

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

DAVID KHESA
HOLIATA MOLEBALISO

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P.
Mofokeng on the 1st day of November 1983

The two accused are charged with the crime of murder. They pleaded guilty to the lesser crime of culpable homicide, which plea the Principal Crown Counsel accepted.

Although Section 240(1)(a) empowers this Court to sentence an accused person who pleads guilty to an offence (other than murder) without hearing any evidence, it has become an established practice in this Court that Crown Counsel gives an outline of the facts of the case. This was done in this case. The reason why, in this Court the hearing of evidence is not obligatory is simply that it is expected to have informed itself from the depositions taken at the preparatory examination. (Rex v Mekhoa Molulela & others, CRI/T/2/82 dated 11th November 1982).

/A certain ...

A certain woman, in the village of the accused and the deceased, discovered that two of her fowls were missing. A report was made to the chief who summoned to his place all the men. The deceased confessed to one of the villagers that if the call to the chief's place concerned the woman's fowls, he was not going to waste anybody's time but would confess to the chief. He, in fact, did just that. He volunteered to go and point out where he had hidden them.

On the way, he tried twice to escape and each time was stopped. On the last occasion, he ran quite some distance but was again caught by the two accused who also started assaulting him with sticks. As they did so, the deceased retreated. The accused continued to subdue him with their sticks. The deceased then turned and, as he fled and with the two accused in hot pursuit, he fell over a Krans which turned out to be deep. He landed on stony surface. Within a short time he was dead.

In the case of Motjekoa & others v Rex, CRI/A/47/76 (in the press) it was said by this Court :

" The accused must, as a general principle, be both the factual and legal cause of the deceased's death. Accused is the factual cause of deceased's death if but for his negligence deceased would not have died when he did. Accused is the legal cause of deceased's death if his conduct was the proximate cause of deceased's death. However, the important rule in cases of culpable homicide is the rule that human conduct or an event which might otherwise have ranked as a novus actus will not so rank if the occurrence is of a class, kind or type which was or should have been foreseen (S. v. Stavast, 1964(3) S.A. 617(T) at 621.) It is sufficient for legal responsibility to arise that the accused
/ought ...

ought to have foreseen some risk of death. The accused need not foresee the actual manner of his victim's death if the manner of the victim's death is within the range of ordinary human experience. (R. v John, 1969(2) S.A. 560 (R.A.D.) at pp 570-1 S. v. Motau, 1968(4) S.A. 670 at 677 G-H.) (See also HUNT, Volume II p. 331)

On the basis of these principles the accused were convicted of the crime of Culpable Homicide, which from the facts, in the Courts view, they had undoubtedly committed.

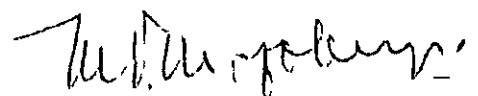
In passing sentence it was taken into consideration that the two accused had shown remorse by pleading guilty. There was again an element of provocation present in this case in that the deceased tried twice to run away and these acts tried the patience of the accused to the extreme. The accused have been in custody for a period of six (6) months awaiting the outcome of this case. That, in itself, is an important factor which must never be lost sight of. It is like a sword of Democles hanging over an accused's head which is, in itself, a painful punishment. (Pieter Makoala, v. Regina, 1963-66 H.C.T.L.R. 64D-66A). On the other side of the coin, the Court hardly ever hears anything concerning the deceased. He is always the bad boy. The Court has not been informed whether he was married and if so, whether he had any children. I was informed that the accused support their aged mothers but I do not know whether the deceased supported his aged parents as well. However, the accused will still have to "raise the head of the deceased" which simply means that they are still going to face a civil action in the Customary Courts as it is the custom.

/The Court ...

The Court is not going to be hard on them since they are related to the deceased. However, they have committed a serious act, namely taking the law into their own hands. They should not take the law into their hands. They have no right to take away the life of a fellow human-being. Since they have done that, like all good citizens who have gone astray, they must receive their punishment without any bitterness. In the particular circumstances of their case, the Court will endeavour to be lenient.

The sentence of the Court is as follows: Payment of the sum of M200.00 (Two hundred Maloti only) or in default of payment to undergo imprisonment for a period of four (4) years.

My assessors agree unanimously with the Court's findings as well as the sentence imposed on the accused.



J U D G E

1st November, 1983

For the Crown : Adv. S. Peete

For the Defence : Adv. Phakoane