IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CRI) N0.5/2014**

CRI/T/39/2010

In the matter between:

'MAKHOTSO MOLISE **1ST APPELLANT**

KHOTSO MOLISE **2ND APPELLANT**

'MANTOA MOKOALELI **3RD APPELLANT**

AND

REX **RESPONDENT**

CORAM: DR MOSITO P

DR MUSONDA AJA

DR VAN DER WESTHUIZEN AJA

DATE OF HEARING: 16 OCTOBER 2019

DATE DELIVERED: 1 NOVEMBER 2019

SUMMARY

The first appellant was sentenced to death by hanging for the brutal murder of an elderly woman; and to 15 years imprisonment for

robbery. The second appellant was sentenced to 20 years for the murder and ten years for the robbery; and the third to 25 years and 20 years respectively. After spending five years in custody before being sentenced and another five years before their appeal against the sentences was heard, counsel for the state and the appellants approached this Court by way of a stated case in which reduced sentences were proposed. The Court considered the extenuating factors to which the trial court did not give sufficient weight, weighed against the seriousness of the offences. It strongly disapproves of the delay in the hearing of the appeal and decided to reduce the sentences substantially.

JUDGMENT

DR VAN DER WESHUIZEN AJA

Background

[1] Cliches are often truths. "Justice delayed is justice denied" is one of those. This is especially true if someone waits behind bars for a decade for her trial and appeal to be finalized. Whether she was going to be executed, or allowed to live, is what she needs to know.

[2] The three appellants are Ms 'Makhotso Molise, her son Mr Khotso Molise and Ms 'Mantoa Mokoaleli. They were arrested in 2009 and have since been in custody. Approximately five years later, on 20 March 2014, they appeared in the High Court of Lesotho on charges of murder and robbery. On 23 May 2014 they were convicted on both charges. On 27 June 2014 a hearing on

extenuation took place and on 22 July 2014 judgment was delivered.

[3] After a hearing on sentence on 23 July 2019, the first appellant was on 20 August 2014 sentenced to "death by hanging" for the murder; and to 15 years imprisonment without the option of a fine for the robbery. The second appellant was sentenced to 20 years imprisonment without the option of a fine for the murder; and ten years imprisonment without the option of a fine for the robbery. For the murder the third appellant was sentenced to 25 years imprisonment without the option of a fine; and for the robbery to 20 years imprisonment without the option of a fine.

[4] Notice of appeal against the conviction and the sentences was given in 2014. The appeal was not heard for five years though. In order for some justice to prevail, this Court enrolled the matter for the October 2019 session of the Court.

Stated Case

[5] The reason for the inappropriately long delay seems to be that the record of the proceedings in the court below was never transcribed. Thus counsel for the appellants and the respondent presented this Court with a stated case. In it they recorded that "the transcript of the record of proceedings … is impracticable due to the fact that the appeal was noted during the time when the High Court was migrating from recording by way of tapes to that

of digital recording, machines that used the tapes are no longer usable … “, together with the understatement that “there is a need for the appellants to know their fate ….”

[6] Counsel informed this Court that the appellants had abandoned the appeal against their conviction. The stated case identified the issues for determination to be whether (1) the trial court correctly found that no extenuating circumstances existed in the case of the first appellant; (2) the trial court justly differentiated between the three appellants; and (3) the sentences were appropriate.

Extenuating Circumstances

[7] In the stated case it is said that “(i)t must be noted that the Crown’s case was mainly based on circumstantial evidence, there have been no eye witness to both the murder and robbery …”. Given that we are not dealing with an appeal against the convictions, this is irrelevant. It is unthinkable that doubt about whether the appellants were indeed guilty in the first place could result in (for example in the case of the first appellant) the death sentence being replaced by 18 years imprisonment. Uncertainty about the correctness of a conviction cannot be an extenuating factor. This kind of reasoning would be an attempt at an immoral and unlawful compromise.

[8] With reference to *S v Lesotho* 1070 (3) 476(A) at 476E on extenuating circumstances the stated case proposes that the use of alcohol is a mitigating factor. Relying on *Maliehe and Others v R* C of A (CRI) No 4 of 1996, the stated case proposes that the extenuating circumstances apply to all three appellants.

[9] The first appellant was 42 years old at the time; the second 18 years; and the third 26 years.

The Trial Court

[10] The trial court found "a panoply of aggravating factors" in the seriousness of the crimes of murder and robbery; the brutality and cruelty of the pre-meditated senseless and heinous killing of a defenceless woman reportedly in her eighties; and the lack of remorse of the appellants. It referred to "the celebrated case" of *S v Makwanyane and Another* 1995 (2) SACR 1 (CC), in which the Constitutional Court of South Africa found capital punishment to be constitutionally invalid; as well as to "reported killings over radios or papers every day", which killings "are brutal and wanton" and "a great concern to this court and our courts". The trial court concluded that the death sentence and the other sentences it imposed were appropriate.

