IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) NO.06/12

In the matter between

CHIEF SEKONYELA **APPELLANT**

and

DIRECTOR OF PUBLC PROSECUTIONS **RESPONDENT**

CORAM: THRING JA
LOUW AJA
CLEAVER AJA

HEARD: 17 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Appeal against conviction of murder and sentence for murder – accused not denying killing deceased – accused not testifying – conviction and sentence of 20 years upheld.

JUDGMENT

CLEAVER AJA:

[1] This is an appeal against the conviction of the appellant in the High Court on a charge of murder and also against the sentence of twenty years imprisonment imposed on him.

[2] The hearing of the appeal was preceded by the hearing of an application for condonation of the late noting of the appeal by the appellant. The appellant's explanation for this was that he was impecunious and was able to obtain finance for the appeal only in August of this year. The crown opposed the application on the grounds that the appellant had failed to deal adequately or at all with his prospects of success in the appeal. In our view

the appellant had made out an arguable case, at least in respect of the appeal against sentence and the application was therefore granted.

[3] It is not necessary to recount the evidence given in the High Court in detail. The appellant did not dispute that he had shot and killed the deceased, who was his biological mother. This occurred on 21 July 2006. The evidence was that the deceased and her daughter had just entered a motor vehicle in the yard of the deceased's home, preparatory to leaving for work at Ha-'Majane, where the deceased owned a shop. Shortly after the deceased had entered the vehicle and had seated herself in the passenger's front seat, the appellant appeared on the scene. Without uttering a word he went up to the vehicle and fired three shots at the deceased, through the windscreen and the side window next to where the deceased was seated. She died instantly. He then fled the scene. The firearm used was a pump action Brenneke shot gun, a weapon used to bring down game such as wild boar, lion, tiger, leopard and Cape buffalo. After the conclusion of the case for the crown the appellant closed his case without

giving evidence and without calling any witnesses in his defence. I should mention that although the accused had pleaded not guilty, it would appear that he did so because of the provisions of section 241 of the Criminal Procedure and Evidence Act No.7 of 1981. This provides in broad terms that save in the case of a charge of murder, where an accused pleads guilty to an offence and the prosecutor accepts that plea, the High Court may bring in a verdict without hearing any evidence. It appears that the defence was of the view that although the appellant did not dispute the charge, it was necessary, because of the provisions of the section, for him to plead not guilty to the murder charge. The appellant did not testify in mitigation of sentence, and also called no witnesses to testify in mitigation on his behalf. He was sentenced to 20 years' imprisonment.

[4] On behalf of the appellant it was submitted that the evidence did not establish that the appellant had intended to kill the deceased. It seems that counsel intended this submission to mean that the killing was not premeditated. In support of this, counsel submitted that the appellant had come to make

peace with the deceased to reconcile family differences but was met with threats that he would die following in the footsteps of his father and brother. No evidence whatsoever to support this version was put before the court and the submission cannot be accepted. In my view, in the absence of any evidence by the accused, the inference to be drawn from his actions that fateful morning was irresistible, namely that he intended to kill his mother when he fired three shots at her from close range with a powerful gun. In my view there is no merit in the appeal against the conviction.

[5] In the absence of any evidence from the appellant, the court *a quo* had only the following information about his personal circumstances;

1) He was twenty years old at the time of the shooting.

2) He was a first offender.

3) He was the father of a young child.

4) Although not in custody, he lived in a state of anxiety during the six years from the time of the

shooting up to the time that the case against him was completed.

[6] With reference to the periods of imprisonment imposed for murder in a number of decided cases and the personal circumstances of the appellant, counsel for the appellant submitted that this court, in its discretion, should reduce the appellant's sentence to one of fifteen years' imprisonment.

[7] The test to be applied on appeal against sentence is trite. It is that the discretion to impose a sentence rests with the trial judge. Because that is so, an appeal court will not interfere with the sentence unless it is shown that the trial judge exercised his discretion in an improper or unreasonable manner. See **S v Pieters** 1987(3) SA717 (AD) at 727E.

The principle was expounded upon by Marais JA in **S v Malgas** 2001(1) SACR 469 (SCA) at 478 (d-g) as follows-

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the*

sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly described as 'shocking', 'startling' or 'disturbingly inappropriate."

[7] An extremely vexing aspect of this matter is the failure of the appellant to give any evidence in mitigation of sentence. Something must have driven him to shoot his mother in cold blood, yet he chose not to take the court into his confidence and explain why he had done so. Had he done so, the trial court would have been able to take his explanation into account when deciding on an appropriate sentence.

[8] While the sentence of twenty years may seem on the high side, it cannot in my view be said that the trial judge acted improperly or unreasonably in imposing the sentence. The sentence is also not, in my view, shocking, startling or disturbingly inappropriate. Indeed, as counsel for the crown reminded us, having regard to the cold blooded manner of the murder, the offence could justify the ultimate penalty.

It is clear that the trial judge took all the relevant factors into account in her well-reasoned judgment on sentence.

[9] The appeal is dismissed and the judgment and sentence of the High Court is confirmed.

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R. B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

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W. G. THRING
JUSTICE OF APPEAL

I agree

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W. J. LOUW
ACTING JUSTICE OF APPEAL

For Appellant: L. A. Molati

For Crown: T. Mokuku