IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A(CRI) NO. 12/07

In the matter between:

MOLIKENG RANTHITHI	FIRST APPELLANT
PASEKA NAMANE	SECOND APPELLANT

AND

REX	RESPONDENT

AND

IN THE CROSS-APPEAL OF

REX	APPELLANT

AND

MOLIKENG RANTHITHI	FIRST RESPONDENT
PASEKA NAMANE	SECOND RESPONDENT
RANKAE MOKATSE	THIRD RESPONDENT
SHOBELA TSOEU	FOURTH RESPONDENT
NTHOBOHLOKOA SHOAEPANE	FIFTH RESPONDENT
MAKOANYANE TLELETLELE	SIXTH RESPONDENT
CHERE RANTHITHI	SEVENTH RESPONDENT
MANESA MATLI	EIGHTH RESPONDENT

CORAM: RAMODIBEDI JA
SMALBERGER JA
PEETE JA

HEARD: 4 APRIL 2008
DELIVERED: 11 APRIL 2008

SUMMARY

Criminal law - Murder - Appeal against both conviction and sentence — Crown's cross-appeal against sentence - Impropriety of suspending sentence following a murder conviction - Section 314(2) of the Criminal Procedure and Evidence Act 1981.

Criminal procedure - Evidence partly recorded in Sesotho as opposed to English - No translation furnished - Rule 58(4) of the High Court Rules 1980 as amended - Rule 5(5) of the Court of Appeal Rules 2006.

JUDGMENT

RAMODIBEDI JA

[1] In the early hours of the morning of 15 July 2001, and at or near Topa village in the district of Thaba Tseka, a group of men from Thabana-Mahlanya village attacked one Tikene Mohlokoane (PW1) whom they suspected of having stolen donkeys belonging to one of them, namely, the third respondent in the cross-appeal.

They surrounded his house and threatened to burn it down if he did not come outside. Some of them carried firearms, both big and small. PW1 raised a hue and cry for assistance from his co-villagers. They promptly obliged by rushing to PWl's house. They included PWl's father, Khomonyane Mohlokoane (PW3) and PWl's younger brother, Thabo Mohlokoane.

[2] When the two groups of men met, a shot went off from the direction of the group from Thabana-Mahlanya. Thabo Mohlokoane (hereinafter referred to as "the deceased") was fatally shot in the stomach. Consequent upon this incident, the two appellants in the main appeal together with the respondents in the cross-appeal, including six other men who do not feature in this appeal, were indicted on a charge of the murder of the deceased.

[3] At the close of the Crown case, the trial court *mero motu* discharged the fourth, fifth and seventh respondents in the cross-appeal. The following people were convicted of murder at the close of the case: the first and second appellants as well as the third, sixth and

eighth respondents in the cross-appeal. They were sentenced as follows:-

1) The first appellant was sentenced to five (5) years imprisonment, half of which was suspended conditionally for three (3) years.

2) The second appellant was sentenced to eight (8) years imprisonment half of which was suspended conditionally for three (3) years.

3) The third, sixth and eighth respondents in the cross-appeal were sentenced to a period until the rising of the court.

[4] The first and second appellants in the main appeal have now appealed to this Court against both conviction and sentence. In so far as conviction is concerned, they complain that this was premised solely on "supposition and utter speculation contrary to factual evidence".

As regards the sentences, they complain that these are harsh and that they invoke a sense of shock.

[5] In its cross-appeal, the Crown for its part has sought to appeal against the discharge of the respondents referred to in paragraph

[3] above. Furthermore, the Crown challenges the sentences imposed as being too lenient and contrary to section 314 (2) of the Criminal Procedure and Evidence Act 1981.

[6] Before proceeding further, it is convenient, first, to express this Court's displeasure at the unsatisfactory state of the record in this matter. There appears to be a new trend by some judicial officers and some counsel to conduct proceedings in the High Court in Sesotho without furnishing a translation. See for example **Basia Lebeta v Rex C of A (CRI) No. 1/08** which was heard during the current session of this Court. Counsel who appeared before this Court in the instant matter have informed us that this new trend has come about as a result of an amendment to Rule 58 (4) of the High Court Rules 1980. In its original form the Rule provided as follows:-

> *"Where evidence in any proceedings is given in any language other than English such evidence shall be interpreted by a competent interpreter. "*

[7] In **Lenka v Rex 2000-2004 LAC 832** this Court, approving **Rex**

v Tseliso Mafeka 1992-96 (2) LLR 1199 (HC), held that the practice of judicial officers acting as their own interpreters at the trial, and thereby failing to use sworn interpreters, amounts to a fatal irregularity.

