C of A (CRI) NO. 11 OF 2002

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

In the matter between:

POLELISO KHALANYANE **1st Appellant**

SEPOMPONYANE SEKONYELA **2nd Appellant**

SEETSETSA SEKONYELA **3rd Appellant**

LECHESA TSOENG **4th Appellant**

MOLETE KHALANYANE **5th Appellant**

And

REX
Respondent

Coram : Ramodibedi, JA
Plewman, JA
Melunsky, JA

SUMMARY

Criminal Law – Murder – whether Crown established that death due to appellants' acts or omissions – appellants' contention that report from medical superintendent does not show that he was a duly qualified medical practitioner and that report not capable of being handed in under ***s 223 (7) of Criminal Procedure and Evidence Act 1981*** *– report as a whole clearly establishes that Medical Superintendent qualified medical practitioner – interpretation of post-mortem report*

also in issue – cause of death properly proved – death due to appellants' conduct in detaining and assaulting deceased and depriving him of food and liquid.

Sentence – insufficient ground for distinguishing between appellants' participation in the crime – desirable, in particular circumstances, that they be treated equally – two of appellants over 70 – portion of sentences suspended in respect of those appellants who received more severe sentences.

Inexplicable delay of over seven years between date of alleged offence and indictment – deplorable – incomplete record contrary to counsel's certification – inexcusable and potentially prejudicial.

JUDGMENT

(7th April 2004)

MELUNSKY, JA

[1] The five appellants were charged with the murder of Phallang Mokaeeane ("the deceased"). They pleaded not guilty before Molai J and assessors in the High Court but were all convicted. The court found extenuating circumstances and the appellants were each sentenced to imprisonment for ten years, save for the third appellant (referred to as A2 in the court ***a quo***) whose sentence was one of six years imprisonment.

[2] Before dealing with the merits of the appeal there are certain matters of importance that require comment. The first concerns the lengthy delay between the alleged commission of the offence – January 1994 – and the indictment of the appellants on 22 May 2001. The delay of more than seven years has not been satisfactorily explained and it is, to say the least, deplorable. Secondly, the record was incomplete: the depositions of three persons at the preparatory examination were admitted as evidence at the trial with the consent of both counsel but did not form part of the record on appeal. Fortunately this omission does not affect the outcome on appeal.

What is more serious was the failure to annex to the record two crucial documents – the report of the post-mortem examination on the deceased's body and a report by the medical superintendent of Paray Hospital. The contents of the reports were read into the record at the trial but the failure to include copies of the originals was a serious failure that contradicts counsel for the Crown's certification that the record was a correct copy of the proceedings. In the event both reports were handed to us at the appeal without objection by either party's counsel but this does not excuse their original omission from the record.

[3] There is no dispute about the facts. The court ***a quo*** accepted the evidence of the principal Crown witnesses and this finding was, quite correctly, not challenged on appeal, especially as no evidence was forthcoming from the appellants or any witnesses on their behalf. Counsel for the appellants limited his argument to a single submission, ***viz.*** that the Crown had failed to establish that the death of the deceased was caused by the appellants' acts or omissions. Hence the significance of the aforesaid reports. The facts, therefore, can be stated briefly.

[4] The events giving rise to the charge took place in the area of Semenyana. The appellants were members of a group known as the Anti-Stock Theft Association, a voluntary association which, as its name proclaims, concerns itself with the prevention of stock theft. The first appellant (A1 in the court ***a quo***) is the father of the fifth appellant (A5 in the court ***a quo***) and the second appellant (A4 in the court ***a quo***) is the father of the third appellant (A2 in the court ***a quo***). The fourth appellant was designated as A3 in the trial court.

[5] Apparently stock theft in the Semenyana area had been rife for many years before 1994 and as a result most of the appellants had suffered substantial losses of stock, especially sheep. During 1993 a large number

of the first appellant's sheep were stolen. The appellants suspected that the deceased and two of the Crown witnesses, Chabasemona Khalanyane (P.W.3) and Marakong Khalanyane (P.W.4) were responsible for the 1993 thefts. In order to extract confessions from the suspects, or perhaps to punish them for their assumed criminal conduct, the appellants, during the early part of January 1994, physically detained the deceased, P.W.3 and P.W.4 in a small hut belonging to the first appellant. The hands of the victims were tied and they were forced to lie on the cement floor of the hut. During their detention they were not given food or liquids by their captors and they were systematically hit with whips and sticks wielded by the appellants. All of the appellants and some others who were not before the trial court took part in the beatings which occurred every day with considerable severity. After about a week of being detained under these circumstances the three detainees were taken by the appellants to chief Abdullah Rantletse. On their way to the chief's place the second appellant struck the deceased with a stick on what was described as the kidney region. As a result the deceased fell to the ground. After this he was unable to walk and covered the rest of the journey on a horse led by the first appellant.

