

IN THE HIGH COURT OF LESOTHO

In the matter between

REX

Vs

TUMO MOHONO

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI
On the 12th November, 2002

The deceased – Boy Mohono, according to the autopsy report, died as a result of massive thoracic and abdominal haemorrhage due to pulmonary and intestinal injury. The Autopsy report indicates that the deceased sustained two gun shot wounds, one on the right chest and the other on the left

arm. There are a multiple penetrating wounds or lacerations on both the small and large intestines. There is a vertical cut on both upper and lower lips of the mouth of the deceased. The deceased is described on this postmortem examination report only as a male African adult. His exact age is not disclosed. The evidence of the witnesses suggests that he was a young man. He was a lot younger than the accused who is about sixty years of age. At the time of the commission of the alleged offence the accused was about fifty-eight (58) years old.

The deceased, accused and all the witnesses resides in one village. Apart from PW1, they also are all related to each other by blood or adoption. They all use the same surname – MOHONO. They are not just the fellow villagers, they also seem quite familiar with each other. They come into contact with each other in their daily movements in the village.

On this date – 21st November 1998, at about late afternoon – (16-17hours), PW3, who was a little girl of about (9) years of age

at that time was chasing after a hen with the help of other children. PW3 and the deceased resided at one homestead-known as Ramakhula's home. While these children were pursuing the hen, the accused appeared in their path. The accused enquired from PW3 about the whereabouts of the deceased. PW3 pointed out to the accused that the deceased is at home.

The accused proceeded towards Ramakhula's home which was the home where the deceased was as indicated by PW3. PW1 had been visiting there at Ramakhula's home. She was now leaving. She proceeded in the direction of her own home. As she descended from Ramakhula's home, she met the accused ascending towards Ramakhula's. Immediately after they had gone passed each other, PW1 heard the accused say, "Boy I am going to kill you!" whereupon PW1 turned and looked at her back. She saw Boy following her. She did not hear Boy respond to the assertion made by the accused. PW1 is certain that the accused was referring to noone but the deceased whose name is

Boy. Without further ado PW1 saw the accused point a gun at the deceased-Boy and discharged the first bullet. She further saw the accused shaking that gun and firing the second time. PW1 rebuked the accused calling him by his name, thus:-
“TUMO.”

The accused when called by his name turned towards PW1. He pointed the gun at her. Fearing for her own safety PW1 fled. PW2 who according to her evidence was minding her own business at her home, she heard the two gun reports. She did not recognise the said gun reports as such nor paid any serious attention to the same. She continued minding her own business. She then heard someone calling her and advising her that her brothers are fighting. It was then that she ran in the direction of those gun reports. She saw as she crossed the road two men, one on top of the other. The accused was on top of the deceased. The accused produced a knife from the right hand side pocket of his trousers. He then stabbed the deceased on the belly while he was still sitting on his private parts or upper

legs. PW2 saw the accused stirring in the deceased's abdomen with that knife after plunging it in.

That little girl-PW3 who was chasing after the hen, had by then caught hold of the hen. She proceeded back to her home. She was coming behind the accused whom she had just informed that the deceased was still at home. As the accused approached Ramakhula's, the deceased came out of the house, following PW1. PW3 saw the accused produce a gun, point it at the deceased and twice discharged it. After the second gun report PW3 saw the deceased fall on his back. The accused then came and sat on top of the deceased. He produced a knife and stabbed the deceased on the belly and stirred. PW3 ran away at the sight of blood.

As the accused continued stirring with his knife in the deceased's belly, PW2 asked him thus"- "Ntate TUMO! why are you killing this person?" This question was repeated twice before there was any response from the accused who

continued stirring with the knife in the deceased's tummy. The question was repeated the third time. The accused lifted his head and looked at PW2. He did not reply her question. She raised the alarm. There were a lot of people in the hut there at Ramakhula's. These people were talking loudly. As a result there was noise; but nevertheless they heard the alarm. One Tsitso jumped through the window of that hut. The accused was sitting on top of the deceased just by the side of that hut directly opposite that window. Many people came. The accused was lifted off the deceased by Ts'ito with the help of another man. The accused pulled his knife out of the deceased's tummy. As the knife was pulled out, some yellowish, whitish substance also came out and fell outside the deceased abdomen but inside the deceased's T. shirt. The accused clasped his knife and put it back in his trousers pocket and left the scene.

