IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) No. 4 of 2005

In the matter between:

SEHLOHO MONATSI **1ST APPELLANT**

POTJO MAQALEHA **2ND APPELLANT**

MONATSI MONATSI **3RD APPELLANT**

and

REX

Heard: 30th March 2007

Delivered: 4th April 2007

CORAM:
Steyn, P
Ramodibedi, JA
Grosskopf, JA

JUDGMENT

Steyn, P

[1] This matter comes before us by way of a Stated Case submitted jointly by the Crown and the three appellants.

[2] The circumstances in which such a Stated Case was submitted is outlined in the introductory comments of counsel which read as follows:

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"In view of the fact that the record of the proceedings in this case is allegedly missing and that the process of reconstructing the record would take a rather long time due to the practical difficulties surrounding same, and also being alive to the need to obviate the backlog of cases; coupled of course with the need for the Appellants to know their fate, it has been agreed by both the Appellants' Counsel and the /Director of Public Prosecutions to make a stated case in the matter, basing ourselves and/or relying on the text of the judgment delivered by the Court **a quo** in CRI/T/22/96. The said judgment having been delivered on the 15th day of December, 2004.

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In pursuance of the afore-mentioned agreement, it was further agreed that the Appellants herein would no longer pursue their application for bail pending appeal filed of record in this matter, and that instead the appeal itself will be pursued, but only in so far as the question of sentence alone is concerned. To this end, a formal notice of withdrawal of the said application will be filed at the hearing hereof.

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On its part the Crown has undertaken not to oppose the application for the condonation of the late filing of the appeal in this matter in terms of Rule 15 (2) of the Court of Appeal Rules No. 182 of 2006. The Respondent's view being that there appears to be reasonable prospects of success on appeal against sentence only."

[3] The facts of the matter are succinctly summarized as follows:

"The three (3) Appellants herein initially appeared jointly charged with eight (8) others of two counts of murder in respect of one **PAKISO**

LEOMA and **EKETSANG LEOMA** as well as two counts of assault with intent to do grievous bodily harm. Before and during the commencement of the trial, some of the accused passed away and two of those remaining were discharged and acquitted at the close of the Crown case, whilst the others, to the exclusion of the present Appellants, were acquitted and discharged at the close of the case on both sides.

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The present Appellants were then convicted on the two counts of murder and sentenced as follows:

'**A1 - 25 years imprisonment – for both counts I and II**
A2 - 25 years imprisonment – for both counts I and II
A7 - 25 years imprisonment – for both counts I and II

The long term imprisonment in respect of A1, A2 and A7 must start running from 1996'.

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Be it remembered that the events leading to the said trial took place in or around the 26th November 1990.

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The events leading to this case as can be deduced from the judgment are that the three Appellants herein were seen by a number of witnesses who knew them previously, notably PW1, PW2, PW3 and PW4 in the company of a number of people, some of whom, including the present Appellants took part in the assault which led to the deaths of the deceased in counts I and II.

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Both deceased persons met their deaths within a very short space of time after the said assaults which were probably instigated by the belief, right or wrong that the deceased had robbed and/or broken into the shop of the First Appellant herein and stole there from some items

of property which they allegedly sold at the village of Khonofaneng.

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As indicated earlier on, although there was no medical evidence led, the two deceased were seen by a number of witnesses in a very bad state of health whilst they were being carted from one place to another during the assaults and succumbed to death shortly thereafter."

[4] As would appear from the terms of the Stated Case (the Case) this Court has been asked to consider the propriety of the sentence imposed by the High Court. The appellants and the Crown were ad idem that the sentence of 25 years imprisonment on each of the appellants could not stand. In this regard it was pointed out that the learned Judge when passing sentence found that the three appellants had killed the two deceased with the direct intent to beat their victims to death and that they were all three of them, of a subjective state of mind desiring the death of their victims. In the body of the judgment as summarized in the headnote, her findings for purposes of conviction are recorded differently. These read as follows:

"3. All the accused must have been aware that the manner in which they carried out the alleged assault upon the deceased, with the type of weapons they used, death was the likely result.

> They deliberately or recklessly continued perpetrating the alleged assault regardless of the likely consequences."

