IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CRI) 4/08

In the matter between:

REX **APPELLANT**

and

LETSEMA THEJANE **RESPONDENT**

CORAM: RAMODIBEDI, P
SMALBERGER, JA
MOSITO, AJA

Heard : 1 October 2008

Delivered : 17 October 2008

SUMMARY

Criminal Law - Sentence following a murder conviction - The trial court backdating the whole of the 10 years sentence imposed to 31 August 1995 as a means to compensate for inordinate delay in bringing the respondent to trial - Accordingly, the respondent not ordered to serve any custodial sentence at all - The propriety or otherwise of the sentence.

JUDGMENT

RAMODIBEDI, P

[1] This appeal pertinently raises the question of the propriety or otherwise of backdating the whole of the 10 years imprisonment imposed on the respondent following a murder conviction as a means, in the learned trial Judge's words, "to compensate for the unconstitutional delay" in bringing the respondent to trial.

[2] The respondent was indicted on a charge of murder. It was alleged that upon or about 31 August 1995, and at or near Ha Mpalipali in the district of Mafeteng, the respondent did unlawfully and intentionally kill his wife, namely, one Masekoati Limakatso Thejane ("the deceased").

[3] The circumstances leading up to the deceased's senseless killing are in my view as disturbing as the history of the case itself as will become apparent shortly. Spurred on by a mere rumour, the respondent suspected the deceased of infidelity. When the latter "disappeared" for

three days and failed to return from a trip which she had undertaken by mutual consent, the respondent took this as confirmation of his suspicion of her infidelity. Upon the deceased's return on 31 August 1995 he mercilessly murdered her, using an iron rod and repeatedly stabbing her with what the respondent himself referred to as a "long" knife in the process. The respondent was arrested and remanded in custody. It is common cause that he was released on bail after six months.

[4] At his trial, which only commenced on 22 January 2008, an unconscionable delay of twelve (12) years after the alleged murder of the deceased, the respondent pleaded guilty to culpable homicide. The Crown, however, rejected this plea, insisting that the facts disclosed murder. Thereafter, the defence admitted all the depositions of witnesses taken at the preparatory examination in 2003. Since these depositions admittedly disclosed the commission of murder, the learned trial Judge had no difficulty in returning a verdict of guilty of murder with extenuating circumstances. There is no challenge directed at that finding.

[5] On 25 January 2008, the learned trial Judge sentenced the respondent to 10 years imprisonment. Acting on the recommendation of both counsel for the Crown and the respondent respectively, he backdated the sentence to 31 August 1995. This, as stated previously, was "to compensate for the unconstitutional delay", in bringing the respondent to trial. The effect of this was that the respondent did not serve any custodial sentence at all following his conviction for murder.

[6] That the learned trial Judge was justifiably perturbed by the inordinate delay in the matter admits of no doubt. This case demonstrates the ugly side of the failure of our criminal justice system in graphic terms. There is no acceptable explanation from all those concerned why an incident which took place in 1995 was only brought to trial in 2008, a period spanning twelve (12) years. To make matters worse, the preparatory examination was only held in 2003. The indictment itself is dated 30 January 2004, a period of nine (9) years after the commission of the alleged offence. The trial court was duly informed by the Crown that the

indictment was "received" by the High Court on 6 May 2004 for "enrolment" and that "it was only sent back to the DPP's [office] for trial this year 2008."

[7] Once again there is no explanation to show why the matter took four years to come to trial after the indictment had been filed with the High Court. All of the aforegoing undoubtedly serve to bring our criminal justice system into disrepute. If it will help, as I think it should, it is of fundamental importance to remember the salutary remarks of this Court per Smalberger JA in Nomoro Edwin Ketisi v

namely:-

> "18. I return to the problem of unreasonable delays in the prosecution of cases. The causes of the problem, and how it is ultimately to be resolved, are matters that fall beyond the scope of this judgment. Suffice it to say that it would seem that there are deficiencies at all levels of the criminal justice system contributing to the problem, that the problem needs to be addressed and that steps should be taken towards its resolution, or at least amelioration, as a matter of urgency. As a Court of Appeal we are concerned about the consequences of the delays and what can be done by the courts to guard against infringement of an accused's constitutional right to a fair hearing within a reasonable time - a concern that should be shared by all involved in the judicial process."

[8] I turn then to determine the appropriateness or otherwise of backdating the whole of the 10 years imprisonment imposed on the respondent. A good starting

point is to recognise that the imposition of sentence is a matter which lies within the discretion of the trial court. An appellate court is reluctant to interfere with the exercise of such a discretion in the absence of a misdirection resulting in a miscarriage of justice. It must be recognised, however, that section 9 (4) of the Court of Appeal Act 1978 confers additional power on this Court to quash the sentence imposed by the trial court and pass such other sentence warranted in law if it thinks that a different sentence should have been passed. See for example Ramaema v R 2000 - 2004 LAC 710 at 733; Molikeng Ranthithi & Another v Rex; In

the Cross-Appeal of Rex v Molikeng Ranthithi & Others C of A (CRI) No. 12/07.

[9] As this Court has repeatedly held, sentence must have regard to the triad consisting of the offence, the offender and the interests of society. See for example Basia Lebeta v Rex C of A (CRI) No. 1/08; Molikeng Ranthithi's case supra; S v Zinn 1969 (2) SA 537 (A).

[10] There can be no doubt in the instant matter that in backdating the whole of the 10 years imprisonment the trial

court, understandably angered by the unconscionable delay previously alluded to, considered only the personal circumstances of the respondent. In so doing the court clearly erred. It failed to attach due weight to the brutal nature of the offence as well as the interests of society. In this regard I discern the need to repeat the following apposite remarks which I had occasion to make in Molikeng Ranthithi's case supra:-

> "[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."

[11] Furthermore, I find no difficulty in concluding that the trial court misdirected itself in effectively equating the pre-trial delay in the matter to a period of imprisonment. I draw attention to the following apposite remarks of this Court in Sehloho Monatsi & Others v Rex C of A (CRI) No. 4/05:-

> "[5] Both counsel also pointed out that the learned Judge, in back-dating the sentence in the manner reflected in the

Case sited 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['s] 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."

[12] It follows from the foregoing considerations that the appeal succeeds. The following order is made:

(1) **The appeal is upheld**.

(2) **The trial court's order backdating sentence to** 31 **August** 1995 **is set aside**.

(3) **The sentence of** 10 **years imprisonment imposed on the respondent by the trial court is confirmed**. **Such sentence shall be reckoned from** 25 **July** 2007, **taking into account the** 6 **months period which the respondent spent in custody while awaiting trial**.

_____

M.M. RAMODIBEDI

PRESIDENT OF THE

COURT OF APPEAL

I agree: _____

J.W. SMALBERGER

JUSTICE OF APPEAL

I agree: _____

K.E. MOSITO

ACTING JUSTICE OF APPEAL

For Appellant : Adv R.R. Rammina

For Respondent : Adv N.K. Lesuthu