[8] Seemingly, as a response to this Court's decision in **Lenka's** case, the learned Chief Justice amended Rule 58(4) in terms of section 2 of the High Court (Amendment) Rules 2006, Legal Notice No.75 of 2006. In its amended form Rule 58(4) now reads as follows:-

> *"Where the evidence in any proceedings is given in any language other than in English such evidence shall be interpreted by a competent interpreter. However, it shall be competent in civil or criminal proceedings for a presiding judge to record evidence in English without the assistance of a court interpreter where all parties know and understand Sesotho and the services of the interpreter cannot be secured without undue delay, expense or inconvenience. "*

It is plain from Rule 58(4) as amended that evidence given in civil or

criminal proceedings must be recorded in English. To that extent, the Rule in its amended form emphasises the use of English rather than detracts from it. In this regard, it is important to realise that the Rule in its original form has not been changed by the amendment in so far as the English language is concerned. What has happened is that a proviso has now been added in the amendment to make it competent for judicial officers to

> "record", as opposed to "interpret", evidence in English in circumstance spelt out in the Rule.

[10] Notwithstanding the above considerations, the record of proceedings in this matter contains several passages where evidence was recorded in Sesotho without any translation being furnished. I point to the following examples, taken at random:-

(1) On page 18 of the record the following evidence is recorded :-

> *"CC:Please go on. What did they (the accused) tell him? Did they answer or they didn't?*
>
> *PWl:The only person who answered*

was Paseka, saying "you likatana, I will kill you. "

CC: Where is he?

PW1:Ke eno Mohlomphehi, moqosuoa oa bobeli."

On page 28 of the record the Crown counsel asked PW1:-

"CC: So what happened thereafter?

PWl:Eaba Mapolesa a ba lokolla hore ba batle moo mo ba belaellang. Ba ile ba batla ba seke ba thola letho. "

On page 60 of the record the Crown counsel asked PW2 about what the police discovered at the scene of crime :-

"CC:What did they (the police) discover?

PW2:Ha ba qeta ho bona mofu, ho mofu mona ba itse ho bonahala o thuntsoe. Tholoana e ne e kene mona ke e nyane, ha se ea sethunya se seholo. Joale ha ba qeta ba be ba sheba mona hore na likhaketlana hore na ebe likhaketlana li ke ke tsa fumaneha tsa sethunya se senyane le se seholo, empa li ile tsa fumaneha. "

(4) The record further shows on page 80 thereof that the learned trial Judge asked PW3 the following question:-

"HL :.....you told the chief, you did not tell the chief who shot your son, you told the police, is that so? I am saying, the first thing, you told the police who shot your son, you didn't tell the chief? Is that so?

PW3:E, ke itse o thuntsoe ke ntate Paseka. "

(5) Again on pages 148-149 the learned Judge put the following question to PW5:-

"HL: Were these people, you say A3 was present on the occasion of searching Tikene 's straw?

PW5:E, le ba bang "

[11] What is incomprehensible to me is that the evidence of witnesses given in Sesotho was, in several places, not interpreted. This, despite the fact that an interpreter was present in court. The evidence was not recorded in English, contrary to Rule 58(4) of the High Court Rules.

It is no doubt convenient at this stage to repeat what this Court said in similar circumstances in **Lebeta's** case, supra, namely :-

"[5] Whatever the merits or demerits of Rule 58(4) of the High Court Rules in the context of the above two cases, the attention of Judges and counsel must

now be drawn to Rule 5(5) of the Court of Appeal Rules 2006 on records. This Rule provides in mandatory terms as follows:-

> *'The copies of the record shall be in English and clearly typed on A4 standard paper in double-spacing on one side of the paper only.'* (Emphasis added.)

[6] It remains only for me to stress that, for the purposes of an appeal to this Court, both judicial officers and counsel are obliged to have Sesotho versions, or indeed any version other than English, translated into English by a sworn interpreter notwithstanding any perceived inconvenience or personal discomfort in the use of English."

