C of A (CRI) NO. 8/04

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

R E X	**APPELLANT**
and	
SELIBO SELIBO	**1ST RESPONDENT**
KUMI KUMI	**2ND RESPONDENT**
POLOKOE MPAPEA	**3RD RESPONDENT**
THABANG MASOKELA	**4TH RESPONDENT**
LETHABO NTJELO	**5TH RESPONDENT**

Held at Maseru on 5 October 2004

Coram:
Steyn, P
Melunsky, JA
Smalberger, JA

JUDGMENT

Summary

Appeal by the Crown against the conviction and the sentence imposed by the High Court – 1. On conviction: High Court finding appellants guilty

of culpable homicide – Crown contending that court a quo misdirected itself and that the evidence established an intention to kill - No misdirection found – appellants correctly convicted of culpable homicide. (2) On sentence – compensation ordered by the High Court - procedure to be followed when making an order in terms of section 321 of the Criminal Procedure and Evidence Act 1981 – such procedure not followed in the court a quo – sentence set aside – suspended sentence of imprisonment imposed with condition of suspension the payment of compensation – whipping – whilst a competent sentence not to be resorted to unless circumstances demand its imposition and no other suitable alternative available. The practice of handing in post-mortem reports commented on.

Steyn, P.

The Crown appeals against the conviction of the appellants of the crime of culpable homicide. They were charged in the High Court with the murder of the deceased. The Crown contends that the Appellants should have been convicted of murder. In casu the court found that the Crown had "not succeeded to show that they intended to kill in a subjective or legal sense" and accordingly found appellants guilty of culpable homicide. In order to assess the correctness of this decision I summarise the evidence.

It was common cause that the deceased died as a result of severe injuries and subcutaneous bleeding sustained by him pursuant to a whipping. There is no cross-appeal before us by the appellants. It can therefore be accepted for purposes of this

appeal that appellants – who did not testify – were the persons who inflicted these injuries on the deceased and caused his death.

The circumstances in which and the reasons why the appellants assaulted the deceased remain obscure. The evidence established that the appellants and the deceased were part of a group of men described by the witnesses as "the men of the mountain" and as such members of a circumcision school. P.W.3, detective trooper Tšalong who was part of the investigating team, testified that the appellants told him that they had assaulted the deceased and had killed him "because the deceased had divulged some circumcision secrets." He asked them what these secrets were but they refused to disclose them saying that "those (the secrets) were the issues pertaining solely to the mountain men and that they would not divulge such secrets to me." The witness added that – "they (the appellants) took him (the deceased) as a man of the mountain and that they should rebuke him as to what he had done. And in administering that punishment, he ended up dead. That is as far as their explanation went."

The only other evidence which is relevant for the purposes of determining the degree of the appellants' guilt is (1) the medical evidence and (2) the testimony concerning the weapons allegedly used in the assault.

The medical evidence was placed before the court by way of a written Post Mortem Examination Report. This report is, in what I can only describe as an abbreviated format and has no particulars of how extensive or how severe the assault on the deceased was. Apart from what is stated above as to the cause of death, the description of the external appearance of the body merely states there were "multiple whip marks all over the body with swelling of skin/subcutaneous tissues". No internal examination was conducted.

As to the instruments used in the whipping, these are

described variously in the evidence as "sticks (which) were cut from the trees." Another witness (P.W.2) says that they "found ropes and wires, showing that when being assaulted, he was tied with those and (with) a belt". The "sticks" had been freshly removed from "blue wattle" trees. There is no evidence of their dimensions.

The Crown's contention was that in evaluating the above evidence, the court *a quo* misdirected itself. In this regard it relied upon a statement of the court in its judgment where the trial Judge says:

> "I am convinced that for whatever reason (which the accused saw fit not to divulge to this Court) the accused one or other or all of them, assaulted the deceased with tree branches causing his ultimate death – <u>which they however ought to have foreseen</u>"

The underlined passage was relied on by Crown counsel for his contention that the trial court misdirected itself. Such a finding – so he submitted – obliged the court to convict the appellants of murder.

