IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 11/2008

In the matter between:

MOLAHLEHI MOHALE **Appellant**

and

REX **Respondent**

Heard: 6 October 2009
Delivered: 23 October 2009

CORAM:
Ramodibedi, P
Smalberger, JA
Melunsky, JA

SUMMARY

Appeal against conviction of murder – undue delay in commencement of trial – single witness for the Crown – withdrawal of admission – appellant's alibi defence rejected by court *a quo* – reasons advanced for doing so unsustainable – this Court at large to reassess conviction – Crown failing to prove guilt of appellant beyond reasonable doubt.

JUDGMENT

SMALBERGER, JA

[1] The appellant and one Mojalefa Machona (to whom I shall refer as accused 2) were convicted in the High Court by Chaka-Makhooane AJ and two assessors of the murder of Mokete Lehao-hao ("the deceased") on 1 September 1995 at or near Kubake in the district of Mohale's Hoek. Extenuating circumstances were found, and the appellant and accused 2 were

each sentenced to 10 years imprisonment. The present appeal is directed against the appellant's conviction; accused 2 has not appealed against either his conviction or sentence.

[2] It appears from the record that the preparatory examination was concluded in March 1997. The indictment is dated 2 July 1997. The trial in the High Court commenced more than ten years later on 18 June 2008 and judgment was delivered on 27 June 2008. No reasons appear from the record for the inordinate delay of more than ten years from the date of the indictment to the commencement of the hearing of what was a relatively simple and straight-forward matter. This Court has, from time to time in the past, expressed in the strongest terms its concern and displeasure at the long delays in the prosecution of matters in the High Court. Such delays are inimical to the interests of both the accused and the Crown and inevitably result in the proper administration of justice, which should at all times be cherished, falling into disrepute.

[3] As will appear more fully below, the conviction of the appellant ultimately rested upon the evidence of a single witness, one Mankata Maile ("PW1"). She testified that at about 7 p.m. on the day in question she went to the appellant's shop in Kubake accompanied by one Nthabeleng. The shop was closed but the appellant offered to re-open it for them. Before he could do so three men, whom she identified as accused 2, Thabang Ratśoane ("Ratśoane") and Moshoeshoe Manyali ("Manyali"), came running towards the appellant. They were carrying sticks and claimed that the deceased was fighting with them. They immediately departed accompanied by the appellant. PW1 and her companion shortly thereafter observed a fight in progress between the group which included the appellant and the deceased. Those involved were all armed with sticks save for the appellant who was in possession of a short spear. According to PW1 the deceased, notwithstanding the odds against him, appeared initially to be gaining the upper hand. At that point the appellant picked up a stone with which he hit the deceased, causing him to fall. The appellant and his three cohorts proceeded to strike the deceased where he lay on the

ground using their sticks and, in the case of the appellant, the "spear he was holding". The assault upon the deceased was a prolonged one.

[4] At the trial it was not in issue that the deceased had been assaulted on the day in question; that he died as a consequence of the injuries he sustained in the assault; and that the circumstances of his death were such as to render the perpetrators of the assault upon him guilty of murder. What was in issue was whether the appellant and accused 2 were party to the assault upon the deceased. (In this respect it should be mentioned that by the time the matter came to trial both Ratśoane and Manyali had passed away.)

[5] The appellant's defence, as it emerged from the cross-examination of PW1 (and his later testimony), was that he had been at home at the time the deceased (who was related to him) was assaulted; that he had not participated in the assault; and that PW1 was falsely implicating him because of a previous

altercation between them which had led to the appellant ejecting PW1 from the place where she lived.

[6] At the conclusion of PW1's evidence counsel who appeared for the appellant at the time (not being Mr. Pitso who argued the appeal), unconditionally admitted the depositions of various witnesses who had given evidence at the preparatory examination. One such deposition was by a certain Lehlohonolo Matsoejane who was referred to as PW4. He claimed to have been an eye witness to the events leading to the deceased's death and confirmed that the appellant had been present at, and party to, the assault upon the deceased. The Crown then closed its case whereafter first the appellant and then accused 2 testified. The latter also denied having assaulted the deceased or having been present at the scene of the assault. No further witnesses were called by the defence.

