

IN THE HIGH COURT OF LESOTHO

In the matter of.

R E X

v

1. THABANG MOHLALISI
2. REFELETSOE PHATE MPOBOLE
3. TSELISO JOHANNES ISAACA

J U D G M E N T O N .

Existence or otherwise of Extenuating Circumstances  
delivered by the Hon. Mr. Justice M.P. Mofokeng on  
the 30th January, 1981.

The three accused having been found guilty of the  
crime of murder the court has now to decide whether or  
not there exist extenuating circumstances and

"Only such circumstances as are connected with or  
have a relation to the conduct of the accused  
in the commission of the crime should have any  
weight at all and care should be taken to eliminate  
any factor which may be either of a purely  
sentimental character or which are only remotely  
connected with the crime."

(per Krause, J.P., in R. v M'foni 1935 OP.D. 191 at 193)

The onus rests on the accused on a balance of  
probabilities. (Rex v Mafetsane Potlaka, 1980 (1)LLR.)  
The test is subjective (Mokone Ramone v Rex, 1967 - 70  
LLR. 31 at 37 (C.A.)).

It is settled law that at this stage of the proceedings  
the accused is entitled to lead evidence if he so desires.  
But even where an accused chooses to remain silent at this  
stage of the proceedings and call no witnesses either will

not be a bar to his counsel from arguing the issue of extenuating circumstance or any other mitigating factor. The reason was neatly summarised by Wessels, J.A. in S v Mkhize, 1979 (1) SA. 461 (A) at 463 when he said.

"The Court is entitled and bound to have regard to the evidence as a whole in order to determine whether or not an accused has discharged the onus resting upon him on the issue of extenuating circumstances."

There are two confessions by two of the accused which the Court ruled that they were admissible. In fact and to be precise, the confession made by accused No.3 before the magistrate was at first objected but later that objection was withdrawn. However in this judgment I shall have in mind the rule laid down by Greenberg, J.A. in R v Valachia and Another, 1945 A.D. 826 at 835.

"But the cases which I have mentioned and others which I have seen since the argument are in favour of the view that when one party to a suit proves against the other party a statement made by the latter then the Court must not disregard any portion of such statement, even though it be in favour of the party who has made the statement; it is its duty to weigh the credibility of such portion and to give such weight to it as in its opinion it deserves, and this applies not only to such portions as explain or qualify any portion adverse to the party who has made the statement, but to everything in the statement which relates to the matter in issue."

I shall also bear in mind the remarks of Beadle, C.J. in S. v Tovakepi, 1973(1) SA. 694 (R.A.) at 695:

"The Court must give careful attention to everything that is said in a confession, if that confession is to be relied on at all in convicting an accused, but if it considers that the exculpatory portions of the confessions or those portions of the confession which deal with extenuating circumstances are untrue for one reason or another, it is perfectly within its rights to reflect those parts of the confession which are favourable to the accused, while accepting those parts which are not."

The three accused did not give evidence on their own behalf nor call any witness at the close of the Crown's case. However, two of them have made confessions before magistrates and it was faintly mentioned on behalf of accused No.2 that he could have made similar confession but for his illness. But this was delving into the realms of speculation and Counsel, in my view was well-advised to stir clear of it. The confessions of accused Nos. 1 and 3 are not detailed. In them it is obvious that the exercise of attacking the deceased in the manner they did was carefully planned. They cut wires when they got to the fence to the shop premises wherein the rondavel where the deceased was, was situate. They did not just think of tying the deceased with wires when they saw the fence. This must have been agreed upon long before they got to that fence. Accused No.3, whose confession is more detailed than that of accused No.1, says that they went past the door of the shop towards the rondavel and saw the deceased speaking, to one person. After a time they came to the rondavel. This time accused No.2 had been instructed to strike the deceased. This is confirmed by accused No.1. The deceased was first throttled by accused No.1 but he, the deceased, shouted and accused No.2 took over the throttling while accused 3 tied his feet and accused 1 his hands. Accused No.3 merely mentions that "In the mouth he was tied by Thabang with a cloth". But accused No.1 says that accused No.2 "took a cloth which he tied over the mouth of that night-watchman." He then tied it with a wire. He tied that wire over that cloth." It is not stated in these confessions where the cloth used for covering the deceased's mouth came from. However, when the process of subduing the deceased was over, the door of the rondavel was closed and accused No.3

was left near the door of the rondavel to remain keeping watch over that night watchman in case he gets up or wakes up" says accused No.3. What did they spend the day doing? Accused No.3 in his confessions says that after they had discussed the matter of "money and blankets" and after accused 1 said they would get more money at chief 'Maseribane's shop, they sat down and drank beer. Accused 1 said that they were at Mothoosele's shop where "we kept buying Sesotho beer which we kept drinking". At sunset they proceeded to the valley in preparation to their expedition to the shop.

