

**C OF A (CRI) NO.7/2007**

**IN THE COURT OF APPEAL OF LESOTHO**

**Held at Maseru**

In the matter between:

**KUBUTU MOKOENYA  
SESINYI MOKOENYA  
BOKANG LELUMA  
TATOLO MAKETSI  
TIKISONE SHALE**

**FIRST APPELLANT  
SECOND APPELLANT  
THIRD APPELLANT  
FOURTH APPELLANT  
FIFTH APPELLANT**

**AND**

**REX**

**RESPONDENT**

Heard: 28 March 2008

Delivered: 11 April 2008

**CORAM:** Steyn, P  
Grosskopf, JA  
Melunsky, JA

### **SUMMARY**

*Criminal Law - Murder - Appellants held liable on the basis of common purpose - prerequisites to be satisfied for a conviction on the basis of common purpose not satisfied in respect of two of the three murder counts.*

### **JUDGMENT**

#### **GROSSKOPF, JA**

[1] The five appellants and one Molato Mokoonya were charged with committing three murders on 18 October 1999 at Thaba-Tsoeu Ha Shale in the district of Mafeteng. Molato Mokoonya was found not guilty by the court a quo on all three counts of murder and acquitted. The five appellants on the other hand were found guilty of all three murders and sentenced in respect of each count to five years imprisonment, such sentences to run consecutively. The appellants lodged an appeal against their convictions and sentences.

[2] I shall first deal with the conviction on count

3. The deceased in that case was 'Miki 'Mapuleng Leluma ("deceased 3"). The evidence on behalf of the Crown shows that deceased 3 was killed on 18 October 1999. She had been staying with her sister, the witness 'Mapoloko 'Mabuti Matsoso (PW1). She was dragged from the house of her sister at about sunrise that morning by one Khotso Mokoanya, who has since died, and appellant 2, who was armed with a spear. A group of approximately twenty people were waiting outside the house. They were armed with sticks and they appeared to be in an aggressive mood. Some of the members of this group started to assault deceased 3 as they led her away. Blood was seen coming from a wound on her head.

[3] Trooper Nqojane (PW5) took part in the investigation of the case. He went to Malumeng on the day that deceased 3 was murdered. He found her body near her home which was not very far from her sister's house where she had been sleeping. PW5 examined her body at the scene and observed approximately eight open wounds on her head and bruises all over her body as if she had been whipped.

[4] The report of the post-mortem examination of

deceased 3 showed that her death was due to "intracranial bleeding and trauma on the head". The doctor who performed the examination observed a fractured skull with multiple sharp edged wounds on her scalp, a laceration on her forehead, linear bruises all over her body and a fractured right arm. The doctor was of the opinion that a heavy sharp object had been used in the assault on deceased 3.

[5] It is the Crown's case that anyone who was identified as a member of that group who had assembled outside the house of the witness PW1 was guilty of the murder of deceased 3 on the basis that they shared a common purpose. It has been laid down in **S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705 I - 706 B that in the absence of proof of a prior agreement an accused who has not been shown to have contributed causally to the killing or wounding of the deceased can be held liable only if the following prerequisites are satisfied:

"In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the [deceased]. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite **mens rea**; so, in respect of the killing of the deceased, he must have intended [the deceased] to be killed, or he must have foreseen the possibility of [the deceased] being killed and performed

his own act of association with recklessness as to whether or not death was to ensue."

[6] This Court has also warned against the indiscriminate application of the doctrine of common purpose. Ramodibedi J A remarked as follows in the case of **Maboka and Another v Rex** (2000-2004) LAC 1, at 18:

"It must always be borne in mind, however, that the modern approach is that there is no magical power contained in the doctrine of common purpose and that where there is participation in a crime, each of the participants must satisfy all the requirements of the definition of the crime in question before he can properly be convicted as a co-perpetrator. Such was the view of the [South African] Appellate Division in **S v WILLIAMS** 1980 (1) SA 60 (A) at 63; **S v MAXABA** 1981 (1) SA 1148 (A) per VILJOEN JA; **S v KHOSA** 1982 (3) SA 1019 (A).

