

CRI/T/18/94

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

HAREBATHO 'MOTA
NTSANE 'MOTA

RULING ON EXTENUATING CIRCUMSTANCES

Delivered by the Honourable Mr. Justice T. Monapathi
on the 10th day of October, 1995

The two Accused have been found guilty of the murder of deceased TEBOHO MOLISE. I have stated the reasons for the finding in my judgment of the 5th October, 1995. I must now state whether or not there are any extenuating circumstances. "Now an extenuating circumstance has been stated to be any factor associated with the crime which serves in the minds of reasonable men to diminish the moral blameworthiness of an accused person for his deed." Per JACOBS CJ in BOTSIO MASHAILE & OTHERS vs REX 1971-73 LLR 148

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at 164.

In my judgment on conviction I have also made a finding that the Accused did not have actual intention to kill which is "where the will is directed to compassing the death of the deceased namely *dolus directus* as described in S v Sigwahla 1967(4) SA 566 (AD) at 5699. "Legal intention, *dolus eventualie* exists where the assailant at the time of the *actus reus* foresaw that it might cause his victim's death" per Evans J in Rex v Thabiso Lejoetso 1971-73 LLR 177 at 180B (see also S v Sigwahla 1967(4) SA 566 at 571 and R v Peete Masheane CRI/T/22/92 - 21-09-92 per Kheola J)

The onus of establishing extenuating circumstances lies on the accused on a balance of probabilities (see S v Ndlovu 1970(1) SA 430A at 433). The accused need not himself give evidence on the aspect of extenuation. Extenuating circumstances may be found either from the body of the record or from other witnesses called on his behalf and the Court may so find even if an accused denied or did or did not admit, at any stage factors which the Court of its own motion nevertheless considers extenuating (see R v Blyth Monanthane CRI/T/14/77 per Cotran CJ). That is why

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despite that the Accused did not admit to drunkenness (see the evidence of P.W.1), and provocation I found these factors as extenuation, in favour of the Accused. The element of provocation was based on the fact that the deceased's torch was shone onto the face of the first Accused. I found provocation but not to the extent that it would remove intention.

There are two other factors that I would find to constitute extenuation, namely that there was no premeditation the Accused and the deceased having been all along been on good terms. There was no evidence or a suggestion of bad blood between them as evidenced by the fact that the Accused continued to refer to the deceased in most respectful of terms. That I took into account.

I have in my ruling on extenuation in the case of Rex vs Rapule Makhetha CRI/T/45/93 of the 21st June 1994 also commented about some of the above aspects that I need only refer Counsel to the ruling. Having regard to the cumulative effect of the factors I found that there were extenuating circumstances and I held that the Accused should not suffer the extreme penalty. My assessors agreed.

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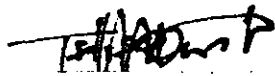
MITIGATION

I did not find that for purposes of sentence I need to make any distinction between the Accused based on their participation in the killing. I have already established that they acted in concert. They are brothers. They are married people with families. This incident was caused by none other than drunkenness and all the absence of consideration that goes with it. I need to have mercy in sentencing the Accused. Indeed the Accused are first offenders. They have taken an innocent life. The deceased will not come back to his family. His contributions and benefits to his family are gone forever. Nothing will compensate the loss adequately.

On the other hand the Courts must mete out such punishments that are not shocking in their severity but neither should they be a farce. If they are a farce the society will look at them as such. The result will be diminution of the authority and the dignity of the Courts in the minds of the public. That should not be encouraged.

I decided that a sentence of seven (7) years to each of the Accused was a suitable one. My assessors agree.

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T. MONAPATHI
JUDGE

10th October, 1995