IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 7 OF 2010

In the matter between:

THE CROWN	APPELLANT
and	
RASELEBELI MABOEE	FIRST RESPONDENT
ANTIPASE SELOMO	SECOND RESPONDENT
THAPELO NTAOPANE	THIRD RESPONDENT
MALEFANE THAMAE	FOURTH RESPONDENT
MOCHEMA MOCHEMA	FIFTH RESPONDENT
MONYANE MOKOATSI	SIXTH RESPONDENT
BULARE MOILOA	SEVENTH RESPONDENT

CORAM: SCOTT, J A
HOWIE, J A
FARLAM, J A

HEARD: 12 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Criminal law – common purpose in relation to a series of offences – adequacy of sentences – unusual circumstances in the wake of military incursion into Lesotho.

JUDGMENT

HOWIE, JA

[1] On 23 September 1998, having escaped from hostilities at Makoanyane Military Barracks in Maseru involving SADC troops and the Lesotho Defence Force (LDF), a group of armed men mainly comprising LDF soldiers committed a series of acts as a result of which the respondents (allegedly members of the group at various times) were charged in the High Court before Nomngcongo J and assessors on multiple counts. The trial began in August 2005 and concluded in June 2010.

[2] The respondents were all convicted on two or more counts ranging from murder and robbery to malicious injury to property. The heaviest sentence imposed on any of them was five years imprisonment and the lightest, 4

years. The sentences imposed on each were ordered to run concurrently.

[3] The Crown appealed against the sentences, contending that they were unduly lenient. The appeal evoked cross-appeals by the respondents against their convictions.

[4] With the aid of a commandeered Toyota van the group proceeded to Mafeteng police station. Their aim, allegedly, was to obtain arms and ammunition there with which they would return to the Barracks and join the LDF efforts against the SADC incursion. As it happened, despite their having succeeded in obtaining police firearms and ammunition they did not return to the battle arena. In the course of what was an event-filled day their proclaimed flame of belligerence in due course fluttered and eventually died.

[5] To obtain the arms and ammunition the plan was to declare their object and secure the weapons peacefully if possible. If there was resistance or retaliation they would use force. Faced with the threat posed by the armed group and their insistent demand the police capitulated and opened their armoury. In the course of the taking of police arms and ammunition a woman member of the police contingent was fatally shot by one of the group. This resulted in a charge of murder (count 1). The taking of the arms and ammunition was the subject of a charge of robbery (count 2). The firearms seized were rifles and pistols. The rifles included an AK-47, two M65's and and LMG.

[6] From the police station armed members of the group drove to the Mafeteng Hospital and subsequently the Mafeteng Hotel. At the hospital they demanded and took

medical supplies and at the hotel, having demanded food and drink, they took, and were given, a variety of drinks and food. These events resulted in charges of robbery of the hospital staff (count 3) and robbery of the hotel personnel (count 4).

[7] In the course of the events referred to thus far members of the group also shot and damaged four public telephones and telephone booths. This led to a charge of malicious injury to property (count 5).

[8] The day's main events terminated in the taking of three Toyota Hilux vehicles, one at Motsekuoa and two at the Matelile road camp of the Roads Improvement Unit (RIU). The latter incident also included the taking of petrol and diesel fuel. The consequence was the preferring of two more robbery charges (counts 7 and 8).

[9] The respondents were legally represented on trial and on appeal. Having pleaded not guilty to all the offences laid to their charge they proffered evidence and arguments which ranged in degrees of unacceptability from the unbelievable to the frankly absurd. In the respects in which the trial court expressly or implicitly found against them on issues of credibility that is not in the least surprising. The predominant issues on appeal therefore concern the strength of the evidence connecting a respondent to a particular alleged offence.

[10] It is appropriate to consider the convictions before dealing with the Crown's appeal. For convenience the respondents will be referred to as the accused and according to their numbering in the court below.

[11] The evidence on count 1, according to the Crown's argument, showed that the deceased was shot because she posed an apparent threat and that this fell within the scope of the plan to use force if the police resisted. Reliance was also placed on the evidence of Superintendent Makaliana that he was told if he did not co-operate he and other officers would be killed.

[12] The trial court's reasons for convicting on this count were that police resistance was foreseen and would be met with force. Because the deceased was perceived as a threat she was shot. Her shooting therefore was encompassed by the common purpose, *inter alia*, to murder.

