C of A (CRI) No. 5 of 2001

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

POSHOLI PHEELLO MOSILI **1ST APPELLANT**

MONTS'O RAMALEFANE **2ND APPELLANT**

REENTSENG PHALALI **3RD APPELLANT**

and

REX **RESPONDENT**

Held at Maseru on 7 October 2004

CORAM: STEYN, P
PLEWMAN, JA
SMALBERGER, JA

Summary

Murder and Robbery - circumstantial evidence - evaluation of evidence - convictions confirmed - extenuating circumstances found - trial court obliged to record what such circumstances are and its reasons for its finding - trial court's failure to do so amounts to an irregularity – enquiry into existence of extenuating circumstances a precondition for the determination of the verdict of the court.

Smalberger, JA

JUDGMENT

[1] On the morning of 17 June 1997 Pieter Johannes Groenewald ("the

deceased") left his home in Ladybrand en route to Lesotho where he was engaged on a road construction project. He was driving a recently acquired white Nissan vehicle described in evidence as a "van" or a "bakkie" ("the deceased's vehicle"). The vehicle's registration number was BFH 193 FS. He failed to return home that night. He was duly reported missing. On 19 June his body was found in a donga at Khomo-e-Tśoana. The body was naked except for a pair of underpants and a grey sock on the left foot. A spent 7.65 mm cartridge was found next to the body. The post-mortem examination revealed that the deceased had sustained various bruises, abrasions and wounds. The cause of his death was recorded as "severe blood loss due to a perforating projectile wound in the neck region". In short, the deceased died as a consequence of a gunshot wound which, judging from the post-mortem report, appears to have been inflicted at point-blank range. The above facts are either common cause or not in dispute.

[2] Arising out of the aforegoing events the three appellants (as accused 1, 2 and 3 respectively), together with four other accused, were arraigned before Maqutu J and two assessors on charges of murder (count 1), robbery (count 2) and kidnapping (count 3). At a certain stage one of the accused (accused 5) absconded. The trial proceeded against the remaining accused. At the conclusion of a protracted trial the three appellants were convicted on counts 1 and 2 and acquitted on count 3. Accused 4 was convicted only on count 2 of receiving stolen property knowing it to have been stolen; accused 6 and 7 were acquitted on all the charges against them. The three appellants were each sentenced to 35 years imprisonment on counts 1 and 2, the two counts being taken together for the purposes of sentence. Accused 4 was sentenced to three years imprisonment.

[3] The three appellants noted an appeal against their convictions and sentences. We were informed from the bar that the first appellant has since passed away leaving only the second and third appellants as parties

to the appeal. For the sake of convenience I shall refer to the erstwhile first appellant, and the second and third appellants, collectively as the appellants or, if the context so dictates, as accused 1, 2 and 3 respectively. The other accused will be referred to, where appropriate, by their numbers at the trial.

[4] The circumstances surrounding the death of the deceased permit of no other reasonable inference than that he was shot with the requisite intent to kill and robbed of his vehicle, his clothes and certain other possessions. The only issue relates to the identity of the perpetrator or perpetrators responsible for these crimes. In this respect the Crown's case against the appellants was based on circumstantial evidence. The nature of that evidence and the cogency of the inferences drawn by the learned trial Judge and his assessors accordingly fall to be considered.

[5] Mr Leuta Mahao (PW4) testified that on 16 June 1997 the appellants were at his home. They were all drinking beer. There was a 7.65 mm pistol lying on his bed. It had been issued to his father who was a policeman. PW4 had taken the pistol home to clean it. Accused 3 handled the pistol while he was there. When they parted company it was already dark. The following day the pistol was missing. PW4 went in search of accused 3. He found him at the home of accused 1. Accused 3 confirmed that he had the pistol and would return it later.

[6] On 18 June 1997, early in the morning, the appellants came to PW4's home. They arrived in a white Nissan vehicle, the description of which corresponded to that of the deceased's vehicle. Accused 3 promised to return the pistol but failed to do so that day. The following day PW4 went in search of accused 3. He eventually tracked him down and, through him, accused 1. The latter handed over the pistol to him. The magazine of the pistol was empty. Accused 3 later promised to replace the bullets that had been used but never did so. On 29 June 1997 the police came and took possession of the pistol. It was handed in at the trial as Exh 3.

