IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 6/2004
CRI/T/64/01

In the matter between :

Tšeliso Monaleli First Appellant
Mafeka Mthimkh'ulu Second Appellant

and

Rex Respondent

6, 20 April 2005

CORAM:
Steyn, P
Ramodibedi, JA
Gauntlett, JA

Summary

Appellants were convicted of murder with extenuating circumstances and robbery – appeal against convictions dismissed – appellants sentenced to 40 years' imprisonment on each count – sentences unusually lengthy – whilst there is no statutory or other limitation as to the length of a competent sentence, sentences in excess of 25 years should only be imposed in exceptional circumstances. – The youth and immaturity of the appellants as well as the fact that they are first offenders militate against the imposition of sentences in excess of 25 years – sentences disturbingly inappropriate - sentences on the murder count reduced to 25 years and on the robbery count to 7 years – both sentences to run concurrently.

JUDGMENT

STEYN, P

[1] The two appellants were charged and convicted on two counts; one of murder and a charge of robbery. They were sentenced on

each count to 40 years' imprisonment. The sentences were ordered to run concurrently. They appeal both against their convictions and the sentences imposed on them.

[2] In essence their appeals are directed at the finding of the High Court that they acted in concert. Indeed this finding of the court, if correct, is dispositive of their appeals against conviction. I say this because it is common cause that one of the appellants murdered the deceased by firing shots at her. In evidence under oath each appellant blamed the other for shooting and subsequently robbing the deceased of M120.00. Each contended that the other had embarked on a frolic of his own and that he was in no way responsible for such conduct, being an innocent or, in the case of the second appellant, allegedly a coerced bystander.

[3] Because of the narrow ambit of the enquiry, the facts can be briefly summarized as follows:

> [3.1] The two appellants crossed together into Lesotho from the town of Ficksburg in the Republic of South Africa on the day in question. They had done so illegally, it seems by fording the river that delineates the border with the R.S.A. near Maputsoe. The fact that the bottoms of their trousers and their shoes were observed by witnesses to be wet led to this inference. They later visited the home of the witness P.W.1 before entering the shop referred to below.

[3.2] The deceased was an assistant in a shop in the border town of Maputsoe in the district of Leribe. On 25 June 1999 and in broad

daylight, eight shots were fired into her body by one of the appellants in the presence of the other.

> [3.3] The appellants were observed by three witnesses as being involved in the murder of the deceased. One witness, P.W.1, mistakenly it would seem, places the firearm in the hands of a person wearing a 'Bafana Bafana' yellow T-shirt, which it is common cause was worn by the second appellant. She was however in her house some distance from the scene. Two eye-witnesses to the shooting, one inside and one outside the shop, positively identified the first appellant as the assassin. Their evidence was preferred and accepted by the court a quo and there is no reason to question the acceptability of this finding.

[4] The only remaining issue is whether there is any reasonable possibility that the second appellant's version could be true; i.e. that he was coerced by the first appellant and was in no way associated with the crimes. In my view there is none. The two appellants had crossed into Lesotho from South Africa together. They had visited the witness P.W.1 at her home together, and begged for food and money from her. They left P.W.1 in one another's company and were some time later seen to enter the shop. A witness who was inside the shop, P.W.3, gave evidence of the shooting inside the shop. She says they were standing next to one another and confronting the deceased when the first appellant fired two shots into the body of the deceased. They ran out of the shop together. Some shots were fired outside the shop by the first appellant and they re-entered the shop together. Whilst they were both inside the store, six more shots were fired into the body of the deceased by the

first appellant in the presence of the second appellant.

[5] After this brutal and excessive use of the firearm, the two appellants ran out of the shop and fled back to South Africa where they were found hiding together in a toilet. The money stolen in the robbery was found in the possession of one of them. The firearm used in the shooting was, according to the police evidence, found to be that of the second appellant. This evidence was not challenged on behalf of second appellant. Indeed much of his evidence was never put in cross-examination and it was correctly rejected by the court a quo as palpably untrue.