[13] With this prelude, I proceed now to deal with the case concerning the appellants in the main appeal. As indicated above, the facts show that a group of men from Thabana-Mahlanya village surrounded PW1's house. This was followed by the shooting of the deceased. But, first, it is necessary to record briefly the relevant events leading up to this incident.

[14] It is not disputed that some time prior to the fateful night in

question, six donkeys belonging to the third respondent in the cross-appeal went missing. Three of the donkeys were later discovered but the other three were found slaughtered on the border between the villages of Thabana-Mahlanya and Topa. PW1 was suspected of having stolen them but, as indicated above, a search instigated by the Thabana-Mahlanya group upon his premises did not yield anything incriminating against him. The same exercise was repeated in the presence of the police but the result was the same. No donkey meat was found anywhere at PWl's place.

[15] Apparently, the Thabana-Mahlanya group was unhappy. They threatened to return in the absence of the police and "collect" PW1 since the police declined to arrest him. It is the Crown's case that they did return and that they killed the deceased in what followed. To that extent, the Crown's case, as I understand it, is that the attack was premeditated and that the fact that in trying to shoot PW1 the bullet hit the deceased does not absolve the appellants.

[16] It is now opportune for me to deal with the case concerning the

appellants in the main appeal.

THE CASE AGAINST THE FIRST APPELLANT

[17] It is not disputed that the first appellant was part of the Thabana-Mahlanya group which surrounded PWl's house. He is the chairman of some anti-stock theft unit in the area. He is a licence holder of a pump-action gun, Exhibit "1". Indeed it is not disputed that on the night in question he was carrying it.

[18] It is common cause that the first appellant was present at PWl's house on the night in question. PW1 testified that the first appellant pointed a gun at him. The following witnesses: PW3, Sello Moalosi (PW4), Tsethemang Leqela (PW5) and Thabiso Mohlalisi (PW6) testified that the first appellant threatened to shoot them all. He was holding a big gun, a fact which he, himself, concedes. He insulted them by referring to them as "likatana" (rags). He was trying to chase them away, apparently so that they could not render assistance to PW1.

[19] Meanwhile, PW3 sought from PW1 the reason why the Thabana-

Mahlanya group had surrounded his (PWl's) place. At that stage the second appellant fired a shot at PW1 but, in the process, hit the deceased fatally. A burst of gunshots was heard from the Thabana-Mahlanya group. This was followed by an exchange of stone throwing between the two groups.

[20] Testifying in his own defence, the first appellant admitted his presence at PWl's house. He, together with his co-villagers, had gone to arrest PW1. He could not explain why, if that was the case, they visited him under the cover of darkness. Nor could he explain why they carried firearms. Be that as it may, he conceded that he was armed with the firearm Exhibit "1". He testified, however, that he did not use it because he was knocked unconscious by the men from Topa village. The evidence on record is clear, however, that this was after the deceased had already been shot.

[21] It is clear from the record of proceedings that the first appellant actively associated himself at least with the second appellant. As

chairman of the anti-stock theft unit, he led the murderous operation against PW1. But more importantly, by carrying dangerous weapons such as firearms, the first appellant must have foreseen that either

PW1 or someone standing close to him might be shot and killed. Indeed the Crown's evidence shows that when he was shot, the deceased was standing close to PW1. The conclusion is, therefore, inescapable that in conducting the operation in question, the first appellant was reckless as to whether the death of PW1 or, as it happened, that of the deceased ensued or not. See S v Ntuli 1975 (1) SA 429 (A) at 437. He was, therefore, correctly found guilty of murder.

THE CASE AGAINST THE SECOND APPELLANT

[22] The case against the second appellant is overwhelming. The evidence of Marothi Ralekhela (PW2), a headman of Topa village, shows that the second appellant and one Ngoako Maphatsoe (A8 at the trial) came to him on the night in question looking for PW1. PW2 requested him to wait until the following morning since it was too late in the night. The second appellant did not heed the

headman's request but went straight to PWl's house where he started the attack as mentioned above.

