IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CRI) N0.2/2013

In the matter between

TANKISO MOHOLISA **APPELLANT**

And

REX **RESPONDENT**

CORAM: SCOTT AP
HOWIE JA
THRING JA

HEARD: 11 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

Criminal Law – murderous assault – appellant joining in – guilty of dolus eventualis – Crown unable to prove fatal injury sustained prior to appellant joining in – appellant guilty of attempted murder – trial proceeding at alarmingly slow pace taking approximately 10 years to complete – a factor taken into account when imposing sentence.

JUDGMENT

SCOTT AP

[1] The accused is one of three accused who were charged as long ago as 1999 with the murder of Takatso Ramabitsa who was brutally kicked and beaten to death on 29 January of that year. The trial proceeded at an alarmingly slow pace. The Crown closed its case during October 2003. The trial finally resumed on 10 August 2010. Accused 2 had since died. The remaining accused both testified in their defence. They were subsequently convicted of murder and on 21 October 2010 each sentenced to eight years' imprisonment.

[2] Both accused appealed. The appellant, who was Accused 3 at the trial, withdrew his appeal apparently for lack of funds. On 19 October 2012 the appeal of Accused 1, Fusi Khoali, was upheld. The appellant, who has now succeeded in raising the necessary funds to brief counsel, seeks to renew his appeal. A further complication is that the tape recording of the Crown evidence is inaudible and has not been transcribed. As in the case of the appeal of Accused 1, the parties are agreed that the summary of the Crown evidence contained in the judgment of the court *a quo* is to be accepted as a record of the proceedings.

[3] It is convenient to begin with the evidence of the appellant. He said that on 29 January 1999 at about 10 am he met Accused 1 and 2 at a recruiting office where he intended applying for employment. They told him that the deceased, whom he vaguely knew, had stolen a firearm that belonged to Accused 2 who was a distant relative. They said that they had spoken to a policeman by the name of Pitso about the matter and that they were going to meet him to devise a plan to recover the firearm. They invited the appellant to join them and the three of them went to

Motse Mocha where Pitso lived. On the way they stopped at the house of Accused 2 where they were joined by a young man whose name was unknown to the appellant. They met Pitso at the latter's house. Pitso produced handcuffs and they planned the arrest of the deceased who they were told was at his girl friend's house. On arrival there, Accused 1 and 2 gave the appellant some money and he and the young man went inside. The deceased was present with his girlfriend, 'Maletsatsi, and a young woman called Puleng. The appellant gave money to 'Maletsatsi for her to buy beer and she and Puleng left. The appellant offered the deceased a cigarette and as he held out his hands to take the cigarette the young man leapt up and he and the appellant pushed the deceased down onto a sofa while the young man handcuffed the deceased and look his firearm from him. The young man then went off to call accused 1 and 2, leaving the appellant to guard the handcuffed deceased. After a while when he did not return, the appellant went outside to see where the others were. The deceased seized the opportunity to flee through the kitchen door and jump over a fence. He said he saw Accused 1 and 2 and also Pitso running after the deceased. Many other people joined the chase and he saw them

assaulting the deceased. When he arrived on the scene the deceased had already fallen to the ground where he was being kicked by the crowd. He denied ever having assaulted the deceased.

[4] The appellant's denial that he had taken part in the assault was in stark contrast to the evidence of the Crown. Ms 'Mapontso 'Neko (PW3), an ex-policewoman, was one of those who gave chase. She testified that when about 5 paces away from the deceased, Accused 1 came to her and said that things had turned bad and left the scene. It was apparent from her evidence that Accused 1 had disassociated himself from the attack on the deceased and it was largely on the basis of her evidence that the appeal of Accused 1 was upheld. 'Neko testified, however, that she later saw the appellant and Accused 2 kicking and hitting the deceased who was handcuffed and helpless. Her evidence in this regard was corroborated by Ms 'Mathabo Ntšekhe (PW6). Two Crown witnesses, PW4 and PW5, observed the appellant at one stage to be in possession of an *"iron ring"* which was used in the attack on the deceased. Both these witnesses observed the appellant's

shoes to the *"blood stained."* According to Mr Tšepo Sekhojane (PW2) some five to eight people joined in the attack on the deceased once he had been apprehended by his pursuers. The attack was brutal. The cause of death was found to be a fracture and dislocation of the cervical spine with internal bleeding. Blood was found in the trachea and there were bruises all over the deceased's face.

[5] Hlajoane J accepted the Crown evidence implicating the appellant in the assault and rejected the appellant's evidence to the contrary. Nothing advanced by counsel for the appellant has persuaded me that the learned judge erred in doing so.

[6] It is not in dispute that the appellant and his co-accused devised a plan to arrest the deceased and recover the stolen firearm. There is nothing to suggest that they had planned to assault or kill him. It is also apparent that the appellant was not the first to apprehend and attack the deceased. His evidence that the deceased had already been struck down and was lying on the ground by the time he

arrived on the scene was not contradicted by the Crown evidence. Nonetheless, it is clear that he joined in what was undoubtedly a murderous attack on the deceased where he lay handcuffed and defenceless. The inference is overwhelming that, at the least, the appellant must have foreseen the possibility of death and joined in the attack, regardless of the consequences. The Court *a quo*'s finding of *dolus eventualis* was in my view accordingly correct. However, given the nature of the injuries sustained by the deceased, there is to my mind a reasonable possibility that the deceased had already been fatally injured by the time the appellant joined in the attack. It follows that the Crown failed to prove that the appellant's conduct causally contributed to the death of the deceased. After some doubt it was finally and authoritavely accepted in **S v Motaung and Others 1990 (4) SA 485 (A)** that in such circumstances an accused cannot be guilty of murder, only attempted murder. I consider that decision to accord with the law in this Kingdom. The appeal must accordingly succeed to the extent that a conviction of attempted murder must be substituted for the conviction of murder.

[7] There remains the question of sentence. As indicated above, the appellant was sentenced to eight years' imprisonment on 21 October 2010. When imposing sentence the judge indicated that she would revisit the question of sentence once the issue of *"raising the deceased's head"* had been finalised. On 30 November the appellant again appeared and although the issue of *"raising the deceased's head"* had not been finalised, the judge reduced the sentence to six years imprisonment. Once having sentenced the appellant to eight years imprisonment, the Court was *functus officio* and had no power to impose a reduced sentence. Nonetheless, the period of six years is indicative of what the judge on reflection must have considered to be appropriate.

[8] In view of the finding that the appellant ought to have been convicted of attempted murder, this court is at large to consider the question of sentence afresh. As indicated above, the trial proceeded at an alarmingly slow pace. Through no fault of his own the appellant had the prospect of a conviction of murder and its possible consequences hanging over his head for a period of more than 10 years

albeit that he was apparently not in custody during this time. Nevertheless, such a state of affairs is unacceptable and must be given due weight when imposing sentence. In all the circumstances, I think a sentence of three years – all of which has virtually been served – would be appropriate.

[9] The order made is the following:

> The appeal is upheld to the following extent:
>
> The conviction and sentence imposed by the Court *a quo* is set aside and the following substituted in its stead:
>
> "Accused 3 (the appellant in this appeal) is found guilty of attempted murder and sentenced to a period of three years' imprisonment commencing on 21 October 2010."

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D.G. SCOTT

ACTING PRESIDENT

I agree _____

C.T. HOWIE

JUSTICE OF APPEAL

I agree _____

W.G. THRING

JUSTICE OF APPEAL

For Appellant **:** M.J. Rampai

For Respondent **:** H. Motinyane