

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

TANKANA NKALAI

RULING ON EXTENUATING CIRCUMSTANCES

Delivered by the Honourable Mr. Justice T. Monapathi  
on the 18th day of October, 1995

I agree with Mr. Ntihoki, the defence Counsel that there are extenuating circumstances in terms of section 296 of the Criminal Procedure and Evidence Act 1981.

I am persuaded that the record of my judgment reveals that there was extreme provocation brought about by the blatant flaunting of an illicit love affair by the deceased and Accused's wife. This had carried the Accused's patience to the extreme. Not to mention the misery and the desperation to which the Accused was driven. This matter was reported by the Accused to his chief and his bugle. I

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have remarked adversely about the Accused's absence of restraint. But this provocation still constitute extenuation.

The Accused has been found guilty of intention to kill in the legal sense as defined in S v Mini 1963(3) SA 188 AD and various judgments of this Court. This also constitute extenuation. See my remarks in the Ruling on Extenuating Circumstances in R v Harebatho 'Mota & Another CRI/T/18/94, 10th October 1995 (Unreported) (on appeal) and in Rex vs Rapule Makhetha CRI/T/45/93 of 21st June 1994.

This finding on extenuating circumstances therefore enabled me to pass any sentence other than that of death on the Accused.

#### MITIGATION

I agreed that there were factors that called out for a merciful and lenient sentence on this accused person. It was clear that his relationship with his wife had been an unpleasant one which would require a lot of effort to restore to normality. It was a matter of speculation as to what effect the death of deceased (the Accused's wife's

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lover) would have on this herculean task. When I asked the Accused as to whether he had not had a choice of abandoning his wife so as to forget about her. He spoke of a "great loss" that would result if he did so. He referred to his house and property.

There is no doubt that the Accused greatly loved his wife even though their marriage was not blessed with a single child. At the age of the Accused (which is about 46) it is not easy to start a new family or fall into new habits. That is why the Accused said he did not have a lot of choices. The Accused was unemployed and he was also sickly with a bad foot. I have also remarked in my finding or extenuation that the illicit love affair "had carried the Accused's patience to the extreme. Not to mention the misery and desperation to which the Accused was driven."

I told the Accused, who is a first offender, that if the law of this country allowed I would have suspended part of his sentence. (See section 314(1) of the Criminal Procedure and Evidence Act 1981). But punish him I must for his having taken the life of a human being. Also as a deterrent to others. The community expects Courts to punish offenders on this serious charge and others. The

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community wants to see this being done. It has to be done.

I accordingly sent the Accused to a period of imprisonment of three (3) years without an option of a fine.

My Assessors agree.



T. MONAPATHI  
18th October, 1995