Appropriate sentence

[11] It is accepted in the stated case and indeed well-known that a court of appeal should not easily interfere with the discretion of a trial court as far as sentencing is concerned. According to the stated case, section 9(4) of the Court of Appeal Act 10 of 1978 allows for a court of appeal to interfere. In *Phaloane v Rex 1980* – 1984 L.A.C. 72 at 88 it was stated that if a court of appeal "is satisfied that the sentence imposed is manifestly too high … either because the trial judge has not taken into account all the relevant factors or if he has, full or sufficient weight has not been given to them", it may set aside a sentence and replace it with another.

[12] Thus it is proposed in the stated case that because the trial court did not give sufficient weight to the use of alcohol by the first appellant, the death sentence should be replaced by a sentence of 25 years imprisonment. From this, the five years that she spent behind bars from her arrest until her sentencing should be deducted, resulting in 20 years. Another two years should be deducted for the five year delay in the hearing of the appeal. Thus a sentence of 18 years is proposed for the murder regarding the first appellant. For the robbery, ten years is proposed. The sentences are to run concurrently.

[13] The stated case proposes the same sentences for the third appellant. For the second appellant, 15 years is proposed for the murder and eight years for the robbery.

The Delayed Justice

[14] This Court has no quarrel with the arguments of the appellants and the Crown that the trial court did not sufficiently take into account the use of alcohol and the time the appellants had been in custody, obviously weighed against the serious and brutal nature of the murder committed by the first appellant; and with the replacement of the death penalty by a sentence of 25 years. It furthermore agrees that the five years the appellants spent in custody between their arrest and sentencing should be deducted, resulting in twenty years.

[15] To deduct a further two years for the five years from the noting of the appeal in 2014 to its finalisation (on the insistence of the Court) late in 2019, is problematic. The delay because of the inability to transcribe the record is wholly unacceptable. What appears to be almost a light-hearted "blame game" between the lawyers of the appellants and the Crown, involving the Registrar, makes it worse. The delay shows disregard for the lives of the convicted persons and the need for closure of those who loved the victim. Waiting for five years to hear whether one is going to be executed by hanging is cruel and inhumane. In court counsel referred to it as "torture". A legal system that needs legitimacy amongst the people it serves may not tolerate and indeed breed this kind of institutionalised systemic cruelty.

[16] How does a court of appeal remedy such abuse? It is tempting to reduce the sentences to the ten years the appellants have already spent behind bars. But herein lies another part of the

problem: To compensate for years of cruel and inhumane treatment under the real threat of execution, one may disregard the seriousness of the crime. Deadly dangerous predators may even be released, at the real risk of public safety. In the present case the last-mentioned possibility fortunately does not enter the picture, as the appellants are first offenders. Even serial killers have the right to know their fate as to life and death though, but the public must be protected against them by way of appropriate sentences.

[17] It is to be hoped that highly unfortunate and unacceptable delays like in the present case will be addressed by all relevant role players with the seriousness and urgency it deserves.

Conclusion

[18] In view of the delay in the delivery of justice, together with all other factors, a sentence of 15 years imprisonment for the murder is appropriate for the first and third appellants. For the robbery, the ten years proposed in the stated case is appropriate. The sentences must run concurrently. The second appellant was 18 years old and the child of the first appellant. At the presumed age of 28 years, he is still young enough not to have his life destroyed by his participation in a serious crime ten years ago. Sentences of 12 years for the murder and eight years for the robbery, running concurrently, are appropriate. It speaks for itself that the sentences do not include the option of a fine.

[19] In view of the above, the following **order** is made:

1 The appeals of the first, second and third appellants against their sentences are upheld.

2 The sentences imposed by the High Court are set aside and replaced by the following:

(a) The first appellant is sentenced to -
(i) 15 years imprisonment on count 1 (murder); and
(ii) ten years imprisonment on count 2 (robbery).

(b) The second appellant is sentenced to –
(i) 12 years imprisonment on count 1 (murder); and
(ii) eight years imprisonment on count 2 (robbery).

(c) The third appellant is sentenced to –
(i) 15 years imprisonment on count 1 (murder); and
(ii) ten imprisonment on count 2 (robbery).

3 With regard to each appellant, the sentences are to run concurrently from the date of sentencing by the High Court.

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DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree:

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DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

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DR P MUSONDA AJA

ACTING JUSTICE OF APPEAL

For Appellants: Adv K Lesuthu

For Respondent: Adv T A Fuma