IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) No. 10 of 2006

In the matter between:

REX	**Appellant**
v	
SHOAEPANE	**Respondent**

CORAM:
Steyn, P
Ramodibedi, JA
Melunsky. JA

JUDGMENT

Summary

Appeal by the Crown against sentence – Matters to be considered when assessing the merits of such an appeal debated – Sec. 9(4) of the Court of Appeal Act 1978 referred to – Court ***a quo*** *misdirecting itself – disproportionate concern with the interests of the accused and a commensurate under-valuation of society's right to protection - in any event sentence startlingly inappropriate – sentence the Court of Appeal would have imposed so much more severe than the sentence the High Court imposed for murder. S v Petje 1980-1984 LAC at 126 referred to. – Accused having stabbed the deceased twice in the face and the chest with a knife after rendering him defenceless by knocking him down with a stick – demonstrative of a degree of viciousness requiring a much longer period of imprisonment than the 4 years imposed. – Sentence increased to 8 years imprisonment.*

STEYN, P.

[1] This is an appeal by the Crown. The respondent (the accused) was convicted of the crime of murder. The court found

that extenuating circumstances were present. The sentence it imposed was one of 4 years imprisonment. This sentence the Crown submitted was "disturbingly inappropriate". It also contended in its grounds of appeal that the court *a quo* misdirected itself by over-emphasizing the personal circumstances of the accused and giving too little weight to the seriousness of the crime as well as the gravity of the conduct of the accused.

[2] The facts found by the court can be summarized as follows:

[3] 1. The accused had a girl friend identified as Exinia. On the day of the murder, accused and one Pitso, who was accused no. 2 in the court below, approached the Crown witness PW1. This witness testified that the accused confronted him with the allegation that he had heard that the witness had slept with Exinia. This PW1 denied. On enquiry by him as to the source of this allegation, he was told by the accused and Pitso that it was the deceased who had conveyed this information to them. PW1 then suggested

that they should together go and confront the deceased and enquire how he could have made such an allegation and on what evidence he relied for this purpose. All three set off with this objective in mind.

3.2 The threesome found the deceased at a shop referred to as Sethuntša's Shop. PW2 was in this shop. The deceased was requested by the accused to come outside. When he did so he was asked by PW1 when he (the witness) could have slept with Exinia. At this and before the deceased could answer, the accused assaulted him with a stick beating him about the upper body. The deceased then left to go to his home apparently to arm himself with a stick. It is clear that PW1, PW2, Pitso and the accused followed the deceased to his home. It is here that the tragedy unfolds itself.

3.3 The deceased apparently decided that he would take on the accused and Pitso separately in a stick fight. Such a

contest then ensued first between the accused and the deceased. The deceased was felled to the ground by the accused. It was whilst he was on the ground that the accused stabbed him once and when he was supine and helpless he stabbed the deceased again. These events as set out above were deposed to by PW1 and PW2.

3.4 The medical evidence confirmed that the deceased died as a result of a stab wound on the left chest which ruptured the left ventricle of the heart. There was also a lacerated wound on the face causing a contusion of the nose.

3.5 It is common cause that the accused killed the deceased by stabbing him with a knife. It was however contended that he acted in self-defence.

3.6 The court *a quo* accepted the evidence of PW1 and PW2 and rejected that of the accused. The court

correctly held there was no question of "legitimate self-defence in the present case". The judge *a quo* goes on to say:

> "The act of killing the Deceased cannot be justified as there had been no attack from the Deceased. A1 was the one who started the fight and seems in my opinion, to have been acting unreasonably, through the whole time surrounding the killing of the Deceased".

The court concluded by holding that the Crown had established the guilt of the appellant beyond a reasonable doubt and found him guilty as charged but found that extenuating circumstances were present. No appeal was noted against conviction.

