IN THE COURT OF APPEAL OF LESOTHO

JUDGMENT

C OF A (CRI) 4/2012

CRI/T/04/06

In the Matter Between:

KEBITSAMANG FALTEN **APPELLANT**

And

REX **RESPONDENT**

Neutral citation:

Coram: Majara CJ, Musonda AJA, Mahase JA

Heard: 12 October 2015

Delivered: 6 November 2015

Summary

Criminal law – Application for condonation for late noting of appeal – Various factors to be considered comprehensively not in a compartmentalised fashion – Appeal against sentence of 18 years imprisonment imposed for murder – factors to take into consideration – Sentence not excessive all things considered.

ORDER

On appeal from: High Court per Mosito AJ

The appeal is dismissed.

JUDGMENT

Majara CJ (Musonda AJA and Mahase JA concurring)

[1] This is an appeal against the judgment of the High Court per Mosito AJ on the 2nd August 2011 in which the appellant was convicted on the counts of murder and attempted murder respectively.

[2] In the first count, it was alleged that on the 31st day of October 2004 and at or near Sefika bus stop in the district of Maseru, the appellant did unlawfully and intentionally kill his wife,

one 'Mamohato Falten. In the second count of attempted murder, it is alleged that on or about the 31st day of October 2004, at or near Sefika bus stop in the district of Maseru, the appellant did unlawfully and intentionally with intent to kill, shoot one Mohapi Sekese in the right hip.

[3] At the end of the trial, the court a quo convicted the appellant on both counts and sentenced him to imprisonment for a period of eighteen (18) years in the first count and seven (7) years on the second count and both were ordered to run concurrently, which effectively meant the appellant was going to serve the sentence of eighteen (18) years imprisonment.

[4] The appellant noted his appeal on the following grounds; that the court a quo erred and/or misdirected itself in convicting the accused on both counts despite the psychiatric report which indicates that on the day in question, 'possibly he lost his memory'; the court a quo erred and/or misdirected itself in dismissing the appellant's application that the Crown's evidence not contained in the witnesses' statements be expunged from the records as that omission highly prejudiced the appellant in the preparation of his defence; the sentence imposed against the appellant on both counts is harsh and/or excessive in the circumstances. However by the time of the hearing of this appeal, the appellant had abandoned the first two grounds and confined himself to the last ground only, namely the appeal against the sentence.

[5] It would also appear that the appeal having been lodged almost a year after the judgment was handed down, the appellant filed an application for condonation for the late filing by way of a

notice of motion which was erroneously not furnished to the Court with the rest of the record. In support of its position to this application, the respondent filed an answering affidavit deposed to by Advocate Maapesa whose averments were to the effect that after the judgment and sentence, appellant underwent therapy in preparation of his acceptance of his fate so that the late filing of the appeal is really an afterthought on his part. These assertions were not gainsaid by way of a replying affidavit.

[6] In this connection, this Court has laid down the rule that the period of delay and the reasons advanced for same are not the only determinant factor whether or not to grant condonation.[1] That rather a more comprehensive approach including other factors such as the prospects of success in the appeal and in a criminal matter, exercise of greater tolerance because the liberty of an individual is involved, as well as any that might be relevant given the particular circumstances of a case. I entirely agree with the court's sentiments in this regard.

[7] In the light of these instructive comments, I am of the view that while the appeal was filed quite late, the fact that it concerns the liberty of an individual who also happens to have been given a serious sentence, this Court would have wisely advised itself if it were to allow the application for condonation to give the appellant a chance to argue his case. The application is thus accordingly granted.

[8] Before I turn to deal with the issues raised for consideration in this appeal, I find it apposite to mention at this stage that in his

[1] Mosaase v R LAC (2005-2006) 206

heads of argument, filed on behalf of the appellant after the appeal was noted**, Mr. Tsenoli** who is representing the appellant for the first time at this stage stated that *'after a thorough examination of the evidence as well as the judgment, the appellant decided to abandon the first and second grounds of appeal'*. The Court finds this quite professional and commendable as indeed it is of the view that in the light of the evidence that was placed before it, the court a quo cannot be faulted for having arrived at its judgment. Needless to say, this also saved the Court a lot of time.

[9] Coming back to the appeal, the undisputed facts leading up to the death of the deceased and the injuries to the complainant in the second count are briefly that on the day stated in the indictment the appellant, a former military man was seen in the company of the deceased at Sefika bus stop where they had been standing for a long time without boarding any taxi, clearly engaged in a long debate/argument.

