IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CRI) NO.3/11**

In the matter between:

FUSI KHOALI **APPELLANT**

and

REX **RESPONDENT**

CORAM: RAMODIBEDI, P
MELUNSKY, JA
SCOTT, JA

HEARD : 9 OCTOBER 2012
DELIVERED : 19 OCTOBER 2012

SUMMARY

Murder – Appeal against a conviction of murder with extenuating circumstances – Conviction based on what the trial court perceived to be common purpose – The whole of the Crown evidence missing from the record – Both counsel for the appellant and the Crown agreeing to proceed on the basis of the Crown evidence as outlined by the trial Judge in her judgment – The appeal upheld – Both conviction and sentence set aside.

JUDGMENT

RAMODIBEDI P

[1] The appellant was indicted together with two others on a single count of the murder of one Takatso Ramabitsa. The murder was alleged to have occured on or before 29 January 1999, and at or near Motsemocha, Ha Tšosane in Maseru District.

[2] On 21 October 2010, an incredible period spanning more than eleven (11) years since the alleged murder took place, the appellant and one other co-accused were found guilty of murder with extenuating circumstances. They were sentenced to eight (8) years imprisonment each. I should mention, for completeness, that the third co-accused, namely, Tankiso Moholisa, passed away in the long intervening period.

[3] It is important to point out that the whole of the Crown evidence is missing from the record. In the circumstances,

both the appellant and the Crown agreed to proceed with the appeal on the basis of the Crown evidence as outlined by the trial Judge in her judgment, something that is undoubtedly fraught with potential prejudice to the appellant. I shall return to this aspect of the case in due course.

[4] The salient facts reveal the following. On some unspecified date prior to the fateful date in question, one of the appellant's co-accused, namely, Utloang Moholisa, had his firearm stolen from his bedroom. He suspected that the deceased was the culprit because he had entered the bedroom before the firearm went missing. He then reported the incident to the other co-accused. In due course the trio mounted a search for the deceased in order to arrest him. Acting on a tip off, they finally found him *"hiding"* in a house belonging to his girlfriend, one 'Maletsatsi. But, it is important to mention at this stage that the appellant's version given on oath in his defence is to the effect that he remained behind and did not go inside the house. Thereafter, he heard an alarm. He then saw the deceased running away. He had already been handcuffed.

[5] Although the appellant ran after the deceased, he says that he could not run fast enough. The deceased outran him. By the time the appellant caught up with the deceased, the latter had already fallen to the ground. He was bleeding.

[6] According to the judgment a quo, the Crown called six (6) witnesses, namely, D/Tpr Thaane (PW1), Tšepo Sekhojane (PW2), Ex Police woman 'Mapontšo 'Neko (PW3), 'Mankholi Ramabitsa (PW4), Molapo Mofoka (PW5) and 'Mathato Ntšekhe (PW6). As mentioned earlier, all this evidence is missing from the record.

[7] In brief, the evidence of PW1, according to the judgment a quo, was to the effect that the three accused surrendered themselves to him on 3 February 1999 at Mabote Police Station. They also surrendered a 7.65 pistol. They *"showed they assaulted the deceased because he had stolen from them that firearm and wanted to arrest him".* As can be seen, this witness spoke in general terms. He did not say who of the accused in particular said what.

[8] The evidence of PW2, according to the judgment a quo, shows that he was an eyewitness to some extent. He heard the alarm, *"stop that thief".* He saw the deceased running and gave chase. The deceased was in handcuffs. There was a crowd of pursuers. He saw five to eight of them assault the deceased. He, However, did not know them. One of them picked up a stone and hit the deceased with it on his chest. The deceased fell to the ground. PW2 heard one of the two men shouting that they were going to surrender themselves to the police. He could not identify the accused before court.

[9] PW3 was a former police woman. She, too, was an eyewitness to the incident in question. She had joined the chase following the alarm which had been raised. She says that when she was five (5) paces away from the scene of the crime, the appellant came to her and told her that *"things had turned bad".* He was walking away from the scene of the crime. I shall revert to this aspect of the case latter in this judgment. Suffice it to say that PW3 implicated both the appellant's co-accused as the ones who assaulted the deceased.

[10] According to the judgment a quo, PW4 was the deceased's sister. She rushed to the scene of the crime and found many people already gathered there. Amongst them she noticed the appellant and one of his co-accused, Tankiso Moholisa. The latter was holding an iron ring. She heard him claim that they had killed the deceased because had they not done so he would have killed them. She also heard the appellant claim that they had killed the deceased and that they were going to report themselves. It is necessary to record, however, that the appellant denied this allegation on oath. Indeed it may also be useful to mention that this witness was obviously so traumatised that, according to the judgment a quo, she actually *"passed out"* at some stage. Her evidence, therefore, had to be approached with caution.

[11] The evidence of PW5 according to the judgment a quo showed the following. He had been staying in the same yard with the deceased. He was invited to the scene of the crime by PW4. He heard the appellant and his –co-accused, Tankiso Moholisa, talking in turn to the extent that they had killed the deceased. It must be noted once again that the appellant disputes this evidence on oath. Be

that as it may, PW5 also said that he saw Tankiso Moholisa holding an iron ring. His shoes were bloodstained.