This is a finding of indirect intention or dolus eventualis. The joint submission by the Crown and the defence Counsel supports this view. Their submission in this regard reads as follows:

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> "It is our further respectful submission that the Court **a-quo** seemed to have overlooked the pertinent fact that the said murders were not premeditated but could possibly have been the result of an improper and/or warped sense of justice, namely the apprehension of suspected culprits. Instead the Court **a-quo** seems to have hammered home the fact that the First Appellant herein, and in defiance of authority, used his financial might to amass an army of vigilantes to help him in apprehending the alleged suspects. It was for this reason that the Court **a-quo** wrongly, in our submission, found the Appellants guilty of murder in the direct sense of **dolus directus**.
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> The above-mentioned set of facts, cumulatively tend to lead us to the conclusion that on the facts pertinent to this case, another Court would not have meted out the same sentence as the Court **a-quo** did."

It has been held that the absence of premeditation and the absence of a direct intention to kill, can, depending on the circumstances of each case, constitute an extenuating or mitigating circumstance. See in this regard Letuka v Rex 1997-1998 LLR/LB 346 at p.361 and Tlali Serine v Rex

1991-1992 LLR/LB 42 at p.45-46.

[5] Both counsel also pointed out that the learned Judge, in back-dating the sentence in the manner reflected in the Case cited above, had applied the wrong principle. Section 376 (2) (a) of the Criminal Procedure and Evidence Act 1981 (the Act) provides – insofar as relevant – that:

> "(2) …..when the accused –
> (a) is ultimately sentenced to imprisonment, the time during which he is released on bail shall be excluded in computing the term for which he is so sentenced…"

It is common cause that all the three appellants were out on bail from the time of their arrest until the date of their conviction by the trial court. No fault can be found with a court taking into account the period of detention an accused person has undergone whilst awaiting trial. However, it is not proper, and indeed unlawful, to back-date a sentence to allow the period of pre-trial delay whilst out on bail to be equated to a period of imprisonment. It would have the absurd result of all three accused sentences of imprisonment being reduced because they were out on bail

pending their trial. This was a patent misdirection. It is clear that the Court *a quo* intended each appellant to serve a sentence of 25 years imprisonment. However, by back-dating the sentence to 1996 (without stating whether it was January 1 or December 31), the court effectively reduced their sentences by some 8 or 9 years. One can only assume that the trial court had laboured under the misconception that the Appellants had been in gaol from 1996 until the date of judgment; i.e. 14 December 2004. This Court was therefore obliged to reconsider the sentences imposed by the High Court.

[6] However, another misdirection occurred. In finding each of the accused guilty the Court attributed various degrees of culpability to each one of the three appellants. She attributed a leadership role to the1st appellant. He was – according to the judgment of the trial court – a "powerful person …. able to recruit and command a private army." The Judge *a quo* ascribes a deliberate violation of the law to this appellant and clearly attributed a high degree of moral guilt to his conduct. A reading of

the judgment makes it clear that the Court regarded the 1st appellant as the commander of "the army" and that he directed operations. He instructed and incited his cohorts to assault the deceased and he himself participated in the violence he unleashed. He should therefore receive a heavier sentence than the other appellants, unless there were other aggravating features found to be present in their conduct.

[7] Both counsel agreed that the 2nd appellant was shown himself to have participated in the assault. He was also the person who reported a burglary – which it would appear never occurred. His report set the scene for the ugly events that followed. However, he was the 1st appellant's employee and performed duties as a night-watchman. He acted on the unlawful instructions of the 1st appellant. His proven level of participation was certainly less than that of the 1st appellant and the degree of his moral guilt is also less. He should therefore receive a

lesser sentence than the 1st appellant.

[8] Counsel were also both of the view that on the evidence before the trial court, it could not be found that the 7th appellant actively participated in the assault on the two deceased. The high-water mark of the case against him was that he associated himself with the pursuit and the assault on the deceased. His guilt within this context is not challenged and he must be punished accordingly. Clearly, however, his moral guilt cannot equate to that of his two co-appellants. He must be sentenced for the misdeeds he committed, not as if he himself participated in killing the two deceased or that he played a prominent role in the affray.

[9] From what I have said above, it is clear that the Court *a quo* erred in not individualizing the punishment of each of the appellants. It is apparent from her judgment that the learned Judge was not only indignant, but also greatly incensed at the merciless beating inflicted on

two innocent persons who needlessly and painfully forfeited their lives. A court is entitled to express its indignation at the brutal murder of innocent citizens. It must always however remain dispassionate and must eschew all anger. Corbett JA, who later became one of the great Chief Justices of South Africa, cautioned Judges who are entrusted with responsibility for imposing punishment on the guilty not to do so in anger.