The accused, TUMO MOHONO, who has pleaded NOT guilty to the charge of murder raised various defences. The accused seems to claim that there was a previous encounter

between him and the deceased that day 21st November 1998. They fought at the place where there was a beer drinking party of some sort. They were separated. They went their separate ways. The accused claims that the deceased had insulted him and thereafter proceeded to attack him. The accused led no evidence to prove these allegations. The accused went to his home where he collected a gun. He claims that he was taking the said gun to the police because he had heard that the guns must be registered. He wanted to register his gun with the police. Be that as it may. On his way to the police station, the accused met the deceased who without any cause at all started throwing stones at him. As the deceased pelleted the accused with the stones, he was also advancing towards the accused who was busy dodging the missiles directed at him. The deceased was armed with a knife with which he stabbed the accused. There is no stab wound or scratch on this accused. The accused acting in self-defence produced the gun and fired into the air-austensibly to frighten the attacker. The two eye

witnesses, PW1 AND pw3 actually saw the accused point the gun directly at the deceased and twice discharged the said gun.

The second defence the accused raised is provocation. The deceased is accused of insulting this accused on the day in question and on many previous occasions. The accused has not been circumcised. The fact has been admitted by the accused. The deceased according to this accused kept telling him this fact regularly. The deceased blamed the accused's failure to excel in the game-pretending to fight with sticks "ho kallana" on the fact of not having been to a circumcision school. The accused did not like this fact to be thrown in his face as regularly as he allege the deceased did. He felt offended everytime he was told he has not been circumcised.

Before I deal with the merits of the defences raised, I must first of all determine the facts of this case. Are the events of that day-21st November 1998 as stated in the crown case or in the defence case? The accused met the deceased and whatever took

place at that point, forms part of the crime scene. There is no evidence that the deceased ever threw a stone or any missile of any kind at the accused. The meeting between the accused and the deceased was not accidental. The accused, as PW3 told this court had been looking for the deceased. He asked PW3 about the deceased's whereabouts. He went to meet the deceased at home where he was indicated by PW3. The deceased and PW3 resided at the same homestead. PW3 pointed out to the accused that the deceased was still at home. Shortly thereafter the deceased came out of the house – his home. The accused claims that this homestead-Ramakhula's is located along his way to the police station. Therefore the accused has to pass the deceased home on his way to the police station. This may be so.

When the accused approached the deceased he was heard proclaiming that he was going to kill the deceased by PW1 who was walking some short distance in front of the deceased. The accused called the deceased by name when he claimed that he was going to kill him. The proclamation by the accused made

PW1 look back to the accused who had just walked passed her. She then realised that the deceased was following behind her. She did not see the deceased throw a single stone at the accused. She could have seen the stone throwing if at all it happened. She saw the accused fire twice with the gun he had in his hand. She rebuked the accused who appeared to turn on to her. The witness - PW1 SARA MACHICHE who is well over seventy years of age fled to the safety of her own home which apparently was not too far from the scene of the crime. PW3 who had been pursuing the hen when the accused asked her where the deceased was, had caught that hen. She was walking behind the accused. PW3 was now going home with that hen. The deceased who has been in the house came out following immediately after PW1. He followed her as she walked to her home which was in the direction this accused was coming from

PW3 saw the accused point his gun at the deceased and fire two shots. She also did not see the deceased throw any stones at the accused. There is no one who ever saw the deceased throw any stone at the accused. PW1 and PW3 were very close to both

the deceased and the accused. They witnessed no stone throwing by the deceased or anyone. It is the finding of this court that no stone was ever thrown by the deceased to the accused.

