

**IN THE COURT OF APPEAL OF LESOTHO**

**Held at Maseru**

**C OF A (CRI-RESERVE) 1/2021**

**CRI/T/58/2011**

In the matter of:

**REX**

Versus

**MAPHALE PHANTŠI  
ACCUSED**

**CORAM:** DR K.E. MOSITO P  
P. T. DAMASED AJA  
DR J. VAN DER WESTHUIZEN AJA

**HEARD:** 23 APRIL 2021

**DELIVERED:** 14 MAY 2021

**SUMMARY**

*Criminal law and procedure - Reservation of law in terms of 15(1) of the Court of Appeal Act No.10 of 1978 - Accused convicted at the end of the trial -Whether the decision of the Court of Appeal in Mohale and Another v Rex C of A (CRI) No 2 of 2005 is correct regard being had to the fact that, it is inconsistent with section 12(4) of the Constitution - Whether the relevant age for consideration for purposes of section 26 (1) of the Children's Act , in light of section 12(4) of the*

*Constitution is the age of the date of the commission of the crime and not the date of sentence.*

## **JUDGMENT**

### **K.E. MOSITO P**

#### **Background**

[1] On the 27<sup>th</sup> day of May 2019, Nomngcongong J convicted Maphale Phantši (hereinafter referred to as “the accused”) of Murder of one Lethibela Letsipa. In mitigation of sentence and also according to the charge sheet, the accused was 17 years of age at the time he committed the offence. He was 27 years of age when he was finally convicted and came up for sentence.

[2] Immediately upon conviction of the accused, the High Court reserved a question of law on sentence for consideration by this Court. The question formulated by the learned judge in terms of section 15 (1) of the Court of Appeal Act, 1978, was framed as follows:

In C of A (CRI) NO 2 of 2005 Phamong Mohale first appellant and Khotso Mohale second appellant vs REX Respondent:. The Court of Appeal, Ramodibedi JA [with Grosskopf JA and Melunsky concurring] held as follows:

“It follows from these considerations that the correct interpretation of section 26 (1) of the Children’s Act, in my judgment, is that if at the date of sentence, the accused has attained the age of 18 years, it is within the court’s discretion to impose whatever sentence it deems appropriate in the circumstances. Put differently the relevant age for consideration for the purposes of section 26 (1) is the age on the date of sentence.”

My dilemma arose out of the apparent conflict of this *dicta* and the provisions of section 12 (4) of the Constitution which provide that:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

The sentence of incarceration which seems called for on this instance where the court of appeal in the Mohale case says I am at large to impose, seems to me to be in conflict with the clear provisions of the Constitution as to the relevant time for the imposition of the sentence.

[3] Although the present matter did not originally appear on the roll of cases for this session, by its very nature, it cried out for urgent consideration. It therefore had to be enrolled and considered. The counsel appearing in the matter were invited and directed to prepare to address the Court on the above issues raised by the learned judge. The matter was ultimately placed before us.

### **Factual Matrix**

[4] The facts that led to the prosecution of the accused are not complicated. They are that, the accused was charged with the crime of murder in that, upon or about the 11<sup>th</sup> day of July 2010 at or near Liphakoeng Malieleng in the district of Berea, he unlawfully and intentionally killed one Lethibela Letsipa by stabbing him with a knife. He pleaded not guilty to the charge. On 27 May 2019, he was found guilty of murder. Later on, the court determined the existence of extenuating circumstances. The accused is described in the charge sheet as being aged 17 years on the date of the commission of the offence. If that is so, he was, in terms of the Children's Protection Act, 1980, a

child. Section 2 the Act describes a child as an unmarried person under the age of 18 years. More about this later.

### **The issue**

[5] The issue raised in this reservation is whether, regard being had to the provisions of section 12(4) of the Constitution of Lesotho, 1993, the decision of this Court in *Mohale and Another v Rex C of A (CRI) NO 2 of 2005* was correct in holding that, the relevant age for consideration for purposes of 26 (1) of the Children's Protection Act, 1980, is the age on the date of sentence as opposed to the age on the commission of the offence.

### **The law**

[6] In order to deal with the specific question of law reserved, it is necessary to begin by examining the constitutional and legal framework within which the issue arises. Section 2 of the Constitution of Lesotho, 1993, provides that, '[t]his Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' In this context, "law" includes any instrument having the force of law made in exercise of a power conferred by a law; and the customary law of Lesotho and any other unwritten rule of law.<sup>1</sup> Accordingly, one of the consequences of Lesotho's constitutional democracy is the requirement that all laws must be construed in light of the Constitution. This requirement flows from the supremacy

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<sup>1</sup> Section 154 of the Constitution of Lesotho, 1993.

of the Constitution. Thus, all laws must be construed in a manner that will bring them within the constitutional confines.

