IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CRI) No.1/2011**

In the matter between:

THABISO KOPANO 1ST APPELLANT

LITABA RAMONE 2ND APPELLANT

AND

REX RESPONDENT

CORAM: Ramodibedi P
Howie JA
Farlam JA

Heard : 4 April 2011

Delivered : 20 April 2011

Summary

Murder - evidence obtained by unlawful means - whether trial unfair - whether any irregularity leading to failure of justice - circumstantial evidence - whether extenuating circumstances present - counsel and court addressing witnesses and accused as "witness" and "accused" – unacceptability of such practice.

JUDGMENT

HOWIE JA

[1] Shortly after 6.00 on the 10th January 2005, the deceased, Busang Justice Rotheli, was shot dead as he lay in a hospital bed in Maseru. His death led to the prosecution of the two appellants. They were tried in the High Court before Guni J and assessors on a charge of murder (count 1) and unlawful possession of a 9mm Norinco Antor Pistol in contravention of section 3 (2) of the Internal Security Act 17 of 1966, as amended (count 2).

[2] The appellants were convicted on count 1 after which the trial court proceeded to consider whether there were extenuating circumstances. In the course of that process the court was

reminded that no verdict had yet been returned on count 2. The court then recorded a finding that the appellants were guilty on that count. The court's eventual finding on extenuating circumstances was that there were none. The appellants were then sentenced to death. No sentence was passed on count 2.

[3] The appellants appeal against the convictions and the finding that there were no extenuating circumstances.

[4] As regards the shooting, it is not in dispute that on 26 December 2004 the first appellant arrived at the police station at Thaba-Tseka and reported that he had fought with the deceased in connection with a vehicle. The appellant's clothes were blood-stained and he handed over a knife. At the scene of the alleged altercation the police found a Toyota Hilux, and observed that a window on the right side was broken and that there were blood-stains inside it. They also were shown the deceased at a nearby house. He had multiple open wounds on the head, neck and chest.

The deceased, who was unable to speak, was taken to a local hospital and ultimately to the Queen Elizabeth II Hospital in Maseru where the shooting took place. As result of the events on 26 December the first appellant was detained in custody from which he subsequently escaped after some days.

[5] According to the police witness who received the first appellant's report, he bore no sign of injury himself. That evidence was not challenged.

[6] It is common cause that the appellants were in the immediate vicinity of the deceased's bed in Ward 4 when he was killed. It cannot be disputed that he was shot with intent to kill. I shall refer below to the appellant's evidence as to why they were there.

[7] On 14 or 15 January 2005 (the uncertainty is not important) the police found a 9mm Norinco Pistol concealed in a livestock kraal on the property occupied by the first appellant at Thaba-Tseka.

[8] The prosecution evidence is that the place where the firearm was concealed was pointed out to them but that evidence is inconclusive as to whether it was pointed out by the first appellant, the second appellant or both appellants. For their part, the appellants put it to the relevant police witnesses through their counsel, and testified in due course, that they had been assaulted in police custody in order that they should show the police where the murder weapon was. I shall revert to this aspect later.

[9] There is clear evidence that the pistol thus discovered was kept in police custody until it was handed to a police ballistics expert for examination and testing.

[10] There is also indisputable evidence that two bullets were removed from the deceased's body in the course of a post-mortem examination and that three cartridge shells were found on or near the deceased's bed immediately after he was shot. The bullets and

shells were also kept in police custody until delivery to the ballistics expert.

[11] Submissions by the appellants' counsel that the Crown evidence failed to detail in all respects how the firearm, bullets and shells were noted in police records, and who dealt with them at every stage, do not advance the appellants' case. The reason is that on 17 January 2005 Senior Inspector Pali, the ballistic expert, examined and tested the relevant articles and concluded that the Norinco Pistol was the murder weapon. He gave that evidence at the trial. It was convincing and not diminished in any respect by cross-examination. His observations cannot have been affected by how or by whom the articles were stored between their finding and their testing unless someone with malign intent (who would have had to possess expert knowledge himself) caused the bullets and shells to be marked as if they had been fired from the Norinco Pistol when they had in truth been fired by another firearm. That theory was, understandably, not put to the Crown witnesses. It has no evidential basis and is hopelessly far-fetched.