[7] There is other evidence which connects the appellants sometime in June 1997 (no precise date having been given) with a white vehicle largely corresponding to the description of the deceased's vehicle. Thus Mr Thabang Makole ("PW5") testified to an occasion when accused 1 parked such a vehicle at his home. The vehicle bore South African number plates. This happened at night. The following day accused 1 apologised to PW5 for parking the vehicle there and removed it. He was accompanied at the time by accused 2 and a third person who the witness

originally identified as accused 3, but about whose identity he was not certain.

[8] A further witness, Mr Michael Molefe ("PW10"), testified that early one morning accused 1 and 2 arrived at his home and informed him that they were selling a white Nissan van. They claimed that the vehicle belonged to a friend from Cape Town. They were accompanied by a third person who the witness was unable to identify. PW10 was not interested in buying the vehicle but suggested that they should approach accused 4 in that regard.

[9] The main Crown witness was Mr Mokhethi Rebamare Ntsoereng ("PW1"). He testified that accused 4 was well known to him. They had previously been involved in an unsuccessful diamond deal. Accused 4 had asked him to keep an eye open for a prospective buyer of a van. In June 1997 accused 4 contacted him telephonically and told him that he was going to bring a van he had for sale to the witness. PW1 in turn contacted Mr Thabo Mphana ("PW2") who he knew had a prospective purchaser for such a vehicle. PW1 left his home for a while. Upon his return he found accused 4 there with the appellants. They had a white van with them which they wanted to sell. The sale of the van was eventually negotiated to a Chinese gentleman through the mediation of PW2. The total purchase price was M12 000.00 of which portion was paid immediately with the balance to be paid later. (The Chinese gentleman was later to become accused 5.)

[10] PW1's evidence concerning the negotiations leading to the sale was confirmed by PW2. He found PW1 at home with four men, and eventually acted as facilitator in bringing about the sale of the van between them and accused 5. He was, however, unable to identify the four men. Mr Kenalemang Kotola ("PW3"), a neighbour of PW1, confirmed that on the day in question four men arrived at the home of PW1 with a white Nissan van. One of the men was accused 1, whom he knew well.

[11] It is common cause that on 28 June 1997 the police, as a result of their investigations, approached accused 5 who handed over a white Nissan van to them. It was subsequently positively identified as the

deceased's vehicle.

[12] Mr Khubelu Khateane ("PW11") testified that sometime in July 1997 accused 1 visited his home. On his departure he left behind a jersey which had assorted cream, white and brown colours. He later handed the jersey to the police. The jersey was handed in at the trial and became Exh 14 (a). The deceased's wife identified it as belonging to the deceased. It had been given to him by his mother. She further testified that he had been wearing it when he left home on 17 June 1997.

[13] During the course of the trial counsel for the Crown sought to hand in, in terms of section 223 of the Criminal Procedure and Evidence Act 7 of 1981 ("the Act"), an affidavit by an expert in ballistics to the effect that the spent cartridge found at the scene of the crime (Exh 13 (a)) was fired from the pistol (Exh 3). The defence did not seek to challenge the finding in the affidavit. However, the learned trial judge, for reasons that are not entirely clear to me, rejected the affidavit. In the result no connection between Exh 13 (a) and Exh 3 was established in evidence.

[14] Many of the items of which the deceased had been robbed were later recovered in the course of the police investigations headed by Det Insp Sello Mosili ("PW14") and handed in as exhibits. Some of these were linked, directly or indirectly, to accused 1 and accused 2 as a result of what was allegedly pointed out by them to PW14. The trial court, however, considered PW14's evidence to be unsatisfactory in a number of material respects and held that it was "unable to accept the evidence of PW14 on how these exhibits were recovered." In the result the evidence linking accused 1 and accused 2 to certain of the exhibits was excluded and regard cannot be had to that evidence.

[15] The evidence of the appellants broadly followed the same pattern. They denied any involvement in the charges against them. They claimed to be no more than acquaintenances of each other. They denied ever having driven or driven in the deceased's vehicle. They further denied any involvement with accused 4 in the sale of the deceased's vehicle to accused 5. They claimed not to have previously known accused 4 – according to them they met him for the first time when the case against

them was first remanded in court. They denied the evidence of the various Crown witnesses to the extent that such evidence conflicted with theirs.