[7] This case presents this Court with an opportunity of defining the reach of the principles expressed by the courts of this country in the context of the Constitution and the principle of constitutional supremacy. This is achieved by declaring invalid any conduct inconsistent with the Constitution. This is because decisions of the courts of Lesotho must derive their validity, as every precedent and other law, from the Constitution of this country.

[8] Section 12 of the Constitution contains various provisions to secure the protection of the law for a person charged with a criminal offence. Section 12 (4) of the Constitution provides that, '...no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.' This section, must be purposively and generously construed and understood so as to avoid what Lord Wilberforce called "the austerity of tabulated legalism"<sup>2</sup>, "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." This provision embodies the principle of legality. In criminal law, the principle of legality guarantees the primacy of law in all criminal proceedings. It seeks fundamentally to afford an accused person the right to be tried and punished only in accordance with existing law.

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<sup>2</sup> Minister of Home Affairs (Bermuda) v Fisher 1980 AC 319 at 328H.

[9] The section is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It embodies the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). It further embodies the principle that the criminal law must not be extensively construed to an accused's detriment. It follows from this that an offence must be clearly defined in law.<sup>3</sup>

[10] The above condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.<sup>4</sup> The principle of legality is one of the venerated concepts in our common law and is embedded in the ancient Latin phrase *Nulla poena sine lege* which means no punishment unless by law.

[11] The above constitutional principles have been concretised by legislative provisions in various statutes. In relation to juvenile justice, the provisions of the *Children's Protection Act*<sup>5</sup> and its repealing enactment: the *Children Protection and Welfare Act (CPWA)*<sup>6</sup>, also help to concretise the provisions of section 12(4) of the Constitution. However, the former and not the latter Act is applicable to the present matter. Section 26 of the Children's Protection Act provides that no child shall be punished by imprisonment. When about to enter the stage of sentencing, the learned judge had to grapple with the provisions of section 26 of the Children's Protection Act; section

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<sup>3</sup> Kokkinakis v. Greece (1993) 17 E.H.H.R. 397.

<sup>4</sup> Ibid.

<sup>5</sup> Children's Protection Act No.6 of 1980.

<sup>6</sup> Children Protection and Welfare Act 7 of 2011.

12(4) of the Constitution of Lesotho, 1993; as well as the decision of this Court in *Mohale and Another v Rex C of A (CRI) NO 2 of 2005*. This was the legal basis for the present reservation.

### **Consideration of the question reserved for decision**

[12] Turning to consider the questions reserved for decision, the starting point is that, section 15(1) of the Court of Appeal Act provides that:

15. (1) In addition and without prejudice to the right of appeal given by this or any other Act, a Judge of the High Court may, upon the determination of a conviction whether in its original or appellate criminal jurisdiction, reserve any question of law arising therein for the consideration of the court.

(2) The Court shall determine any question reserved for its consideration under subsection (1).

(3) On the determination by the Court of a question reserved for its consideration under subsection (1), the Court may make an order confirming, or setting aside the decision of the High Court, and shall have the same powers in relation to a case stated by the High Court as it has in relation to an appeal.

[13] The first issue is whether the judgment of this Court in *Mohale and Another v Rex*<sup>7</sup> (per Ramodibedi JA, with Grosskopf and Melunsky JJA concurring) was correctly decided. As indicated earlier, the issue whether the decision that, "...the correct interpretation of section 26 (1) of the Children's Act, ... is that if at the date of sentence, the accused has attained the age of 18 years, it is within the court's discretion to impose whatever sentence it deems appropriate in the circumstances. Put differently the relevant age for consideration for the purposes of 26 (1) is the age on the date of sentence" was correct.

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<sup>7</sup> *Mohale and Another v Rex C of A (CRI) NO 2 of 2005*.

[14] When the decision in *Mohale and Another v Rex (supra)* was made, in 2005, the current Constitution of Lesotho was already in operation. The Constitution came into force on 1 April 1993. Section 12(4) thereof provides in part that, “...no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.” This provision is clearly inconsistent with the imposition of a sentence that, an accused who at the time of the commission of an offence for which he was convicted, had not attained the age contemplated by section 26(1) of the Children’s Protection Act. I am of the view that, the provisions of section 12(4) of the Constitution were intended to prevent the imposition of a heavier punishment for an offence which at the time of its commission could only attract a light punishment.<sup>8</sup>

[15] What then should we do with our decision in *Mohale and Another v Rex (supra)*? In *Chirwa v Transnet Limited*,<sup>9</sup> the Constitutional Court of South Africa once faced a similar dilemma. This is apparent from its following remarks:

“ [P]recedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot ‘rule’ unless it is reasonably predictable. A highest court of appeal — and this Court in particular — has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order – as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and

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<sup>8</sup> In *Ikpasa v. Bendel State* (1981) 9 S.C.7 at p.15.

