

CRI/T/80/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

HALEJOETSE MATALA

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 9th day of May, 2001

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The accused was charged with the crime of murder, specifying that on or about 17th October 1998, at or near Ha-Matala in the Leribe district, the accused did unlawfully and intentionally kill one 'Makhotso Matala.

When the charge was put to the accused he indicated unequivocally that he did kill the deceased but that it was not with intent.

It should be clear that the deceased is his wife.

However because the Crown rejected this plea of guilty to culpable homicide, the Court had to enter a plea of not guilty, and accordingly the Crown had to lead evidence and thus called its first witness.

The first witness was the daughter of the couple aged 21 presently. She outlined to the Court the events of the day in question. In brief she said that on that day her father arrived from work on the mines in South Africa. On arrival he asked PW1 to go and call her mother who was absent. Apparently the mother was at the place where there had been a death and there preparations for the funeral were afoot.

When the mother arrived she prepared tea for the accused. While this was going on a fellow from the circumcision school arrived and raised his objection and complained to the accused and his wife that it seemed they were not practising abstinence despite the fact that their son was in the circumcision school and had fallen ill. The accused drew this to the attention of his wife when this messenger had left, but she didn't seem to care at all about this objection.

The accused has not been to the circumcision school, and he doesn't like it, but PW1 his first daughter has been to that school and also of course the son who was ill

at the time at the circumcision school.

It was in this sort of background that the accused, though he doesn't approve of this type of school, indicated as follows to the deceased : "my wife since you have associated yourself with this type of school and things pertaining to it, it is high time you observed the taboos and rituals pertaining to this type of practice". And this is what the wife seemed not to give any thought to. She made light of the admonition to the disappointment of the accused. Indeed she started swearing at one of her younger daughters and continued until the accused felt that the insults and the swear words were obliquely intended for him. It may be so concluded because the daughter had done nothing to attract that type of response from her mother. PW1 testified to that effect in fact.

Now that the accused intervened in the manner that he did by questioning whether the insults were not in fact obliquely intended for him, the wife now started swearing at PW1, calling her a prostitute and saying that she is terribly bothered and troubled by their presence at her house. This went on until the accused and his wife went to their bedroom. Other members of the household went to their bedroom in a separate hut a distance away.

It was while they were in the early stage of their sleep that PW1 heard a cry and identified the cry as emanating from her mother. Knowing her mother's habits she asked the younger boy Lefojane to go and ask of the father's pardon on behalf of the mother or else the mother would go on and on. Meantime she herself made for her aunt's place or what she calls her grandmother 'Mantebaleng to seek her assistance and intervention between her mother and father. But the form of assistance that was offered was hardly any good because the interveners didn't enter the bedroom in which the assaults were going on. However she appealed to the accused, that is 'Mantebaleng appealed to the accused who said well he had acknowledged her message and pleas. To all intents and purposes the ruffraff that was going on in the bedroom appeared to have stopped. In fact there came a stage when the deceased asked for water from her daughter PW1. Apparently the accused had exchanged bedrooms and had decided to go and sleep in the separate bedroom which is the separate hut used by children. The accused asked that if the deceased wanted water then she had better come and have it in the bedroom where the accused was. Thereupon the deceased said she would rather the daughter let the question of water be, she was going to sleep.

The following day of course it was discovered to the horror of everybody else

that the deceased had succumbed to the assaults which she had received the previous night.

Although the plea by the accused of culpable homicide has been accepted, it is important to give a short background as to the type of law that applies to the sort of circumstances obtaining here.

Originally, that is before 1959, it appeared that deaths occurring between spouses sometimes were brought about by provocation and such deaths while admittedly amounting to murder, it appeared that because of the sort of peculiar situation in which married couples usually found themselves then the sentence which murder would usually incur, namely, the death sentence, was not really proper. The legislature therefore found it fitting to enact a law which while acknowledging that the killing was unlawful and to all intents and purposes was murder, but yet for purposes of avoiding the imposition of the death sentence, it should be treated as culpable homicide.

This catered for situations where a man would find his wife in adultery with another, and the husband because of anger deliberately and purposefully and with

intent killed the encroacher upon his marital rights. The result was that, that was murder because murder is nothing else but homicide executed with intent, and because the provocative action of the paramour had angered the accused then it was felt that he mustn't be convicted of murder but rather of culpable homicide, taking into account this provocation as an important circumstance to that end.

