IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 1/2020

HELD AT MASERU

In the matter between:

TELLO MABUSELA **APPELLANT**

VS

REX **RESPONDENT**

CORAM: **DR. P MUSONDA AJA**
M H CHINHENGO AJA
DR. J VAN DER WESTHUIZEN AJA

DATE OF HEARING: **12TH MAY, 2020**

DATE DELIVERED: **29TH MAY, 2020**

SUMMARY

Criminal law- Appellant sentenced to three death penalties for three murders twenty- five years for attempted murder and ten years for robbery- Appellant unable to prosecute appeal as tape recordings missing- Death penalties unexecuted for over six years- This torturous and amounts to inhuman and

degrading treatment within the context of section 8 (1) of the constitution of Lesotho- Death sentences commuted to life imprisonment to run concurrently.

JUDGEMENT

DR. MUSONDA AJA

[1] This matter comes before us by way of a stated case submitted by the Crown and the appellant.

[2] The circumstance in which such a stated case was submitted is outlined in the introductory comments of counsel which reads as follows:

> "In view of the fact that some of the cassettes that had recorded half of the proceedings in the case are allegedly missing and the process of reconstructing the full record is inevitable, and also being alive to the need to obviate the backlog of cases, coupled of course with the need for the appellant to know his fate, it has being agreed by both appellant's counsel and the Director of Public Prosecutions to make a stated Case in the matter, basing themselves in the judgment delivered by the court a quo in **CRI/T/22/96**, on the 15th day of December, 2004 and **Sehlolo Monatsi and Others v Rex C of A (CRI) NO.4 OF 2005**. In pursuance of the afore-mentioned agreement, the Crown has undertaken not to challenge the late filling of the appeal in this matter in terms of Rule 15(2) of the Court of Appeal Rules 2006, and the prayer that the death sentence be

altered. The Respondent's view being that there appears to be reasonable prospects of success of appeal against sentencing only."

Factual matrix

[3] The appellant and others, were in Count one, charged with Robbery of a Motor Vehicle, a Cellular phone, a travel document No. RA 177180, office keys and residential house keys, the property of or in the lawful possession of Thabo Phohleli, on the 5th of September 2010, at or near Ha Ramatsa in the District of Maseru. He was sentenced to ten (10) years. In the second Count, the appellant with another were charged with the unlawful and intentional killing of the said Thabo Phohleli on the 5th of September 2010, and at or near Ha Ramatsa in the District of Maseru. The fourth and fifth Counts related to the unlawful and intentional killings of Thabang Malikoe and Malerato Maphathe, respectively and at or near Lithoteng in the district of Maseru on or about the 27th of September, 2010. He was sentenced to death for the three murders. In Count seven, the appellant was sentenced to twenty five (25) years for the attempted murder of Thabang Katelo, who had become a reluctant confederate. Before commencement of the trial, all charges were withdrawn against Thabang Katelo, who was the 4th accused and became 'PW1' (star witness).

[4] The appeal before us is against the sentence. Both counsel for the parties agree that the sentences that were imposed were inappropriate.

[5] However, for completeness, and neatness though this is not an appeal against convictions, it is important to highlight the evidence upon which the court a quo based the conviction and sentences of the appellant.

[6] The learned Judge made a finding that the police who were close on the heels of the kidnappers and their victim, later found the victim's body, handcuffed with bullet wounds to the head. Next to the body they found a shell. This shell was later submitted for forensic examination, and it was established that the shell had been fired from a gun that was later seized by the police from the appellant in count 2 for murder of Thabo Phohleli on the 5th of September, 2010.

[7] The murder convictions, subject of Count 4 and 5, according to the learned judge, were based on circumstantial evidence. The appellant had told PW1 that he had got rid of a certain carelessness at Corning. The person at Corning was PW1's name sake. The Appellant told PW1 that his name sake, had been with some woman whom he had trussed up. Indeed, when the police went to the scene, they found a woman strangulated with a piece of wire. The appellant made an unsolicited admission that he would kill the man at Corning, and that PW1 would show him the man. In the vicinity of the killings of the man and the woman, a

bullet shell was found. It was also submitted for forensic examination. It was found to have been fired from the gun seized from the appellant upon his arrest. It was the learned Judges' view that the inference, that the appellant killed both deceased, subject of the murders in count 4 and 5 was inescapable in any event, as he had confessed to his relative, PW10.

[8] The attempted murder conviction was based on PW1's evidence which was corroborated by PW11. In respect of the robbery conviction, the appellant was in possession of the keys which were robbed from Thabo Phohleli. He handed the keys to the police.

