CRI/T/27/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PAKI MAOELA

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 16th day of August, 1990.

The accused pleaded not guilty to a charge of the unlawful and intentional killing of one 'Malibakiso Maoela who died on 25th November, 1988 at Matsaneng in the district of Mafeteng.

The court refused an application to admit in terms of section 223(7) of the Criminal Procedure and Evidence Act 9 of 1981 the post mortem report of the doctor who examined the deceased. The reason for the refusal was that grave doubts surrounded the question whether the body examined was of the deceased in the instant case in view of the fact that P.W.5 Kuse Maoela whose names appear in the doctor's report

/as

as the man who identified the deceased before him denied both at P.E. and in this Court that he ever identified the deceased's body to any doctor around the time of its examination.

Consequently the crown recalled P.W.3 a 14 year old daughter of the deceased who testified that before her mother's death which occurred on the same day that she was stabbed by the accused she was in good health. P.W.2 Daniel Rasebonang had testified before P.W.3 did that police who came to collect the deceased who was still alive but only barely so then, had taken some thirty minutes to arrive at the scene. The deceased was taken to the hospital in Mokone's vehicle. On account of the nearness of the hospital to the scene the deceased could not have taken more than twenty minutes to reach the hospital where she was certified dead a short while after arrival and examination. It should then be clear that the deceased did not survive more than an hour after being stabbed.

Under cross examination following her recall P.W.3 testified that it was correct that her mother during a period in excess of one month had had her leg in plaster of Paris cast due to an injury sustained when she fell into a donga when she slipped.

Giving clarification in response to a question posed by the gentleman assessor on my left P.W.3 stated that the fall could have happened either in February or March 1988 while the stabbing occurred in November of that year.

In submissions made at the closing addresses Mr. Pitso for the defence held P.W.3's evidence in doubt because he contended P.W.3 had said her mother had sustained an injury a month before the killing whereas later her answer tended to indicate that the injury had occurred some 8 to 9 months before.

But the context in which P.W.3 was asked under cross-examination entails neither a contradiction necessarily nor

an attempt to fabricate. It went as follows:-

> "Is it not true that for some month or so before her death the deceased had fallen into a donga and plaster of Paris had to be applied -?
>
> It is true."

If the answer was "it is not true" in response to the part of the question that suggested that the injury had occurred only a month before the stabbing then the essence of the question that she had sustained an injury to her leg before the stabbing would have falsely been denied and needlessly lost. Thus it required the clarification that the gentleman assessor elicited from the witness.

In any event P.W.3's reply that when she died the deceased's leg was no longer in plaster of Paris cast satisfies me that she was then in good state of health. Moreover the deceased who was quite close to her daughter and usually revealed to her what ailments she had did not complain of any around the period immediately surrounding or preceding her death. I take it therefore that no other cognisable cause than the one attested to by the eye witnesses is accountable for the deceased's death.

In this state of events therefore the submission that the cause of death has not been established is rejected.

Speaking generally it is not unknown in criminal cases that even where the dead body has disappeared as in the case where it was thrown overboard at sea and thus precluding possibility by medical evidence to establish the cause of death the culprit has been brought before court, tried and where appropriate convicted.

This should serve as a pointer that even although medical evidence is helpful or even necessary for purposes of establishing the cause of death, its absence cannot per se render a criminal trial foredoomed because as rightly pointed out by Mr. Mokhobo for the crown there is authority

/for

for the view that even though there is no medical evidence as to the cause of death that does not preclude the court from convicting an accused person of a homicide.

P.W.6 Police Woman Motsamai who attended the scene of crime immediately on receiving a report regarding the assault on the deceased testified that on her examination of the deceased she saw blood coming from a wound situated on the left side of the deceased's chest.

P.W.1 Detective Trooper Mpholo identified EX."1" as the knife that the accused handed to him on 26-11-88 when the latter came to report himself to P.W,1 at the Police Station.

P.W.5 Kuse Maoela the accused's father testified that he is the one who undertook to send the accused to the police station as the accused was absent when the police came to P.W.5's place looking for the accused who was living there.

The only other eye witness besides P.W.3 who testified to these events is P.W.2 Daniel Rasebonang.

