unsurmountable as evidence will show later that it is unnecessary to apply this last straw when the penultimate one is enough to break a camel's back". (The underlining is mine).

This constituted an irregularity, of course. Appellant No.2 had in the oral evidence in court, only conceded that the attorney who had drafted it, got the first appellant's name from him. Only portion of paragraph 4 of the affidavit was actually read out in court and the second appellant did not, judging by the record, make an unequivocal admission that that reading was correct, merely saying "I hear it appears from the papers" (emphasis added).

The learned Judge also took into account against the accused an alleged confession by accused 2 to the accomplice Khanyapa(PW4). The substance of this confession was that when he and others went to the office, they opened the window. The nightwatchman woke and came to the door. The witness then went to the door. The judgment continues :

> "When the man went out through the door they 'locked' him. PW4 didn't ask what was meant by 'locked' him because he already knew that he 'had seen the deceased'. And he explained further 'to my understanding it means suffocated or strangled him. This is the ordinary meaning I attach to the phrase they locked him"

Apart from apparently elevating this witness to the status of an expert on the

meaning of words, this passage as recorded in the judgment bears little relation to the evidence on record. The relevant portion of the record of the evidence of PW4 reads thus :

"PW4 : When he decided to step out through the door they crabbed him in a kind of scold.

Ct :What did you understand by the word "knock", Did you ask him what he meant?

PW4 : I didn't, my Lord.

H.L. : Meaning you understood what was meant by that?

PW4 : I understood because I had already seen the dead person.

H.L. : May be you can use benefit of your knowledge then.

PW4: To my understanding is to suffocate or strangle him".

The court *a quo* also misunderstood the evidence of the Crown witness Ms Sello, who had testified that she had previously seen the second appellant on the premises where the crimes were subsequently committed. She had specifically said that she had neither seen nor purported to have testified that she had seen the second

appellant ever moving the safe. "When I gave evidence I didn't say that I saw him actually in the operation of moving the safe my Lord" (Ms Sello's evidence at p.273)

This was elevated by the learned Judge to something which he apparently regarded as incriminating :

> "PW5" (Ms Sello) "testified that on one occasion accused No.2 and his co-workers assisted her in moving the safe in which revenue was kept".

The first appellant had testified in his evidence in chief, that he had been tortured by the police in the course of which his finger had been wounded having been pinched with a pair of pliers. Thereafter he was taken to a laboratory where blood was drawn from him, and then to hospital where he was examined by a doctor. The member of the CID who took him, "said the doctor should examine my finger, it seemed that I was bitten by somebody whom I had killed". What the policeman had averred, was untrue according to the appellant. He denied that the doctor had examined him at all.

The police had clearly hoped to link the first appellant with the crimes in

question in some fashion by blood grouping. The real evidence had disappeared and no medical evidence was tendered relating to his injured finger. Not even a form recording that any such had occurred forms part of the record before us.

Despite this, the trial Judge seems to have accepted that there had been such an examination the result of which had implicated the first appellant.

PW8, Sergeant Mathlole had testified that when accused No.3 mentioned the name of the first appellant to him, he confronted the latter and saw that he had a freshly wounded finger. Defence counsel objected to PW8 giving testimony as to the cause of the wound on the grounds that the witness was not an expert in this field. He was overruled. PW8 then said that

> "The wounds were not on top or below but the finger was caught between such thing as teeth".

He did <u>not</u> testify that it was the first appellant who had told the doctor who examined him, that he had been bitten, according to our record.

The judgment however infers that the first appellant had told PW8 that he had been bitten and that PW8 had passed that information to the doctor, on the grounds of evidence by PW8 that in the ordinary course that would be the sequence of events

with no mention at all of what the appellant had told him (assuming it would have been admissible) nor what the doctor had in fact recorded if anything; and finds his explanation of the injury to his finger to be false on the strength of this, moreover praising Crown Counsel for having speculated on the strength of what had not been established and himself adopting that speculation. According to the judgment Crown Counsel had submitted by way of a "deliberative question .....: Couldn't accused 1 have sustained the injury during the scuffle with the deceased nightwatchman who could have bitten him on the finger in defence of his life?" (Pages 895 and 910 of the record).

It is unnecessary to detail further analysis of the voluminous record. From what has been said thus far it is clear that the charges were poorly prosecuted probably largely due to the inordinate delay, and its course speckled with irregularities which persisted into the judgment itself. A strong indication of that - if further comment is necessary - is that the trial Judge was probably distracted by his rejection of the defence alibi evidence, into ignoring the fact that the onus burdened the Crown to prove all the elements of the offence charged. An inference of an intention to kill on the part of all the persons involved in the breaking and entry, would not satisfy the requirements stipulated in ***R vs Blom*** 1939 AD 188. No lethal weapon was taken by any of the perpetrators to the knowledge of his or their

companions, to found an inference of common purpose. And there was no evidence pin-pointing any particular individual as having assaulted the deceased where nothing can be made of the speculative bite-mark with which the first appellant was wrongly saddled.

Mr Mdlhuli fairly and correctly conceded that it could not be said that conviction on some lesser or any charge was inevitable despite the manifest flaws in the proceedings, the judgment, and the record on appeal.

The appeal is accordingly allowed and the conviction and sentences are set aside.

D.L.L. SHEARER
Acting Judge of Appeal

I agree :

J. BROWDE
Judge of Appeal

I agree:

L.VAN DEN HEEVER
Judge of Appeal

Delivered this.....Day of July, 1998 at Maseru