CRI/T/68/2000
IN THE HIGH COURT OF LESOTHO

In the matter between

REX
v
LEFU NTOBO 1st ACCUSED
ABDUL WAHAB ABUBAKER 2nd ACCUSED
JIAN ZIN YAN 3rd ACCUSED
AFZAL ABUBAKER 4th ACCUSED

RULING ON EXTENUATING CIRCUMSTANCES

Delivered by the Honourable Mr. Justice M.M. Ramodibedi on the 13th day of December 2001

Having found A1 (hereinafter simply referred to as the accused) guilty of murder the Court is now enjoined by Section 296 (1) of the Criminal Procedure and Evidence Act 1981 to determine whether or not there are extenuating circumstances in this matter. That Section simply reads as follows:-

> "296 (1) Where the High Court convicts a person of murder, it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them.
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> 2) (2) In deciding whether or not there are any extenuating circumstances, the High Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the accused belongs."

Section 297 (3) also bears reference. It provides as follows:-

> 3) The High Court may impose any sentence other than death upon any person convicted before or by it of murder if it is of the opinion that there are extenuating circumstances."

Decisions on what constitutes extenuating circumstances are legion but, in my view, the most comprehensive definition of such circumstances as well as the proper approach to be adopted by the trial court is that of Holmes JA in S. v Letsolo 1970 (3) SA 476 (A) at 476-477. The learned Judge's remarks require quotation in full 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 the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to

consider –

a) whether there are any 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 in doing what he did.

In deciding (c) the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.

Such an opinion having been expressed, the trial Judge has a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence. The possibility of such an alternative should be considered by the trial Judge, in view of the words "the court may impose any sentence other than the death sentence" in the proviso to sec. 330 (1) of the Code (our Section 297 (3)). And it should be weighed with the most anxious deliberation, for it is, literally, a matter of life and death. Every relevant consideration should receive the most scrupulous care and reasoned attention; and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion, that is to say unless the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

Letsolo's case (supra) has been followed in several cases in this country but the locus classicus on the issue of extenuating circumstances is no doubt the decision of the Court of Appeal in Tahleho Letuka v Rex 1997-98 LLR&LB 346 per Steyn P.

Again the remarks of Schreiner JA in R v Fundakubi and Others 1948 (3)SA 810 (A) at 818 bear reference because of their undoubted importance in determining the existence or otherwise of extenuating circumstances. The learned Judge said the following:-

> "But it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration."

It is upon the above mentioned principles that I approach this matter.

it requires to be mentioned at the outset that the accused has not led any evidence in extenuation at this stage of the proceedings. He 5 relies on such extenuating circumstances as may be found from the record of proceedings in the principal case leading to his conviction. He is, in my view, fully entitled to adopt this approach. It is indeed trite law that the fact that an accused person fails to give evidence in extenuation does not preclude a Court from examining the evidence as a whole in order to determine whether there are such

circumstances. See for example S v Shoba 1982 (1) SA 36(A) at 40 F-G: S v Rammutla 1992 (1) SACR 564 (BA) and Tahleho Letuka v Rex (supra) at 360, 361 and 365.

As was laid down by the Court of Appeal in Tahleho Letuka v Rex (supra) at 362 the Court bears an over-riding responsibility to ensure that the enquiry as to the existence or otherwise of extenuating circumstances is conducted "with diligence and with an anxiously enquiring mind." That, of course, is an approach that not only binds me but an approach which I am happy to follow.

One further important principle remains to be mentioned in determining the question of extenuating circumstances and it is that the

Court must also have due regard to the existence of aggravating circumstances, where such be the case. It is on this issue that I propose to commence the enquiry at hand.

Subject to what follows hereinunder, the evidence suggests that the deceased was killed for a reward. That being so, and again subject to what remains to be stated shortly, the accused fits the description of a hired killer. At any rate, the Court has already found that the killing of the deceased was pre-meditated. In my view these are no doubt aggravating circumstances which I have duly taken into account in deciding whether or not there are extenuating circumstances.