[16] The evidence establishes convincingly that the appellants were well known to each other and were seen in each others company both before and after the time the deceased was robbed and murdered. This appears, *inter alia*, from the evidence of PW4, PW5 and PW10 as well as that of Ms Maliau Phate ("PW8"), to whom they were well known. According to the evidence of PW1 they, together with accused 4, were in possession of the deceased's vehicle immediately before its sale to accused 5. The trial court approached the evidence of PW1 with commendable caution and treated him as akin to an accomplice. It sought and found corroboration of his evidence with regard to the events of the day of the sale and the identity of the appellants in the evidence of PW2 and PW3 (both of whom were found to be credible witnesses) as well as in the evidence of other witnesses such as PW5 and PW10 who had previously seen accused 1 and 2 and a third person (who on a conspectus of the evidence as a whole could only have been accused 3) in possession of a white vehicle the description of which corresponded to that of the deceased's vehicle.

[17] On appeal it was conceded by counsel for the appellants, in my view correctly, that the evidence established that they were party to the disposal of the deceased's vehicle to accused 5. On the overwhelming probabilities that was the same vehicle that the appellants were seen in by PW4 on 18 June 1997 and also the vehicle referred to by PW5 and PW10 in evidence.

[18] The suggestion advanced by accused 1 and 2 that the vehicle they were seen in by PW5 and PW10 belonged to some third party from Cape Town who wanted to sell it simply does not hold water when

> the evidence is viewed as a whole. It is stretching coincidence too far to believe that over a period of a few days they would be involved in the disposal of two similar vehicles (bearing in mind that they had no connection to the motor trade). If the vehicle offered for sale to PW10 was not that of the deceased, why was it not offered, after PW10 turned it down, to accused 4, as recommended by PW10 (which is what appears to have happened in the case of the deceased's vehicle). In all the circumstances the only reasonable inference to be drawn is that the white vehicle about which PW5 and PW10 testified (as well as PW4) was that of the deceased.

[19] Counsel for the appellants contended that the fact that they were in possession of the deceased's vehicle, as testified to by the Crown witnesses, did not justify the inference, as the only reasonable inference, that they were responsible for robbing and murdering the deceased. There were other reasonable inferences that could be drawn, so it was argued, indicative either of their innocence or their guilt in respect of a lesser crime. Thus it was contended that the reasonable possibility could not be excluded that they participated in the disposal of the deceased's vehicle without any prior involvement in the robbery and the murder of the deceased.

[20] If PW4's evidence is to be accepted, it means that the appellants were already in possession of the deceased's vehicle on 18 June 1997, the day after the deceased went missing. It also follows from his evidence that accused 3 must have been in possession of the pistol Exh 3 on 17 June 1997. Even though not proved conclusively that the shot that killed the deceased was fired from Exh 3, accused 3 was armed with Exh 3 and had the means to shoot and kill the deceased. The trial court found that PW4's evidence that the pistol had been stolen was suspect. It considered the question whether "PW4 might have lent this weapon to accused 3 or have been actually the perpetrator of the murder of the deceased". There is no evidence on record to suggest that PW4 had any complicity in the killing of the deceased. Nor was any substantial reason advanced why he should falsely implicate the appellants. The fact that accused 3 was in possession of the pistol on the day the deceased went

missing is of greater significance than the circumstances in which he acquired possession of it, i.e, whether he took it or whether it was lent to him. It would appear that despite certain reservations the trial court ultimately relied upon PW4's evidence. I see no reason to fault it in that regard.

[21] The failure of the deceased to return home on 17 June 1997 points to his having been robbed and murdered on that day. The fact that the appellants were in possession of the deceased's vehicle the following day strongly suggests that they were involved in the robbery. The shorter the lapse of time between the commission of a robbery and being found in possession of the spoils, the stronger the inference of involvement. This is so more particularly when no acceptable explanation for such possession is forthcoming or where there has been a false denial of possession, as in the present case. The association of the appellants with each other before as well as after the robbery, including their connection to the deceased's vehicle, points to their having acted in concert. Their false claims that they were mere acquaintances serves to strengthen the inference to be drawn in that regard. Furthermore, accused 1 is linked to the robbery through his possession of the deceased's jersey, Exh 14 (a). Finally, there can be little doubt that the person or persons' responsible for the robbery were also responsible for the deceased's murder in the absence of any suggestion of later disassociation.