It is salutary for courts to exercise some caution to ensure that innocent persons are not convicted for crimes committed by others, for such is the inherent danger of the doctrine of common purpose."

See also **S v Banda and Others** 1990 (3) SA 466 (B) at 501 E-F.

[7] I shall first consider the evidence of the Crown witnesses who identified the appellants who had been present at the scene where deceased 3 was removed from the house with force and thereafter assaulted. The witness PW1 saw the said Khotso and another dragging deceased 3 from the house of the witness where deceased 3 had been sleeping. It was early in the morning and before sunrise according to PW1. Khotso has

since died. She also saw a certain Tichere who, too, has since passed away. The witness PW1 further identified appellant 1 as one of the people present. She went outside and saw a number of people gathered in front of her house. They were armed with spears and sticks. The witness was frightened and confused and unable to identify anyone else in the group. She saw how the people in the group led deceased 3 away in the direction of her home assaulting her on the way.

[8] The witness 'Maleroala Leroala (PW2) has an eye problem which affects her eyesight. She nevertheless identified Khotso and appellant 3 as members of the group who followed deceased 3 past her house one morning before sunrise. Deceased 3 was her neighbour. The witness PW2 saw that deceased 3 was bleeding from a wound on her head. She also saw that the people in the group who followed deceased 3 were armed with sticks and that some of them were assaulting deceased 3 with their sticks.

She could identify only Khotso and appellant 3 amongst the crowd following deceased 3.

[9] The witness Matobako Matsoso (PW6) was approximately 20 years of age when deceased 3 was killed in October 1999. He identified all five appellants. He said he knew them all very well as people from the neighbouring village Ha Pitso. PW6 stayed with his mother, the witness PW1, in the same house where his aunt, deceased 3, had been staying. He was woken up early one morning in October 1999 by his sister who made a report to him. He then saw Khotso and appellant 2, who was armed with a spear, enter the bedroom where deceased 3 had been sleeping. They dragged her outside where a group armed with sticks was waiting. She was led away followed by the group of not more than 20 people. The witness PW6 identified the five appellants by name as persons who were present at the scene when deceased 3 was dragged out of the house and led away. PW6 also mentioned the names of the said Tichere and a certain Mohapi who was not one of the accused. PW6 further identified Molato Mokoonya as one of the people who had been waiting outside, but it will be recalled that he is the accused who was discharged in the court a quo.

[10] There are a number of reasons why the identification of

the five appellants is reliable in my opinion. The first aspect that must be borne in mind is that the Crown witnesses knew the appellants. They came from the neighbouring village. It was further not suggested to the Crown witnesses in cross-examination that the appellants were not part of the armed group who gathered outside the house of PW1 and who assaulted deceased 3. It was actually put to Pw6 in cross-examination that appellant 2 says that "they" saw him while they were standing in the forecourt and that they saw him running away. Appellant 2 therefore placed himself on the scene. PW6 incidentally denied that he ran away as alleged. What is more, not one of the appellants testified at the hearing in the court a quo. The identification of the appellants by the Crown witnesses therefore remained uncontested.

[11] I therefore conclude that the five appellants were shown to have been present at the scene where deceased 3 was seriously assaulted with spears and sticks and that they associated themselves with the attack on deceased 3. I am further of the view that all the other prerequisites set out in Mgedezi's case, supra, have been satisfied and that the five appellants were correctly convicted of murder on count 3.



[12] I shall next deal with the appellants' conviction on counts 1 and 2. The deceased in count 1 was Itumeleng Monki ("deceased 1") and the deceased in count 2 was Mahlomola Ralintoane ("deceased 2"). The only witness who dealt specifically with the murder of deceased 1 and deceased 2 is Phokoane Monki (PW3). Deceased 1 was the son of this witness' elder brother. The evidence of PW3 is that he was woken up at dawn one morning by a sound on the door of the house where he was sleeping. He saw many people gathered around the house. Some of them were throwing stones while others were just standing. They appeared to be in "a fighting mood" but they did not say anything. The witness PW3 saw deceased 1 leaving the house. He ran across the yard into the garden. One of the people in the crowd said "there he is" and those people then ran after him throwing stones at him. The witness PW3 saw deceased 1 when he fell down. The people in the crowd then started chasing deceased 2 who was a family friend. The witness did not see whether the people who were chasing deceased 1 and 2 were armed. The witness later found deceased 1 where he had fallen down. He was dead. He had wounds on his head and all over his body. PW3 does not know

what happened to deceased 2 but he was also found dead.