[12] The first appellant's evidence was that he went to the Queen Elizabeth II Hospital to visit his aunt's son. His account in evidence-in-chief was brief. He said he was looking for the boy in a particular ward (obviously it was the ward in which the deceased was) when he heard a gunshot. He immediately ran. While running he heard two more shots. He looked back and saw that the second appellant was in the ward, following him. Before that he was unaware that the second appellant was at the hospital. They then left the hospital.

[13] Under cross-examination his account was the following. He was told over the telephone on Friday 7 January by his mother that the boy was seriously ill in that hospital and, because he was in Maseru for other reasons, he volunteered to go and see the child. However, he did not go to the hospital over the weekend, he only went on Monday the 10th . He gave no particular reason to wait till Monday. He just chose that day as the one on which to pay the visit. Nor did he explain why he went so early. At the hospital he was told the boy was in ward 4. Despite looking all through ward 4

he failed to find him. Eventually the appellant went outside into the hospital yard and telephoned his mother who told him that the boy had been released on the previous Friday.

[14] His account under cross-examination fails to explain how the second appellant happened to be with him when the shooting occurred and it conveys that he left the hospital not because of the shooting but because he could not find his aunt's son. Obviously, once he was told the boy had been discharged there was no reason for him to re-enter the hospital.

[15] His version became even more questionable under further cross-examination. He said that the reason why the second appellant was in Maseru at the time was because the latter, who was his paid employee, had come to Maseru to bring him money. This the second appellant gave him very early in the Monday morning before he left for the hospital. That done, the second appellant did not go anywhere. Later still he said that the second

appellant had not arrived in Maseru early on Monday but had been there from the Friday before. This made it even more implausible that they would wait until early Monday morning for the handing over of the money.

[16] The second appellant's evidence as to his presence at the hospital was that he had gone there to look for the first appellant. He confirmed having arrived in Maseru on the Friday and having given money to the first appellant earlier on the Monday morning. He said that he thereafter went "to deliver the money" to an attorneys' firm but that its offices had not yet opened. He then decided to follow the first appellant, who had told him he was going to ward 4. While looking for the first appellant in the ward he heard the gunshots and ran out of the hospital. The second appellant said that the money he brought to Maseru was given to him by the first appellant's wife and that it was destined for the first appellant's attorney.

[17] The story of the alleged visit to the sick child is plainly inconsistent, improbable and illogical. So, to a lesser extent is the account concerning the money but the latter aspect could conceivably constitute a transposition of events that did indeed occur but at some other time. It is really the reason for the hospital visit that is so improbable it is not reasonably possibly true. That means it was false beyond reasonable doubt. The trial court's conclusion on credibility was not thus expressed but plainly the appellants were, understandably, not believed in this regard.

[18] Reverting to the alleged pointings out by the appellants, the trial court found these to have been proved. I have not recounted the evidence each appellant gave as to alleged violations of their rights by the police and I shall say why presently. What is important here is that the defence evidence of police assaults was foreshadowed by relevant and appropriate cross-examination by defending counsel. It was then the trial Judge's duty, if the prosecution remained intent on proving the alleged pointing out, as indeed it did, to hold a trial within the trial. That requirement of

criminal procedure is so well known the Judge cannot have been unaware of it. Conceivably, she may have overlooked it. Without question, however, an interlocutory trial to determine the admissibility of the pointing out should have been held before the trial court was in a position to make the finding, first that the police evidence as to the alleged assaults was to be believed beyond reasonable doubt and second, that the evidence of the pointing out was admissible. The trial court's approach to this aspect therefore constituted an irregularity.

