IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO.6/ 2011

In the matter between:

TAU LEFU APPELLANT

AND

REX RESPONDENT

CORAM: RAMODIBEDI, P
HOWIE, J A
TEELE, AJ A

HEARD: 11 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Criminal Law – Sentence – Principles thereof – Appellant effectively sentenced to 36 years imprisonment for double murder – Such sentence so excessive as to be grossly disproportionate to the

offences charged in the circumstances of the case – Appeal against sentence upheld and the sentence effectively reduced to 20 years imprisonment.

JUDGMENT

RAMODIBEDI P

[1] The appellant in this matter was indicted in the High Court on two counts of the double murder of Moshoeshoe Pitikoe Moshoeshoe ("the deceased") and the latter's three month old baby, namely, Nkuebe Moshoeshoe ("the baby") respectively. He faced a further charge of unlawful possession of a 9mm pistol in contravention of s 3(1) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966 read with s 8 of the Internal Security Act No. 4 of 1999, (Amendment) Act. These offences were alleged to have taken place in or about 9 November 2005 and at or near Likoting Ha-Nyenye in Leribe district.

[2] The appellant was found guilty as charged on all the three counts. He was sentenced as follows:-

Count I (murder): 18 years imprisonment.

Count II (murder): 18 years imprisonment.

Count III (unlawful possession of a firearm):

a fine of M500.00 or 6 months

imprisonment in default of payment.

The sentences on the first two counts were ordered to run consecutively. The sentence on the last count was ordered to run concurrently with the sentences on the first two counts. The appellant has appealed to this Court on the single ground that the effective sentence in question is severe and that it induces a sense of shock.

[3] Before determining the appropriateness or otherwise of the sentence imposed by the court a quo it is necessary to give a brief outline of the relevant facts. It was the case of the Crown that on the fateful day in question the deceased was sitting under a tree at his rented premises. He was holding the baby in his arms wrapped in a white baby blanket. The two were facing each other. Suddenly the appellant approached the deceased. He was heard exclaiming "*hey you man!!!.*" He then shot the deceased and the baby with a 9mm pistol. There were four gun reports in all. The deceased fell to the ground in a pool of blood. He died on the spot. The baby was injured too in the process and was taken to hospital but sadly died on the same day.

[4] The police collected four 9mm shells and one spent bullet from the scene of the crime. They examined the

deceased's body which had sustained bullet injuries. There were two wounds on the chest area, one wound on the rib area, one wound at the back around the waist and another wound at the back towards the middle of the shoulders. The baby had an entry bullet wound at the back.

[5] The post-mortem report established that the deceased's death was due to the destruction of the lung tissue and heart as well as acute respiratory and circulatory failure. There were three penetrating gunshot wounds on the anterior chest. These exited at the back. The post-mortem report of the baby on the other hand established that the cause of death was due to the multiple destruction of the internal organs resulting in severe blood loss.

[6] In his defence the appellant claimed the ownership of the rented premises in question. He testified that he had merely gone to the premises in the company of one Setopa to repair the door locks. He introduced himself to the deceased and demanded to know why he was on the premises. He claimed that the deceased attacked him with a knife. He left, but only to return later in order to lock the doors. On this occasion the deceased rushed at him. He became frightened that the later might kill him. He then pulled the gun which was in his possession and shot the deceased. He said he was not aware that the deceased was carrying a baby.

[7] As can be seen, the appellant tried to raise self-defence. The court a quo however correctly, in my view, rejected this defence. It was simply pathetic. It is common

cause that the deceased was unarmed for that matter. It follows that the appellant was correctly convicted.

[8] This Court has repeatedly stated that sentence is a matter which lies pre-eminently within the discretion of the trial court. Such a discretion, however, is a judicial discretion which must be exercised upon a consideration of all the relevant factors. It is not an arbitrary discretion. As a matter of fundamental principle an appellate court is reluctant to interfere with sentence unless there is a misdirection or startling sentence disparity resulting in a miscarriage of justice.

[9] It is essential, too, to caution against approaching sentence in a spirit of anger since that would make it difficult for the sentencer to balance the triad consisting of

the offence, the offender and the interests of society. See S v Zinn 1969 (2) SA 537 (A) at 451.

[10] It is further worth noting that in terms of s 9 (4) of the Court of Appeal Act 1978, this Court has additional power to impose an appropriate sentence if it thinks that a different sentence should have been passed. See, for example, such cases as R v Lebina and Another 2000 – 2004 LAC 464; Ramaema v R 2000 – 2004 LAC 710; R v Shoaepane 2005 – 2006 LAC 530; Ranthithi and Another v R; R v Ranthithi and Others 2007 – 2008 LAC 245; R v Thejane 2007 – 2008 LAC 420.