[13] The witness PW3 said that he knew the six accused who were charged with murder in the court a quo. They were from a neighbouring village Ha Pitso.

He was nevertheless unable to identify anyone of the people who had attacked deceased 1 and deceased 2. One would have expected PW3 to have recognized at least some of the six accused if they had been present in the crowd that attacked deceased 1 and deceased 2. PW3 did not see whether the attackers were armed or not. We know that the people in the group who attacked deceased 3 were seen to be armed with spears and sticks, while none of the witnesses who saw the attack on deceased 3 saw the attackers throwing stones at deceased 3. It is of some significance that the people who attacked deceased 3 were armed with spears and sticks while the people who attacked deceased 1 and deceased 2 were not seen with spears and sticks but were using stones in their attack on deceased 1 and deceased 2. This may point to the presence of two different groups.

[14] The witness Matiase Rankhalane (PW4) does not take the matter any further. He also knew the six accused who were from the neighbouring village but he was unable to identify any of the people in the crowd that passed his house early one morning in October 1999. They were singing a song saying "when the vulture is hungry it goes about looking for prey". The witness later found the body of deceased 1 behind the house that belonged to him and the body of deceased 2 on the other side of the village.

[15] Counsel for the Crown asked us to draw the inference that the appellants were also part of the crowd that killed deceased 1 and deceased 2, that they were present at the scene where deceased 1 and deceased 2 were being assaulted and killed and that they performed some act of association with the conduct of the perpetrators of the assault. Counsel for the Crown submitted that we should therefore find that the appellants are also guilty of the murder of deceased 1 and deceased 2 on the basis of common purpose.

[16] It is certainly possible that the five appellants were also present when deceased 1 and deceased 2 were killed, but it is

equally possible that they were not. It should be borne in mind that the witness PW3 did not recognise anyone of the appellants outside his house when the attack on deceased 1 and deceased 2 started. We do not know whether deceased 3 was killed before or after the other two, and, if before, whether the five appellants did not deal with deceased 3 while other members of the group went to look for deceased 1 and deceased 2.

[17] In reasoning by inference there are two cardinal rules of logic which cannot be ignored, as was pointed out by Watermeyer J A in the well known case of **Rex v Blom** 1939 AD 188, at 202-203:

- "(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."

It is clear in my view that the inference which counsel for the Crown seeks to draw can simply not be drawn. In the circumstances there are no grounds for even finding that the five appellants were present at the scene where the attack on

deceased 1 and deceased 2 took place. The conviction of the five appellants on count 1 and count 2 can therefore not be upheld.

[18] The learned judge in the court a quo sentenced the five accused each to an effective term of 15 years imprisonment made up of 5 years imprisonment in respect of each of the three murders, such sentences to run consecutively. Where the convictions on counts 1 and 2 now fall away the five appellants will each serve only 5 years imprisonment in respect of count 3. This is certainly not a severe sentence for a brutal murder but the Crown has not lodged a cross appeal against sentence and counsel for the Crown did not wish to address us on sentence.

[19] The following order is accordingly made:-

1. The appeal of the five appellants against their conviction and sentence on counts 1 and 2 is upheld.
2. The appeal of the five appellants against their conviction and sentence on count 3 is dismissed.

F H GROSSKOPF  
JUDGE OF APPEAL

I agree

J H STEYN  
PRESIDENT OF THE  
COURT OF APPEAL

I agree

L S MELUNSKY  
JUDGE OF APPEAL

For Appellants : B.M.R.M. Masiphole

For Respondent : A.M. Lenono