CRI/T/46/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

vs

NOZABALESE 'MOSO

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo,
Acting Judge, on the 14th August, 1995.

The accused Nozabaleze 'Moso was charged before this court of the murder of Bonkile 'Moso it being alleged that:

upon or about the 7th day of July, 1995 and at or near Tele in the district of Quthing the said accused did unlawfully and intentionally kill one Bonkile 'Moso.

A preparatory examination had been held in which five (5) witnesses to wit: P.W.1 'Masehloho Lesofe, P.W.2 Stephen Khakhau, P.W.3 Mahala Ntloko, P.W.4 No.6373 D/Tpr. Moreki and P.W.5 Dr. A.J. Siddiqi had given evidence. On the trial of the accused the defence counsel had admitted evidence of P.W.2, P.W.3, P.W.4 and P.W.5 and P.W.1 had testified.

In her testimony P.W.1 had told the court that accused was her granddaughter who had lived with her as a baby. That accused's mother had spent most of her time in the Republic of South Africa working; she further testified that accused had attended school though she could not say how far she went. She went on to say that although accused had a child (the deceased) she was unmarried and as to who was the child's father accused had refused to tell. She went on to testify that the deceased was not well provided and was consequently not well nourished because she had no sources of income save subsistence farming. She said the child was sickly but as she could not afford she took the child to see a Dr. on those rare occasions when money was available. She had cared for the child until it was 1 year seven months old.

P.W.1 told the court on arriving home from gathering firewood she found accused and the child had gone to their home and after reporting the matter to the chief and the police accused was found but without the child and accused had said that she had left the child in the donga. Accompanied by the police she had gone to the spot where the child was left and accused had pointed out the spot where she had deposited the child. The spot, according to her, viewed from the top, was a crevice overlooking a ravine where, beneath, there was water. The party had then descended into the donga and the child was pointed out by the mother (accused) and it was only after the accused retrieved the child (deceased) that they saw the child. The child had been wrapped in a shawl and was already dead.

Cross-examined the witness said all of them including accused and the child were starving but for her part she was happy with the child because it was God's gift. She denied she had in any way contributed to accused's ghastly deed and denied when drunk she had repeatedly referred to the deceased as a bastard or that she did not want a bastard in her home.

It would be quite fruitless to spent time delving into this witness's evidence. I found her unsatisfactory in her evidence but this can be accounted for by the fact that she is Xhosa speaking and although conversant in Sesotho there are times when she gets bamboozled linguistically, sometimes. For example asked with what she had thrashed accused with after it was found she had killed her child P.W.1 to the consternation of all of us said with a 'leaf'. Now, by leaf she actually meant a branch of the tree.' Whatever may be said about P.W.1's evidence, materially it was no different from what the accused had herself testified to.

Medical evidence had then been admitted by consent and marked Exh. "A" and the Crown had closed its case.

The accused then testified that she was 17 years old having been born on 5th June, 1977; that she was literate having gone up to standard V and failed to proceed with her education because she was pregnant. She testified that she was unmarried. That one Sonny was the father of her dead child. She had informed Sonny of her pregnancy and he had threatened to beat her up if she disclosed this and this is why when P.W.1 had confronted her of the

pregnancy she had not revealed who was responsible. Ever since Bonkile's (the deceased) birth P.W.1 had become hostile and was at her worst when drunk saying she could not bring up a child whose father she did not know.

Accused went on to testify how on a cold and wintry day in July, 1993 she went to a cafe and P.W.1 had gone drinking and the deceased who had been born on 17th May, 1992 was then 1 year 7 months. She had left home to buy tablets to still her headache and returning home she found the child sitting outside, alone. Inquiring why the child was alone outside at that time of day one Mmamme said the child had been left there by P.W.1. P.W.1 had then said she was to leave with the child and go wherever she wished. She testified that this hurt her and she put the child on her back for the fields and had there thrown her into the donga and left for Herchel.

Back home at P.W.1's accused went to testify that herbs were there prepared, and she was made to undress and wash in the mixture. She was assaulted the while it was asked where the child was.

Cross-examined the accused deposed that when she did the deed she was hurt and befogged and that this was caused by finding her child placed outside. She demonstrated how she threw the child into the donga or ravine by lifting her hands up with palms facing upwards, jerking her arms up and down and said the child went in head first and when she turned her back on the child she expected that child would die.

Asked by the Assessor she said when she threw the child into the donga she was awake and facing her but she was not looking at the child.

To a question by the court accused said she regretted this child ever having born.

'Mamokhethi 'Moso (accused's mother) testified that accused had been born on 1st July, 1977. She also disclosed the fact that she had been sitting in court throughout the proceedings and that she nevertheless knows better when accused was born.

The defence then closed its case.

Mr. Lenono for the Crown submitted that accused anticipated that in throwing the child into the donga the child would die and that here was no defence in the case. Further, that provocation was not a factor in that the deed was not done in the heat of passion as accused had admitted she was aware of the consequences of her deed.

Mr. Mathafeng for the defence submitted that the court was to depart from the rule which fixes criminal responsibility at 14 years in that at the time of committing the offence accused was 15 years old and that the difference between 14 years and 15 years was so marginal that it could not be said that there was a difference in the ages. That it was not challenged that P.W.1 had in fact abused the accused.

Mr. Mathafeng submitted further that P.W.1's memory was doubtful as she seemed to remember conveniently and selectively. That by reason of age accused did not have the capacity to appreciate the wrongfulness of her deed and therefore lacked criminal responsibility. That there being no overlapping of ages as to criminal responsibility and the age of accused this court apply rules of equity so as to do justice between man and man.