He told the court that on that fateful day he had occasion to go to a restaurant surviving under the commercial name Eighty-Eight. He was drinking "Long Toms" of Lion Lager and had just downed a sixth can of the same stuff and was about ready to leave after buying a case of these "Long Toms" when a young man came to him. He did not know this young man. The young man called him by name.

P.W.2 who was surprised by the familiarity that the young man showed to him asked if the young man knew him. This young man was the accused who in response said yes. The accused further told P.W.2 that he knew P.W.2's children and explained that he stayed at Maoela's house which is next door to P.W.2's.

P.W.2 then asked the accused to help him carry the case of "Long Toms" to P.W.2's home. The accused agreed.

/Along

Along the way the two met a woman whom P.W.2 later knew as the deceased.

P.W.2 heard the deceased say to the accused that the accused is silly. The accused put the case down and aggressively made for the deceased. This event was later demonstrated before the court which recorded it as follows:-

> "Demonstration; a quick but gentle dropping of the box on the ground followed by a brisk walk towards the (imagined) deceased."

P.W.2 stated that the deceased had by then had her back towards the accused some 7 paces away. P.W.2 admonished the accused against the act as he feared that from the manner of his approach towards the deceased the accused was going to attack her. The accused heeded the admonition, turned back picked up the case and proceeded with P.W.2 to the latter's home.

On arrival the accused asked P.W.2 for the brand of cigarettes called 20 Peter Stuyvesant. P.W.2 sent a child to buy him some.

P.W.2 then told the accused that he was going to Lelimo's cafe. The accused said he was going with him. When P.W.2 got inside the cafe the accused had lagged some 15 paces behind him. Then P.W.2 heard a noise outside. When P.W.2 marched outside to indulge his curiosity he saw the accused chasing after the deceased. P.W.2 came after the accused and reprimanded him. The accused came back.

P.W.2 proceeded to Albert's cafe which is 50 paces away from Mokone Lelimo's cafe. P.W.2 was following the deceased who had run behind Albert's cafe. It is at this cafe that P.W.2 found the deceased fallen and bleeding. He tried to help stop the bleeding but was unable to locate the wound from which the blood was spouting.

P.W.2 testified that as he was seeing the accused for the first time on that day he would not tell if he was drunk.

/But

But the accused never drank in his presence.

In cross-examination P.W.2 was told that the deceased met him and the accused on their way to Mokone's cafe from P.W.2's home and not on their way from Eighty-Eight restaurant to P.W.2's home. Further that when he went towards the deceased the accused was not in an aggressive mood. P.W.2 denied these assertions and buttressed his observation of the latter event by pointing out that he even called the accused back and the accused complied. The accused does not deny that he heeded P.W.2's call to desist from approaching the deceased.

P.W.2 testified that he was ignorant of the state of relationships between the accused and the deceased for he was seeing them for the first time that day. He did not know until subsequently that they were even aunt and nephew.

He denied that apart from saying the accused was silly the deceased further swore at the accused by the latter's parents' private parts. He said he would have heard if any such utterances had been made by the deceased.

Indeed as later indicated by the accused the relative positions the three of them were bearing towards each other make it impossible to accept that P.W.2 could not have heard words uttered by the deceased apart from the fact that she said the accused was silly. The accused showed that he and P.W.2 were walking abreast of each other with P.W.2 just a foot apart when the deceased who was 8 paces away uttered whatever words she did.

P.W.2 denied that because of drink he might have forgotten that the deceased had sworn at the accused by his parents' private parts. He branded as a lie the suggestion that he invited the accused to go with him to Mokone's cafe.

He described as unfounded the suggestion that the accused was going to beg for pardon from the deceased wh

/he

he approached her for the aggressive manner created no basis for any such suggestion.

Asked on what basis he could have gone back for the pardon of someone he had not wronged the accused said the deceased was aggrieved with him because he had not greeted her.

The accused did not say at what stage the deceased is alleged to have said he did not greet her. But if he contends that it was while he was in P.W.2's company this version was never put to P.W.2. It stands to reason therefore that the conclusion may not be faulted that the version was never put because it was a fabrication.

