IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) No. 19 of 2006

In the matter between:

NKHILANA LEPHOSA
Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Held in Maseru on 23rd March 2007

CORAM
Steyn,P
Ramodibedi, JA
Melunsky, JA

SUMMARY

Appellant convicted of murder – Extenuating circumstances found by trial Court – Sentenced to 7 years imprisonment two years suspended. – Appeal by appellant against conviction and cross-appeal by the Crown directed at both the incompetence of the sentence and its inadequacy – Appellant confining his appeal to two narrow grounds – no application for leave to rely on grounds not set forth in his notice of appeal – Court invoking Court of Appeal Rule 4 (5) and confining appellant to argue only those grounds set out in his notice of appeal. – Court ***a quo*** *correctly convicting appellant and appeal against conviction dismissed. – On cross-appeal Court found sentence imposed incompetent as being in conflict with the provisions of section 314 (2) of the Criminal Procedure and Evidence Act read with Schedule III. – In the light of the gravity of appellant's conduct and his degree of moral guilt and despite the presence of mitigating circumstances sentence*

inadequate – sentence of Court ***a quo*** *set aside and sentence of 10 years imprisonment imposed.*

JUDGMENT

Steyn P

[1] The appellant was convicted in the High Court on a charge of murder. Extenuating circumstances were found to be present and the appellant was sentenced to 7 years imprisonment 2 years of which were suspended for 3 years on the usual conditions. He appealed against his conviction on the following grounds:

> "-1-
> The Learned judge erred in preferring the version of PW10 as to the distance between him and the scene of the alleged crime as against the version of accused corroborated by PW9.
> -2-
> The Learned judge erred in convicting on the evidence of PW10 considering his distance from the scene and his age at the time of the incident."

[2] The Crown noted a cross appeal directed at the above sentence on the following grounds:

-1-

"The Learned trial judge erred and misdirected himself by imposing a sentence which is shockingly lenient in regard to the circumstances of the case.

-2-

The Learned trial judge erred and misdirected himself by suspending a portion of the sentence after convicting the accused of murder in contradiction of section 314 (2) of the Criminal Procedure and Evidence Act No. 7 of 1981."

[3] It is common cause that the deceased died of injuries inflicted on him by the appellant. The only two issues were whether the appellant's assault on the person of the deceased was unlawful, and if so whether he had the intention to kill the deceased. The Court *a quo* found that the appellant assaulted the deceased unlawfully and with the requisite intention to kill.

The facts are the following: the body of the deceased was found by PW1 in the veld where the

appellant herded his cattle. The witness saw the appellant nearby herding goats. Whilst he was still in the veld he heard an alarm raised and saw villagers running in the direction of a nearby river. He also went to a spot in the river where he found villagers gathered around the body of the deceased. The latter had a big open wound on the middle of the head, a swollen right hand and multiple bruises all over his body. He and the other villagers later found the deceased's blanket, his stick and his hat under a nearby peach tree, where he had seen the appellant previously. The witness asked the appellant whether he knew what had happened and how the deceased had met his death. The appellant denied any knowledge of how this had come to pass. This evidence was admitted by the appellant at the trial.

[4] PW2 was detailed by the villagers to guard the appellant and hold him in custody. They did this, because despite his denials, he was suspected as the deceased's assailant. However, the appellant escaped from custody before the police arrived. He was arrested some three days later and handed over a white stick and a Lesiba (a musical instrument) to the police.

[5] The report of the pathologist who performed the post mortem examination on the deceased was handed in by consent. His findings were recorded as follows:

> "- a haematoma on the chest, stomach and hands.
> - Multiple laecerations on the head
> - A haematoma around the right eye
> - A depressed fracture on the temporal bone – Fracture parietal. When opening the skull

(we) discovered that the (Deceased) had some clots (subdural haematigma)

- He (Deceased) also had blood in his right lung (right haemathorax)
- His right elbow was broken."