[13] There is nothing but inadmissible hearsay evidence as to who shot the deceased so that one cannot determine why she was shot. What is clear is that she was shot after

the police had capitulated and opened the armoury. It was not shown to be part of the group's common purpose to shoot anybody if its objective had already been attained, as it indeed it had. It is also clear that the deceased was not shot because she was trying to prevent the group's departure. There is therefore insufficient evidence, even if the individual perpetrator intended to kill, to link any respondent to her killing by way of the doctrine of common purpose. The convictions and sentences of accused 3, 7 and 8 on count 1 must therefore be set aside.

[14] The taking of the police arms and ammunition was effected at gunpoint and accompanied by the threat to kill if there was resistance. There is no ground for thinking that the group intended eventually to return any of these articles. No credible evidence established or even hinted at that intention. On the evidence it is not a reasonable

possibility. On the contrary, and on the assumption that at some initial stage of their escapade the group did intend to resume the fight against the SADC forces, they could at most have foreseen that this weaponry would be added to the stocks of the LDF to use in combat. In that event the ammunition would be consumed. As for the firearms, they would be used in battle for as long as they functioned. If they ceased functioning they would probably have been cast aside or would have fallen to the enemy if their bearers succumbed. At best for the defence there was, by inference, indifference on the part of the accused as to the eventual fate of their spoils. The elements of robbery were thus established as regards count 2.

[15] Those convicted on this count were accused 1, 2, 3, 7 and 8.

[16] Accused 1 was a member of the Mafeteng police. He tendered the explanation that his instrumentality in aiding the group was induced by fear for his life. His explanation for departing with the group was that they provided the means by which he could escape the attack which he foresaw would be launched against the police station by hooligans. Crown evidence showed him to have been an active and willing supporter of the group as does the evidence as to later events. The following day he was seen in possession of an LMG rifle. His evidence was not reasonably possibly true. He was correctly convicted on count 2.

[17] Accused 2 was not originally one of the group. A member of the LDF, he had fled the fighting in Maseru and had come to Mafeteng police station to visit a relative. On arrival he apparently cut a drab and pathetic figure. Once

the group arrived, however, his attitude changed. The Crown evidence, correctly preferred to his, showed him to have become an active member of the group. Indeed, on their departure from the police station he was in possession of a police AK-47. By inference it was the same weapon he was seen in possession of three days later. He, too, was correctly convicted on count 2.

[18] Accused 3 was not shown to have committed any act perpetrated in intentional furtherance of the common purpose in relation to this count. He was present at the police station premises but said he did not proceed with the group to the hospital and hotel. He admitted rejoining the group on their way back to Maseru and said that their transport was all that was available to him. The high point of the Crown case is the evidence that force would be used to get arms if necessary and the evidence of Private Seleke

who said accused 3 was in possession of two firearms at the police station. It was put to him in cross-examination that they were accused 7 and 8's firearms. He said he could not deny that. As it was the Crown's case that accused 7 did indeed leave his firearm outside the police premises this would lend credence to the defence of accused 3. The trial court made no express credibility findings adverse to him but his evidence that the plan did not include the use of force was, by clear implication, rejected. However, his evidence that after the shooting he took no further part in the relevant events was not dealt with by the trial court. It may reasonably possibly be true that he withdrew from the common purpose as a result of that incident. Nevertheless, the robbery at the police station was all but complete before the shooting and he was therefore culpably complicit in the robbery up to that stage. The case against accused 3 on this count was

therefore proved. His conviction and sentence on count 2 must stand.

[19] The defence of accused 7 and 8 on this count was that the arms and ammunition were given freely and voluntarily. They persisted with this ridiculous story on appeal. It must be rejected. Their convictions on count 2 are unassailable.

[20] Count 3 concerns the events at the hospital. Accused 3 was convicted on this count but the single evidence of his presence there was contradicted by his evidence that he had by then withdrawn from the group's activities. In the absence of rejection by the trial court of this evidence after proper consideration the case against him on this count was not proved. (Despite his conviction he was not in fact

sentenced for this offence.) His conviction on count 3 must be set aside.