P.W.2 conceded that as he was indoors he did not see the source of the second encounter between the accused and the deceased. He however denied that the accused did not chase the deceased.

It was put to P.W.2 that it was the deceased who attacked the accused. In reply P.W.2 said when he appeared it was when the accused was chasing the deceased.

P.W.3 now aged 14 stated that she attends school and is doing standard 6 presently.

On the day in question she and her mother were just arriving from Mafeteng when the accused approached them while they were next to 'Mamolahlehi's home.

The accused touched the deceased on the chest and the deceased warned him not to. The accused left her and went away.

P.W.3 afterwards went to Mokone's cafe leaving her mother sitting next to a dam 50 yards away from Mokone's cafe.

P.W.3 found the accused at the cafe in the company of P.W.2 whom she did not know. There was no shopkeeper in the cafe.

/While

While P.W.3 was in the cafe the accused said to her "you, I want to kill your mother."

Thereafter P.W.3 proceeded to go outside intending to report the accused's threats to her mother. But she met her mother at the door and the mother asked P.W.3 why she was was waiting there. P.W.3 told her that the shopkeeper was not in. It was at this stage but just outside the door some 6 paces away that P.W.3 told her mother about the accused's threats.

The accused came following after the deceased after she asked him why he said he was going to kill her.

P.W.3 saw the accused thrust his hands into his pocket whereupon the deceased asked "what are you doing Paki."

The accused drew a knife tore at the deceased's dress with it and the deceased said "sorry sorry brother" and tried to flee.

The accused said I want to kill you. Saying these words the accused followed the deceased and stabbed her. The deceased ran to Albert's cafe at the door of which she fell and much blood flowed from her wound.

P.W.3 did not know what became of the accused. P.W.3 identified Ex."1" as the knife used by the accused to stab the deceased.

EX."1" is a knife with a white handle. Its blade is very very sharp and has a mean looking thin sharp point. The entire blade is about four inches long.

P.W.3 denied that this knife was wrested from the deceased's grasp by the accused during the fight when the accused was being attacked by the deceased.

She denied the allegation that the accused did not say he wanted to kill the deceased. She however said even though the threats were not uttered in an angry mood they frightened her because of the manner in which the accused had just

/previously

previously touched her mother's chest.

She said the accused was about a foot away from the deceased when he drew the knife. However P.W.3 did not notice the stage at which the knife was unclasped.

It is somewhat strange that P.W.2 in whose presence the threatening words were allegedly uttered made no reference to them. In fact P.W.2 said the accused remained outside the cafe when he himself was in it. Only did P.W.2 move out when his attention was attracted to the noise outside. When he appeared he saw the accused chasing the deceased.

P.W.2 and 3 corroborate each other regarding the chase by the accused of the deceased.

However the accused in his evidence testified that it was true that P.W.3 found him and P.W.2 in the cafe.

The accused's version is that on the day in question he found P.W.2 at Eighty-Eight Restaurant. He and P.W.2 were already from P.W.2's house when they met the deceased who said the accused was silly when they met her. She also swore at him by his parents' private parts. He was hurt by this. He tried to approach her but was stopped by P.W.2 as he intended speaking to her. He and P.W.2 proceeded on their way to the cafe inside which they were found by P.W.3 who said nothing to them and they to her.

He denied that he told P.W.3 that he wanted to assault or kill her mother. He only said that P.W.3 should beg for pardon on his behalf from her mother because the deceased had insulted him alleging that it was because he did not greet her. However this was not put to P.W.3. Then P.W.3 left leaving the accused in there. There and then the deceased came in and started assaulting the accused with a litter of cocacola bottle. However this was never put to either P.W.2 or P.W.3, yet in C of A (CRI) 7 of 1989 Naro Lefaso vs Rex (unreported) at 7 Schutz P. had this to say:

/"The

"The need for the defence to put the salient parts of the defence case to the relevant crown witnesses has been stressed by this Court over and over again. One reason for putting the defence version is to give the crown witnesses a chance to counter it."

....."From an accused person's point of view failure to reveal his version before he gives evidence leads to a natural inference that he has concocted a version at the last minute, even though such an inference should not always be drawn."