In a nutshell, that was the basis of the convictions, though this appeal is only against sentence.

THE APPEAL

[9] It is valiantly argued in favour of the appellant, that his right to appeal had been seriously compromised by the absence of the record. His appeal had pended since 12th September, 2013, when he was sentenced. It was argued that without a record, there can be no appeal and without an appeal, there can be no fair trial. The case of **R v Ts'osane**[1] was cited in support of that proposition.

[10] In **S v Makwanyame and Another**[2], it was stated that:

[1] LAC (1995-1999) 635.

> "The mental anguish suffered by convicted persons awaiting the death sentence is well documented. A prolonged delay in the execution of a death sentence may itself be a cause for invalidation of a sentence of death that was lawfully imposed. In India, Zimbabwe and Tanzania, were death sentences are constitutional, sentences of death have been set aside on these grounds. The relevant authorities are collected and discussed by Gubbay CJ in Catholic Commission for Justice and Peace in **Zimbabwe v Attorney General, Zimbabwe and Others 1993 (4) SA 239 (ZSC),** and Lord Goff, in **Pratt v Attorney General for Jamaica (1993) 3 WIR 995 (JPC)**."

[11] Advocate Mafaesa, argued this Court to uphold the appeal and set aside the death penalties in lieu thereof impose a 15 years sentence.

[12] The Respondent harbored the view that the imposition of the death penalty was injudicious.

The Law

[13] Sentence is the discretion of the trial Court. It is the practice of courts in both common law and Roman Dutch law jurisdictions not interfere with the exercise of such discretion, unless the sentence or sentences have come to the appellate court with a sense of shock, or are wrong in principle.

[14] In **Pholoane v Rex**[3], it was stated that;

[2] (CCT 3194) 1995 ZAC 3.

[3] 1980-1984 LAC 72 at 88.

> "If the 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 or she has not given full or sufficient weight to those factors, it may set aside the sentence and replace it with another."

In **Jaure**[4], it was stated that, although the onus of proof of extenuating circumstances is said to be on the accused, counsel for the state can and should assist the court in arriving at an informed decision on the extenuation. The Court should examine all the evidence and consider whether extenuating circumstances are shown on a balance of probabilities, regardless of who produced the evidence.

[15] In **R v Taylor**,[5] Shcreiner JA stated;

> "It is clear that in arriving at a conclusion as to whether to express the opinion that extenuating circumstances are or are not present, a jury or court, or judge or assessors, has not only to find facts relevant to the subject of extenuation, but also after considering those facts and the extent of their probable influence on the accused's conduct to form what is essentially a moral judgment as to whether circumstances ought to be characterized as extenuating. The express opinion by the triers of fact that extenuating circumstances are or are not present, is not part of the sentence or part of the Judge's reasons for sentence, it is a distinct procedural step in relation to the power to sentence a convicted murderer."

[4] 2001(2) CIR 393 (H).

[5](1949) (4) SA 702 at 717.

[16] In an erudite judgment, the then Chief Justice of Zimbabwe, Chidyausiku in the **State v Ngobile Sibanda**,[6]said;

> "The conclusion must inevitably be reached that a murder trial ends with the judge and assessors making findings on the existence or otherwise of extenuating circumstances following a conclusion for murder. Until that stage is reached, the trial is not complete, nor can the presiding judge proceed on his own to determine the question of extenuation without consulting the assessors in order to assess an appropriate sentence in a given case."

A death penalty is probable when the crime was brutal, cold-blooded, deliberate, unprovoked, fatal, gruesome and wicked, heinous or violent. Delay in the execution of the death penalty has been said to be mitigating by the Indian Supreme Court in **Vivian Rodrick v State of West Bengal**.[7] The Supreme court of India went on to say;

> "Inordinate and unreasonable delay in the execution is a violation of the right to life, which is the most fundamental of all rights guaranteed by the Constitution, and entails a ground for commutation of capital punishment to life term, keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her."

[17] In **Sarele v Rex**[8] Chinhengo AJA said;

[6]Judgment No. 5C 4108, 2008 ZWSC 5109 March, 2008.

[7]AR (19710 SC 1584.

[8]C OF A (CRI) 2 of 2015 [2018] LSCA 26 of December, 2018.

> "The presentation of incomplete records not only reflects badly on the parties concerned and constitutes an insult to the court, but it also reflects extremely badly on the administration of justice in this country."