[6] The chief refused to entertain the appellants' complaints against the detainees as it was obvious that they had sustained severe injuries. He directed that the appellants take them to a doctor for treatment. They were, however, taken back to the first appellants' hut but were released the following day. Shortly after their release the police arrived and took the three men to the Paray Hospital at Thaba-Tseka where they were admitted to the wards. P.W.3 and P.W.4 were subsequently discharged after receiving treatment but the deceased died in the hospital two or three days later.

[7] With that resume, I turn to the medical evidence which consists entirely of the two reports to which I referred earlier. Counsel for the Crown sought to hand in the reports to the trial court in terms of ***s 223 (7) of the Criminal Procedure and Evidence Act 1981***. The appellants' counsel raised no objection to the handing in of the post-mortem report but submitted that the report from the medical superintendent of Paray Hospital did not identify the author as a duly qualified medical practitioner. He accordingly argued that the report was not admissible under the section.

Both reports were, however, admitted by the trial court.

[8] The report from Paray Hospital is dated 31 January 1994 and is signed by the medical superintendent, A. Siegwart. It reads:

> "To whom it may concern
>
> re**: N'tate Phallang Mokaeane, 25 years from Semenanyana**
>
> I certify that I treated as a M.O. above mentioned patient at Paray Hospital from 10.1.94 until he died on 13.1.94, 2.30am.

He was admitted on 10.1.94, 11:30pm, and alleged to have been assaulted on 3.1.94. He further alleged to have been kept as a prisoner by his aggressors.

His general condition was fair and he was complaining about pain on his buttocks. On 11.1.94 it turned out, that he hadn't passed urine since he got assaulted.

> My findings: 2 deeply and plain wounds with severe infection and much nectrotic tissue on both buttocks, small abrasions everywhere and a fracture of the 3rd finger left. I also assumed kidney failure. I treated him with painkillers, antibiotics and local disinfectants. His kidney didn't seem to recover. On 12.1.94 I did a debridement (removal of infected and dead tissue). Despite that treatment his condition got worse and he died due to kidney failure on 13.1.94. Kidney failure was caused by toxic substances from his necrotic and infected wounds and not having had enough liquid during his captivity."

In this Court the appellants' counsel submitted that the aforesaid report should have been excluded as it does not appear **ex facie** the document that Mr. Siegwart was a duly qualified medical practitioner. He contended that a medical superintendent might be an administrative official with no medical training. It is correct that in the document in issue there is no explicit statement that Mr. Siegwart is a duly qualified medical practitioner. This, however, is not a requirement of the section. All that is required in terms of **S. 223 (7)** is sufficient evidence to satisfy the trial court that the signatory of the report is a qualified practitioner. The court may be so satisfied from evidence **dehors** the document or from the contents of the report as a whole.

[9] In the present case Mr. Siegwart describes himself as " a MO" which, it is common cause, is an abbreviation for medical officer. Equally significant are the contents of the report from which it is apparent that Mr. Siegwart carried out a physical examination of the patient, that he prescribed treatment and that he carried out a surgical procedure in the form of a debridement. It is inconceivable that a mere administrative official would have provided such treatment. What we have is a medical officer, being the medical superintendent of the hospital, who treated the deceased. The cumulative effect of the aforegoing leads to the inevitable conclusion that Mr. Siegwart was a duly qualified medical practitioner. His report, therefore, was properly admitted.

[10] What needs to be noted with concern is the fact that by the time the matter eventually came to trial Mr. Siegwart had left Lesotho and was not available to give evidence. This is just one indication of how the administration of justice could have suffered due to the delay in bringing the appellants to trial.

[11] The post-mortem report on the deceased is dated 27 January 1994. The autopsy was performed on that date at the Queen Elizabeth II Hospital mortuary by the medical superintendent of that institution whose signature is illegible. He designates himself as a medical practitioner with the qualification of MD. He says in the report:

> "That as a result of my observations a schedule of which is appended, I am informed that death occurred (6) 12 days prior to my examination, and
>
> That it was due to (7) shock extensive wounds both buttocks."

The figures (6) and (7) refer to the notes in the form.

[12] On behalf of the appellants it was submitted that the date of death and the cause of death were both based on information given to the medical practitioner and that there was no admissible evidence to establish the cause of death. This contention is not correct. Under note (7) the practitioner is required to give the cause of death

"as evidenced solely by objective appearances."