[23] The evidence of the Crown witnesses PW1, PW3 and PW5 squarely placed the second appellant at PWl's house on the night in question. Not only that, the second appellant threatened to kill all the people who had come to PWl's assistance. Interestingly, the statement of Litseho Masilo which was handed in by consent at the trial as Exhibit "B" confirms this point. The statement also confirms the presence of the first and second appellants at the scene of crime. The second appellant was carrying a firearm.

[24] Both PW1 and PW3 testified that they saw the second appellant shoot the deceased who was standing next to PW1. The latter said that he actually "saw the fire coming out from the gun". He also heard the gun report. The deceased "staggered to the ground". The evidence of PW3 corroborated that of PW2. He, too, testified that he saw "the fire coming from him (the second appellant) going to my son" (the deceased).

[25] The second appellant testified on his own behalf. He conceded that he was present at PWl's house. While waiting for the chief to arrive in order to facilitate their "meeting" with PW1, the second appellant's group was attacked by Topa villagers. He testified that he heard firearm reports from Topa villagers. The firearm Exhibit "1" was "never" used because the owner thereof, namely, the first appellant, was hit right at the beginning of the fight. I may pause there to observe that the second appellant is plainly lying on this point. As will be recalled, the ballistic report established that the firearm Exhibit "1" was in fact discharged. Furthermore, the second appellant himself confirmed that this firearm was found on the side of the Thabana-Mahlanya group.

[26] The second appellant testified that he heard firearm reports on the side of the Topa villagers. This, despite overwhelming evidence that there was no shooting from that group. Finally, the second appellant denied carrying any firearm at all. Nor did he shoot the deceased.

[27] After seeing the witnesses, observing their demeanour and hearing

their evidence, the trial court believed the Crown witnesses and disbelieved the appellants. This finding is fully justified on the facts. There is no misdirection shown to exist. An appellate court is loathe to interfere with the trial court's findings of fact in the absence of a misdirection.

[28] The evidence has established that the second appellant was carrying a firearm. He was boisterous, threatening to shoot the Topa villagers who had come to PWl's rescue. He ended up discharging his firearm, shooting the deceased in the process. I consider that in these circumstances the second appellant must have foreseen the possibility of resultant death, either of PW1 or the deceased who was standing close to the former. On any account, the second appellant was reckless as to the fatal consequence and it occurred. He, too, was correctly found guilty of murder. See Ntuli's case (supra).

[29] For the sake of convenience, the appellants' appeal against sentence will be considered together with the respondent's cross-appeal on the issue.

THE RESPONDENT'S CROSS-APPEAL

[30] As previously mentioned, the Crown has sought to appeal against the discharge of the respondents referred to in paragraph [3] above. The notice of cross-appeal filed of record, however, clearly shows that the appeal is directed against sentence only and not conviction. For the avoidance of doubt, the notice of cross-appeal reads :-

> *KINDLY TAKE NOTICE THAT,*
> *the appellant having not been satisfied with the sentence imposed by the magistrate (sic) court in CR/66/02 intends to appeal against sentence. " (Emphasis added.)*

[31] Despite the fact that the notice of appeal is unmistakably directed against sentence only the grounds of appeal irregularly attack the discharge of the fourth, fifth and seventh respondents. When these difficulties were pointed out to Mr. Mokuku for the Crown at the hearing of the matter, he fairly and properly abandoned the cross-appeal against the respondents in question. Counsel adopted a correct approach, especially in view of the fact that the Crown's evidence against these respondents was very flimsy. They were not identified. The Crown failed to establish a prima facie case against

them.

[32] The Crown tried manfully, but without any conviction, I suspect, to show that this was a case in which the doctrine of common purpose should apply. There was insufficient evidence to support this view except mere suspicion. It is true that in his evidence PW3 characterised the attack by Thabana-Mahlanya group as a "mission" to kill his son. He even went to the extent of literally saying that there was common purpose. I should be slow to accept his word on the issue in view of the fact that he was not part of the Thabana-Mahlanya group at any time. He never attended any meetings with them. It follows that his evidence on common purpose is mere speculation and conjecture, coming as it does from an understandably disgruntled father of both the deceased and PW1.

[33] The correct approach in a case such as this is to consider the individual participation of each accused in the commission of the offence without reference to the doctrine of common purpose. Viewed in this way, and as I repeat, I am satisfied that the Crown failed to establish a prima facie case against the respondents in the

cross-appeal.