The doctor's findings as to the cause of death was the head injuries the deceased had sustained.

[6] All the above evidence was admitted on behalf of the appellant and formed part of the record of the proceedings. Counsel sought on appeal to challenge the admissibility of this evidence with reliance on the decision in Rex v Maphiri 1999-2001 LLR 14 at 20. This is a judgment critical of the procedure of reading contentious evidence recorded at a preparatory examination into the record. The facts of this matter are clearly distinguishable from those recorded in that judgment. The evidence which was read into the

record was all recorded as admissions made by the accused. Facts cannot be admitted in the High Court and their admissibility subsequently challenged on appeal. Moreover, the grounds of appeal did not raise this issue as one which the appellant sought to rely on. Neither did the appellant seek leave to do so. See in this regard the provisions of the recently published Court of Appeal Rules 2006 – Rule 4 "Notice of Appeal" sub rule 4 (5), (published in Supplement No.2 to Gazette No. 55 of 17th November 2006). This rule reads as follows:

> "The appellant shall not argue or rely on grounds not set forth in the notice of appeal unless the Court grants him leave to do so. The court, in deciding the appeal, may do so on any grounds whether or not set forth in the notice of appeal and whether or not relied upon by any party."

The Court and the Crown should not be embarrassed by grounds of appeal being argued of which no

notice was given. We accordingly ruled that the appellant was confined in his argument to those grounds contained in his notice of appeal.

[7] Two witnesses were called to give oral evidence concerning the history of the events that took place in the lives of the two key parties – the deceased and the appellant – and their conduct both before and on the day in question. The first was PW9 who testified *inter alia* to certain prior events and the contents of conversations he had with the appellant. He, like the appellant, was a herder. A few days before the death of the deceased, the appellant told him that he wanted to assault the deceased but gave no reason. PW9 then informed the deceased that he had heard from the appellant that the latter wanted to beat him. The witness enquired from the deceased what the reason was but the response was that he did not

know what the cause was.

[8] These three persons i.e. the deceased, the appellant and the witness attended at an initiation school and were, together with three others, circumcised at the same time. The witness went to bed but was woken by a noise. He found the deceased and the appellant on the verge of fighting one another – both of them armed with knives. He intervened and they desisted. He received the impression that they had made peace because they had a smoke together. The appellant and the witness left the initiation school the next morning, leaving the deceased and the three others behind. The events of the previous evening were raised in discussion between the witness and the appellant. PW9 sought the reason for the animosity between

the deceased and the appellant but he received no explanation. Indeed, according to the witness, the appellant upbraided him for not supporting him in his dispute with the deceased. The appellant said that he intended to assault the deceased with a stone, “hit him on the right arm and stab him.”

[9] The next day, a Sunday and the day the deceased was killed, the witness observed many of the villagers going down to the river. He also went to the crime scene. He found the deceased already dead. He observed the injuries sustained by the deceased. These appeared to him to be both knife or stab wounds and injuries caused by a blunt object like a stone. The appellant also appeared on the scene. According to the witness the appellant was asked what he knew about the incident and he

denied any knowledge of it. The appellant appeared to be frightened. It was put in cross- examination that in so far as relationships were concerned the witness was closer to the deceased than to the appellant. This he denied saying that they were good friends.

[10] The only witness who allegedly observed the relevant incidents was a young man, PW10, who was seventeen. When he testified as to the events which took place in 1997 he must have been about 9 years old. He was herding some horses at a place next to where the appellant was herding animals on the day in question. He was some 120 meters away from where the events he described took place. He saw the deceased sleeping under a peach tree. He saw the appellant sneaking up to where the deceased

was sleeping and saw him assault the deceased repeatedly by beating him with a stick. The deceased tried to run away and the appellant chased him into the river – some 50 meters from the peach tree where the initial assault took place. The two persons disappeared into the river-bed and after a short while only the appellant reappeared.