[10] In S v Rabie 1975 (4) SA 855 (A) at pp.865/866 he had this to say:

> "In his Commentary on the Pandects, 5.1.57, Voet writes of the need for Judges to be free from hatred, friendship, anger, pity and avarice. In a note on this section in his Supplement to the Commentary (published in 1973) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the Selective Voet – Gane's translation, vol. 2, at p. 72). The note (quoting Gane's translation) commences:
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> > *"It is true, as Cicero says in his work on Duties, bk. 1 ch. 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."*

> Van der Linden further notes that among the most harmful faults of Judges is, *inter alia*, a striving after severity (*severitatis affectation).* Apropos this, a passage is quoted from Seneca on Mercy, including the declaration: "Severity I keep concealed, mercy ever ready" *(severitatem abditam, clementiam in promptu habeo).* Van der Linden concludes with a warning that misplaced pity (*intempestiva misericordia)* is less to be censured.
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> Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in *S v Zinn* [2],at p. 541). A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case". (Italics added)

[11] A reading of the highly emotionally charged judgment on sentence of the learned Judge caused me grave concern at her approach when passing sentence. I respectfully suggest that she should have regard to the above wise injunction. The fact that she proceeded to impose sentences which are manifestly unjust in respect of the 7th appellant, whose proven criminal conduct was clearly nowhere near as

reprehensible as that of the 1st appellant, is the best evidence that the court, in its anger, failed to have regard to the role each of the appellants played in this tragedy when passing sentence. Sentences must be individualized; only through a calm and dispassionate assessment of the degree of moral guilt of each accused can fairness and a just disposition be achieved through the sentencing process.

[12] In view of the various misdirections referred to above it is common cause that this Court was not only entitled but also obliged to reassess the sentences of each of the appellants. Counsel jointly suggested that a sentence of the order of 10 years would be appropriate. I do not agree insofar as 1st appellant is concerned. Even though it is clear that the injuries sustained by the victims were not as severe as articulated by the court *a quo* when passing sentence, they nevertheless constituted an extensive and prolonged assault. The three accused thought – wrongly it would seem – that the two deceased men had committed a burglary.

However, the gross over – reaction to the situation and the persistence of the 1st appellant in conducting the affray requires in my view the imposition of a sentence of at least 12 years imprisonment – the two counts taken together for purposes of sentence.

[13] Second appellant was an employee and his responsibility must be diminished by his relationship with his employer. Nevertheless his willingness to carry out his employer's instructions including an admitted assault on the deceased is indicative of the role he played in the events in question. Whilst therefore his moral guilt must be assessed at a lower level than that of the 1st appellant, his punishment still requires the imposition of a long term of imprisonment. I believe that a sentence of 8 years imprisonment (the two counts taken together for purposes of sentence) would be appropriate in all the circumstances.

[14] The 7th appellant was a minor player in the fracas. In the case of Molelle v Rex and Rex v Kaloko and Others c of A (CRI) No.12/2004 this

Court had to deal with an accused who had, like the 3rd appellant, played a minor, but nevertheless participative role in an armed insurrection. This Court sentenced him to an effective term of 4 years imprisonment. Comparing the relative degrees of moral guilt, I believe that there are such similarities so as to render an imposition of the same sentence appropriate. A sentence of 4 years imprisonment (the two counts taken together for purposes of sentence) is therefore imposed on him.

[15] In determining the sentences the Court has taken into account the fact that the appellants believed they were dealing with two persons who had broken into premises and had committed a crime. Nevertheless, the Court cannot permit people to take the law into their own hands.

[16] In the result the appeal against the sentences imposed on the three appellants is upheld. The sentences of 25 years imprisonment imposed on each of the three of them is set aside. Instead thereof the following sentences are imposed. The two counts are taken together for purposes

of sentence.

1st appellant 12 years imprisonment;
2nd appellant 8 years imprisonment;
3rd appellant 4 years imprisonment.

These sentences are to run from the date of their conviction; i.e. 15 December 2004.

[17] The Court records its appreciation for the sensible and constructive involvement of Mr. Thetsane and Mr. Nathane in these proceedings. As a result of their co-operative and helpful attitude they assisted the Court in rectifying an injustice.

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JH Steyn
PRESIDENT OF THE COURT OF APPEAL

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I agree: **MM Ramodibedi**
JUSTICE OF APPEAL

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I agree: **FH Grosskopf**
JUSTICE OF APPEAL

Delivered on the 4th day of April 2007

For the Crown: Mr. L. Thetsane
For Defence: Mr. H. Nathane