[19] The question, then, is whether there was a failure of justice: See section 329 (2) of the ***Criminal Procedure and Evidence Act 1981.***

[20] The South African Constitution contains a provision [section 35 (5)] which says that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be

detrimental to the administration of justice. The Lesotho Constitution does not have such a provision but unfairness in a criminal trial would be contrary to the provisions of section 12 and would certainly bear on the question whether a failure of justice had resulted.

[21] The essential question is whether the pistol constituted evidence obtained as a result of unlawful police conduct, assuming in the appellant's favour, purely for argument's sake, that such conduct occurred and assuming further that if an interlocutory trial had been held on this aspect unlawful police conduct could not have been excluded beyond reasonable doubt.

[22] Plainly, a pointing out is an admission by conduct and will often also imply guilty knowledge. If the pointing out is the product of unlawful police conduct (ignoring whether any real evidence has been discovered as a result) the pointings out will be evidence obtained as a result of such police conduct. Real evidence

discovered as a result of such conduct, however, stands on a somewhat different footing. Real evidence will include a physical object - in the instant case the pistol. In the Canadian Supreme Court case of ***R v Collins (1987) 28 CRR 122 at 137, [1987] SCR 265 at 284***, it was said:

> "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair…"

Later in that judgment it was said:

> "…the evidence obtained as a result of the search was real evidence, and while prejudicial to the accused as evidence tendered by the Crown usually is, there is nothing to suggest that its use at the trial would render the trial unfair."

Collins was followed in the later Canadian Supreme Court case of ***R v Jacoby (1988) 38 CRR 290 at 298***.

[23] Real evidence may be discovered as a result of police duress but cannot have been obtained, in the sense that admissions are obtained i.e brought into existence, by such duress.

[24] In the South African Supreme Court of Appeal case ***S v M 2002 (2) SACR 411 (SCA***) it was indicated that real evidence procured by illegal or improper means does not involve self-incrimination. Unlike, in other words, evidence that an accused made an admission verbally or by a pointing out.

[25] In my view these cases also reflect the law of this country in the present aspect. It remains to mention that it was not the first appellant's case that he had pointed anything out in any event.

[26] The prosecution therefore established as regards the first appellant that:

a) He severely wounded the deceased on 26 December 2004 as a result of ill-will he bore the deceased arising out of

something that had occurred at an earlier time. What that was need not be more closely considered for the purposes of the Crown case on count 1. There was enough to establish a murderous motive on his part *vis-à-vis* the deceased;

b) He was in the immediate vicinity of the deceased's bed when the latter was murdered;

c) The murder weapon was concealed on his property between the time of the killing and its finding four or five days later;

d) His evidence as to the hospital visit was false beyond reasonable doubt.

[27] The argument by counsel for the appellant was that the evidence implicating the first appellant was only circumstantial and that the chain of such evidence was insufficiently strong.

[28] Facts (a) (b) and (c) above were either not in dispute or not disputable. If the killer was somebody else it is a more than

remarkable coincidence that he had the same motive at all but, in addition, that he decided to kill the deceased at the very moment that the appellant was near the deceased's bedside. Further, the real killer must have decided, having noticed the appellant at the murder scene, no doubt among many others, to pick on him (if he knew him) or to find out who the appellant was (if he did not know him) so that he could hide the pistol on the appellant's property and divert attention away from himself.

[29] On count 1, the proved facts are in my view consistent with the first appellant's guilt and they exclude all other reasonable inferences except that of his guilt. Despite the irregularity referred to earlier, there was no failure of justice. He was therefore convicted on sufficient evidence and his appeal against that conviction cannot succeed.

[30] As regards the second appellant, only facts (b) and (d) above apply. As to (b) his status as employee of the first appellant

provided him with reason enough for being in the company of the first appellant and for putting up a false story in support of his employer. But that is not enough, despite one's reasonable suspicions, to justify the inference that he knew what the first appellant intended to do, and that he himself also had the intent to kill. There is also insufficient evidence to warrant the inference, if he did know where the pistol was hidden, that he participated, with the necessary wrongful intent, in its concealment.