[21] The Crown evidence proved conclusively that robbery was committed at the hospital and that accused 7 and 8 took leading roles in its commission. Their defence that the medical supplies were freely handed over is, as already mentioned, not credible. Accused 1 and 2 did not enter the building but were part of the group that went there. The only reasonable inference is that they knew of the intention to rob and continued their association with the group with the intention that the offence be committed. Accused 1, 2, 7 and 8 were therefore correctly convicted on this count.

[22] Essentially the same considerations pertain to the events at the hotel save that accused 1 and 2 were not put on their defence on count 4. Their conviction was thus in

conflict with the learned Judge's ruling at the end of the prosecution case. Very properly, counsel for the Crown conceded that, in these circumstances, their convictions should not be upheld. I agree. There is no basis on which to doubt the correctness of the convictions of accused 7 and 8.

[23] There is substance in the submission by counsel for the Crown that the evidence as to the events at the hotel, particularly the taking of liquor and the cynical remark that the hotel could look to the Prime Minister for payment, leads strongly to the inference that the group's mission by this stage no longer had a military motive, if indeed it ever did.

[24] The shooting of the telephone booths which followed serves to strengthen that inference. Any suggestion that

the SADC operation might in the slightest have been hampered by these acts of vandalism would be divorced from reality. Accused 7 was clearly proved guilty on count 5.

[25] The subsequent taking of the vehicles occurred after the group had met a large number of other LDF members at Motsekuoa including accused 5 and 6. The others said they were looking in vain for petrol. What their destination was, is uncertain. However, the hotel food was unloaded and those present partook of it. It was then that the RIU Toyota Hilux, the subject of count 7 came on the scene. Accused 6 stopped it and spoke to the occupants after which they alighted. Accused 2 and 5 got in, accused 2 being the driver. They proceeded from there to Matelile where the former occupants of the van said there was petrol to be had. All the other soldiers that were at

Motsekuoa followed in convoy. At the RIU camp at Matelile the armed soldiers frightened the workers there into submission. The intruders filled their vehicles with petrol and diesel and demanded more vehicles. They eventually seized two. From this point the various vehicles, in some of which the various accused who were present there were travelling, dispersed. There is no evidence that any of these people, including any accused, made for the scene of the fighting in Maseru or intended to do so. They appear to have all gone their separate ways. The inference is compelling that all concerned were indifferent whether the vehicles' owners ever recovered them.

[26] Accused 5 did not testify. Accused 2 as already mentioned was a willing and active participant in the initial group and no less active in the events at Motsekuoa and Matelile. Accused 6 took up the refrain of accused 7 and 8

that the vehicles and fuel were handed over freely and voluntarily. That defence is no less worthy of rejection in his case than in theirs. It follows that accused 2, 5 and 6 were correctly convicted on counts 7 and 8.

[27] It remains, as far as the convictions are concerned, to say that counsel for the accused before us stressed the trial court's omission to warn itself of the risks inherent in convicting on the accomplice evidence which provided the mainstay of the prosecution case. It is settled law that such risks are adequately safeguarded against if there is corroboration implicating the accused or by the consideration that the merits of the Crown evidence and the demerits of the accused's evidence are beyond question. Both forms of safeguard are present in this case and, in addition, accused 5 did not testify.

[28] To sum up the outcome of the cross-appeals on conviction:

Count 1: The cross-appeal of accused 3, 7 and 8 succeeds.
Count 3: The cross-appeal of accused 3 succeeds.
Count 4: The cross-appeals of accused 1 and 2 succeed.

Save as above, the cross-appeals fail.

[29] Turning to the Crown's appeal and the matter of sentence, the trial Judge bore in mind the traumatizing effect of the events at the Barracks which the accused, save for accused 1, had earlier experienced. He found, however, that this could not justify what they did afterwards. As against that, the Judge considered that the delay in bringing the matter to finality militated against the

imposition of the lengthy imprisonment sentences for the imposition of which the prosecution had contended.

[30] Before this Court, Crown counsel argued that the effective sentences imposed were inadequate bearing in mind that a police station was depleted of weapons in a time of turmoil when there was need for law and order; that the accused's efforts had nothing to do with repelling invaders; that the accused, members of the police or defence forces, were meant to uphold law and order, not flout it; that the attitude they displayed at the various sites of crime evinced arrogance and disregard for the interests of the robbery victims; and that none had displayed any remorse. Moreover, it constituted a misdirection to impose the same effective sentence on most of the accused.

