IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 6/2005

Held at Maseru

In the matter between:

Tokiso Tabaphe **Appellant**

and

Rex **Respondent**

CORAM:
Grosskopf, JA
Plewman, JA
Gauntlett, JA

Summary

Criminal law – murder –self-defence - criminal liability of intoxicated persons – intoxication as an extenuating circumstance – sentence.

JUDGMENT

GROSSKOPF, JA

[1] The appellant was convicted of murder and sentenced to eight years imprisonment by the court a quo. The judgment of the court a quo on extenuating circumstances and on sentence does not form part of the appeal record, but we were assured by counsel for both parties (who also appeared at the trial in the court a quo) that the court a quo found extenuating circumstances and sentenced the appellant to 8 years imprisonment. It is however unacceptable that an appeal against sentence has to be decided in the absence of the judgment on sentence. I shall return to the appeal against sentence here under.

[2] In terms of the new Court of Appeal Rules, which are about to be

promulgated, the office of the Director of Public Prosecutions will be responsible for the preparation of the court record in criminal matters (Rule 4 (8)). Rule 4 (9) requires a certificate certifying the correctness of the record, and duly signed by the person responsible for the preparation of the record, to be filed with the record. Rule 4 (8) provides that the party responsible for the preparation of the court record shall be liable to an adverse costs order, including an order de bonis propriis, in the event of a dereliction of this duty. I may point out that there are other appeals, both criminal and civil, enrolled for this session where the records are incomplete in material respects. There shall be no excuse in future for lodging incomplete or incorrect court records with the registrar or for serving such records on other interested parties.

[3] The facts in this case are briefly the following. The appellant came to the village of Motsekuoa in the district of Mafeteng during the morning of 20 April 1999 to meet his friend Thabang Makara ("Makara"). The appellant, who was a stranger to that village, went to look for Makara at a shebeen in the village. Makara was not there and the appellant joined a group of people drinking beer at the bar. Present in this group were Lefosa Lefosa ("the deceased"), one Nkuba Nkhabutlane ("PW2") and one Lebohang Molantoa ("PW5"). The witness PW2 happened to know the appellant from the mines at Carltonville in South Africa. The appellant complained

after a while that there was no music at this bar with the result that the group moved to a nearby shebeen at around 12:00 that morning. One Nkatla Motsetsela ("PW1") and a short man by the name of Leburu Habai ("Habai") joined the group at around 13:00 at this bar. Sometime thereafter the appellant's friend Makara joined the group at this shebeen.

[4] The appellant was once again not satisfied with the music which was played at this bar. He insisted that they play so-called "Famo" (Sesotho) music by a musician called Mantša. When the waitresses refused to do so he produced a knife whereupon the owner ordered the group to leave the premises. The group then went to another shebeen in the village where they drank beer but they were again ordered to leave the shebeen because the appellant had insulted the waitresses.

[5] The group thereupon went to Molomo's place also called the Golden Rose. It was in the late afternoon. The appellant had been drinking all day and he was obviously quarrelsome. On their way to the Golden Rose Makara tried to persuade the appellant to go home with him, but the appellant joined the others at the Golden Rose where they continued drinking beer. While there, the appellant went up to a nearby table where he took the beer of a stranger, one Thabang Molamu ("PW3"), and drank it without his permission.

[6] The appellant was now clearly in an aggressive mood. He bought half a bottle of brandy. At the same time the short man called Bahai bought a quarter bottle of brandy which he shared with the others. Habai went outside to relieve himself and when he returned the appellant, without any apparent reason, threw the bottle at him, hitting him on the forehead. Habai turned back and went outside again, followed by the appellant. The deceased then stood up and followed them outside. Shortly thereafter the deceased came back into the bar with the appellant chasing after him, brandishing a knife. A number of witnesses saw the appellant stabbing the deceased in the chest while they were inside the shebeen. It is the evidence of the witness PW2 that the deceased did not fight back. When the witness PW2 tried to intervene the appellant stabbed him in the hand or arm. The appellant tried to stab PW2 a second time, but PW2 managed to take a stick from a night watchman. He hit the appellant between the eyes with this stick and floored him.

