

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. CHERE SEKOTOKO KHOLOANYANE
2. 'MATIEHO MOSEBI

EXTENUATING CIRCUMSTANCES

and

S E N T E N C E

(5th December, 1980)

The accused has already been convicted of the crime of murder. The defence has conceded that that verdict is correct. Now the question to be considered at the present stage is whether there exists extenuating circumstance(s) which will not make it obligatory to the Court to pass the death sentence but leave it with a discretion whether to do so or not.

It is now trite law that the onus is on the accused to establish the existence of extenuating circumstances. Since the onus is on the accused he can discharge it on a balance of probabilities.

In the case of Rex v Botso Mashaile and Others, 1971 - 73 L.L.R. 148 at 164 Jacobs, C.J. said:

"..... an extenuating circumstance has been stated to be any fact associated with the crime which serves in the minds of reasonable men to diminish the moral blameworthiness of an accused person for his deed.

I agree that the subjective side is of great importance. Nothing which influenced the accused's minds

2/ or emotions

or emotions and therefore their conduct can be ruled out even if it was unreasonable for them to be so influenced. Nor must the brutality and callousness of the deed be given too much weight and be allowed to automatically exclude the possibility of extenuating circumstances."

I entirely agree. However, ultimately the question to be determined is: What was the state of the accused's mind at the time when he killed the deceased, subjectively speaking. (See Mokola Ramone v Rex, 1967 - 70 L.L.R. 31 at 37).

The accused, at first, deliberately chose not to give evidence under oath. His counsel stated so. However, it did not take him more than ten minutes when a short adjournment was requested by his counsel and was granted. Immediately the Court resumed, an application was made that the accused should give his evidence on oath. This was a serious matter in which technicalities had to take a back seat. It was literally a matter of life and death. The application was granted. The upshot of that evidence is that the accused did not emerge very well indeed. He refused to admit the simple fact that he took part in the killing of the deceased. He said he was passing when he was called, by the deceased, into the house and informed that beer was being sold. He was hardly in the house when, without any reason, Tleho the accomplice, began to bash his step-father's head with a huge knob-kerry. He says, he merely assisted in the disposal of the body. Nobody believes this story that he was, as it were, called to come and witness the death of the deceased. Crown Counsel tried for hours to extract information from him which would be useful at this stage of ^{the} proceedings but in vain. The man just lied from beginning to end. If a man lies so much how can the Court come

3/ to a favourable

to a favourable conclusion as to his state of mind? However, as Cotran, C.J. has put it in the case of Rex v Ramakau Molomo, CRI/T/38/75 (dated 2nd April, 1976):

'..... the practice we have adopted in Lesotho, and I believe also in the Republic, is to ignore, if it is found to be false, what the accused himself says in defence and look at all the evidence in the case and other surrounding circumstances to see, irrespective to what he says or does not say in extenuation, if there are factors favourable to him.'

It was submitted by Mr. Maqutu that the accused had been drinking shortly before the deceased was killed. However, in finding accused guilty the Court found that the murder had been planned. Once that was the position as the finding of the Court showed, subsequent drinking did not act as a less aggravating circumstance but rather the opposite. The role played by liquor in homicide cases is of two kinds:-

- (i) Where the accused drinks and in his affected state he kills X. In such a case the accused may, in law, be capable of forming an intention but that same degree of intoxication may be sufficient to reduce his moral guilt. Such cases are Rex v Mafihlo Mocheko, CRI/T/25/69 at 22; Rex v Bennie Lichaba, CRI/T/35/75; Rex v Boy Moeti and Another, CRI/T/8/76 (dated 19/9/76), to mention but a few.
- (ii) Where the accused had preplanned to kill X. He then drinks in order to have moral courage to carry out his plan to the finish. In this case the liquor rather than reduce the moral guilt, it acts as an aggravating factor. Such a case is that of Rex v Blyth Monathane, CRI/T/14/77 (dated 27th October, 1977).

The present case would seem to fall under (ii) above. This submission, therefore, fails.

The second submission was that there was a possibility that the accused played a minor role in the murder of the deceased. It was submitted that this was evidenced by the fact that the accomplice witness had just vanished since he last gave evidence during the preparatory examination. The degree of participation in the commission of a crime is taken into consideration and is of considerable importance and may lead in differentiation of sentences. (See Mafookane Maanela and Others v Rex, CRI/T/26/77 (dated 19/1/78; Botso Mashalle and Others (supra) at 165). In this present case I cannot say that what was submitted on behalf of the accused cannot reasonably be true. It is a submission favourable to the accused and only his co-accused i.e. the accomplice could throw some light on it and, in the absence of that evidence and despite the lies accused has told me, I must accept it. I must also accept the fact that the accused was terrified of Tieho as he stated and he obeyed his instructions. Schreiner, J.A. in Kgolane & Others v Regina, 1960(1) P.H. H 110 at pp. 168-70 puts the position neatly as follows:

"No doubt, particularly where a number of persons are concerned, one or more of whom are in control and who are in a position to require the obedience of the rest, the moral guilt of the latter may be less than that of the leaders."

I respectfully agree. In my view this situation obtained in the present case before me.

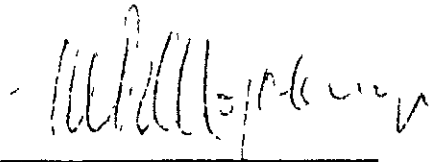
As it was again pointed out in the case of Rex v Mafookane Maanela and Others (supra) that the fact that the accused had given information which was of tremendous help was taken into consideration. The accused in this present case gave useful details to Daniel. This information

5/ proved

proved particularly useful to those concerned with the investigation of the killing of the deceased.

Taking the totality of the evidence led during the trial and during the extenuating stage that there exists extenuating circumstances in this case. It may be that the Court has erred in this respect but it is far better to err in favour of an accused person in such circumstances.

My assessors agree.



J U D G E

For the Accused: Mr. C. Maqutu

For the Crown Mr. Muguluma

SENTENCE

I take into consideration the fact that you have no previous conviction; that you are a married man with a child and that you are a relatively young man. I have also taken into consideration the fact that you assisted a great deal in the investigation of your own crime and therefore, ought to be treated with leniency. (See Stephen Meyer & Others v Rex, CRI/T/42/77; Mafookane Maanela & Others (supra). But that does not imply that the Court must deal with you softly. A deterrent sentence is called for as the Crown indicated, but in doing so the Court shall be merciful.

You have taken away the life of a fellow human-being who had not provoked you. You killed him because of the love you had for his wife. I am about to demonstrate to you that you cannot take away a person's life and get away with it. This Court, moreover, has repeatedly said that it does not countenance the use of a knife. You must be punished for all these things though mercifully.

6/ The least

The least sentence I can impose on you in your
circumstances is one of twelve (12) years' imprisonment.

My assessors entirely agree



J U D G E

5th December, 1980