CRI/T/44/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

1. **REFILOE MOKALANYANE**
4. **ANDREAS Van der MERWE**
5. **MOKHERANE TSATSANYANE**

RULING ON EXTENUATION

Delivered by the Hon. Mr Justice M.L. Lehohla on the 15th day of May, 2001

.....

After conviction on all counts accused 1 relied on the sole evidence of his mother DW6 'Marefiloe Mokalanyane to adduce evidence in extenuation.

DW6's function during this phase of the proceedings is to establish on a balance of probabilities that in respect of Counts I and II involving the deaths of Armstrong Moeketsi and 'Mamolulela Mofolo extenuating circumstances exist.

These are factors which the Court takes into account in an endeavour to see if the reprehensibility of the offence committed and for which the accused has been convicted can morally speaking be palliated.

The test to be applied in making this determination is a subjective one.

Factors which the Court has to have regard to in this exercise have been well summarised by **Holmes J.A.** in ***S. vs Letšolo*** 1970(3) SA 476 A at pp 476 E - 477 B as follows :

> "Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider :
>
> (a) whether there are facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
>
> (b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
>
> (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused's doing what he did".

In deciding (c) above the trial court exercises a moral judgment.

DW6 told the Court that accused 1 is her son born on 5th January 1976. It is common cause that this being the case simple arithmetic would put accused 1's age in June 1995 when the offences were committed at 19 years and some odd five or so months. DW6 said that accused 1 was lying when he said she had told him in 1999 that he was aged twenty-five. She put down the suggestion for this lie to either accused 1's illiteracy or stupidity. She hazzarded the guess that he might have misunderstood her in one of the many admonitions to him when being helped in his studies by his siblings that "look you are so old but ignorant and are being helped by children aged such and such coming after you"

She elaborated on the personality of accused 1 as being of a highly gullible individual, easily cheated by his siblings who would help themselves to his food and things without protest. Friends also take advantage of this softness on the part of accused 1 who would allow them to take away his clothes and would not go and fetch them unless pushed by DW6 to do so. Asked why he had given his things to his friends his disarming answer would be that he had lent them to them.

DW6 projected the intellectual ability of accused 1 as one of the lowest kind. She says accused 1 went as far as Std III but did not pass it. Never in his career in

school did he pass any class without repeating it twice or three times.

DW6 explained that accused 1's relationships with people outside the family were cordial. She said he was always respectful of his elders and if he found them at the home he would greet them respectfully.

She was unable to account for the behaviour of accused 1 in Court when he referred to Dw1 Tšehlana Moeketsi Sello who is by far his elder and qualifying in my view to be his father in referring to him without the title "ntate" that every Mosotho child does not need to be reminded to preface an elder's name with when addressing him to show respect.

DW6 suggested that her son before Court is very forgetful. She indicated that she kept on reminding him of his age.

In addressing the Court *Mr Mosito* suggested two things to be considered in trying to find that extenuating circumstances exist in this case. The two things being, as learned Counsel submitted, youth and imbecility.

He accordingly referred this Court to ***R vs Whitehead*** 1970(4) SA 424 AD 436 where it is suggested that regard be had not only to the main purpose of punishment such as deterrence, retribution etc but also to the individual concerned and circumstances of his crime. Among factors emphasised age also featured in the eyes of the court in the authority of ***S vs Zinn*** 1969(2) SA at 537.

Learned Counsel relying on the view that the question of youth goes to the issue of mitigation stated in terms that authorities are ample that it also informs on the question of extenuation.

The **Law of South Africa** Vol 25 by W.A. Joubert *et al* at page 6 sets out that

> ".....In the case of murder a juvenile should not normally be sentenced to death unless the act was performed as a result of inherent vice and wickedness".