[11] As will be remembered from paragraph [2] above, the sentences against the appellant on the first two counts were ordered to run consecutively. What this means is that the appellant was sentenced to an effective cumulative

sentence of 36 years imprisonment. For the reasons which will become apparent shortly, I have no hesitation in coming to the conclusion that the sentence was so excessive as to be grossly disproportionate to the offences charged in the circumstances of the case. The indictment shows that the appellant was 49 years of age when he committed the offences in question. He was 55 years old when he was sentenced to an effective period of 36 years imprisonment. This means that he would leave prison at the age of 71 years, if he was lucky to live that long.

[12] In the Botswana Court of Appeal in Christian Bashinyana Gaborekwe v The State, Criminal Appeal No. CLCLB – 072-08 (reported on line under S v Gaborekwe (CLCLB – 072-08) [2009] BWCA 67 929 July 2009), I had occasion to state the following (Moore AJP and Howie JA concurring):-

> *"[4] In the leading case of Moatshe v The State; Motshwari And Another v The State [2004] 1 BLR 1 CA (Full Bench), this Court laid down the fundamental principle that where the cumulative effect of consecutive sentences is so excessive as to be grossly disproportionate to the offences charged, this amounts to inhuman or degrading punishment. In that sense it violates s 7 (1) of the Constitution which provides that no person shall be subjected to torture or inhuman or degrading punishment or other treatment. In fairness to Mr Modie for the state, he readily conceded, and properly so in my view, that the sentences in the present matter [namely 30 years imprisonment] run foul of this principle. Nothing further need be said save to point out that the case of Motshwari v The State; Motshwari And Another v The State (supra) has been followed in such cases as Matlho v The State 2008 (1) BLR 84 (CA); Tshosa v The State 2008 (1) BLR 92 (CA); Mokoena v The State 2008 (1) BLR 151 (CA); Moatshe v The State 2008 (1) BLR 175 (CA)."*

[13] Now, the relevance of the Botswana cases on the point lies in the fact that s 7 (1) of the Botswana Constitution is identical, word for word, to s 8 (1) of our Constitution. Both sections provide as follows:-

> *"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."*

[14] Admittedly, the appeal in the present matter was not argued on the basis of s 8 (1) of the Constitution. I am prepared, however, to adopt the principle that where sentence is so excessive as to be grossly disproportionate to the offences charged the appellate court is entitled to interfere and pass an appropriate sentence. If authority be required for this proposition it is s 9 (4) of the Court of Appeal Act. This is such a case.

[15] In my view, the court a quo misdirected itself in at least two fundamental respects in sentencing the appellant, namely:-

(1) In failing to take into account provocation despite the court's finding to that effect at the stage of extenuating circumstances. At that stage the court had made the following

finding:-

> *"I have also found that an extenuating factor does exist in this case namely, the accused's belief that the premises that the deceased was renting are his and that this gave him the right to go and repair and/or change the locks to the door if resisted."*

It is essential to stress that extenuating circumstances and the imposition of sentence are completely different stages in the course of a criminal trial.

(2) In failing to recognise that the shooting of the baby was in fact one single transaction with the deceased's shooting.

[16] It follows from the foregoing that it is necessary to ameliorate the harshness of the cumulative effect of the sentences imposed on the appellant by adopting a device that part of the sentence on count II should run

concurrently with the sentence on count I as proposed in the order below. It must be stressed, however, that murder is a very serious offence which was committed in circumstances barely extenuating. The appellant deserves to be punished severely but proportionately to the offences charged.

[17] Doing the best I can in balancing the triad between the offence, the offender and the interests of society in the circumstances of this case, I consider that justice would be served by ordering that 16 years imprisonment of the sentence imposed on the appellant on count II should run concurrently with the sentence of 18 years imprisonment on count I so that the effective sentence is 20 years imprisonment.

[18] In the result the appeal is upheld. The following order is made:-

(1) 16 years imprisonment of the sentence imposed on the appellant on count II will run concurrently with the sentence on count I.

(2) The sentences on counts I and 3 respectively are confirmed.

(3) The appellant will serve an effective sentence of 20 years imprisonment.

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree: _____

C.T. HOWIE
JUSTICE OF APPEAL

I agree: _____

M.E. TEELE
ACTING JUSTICE OF APPEAL

For the Appellant: Adv. M.J. Rampai

For the Respondent: Adv. M. Tlali