

**IN THE COURT OF APPEAL OF LESOTHO**

**C OF A (CRI) NO.5/10**

In the matter between:

**MOLUPE MOKONE**

**APPELLANT**

and

**REX**

**RESPONDENT**

**CORAM:** RAMODIBEDI, P  
SCOTT, JA  
HURT, JA

**HEARD** : 12 AUGUST 2012  
**DELIVERED** : 3 SEPTEMBER 2012

**SUMMARY**

*Criminal Law – Murder – Sentence – Principles thereof – Inordinate delay in bringing the appellant to trial – The trial court failing to attach sufficient weight to the appellant’s personal circumstances – Appeal against sentence upheld – The sentence of nine (9) years imprisonment imposed by the High Court set aside and replaced with a sentence of four (4) years imprisonment.*

## **JUDGMENT**

### **RAMODIBEDI P**

[1] This appeal is directed against a sentence of nine (9) years imprisonment imposed on the appellant by the High Court on 4 March 2010 for murder with extenuating circumstances. It was alleged in the indictment that upon or about 31 October 1993, and at or near Ralebitso Village, Matelile in the District of Mafeteng, the appellant unlawfully and intentionally killed one Paulus Morie (“the deceased”).

[2] Before proceeding further, it is necessary to comment upfront on the shocking inordinate delay of 17 years in bringing the appellant to trial. This patently unacceptable state of affairs is compounded by the fact that there is simply no explanation proffered for the delay on the record as it stands. As the learned trial

Judge correctly observed, it is mind-boggling that the matter took as long as it did for a simple prosecution, requiring very little investigation as it turned out. According to the judgment a quo at page 2 thereof, the matter “apparently only came before me the courts (sic) in 2006 and was only heard on the 24th March 2010.” The latter date is itself probably a typographical error because, as pointed out above, the judgment was delivered on 4 March, 2010.

[3] Typically, contrary to several directions from this court, the record of proceedings from the High Court is unhelpful. It does not reflect any dates when anything was done in court at all. There are no dates reflecting when the appellant appeared in court or when the matter was heard. The importance of a proper record of dates in a criminal case cannot be overemphasised, more especially with regard to sentence.

[4] Quite understandably in these circumstances, in my view, **Adv Mda** for the appellant contended in the forefront of his submissions that the appellant's right to a speedy trial in terms of s 12 (1) of the Constitution had been infringed. Although this Court is ordinarily reluctant to determine a collateral constitutional attack where a matter may properly be determined on another basis, I consider that this is an exceptional case which calls for adverse comment against the prosecution and in favour of the appellant. Purely as an example, the appellant was 18 years of age at the time of the commission of the offence. He was 35 years old when he was sentenced. Prima facie, the prejudice he suffered is self-evident. I shall return to this aspect of the matter shortly.

[5] In several of its decisions, this Court has repeatedly upheld the right to a speedy trial as enshrined in s 12 (1) of the Constitution. See, for example, **Director of Public**

**Prosecutions v Lebona LAC (1995-1999) 474; Ketisi v**

**Director of Public Prosecutions LAC (2005-2006) 503.**

In the latter case, this Court quoted with approval the following apposite remarks of the Constitutional Court of South Africa in the case of **Wild And Another v Hoffert NO and Others 1998 (3) SA 695 (CC)** at 702 which dealt with a substantially similar provision to our s 12 (1) of the Constitution:-

*“The Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the State is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That, in turn, means that both State prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial.”*

[6] Turning now to sentence, it is convenient at this stage to set out a brief outline of the relevant facts. In doing so, it is necessary to start a little earlier than the fateful day of 31 October 1993 when the deceased was murdered.

[7] Sometime in September 1993, and while away at St Thomas School, the appellant received a report that his father, mother and brother respectively had been severely assaulted by the deceased and others using swords. This was after the appellant's father, who was a headman at the time, had impounded cattle belonging to the deceased and others over a reserved veld. The appellant immediately went home. His father confirmed the assaults and the appellant saw for himself the injuries on the three close family members of his. Naturally, and bearing in mind his tender age at the time of this incident, this must have traumatised and upset the appellant a great deal. Without minimising the seriousness of the offence, this is a relevant consideration in ameliorating the harshness of the sentence which might otherwise be imposed in an ordinary murder case.

[8] Against this background, the appellant testified that on the fateful day of 31 October 1993, whilst in the company of his brother, Malefetsane, he met the deceased who was walking along the road with a group of men. The deceased started throwing stones at the appellant. In the process the appellant was hit at the back as he tried to run away. In due course the two men grappled with each other. The deceased hit the appellant with a metal rod. Malefetsane managed to disarm the deceased of the iron rod and started assaulting him with it on the head. The appellant, too, assaulted the deceased. He stopped when he realised that the latter was “weak”. As can be seen, the appellant tried to raise self-defence. But this defence was in my view correctly rejected by the trial court.