There was moonlight.

Accused No.1 gave evidence under oath and all he said was, in his own words.

"My going there was not to kill a person. It was merely to go and steal money. I had the misfortune of tying that person badly when I was tying him so that he could not be able to speak before I went to the shop. I did not see the probability of him dying as a result of my tying him because it was dark, I was not aware that it could kill him i.e. placing the cloth over his mouth."

That is virtually all he said in his evidence in chief. The cross-examination was long and searching in order to find out what took place when this crime was committed.

The outward manifestations of their actions would give us a more reliable indices of what the accused's state of mind was. This accused agreed that it had been discussed as to how the cloth would be used. It would cover the deceased's mouth. He would then be tied with wires. It was agreed that his hands would be tied at his back. Each of the accused carried a wire which was obtained before proceeding to the shop and rondavel. Each one of them, it was agreed, would tie the deceased. He then says that

accused 2 tied the deceased with a cloth which had been in the possession of accused No.3. They had only agreed that deceased's mouth should be covered. But this cannot be true as we have just seen from a quotation of his evidence in chief. It was he who placed the cloth over the mouth of the deceased.

He says that the cloth was torn into three pieces. However he does not say what happened to the one piece. We know that one piece was used to cover the deceased's mouth and another was found in accused No.3 possession. What became of the third one? He does not say but we now know it was found pushed inside the deceased's mouth. He also saw that "a wire was tied over the cloth." That he says he did "so that he does not make noise". The cloth had been handed to him by accused No.2 who in turn got it from accused No.3. But when he is pressed for details his stock answer is that it was dark.

Later they were to ask accused No.3 whether the deceased was still alive when he left guarding the rondavel. Surely, the mere tying of the hands and the feet and covering of the mouth with a cloth and tying a wire over it could not have killed the deceased?

About the drinking during the day the evidence went something like this.

".... We bought Sesotho beer before then. It could be about midmorning. A scale was worth 20c. We eventually bought 60c worth. We did not buy it all at once. We all shared it. This was before we bought food. It could have been about lunch time. Thereafter we never drank again until we went to the shop. I was always with the other accused".

Accused No.3 said in evidence before this Court.

"My state of mind when I was doing what is alleged I did, is that I was frightened coupled with deep thinking about what I was doing. What actually frightened me, as I was doing this for the first time, is that when this person first shouted I had great fright. I was wondering what would happen to me if we were to be caught".

He repeated that he held the feet and tied them with mesh wire. He also got hold of the deceased's hands but the latter overpowered him. He says that accused No.1, who wore his jacket, took out a cloth out of it. He then says: "These are the things that frightened me". He was very frightened "because I thought here we have tied a person inside the house and now we are going to break into a shop." He remained outside the rondavel but if the deceased were to emerge he would tell one of his co-accused. He then agreed that for that exercise he did not need to be armed with a stick (Exhibit 23). He said that he had picked up the cloth which was used on their way to the scene of the crime. He was going to tie his hair with it. He says that he drank Sesotho beer the whole of that day until sunset, together with his co-accused. After they had finished tying the deceased, accused 1 shone a torch inside the house and it was only then that he saw a piece from the cloth he had, had fallen on the floor and he pocketed it. That piece of cloth was later found in his possession by the police when he was arrested inside the beer hall.

Accused No.2 described what happened inside the rondavel and said: "I throttled him so that he should not shout". He did not anticipate that deceased would die. He says: "Thabang tied him with a cloth over the mouth and tied it at the back of the head." He had been ordered by accused No.1 to do whatever he did to the deceased. He says "I tied his hands at his back. I was now throttling him. It was bad. I was not happy in spirit. Now it makes me feel sorry."

About the beer they consumed on the day in question, he says: "The following day we drank beer. A scale was worth 20c. We shared the beer. We consumed four scales all together." Then they ate bread and milk. It was before midday. Thereafter they "did not drink alcohol from then until we went to Sekhonyana's shop". They pulled the wires at the fence "for tying that person i.e. nightwatchman." He struck the deceased with exhibit 23. It was a hard blow which was intended to fell him. Inside the house accused No.1 had asked him to throttle the deceased, while he, accused No.1 "tied a cloth on the mouth". He was not given a cloth by anybody. He heard a cloth being torn. He described in detail what each accused did to the deceased. His tying of the deceased was in accordance with the plan. Deceased had spoken and said: "Why are you tying me". This of course is the first intimation that the deceased ever spoke a word. What chance did he have? He screamed only once and that scream was quickly muffled. He says he saw the person who pushed the cloth inside the deceased's mouth. That was accused No.1. When accused No.1 did that, he, accused No.2, released his grip on the deceased's throat because "he would die and also because the cloth would prevent the noise from being heard". Having watched the deceased mouth opened and the cloth pushed inside it, he did not now see the wire being tied over the cloth which had covered the mouth.