It requires to be emphasized at this stage, however, that, in respect of hired killers, the death penalty is not automatically the only proper sentence. In a fitting case exceptional circumstances may lead the Court to conclude that there is no proper sentence other than death notwithstanding the fact that, as was said by Goldstone JA in S v Mabaso and Others 1992 (1) SACR 690 (A) at 694, "hired killing fills any decent

person with revulsion and loathing". See also S v Dlomo and Others 1991 (2) SACR 473 (A) at 477-478 where the same learned Judge correctly remarked that "any decent member of society will instinctively and roundly condemn the hired killer " It all depends on the particular circumstances of each case and one must hasten to say that in both S v Dlomo & Others (supra) and S v Mabaso & Others (supra) no exceptional circumstances were found hence the accused were condemned to death. Indeed, without deciding the question of the constitutionality of the death sentence, it is, I suggest, of utmost importance to bear in mind Section 5(1) of the Constitution of Lesotho which enacts that "every human being has an inherent right to life" and that "no one shall arbitrarily be deprived of his life." This is a fundamental human right guaranteed and protected in the Constitution and, in my view, it underpins the very sanctity of human life.

It is true to say that subsection 5 (2) of the Constitution makes the killing of a person in execution of the sentence of death imposed by a court in respect of a criminal offence under Section 296 of the Criminal

Procedure and Evidence Act 1981 an exception. As the law stands, such a killing is lawful. Be that as it may, I consider that the death sentence should only be imposed in the most exceptional cases where there are no prospects of reformation and where the objects of punishment such as deterrence, prevention, rehabilitation and retribution would not properly be achieved by any other sentence. See S v Makwanyane 1995 (3) SA 391 (CO at 418. Again each case must obviously depend on its own circumstances.

I turn then to the facts of this case as gleaned from the record of proceedings in the principal case.

The accused is a first offender who, it would seem, has never clashed with the law before for a period spanning 35 years. This is no doubt commendable and it gives the Court the necessary confidence that he is likely to reform. Without in any way minimising the seriousness of the matter and in the absence of evidence to the contrary, I shall assume in his favour that, as a first offender, he is a "fallen anger as opposed to

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an incorrigible rogue. In my opinion this lessens the moral blameworthiness of the accused and, as such, constitutes an extenuating circumstance.

I have also taken into account the fact that the accused was admittedly very cooperative with the police investigation and that it was through his full cooperation that he freely and voluntarily led the police to the murder weapon Exh "1" and the black bag Exh "8" which he had been carrying on the day of the murder. These exhibits provided material corroboration in the Crown case. In my view, these factors show some measure of remorse and thus reduce the moral blameworthiness of the accused. It was no doubt in keeping with the accused's cooperativeness that at the close of the Crown case Mr. Phoofolo told the Court that the accused would merely make an unsworn statement as opposed to evidence on oath. He could not, as I see it, bring himself to lie on oath. It was only after a change of counsel that the accused finally gave evidence which sought to contradict what has been said above with regard to his production of the exhibits.

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There is then the question of the accused's general background. I have taken this factor into account as an extenuating circumstance. See Tahleho Letuka v Rex (supra). He is an unsophisticated young man aged 37 years old coming from a rural background at Mazenod. As I watched him throughout this long trial lasting for more than a whole year he has struck me as a simple rural peasant of low intelligence. He is an ordinary taxi driver with limited education. Infact he is a drop-out who left school prematurely because his parents could no longer afford his school fees. This was in 1982. He got employed in the mines in South Africa for six years and was retrenched. Back in Lesotho he worked as a taxi driver from 1989 drifting from one taxi employer to another in seemingly endless dismissals until he finally settled as a taxi driver under the employment of Thelingoane 'Mota. He did not earn a regular monthly salary but only got paid according to the number of passengers he carried.

It follows from all of these factors in the preceding paragraph, in my judgment, that the accused has a very unstable general background

which serves to diminish the moral blameworthiness of his conduct.

This, in my opinion, is an extenuating circumstance.

I consider further that probabilities are that these factors would, in my view, render the accused susceptible to manipulation by others more especially his boss Thelingoane cMota who, as will be recalled, was supposed to give evidence as an accomplice but turned against the Crown at the door step so to speak.

I have again taken into account the fact that even though the conspiracy was to kill all the three Indians in the deceased's family the accused and his co-conspirator did not kill the deceased's wife and thus did not compound the murder. Some measure of compassion, obviously crept in the mind of the accused. In my view this reduces the moral blameworthiness of the accused notwithstanding his heinous act.

Similarly I have taken into account the fact that the accused did not compound the murder by helping himself to the large amount of cash that

lay in the open safe at the deceased's house. Once more I consider that this reduces the moral blameworthiness of the accused's conduct.

