IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CRI) NO.9/2007**
CRI/T/184/2002

In the matter between:-

MOROA HA-BUSOE CHABELI **APPELLANT**

AND

REX **RESPONDENT**

CORAM: STEYN, P
SMALBERGER, JA
MOFOLO, JA

HEARD: 27 MARCH 2008

DELIVERED: 11 APRIL 2008

SUMMARY

Appeal against conviction of murder without extenuating circumstances and sentence of death -Crown conceding conviction should have been one of culpable homicide - appellant in agreement - concession properly and correctly made - conviction altered accordingly - partly suspended sentence imposed.

JUDGMENT

SMALBERGER, JA

[1] It is common cause that Mokutsu Busumane ("the deceased") died on 25 December 2001 as a result of injuries sustained by him from a blow or blows inflicted upon him by the appellant with a lebetlela stick (a plain, solid, fairly heavy stick). This led to a charge of murder being preferred against the appellant in the High Court. At the conclusion of the resultant trial, on 29 October 2007, the appellant was convicted of murder by Mahase J and two assessors. No extenuating circumstances were found and he was sentenced to death. The present appeal lies against both his conviction and sentence.

[2] At the commencement of the appeal hearing Ms Ngcobo for the Crown informed us that upon consideration of the evidence on record, and after consultation with senior members in the office of the Director of Public Prosecutions, it had been decided that the Crown would not support the court *a quo's* finding of murder but

would seek a conviction of culpable homicide instead. Mr. Masiphole for the appellant accepted that the correct verdict should have been one of culpable homicide on the basis that in inflicting the injuries that caused the deceased's death the appellant had acted beyond the reasonable bounds of self-defence. For reasons that follow we are more than satisfied that these concessions were correctly and properly made.

[3] The undisputed evidence is that on the late afternoon of the day in question (which happened to be Christmas Day), the appellant went to the shop of one Molise in a nearby village where he bought beer and tobacco. He was joined by one Mahlomola Chabeli and they both partook of beer on the premises. The deceased arrived and twice asked the appellant to buy him beer. On each occasion the appellant responded that he did not have any money. The deceased took offence to the appellant referring to him on the second occasion as "man". At that point the appellant apologized and left the shop without finishing his beer. According to the appellant he did so because he wished to avoid a confrontation with the deceased. It is common cause that precisely one year previously, also on Christmas day, there had been an

altercation between the deceased and the appellant which had resulted in the appellant being seriously assaulted by the deceased.

[4] The appellant then proceeded to the shop of one Rampone, some 600 metres away, where beer was being sold, music was playing and people were dancing outside. He purchased another beer. Shortly thereafter he was joined again by Mahlomola, more beer was bought and further drinking ensued. Later the deceased arrived in the company of Sekila Mokhothu ("PW1"). On entering, the deceased drank uninvited from the beer being shared by the appellant and Mahlomola, after which he left again. More beer was bought by PW1 of which the appellant claims he reluctantly had no more than a sip before going outside to relieve himself, taking his stick with him.

[5] There is a dispute with regard to the events that occurred subsequently. According to the appellant, he was about to re-enter the shop when he heard something being said behind him. On turning, he observed the deceased directing a blow at him with a stick. He was struck on the head but did not fall. The appellant claims that he then retaliated in self-defence, hitting the deceased

once in the rib area with his lebetlela stick and then, when it appeared to him that the deceased intended to persist with the assault upon him, he struck the deceased a further blow on the forehead, causing him to fall to the ground. He denied that he struck any further blows after the deceased had fallen. He further claimed that immediately thereafter he was involved in a struggle with PW1, John Chabeli ("PW2") and others during the course of which stones were thrown at him and he was hit with a stick, as a result of which he sustained certain injuries. He handed himself over to the police the following day. The policewoman who arrested him recorded at the time that "the suspect was assaulted on the head, neck, arm and at the back between shoulders and hip".