Mens rea

The intention to murder is seldom express. In almost all the cases, the means rea is established from the facts of the case and the surrounding circumstances. Rex V THABISO LETJOETSO 1971 – 73 LLR 177 AT 180. In the present case the accused made certain expression which must assist this court to arrive at the conclusion that there is a requisite means rea in this case. At the first encounter between the accused and the deceased as witnessed by PW1, the accused was heard proclaiming “Boy I am going to kill you!” Immediately after so proclaiming the accused fired two shots directly at the deceased. Apparently the bullets hit the deceased, on the right chest and left arm. The accused despite the overwhelming evidence of the crown witnesses including medical report

persist in his denial and alleges that he fired only one shot and into the air. He must have fired into the air around the deceased because the deceased was hit on the right chest and left arm, presumably by the two bullets which were discharged from the accused's gun as he fired into the air. The fact that the accused fired twice and shook his gun before firing the second time goes some way towards establishing that mens rea. The deceased fell on his back. He lied on the ground prostrate. That clearly indicates that the deceased posed no danger to the accused at this stage. Nevertheless the evidence shows that the accused climbed and sat on top of the man who was lying down in that total submission position. He then proceeded to produce a knife and stab that motionless body. Why? For what purpose? The deceased was still alive. As though the accused was not satisfied with the injuries so far sustained by the deceased, he then stirred with his knife in the deceased tummy. For what purpose was he stirring inside the deceased's tummy with a knife? This stirring must account for the multiple penetrating lacerations on both small and large intestines as shown in the

postmortem examination report. These are the established facts of this very cruel assault perpetrated by the accused on the deceased. The use of two deadly weapons, one after the other leaves me in no doubt that the accused intended to kill the deceased.

The expressions made by the accused after he had been removed from the top of the deceased shows that the accused intended to kill the deceased or did not care if he dies. He claimed that he has sent the deceased to the ancestors. There he should report that the accused has done and finished the job or words of this effect. From his actions and expression of satisfaction about the job done, conclusion may safely be made that this accused intended to put an end to the deceased's life. S V. SIGWAHLA 1967 (4) SA 5 66.

Self-defence

For the accused to raise successfully this type of defence i.e. (Private-defence) there must be an unlawful attack, which

has either commenced or is imminent upon his person. R V MIYA and others 1966 (4) SA 274. The accused claims that the deceased commenced an attack upon his person by throwing stones at him. Had this allegation been proved the accused would have gone some distance in the endeavour to establish private-defence. The allegation by the accused that he was attacked is false. All the three-eye witness who saw the accused on top of the deceased did not see any attack upon the accused by the deceased. PW1 heard the accused who was very close to her, say "Boy I am going to kill you!" PW1 turned to look at the accused and then realised that Boy who was coming behind her was about to meet the accused. This witness was at the scene of the crime but despite seeing that the accused was armed with a gun and that he had something else hidden under his blanket , she did not see any stone throwing. The deceased was not armed according to all those who saw him at the scene of the incident. When the accused commenced to shoot at the deceased the accused was in no danger. His Welbeing had not been threatened in anyway. There has been no threat to his

personal safety. GIDEON LETELE V REX CRI/A/149/1968. The accused therefore did not shoot the deceased in self-defence. Similarly the subsequent stabbing and stirring with the knife by the accused, in the deceased's tummy was unwarranted.

The accused's second defence against this charge of murder is provocation. In terms of Homicide LAW AMENDMENT PROCLAMATION 1959 provocation can be raised as a defence against a charge of murder. The application of the provisions of this proclamation reduces the guilt of the person who caused death under sudden provocation from that of murder to culpable homicide. Section 3 reads as follows:

“3. (1) A person who –

- (a) unlawfully kills another under circumstances which under for the provisions of this section would constitute murder; and
- (b) does the act which causes death in the heat of passion caused by sudden

provocation as hereinafter defined and before there is time for his passion to cool, is guilty of culpable homicide only.

- (2) The provision of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.”

When was the accused provoked? When did he react to the said provocation? The accused seems to suggest that he was insulted by the deceased. Provocation as defined in section (4) four of **CRIMINAL LAW (HOMICIDE AMENDMENT)** – (supra) *“include any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person.... To deprive him of the power of self-control and induce him to assault the person by whom the act or insult is done or offered”*.