[7] It is incomprehensible that the appellant's counsel agreed to the admission of PW4's deposition, which incriminated the appellant, in the light of the appellant's defence as put to PW1

under cross-examination and later testified to by the appellant. Presumably the admission was either made without the appellant's consent, or without a proper appreciation of its significance, for when the appellant was cross-examined with regard to PW4's deposition he vehemently denied any complicity in the deceased's death. Asked why he had not challenged the admitted statement of PW4 his response was: "Since the beginning of the evidence starting from PW1 I have been denying the evidence".

[8] Surprisingly no attempt was made at that stage to withdraw the admission of PW4's deposition. It was only during the course of his address to the trial court on the merits that the appellant's then counsel sought to have the admission withdrawn. Lengthy argument followed which culminated in counsel for the Crown stating: "I agree with my learned friend that as regards PW[4] that the admitted deposition be wholly or partly withdrawn. I agree with him in that case and then we boldly rely on [the] evidence of PW1 and we have no problem with that evidence. We boldly rely

on it." As a consequence the learned trial judge, in the apparent exercise of her discretion, ruled that the admission of PW4's deposition be expunged from the record.

[9] Whether the trial judge acted correctly in allowing the appellant to withdraw the admission previously made on his behalf is a matter open to debate. It is not clear from the record on what grounds she arrived at her conclusion in that regard. The guiding principle in this respect is that laid down by this Court (per Steyn P) in **Rex v Sehloho Joseph Maphiri** LLR 1999-2001 14 at 22E – F as follows:

> *"Clearly an accused can withdraw an admission formally made and can do so if he can show that it was not freely and voluntarily made or where e.g. the admission is equivocal and ambiguous and uncertainty arises as to what was admitted. However, an admission precisely formulated and formally made by an accused or on his instructions, and which is clear and unambiguous, is binding on such an accused and cannot – in the absence of an acceptable explanation – be withdrawn."*

[10] In line with the above decision, once it became apparent during the cross-examination of the appellant that he had no intention of admitting the vital fact in PW4's deposition that he

was a party to the assault upon the deceased then, as stated by Steyn P at 20 I-J:

> *"[T]he trial Court should in my view have enquired as to whether the decision to admit the evidence at the preparatory examination was indeed made voluntarily by the accused and was made in accordance with his instruction to his Counsel. To have proceeded with the trial without any such enquiry was in my view irregular."*

[11] In the present case no such enquiry was held into the circumstances in which the admission of PW4's deposition came to be made. Presumably the trial judge was ultimately of the view that it was inherently improbable that the appellant, in the light of his previously revealed defence, would have authorized his counsel to make the admission purportedly made on his behalf. That coupled with the Crown's attitude probably led to her decision. Be that as it may, she allowed the admission to be withdrawn, the Crown has not challenged her decision and the circumstances of the matter do not justify interference with her decision.

[12] In the light of the events which occurred it would probably have been open to counsel for the Crown to have applied to re-open the Crown case to call PW4 to testify. (I make no firm finding in that regard.) No such application was made. It may well be, having regard to the lapse of time since the murder was committed, that PW4 was no longer available to testify – the record is silent in that respect. Nor did the Crown seek to invoke the provisions of section 227(1) of the Criminal Procedure and Evidence Act 1981 ("the Act"). The end result is that the Crown case against the appellant rested solely on the evidence of a single witness, PW1. Section 238(1) of the Act provides that a court may convict a person of any charge against him on the single evidence of a competent and credible witness. But where, in a case such as the present, the evidence of PW1 that the appellant assaulted the deceased is denied under oath by the appellant, the trial court had to be satisfied, on adequate and acceptable grounds, that the evidence of PW1 was true and accurate and the appellant's denial false before it was entitled to

hold that the appellant's guilt had been established beyond a reasonable doubt.