The accused proceeded to say the deceased while assaulting him was saying he is silly like his father after whom he had taken.

She went outside and made a spectacle of herself shouting and saying the accused should come outside the cafe so that she could show her that she was a girl from Maseru. The accused obligingly came out and went to tell her she should not disgrace him as she was his aunt.

The accused said he noticed that the deceased was ready to fight as she was holding a knife which was already unclasped. He only observed when he was a foot away that the deceased was holding a knife.

When the deceased delivered a stabbing blow at him the accused got hold of her hand and pulled the knife away and quickly cut her with it for he was also afraid of the knife.

He said he stabbed her once with that knife.

Under cross examination the accused stated that he did not know how old he is. He denied that he and P.W.2 met the deceased along their way from Eighty-Eight Restaurant to P.W.2's home. He would not say why P.W.2 should lie saying the accused even dropped the case of beer in order to approach the deceased in the manner earlier described.

The accused said it surprised him that P.W.2 should only have heard the deceased say he was silly and fail to hear when she was invoking his parents' private parts. He said he didn't know why P.W.2 should say the accused approached the deceased aggressively. He denied that he did so.

/He

He said he didn't know why P.W.2 felt he should stop him.

After denying that he had earlier said P.W.2 urged him to go and beg for pardon from the deceased the machine was played back and his unmistakeable voice contradicted him and only then did he admit he had been correctly recorded as having said so.

Asked if therefore he had told his counsel that P.W.2 had urged him to ask for pardon from the deceased he said he did.

Asked if it was put to P.W.2 that he said accused should go and ask for pardon he said it was. When told to desist from lying he quickly countered his previous answer and said that he had made a mistake.

He testified that he had gone to buy bubble gums from Mokone's cafe. But when he entered the shopkeeper P.W.4 went out.

"You remained in the shop when P.W.4 Makena went out -?

I remained with another man I don't know.

What was he doing -?

Drinking with P.W.4 Makena.

Anybody else in there -?

Only two of them.

Court:

Who was Makena drinking with -?

Moiloa."

Clearly from the above it should not be difficult to realise that the accused is a facile liar. In one and the same instance he says he doesn't know with whom Makena was drinking and yet he says the man is Moiloa. Thus showing he knew him, this being borne out by the fact that he said he

/was

was speaking with this Moiloa in the cafe.

The accused said the only occasion he spoke to P.W.3 in the cafe was when he asked her to go and ask for pardon for him from the deceased. He said there was no bad blood between him and P.W.3 and that no quarrel had occurred between them previously. He was thus hard put to it to say why then P.W.3 could lie about him and say he threatened to kill her mother while they were in Mokone's cafe. He merely contented himself with saying he was surprised at this.

The accused stated that if the question was ever put to P.W.3 that her mother was the first to attack him with the coke bottle he would have heard. Amazing to relate that even though this would seem to constitute a vital aspect of the accused's defence in this case he however let it pass over in silence yet he sought to make the court to believe that he was not satisfied with the fact that his counsel omitted to put it on his behalf. When his attention was drawn to the fact that if he felt while proceedings were going on in court unequal to the task of catching his counsel's eye in order to let the latter approach him there in the box his opportunity seemed in these proceedings not to have been lost since P.W.3 had been recalled after an interval spanning about eight hours. At this juncture the accused was clearly in a cleft stick yet in Phaloane vs Rex 1981(2) LL R at 246 Maisels P. as he then was stated:-

> "It is generally accepted that the function of counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. Moreover, even making allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to the crown witnesses, it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation."

It seems to me palpably false that if counsel for the accused had been briefed by the accused on this aspect of the matter he could have failed to put it to the crown witnesses.

/Furthermore

Furthermore the accused having heard P.W.6 give evidence from the start to finish, even though he realised that at the time he went to make his statement it was before P.W.6 that he did so, and further that P.W.6 saw the injury that he sustained on his mouth from the alleged bottle blow delivered by the deceased, failed to have this question put to P.W.6 and thus denied the court the opportunity to observe the reaction of P.W.6 to this important allegation which could either have been confirmed or denied.