The accused seems to have harboured a special grudge against the deceased. On that day and the time he fired shots at the deceased, the deceased had done or said nothing. The accused was not reacting to the immediate provocation. By asking this question “How many times have you been insulting

me?" the accused seemed to suggest an accumulation of several times when insults have been offered by the deceased to him. The court is urged to presume that sometime in the past this deceased insulted this accused. There is no evidence to support the suggestion. What was the insult? The accused according to his evidence he felt insulted when he was told that he has not been circumcised. The accused has not been circumcised. That fact is the truth. If the deceased did tell the accused that fact the accused has admitted that it is true he is not circumcised. Why would he feel insulted when someone states that fact which the accused accepts to be the truth? There are a lot of men who are not circumcised. It cannot be regarded as an insult to say someone is not circumcised. At any event there is no evidence that the deceased spoke to the accused before he fired a shot or attacked him as described. If at all any provocation took place, it was prior to the accused's going to his home to fetch the gun according to the accused.

The accused has failed to establish the essential elements of provocation as defined in the CRIMINAL LAW (HOMICIDE AMENDMENT). MANTAOTE NTAOTE V DPP LLR and BULLETIN 1995. 1966 Page 72 . There is no evidence of recent provocation. If the accused has been insulted many times in the past, it was wrong for him to harbour the grudge for as long as he did. It was equally wrong to go about looking for the deceased if the deceased had provoked him sometime in the past. He gave himself an opportunity to cool off. When the accused went home to collect a gun for whatever purpose, he cooled off from the passion of anger if at all there was anger brought about by the alleged insult.

The manner in which the accused attacked the deceased indicates that he was determined to kill his victim. He is therefore found guilty of murder with direct intent to end the deceased's life.

He fired at him twice. It appears the accused is a good shot and accurate. Each time he fired at the deceased he made a hit. Can it be said that one bullet travelled in a semi triangle fashion in order to injury the deceased on his right chest and left arm? We have no expert evidence in this regard. This impression is made from the fact that the deceased sustained two gun shot wounds. One of the right of his chest and the other on the left arm according to the report of the post-mortem examination.

When the deceased fell after sustaining those gun shot wounds the accused rushed at him. He laid prostate according to the evidence of the eye witnesses who saw him fall on his back. He was still alive. The accused rode on top of him. He sat on his private parts region. He produced a knife from his pocket according to PW3. He stabbed that person who laid prostrate and was doing nothing threatening the accused's own personal safety.

It seems an ordinary stab did not satisfy the accused. Therefore he was seen by PW2 and PW3 stirring with his knife inside the deceased's tummy. This stirring must account for the description of the injuries as seen by the doctor on the intestines of the deceased. They are describe as multiple laceration on both small and large intestines. He actually succeeded to pull those intestines out of the deceased's abdomen when he pulled out his knife at the end of his stirring business. The accused must have successfully wound the deceased's intestines around the blade of his knife for them to come out with that blade.

PW3 actually saw that yellowish whitish substance fall off the T-shirt of the deceased when he was moved after the accused had been removed off his body. Those men who assisted the deceased to stand up and who moved him to the verandor pushed the intentions back into his tummy. The accused was almost singing praises for the success of his act. He expressed how he had sent the deceased to his ancestors.

This is the man who manifestly had a direct intent to kill his victim.

EXTINUATING CIRCUMSTANCES

These are any factors associated with the crime and which serve in the minds of reasonable men and women to diminish the moral blameworthiness of an accused person for his deed. These are the words used by JACOBS CJ (as he then was) in the case of **BOTSO MASHAILE and Others v Rex 1971 – 73 LLR 148 at 164**. This is how the extenuating circumstances are identified in the facts of the case. The Onus of establishing extenuating circumstances lies on the accused. He must discharge the same only on the balance of probabilities. REX V NDLOVU 1970 (1) SA 430 AT 433. The accused may lead evidence from himself or from his other witnesses on this question of extenuating circumstances. The court is obliged to give the accused an opportunity to advance any such factors which may

assist him to diminish his blame worthiness of his crime. He can advance such extenuating circumstances during the trial or after the verdict. NTJANYANA PHAKOE HCLR 1963 –1966 p140. This accused advanced such extenuating factors during the trial both through crown and defence witnesses, primarily as a defence.