Under note (9) the doctor again recorded that there were extensive wounds to both buttocks and bruises to the deceased's face. It is quite clear, therefore, that he observed and had regard to the wounds to the buttocks. The argument on the appellants' behalf is based solely on the word "and" between the paragraphs dealing with notes (6) and (7). This word is part of the printed form. The paragraphs deal with different matters and the presence of the conjunctive word between them does not reasonably convey that the doctor did not do what he was called upon to do – to furnish the cause of death based solely on objective appearances.

[13] There was also a submission that the doctor who performed the autopsy should have removed the deceased's kidneys from his body and reported on their condition. This argument was based on the reference to "assumed" kidney failure in the Paray Hospital report and to the fact that the deceased was struck in the kidney region on his way to chief Abdullah Rantletse. The medical practitioner obviously did not find it necessary to examine the deceased's kidneys: there is no ground for assuming that his decision was wrong. Nor is there anything to indicate that kidney failure was due to a blow to the body. The failure, according to the report, was due to the necrotic and infected wounds on the buttocks and to the absence of liquid consumption.

[14] It is quite clear that the deceased was brutally assaulted. His captors beat him severely and failed to give him food and water. He was in such a weakened condition that he was unable to answer when his father spoke to

him on the way to chief Abdullah Rantletse. He then received a blow to his back which contributed to his inability even to walk. He ended up in hospital with infected and necrotic wounds that required surgical treatment. He died within a few days of his admission. It is unnecessary to consider the precise mechanism that caused his demise: it is sufficient to say that confinement on the floor of a small hut, persistent violent assaults and the deprivation of liquids all played their part in his eventual death. The appellants were, therefore, correctly convicted.

[15] The question of sentence gives rise to some difficulty especially because of the decision of the trial judge to treat the third appellant more leniently than the others. The reason given for this was the judge's statement that

> "there was no indication that he played any special role that would make him deserve the same punishment as the others."

There is, of course, no need to impose the identical sentence on each participant to the same crime. Each participant's individual circumstances, including the degree of his participation must be carefully considered. Nevertheless, where accused persons are more or less equally associated in the commission of an offence and there are no factors personal to each accused which suggest the need for the imposition of disparate sentences, a court of appeal may interfere with the sentences where they are treated differently **(cf S v Moloi 1969 (4) SA 421 (A) at 424 & E-F).** This seems to me to be such a case.

[16] The third appellant was actively involved in the detention of the deceased. Indeed, according to P.W.4 the third appellant was one of the persons who brought the deceased to the first appellant's hut. He played the same part as the others in the persistent assaults. He used a stick to beat the deceased and there was nothing to indicate that his degree of participation was less blameworthy than that of the other appellants. Nor are there any factors personal to the third appellant that are of particular significance. He is a relatively young man and, like the other appellants, he has a clean record. And it may be noted in this regard that the first and second appellants are both well over seventy years of age. All in all there seems to be no compelling reason for treating the other appellants more severely than the third appellant.

[17] Of course it does not follow that a court of appeal will inevitably interfere when disparate sentences are imposed on different accused for insufficient reason. Thus a court would not interfere where the lesser sentence is regarded as inadequate or too light. This is not the position in the present matter. While there is no doubt that the appellants treated the deceased with cruelty and that the assaults were persistent and premeditated, they did not intend to kill him. They were convicted on the basis of **dolus eventualis**, and rightly so. Moreover they acted under the misguided belief that they had some right or justification for harming the deceased as they believed that he had stolen the first appellant's sheep. In all the circumstances of the case it seems reasonable to reduce the sentences of the first, second, fourth and fifth appellants by conditionally suspending four years of their respective sentences. By so doing their sentences will not be too disproportionate to that imposed on the third appellant. Having said

that, however, I feel constrained to emphasize that it is not open to members of the public to take the law into their own hands by imposing their own form of punishment on suspected miscreants. Lesotho is a constitutional democracy. It is a country where the rights of individuals are protected and where there are proper institutions and resources for dealing with criminals.

[18] The following order is made:

1. The appeals against the convictions are dismissed.

2. The sentence of 6 years imprisonment on the third appellant is confirmed.

3. The sentences of 10 years imprisonment imposed on the other appellants are set aside and replaced by the following: in respect of each such appellant:

"Ten years imprisonment, four years of which are suspended for five years on condition that the accused is not convicted of an offence involving an assault with intent to do grievous bodily harm committed during the period of suspension."

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L.S. MELUNSKY

JUDGE OF APPEAL

I agree

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M.M. RAMODIBEDI

JUDGE OF APPEAL

I agree

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C. PLEWMAN

JUDGE OF APPEAL

Delivered at Maseru this 7th day of April 2004

For Appellant : Mr. T. Mahlakeng

For Respondent : Mr. M. Molokoane