[22] In all the circumstances, and on a conspectus of the evidence as a whole, the only reasonable inference to be drawn consistent with all the proved facts, is that the appellants were the persons responsible for the robbery and intentional killing of the deceased. In the result their appeal against their convictions falls to be dismissed.

[23] This brings me to the question of sentence. Having found the appellants guilty of murder it was incumbent upon the trial judge to consider, in terms of section 297 (3) of the Act, whether extenuating circumstances were present. Without a finding to that effect the death sentence was mandatory (section 297 (1) (a)). The record does not reflect any enquiry or decision in that regard. The judgment on the merits is simply followed by that on sentence. In the latter judgment a passing reference is made to extenuating circumstances having been found, without any indication as to

what those circumstances were. It is indeed difficult to conceive, on the facts of the present matter, what extenuating circumstances could have been present.

[24] In **DIRECTOR OF PUBLIC PROSECUTIONS v MARABE** C of A (CRI) No 10 of 2000 (unreported) Steyn P stated that :"[A] court is obliged to record not only what the extenuating circumstances are, but also, whether it finds that such circumstances are or are not present and by what process of reasoning it arrived at its decision."

In the course of his judgment Steyn P referred to the remarks of Maisels JA in **MATSOAI v REX** 1967 LLR 70 at 75 to the effect that: "[W]e are bound to say that in our opinion when extenuating circumstances are found, it is advisable that these should be specified. The nature of the extenuating circumstances may have a bearing on the proper sentence to be imposed and, for that reason alone, the appeal court should have the benefit of the trial court's reasons for finding extenuating circumstances. Moreover on grounds of public policy it seems desirable that the public should be informed what the extenuating circumstances were."

The absence of reasons by the trial court may operate unfairly, as against both an accused person and the Crown (cf **S v IMMELMAN** 1978 (3) SA 726 (A) at 729C).

[25] Not only do the above principles require to be stressed, it is imperative that they be scrupulously complied with. In the instant case there was a regrettable failure to do so. The failure of the

trial court to hold an enquiry and to specify what extenuating circumstances were present constitutes an irregularity. Indeed, the enquiry is a pre-condition for the determination of the verdict of the court, i.e. (1) whether an accused is guilty of the crime of murder and (2) in the event of a positive finding that extenuating circumstances have been found to be present, what those are and what sentence other than the death sentence can lawfully be imposed. The irregularity, however, is not one that constitutes a miscarriage of justice affecting the appellants prejudicially. As far as the Crown is concerned, it did not seek to appeal against the trial court's purported finding of extenuating circumstances.

[26] It is a salutary principle that where an accused person is convicted on more than one count sentence should be passed separately on each count. There are, however, instances where separate crimes are so closely related in time, place and circumstances that a trial judge is justified in taking more than one count together for the purposes of sentence. This is such a case, and the trial judge cannot be faulted for adopting such an approach.

[27] The sentence imposed on the appellants was a very substantial one. I myself would have been inclined to impose a lesser sentence notwithstanding the seriousness of the appellants' conduct and the heinousness of the offences they committed. One must guard against the imposition of sentences that are so high as ultimately to leave little or no hope for the offender's rehabilitation and reintegration into society. However, there is not a striking disparity between the sentence I would have

imposed and that in fact imposed. Nor does any other recognised ground exist for interfering with the sentence. It follows that the appellants' appeals against their sentences cannot succeed.

[28] In the result, and bearing in mind that the first appellant has passed away, the following order is made:

The appeals of the second and third appellants (accused 2 and 3 at the trial) against their convictions of murder (count 1) and robbery (count 2) as well as the sentences imposed on them, are dismissed.

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J. W. SMALBERGER
JUDGE OF APPEAL

I concur:

_____
J. H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I concur:

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C. PLEWMAN
JUDGE OF APPEAL

Delivered at Maseru this 20th day of October, 2004.

For Appellants: Mrs M. Lethola

For Respondent: Ms T. Dlangamandla