[6] None of the four Crown witnesses who testified to the events surrounding the death of the deceased witnessed the start of the fight between the appellant and the deceased. Three of them, PW1, PW2 and 'Mamorena Tsoeu ("PW3") were inside the shop where beer was being served when a commotion outside alerted them to the fact that there was a fight in progress. The fourth witness Janefeke Ratolo ("PW4") was *en route* to the village when informed of the fight. All four testified that when they arrived at the

scene the appellant was hitting the deceased with a stick while the latter lay helpless on the ground. According to PW1 and PW2 they tried to intervene but were prevented from coming to the deceased's assistance because of the appellant's aggressive conduct and threatening attitude. PW2 admitted striking the appellant once on the back with a stick; the Crown witnesses denied that any stones were thrown at him.

[7] PW1 testified that while the deceased was lying on the ground the appellant struck him "many times" on the head with his stick "until he was satisfied". He was unable to say how many blows in all were struck. PW2 also claimed that the appellant assaulted the deceased "until he was satisfied". He too was unable to say how many blows were struck. The evidence of PW3 was in similar vein. When PW4 was asked how many times the deceased was struck while he was on the ground, she replied that "it could be about three times".

[8] The post-mortem report on the body of the deceased was handed in by consent. It reflects the cause of death as "brain tissue laceration; cut skull bone right facial region". Under the heading

"External Appearances" there appears the following: "Long opened (sic) wound on right facial region. Visible brain tissue". Examination of the skull revealed "Brain laceration, fracture of frontal bone, zygomatic bone and right parietal bones". In addition there were cut wounds of the palate and right nose. The report reflects no view on the likely number of blows that would have been necessary to cause the damage found, or the degree of violence used. This is *par excellence* an example of where the doctor who performed the post-mortem should, if available, have been called to elaborate on his findings. Without such elaboration one is left in the dark as to the likely number of blows struck.

[9] There are a number of major shortcomings in the judgment of the court *a quo.* It proceeds from the unjustifiable premise that the appellant started the fight with the deceased because, as found by the court *a quo,* he harboured a grudge against the deceased arising from their clash a year ago when the deceased assaulted him, a fact said to have been conceded by the appellant in his evidence in chief. I have found no such concession on record; in fact under cross-examination the appellant persistently denied that he had assaulted and killed the deceased because of a festering

grudge. Admittedly the appellant was mindful of what had happened the previous year which is why, according to him, he was anxious to avoid a confrontation with the deceased. There is simply no justification for finding that the appellant attacked the deceased simply out of revenge. Moreover, there is nothing to gainsay the appellant's evidence that the deceased was the initial aggressor. The deceased had earlier manifested a somewhat provocative and aggressive attitude when first requesting money from the appellant and later taking an uninvited sip of his beer. Given the past history between the appellant and the deceased, the circumstances that pertained that evening, and the inability of the Crown to provide contrary evidence, the appellant's version of how the fight started could reasonably possibly have been true, and should have been accepted.

[10] Furthermore, from the tenor of its judgment the court *a quo* appears to have viewed the assault upon the deceased in a far more serious light than the evidence justified. It repeatedly made statements such as the appellant "mercilessly" belaboured the deceased; he "continued to belabour the helpless deceased with a stick all over his body and in particular on his head until the

deceased's skull was fractured and its contents were exposed" (this despite the fact that no witness testified to the deceased being hit on the body and no signs of injury to his body were found); the "brutal assault upon the deceased"; and "the manner in which he brutally and mercilessly assaulted the deceased", to cite but a few examples. One is left with the impression that the court *a quo* considered the deceased to have been beaten to a pulp, yet in sharp contrast the post-mortem report reflects only one visible external wound. This does not mean that only one blow was struck, but given the court *a quo's* findings one would have expected far more visible signs of external injury.

[11] The court *a quo* also rejected out of hand the appellant's evidence that he had been struck and stones had been thrown at him at the scene of the crime, causing him certain injuries, without any regard to the fact that he exhibited such injuries when he handed himself over to the police the following day. The fact that he had injuries *prima facie* lends support to his evidence in this regard.

