IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) No. 16 of 2006

In the matter between:

PETER MOLISE **APPELLANT**

and

REX **RESPONDENT**

Held in Maseru on the 26th March 2007

CORAM:
Steyn, P
Grosskopf, JA
Smalberger, JA

JUDGMENT

Summary

*Appellant was found guilty of murder. No extenuating circumstances were found and appellant was sentenced to death. He appealed both against conviction and sentence but abandoned his appeal against conviction. Crown correctly conceding that extenuating circumstances were present. Court confirming that absence of premeditation, the absence of a direct intention or a manifest desire to kill the deceased and a finding that only **dolus eventualis** was found to be present (only a stab wound having been inflicted) did in all the circumstances constitute extenuating circumstances. Having regard to both aggravating and extenuating circumstances, a sentence of 18 years imprisonment imposed. Having regard to the period of imprisonment already served, effective sentence to be served by appellant is 17 years.*

Steyn, P

[1] The appellant was convicted of the crime of murder in the High Court. No extenuating circumstances having been found, the appellant

was sentenced to death. He noted an appeal both against his conviction and his sentence. However, when the matter was called, Mr. Mokoko who appeared for the appellant very sensibly abandoned the appeal against conviction and confined his submissions to the matter of sentence.

[2] Ms. Makholela who appeared for the Crown in well-reasoned heads of argument, while contending that the appellant was correctly convicted of murder, conceded that the court *a quo* erred in not finding that extenuating circumstances were present. That she was right to do so, is manifest for the reasons that follow.

[3] The facts found are the following. The deceased and his wife, PW1, travelled by taxi from Maseru to Mazenod. There they alighted at the shops and were walking on their way home when the deceased stopped to pass water. A person, who happened to be the appellant, passed between them. They were near to a "drinking place" and the appellant after passing between them stopped at the door of the shebeen and peeped into the house. After doing so he went to another house and once again peeped through the door. He then returned to pass between them, but as he was about to pass he jumped to where the witness was

standing and said to her that she should kiss him. She jumped away from him at which her husband said: “man what are you doing with my wife”. Her husband was understandably upset and spoke to the appellant in an angry tone. The next thing she saw was that the appellant put his hand in his pocket and he produced an okapi knife. Her husband said “Are you producing the knife for me?” The appellant’s response was to say “here it is and I am stabbing you”. He then proceeded to stab the deceased in the collar bone area. She averred that the appellant stabbed the deceased twice, but as will be seen, the post mortem examination revealed only one stab wound. It was a deep wound, some 10cms long and 2cms in diameter in the clavicular region. As a consequence the lung collapsed which is described by the doctor as a massive haemopneumothorax. According to the witness the deceased tried to free himself, he succeeded and fled. However, the appellant pursued him. She (the witness) cried out for help but no one came and her husband fled to another house with the appellant in pursuit. Whilst appellant was chasing the deceased he said “so you are still alive, I should have killed you!” Eventually her husband collapsed. She was

ordered by the appellant to search his body. He was already dead. The appellant also lifted his shirt and showed her what she described as an old scar alleging that her husband had stabbed him in the back with a screwdriver. This was correctly found by the court *a quo* as a falsehood and this defence was not persisted in before us. Indeed no screwdriver was ever found or seen by anyone. Moreover PW2 who also saw the appellant display his back describes it as a scratch and "an old scar" and "healed wound." Finally PW3, a fellow villager of the appellant, deposed to a conversation he had later that day with the appellant who admitted to him that he had killed a person.

[4] The appellant testified. Except for making the allegation that he had been assaulted by the deceased with a screwdriver before stabbing him, he denied most of the evidence of the Crown witnesses. He was correctly found to be a lying witness and the Court *a quo* was clearly right in rejecting his evidence and accepting the testimony of PW1, PW2 and PW3. At no stage did the appellant tender any acceptable evidence as to how he came to act in such an extraordinary manner on the day in

question. His attempt to try to kiss a woman whom he had never met before, his production of a knife and stabbing a stranger in the chest without any provocation is bizarre conduct which has no rational or understandable basis. However, it is on the acceptance of this evidence that the appellant's moral guilt has to be assessed and punishment determined by the Court.

[5] The Court *a quo* found that there were no extenuating circumstances. Whilst I can understand the Court's indignation at the unconscionable behaviour of the appellant, there are indeed circumstances which should have obliged a Court properly instructed to find that the appellant's moral guilt was reduced by their presence. The behaviour of the appellant was so aberrant as to question his state of mind at the time these events took place. He is in his middle forties and has a clear record. His conduct must have been out of line with his previous behaviour patterns, because if he was a man of violence one would have expected that to have been evidenced by previous convictions. He did not know either the deceased or his wife. He had

no assignation to meet with them on the day in question. His strange behaviour was clearly unpremeditated. He was correctly found guilty of murder by virtue of an indirect or inferred intention (***dolus eventualis***) and not of premeditated murder or of a clear desire or direct intention to kill the deceased. (Only one stab wound was found on the body of the deceased.) It is clear on the authorities and judgments of the courts of the Kingdom that the circumstances cited above can be held to amount to the presence of extenuating circumstances. See in this regard **Letuka v Rex** 1997-1998 LLR - LB 346 at p361 and the cases cited therein. See also **Tlali Serine v Rex** 1991-1992 LLR - LB 42 at pp44-45. It is also our view, confirming the responsible approach of the Crown, that the Court *a quo* should have convicted the appellant of murder with extenuating circumstances. Its verdict is therefore amended to read: "Guilty of murder with extenuating circumstances."

[7] Despite this finding the appellant deserves a lengthy sentence of imprisonment. Having regard to the sentences imposed by the High Court in cases serving before us, it is our view that 18 years is

appropriate. He should however receive "credit" as it were for the period he was imprisoned before receiving bail and post conviction. It was slightly less than a year but I have rounded this off and I decree that he should serve an effective sentence of 17 years imprisonment.

J H Steyn
President of the Court of Appeal

I agree:

F H Grosskopf
Justice of Appeal

I agree:

JW Smalberger
Justice of Appeal

Delivered on the 4th day of April 2007

For the Crown: Ms Makholela
For the Appellant: Mr. T.J. Mokoko