[7] Counsel for the appellant submitted that there is no evidence as to what had happened outside between the appellant on the one hand and the deceased and Habai on the other hand. Counsel probably meant that there was no evidence for the Crown in this respect because the appellant did indeed explain fully in the course of his evidence what had happened outside. His version, or at least as much of it as was put to the witness PW2 in cross-examination, was denied by PW2. The appellant's evidence is that he went outside to relieve himself and that PW2 and others then prevented him from re-entering the shebeen. The appellant's version is that the deceased at that stage held him by his jacket and tied it around his neck and hit him. The appellant further alleged that PW2 hit him with an iron rod and then searched him. The appellant testified that when the people surrounded him he took out his knife and brandished it. At that stage the deceased was still holding him, but

according to the appellant he did not intend to stab the deceased. The appellant could not however deny that he had in fact stabbed the deceased, but he was adamant that this did not happen inside the shebeen. Four Crown witnesses, i.e. PW1, PW2, PW4 and PW5, were certain that the appellant stabbed the deceased inside the shebeen. There is no reason to reject the evidence of these Crown witnesses in this respect. The appellant's version of how the deceased attacked him outside was never properly canvassed with the witnesses for the Crown. The court a quo found PW1 and PW2 to be truthful and reliable witnesses and that PW3, PW4 and PW5 corroborated their version of the unprovoked stabbing of the deceased. The court a quo accordingly rejected the appellant's version that he acted in self-defence. I have no hesitation in rejecting the appellant's evidence in this respect as false. The appellant cannot therefore rely on self-defence.

[8] A further question is whether the appellant could have formed the required intention despite his state of intoxication. There is a statutory provision in Lesotho regarding the criminal liability of intoxicated persons. Proclamation 60 of 1938 provides that intoxication shall not constitute a defence to any criminal charge, save as provided in section 2 of the proclamation. Section 2(4) reads as follows:

> "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or

> otherwise, in the absence of which he would not be guilty of the particular offence charged."

[9] It is difficult to determine what the appellant's state of intoxication was at the time when he stabbed the deceased on the evening of 20 April 1999. He had been drinking beer since the morning with other members of the group. The witness PW1 explained that he did not know the appellant but that he would not say that he was drunk. The witness PW5 concluded that the appellant "appeared to be drunk but not severely drunk". The appellant testified that he and Makara bought "some food and some drinks" that evening, but he added –

"I did not drink too much beer because I was already scared ….. by the utterance of the deceased that he is going to assault Makara …".

When cross-examined the appellant said that he was "moderately drunk". He denied that he had been too drunk to remember that they had visited four and not three shebeens. The court a quo also asked the appellant about his state of intoxication and he answered –

> "No I was not that much drunk because I was thinking of my journey [the next day]".

[10] In my view the appellant, though intoxicated, could and in fact did form the necessary intention to kill the deceased. This appears not only from the appellant's own evidence about his state of intoxication, but also from his conduct that night. I

therefore find that the appellant was duly convicted of murder by the court a quo. His appeal against his conviction must accordingly be dismissed.

[11] We do not have the reasons for the court a quo's finding that there are extenuating circumstances, but the appellant's intoxication certainly played a role in this respect. The principle that drunkenness, although no excuse for the crime, mitigates the punishment has been accepted by the courts in South Africa over many years. Wessels J put it as follows in Fowlie v Rex 1906 TS 505 at 511:

"Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected by liquor that his punishment should be softened."

(See further S v Ndhlovu (2) 1965 (4) SA 692(A) and the long line of cases referred to by Holmes JA in his judgment in the Ndhlovu case).

[12] As mentioned above we do not have the court a quo's judgment on sentence. We therefore do not know what circumstances the court a quo took into account, or failed to take into account, in sentencing the appellant to eight years imprisonment. The sentence certainly does not induce a sense of shock. The appellant was further unable to point to any misdirection on the part of the court a quo in sentencing the appellant. The appeal against sentence must therefore also be dismissed.

[13] The following order is made:

The appellant's appeal against his conviction and sentence is dismissed.

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F H Grosskopf
JUDGE OF APPEAL

I agree :

_____

C Plewman
JUDGE OF APPEAL

I agree:

_____

J J Gauntlett
JUDGE OF APPEAL

For the Appellant : Adv. A.T. Monyako

For the Respondent : Adv. T. Mokuku

Delivered at Maseru this 11th day of April 2006.