[6] The finding of the court a quo that the two appellants acted in concert in respect of both the murder and the robbery is, in the light of the overwhelming Crown testimony, unassailable. The inference that the two appellants associated with one another in pursuance of a common illegal purpose is irresistible. They were in my opinion therefore correctly convicted of both robbery and murder. Their appeals against these verdicts is dismissed.

[7] The appellants have noted an appeal also against their sentences of 40 years imprisonment. These sentences were imposed by the High Court after it had found their youth to be an extenuating circumstance. (The first appellant was 19 and the second appellant 18 years of age at the time of the shooting.) The only question before us is whether in the light of all the circumstances this unusual lengthy sentence imposed by the court a quo is disturbingly inappropriate.

[8] I say "unusually lengthy" because sentences in excess of 25 years imprisonment have been described as "exceptionally long" and as "only appropriate in very exceptional circumstances." See S v Whitehead 1970 (4) SA 424 (A) at 438 F-H, S v Sibiya 1973 (2) SA 51 (A) and the authorities collected in S v M. 1993 (2) SA 1 (A).

[9] There is no legislative or other limitation imposed upon a court when determining the length of a sentence to be imposed upon an offender. In every case the court must give due consideration to the triad of factors that has to be evaluated i.e. the offence, the offender

and the interest of the society (S v Zinn 1969 (2) SA 537(A) at 540). The court has the task of balancing these divergent objectives and to pass a sentence which accords adequate weight to each.

[10] The murder of the deceased was certainly a brutal, indeed vicious crime. The fact that the appellants went back into the store and fired six further shots into the body of the deceased elevates this offence into one meriting a lengthy period of imprisonment. Coupled with this consideration is the fact that the appellants demonstrated no remorse and steadfastly tried to blame each other.

[11] Both appellants were young, as stated above, 19 and 18 years respectively when they committed these two offences. The immaturity of youthful offenders has been regarded by Southern African courts as a factor which can mitigate the gravity of a crime – even one of premeditated violence resulting in the loss of life. This is the more so if it is coupled with a limited exposure to education. See in this regard the majority judgment of this court in Thebe v R 1985 – 1989 LAC 33 at 49 – 51 and the authorities cited in support of the majority decision. They are both first offenders and whilst the deterrent and retributive objectives of the punishment need to be recognized by the imposition of a very lengthy period of imprisonment, the reformative and corrective impact of such a

sentence would best be served by at least leaving the door open for them to return to society at some realistic future date.

[12] The sentence of 40 years' imprisonment on the second count is in any event clearly excessive and needs to be radically reduced so as to reflect the appropriate degree of moral guilt of the appellants and we intend to do so.

[13] Counsel for the second appellant asked us to impose a lesser sentence on him because he did not fire the shots that killed the deceased. Had he used the opportunity afforded by the second phase of the enquiry, after the finding that extenuating circumstances were present, and had he given evidence which could have distinguished his moral guilt from that of the first appellant, there may have been merit in such a contention. In the absence of such evidence we do not see any `justification for distinguishing between their respective degrees of moral blameworthiness merely because the one pulled the trigger and the other did not. On the evidence before the court the second appellant associated himself fully and extensively with the commission of both crimes.

[14] Having regard to all the factors and circumstances identified above, we have concluded that a just sentence is the following:

1. Both appellants are sentenced to 25 years' imprisonment on count 1 – the charge of the murder of the deceased.

2. Both appellants are sentenced to 7 years' imprisonment each on the robbery charge – i.e. count 2.

3. The sentences are ordered to run concurrently and are to take effect from the date the appellants were arrested and detained in custody in respect of these two offences.

[15] In the result the appeal against the convictions of both the appellants is dismissed. The appeal against the sentences imposed are upheld to the extent set out above.

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J.H. STEYN
PRESIDENT

I agree.

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M.M. RAMODIBEDI
JUDGE OF APPEAL

I agree.

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J.J. GAUNTLETT
JUDGE OF APPEAL

Delivered at Maseru on this 20th day of April 2005.

Counsel for the first Appellant : Mr. T. Mpaka
Counsel for the second Appellant : Mr. K. Lesuthu

Counsel for the Crown : Miss H. Motinyane.