[34] This brings me to the question of sentence. It is well-recognised that sentence is a matter which pre-eminently lies at the discretion of the trial court. A Court of Appeal will not ordinarily interfere in the absence of a misdirection resulting in a miscarriage of justice. It is, however, salutary to have regard to section 9(4) of the Court of Appeal Act 1978. It reads as follows:-

> *"On appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore (sic) as it thinks ought to have been passed, and in any other case shall dismiss the appeal. "*

[35] As previously mentioned, the trial court suspended sentences in respect of the first and second respondents in the cross-appeal. Mr. Maieane for these respondents conceded before us that the trial court was incompetent to do so. This concession was fairly and properly made. In this regard section 314(2) of the Criminal Procedure and Evidence Act 1981 provides 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 subsections (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. "*

Murder is a Schedule III offence. Accordingly, the trial court had no power to suspend sentences once the first and second respondents in the cross-appeal had been found guilty of murder. See Nkahlana Lephosa v the Director of Public Prosecutions C of A (CRD No. 19/2006.

[36] In determining a proper sentence in this case, it is necessary to have regard to the triad consisting of the offence, the offender and the interests of society. See for example S v Zinn 1969 (2) SA 537 (A). As regards the consideration relating to the crime committed, there can be no doubt that murder is a very serious offence indeed. This Court believes in the sanctity of human life. It is in the

interests of society that people convicted of murder be put away for a long time. This is so in order to protect society itself against such people. There must also be a distinction drawn between sentences for murder and sentences for culpable homicide. Viewed in this way, I accept that the sentences in this case, ranging as they do from "a sentence to a period until the rising of the court" in respect of the third, sixth and eighth respondents, to an effective sentence of 4 years imprisonment in respect of the second respondent, are woefully inadequate for a murder conviction in the circumstances of this case. Such sentences in my view amount to a travesty of justice.

[37] Regarding the personal circumstances of the respondents, the following factors must be taken into account in addition to those canvassed at the trial:-

4) All the respondents are first offenders.

5) The respondents are unsophisticated "tribesmen" from the rural areas.

As against these factors, one must take into account the following:-

6) The respondents took the law into their own hands. In doing so, they defied the advice of the police to leave PW1 alone. They defied the headman's advice to desist from confronting PW1 at

night.

7) Some of them were armed with guns, something that must have been apparent to the rest of the Thabana-Mahlanya group.

8) By pleading not guilty, they failed to demonstrate remorse.

It is also important to recognise that the respondents' individual roles in the deceased's murder varied to some degree. Thus, for example, the sixth respondent appears to me to have played a minor role. The first and second respondents, on the other hand played an active part. The first appellant was the ringleader while the second appellant fired the shot that killed the deceased. There is, therefore, nothing to set the two respondents apart. The third and eighth respondents' role was less blameworthy than that of the first and second respondents. Their moral blameworthiness is, however, more than that of the sixth respondent.

[39] Giving this matter my best consideration, I have come to the conclusion that the most appropriate sentence that will fit the crime, the offender and the interests of society in these circumstances is the following:-

The first respondent (Molikeng Ranthithi): 12 years imprisonment.

The second respondent (Paseka Namane): 12 years imprisonment.

The third respondent (Rankae Mokatse): 10 years imprisonment.

The sixth respondent (Makoanyane Tleletlele): 8 years imprisonment.

The eighth respondent (Manesa Matli): 10 years imprisonment.

[40] In the result, the following order is made:-

9) The appellants' appeal in the main appeal is dismissed.

10) The Crown's cross-appeal against the discharge of the fourth, fifth and seventh respondents was abandoned. It is accordingly struck from the roll.

11) The Crown's cross-appeal on sentences against the first, second, third, sixth and eighth respondents is upheld.

12) Such sentences are set aside and replaced with the sentences reflected in paragraph [39] above.

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree:

J.W. SMALBERGR
JUSTICEOF APPEAL

I agree:

S.N. PEETE
JUSTICE OF APPEAL

FOR FIRST AND SECOND
APPELLANTS AS WELL
AS RESPONDENTS IN

CROSS-APPEAL: MR. T. MAIEANE

FOR RESPONDENT: MR T. MOKUKU