[18] In **Henfield v The Attorney General of the Commonwealth of Bahamas**,[9] Lord Goff delivering the Opinion of the Privy Council, heavily relying on **Pratt and Another v Attorney**[10], said;

> "There is an instinctive revulsion against the prospect of hanging a man after he has been under sentence of death for many years. What gives rise to this instinctive revulsion? The answers can only be our humanity; we regard it as an inhumane act to keep a man facing agony of execution over a long extended period of time."

[19] Furthermore, the Board, held that parts of this time occupied in legitimate resort by the convicted man to appellate procedures should not be left out of the account in computing the relevant period of delay. In reaching this conclusion, the Board, invoked the European Court on Human Rights decision in **Soering v United Kingdom,**[11], explicitly repudiating the "death row phenomenon" which has developed in certain States in the United States of America, where men may be executed after a prolonged period of time which has elapsed, while their lawyers pursue a multiplicity of appellate procedures. The Board, when considering the

[9] Delivered on the 14th October, 1996.

[10] (1942) AC 1.

[11] [1989] 11 E.RR 439.

definition of delay, their attention concentrated on the 5 year period specified in Pratt. Beyond 5 years from the date of the sentence, the execution will constitute cruel or inhumane punishment, as it is torturous.

[20] **THE ISSUE**

(i) What is the effect of non-execution of sentence since 12th September, 2013, when the appellant was sentenced to death, within the context of section 8(1) of our Constitution?

[21] **Consideration of the Appeal**

It is a painful reality that the murders were brutal. However, when carrying out a factual enquiry whether extenuating factors exist, the trial judge must consider all the factors that arise from the evidence laid by the prosecution and the prosecution must assist in that enterprise. This is the tenor of Chidyausiku's judgment in **Sibande**, which we cite with approval. The evidence that the appellant was aggrieved by one of the victim's termination of PW10's employment (his sister) and was afraid that the other two victims would be potential witnesses, these factors were not sufficiently interrogated. We are unable to say if these factors were sufficiently interrogated; the learned Judge would not have imposed the ultimate sentences. Put in another way, would these murders be classified as un-

provoked, cold-blooded etc? .However the view that we shall take there is no need to discuss extenuation indepth

[22] The appellant has been on the death penalty row for 6 years and 8 months. Wouldn't this be said to fly in the teeth of our fundamental rights and freedoms, specifically section 8(1), as it exceeds 5 years? We agree with the Board in **Henfield** when they said:

> "States which wish to retain capital punishment must accept the responsibility of ensuring that executions follow shortly as practicable after sentence, allowing reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The "death row phenomenon" must not become established as a part of our jurisprudence."

[23] In the appeal before us, the appellant was deprived of the right of appeal by failure to provide him with the record and the position so remains. Which situation was deprecated by Chinhengo AJA, as stated earlier in this judgment. Such delay cannot therefore disadvantage the appellant.

[24] In **Molise and 2 others v Rex**[12] this Court, per Westhuizen AJA, discussing the balance between the two, the seriousness of the offence and inhumane and degrading treatment said:

> "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. The public must be protected against them by way of appropriate sentences."

[25] **CONCLUSION**

In view of the delay in the delivery of justice and execution of the death penalty, together with all other factors discussed earlier, the proposed 15 years imprisonment by appellant's Counsel is inadequate.

[26] In view of the above, the following order is made

1. The appeal against the appellant's sentence is upheld.

2. The death penalties imposed by the High Court are set aside and replaced with the following;

The appellant is sentenced to-

i. 10 years on count one robbery

ii. Life Imprisonment on count 2 (Murder)

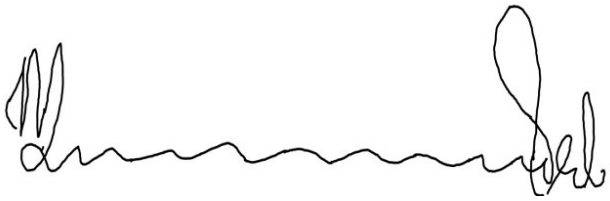
[12] C OF A (CRI) 5/14 (2009) LSCA 59 (01 November, 2019).

iii. Life Imprisonment on count 4 (Murder)

iv. Life Imprisonment on count 5 (Murder)

v. 20 years on count 7 (Attempted murder)

Life sentences to run concurrently, meaning he will serve one Life sentence from the date of sentencing by the High Court.



DR. PHILLIP MUSONDA

ACTING JUSTICE OF APPEAL

I agree:

MOSES CHINHENGO

ACTING JUSTICE OF APPEAL

I agree:

DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV. N.J. MAFAESA

FOR THE RESPONDENT: ADV. L. M. MOFILIKOANE