I have found this case most disturbing. It boggles the mind how an intelligent, clear-minded woman like the accused who, to me, seemed much older than her age, could have succumbed to such a ghastly deed.

It is to be remembered that in this case the accused has not denied that she killed her child in the manner demonstrated to this court and that her reason for this is that she was hurt and in a state of confusion. Accused has told the court that this action was precipitated by finding her child sitted outside and P.W.1 saying they could leave and go with the child wherever she wished. Even if this be true, I do not see how this could have provoked accused to kill her child. As was suggested, she could have gone back to her home as she eventually did or she could have given away this child to some relative to look after. In any event, she had a wide choice of alternatives.

As to the allegation that she was provoked this is far-fetched for even if the accused had an altercation with P.W.1 that had nothing whatsoever to do with the deceased.

Our Criminal Law (Homicide) Amendment Proclamation No.42 of 1959 Section 4(a) provocation is defined as follows:

> 'The word 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, where done or offered to an ordinary person or in the presence of ordinary person to another person who is under his immediate care to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.'

Sub-section 3(1) and (2) respectively are to the effect that:

SS 3(1)

> 'A person who
>
> (a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder and
>
> (b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of Culpable Homicide only."

SS (2)

> 'The provision of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

In this case there is no causal link between the accused and the deceased nor does the act which caused death bear a reasonable relationship to the provocation.

Asked by one of the Assessors accused told the Court she was already on her way with the deceased when she formed the intention to kill the deceased.

Accused's case is in many ways ages of antiquity revisited. In ancient times and even now in some parts of the world people immolate themselves for the sake of humanity's wrongs. But they take their own lives and not those of innocent victims. It appears to me that accused looking at herself, the fact that she had a child by a man who did not support the child, was herself and the child not well provided for and, as she told the court, regretted ever having had this child, she saw the emptiness in herself and saw the deceased as disposable in order to relieve herself of problems associated with the deceased.

She was wrong, in my view, to have taken such a morbid and narrow path as to translate her emptiness into taking the life of an innocent child.

This is a case which must be distinguished from S. v. P., 1972(3) S.A. 412(A.D.) where the age of the accused and an unhappy upbringing were (rightly so in my view) taken as some of the factors in extenuation by the trial court.

In S. v. P. (supra) a boy had twisted a chain around the neck of an escort until the escort had collapsed. The trial court had drawn the inference that the boy must have subjectively foreseen the possibility of resultant death and that therefore this was a case of dolus eventualis and the boy having been found guilty of murder the appeal court reversed the finding to one of guilty of culpable homicide on the grounds that dolus eventualis had not been established.

Apparently Holmes J.A. had relied on the disclosure by the appellant that at the industrial school they had played such games as twisting a towel round a playmate's throat whereupon the victim would fall to the floor, kicking and bumping his head with no fatal consequences. Mr. Justice Holmes was of the view that the appellant when he twisted a chain around the neck of the escort it was playing a similar game and it could not be said that the appellant had the intent to kill the escort constructively.

As far as this court is concerned, accused played no games nor did she put up any valid defence except her age which was said to be borderline.

Both accused and her mother (the latter in spite of having been in court) respectively testified that accused was born on 5th June, 1977 and 1st July, 1977 so that at the time of commission of the crime accused was 15 years old at least.

Snyman (Criminal Law, 2nd Ed.) p.168 says that a child 'after completion of his seventh year but before completion of his fourteenth year (in other words, till just before his fourteenth birthday) _____ is rebuttably presumed to lack criminal capacity' and that courts refer to such a child who lacks criminal capacity as being doli incapax. Quoting Nbamo's case (1956 1 PH H28(SR), Snyman says 'the closer a child approaches the age of fourteen years, the weaker is the presumption that he lacks criminal capacity.' p.120.

It was not contested by the defence that accused was 15 years or that she was over the age of 14 years when she committed the crime. All I was asked to determine was whether, given accused's age, she had criminal capacity to commit the crime and I hold that when accused killed her child she had the criminal capacity to do so.

I hold that in this case the crown has proved its case beyond reasonable doubt and in addition, notwithstanding accused's age and hence immaturity and the fact of her unhappy upbringing, I do find that when she threw her child down the ravine in a manner she demonstrated to court accused must have subjectively foreseen the possibility of resultant death and was reckless as to the fatal consequences thereof.

Accordingly accused is found guilty of murder.

My assessors agree.

G.N. MOFOLO

Acting Judge

7th August, 1995.

For the Crown: Mr. Lencoo
For the Defence: Mr. Mathafeng

EXTENUATING CIRCUMSTANCES

In view of accused's age and hence her immaturity and her unhappy upbringing there are, in this case, extenuating circumstances and counsel was sparred the trouble of addressing the court on this question.

The court is much indebted especially to the Probation Officer who presented a well prepared and reasoned document regarding circumstances of the accused and what might be best for her. The invaluable arguments in mitigation of sentence by both Counsel were also seriously considered but nothing said has changed this court's mind that the accused, circumstanced as she is, requires strong, effective and hopefully enlightened supervision to place her on course to take her rightful place in society as a responsible and caring mother.

The sentence of the Court is that the accused is sentenced to detention in juvenile training centre subject to Prisons Proclamation 30 of 1957.

My assessors agree.

G.N. MOFOLO
Acting Judge
17th August, 1995.