[31] It follows that the second appellant ought to have been acquitted on count 1. The necessary consequence is that he ought to have been acquitted on count 2 as well. His appeal must therefore succeed on both counts.

[32] For the reasons already stated, the first appellant must have had possession of the pistol when he fired the fatal shots and when by inference, he hid it. He was therefore proved guilty on count 2. [The argument that the make of pistol was wrongly stated in the

charge sheet takes the case nowhere. The evidence would have cured the defect in the charge had it been essential to include the make of pistol in the particulars of the charge: section 58 of the ***Criminal Procedure and Evidence Act***. But plainly that was a matter which it was unnecessary to prove: section 154 (1) (a).]

[33] The next issue concerns the matter of extenuating circumstances. The events of 26 December 2004 have already been mentioned. In addition, the first appellant said in his evidence that the altercation of that date was preceded by a series of precipitating events. First, the deceased sold him a 4 x 4 vehicle in 1999. During 2002 the deceased, with a gang of accomplices, robbed him of that vehicle at gunpoint. On 26 December 2004 they met again. The appellant asked the deceased where the vehicle was. The deceased's response was to take out a gun and to shoot at the appellant. That led to his stabbing the deceased in self-defence, so he said. He was then arrested for wounding the deceased. He said that in custody the police assaulted him, the obvious implication being that they wanted him to admit guilt for what he had done to

the deceased.

[34] It will be recalled that the Crown evidence was that on 26 December 2004 the appellant did not appear to have been injured and that he was detained in police custody from which he escaped. He testified that after escaping he was eventually medically examined. As part of his case he tendered, and the court admitted, a police medical form RLMP 47 bearing the date 3 January 2005 which he was given to submit to an examining doctor at Queen Elizabeth II Hospital. After completion at the hospital the form (according to the accepted rendering of its contents by defence counsel) recorded the findings that the appellant had sustained bruising around both breasts and had pain in the head and pain on the left lower chest, which injuries were the likely result of kicking with considerable force.

[35] The inevitable conclusion is that the appellant, between 26 December 2004 and 3 January 2005, that is to say, some seven

days before the murder, had been assaulted in police custody. This naturally does not excuse any of this appellant's conduct but it serves to shed light on the state of mind with which he went to shoot the deceased.

[36] The deceased had sold him a vehicle. By inference the appellant had paid for it. The deceased then staged a hijacking to rob him of it. When they next met the deceased took the offensive and he responded. Accepting that he did not defend himself on that occasion but was the aggressor himself, he had nevertheless, on his unchallenged evidence, been sorely provoked. Having been incarcerated as a result, he was then assaulted in custody.

[37] On the evidence, accepted or indisputable, there was a substantial history of enmity on the part of the appellant engendered by what, objectively viewed, was seriously provocative conduct by the deceased, together with the consequence of unlawful conduct by the police while he was detained in custody. The

appellant could understandably have seen these unfortunate events as cause and effect.

[38] The trial court dismissed the appellant's evidence in this regard because the issue had not been raised in cross-examination of the Crown witnesses and no evidence had been given that the hijacking had been reported to the police. This approach was misdirected. When the cause of the 26 December event was canvassed with the first Crown witness she said she did not know but had heard that it concerned a motor vehicle. She was the only possibly relevant witness and it would have been pointless, given her answer, to have cross-examined her further. As to the absence of any report to the police, this was not taken up with anybody. Even if there was an onus on the appellant, what he said about the bad relationship between him and the deceased was not challenged. And the hijacking incident, according to the appellant, was reported at Mokhotlong Police Station. It was open to the court itself to call evidence, in the exercise of its powers and in order to attain a just result.

[39] Plainly, for the appellant to have done what he did at the hospital there was probably some powerful influence operating on his subjective state of mind at the time. On the evidence the only possible source of that influence was anger or frustration arising from what, over the preceding years, had occurred between him and the deceased involving what he, by necessary inference, regarded as the deceased's unlawful and intolerable conduct. That, in my opinion, objectively viewed, diminished the appellant's moral guilt. The trial court ought therefore to have found that there were extenuating circumstances.