The accused stated that he did not chase after the deceased and emphatically said P.W.2 who said he saw him do so when he appeared was lying and should not be believed because he never got outside the cafe at all. But it was never put to P.W.2 that he never got out of the cafe at all. This is a matter that this Court heard for the first time when the accused was giving evidence under cross examination yet in Lefaso above at 8 Schutz P. stated that another reason for putting the defence version is that

> "crown counsel is entitled to assume that a fact is not in issue if it has been deposed to and is not challenged. There is no call on the prosecuting counsel to call further witnesses to prove a fact which is not in issue."

Yet the accused said he stabbed the deceased on the right side of the chest and urged that P.W.6 who said the injury was on the left side of the chest should be disbelieved even though her version which was clearly in conflict with his was let go unchallenged.

In the same vein in Small vs Smith 1954(3) SA 434 Classen J. pointed out that

> "It is grossly unfair and improper to let a witness's evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved."

With regard to the evidence of P.W.3 vis a vis the actions of the accused on that day I find the words of Schutz P. highly commendable in C of A (CRI) No.3 of 1984 Thebe vs Rex (unreported) at 20 where the learned President said:-

/"To

> "To my mind the evidence should be accepted as true. It is very difficult to believe that the witness would have fabricated this story against his own cousin to whom he bore no hostility."

The accused's narration of how he approached the deceased who had raised a knife as he observed this some distance away was a pathetic attempt at wiggling out of a difficult situation created by himself for he later said he only observed the knife in the deceased's hand when the latter suddenly raised it to stab him when he was barely a foot away from her as he was responding to her call to come and be shown that she is a girl from Maseru. This sudden change from the fact that he had observed the knife as he approached to the fact that he only observed it when raised and ready to stab him is difficult to comprehend. However it seems that in his invention of the defence as he is getting along he wishes to improve his tale because in a clear contradiction of his earlier statement that he saw the knife raised as he approached the deceased who was some distance away he later sought to show that he failed to see this knife well in advance because the deceased had concealed it in her folded arms.

Given the atmosphere that the accused himself created of a furious woman who was boasting about being a girl from Maseru and was obviously on a war path it becomes difficult to accept the story that she was folding her arms as she was doing so. It is said she was wearing only a jersey on her upper body thus her arms were not covered under a blanket.

In Broadhurst vs Rex (1964) A C 441 at 457 Lord Devlin said:-

> "Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all ..... But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt..."

/Implicit

Implicit in the accused's answers that he did not know why his counsel did not put his version to the prosecution witnesses was an attempt to cast a blame on his counsel for the fabrications produced at the last minute from the accused's own mind. I cannot accept that his counsel is to blame for this.

I have already dealt with the question relating to the advantage afforded by the availability of medical evidence to establish the cause of death. But in Rex vs Fred Tekane 1980(2) L L R at 342 support is given to the view

> "that it is not encumbent upon the crown to prove scientific cause of death provided ...it is able to prove that the act that resulted in death was perpetrated by the accused."

In R vs Adams 1957 CR. R.R. 365 in his charge to the jury Devlin J. as he then was said

> "Cause means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a common sense way as the cause."

Adopting the same attitude Cotran J. as he then was in Thabo Tsomela vs Rex 1974-75 LL.R at 99 said

> "I am unable to subscribe to the view that a court of law is precluded from coming to a conclusion about the cause of death by reason only that no medical evidence was available, or if available was not satisfactory or not (scientifically) conclusive."

With regard to the two opposing versions namely that of the crown and that of the accused it would be beneficial to adopt the approach favoured by Tebbutt J. in S. vs Jaffer 1988(2) SA 84 at 88 et seq that

> "The story may be so improbable that it cannot reasonably be true. It is not, however, the correct approach in a criminal case to weigh up the State's version, ..., against the version of the accused and then to accept or reject one or the other on the probabilities."

/In

In S. vs Munyai 1986(4) SA 712 at 715 arguing in the same vein Van der Spuy said

> "There is no room for balancing the two versions, i.e. the State's case against the accused's case and to act on preponderances."