[9] The Crown relied principally on two eyewitnesses, namely, ‘Makeboetsoe Ntoi (PW1) and ‘Mabafokeng Fosa (PW2). They both corroborated each other in material

respects. In a nutshell, they testified that in the afternoon of the fateful day in question the deceased was coming from church in the company of his daughter. The appellant and Malefetsane followed them from behind. Suddenly, the two young men assaulted the deceased with some “glittering objects”, even after they had felled him to the ground. They then ran away.

[10] The post-mortem report revealed that the deceased had sustained three lacerations on the head, each measuring 3 cm. There was a skull fracture. The cause of death was due to “head injury.”

[11] As this Court has repeatedly said, the imposition of sentence is a matter which pre-eminently lies within the discretion of the trial court. An appellate court is loath to interfere in the absence of a material misdirection resulting in a failure of justice. This principle is now so well-settled in this country that it is



hardly necessary to quote any authority in this matter. But, again as has been emphasised repeatedly, this Court has additional power in terms of s 9 (4) of the Court of Appeal Act 1978 to quash the sentence passed at the trial and pass such other sentence warranted in law, whether more or less severe, as it thinks ought to have been passed. See, for example, **Mohale And Another v R LAC (2005-2006) 196** at 200; **Ranthithi And Another v R; R v Ranthithi And Others LAC (2007-2008) 245** at 254. This is undoubtedly such a case as proposed below.

[12] In sentencing the appellant, the learned trial Judge correctly considered the triad consisting of the offence, the offender and the interests of justice. I regret to observe, however, that in doing so she failed to attach sufficient weight to the appellant's personal circumstances. Although correctly noting that at the time of the commission of the offence the appellant was

“at a young age and had thus not reached the level of maturity that brings with it the necessary wisdom that should guide one’s decisions and actions,” the court did not consider that at the actual age of 18 years the appellant had just missed the threshold for qualification as a child. This was so in terms of s 2 of the Children’s Protection Act 1980 which defined a child as “unmarried person under the age of 18 years.” Section 26 (1) of that Act provided that “No child shall be punished by imprisonment.”

[13] In the course of her judgment on sentence the learned trial Judge made the following remarks which have caused me grave concern:-

*“Assuming that as he testified, the accused’s family had been attacked by the deceased and others, he had no right to take the law into his own hands especially with respect to something he had no first hand knowledge of and was only told about when he went home. His and his brother’s behaviour was thus barbaric and totally unacceptable.”*

It is apparent from these remarks that the learned trial Judge put the deceased's attack on the appellant's family members not higher than an "assumption." The fact of the matter, however, is that the attack was an uncontested reality. Accordingly, these remarks amount to a misdirection. It means that the Judge was not able to appreciate the full extent of the trauma which the appellant went through at his young age as a result of the attack in question. But, having said this, it is also necessary to caution against resort to self-help. Nobody should be allowed to take the law into his/her own hands. The appellant must, therefore, be punished appropriately as reflected in the order hereunder.

[14] Finally, the learned trial Judge must be commended for making the following apposite remarks in favour of the appellant in her judgment on sentence:-

*“Furthermore, all of seventeen (17) years have come and gone without his case being prosecuted and the suspense of his knowing his ultimate fate in itself serves as some form of punishment. Had he been tried soon after the incident, he would probably have completed and/or be on the verge of completing his sentence. Surely this factor has to operate in his favour.”*

Regrettably, however, the sentence of nine (9) years imprisonment imposed on the appellant in these exceptional circumstances serves as ample proof that the Judge attached insufficient weight to the extraordinary long delay of 17 years in bringing the appellant to trial, something that is decidedly contrary to public policy and the interests of society.

[15] Doing the best I can in these circumstances, I consider that a period of four (4) years imprisonment would best fit the triad consisting of the offence, the offender and the interests of society in the matter.

[16] In the result the appeal is upheld. The sentence of nine (9) years imprisonment imposed on the appellant

by the High Court is set aside and is replaced with the following sentence:-

“Four (4) years imprisonment.”

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**M.M. RAMODIBEDI**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:

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**D.G. SCOTT**  
**JUSTICE OF APPEAL**

I agree:

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**N.V. HURT**  
**JUSTICE OF APPEAL**

**For the Appellant** : Adv Z. Mda  
**For the Respondents** : Adv. M.E. Tsoeunyane