[40] It follows that the sentence of death imposed on the first appellant was not compulsory. It was accepted by counsel on both sides that it was appropriate for this court to assess sentence on count 1 afresh.

[41] The facts do not warrant discretionary imposition by this Court of the death sentence. But they also do not warrant a

sentence of ten years or less as unrealistically suggested by counsel for the appellant. The killing was obviously premeditated and was carried out brazenly with conspicuous and reckless disregard for the concerns of anybody who might witness it. Although this could be said to be indicative of an offender driven to distraction it was, when all is said and done, really indicative of the calculated execution of a defenceless victim.

[42] I consider that the facts call for a very long term of imprisonment and that which fits all the relevant considerations is one of 25 years. The sentence on count 1 must be altered accordingly.

[43] The appellant was not sentenced on count 2 and it was common cause that his case must be remitted for the trial court to hear argument on sentence and then to impose an appropriate sentence. It remains to refer to certain features of the trial which cause concern and call for comment.

[44] The trial was unnecessarily prolonged by continuous interruptions either by the Judge or by counsel. Very few, if any of these were necessary or even reasonable. Where pointless or unnecessary interjections or objections come from counsel it is the duty of the Judge to stop them or discourage them. Where they emanate from the Bench an unfortunate and undesirable example is set. In this case interruptions are evident every few pages. Witnesses must by and large be left to give their evidence unhindered. Only objections of substance should be entertained and it behoves counsel and courts sufficiently to prepare themselves for a case to be able to recognize what are points of substance and what are not.

[45] Then it is necessary to disapprove of a tendency in this case which may, I apprehend, be a fairly general practice. Counsel and the Judge were guilty of it in this case. It involved calling witnesses and the accused not by their family names but by the appellation "witness" or "Accused" or "Accused persons" as the case might be.

In ***S v Gwebu 1988 (4) SA 155 (W)*** at ***158 F-H*** it was said:

> "This depersonalizing of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper names. Members of the public who appear in our courts, whether as accused or as witnesses, are to be treated courteously and in a manner in keeping with the dignity of our courts."

See, too, ***S v Abrahams and Another 1989 (2) SA 668 (E)*** at ***669 E – 670 B.***

[46] Having said that in regard to addressing witnesses and the accused, it is necessary, finally, to refer to the language which the Judge used towards counsel for the accused. We were assured that the words appearing in the record were not those of the interpreter but those of the Judge speaking in English. At p 243 of the record the Judge said to counsel:

> "…. You know that a lawyer is mini encyclopedia, do not play such a damn fool simply to waste time…"

And at page 291:-

> "I do not know what relevance is the evidence you have (led) for the whole day, it has not touched a damn thing about the case that is before court against your client…."

[47] No one should imagine that the patience of judicial officers is not severely tested at times. We are aware of that. But the use of "damn fool" and "damn thing" is inconsistent with the dignity of our courts. It is degrading and disrespectful towards counsel. It is unquestionably language unbecoming a presiding judicial officer and more particularly a Judge of the High Court. It calls for, and hereby elicits our stern disapproval.

[48] In the result the order of this Court is as follows:

1. The convictions of the second appellant on both counts are set aside.

2. The conviction of the first appellant on count 1 is altered to read "guilty of murder with extenuating circumstances".

3. The sentence of death imposed on the first appellant on count 1 is set aside and substituted therefor is a sentence of imprisonment for 25 years.

4. The matter is remitted to the trial court for the imposition of sentence on the first appellant on count 2 after hearing such evidence and argument as the appellant and the Crown seek to present.

C. T. HOWIE

Justice of Appeal

I agree

M. M. RAMODIBEDI

President

I agree **I. G. FARLAM**

Justice of Appeal

For the Appellant : Adv. M. A. Rafoneke

For the Respondent : Adv. P. K. Joala