Therefore, then according to Proclamation 42 of 1959 section 3(i) it is provided that

“A person who (a) unlawfully kills another under circumstances which but for provisions of this section would constitute murder and

(b) does the act which causes death in the heat of passion, caused by sudden provocation and before there is time for his passion to cool is guilty of culpable homicide only”

Under section 4(a) the word provocation is meant to

“Include insult or wrongful act, when done or offered to an ordinary person, or in the presence of an ordinary person, to another person who is under his immediate care, or to whom he stands in a parental filial or fraternal relationship”.

I have no doubt therefore that the situation of the accused comes neatly under

this section because his daughter stands in filial relationship with the accused and the daughter was, and not only one but daughters were insulted as prostitutes, including of course the accused in an oblique manner.

Now coming to the submissions. Very neatly *Mr Teele* took the Court through what amounts to mitigating factors in this matter, indicating that the accused is supporting four of his surviving children including PW1, and PW1's own child (illegitimate child). He indicated that for a duration of upwards of thirty years of their marriage the accused had never got involved in unlawful acts. One other thing which showed the accused to be remorseful of what he has done is that he wept immediately on discovering that his wife had died. He cooperated with the police to the full, and confessed his offence to the magistrate.

In this regard the accused could rather be treated or looked upon not as a criminal but rather a fallen angel, and that as far as possible custodial sentence should be avoided, if only to avoid polluting what otherwise seems an untarnished character in the character of the accused.

I do accept that the accused appears to be an unsophisticated person. I agree

also that the incident leading to the death of the deceased was an unfortunate one. PW1 went a long way towards showing the character of her mother which was of an aggressive type, and she went as far as to indicate that she herself felt threatened by her mother to the extent that she feared they might quarrel or rather she was going to manhandle and assault her mother herself because of the mother's behaviour.

Court has been asked to temper justice with mercy therefore.

There is the case which was cited by learned Counsel, namely *S. vs Harrison* 1970(3) SA at 686 which is authority for the view that justice must be done; but mercy not a sledge-hammer, is its concomitant. I was also referred to *S. vs V.* 1972(3) SA at 614, which in brief indicated that the element of mercy is a hallmark of civilised societies, and that this does not mean that the court should have anything to do with maudlin sympathy for a criminal or permissive tolerance of his misdeeds. It is an element of justice itself.

Well, while all this has been said and I having been told that the accused now earns less than what he used to earn as a mine-worker, that now that he is a mere labourer he earns Seven Hundred Maloti per month, he should nonetheless be given

an option of a fine.

Faced with this difficult situation the Court felt called upon to ask the Crown Counsel to express a view regarding custodial sentence.

The Court at the back of its mind was alive to the fact that what we have here in terms of the homicide amendment act that I have indicated, is murder tempered by this law in order to help an accused person escape a hanging. That is all that this was intended to do. But however learned Counsel for the Crown fought shy of giving any help to the Court in this regard and contented herself with saying the accused must be punished. I have no doubt that the accused has got to be punished; but how?

My assessor and I had a deliberation on this aspect of the matter moved by the fact that the accused is remorseful, he has got children to look after and who are going to suffer if he goes to prison or remains for a long time in detention or that he himself is going to get polluted despite that he has led an exemplary life for a long long time.

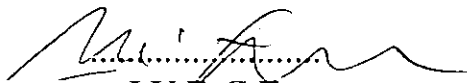
In the circumstances and bearing in mind what I have said about this law and

also that provocation is not a defence but just a plea in mitigation, felt that the lightest sentence the Court can impose is the following :

That the accused be made to pay a fine of four thousand (M4000-00) Maloti, or failing that be kept in prison for six (6) years. Half of this punishment is suspended for two years, on condition that the accused be not convicted of a crime involving violence to the person of another, committed during the period of the suspension.

The accused is further allowed a further six months within which to pay the fine. This means that payment should be effected by not later than 9th November, 2001.

My assessor agrees.


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J U D G E
9th May, 2001

For Crown :Miss Dlangamandla
For Defence : Mr Teele