[11] In cross-examination it was put to the witness that the appellant struck the deceased in the process of defending himself against an attack on him by the deceased. This the witness denied, repeating his version that the appellant sneaked up on the deceased whilst he was asleep under the peach tree and that he - the appellant - was the aggressor belabouring the deceased repeatedly until they both disappeared from his view into the river.

[12] The appellant testified. He denied the evidence of both PW9 and PW10. More particularly he denied ever telling PW9 that he intended to assault the deceased. As to the events in question he testified that the deceased approached him where he (the

appellant) was in the vicinity of the peach tree. When he was close to him he said “hey man, if you don’t kill me I’ll kill you today”. The appellant says that he rolled his blanket around his arm and a fight started. The deceased also had a stick, but he – the appellant – had two sticks and he managed to hit the deceased on the head. He confirmed PW10’s evidence that the fight ended in the river – or as he called it – a donga. He also confirmed that PW10 was in the vicinity that day. When questioned as to how it came to pass that the deceased’s stick and blanket were found under the peach tree, he denied that they were found there, this despite the admitted evidence that this was the case. He admitted having denied that he was involved in a fight with the deceased when he was questioned about it on the day in question. He said he did so

because he was frightened. He said he only hit the deceased once on the head and could not explain how he sustained the other injuries described by all the witnesses and detailed by the pathologist in his post mortem report.

[13] The trial judge in a carefully reasoned judgment analyzed the evidence and concluded as follows:

13.1 He found PW9 to be a truthful and credible witness

13.2 He had no hesitation in accepting his version of the events on which he testified in preference to that of the appellant

13.3 PW10 impressed the court as honest and truthful. He said he was unshaken in cross-examination

13.4 The appellant was described as a very poor witness. He was particularly unimpressive

concerning his version that he acted in self-defence. He was clearly untruthful in his denial that he had any involvement with the assault on the deceased. Indeed the court had no hesitation in rejecting the appellant's defence of self-defence.

13.5 The court found it "as proven beyond a reasonable doubt "that the accused sneaked (up) to the peach tree, surprised and attacked the deceased who was there sleeping and unsuspecting."

[14] The court concluded accordingly that: "The accused subjectively, intentionally killed the deceased on the 28th of December 1997 as alleged by the Crown. I convict the accused of murder. My Assessors both agree with this finding." The court found extenuating circumstances and sentenced the appellant as set out above in par.1. I will deal with the question of sentence below when considering the

merits of the cross-appeal.

[15] Counsel for the appellant in a well-researched and cohesive argument contended that the Crown had failed to discharge the onus of proving that the killing of the deceased was unlawful. In this regard he relied on the provisions of section 238 of the Criminal Procedure and Evidence Act 1981 (the Act). He contended that PW10 was a single witness and although competent, he was not a credible witness.

[16] This submission cannot be sustained for a variety of reasons. Thus, e.g. it is common cause that appellant did assault the deceased at the place and at the time PW10 testified he saw the appellant raining blows on the person of the deceased. The injuries described in the post mortem report are

consistent with the version deposed to by the witness. It is manifestly inconsistent with that of the appellant who alleged that he only struck one blow at the deceased. The stick and the blanket of the deceased were found under the peach tree where the deceased had, according to PW10, been sleeping when he was assaulted by the appellant. The version deposed to by the appellant had the two contestants fighting one another all the way from the peach tree where the deceased's stick was found, yet the appellant emerged without any injuries. The appellant was a proven liar and whilst his denial of being involved in the killing of deceased in the presence of the villagers is perhaps understandable, his subsequent denial to the Chief is not as readily explicable. Moreover, as is indicated above, the Court *a quo* made carefully reasoned and well

motivated creditability findings which, by and large, appear to be well founded. I have no doubt the Court *a quo* was right to find the appellant guilty as charged on the overwhelming evidence before it.