[12] While the appellant's conduct must be viewed on the basis that he did not start the fight and did not assault the deceased

to the extent found by the court *a quo,* it cannot be accepted, as he claims, that he only struck the deceased once on the head, and did not strike him while he was on the ground. A realistic appraisal of the internal skull injuries sustained by the deceased suggests, as an overwhelming probability, that he was struck more than one blow on the head. This lends credence to the evidence of the Crown's witnesses that the appellant continued to strike the deceased while he was lying on the ground, even though some of them may have exaggerated the extent to which he did so having regard to the post-mortem report. PW4's evidence that the appellant struck the deceased three blows while he was on the ground is perhaps nearest the mark.

[13] Whatever justification there may have been for the first blow to the deceased's head, once he had fallen to the ground and no longer posed any threat to the appellant, any further assault upon his person was unjustified and unlawful. In inflicting further injury on the deceased the appellant clearly exceeded the bounds of self-defence and unlawfully caused the death of the deceased. Having regard to the circumstances surrounding the deceased's death the Crown in my view failed to establish the requisite intention to kill

on the part of the appellant, either in the form of direct intention or *dolus eventualis,* and the appropriate verdict is therefore one of culpable homicide, as conceded by both the Crown and the appellant. It follows that his conviction must be altered accordingly, and the death sentence set aside.

[14] Even on the court *a quo's* own findings, given the events that preceded the assault, the nature of the weapon used, the extent of the injuries inflicted as reflected in the post-mortem report, the fact that a fair amount of liquor had been consumed by the appellant and the history of a previous assault upon the appellant by the deceased, there were clearly extenuating circumstances present and no justification for the imposition of the death penalty. This Court has emphasized in the past that the death penalty should not lightly be imposed; it is only called for in exceptional cases where there is no possible extenuation and where no other sentence would be adequate.

[15] The unlawful killing of a human being constitutes a serious offence which generally merits a substantial custodial sentence. For purposes of sentence it must be accepted that the

appellant was not the initial aggressor, that he was mildly under the influence of liquor and was probably incensed by the deceased's conduct. However, this cannot excuse the excessive vigour with which he assaulted the deceased while the latter lay helpless on the ground. Our sentence must needs reflect disapproval of such conduct. In arriving at an appropriate sentence due regard must be had to the fact that the appellant is a first offender and that he was imprisoned on death row awaiting the outcome of his appeal for approximately five months. Account must also be taken of the fact that the appellant handed himself over to the police which may be an indication of some remorse on his part.

[16] Mr. Masiphole referred us during argument to the decision of this Court in **MPAKA MOSALA v REX 1997-1998 LLR-LB 240** where there was a substituted verdict of culpable homicide and part of the sentence imposed was suspended on condition *inter alia* that compensation of seven head of cattle be paid to the family of the deceased in that case thereby "raising the head" of the deceased, as it is customarily known. We agree that a partially suspended sentence with a similar condition of suspension should be imposed on the present case. However, the circumstances

of the present case call for a more severe sentence than in **Mosala's** case, and we consider compensation of ten head of cattle to be appropriate. The appellant is apparently in a position to pay such compensation.

[17] The appeal succeeds to the extent that the conviction of murder without extenuating circumstances and the sentence of death are set aside and replaced by the following:-

1. *The appellant is found guilty of culpable homicide.*

2. *The sentence imposed is one of six years imprisonment calculated from the date of his conviction (29 October 2007) of which two years are suspended for three years on condition that the appellant-fa) Delivers ten head of cattle (or their equivalent value) to the family of the deceased within one month of the date of this judgment;*

(b) Is not convicted of an offence, committed within the

period of suspension, involving violence against the person of another, in respect of which he issentenced to direct imprisonment for a period in excess of six months.

J W SMALBERGER
JUDGE OF APPEAL

I agree:

JH STEYN
PRESIDENT 0F THE
COURT 0F APPEAL

I agree:

G N MOFOLO
JUSTICE OF APPEAL

For Appellant : Adv B.M.R. Masiphole
For Respondent : Ms L Ngcobo