I disagree. Indeed the above underlined passage is in my

view a correct and apposite formulation of the test when convicting an accused of culpable homicide and not of murder. To convict of murder the test is different. To do so the court must be satisfied that an accused actually in fact (subjectively) foresaw that death might result from his unlawful conduct and nevertheless proceeded to perform the acts which resulted in death. See in this regard Phumo v Rex L.A.C. 1990 – 1994 146 at pp. 148 – 150 and the cases cited therein. At p.149 Browde JA – after referring to the often cited judgment in S v Sigwahla 1967 (4) SA 566 (A) - says the following:

> "The test in essence therefore is what did the appellant intend and what did he foresee would be the result of his attack on the deceased. In his able argument before us counsel for the Crown contended that in the light of the reason advanced by the appellant for assaulting the deceased (he refers here to the appellant's expressed belief that the deceased was responsible for the blowing off of his roof which he fairly conceded could give rise to extenuating circumstances) the inference was

> irresistible that the assault was premeditated and that, if the appellant did not deliberately set out to kill the deceased when he assaulted him, he did foresee that his assault might result in the deceased's death and was reckless as to whether death ensued or not. In submitting this, counsel correctly jettisoned the learned judge's finding in the court *a quo* that 'the accused ought, as a reasonable man, to have realized that assaulting a man of slender frame so advanced in age, would result in fatal consequences…' As pointed out above, the test is what the subjective intent of the appellant was, and the foresight of a reasonable man is inappropriate to the intent required for murder."

After dealing with the inferences to be drawn from the facts of the matter in casu, the court proceeds to say at p.150:

> "From the evidence as a whole it seems to me that it is also reasonable to infer that the appellant, in anger engendered by his belief that the deceased had caused him harm, intended only to deliver a thrashing to the deceased without killing him. The appellant should, therefore, not have been found guilty of murder. The

> attack on the deceased was clearly of such a nature that the appellant should reasonably have foreseen that it might lead to the death of the deceased and for that reason the appellant should have been found guilty of culpable homicide."

For these reasons it follows that the learned judge did not misdirect himself in the passage from his judgment cited above. He was in my opinion not only correct in this regard but also in finding on the evidence that the appellants ought to have foreseen that death might result from their conduct. The medical evidence and the weapons employed did not justify any other finding.

The appeal by the Crown against the conviction of culpable homicide is therefore dismissed.

I come to deal with the appeal by the Crown against sentence. The relevant portion of the proceedings post conviction reads as follows:

"**Crown Counsel:** No previous convictions

Mr. Fosa: In mitigation.

Sentence: Each accused shall receive five strokes

> and in addition thereto shall pay M1000.00 to be all paid over to the widow of the deceased before the end of November 2004."

SENTENCE

The Crown has appealed against the sentence on two grounds: They are that:

(1) The sentence passed by the judge is so lenient that it induces a sense of shock.

(2) The sentence by the court *a quo* "is improper as it is contrary to the provisions of the law (section 321 of the Criminal Procedure & Evidence No. 7 of 1981)".

It would appear from the citation from the record referred to above that either the learned judge gave no reasons for sentence, or if he did so, these were not recorded. This Court has repeatedly stressed the fact that reasons for sentence must be given and that a failure to do so is an irregularity. See S v Immelman 1978 (3) 726

(A) at 729 (C) and Director of Public Prosecutions v Marabe (unreported) C of A (CRI) 10 of 2000.

Arising from the fact that there was no record of the reasons for sentence in that case, an undertaking was given at that time (October 2001) by the Director of Public Prosecutions that the practice of not recording proceedings post conviction will cease forthwith "and that the findings, reasons and judgment of the Court on issues post conviction will also be recorded." The Director is respectfully reminded of this undertaking and we trust that his office will diligently ensure that his undertaking is implemented.

Be that as it may, the first issue to be decided is whether the sentence was a competent one in all the circumstances. Sec. 321 – in so far as it is relevant - reads as follows:

> "321 (1) When any person is convicted of an offence, which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may after recording the conviction and upon the application of the

injured party, award him compensation for the injury, damage or loss where the compensation claimed does not exceed the civil jurisdiction of the court if the compensation, save as is otherwise provided in any other law, does not exceed 400 maloti.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or hear further evidence either upon affidavit or verbal."