[13] The trial court rejected the evidence of the appellant on the basis that it was "not only improbable … but false". No reasons were advanced for finding the appellant's evidence improbable. There is nothing inherently improbable in his version of the events. The record fails to reveal any acceptable reason or motive for his becoming involved in an assault upon the deceased. His apparent lack of interest and concern about the deceased's welfare at the time the deceased was being loaded onto a vehicle to be taken to hospital may reflect adversely upon him as a person, but does not necessarily justify the rejection of his evidence. The reason given by the trial court for rejecting his evidence was that he had "concocted the story of an alibi". This finding was premised on the fact (1) that he had failed to disclose his alibi to the police immediately upon his arrest and detention so as to allow his claimed alibi to be thoroughly investigated, and (2) that he failed to call witnesses to confirm his alibi that he was at

home at the time he was alleged to have assaulted the deceased. Significantly the trial court made no adverse findings on demeanor against the appellant.

[14] The basis on which the trial court rejected the appellant's evidence totally lacks foundation. There is simply no evidence on record that the appellant when arrested was asked about his whereabouts at the time of the offence or, if asked, that he failed to disclose that he was at home at the time. Nor was the appellant ever questioned when giving evidence on whether he disclosed his alibi to the police when arrested. For all we know he may well have done so. Nor is there evidence to suggest that there were witnesses available to the appellant that could have been called to confirm that he was at home at the time. The record is silent on that point. It follows that the trial court misdirected itself with regard to the basis on which it rejected the appellant's evidence, leaving this Court at large, and indeed obliged, to consider the matter afresh.

[15] The trial court found PW1 to be a “very credible witness”. The circumstances under which she claimed to have witnessed the assault upon the deceased were such that, coupled with the fact that the appellant was well known to her, the reasonable possibility of mistaken identity on her part can be ruled out. What had to be considered was whether she might have had reason to falsely implicate the appellant. In this respect it must be remembered that the appellant claimed that PW1 was ill-disposed towards him because of certain past events, something she denied.

[16] Apart from certain minor discrepancies in PW1’s evidence which can be attributed to the lapse of time between the event and her testimony, there is one important aspect of her evidence that gives cause for concern. She claimed that the appellant, during the assault on the deceased, was armed with a short spear. She did not describe the manner of its use, but a spear is essentially a stabbing instrument. However, while the post-mortem report shows that the deceased suffered severe head

injuries, presumably from the application of blunt force, which led to his death, on the face of the report he does not appear to have suffered any injuries consistent with being stabbed. Nor was there any evidence of a spear being traced to the possession of the appellant.

[17] I am mindful of the fact that the trial court had the advantage of seeing and hearing PW1 and the appellant testify. While it obviously formed a favourable impression of PW1, it made no adverse findings on demeanor against the appellant. As pointed out, it rejected the appellant's evidence on grounds that are unsustainable. There may well be an element of hostility in the relationship between PW1 and the appellant. There is no apparent motive for the appellant to have assaulted the deceased, to whom he was related. It is trite that the onus rested on the Crown to rebut the appellant's defence of an alibi. In my view it is impossible on the appeal record to conclude beyond a reasonable doubt that PW1's evidence of the appellant's involvement in the assault upon the deceased is true and

acceptable, and the appellant's denial false. In the circumstances it follows that the appellant was entitled to his acquittal and the appeal must succeed. Had the trial not been so long delayed, had there been more witnesses available to the Crown than seems to have been the case, had police and medical evidence been led in relation to matters that have caused uncertainty or concern, the outcome of the matter may well have been different.

[18] In the result the appellant's appeal succeeds and his conviction and sentence are set aside.

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree : _____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree : _____
L.S. MELUNSKY
JUSTICE OF APPEAL

For the Appellant : Adv P. Pitso

For the Respondent:	Adv T.M. Mokitimi Adv P.K. Joala