C OF A (CRI) NO.5 OF 2005

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru:

In the mater between:-

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

and

MOEKETSI PITA FIRST RESPONDENT
RETSELISITSOE PITA SECOND RESPONDENT
THABISO PITA THIRD RESPONDENT

CORAM:

GROSSKOPF, JA
PLEWMAN, JA
TEELE, AJ

SUMMARY

Criminal law – Crown appeals against conviction of culpable homicide on murder charge – accused acted with common purpose – increased sentence.

GROSSKOPF, JA

[1] The appellant in this case is the Director of Public Prosecutions. The three respondents and their brother Thabo Pita (since deceased) were the four accused in the court a quo. I shall refer to Thabo Pita as accused 1, to Moeketsi Pita as accused 2, to Retselisitsoe Pita as accused 3 and to Thabiso Pita as accused 4. The four accused were charged in count 1 with the crime of murder of one Lehlohonolo Pita ("the deceased"), and in Count 2 with the crime of assaulting one Mokhalinyane Pita ("the complainant") with intent to do grievous bodily harm.

[2] Accused 1 had passed away during the trial. The court a quo found accused 2, 3 and 4 guilty of culpable homicide on count 1 and of assault with intent to do grievous bodily harm on count 2. Accused 2 was sentenced to four years imprisonment or M4000.00, half of which was suspended for three years, on count 1, and to one year imprisonment or M1000.00 on count 2. Accused 3 and 4 were each sentenced to two years imprisonment or M2000.00, half of which was suspended for three years, on count 1, and to one year imprisonment or M1000.00 on count 2. It was further ordered that the sentences (of imprisonment) were to run concurrently. The Director of Public Prosecutions has appealed against the conviction and sentence of all three accused on count 1.

[3] There has been a dispute for some time between two factions of the

Pita family over a certain field at Thoteng used for the cultivation of crops. The mother of the deceased and the complainant, one Cecelia Pita ("Cecelia"), told the court a quo that she became entitled to the field after the death of her brother (also called Thabo Pita) in 1977. She alleged that she had been cultivating the field until the death of one Kaizer Pita, the father of the accused. After his death the accused then claimed that they were entitled to the field and this gave rise to the dispute. It ended in the Matsieng Local Court which decided in April 1997 that Cecelia had failed to establish her claim to the field. Cecelia nevertheless continued to lay claim to the field and hired a tractor in April 1998 to plough the field.

[4] The dispute came to a head on 25 April 1998 when the tractor driver started to plough the field. It is the Crown's case that the deceased, his brother the complainant and one Tankiso Motumi ("PW1") were at the field watching the tractor ploughing when the four accused arrived on the scene and stopped the tractor. According to the witness PW1 the accused seemed "very angry" when they arrived. The complainant told the court a quo that the accused were heavily armed "as if they were coming to fight". Accused 1 was holding a sword or sable, accused 2 had a pistol or similar looking firearm, while accused 3 and 4 were armed with iron rods. Accused 2 fired a shot in the direction of the deceased and the complainant but did not hit anybody. Accused 2 then fired a second shot which hit the complainant on his head and caused him to fall down. Accused 3 and 4 thereupon rushed towards the complainant and assaulted him with the iron rods, hitting him on the head. The witness PW1 observed bleeding wounds on the

complainant's head.

At the same time the deceased and accused 1 were holding each other "in a fighting manner". Accused 2 ran towards them and fired a further two shots, hitting the deceased on the head. The deceased fell down and accused 1 struck him on the head with the sable. The witness PW1 observed a gaping wound on the deceased's forehead. It was later found that the deceased had in fact sustained eight deep wounds on his head.

[5] The witness PW1 suggested to the complainant that they should run away. As they departed PW1 heard accused 1 shouting:

"*Follow those ones and kill them.*"

Accused 2, 3 and 4 chased after PW1 and the complainant but they managed to escape. The deceased died shortly thereafter as a result of his wounds, but the complainant survived.

[6] Accused 1 passed away before he could conclude his evidence, while accused 3 and 4 elected not to give evidence. The defence version therefore depends on the evidence of accused 2. According to him he and accused 1 were the real victims. He entered the field not expecting anything when he saw four men coming towards them in a hurry. The deceased was in front followed by the complainant, PW1 and one Sechele Mohata ("PW4"). The deceased had a lebetlela stick in the one hand and a sable in the other hand. The deceased then attacked accused 1 while the complainant attacked accused 3 and 4.

Accused 2 denied that he was carrying a firearm. He said he had heard gunshots, but he could not see who was firing. Accused 1 and accused 4 allegedly sustained serious injuries in the course of the fight, but this was shown to be false in the light of the police evidence.

[7] It is obvious that accused 2 tried to reverse the roles played by the respective parties, but his version that the deceased, the complainant and their friends were the real attackers was never put to the Crown witnesses. The evidence of the Crown witnesses that it was the accused who were carrying and using the lethal weapons was not disputed in cross-examination. It is not surprising that the court a quo rejected the accused's version as false.

The court a quo concluded as follows:

> *"The grievous nature of the injuries show that they were inflicted with a murderous intent and the accused acted [with] common purpose; each of them knew that they carried lethal weapons and that, in the encounter over this piece of land, such instruments could be used. Indeed, they were used with fatal results. They acted in concert throughout in [perpetrating] the attack despite their right to the field."*

[9] I agree with the learned judge in the court a quo that the accused had a murderous intent and that they acted with common purpose. The prerequisites that have to be satisfied for a finding of common purpose where there was no prior agreement are set out as follows in **S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705 I – 706 B:

> *"In the absence of proof of a prior agreement, accused No.6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in* ***S v Safatsa and Others*** *1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite* ***mens rea****; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."*

In my view these prerequisites have all been satisfied in the present case, also as regards accused 3 and 4. But the circumstances outlined above are of a strongly extenuating nature.

[10] In the light of the finding of the court a quo accused 2, 3 and 4 should all three have been convicted of murder (with extenuating circumstances) and not merely of culpable homicide. The appeal of the Director of Public Prosecutions against the conviction on count 1 therefore succeeds. In the result the sentences on count 1 are no longer appropriate. In my view accused 2 played a more leading role in the attack than accused 3 and 4 and he should accordingly receive a heavier sentence than accused 3 and 4. It should however be borne in mind that the attack was in a sense provoked in that the accused regarded the field as their field. But that did not give them the right to

take the law into their own hands. I would accordingly sentence the accused as follows on count 1:

Accused 2: 7 years imprisonment

Accused 3: 5 years imprisonment
Accused 4: 5 years imprisonment

[11] The following order is made:-

1. The appeal of the Director of Public Prosecutions against the conviction of the three respondents of culpable homicide on count 1 is upheld. The conviction of culpable homicide is set aside and substituted with a conviction of murder in respect of all three respondents, but with extenuating circumstances.

2. The appeal of the Director of Public Prosecutions against the sentences imposed on count 1 is upheld. The sentences imposed on the three respondents in respect of count 1 are set aside and substituted with the following sentences:

   First respondent (accused 2 at the trial): 7 years imprisonment

   Second respondent (accused 3 at the trial): 5 years imprisonment

   Third respondent (accused 4 at the trial): 5 years imprisonment

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F.H. GROSSKOPF

JUDGE OF APPEAL

I agree: _____

C. PLEWMAN

JUDGE OF APPEAL

I agree: _____

M. TEELE

EX OFFICIO JUDGE

OF APPEAL

For the Appellant : Adv. T. Dlangamandla

For the Respondent: Adv. T.J. Mokoko

Delivered at Maseru this 11th day of April 2006.