[10] In their testimonies, two of the witnesses namely PW1 and 2 respectively told the court that they heard the sound of a gunshot whereupon the appellant was seen walking away from the deceased who had fallen down evidently having been shot by the appellant. The appellant was shortly thereafter seen talking on his mobile phone. People that were within the premises rushed to the aid of the deceased who was found bleeding from the nose. They called out for assistance and at that time the appellant walked back to where the deceased had fallen down and upon reaching her, he shook her and shot her again about three times. At that time another man emerged and called out to the appellant

whereupon the latter turned towards him and told him he would give him his mother. He then fired a shot in his direction. However, the bullet did not hit the intended victim but instead hit an innocent bystander one Mohapi who happens to sell cassettes in that area.

[11] According to PW 3 who is also the sister of the deceased, the two had been travelling together earlier on that day and she had eventually left the deceased at the bus stop in the company of the appellant. It was her testimony that later on after she had arrived home she received a telephone call from the appellant on her mobile phone and told her that when they (appellant and the deceased) took their marital vows, they said only death would do them part and that he had just accomplished that.

[12] The evidence further revealed that after the shooting incident, the deceased was conveyed to a hospital and was declared dead upon arrival. PW 3 Mohapi Sekese was also taken to a doctor to receive treatment to the wound that he had sustained from the gunshot. The witness's testimony was that though the wound has since healed he has complications in that he can no longer do heavy work as he has developed cramps.

[13] In his defence, the appellant told the court that he had an argument with the deceased who was refusing to come home with him. During the argument the deceased slapped him and he drew out his firearm, but had a blackout at that stage and cannot remember what happened thereafter until much later when he received a phone call from his brother who told him he had just learned he had fatally shot his wife. It is at that point that he

found himself in a taxi travelling in the direction of Teyateyaneng without remembering how he had boarded it. He pleaded temporary loss of memory.

[14] In support of his DW1's evidence, the defence called one Andy Scrase who is described as a psychiatrist. Her testimony was to the effect that, the fact that the appellant who was diabetic and had not eaten for almost six hours before the incident, could possibly make him confused, aggressive and forgetful. The learned Judge a quo found her report inconclusive.

[15] Having considered all the evidence, the court a quo accepted the evidence of the crown witnesses and rejected the defence's version. Since the fact that the appellant is the one that shot both the deceased in count one and the complainant in count, the real issue for the court's determination was whether the defence had successfully established that indeed when he pulled the trigger, the appellant was not in control of his mental faculties due to the alleged temporary loss of memory which would in turn exculpate him from shooting both with the intention to kill them.

[16] To this end the court rejected the defence's version as entirely false and found that the appellant was fully cognizant of his actions. The court further found that the evidence of DW2 was inconclusive and unhelpful, not to mention that the witness had not told the Court anything about her training, skills, qualifications and experience. The learned judge further observed and I might add correctly so, that '*she however made it clear that she had nothing to confirm that the accused was confused, aggressive and forgetful at the time of the shooting*.'

[17] Having considered all the evidence and also accepting that the alleged slap must have provoked the appellant, the court a quo found that the evidence of the Crown witnesses was satisfactory and that the Crown had discharged its onus of proof beyond a reasonable doubt on both counts.

[18] I have already shown that the appellant has since abandoned his appeal against conviction and the admission of evidence that was not availed by way of statements to the defence in order for it to properly prepare its defence. Thus, on the only issue at hand, i.e. whether or not the effective sentence of the court a quo is harsh and or excessive in the circumstances, Counsel made the contention that in assessing the factors weighing against the appellant the trial court erred in stating in its judgment that the appellant:-

i) shot the deceased in her skull causing her death - when there is no such evidence;

ii) attended his remands and stood his trial religiously – while that could only serve as a mitigating factor in favour of the accused not otherwise, thus arriving at the conclusion that these elements, *inter alios* weigh against the appellant.

[19] Counsel added that in a similar case of an accused that was trained as a military officer, the court meted out a lesser sentence than the one imposed in this case, i.e. twelve (12) years imprisonment.[2] He further quoted **Serame Linake v Rex LAC** and

[2] Nkoli Malia v Rex C of A (CRI) No. 3 of 2013

DPP v Khama [3] in which the Court passed the sentence of ten (10) years imprisonment respectively.

[20] He submitted that the Court is cloaked with statutory powers to interfere with a sentence if it is of the view that a different one should have been passed and added that on the basis of the principle of *stare decisis* and judicial precedence, the judgment of the court a quo induces a sense of shock as it is too severe. He urged the Court to reduce the sentence to anything between 10 and 12 years for the murder and that there being no argument to be advanced on the sentence in the second count, his humble submission is that the order that the sentences should run concurrently should be confirmed.