At 716 Van der Spuy went on to say

> "The fact that the court looks at the probabilities of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all the probabilities the version made by the accused is so improbable that it cannot be supposed to be the truth, then it is inherently false and should be rejected."

In S. vs Kubeka 1982(1) SA 534 at 537 Slomowitz said in regard to an accused's version

> "Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

As Van der Spuy put it at 715

> "In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

The favoured course was adopted in S. vs Singh 1975(1) SA 277 where it was said that the proper approach was for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case.

> "This was to ascertain if the accused's version was so improbable as not reasonably to be true. This however, did not mean a departure from the test laid down in R vs Difford 1937 AD 370 at 373 that even if an accused's explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

I have had close consideration of the foregoing in conjunction with the facts presented before me in this case and am of the firm opinion that the accused's version is not only inherently improbable but beyond all doubt false. Thus it cannot be possibly reasonably true. It is thus rejected on that score.

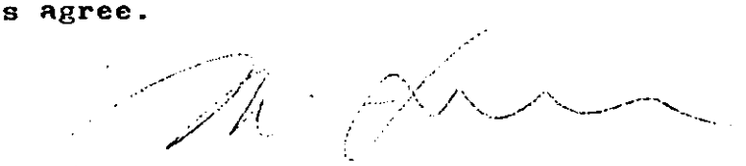
The accused was aware that he was wielding a dangerous weapon. He ought as a reasonable man in the circumstances, to have realised that when thrust into the deceased's body it might cause injury or even death.

There is no room for the application of the Homicide (Amendment) Proclamation 42 of 1959 even granting that the accused was provoked at his first encounter with the deceased by the latter's remark that he was silly. However a lot of time passed in between then and the second encounter such that his passion had cooled down.

There is no room for a plea of self-defence because the accused had disarmed his victim when he stabbed her.

He is accordingly found guilty of murder as charged.

My assessors agree.



J U D G E.

16th August, 1990.

JUDGMENT ON EXTENUATION

Counsel for the accused addressed the Court in extenuation.

The thrust of the accused's plea in this regard is three-pronged.

His counsel asked the Court to take into account that although the element of provocation could not be relied upon in the main trial because of its remoteness at that stage to the criminal act, yet for purposes of extenuation that element cannot be discarded as equally too remote.

He further urged the Court to consider the fact that the effective cause of death did not derive from the state of criminal intent referred to as dolus directus but rather from the one known as dolus eventualis.

He finally submitted that even though the accused's age is unknown he is a young man.

The Court's view is that even though taken individually none of these factors can help reduce the accused's blameworthiness, however their cummulative effect suffices to ground a conclusion that extenuating circumstances exist in the instant case. The Court therefore is persuaded that the extenuating circumstances do in fact exist.

MITIGATION

In an effort to determine the accused's age his counsel consulted his father who was sitting in Court.

Mr. Pitso subsequently informed the Court that the accused is aged 19. I have already stated that this factor

/alone

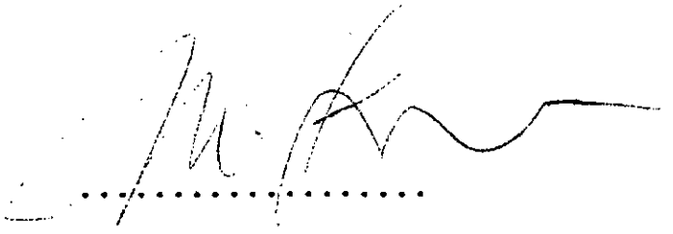
alone could not reduce the accused's moral blameworthiness. In this regard I am fortified by the minority decision by the Appeal Court President in C. of A.(CRI) Thebe vs Rex.

The fact that the ultimte sentence has been averted should be as far as the accused's luck can go and no further.

The heartless manner in which the deceased was slaughtered in full view of her then 12 year old daughter and the fact that no apparent reason justified the accused's wicked act on a defenceless female should suffice to indicate the Court's attitude towards the accused's conduct.

He is accordingly sentenced to 19 years' imprisonment.

My assessors agree.



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J U D G E

16th August, 1990

For Crown : Mr. Mokhobo

For Defence: Mr. Pitso