[31] For the accused it was submitted that no increase in sentence was called for. And accused 1, 2, 3 and 5, who cross-appealed against their sentences, contended for a reduction in sentence.

[32] It seems to me that the trial Judge's imposition of the same effective 4 years sentence on all but two of the accused irrespective of the number of counts involved constituted a failure properly to differentiate between the varying degrees of blameworthiness of the different accused. It was a misdirected approach which renders this Court at large to consider sentence afresh in respect of those appellants whose sentences are liable to appeal or cross-appeal.

[33] The relevant events happened nearly fourteen years ago. Accused 2, 3 and 8 were then 21 or younger and the

rest were in their mid twenties. They would have been impressionable young men, no doubt acting in the aftermath of the adrenalin surges they would have experienced in the confrontation at the Barracks. It is not the Crown's case that they deserted but, as already indicated, it is unlikely that they ever seriously contemplated how they would help their colleagues under siege by returning with the relatively meagre number of weapons they had managed to secure. Their escapade was ill-considered and their aims were fanciful, perhaps as befitted people of their age and the circumstances in which they found themselves.

[34] On the other hand their conduct would have instilled fear in their victims and, as argued for the Crown, Lesotho society was entitled to expect protection from its soldiers, not lawlessness.

[35] Taking the facts and circumstances of the case into account the Crown is justified in asking that the sentences of accused 7 and 8 – who took clearly leading roles in the initial and most serious offences in the series – be increased. To that extent the appeal succeeds. On the other hand, accused 2, 3 and 5 are justified in submitting that their subservient roles be recognized by a reduction in sentence. To that extent their cross-appeals on sentence succeed.

[36] The order of this Court is as follows, taking the various respondents in order:

1. <u>The first respondent (accused 1)</u>

    1.1 His cross-appeal against his conviction on count 4 is allowed. His conviction and sentence on that count are set aside.

    1.2 The appeal against his sentences is dismissed.

2. <u>The second respondent (accused 2)</u>

2.1 His cross-appeal against his conviction on count 4 is allowed. His conviction and sentence on that count are set aside.

2.2 His cross-appeal against sentence is allowed and the Crown's appeal is dismissed. His sentences on counts 2, 3, 7 and 8 are reduced to 3 years imprisonment on each count. The sentences are to run concurrently.

3. <u>The third respondent (accused 3)</u>

3.1 His cross-appeal is allowed. His convictions on counts 1 and 3 are set aside as is his sentence on count 1.

3.2 The Crown's appeal is dismissed. His sentence on count 2 is set aside. In its stead is substituted a sentence of two and a half years imprisonment.

4. <u>The fourth respondent (accused 5)</u>

The appeal is dismissed. His cross-appeal is allowed. His sentences on counts 7 and 8 are set aside. In their stead is substituted a sentence of two and a half (2½) years imprisonment per count. The sentences are to run concurrently.

5. <u>The fifth respondent (accused 6)</u>

The appeal and cross-appeal are dismissed.

6. <u>The sixth respondent (accused 7)</u>

The appeal is allowed and his cross-appeal is allowed in part and dismissed in part. His conviction and sentence on count 1 are set aside. His sentence on count 2 is set aside. In its stead is substituted a sentence of seven (7) years imprisonment. The sentences imposed on counts 2, 3, 4 and 5 are to run concurrently.

7. <u>The seventh respondent (accused 8)</u>

The appeal is allowed and his cross-appeal is allowed in part and dismissed in part. His conviction and sentence on count 1 are set aside. His sentence on count 2 is set aside. In its stead is substituted a sentence of five (5) years imprisonment. The sentences imposed on counts 2, 3 and 4 are to run concurrently.

_____

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

_____

D.G. SCOTT
JUSTICE OF APPEAL

I agree:

_____

I.G. FARLAM
JUSTICE OF APPEAL

For the State :	Adv. G.J. Leppan
For first appellant:	Adv. Senekane
For second appellant:	Mr. T.M. Maieane
For third appellant:	Adv. L.D. Molapo
For fourth appellant:	Adv. H. Nathane
For fifth, sixth and seventh appellants:	Mr. P.T. Nteso