Another factor that I have taken into account as reducing the moral blameworthiness of the accused in the crime is the fact that there is no evidence to show that he actually received any payment at all either before or after the killing of the deceased. There was only a promise and nothing more. In this regard it will be recalled that lack of payment is one of the reasons that prompted the accomplice PW3 Khopiso Kholumo Sempe himself to back out of the conspiracy and to spill the beans. Thus, although the Court has given the accused the tag of "a hired killer," this must obviously be qualified to the extent that there is no evidence that the accused gained any financial reward for the killing after all.

I deal next with the role played by the accused. Mr. Nel for the Crown submits that the accused played a leading role. I regret to say that I cannot agree with this submission. There is certainly no evidence on record that the accused played a leading role or that he was the prime

mover. At worst for the accused all that can be said against him is that he played an active role but even that has to be viewed in context. I say this because by its very nature, the conspiracy in this case no doubt emanated from the rival Abubaker family on the Crown's own version. That being so, it seems to me that the conspiracy involved a much larger picture than the Crown was able to prove. I consider, not only as a matter of logic and common sense, but also as a matter of an inescapable inference that there were principal initiators or role players and that the accused was only involved at the recruiting as well as the execution stage. He was not the only one involved in the recruitment for that matter. Various people were active in the recruitment as for example the accomplice PW3 himself was involved in

the recruitment of Chaisa and so was Sekete, Seeiso, the unidentified Chinese and the rival Abubakers.

That what I have set out above is not mere speculation, is borne out by the list of names in the original indictment itself. Apart from the two Abubakers, A2 and A4, as well as the Chinese A3 the original indictment contained the names of Motlatsi Maoeng (A3) and Sekete Mopeli (A6)

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both of whom were active co-conspirators and so was Kid Seeiso as well as Chaisa.

Motlatsi Maoeng and Sekete Mopeli apparently absconded and could not face prosecution along with the accused. Sekete was heavily implicated in the case. As previously stated, another name was that of Thelingoane' Mota who featured in the old indictment as a co-conspirator and evidently as an accomplice witness. In my view, it seems highly unlikely that the accused could have played a bigger role than his own boss and employer Thelingoane 'Mota. In any event my "anxiously inquiring mind" reminds me, and indeed the record will show at pages 3- 5, that in his opening address Mr. Nel for the Crown informed the Court that the conspiracy started with the two Abubakers whose father had been killed ten years before and that A3 was the next person to be involved followed by "the Crown witness." The latter then recruited the accused.

Although Mr. Nel did not mention the name of the "Crown

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witness" in question I have little doubt that it was Thelingoane 'Mota who, as I have said earlier, featured in the indictment as a co-conspirator. At that stage PW3 Khopiso Kholumo Sempe had not yet been involved. It will be recalled that he was only subsequently recruited by the accused himself. It was Thelingoane 'Mota himself who admittedly hid the murder weapon Exh "1" inside a scrap car in his own yard. Indeed I accept the submission made by Mr. Sello on behalf of the accused that in a matter such as this, the Court cannot ignore the ranking of the plotters, co-perpetrators or socii criminis. Nor can the Court ignore the fact that Thelingoane 'Mota stands in a position of authority over the accused as the latter's employer. His influence over the accused is self-evident.

Whatever the case may be, however, the real point I am endeavouring to highlight is that the Crown has failed to prove who were the principal movers and leading role players in the crime. Nor has the Crown told the Court as to the whereabouts of the co-perpetrator who accompanied the accused when the deceased was killed. He may well be

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the prime mover or principal offender himself just like the other persons mentioned above. Which brings me to the case of Maliehe and Others vRex 1997-98 LLR&LB 168. (Also reported in 1997-98 LLR 506).

In Maliehe's case (supra) the Court of Appeal expressed itself, per Browde JA, in the following remarks which have weighed heavily with this Court:

> "It would also in my view be unconscionable were accused No. 2 to be sentenced to death where the prime mover, Mothobi, is not before Court and the actual killer, already described as cold blooded and without conscience, got scott free." (Emphasis added).

Apart from the fact that the accused was present when the deceased was killed, these remarks are apposite to the instant case. I may add, significantly, that the Crown was unable to prove who actually pulled the trigger.

It follows from the aforegoing considerations, in my opinion, that the cumulative effect of the factors fully set out above had a bearing on

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the accused's conduct and that bearing was sufficiently appreciable to abate or lessen the moral blameworthiness of the accused in the commission of the offence. Undoubtedly the offence is extremely serious but it does not merit, in my opinion, the extreme sentence of death.

In the result I have come to the conclusion that there are extenuating circumstances in this matter and that it would be inappropriate in the particular circumstances of this case to take the drastically extreme step of ordering the accused to forfeit his life. The verdict against the accused on Count I is hereby accordingly recorded as follows:-

> "guilty of murder with extenuating circumstances."