[12] PW6 did not implicate the appellant in her evidence. On the contrary, she implicated both the appellant's co-accused. She said that when she arrived at the scene of the crime she found Utloang Moholisa sitting on the deceased's stomach holding an iron rod. When she confronted him he said that they were killing the deceased because if he survived he was going to kill them. He also said that he saw the two co-accused assault the deceased. She, too, did not implicate the appellant.

[13] According to the post-mortem report which was handed in by consent the cause of death was due to a fracture and dislocation of the cervical spine and internal bleeding.

[14] The appellant testified in his own defence. He denied ever telling PW1 that he had assaulted the deceased. Similarly, he denied the allegations imputed to him by PW4 and PW5. These, as will be recalled, were to

the effect that the appellant had claimed to have killed the deceased. In a nutshell, the appellant gave an exculpatory explanation as fully set out in paragraphs [4] and [5] above.

[15] In the course of her judgment, the learned Judge a quo made a finding that *"the three accused were seen assaulting the deceased."* That, in my view, was a material misdirection insofar as the appellant is concerned. There is not a single witness who testified to seeing the appellant assault the deceased. In my view this misdirection clouded the learned Judge's judgment and led her to the wrong verdict in respect of the appellant as she did.

[16] When confronted by the apparent lack of evidence implicating the appellant, the learned Judge a quo resorted to the doctrine of common purpose. On pages 24-25 of her judgment she said this:-

> *"We have not been told as to who between the three accused delivered which blow, but relying on* ***S v Malinga and Others 1963 (1) SA 692****, being a party to a common purpose to commit some other crime and foreseeing the possibility of one or both of them causing death of someone in the execution of the plan yet persisting but reckless of such fatal consequences which resulted, then all would be held liable for the same crime."*

[17] In my view, Malinga's case may be distinguished from the present case. That was a clear case of common purpose. In casu, the evidence shows that the sole purpose driving the appellant and his co-accused was to arrest the deceased. There is no evidence on record that the appellant and his co-accused had planned to assault or kill the deceased. Even if they had, I consider that PW3's evidence to the effect that the appellant walked away from the scene of the crime, while remarking that *"things had turned bad"* would suffice to establish the appellant's disassociation from the common purpose. The point, however, is that the learned Judge a quo misdirected herself in finding that there was a common purpose to assault or kill the deceased.

[18] As was stressed in **S v Madlala 1969 (2) SA 637 (A)** at 640-541, and correctly so in my view, once there is absence of proof of common purpose, *"a court cannot convict co-accused on the footing that one or the other or both of them must have done the deed, for that basis postulates the possible innocence of one of them."* In this jurisdiction it is important to recall that more than twelve

years ago I had occassion to sound a caution against improper use of the doctrine of common purpose in **Maboka and Another v R 2000-2004 LAC 1** at p18 in the following terms which bear repeating:-

> *"It must always be borne in mind, however, that the modern approach is that there is no magical power contained in the doctrine of common purpose and that where there is participation in crime, each of the participants must satisfy all the requirements of the definition of the crime in question before he can properly be convicted as a co-perpetrator. Such was the view of the [South African] Appellate Division in* ***S v Williams 1980 (a) SA 60 (A)*** *at 63;* ***S v Maxaba 1981 (1) SA 1148 (A) per Viljoen JA; S v Khoza 1982 (3) SA 1019 (A)****.*
>
> *'It is salutary for courts then to exercise some caution to ensure that innocent persons are not convicted for crimes committed by others, for such is the inherent danger of the doctrine of common purpose.' "*

[19] The learned Judge a quo was critical of the attempt by the appellant and his co-accused to arrest the deceased. She concluded that they *"planned to take the law unto themselves by devising their own means of arresting and getting back their gun."* With respect, the learned Judge misread both the evidence and the law. Apart from the appellant's explanation that the theft in

question had been reported to one policeman Pitso, section 27 of the Criminal Procedure and Evidence Act 1981 empowers private persons to arrest without a warrant or to pursue the offender in a case of theft. This was undoubtedly such a case.

[20] It follows from the foregoing considerations that the Crown failed to prove its case beyond reasonable doubt. The appellant's explanation as fully set out in paragraphs [4] and [5] above may reasonably possibly be true in the circumstances. See **R v Difford 1937 AD** 370. It will be recalled that the appellant's explanation that he disassociated himself from the deceased's arrest was in effect supported by the Crown's own witness PW3 who testified that the appellant walked away from the scene of the crime remarking *"things had turned bad."* Furthermore, it is a telling point in the appellant's favour that the court a quo did not make any credibility findings against him.

[21] Finally, I should record that the fact that the Crown submitted an incomplete record in this case has not helped its case in my view. The potential prejudice to the

appellant as a result of the omission to include in the record the evidence of all the Crown witnesses is self-evident. This Court is inhibited, through no fault of the appellant, from determining for itself the value of such evidence especially under cross-examination. In these circumstances the appellant's conviction cannot be supported. It has, in my view, resulted in a failure of justice.

[22] In the event the appeal is upheld. Both conviction and sentence recorded by the court a quo are set aside.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OF APPEAL

For the Appellant : Adv P.R. Thulo
For the Respondent : Adv H.M. Motinyane