The accused claimed provocation as a defence against the charge of murder. If provocation is established, in terms of CRIMINAL LAW (HOMICIDE AMENDMENT) PROCLAMATION 1959, it reduces the crime of murder to that of CULPPABLE HOMICIDE. Even though the accused failed to prove the essential elements of provocation as set out in the above cited Proclamation this court is not precluded to take a look again and determine whether or not that provocation can be regarded as an extenuating factor.

The accused claimed that he and the deceased had an encounter earlier that day. They were at MASALA'S where there was a feast in honour of the ancestral spirits.

There was beer drinking taking place during that ancestral ritual. This accused told this court that he does not drink alcohol and that the deceased did. The accused told this court that the deceased asked him to give him (the deceased) beer together with the container from which he could drink it. The accused seemed to have had a number of instances at different times when the deceased provoked him. He said the deceased insulted him when he (the accused) failed to provide the deceased with beer and the container to drink from. He was insulted with his mother's private parts. They fought as a result of that insult. They were separated. The deceased was reprimated. The accused left for his home. So did the deceased.

The departure of the two after they were separated was not the closure of the chapter only but the end of the matter.

The accused left for his home to fetch his gun in order to take it to the POLICE STATION FOR REGISTRATION as he had heard that such is a requirement. This time lapse between the alleged fights during the first and the second encounters gave the accused an opportunity to cool off his passion. According to the accused he did go home to fetch the gun but not for the purpose of using it to continue their previous fights with the deceased. Therefore the accused cannot rely on the provocation which he claims was offered at the time they fought and were separated and they went their separate ways.

The fact that the accused was heard saying to the deceased “How many times have you been insulting me with my mother’s private parts” at the time the accused commenced the attack upon the deceased merely shows that the accused had harboured a special grudge against the deceased. That can only operate as an extenuating circumstances. It was expression of bitterness which the accused had perhaps accumulated over a time. It seems to me that is what caused him to attack the deceased.

The accused seemed to resent the use of the Surname MOHON by the deceased. He claimed that the deceased came with his uncle from Gaudeng as a small boy. He was then using the surname MOFOKENG. The accused persistently denied any relationship between him and the deceased. He seemed to have some resentment and reluctance to accept that they are related by blood or adoption. There is no evidence that the deceased had taken the accused's place in their family. What could have brought about the resentment to the extent of attempting to exclude the deceased from the MOHONO family by the accused is not clear. The accumulative effect of numerous factors such as being told regularly that he had not been to a circumcision school together with other alleged insults may have instilled hatred of the deceased by the accused. Hatred is a factor which may also contribute towards the reduction of the blameworthiness of the accuse'd deed.

The immense hatred was demonstrated by the accused in the manner he stabbed and stirred with his knife in the deceased's tummy. He wound the deceased's intestines on the blade of his knife to be able to pull them out together with his knife. The sight of the blood made PW3 run away. But the accused continued stirring ignoring the appeals and questions of why he was killing that person. The accused had nursed and natured such bad feeling against the deceased he could not stop and to consider that what he was doing. The accused who does not drink was not drunk. He was in his sober and sain sense but he demonstrated extreme cruelty. This must also be an extenuating factor.

MITIGATION

All those factors which this court has considered in extenuation can be further considered in mitigation. This is what I actually propose to do. I shall consider them again for the purpose of reducing an appropriate sentence even further.

In addition to those factors associated with the commission of this offence I shall also consider those factors which pertain to the person of the accused. He was (58) fifty-eight years in 1998 when he committed this offence. He must be over sixty (60) years of age now in 2002. As such he is a senior citizen. He is said to be the first offender. Going to jail for the first time at his age must be traumatic. He also has a family which he shall miss. His family will miss him and his support.

There are certain alleged acts of contrition which the accused told this court that he was required to perform and he did perform them. He told the court that he provided two beasts – a sheep and a cattle. He also assisted those who were preparing food for the funeral service by providing with firewood. Assisting with essentials for the burial of the deceased was itself an acknowledgement that he has caused the death of the deceased especially because the accused persists in his denial of any relationship with the deceased.

The accused is sentenced to fourteen (14) years imprisonment.

My brother assessor agrees with those findings.

K.J. GUNI
JUDGE



Assessor - Mr. Khobotlo

Mr. Kotele - for Crown
Mr. Monyako - for Defence