[17] The issue of the propriety of the sentence is in issue by virtue of the cross-appeal noted by the Crown. Two issues are raised in this context. First, the Crown submitted that the provisions of the Act clearly preclude the court from suspending any portion of a sentence of imprisonment imposed consequent upon a conviction for murder. Second, so the Crown contended, the sentence is "shockingly lenient having regard to the circumstances of the case."

Section 314 (2) of the Act reads as follows:

"Whenever a person is convicted before the High Court or any subordinate court of any offence other than an offence

specified in Schedule III, the court may pass sentence, but order that the operation of the whole or any part thereof be suspended for a period not exceeding 3 years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with sub-sections (3) and (4) respectively, and the order shall be subject to such conditions (whether as to compensation to be made by that person for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein."

Counsel for the appellant was obliged to concede that the sentence imposed by the court *a quo,* inasmuch as it sought to suspend part thereof, could not stand. He is clearly right in making this concession. Whilst the sentencing discretion of a court is an important component of a fair and effective sentencing framework, the legislature has explicitly ousted the court's power to use the tool of a partially suspended sentence when determining punishment for an offender convicted of murder. (See the provisions of Schedule III in this regard.) Such sentence as is ultimately imposed on the appellant for murder must not include any proviso suspending

any part of it.

[18] The second issue, i.e. whether the sentence is "shockingly lenient", requires a careful evaluation of the facts, an assessment of the degree of the appellants' moral guilt and both such aggravating and mitigating factors as may be found to be present. The Court should then determine on such facts as it finds established what sentence it would have imposed. If the disparity between such sentence and that imposed by the High Court is truly significant, it would be entitled to interfere.

[19] The first issue to be decided is what the degree of moral guilt of the appellant is. This in turn requires an assessment of the evidence and the extent to which we can rely on the version deposed to by the two witnesses whose evidence was contested by the appellant. As I have indicated above, we believe that the Court was clearly right in rejecting the version of the appellant as to the manner in which the assault on the deceased was perpetrated. It does not follow, however, that all the

evidence of PW9 and PW10 should be unhesitatingly accepted. Mr. Thulo for the appellant submitted that the version of the conversation the appellant had with PW9 is inherently improbable and accordingly suspect. I am of the view that the court should be careful of accepting this portion of the evidence as being reliable. Indeed there may well have been some embellishment, especially in view of the fact that the hearing of this matter took place some 8 years after the event. However, I am satisfied that PW10's evidence as to how the assault took place can be relied upon for the purpose of determining the degree of the appellant's moral guilt. See in this regard the reasoning set out in para.16 above. This means that the Crown established that this was indeed a callous and premeditated murder. That there are mitigating circumstances which were given

in evidence but not recorded is common cause. The appellant for some reason had a grudge against the deceased. That there was bad blood between them at this time is evidenced by the near knife fight at the initiation school a day or two before the murder. Moreover, the appellant is 1. “an illiterate herd-boy of relatively low intelligence,” according to the trial judge. 2. Also he is still a young man who has no previous convictions.

[20] Having assessed all the relevant facts, it is my view that despite the mitigating circumstances, the gravity of the offence would oblige us to impose a sentence of 10 years imprisonment. This is double the effective sentence imposed by the High Court and also significantly more than the pro forma 7 years imposed. We are accordingly entitled to

interfere with the sentence imposed by the court *a quo*.

[21] For these reasons the appeal against the conviction of the appellant is dismissed and the conviction is confirmed. The cross-appeal by the Crown against the sentence imposed is upheld. The sentence imposed by the High Court is set aside and a sentence of 10 years imprisonment is imposed in its stead.

J.H. STEYN
President of the Court of Appeal

I agree:

M.M. RAMODIBEDI
Justice of Appeal

I agree:

L. MELUNSKY
Justice of appeal

Delivered on the 4th day of April 2007

For the Crown: Mr. L. Mahao

For Appellant: Mr. P.R. Thulo