Reacting vehemently to this submission *Miss Maqutu* for the Crown relying on section 297(2)(b) of our Criminal Procedure and Evidence Act No.9 of 1981 cited the provision saying :

> "The High Court shall not pronounce a sentence of death by hanging (b) against a person convicted of an offence punishable by death if in the

> opinion of the High Court that person was at the time of the commission of the offence under the age of 18 years, but shall instead sentence him to be detained during the King's Pleasure....."

She thus emphasised that the wording of the statute leaves no doubt as to the category of persons standing to benefit by avoiding pronouncement of the death penalty against them; i.e. those under 18 years of age. The accused having been 19 years 5 months was well above the age contemplated by statute as the age he could benefit by i.e. if he was under 18 years of age.

On my part I challenged my assessors to find if it can be said the accused is entitled to a claim of "youth" as a basis for extenuation in this case. They unanimously said they found none no such thing.

Indeed in ***Thebe vs R*** LAC 1985-89 at page 48 Schutz P faced with a similar situation had this to say :

> "There remains the question of youth. I pass over the possibly controversial question as to whether youth alone can constitute extenuation..... . A problem about treating youth alone as an extenuating circumstance is that a line has already been drawn at the age of 18 years. How many more lines are to be drawn? In general, I think that youth must be weighed together with other factors. One must have regard to the personality qualities, maturity, experience and

circumstances of the youth involved.

.....It seems to me that it was not youth but a choice of evil that set him upon his dark course".

Mr Mosito sought to supplement the question of doubtful factor of youth with imbecility to which DW6 testified. *Miss Maqutu* for the Crown sought to disprove this allegation. But as correctly pointed out by *Mr Mosito* DW6 was not challenged in her assertion relating to the gullibility and imbecility of accused 1. True enough the fact that something has not been challenged in law, it has repeatedly been said, does not have to be accepted as correct and acceptable. After all a criminal trial is not a game where one side is entitled to take an unfair advantage of an omission by the other. C/F ***Rex vs Hepworth*** 1928 AD 265. But if it is let pass in silence during cross-examination only to be challenged in argument it might not be looked upon as fair.

I have no qualms in accepting the essential submission in *Miss Maqutu's* arguments. But I should not overlook the judgment of Miller J.A. in ***S vs Ceaser*** 1977(2) SA 348 A where the following was said :

> "A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious or wicked

propensities throughout his life; nor a long history of wickedness necessary to such a finding".

The words of Mahomed and Aaron JJA in ***Thebe*** above at page 50 chime in with the unchallenged evidence of DW6 that :

"On reading the record of the trial, the appellant comes through as an unsophisticated, semi-literate, rural youth of below average intelligence, and out of the main stream of the normal activities of boys of his age".

Like in the instant case the youth in ***Thebe*** had just graduated above 19 years.

It would seem to me that youth does not necessarily mean age but immaturity that hovers around the age of 18 years.

Thus the learned appeal Court Judges' words are worthy of attention :

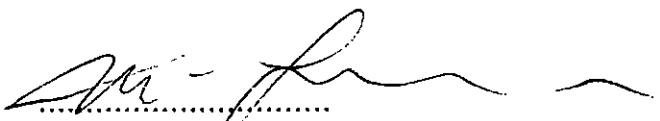
"Many irrational beliefs are tolerated and encouraged by even older men in an unsophisticated environment..... . An offence committed in these circumstances, however heinous when objectively perceived, reduces in some measure the moral guilt of the offender".

Their Lordships further indicated

"The Court *a quo* took into account the youth of the appellant but it failed to appreciate sufficiently that this was *prima facie* evidence of immaturity.....".

In the result the Court very reluctantly finds that youth in the instant case is a sufficient factor when looked upon as indicative of immaturity to constitute an extenuation enough to relieve accused 1 from the effect otherwise of mandatory death sentence for his offences.

My assessors agree.



J U D G E
14th May, 2001

For Crown : Miss Maqutu
For Accused 1 : Mr Mosito
For Accused 4 : Mr. Lesuthu
For Accused 5 : Mr. Mahlakeng