[21] For the Crown, **Mr. Tlali** made the contention that as stated in the answering affidavit to his application for condonation for the late filing of his appeal, it is clear that the appellant was content to serve his sentence and never intended appealing the judgment after the counselling he received. Further that the inordinate delay before the filing of the appeal is clearly an afterthought. He added that over and above that, the appellant has no prospects of success as the grounds upon which he appealed were thoroughly dealt with by the court a quo and for all these reasons, the delay should not be condoned.

[22] For the sake of brevity, I shall not dwell on the Crown's response to the two grounds of appeal that were abandoned as doing so will not serve any real purpose. In connection to the submission that the sentence meted by the court a quo is too harsh

[3] LAC (2009-2010) 1; LAC (2007-2008) 371

and/or excessive, Counsel stated that there is a plethora of authorities on the principle that sentencing is a matter that lies within the discretion of the trial court. He submitted that the mere fact that an appellate court would have imposed a lighter sentence if the punishment was within its discretion is not in itself sufficient reason for the Court to intervene. To this end, he referred the Court to the case of **Tau Lefu v R** [4] in which Ramodibeli P had this to say at page 7 of the judgment:-

> *"This court has repeatedly stated that sentence is a matter which lies pre-eminently within the discretion of the trial court. Such 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."*

[23] It was Counsel's further submission that there was no misdirection on the part of the court in imposing the sentence this being more so when this Court confirmed the sentence of eighteen (18) years imprisonment imposed by the trial court in the **Tau Lefu case (supra)**.

[24] I wish to start from the premise that Counsel's submissions insofar as they narrated the principles to be applied in matters of sentencing are quite correct. Indeed considerations of justice, fairness and equity dictate that like cases should as far as possible, be treated similarly. It is also now established law that the Court has to consider the triad of factors consisting of the offender, the

[4] C of A (CRI) No.6 of 2011 (unreported)

crime and the interests of society. Further that the punishment should fit the crime. This is more so when the offence is of so serious a nature that it carries the capital sentence as is the case in this appeal.

[25] It is also trite that sentence is a matter that pre-eminently lies within the discretion of the trial court. Inarguably, the trial court is in the best position to determine the most appropriate sentence having heard the matter from start, analysed all the evidence and taken into consideration all the peculiar circumstances of the case before it.

[26] However, it is also a fact that trial courts do on occasion commit a misdirection including passing inappropriate sentences. It is under those circumstances that the appellate court will interfere and set such a sentence aside and substitute it with a more appropriate one. However, certain guidelines have been laid down to guard against what can loosely be termed arbitrary, injudicious or 'willy-nilly' interference. For instance, in the case of **S v Narker**[5] quoted to this Court, Holmes JA aptly stated that:-

> *"In every appeal against sentence the question is whether it can be said that the trial court exercised its judicial discretion improperly. When can this be said, bearing in mind that reasonable men may differ in the matter of sentence? In the absence of misdirection of irregularity, a test often applied is whether the sentence appears to the Court of Appeal to be disturbingly inappropriate."*

[5] 1975 (1) SA 583

[27] These oft-quoted sentiments have by and large become the established principle of law. Indeed as already quoted above from this Court's judgment in **Tau Lefu v Rex (supra)**, '*an appellate court is reluctant to interfere with sentence unless there is a misdirection or startling sentence disparity resulting in a miscarriage of justice*'. The same remarks were expressed in the case of **Linake v R; DPP v Serame Linake**[6] per Ramodibedi P at page 15 of the judgment.

[28] Bearing all these factors in mind in conjunction with the triad consisting of the offender, the crime and the interests of society and considering the following; murder is a capital offence yet it is alarmingly on the rise in Lesotho; the appellant herein shot at the deceased in cold blood in full view of the public and upon realising that she was still alive, went back to fire more shots at her, a clear manifestation of the intention to kill her; the appellant is a professional military man who has been trained on and knows very well about handling firearms; the appellant coldly telephoned the deceased's sister to gloat about the fact that he had just fatally shot his wife; the appellant overreacted to the alleged slap by the deceased; and weighing them against the extenuating factors, i.e. that the deceased had slapped him in public as well as the mitigating factors that the court a quo mentioned in its judgment, it is my view that the sentence of eighteen years imprisonment is not so harsh as to induce a sense of shock and as such, does not justify interference by this Court.

[6] C of A (CRI) No. 10/08

[29] I should also mention that the other ground that the defence had raised, i.e., that the trial court wrongfully included the fact that the appellant had attended his remands and trial dates religiously amongst the elements it weighed against him was found to be clearly a typographical error and possibly a result of cut and paste as Counsel correctly accepted in Court.

[30] In the result, the following order is made:-

The appeal is dismissed. There is no order of costs.

N. J. MAJARA
CHIEF JUSTICE

I agree:

P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

M. MAHASE
JUSTICE OF APPEAL

For the Appellant : Mr. Tsenoli

For the Respondent : Mr. Tlali