M.M. Ramodibedi
JUDGE
13th December 2001

For the Crown: Mr. Nel
For the Accused: Mr. Sello

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SENTENCE

It is now the onerous task of this Court to pass an appropriate sentence in the particular circumstances bearing in mind the seriousness of the case. Most of the relevant mitigating factors in favour of the accused have already been canvassed in the Court's ruling on extenuating circumstances and it is strictly unnecessary to repeat them here. I desire only to say that I have duly taken them into account in determining an appropriate sentence that will meet the ends of justice with particular reference to the main purposes of punishment namely deterrence, prevention, reformation/rehabilitation and retribution. Although each purpose is important in its own right I consider that, in a case such as this, deterrence merits more emphasis in order to make an impression upon others, and thus discourage them from committing similar acts. That notwithstanding, however, I shall bear in mind the salutary principle that punishment must be tempered with mercy.

I have taken into account all that both Counsel have submitted on

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the question of a proper sentence. In particular I have taken the accused's personal circumstances into account. He is married with two minor children. He is the bread winner. As I have previously stated, he is a first offender. He deserves to be given an opportunity to reform rather than be broken. I have also taken into account the fact that the accused has spent two and half (2/2) years in custody whilst awaiting trial. Mr. Sello recommends not more than 20 years imprisonment.

On the other hand it requires to be emphasised that this Court believes in the sanctity of human life. The unlawful taking away of human life deserves to be punished adequately. More so in the circumstances of this case where the killing of the deceased can be described as brutal, callous and heinous.

I have taken into account the aggravating circumstances in this case particularly the fact that this was a premeditated murder for a reward. Elsewhere I have described the accused as a "hired killer" although with some qualification in view of the fact that there is no evidence that he

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was actually paid at all. The deceased was killed execution-style in his own house. He did not deserve to die like that and his family and beloved ones did not deserve to lose him in that manner. It is for that matter outrageous that the accused and his co-perpetrator pretended to be messengers of Court with a mission to serve summons on the deceased. This was no doubt a dirty plot in order to gain access to the unsuspecting deceased. Mr. Nel recommends not less than 20 years imprisonment.

There is little doubt in my mind that no civilised society will tolerate the kind of conduct perpetrated by the accused. As previously stated, such conduct fills any decent person with revulsion and loathing. The accused must therefore brace himself to square his account with society. The interests of society undoubtedly demand that a man like the accused must be put away for a long time as a protection against society itself

Although it is always difficult to make comparisons of cases when it comes to sentence due to the fact that each case depends on its own

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particular circumstances, I consider that Maliehe's case (supra), where accused Nos. 1 and 2 were sentenced to 20 years imprisonment each as a starting point, was less serious than the instant case. The latter therefore merits a heavier sentence. This is mainly so because in Maliehe's case the Court of Appeal was satisfied that the evidence pointed to "great frustration amongst the employees of the Bank" including the accused. The deceased, Toloko Kimane, who was the Manager of Barclays Bank was perceived by the employees including the accused as a stumbling block to their strike action. All of these cannot be said of the accused in the instant case. He simply killed for a promise of a reward. His action bears the

hallmark of pure greed and it is this factor that must no doubt be revolting to society which is, in turn, entitled to adequate protection.

All things being considered, the most appropriate sentence that I can think of in the particular circumstances of this case is one of twenty-five (25) years imprisonment on Count I.

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In sum, the accused is sentenced as follows:

COUNT I : Twenty-five (25) years imprisonment.
COUNT II : Five (5) years imprisonment.
COUNT III: Five (5) years imprisonment.

Sentences on Counts II and III shall run concurrently with the sentence on Count I.

M.M.. Ramodibedi
JUDGE
13th day of December 2001

For the Crown : Mr. Nel
For the Accused (A1) : Mr. Sello

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ORDER

I have considered the evidence of the accomplice witness PW3 Khopiso Kholumo Sempe and I am satisfied that he fully answered to the satisfaction of the Court all such lawful questions as were put to him. Accordingly he is discharged from all liability to prosecution for the offence concerned in terms of Section 236 (2) of the Criminal Procedure and Evidence Act 1981.

The firearm Exh "1", 9 mm Luger M80 Serial Number Bl 1850 is forfeited to the Crown.

M.M.Ramodibedi
JUDGE
13th December 2001

For the Crown : Mr. Nel
For the Accused (A1) : Mr. Sello