[4] In determining the propriety of the sentence this Court is conscious of the fact that the determination of a fit and proper

sentence is primarily the duty of the court that imposes it. It has heard the evidence, it has in the ordinary course of events the opportunity of assessing the character of an accused. It would be aware of the community's expectations and would be sensitive as to how to balance the interests of an accused with the need to pass a sentence that will deter others and speak to the community that it will protect them by passing a sentence which is neither too severe nor too lenient.

[5] The fact that sentence is primarily the function of a trial court does not however mean that a Court of Appeal will not interfere if it is obvious that the sentence is clearly inappropriate or the court has misdirected itself. See in this regard the provisions of Section 9(4) of the Court of Appeal Act 1978, R v S 1958 (3) SA 162 (A) and S v Petje and Ano. 1980-1984 LAC 124 at 126. In its judgment on sentence the High Court carefully analysed the evidence and correctly identified the triad of factors that have to be considered when determining a sentence which is commensurate

with the degree of the moral guilt of the accused. See S v Zinn 1969 (2) SA 537 (A) at 540. See also S v V 1972 (3) SA 611(A) at 614. However, it also made certain comments which indicate a misguided over-emphasis of the interests of the accused when these had to be weighed with proper regard also to the interests of society. The following statements by the court *a quo* demonstrate the validity of these concerns. It says:

> 5.1 "In imposing (a) custodial sentence the courts will always say in addition that they are removing offenders from the society, the reasons they always give is that oh! This is a way of protecting the society from the criminal acts of offenders. And in addition it is to say punishment should be demonstrated for what it is intended to be.
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> This is one the (sic) unfortunate case that I have come across. It is because circumstances clear (sic) indicate that this was an unfortunate occurrence and it should not have happened".

5.2 The judge *a quo* also goes on to say:

"I repeat that I am unhappy, and if the offence committed by the Accused was an offence that did not belong to section 314 of the CP & E (about postponement and suspension of sentence) I would have done many things, but my hands are tied. I have no alternative to send this young man to prison".

5.3 He concludes before passing a sentence of 4 years imprisonment that:

"In my mind I remain seeking that I have impose (sic) as lenient sentence as possible. It must not be too lenient because it will look nonsensical. It is because if it does so it may send a wrong signal that people can do things with impunity. It is a good state of affairs If people still believe in that the law is effective. That's what we are looking for, so that the society can say that the law still strives to protect it. I repeat that the circumstances of this case are unfortunate". (I interpose to say that many crimes of violence are "unfortunate". Why this case was so significantly unfortunate is difficult to fathom.)

5.4 Finally evidence of an over-emphasis on the rights of the offender is the court's statement that "the main purpose (of sentencing) one would say is to rehabilitate the offender."

[6] Although, as I have indicated above, the court did consider and correctly define the triad of factors to be taken into account in sentencing, the above statements do in my view demonstrate a disproportionate concern with the interests of the accused and a commensurate undervaluation of the society's right to protection.

[7] In any event we are of the view that, bearing in mind the gravity of the offence and the high degree of the moral guilt of the accused, a sentence of 4 years imprisonment is indeed startlingly inappropriate. If we were to have sentenced the accused ourselves, the sentence we would have imposed is so much more severe than that passed by the High Court, that we are obliged to interfere.

[8] In this regard we point to the fact that the accused had felled the deceased to the ground. At this point he was defenceless. To take out a knife and to stab the deceased in the face and the chest, both vulnerable parts of the body, demonstrate a degree of

viciousness that required a much longer period of imprisonment than 4 years. If it were not for his youth one would have considered a sentence of 10 or 12 years to be appropriate.

[9] It follows that the appeal by the Crown against the sentence imposed is upheld. The sentence of 4 years imprisonment is set aside. In its place the following sentence is imposed, viz, 8 years imprisonment.

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J.H. Steyn
PRESIDENT

I agree:

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M.M. Ramodibedi
JUSTICE OF APPEAL

I agree:

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L. Melunsky
JUSTICE OF APPEAL

Delivered at Maseru on this 20th day of October 2006.

For Appellant: Ms. L. Mofilikoane

For Respondent: Mr. A.T. Monyako