This Court must be careful to be fair to the trial court. It is possible, although unlikely, that there may have been an application for compensation as contemplated by Section 321 (1). However, we are bound by the record and we have no option but to proceed on the basis that no such application was made by the "injured party" or his representative, and that no inquiry was made as to the propriety of the award bearing in mind the personal circumstances of the accused persons. Clearly no evidence was led as contemplated by Section 321 (2). The award also exceeded the quantum permissible under the sub-section 321 (1).

It follows that there was a failure to act in accordance with the requirements of Section 321 and that therefore the sentences ordering compensation cannot stand and must be set aside.

However, this Court must either itself pass a proper sentence

or send the matter back to the court *a quo* for this purpose. With the agreement of both counsel we proceeded to propose a sentence for the appellants which both in their and in our opinion would meet the requirements for a just disposition of the issue of sentence. The order we make below is therefore made with the concurrence of the parties' representatives.

Compensation orders, where appropriate and when coupled with the terms of a suspended sentence can be an important and effective arrow in a court's quiver. The victim or his dependants are often a neglected party in the criminal justice process. Restorative justice is often an elusive goal. However, if on enquiry it appears that an accused has the means to pay compensation either by way of the payment of a lump sum or by way of instalments in order to expiate his crime, courts should feel free to resort to such a form of punishment as a condition of a wholly or partially suspended sentence. It must obviously do so only in appropriate cases and it must be reasonably clear that such

a condition can be fulfilled by the accused or on his behalf. See generally in this regard S. v Swane 1973 (3) SA 601 (O), the Guide to Sentencing in S.A. – Terblanche – Butterworths - p.429 *et seq.* and "Sentencing" by D.P. van der Merwe - Juta and Co.–1-14 – 1-15, 4-46 – 4-47, 4-64 – 4-65.

Crown counsel also raised the question of the imposition of strokes which he contended was an inappropriate form of punishment in all the circumstances of the case. Regrettably the strokes had already been inflicted by the time the appeal was noted. No purpose would therefore be served to address his submissions in this regard in dealing with the sentence to be imposed.

However, I would comment as follows: Corporal punishment as a correctional instrument for use by the courts of law has been increasingly disapproved of in many countries. See in this regard the commentary by van der Merwe *op. cit.* at 4-15 to 4-31. It is an irreversible form of punishment and for the reasons set out in S. v Williams 1995 (2) SACR 251 (CC) must clearly, even if constitutional in this Kingdom, only be resorted to where circumstances demand its imposition and no other suitable remedy

is available. See in this regard also the judgment of the Zimbabwean Court in S. v Ncube and others 1988 (2) SA 702 (ZSC).

I referred above to the brevity of the medical report handed in at the trial. It would have been most helpful for the purposes of a just outcome if the examining doctor had been called to testify. I understand from Crown counsel that the medical practitioners rendering these services are transient and contractual servants of the State and are often unavailable to testify. In these circumstances every effort should be made to ensure that their instructions require them to render full and detailed examinations of injured or deceased persons, which they should also report on fully. The Director of Public Prosecutions is requested to address this matter to try to ensure that adequate medical data is placed before the Court.

In the result and for the above reasons the Court orders as follows:

1. The appeal of the Crown against the conviction of each of the appellants fails and the convictions are confirmed.

2. The appeal against the sentence imposed on each of the appellants succeeds and the sentences are set aside.

3. In place thereof the following sentence is substituted in respect of each appellant:

   "Each accused is sentenced to three years

imprisonment suspended for three years from today's date on condition that:

(i) The accused pays over to the widow of the deceased to whom he was married at the time of his death, the sum of M1000 on or before the 30th of November 2004; and

(ii) The accused is not convicted of the crime of assault with the intention to commit grievous bodily harm committed during the period of suspension.

J.H. Steyn
PRESIDENT

I agree: **L. Melunsky**
JUSTICE OF APPEAL

I agree: **J.W. Smalberger**
JUSTICE OF APPEAL

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

For the Appellant: Mr. M. Seitlheko
For the Respondent: Mr. T. Fosa