It is interesting to note that accused No.2 says that he did not see the use of the wire over the cloth which covered the mouth because he had "left the spot". Surely it was part of the plan that the deceased's mouth be covered with a cloth which accused No.3 had in his possession, part of which was still found on his possession the following day. Accused No.3 said he had moved from the area of the feet

towards where there was still activity.

It is quite clear from all the evidence before Court that there was a plan to silence the deceased. This was conceived long before the accused arrived at the rondavel. It was decided that the deceased was to be tied in the manner in which the accused described. This tying, of the deceased, was not a matter which was arrived at on the spur of the moment. That is why when they got to the fence, each cut a sufficient length of wire. The deceased was not only to be immobilised but silenced as well. This silencing process was not to be achieved by mere covering of the mouth with a piece of cloth but that he had also to be gagged. That is why firstly, both accused Nos. 2 and 3 say they were frightened; and secondly, no objection was made when accused No.1 was opening the deceased's mouth and pushing a cloth right inside it. He was carrying out the plan of silencing the deceased to its conclusion. Thirdly, they expected the deceased to die and that is why they later asked accused No.3 whether when he left guarding the rondavel the deceased was still alive. He had not been asked to inspect the deceased now and again to see if anything went wrong with the tying. It was faintly submitted that it had been the intention of the accused to release the deceased when their mission was completed. Their own versions gainsay this. Already on their arrival they saw the deceased with another person. They also say the rondavel is near the road. Well, friends of the deceased could have come before then and that danger was surely fresh in their minds before they embarked upon this reprehensible assault on the deceased. Again when accused No.3 alerted them that there was a person coming they did not run away immediately.



Accused No.3 stealthily followed that person until he disappeared in the direction of the village. But what is significant here is that accused No.3 passed behind the rondavel in which the deceased lay on his way following the stranger and back and never went to inquire after the situation of their victim. It was only after his return that they left. They say they left hurriedly. But the rondavel was a few paces away from the shop where they were. They did not go to the rondavel to release the deceased because they knew he was dead.

I accept the fact that the three accused had a drink but the quantity they had was not much and it was taken quite early. Moreover, the drink was taken not hurriedly but slowly. At lunch time they had something to eat. Precisely because they had such an important mission to fulfil it is against probabilities, as accused No.3 suggests, that they sat drinking from morning till sunset, shortly before they were to embark on their plan which would lead them to wealth by the following day. Their actions on their way to the shop, and rondavel and rationality at and inside the rondavel leads this court to the only inevitable inference, namely, that whatever drink they had had that morning, its effect on them had positively disappeared. In other words they were no worse off than a man who had taken a pint of beer the whole day.

I shall repeat the words of this Court in the case of Rex v Sello Lemphane & Others, CRI/T/38/78 (unreported) at p. 6.

"..... the accused murdered the deceased so that they could carry out their human lust with calmness. They wanted no disturbance when committing the crime

of Housebreaking with intent to Steal and Theft. The nightwatchman had to be put out of the way. They were still bent on going to get the money themselves from the safe in the shop".

These words apply with equal force in the instant case.

In that same case the following words were said which are true in this particular case also:

"....The accused killed because they were going to satisfy a human lust - to get rich without shedding a drop of sweat for it..."

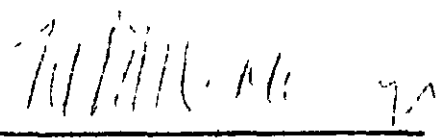
I have also considered the provisions of section 290(2) of the Criminal Procedure and Evidence Proclamation 59 of 1938 (See Rex v Sello Lemphane & Others (supra)) as well as the totality of the evidence before me and have come to the conclusion that their blameworthiness is extreme (Ndimande v R, 1970 - 76 S.L.R. 100 at 101.)

The only conclusion that this Court can arrive at, and having weighed carefully what their Counsel Mr. Modisane has so ably put before me on their behalf, is that the Court is unable to find that there are any extenuating circumstances in this case in respect of all the three accused.

My assessors unanimously agree with all my findings.

For the Accused : Mr. Modisane

For the Crown : Mr. Muguluma.

  
J U D G E

S E N T E N C E .

On Count 2:

The crime of Housebreaking with intent to steal and theft has definitely been on the increase in this Country of recent years. This trend must be halted. A deterrent sentence is therefore called for. In the particular case,

however, practically all the goods stolen have been recovered. I have, moreover, taken careful notice of all that their counsel has said on their behalf. Each accused is sentenced to undergo imprisonment for a period of six (6) years.

On Count 1:

DEATH.

  
J U D G E

30th January, 1981.