CRI/T/48/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X
v
TSOTANG PELEA

EXTENUATING CIRCUMSTANCES AND MITIGATION

Delivered by the Honourable Mr Justice T. Monapathi
on the 4th day of February 2000

The Accused was found guilty of the murder of Phallang Mosala on the 25th January, 2000.

Yesterday I found this accused favoured with existence of extenuating circumstances. I noted that those extenuating circumstances are circumstances which influenced the accused's mental faculties or mind, which concern the crime with which he has been convicted, being reasons for which his involvement is considered as being less blameworthy. And I was referred to the case **STATE V MINI** 1963 (3) S.A. 188 A.D.. It has been stated that extenuating circumstances may be defined as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from legal capacity.

Miss Mohapi for defence, referred to me circumstances which she said I must consider. Firstly whether there are any facts which might be relevant to extenuation such immaturity, intoxication or provocation. Secondly, whether such facts in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such facts had a bearing sufficiently enough to abate the blame worthiness of the Accused in doing what he did. I was referred the case of **STATE V LETS'OLO** 1970 (3) S. A. 476 at 476 (F) - 477 (B). I agreed that the evidence in the record showed that the Accused was drinking alcohol at the time of the commission of the crime, as the crime was indeed committed in the bar. The Accused admitted that there was such drinking before the commission of the crime. This was one of the things that I considered as extenuation. I noted that such drunkenness need not be to the extend that it could negate intention. It was submitted that the court would still have to consider such kind of drunkenness even if it was denied by the Accused himself.

It was also clear from the evidence of both the Crown and the Defence that the killing resulted from exchange of abusive words, there was an exchange of those words between the deceased and the accused. Although some witnesses did not hear such words and although there may have been some disagreement as to the content and so forth but there were those words which were provocative enough such as that the Accused, I quote from the evidence of Martha (PW5) "the deceased will castrate his own mother that the Accused was the detective and that the Accused would be castrated". It was emphasized that factors such as provocation and the intoxication were to be considered even if the Accused may deny their existence. I took those factors cumulatively as it was submitted. I agree therefore that in my discretion I would impose any other sentence upon this Accused other than that of death. In this regard I was referred to the case of **REX V SETENANE MABASO AND**

OTHERS 1982 - 1984 LLR 319 and particularly at page 335. I was referred again to that case of **STATE V LETS'OLO (supra)**. In regard to extenuation, I was generally referred to the authority of CRIMINAL LAW AND PROCEDURE THROUGH CASES in relation to some principles in determining the existence or otherwise of extenuating circumstances, this work by Judge M.P. Mofokeng at page 242, the aspect appearing at (e) And the case of **STATE V SIGWAHLA** 1967 (4) S.A. 566 which Mr Lenono for the Crown referred to me. I finally considered this aspect of the fact that there was indirect intention that led to the killing, this which is called *dolus indirectus*.

ON MITIGATION

This morning I was addressed on mitigation of sentence. I first noted that the Accused, Mr Pelea was a thirty nine (39) years old former policeman. At the time of the commission of the offence he was still a policeman. The likelihood was that he would be dismissed from this work as a result of this conviction. I agreed with Miss Mohapi that first and foremost were the personal circumstances of an accused person which must be considered. I noted that the Accused was a married man with two children. One other thing that I also considered was the aspect of the relationship of this accused person and the deceased, the latter who was a former policeman. I believed that they were friends although the deceased had been dismissed from his job. Indeed the Accused did not say he did anything towards the family of the deceased as after his death by way of atonement or compensation. This he attributed to the attitude of the deceased's father-in-law.

I was urged by Miss Mohapi to consider that this accused person was a first offender. It was said he was a first offender with regard to my being persuaded or in an effort to persuade me that he ought not to be sentenced to imprisonment. In response to that I instantly replied in that my attitude would be that, that a first offender may not get a sentence of imprisonment was not a fixed rule. That case of **REX V MAKOSHOLO** Criminal Review Order No. 20 of 1982 showed that the fact that an offender was a first offender does not guarantee him a punishment out of prison. Indeed it depended on the merit of each individual case. One thing that had to be taken into account, without hesitation , was that this accused had committed a serious offence. This was an overriding consideration. Indeed the Accused might be exposed to dangerous elements in prison. But the purpose of prison has primarily been to rehabilitate people. It would therefore be hysterical to suspect that every prisoner is at the risk of contamination.

I have considered that this killing and the matter of the charge of this Accused are matters of since the year 1989. The investigation of this offence including the charge against the accused are matters of over ten years. This accused person has been now in prison by order of this court for over a month. I would not be unmindful of the kind of provocation that the accused went through which resulted in the killing. It was an extreme kind of provocation. I cannot also be unmindful of the fact of there having been drinking. Indeed such drinking that I must consider or the intoxication need not be of a serious kind. The drinking, the intoxication need not be of extreme kind, it suffices that it must have influenced the accused person. I concluded, dispute Accused's denial, that he must somewhat have been influenced by his drinking of beer.

I needed to refer to the aspect of extreme provocation. It crossed my mind and

indeed I agonize over it whether considering the evidence that we have before us that provocation could not have been a defence in itself. But I noted that this was not to be, that is, there was a great reluctance on the part of the defence to even consider that could be a defence. But I am however satisfied that it is a matter to consider for the purpose of the punishment.

This accused person was a policeman. Mr Lenono has warned that the court had to consider that a policeman who did an offence of this kind while on duty, cannot be treated in a serious light. Indeed such was a situation in the instant one, where a policeman has actually killed a civilian. I was referred to the attitude of the Court of Appeal, in that case of **NTHUNYA LELEKA V REX**, Court of Appeal No.1 of 1973 and the case of **SAMUEL MOTLOMELO V REX** 1967-1970 LLR 81. In those cases judges have said that the conduct of the member of the police should not be treated lightly in circumstance such as this one. I agreed with them and that was my attitude.

I had to say that I found Mr Pelea to be a very intelligent man. I was confident that should he have been with the force by now he would have been promoted into the upper ranks. A terrible thing occurred to him. I was reminded that Mr Pelea spoke of the temperament of the deceased. I reminded myself what Mr Pelea said about the temperament of the deceased, that the deceased had even been convicted of an attempted murder of something like that and that he would more likely than not have been violent. Objectively or even alternatively when placed in positions which Mr Pelea must have been he should not have used the means that he used. He should not have killed this man in the hasty fashion that is shown by the evidence the Crown.

I was persuaded that this was not a case where a suspendence sentence would fit the circumstances. That I would not do and the seriousness of the offence spoke for itself. I have decided that the accused be sentenced to a period of five (5) years in prison. He is sentenced to a period of five years imprisonment.

T. MONAPATHI
JUDGE

4th February 2000

For the Crown : Mr. M. Lenono

For the Accused : Miss R. L. Mohapi