<sup>9</sup> *Chirwa v Transnet Limited* 2008 4 SA 367 (CC).



interpretations may change. At the same time, though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts."<sup>10</sup>

[16] I fully appreciate and associate myself with the foregoing remarks. I adopt the remarks *mutatis mutandis*. In *Rodriguez de Quijas u Shearson/American Express*,<sup>11</sup> the court remarked that, if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. What this actually means is that, this Court has the prerogative of overruling its own decisions.

[17] With the foregoing remarks in mind, I nevertheless hold that, the decision in *Mohale and Another v Rex (supra)* was incorrectly decided to the extent that it held that, if at the date of sentence the accused has attained the age of 18 years, it is within the court's discretion to impose whatever sentence it deems appropriate in the circumstances. The correct legal position is that, the relevant age for consideration for the purpose of section 26 (1) of the Children Protection Act, is the age of the commission of the offence, not the date of sentence.

[18] In *Lepule v Lepule and Others*<sup>12</sup> this Court pointed out that, all courts in Lesotho, including the Court of Appeal, are

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<sup>10</sup> Gcaba para 62.

<sup>11</sup> *Rodriguez de Quijas u Shearson/American Express*, 490 U.S. 477 at 484.

<sup>12</sup> *Lepule v Lepule and Others* (C of A (CIV) NO. 34/2014) para 75.

creatures of legislation in that they have been established by the Constitution and the relevant legislation and they exercise their jurisdiction in terms of the law of the land. The jurisdiction of an apex court to review its own decisions is not an appeal in disguise. As was pointed out in *Lepule v Lepule and Others (supra)*:

[97]... we are persuaded that although the Lesotho Court of Appeal does not have direct jurisdiction, whether in the Constitution or in the applicable legislation to review its own judgments, the Court may, when the appropriate circumstances arise, exercise that jurisdiction, based on its inherent common law duty and obligation to serve the interests of justice. However, similar to the jurisdictions discussed earlier, this Court, must be circumspect in doing so, but not exercise that power with undue rigidity. This Court must therefore proceed to do so only when exceptional circumstances are present. Similarly, exceptional circumstances will exist where, in the prior judgment, a patent error has occurred and or there has been a gross or serious miscarriage of justice which can be corrected only by reviewing this Court's prior judgment.

[19] In *Hippo Transport v Commissioner of Customs & Excise*,<sup>13</sup> this Court pointed out that, if any apparent error is noticed by a "superior court" in respect of any orders passed by it the superior court has not only power, but a duty to correct it. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision.

## **Disposal**

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<sup>13</sup> *Hippo Transport v Commissioner of Customs & Excise* C of A (CIV) 06 of 2017 at para 15.

[20] The decision of this Court in *Mohale and Another v Rex (supra)*, is inconsistent with section 12(4) of the Constitution of Lesotho for holding that, the correct interpretation of section 26 (1) of the Children's Protection Act is that, if at the date of sentence the accused has attained the age of 18 years, it is within the court's discretion to impose whatever sentence it deems appropriate in the circumstances. The decision of this Court was incorrect in holding that, the relevant age for consideration for purposes of section 26 (1) of the Children's Protection Act, is the age of the accused on the date of sentence as opposed to the age of the commission of the offence.

[21] The present case is a clear testimony that delay in the dispensation of justice is inimical to the attainment of substantial justice. In spite of the various machineries for criminal justice administration, the problems of delays have rendered the quick dispensation of criminal justice more of a myth than a reality in Lesotho. The trend of delay in the system runs through pre-trial, trial and post-trial stages of the criminal justice system of this country. Had the accused been tried within a reasonable time of the commission of the offence, problems of the present nature would hardly ever arise.

### **Order**

[22] In the result, the following order is made:

- (a) The decision of this Court in *Mohale and Another v Rex C of A (CRI) NO 2 of 2005* is overruled to the extent of its inconsistency with section 12(4) of the Constitution.
- (b) For the avoidance of doubt, it is hereby declared that, the relevant age for consideration for purposes of section 26 (1) of the Children's Protection Act, 1980, in light of section 12(4) of the Constitution, is the age of the date of the commission of the crime and not the date of sentence.
- (c) The matter is remitted to the High Court for treatment according to law.



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**DR K E MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:



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**P. T. DAMASED**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**DR J. VAN DER WESTHUIZEN**

**ACTING JUSTICE OF APPEAL**

**FOR THE CROWN:**

ADV. R. THABA

**FOR THE ACCUSED:**

MR. E.M. SELLO