

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

versus

SHAO MING SHENG

WHETHER EXTENUATING CIRCUMSTANCES EXIST

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 6th day of August, 1997

The accused has been found guilty of murder. Murder is a capital offence unless extenuating circumstances exist. See section 297(3) of the *Criminal Procedure and Evidence Act* of 1981. Where no extenuating circumstances exist, the accused has to be sentenced to death. In such a case the court has no discretion in the matter but has to sentence the accused to death. Where extenuating circumstances have been found, in terms of the said Section 297(3):

“The High Court may impose any other sentence than death...if it is opinion that there are extenuating circumstances:

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The first step now that accused has been found guilty of murder is whether there are extenuating circumstances. In other words, the court has to decide whether it is obliged to sentence the accused to death.

The accused elected not to adduce any evidence on the question of extenuating circumstances.

Accused has killed three people and it is a fundamental principle in our society that life is sacred. It is in order to underline the sacredness of life that sometimes the court is obliged to sentence people to death. Our society has long realised that a retributive punishment of a life for a life and an eye for an eye just cannot work. For this reason, this society has reserved the death penalty only for those cases in which there are no factors that in the minds of right-thinking people reduce the accused's moral blameworthiness. See *Rex v Botšo Mashalle & Others* 1971-73 LLR 148 at page 164.

Mr. *Phoofolo* for the accused argued that Browde JA in *S.M. Maliehe & 2 Others v Rex C of A (CRI) No.4 of 1996* (unreported) doubted if there is an onus

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on the accused to prove the existence of extenuating circumstances. I believe what his Lordship meant was that it would be unreasonable for the accused to prove the existence of extenuating circumstances where they are already on record. If extenuating circumstances are not there on record, the accused has to place them on record to enable the court to find them.

It is not easy to determine what extenuating circumstances are. This causes some inconsistency because moral blameworthiness is determined by a particular court viewing facts in the atmosphere of a particular trial. This is, so to speak, an exercise of a discretion. The limits to this discretion is that it has to be exercised judicially.

In *Phakiso Koaile v Rex* 1978 LLR 366 the Court of Appeal stated that so long as the finding of the court is reasonable, it is in order because the determination of extenuating circumstances is,

“essentially a value judgment by the trial court regarding the moral blameworthiness of the accused having regard to all the relevant circumstances of a particular crime. The responsibility is primarily of the trial judge...—*T. Masuka v Regina* CR/APN/8/77 of the Swaziland Court of Appeal quoted with approval.

In *Mokola Ramone v Rex* 1967-70 LLR 31 at page 36 the Court of Appeal acknowledge that courts are bound sometimes to come to different conclusions on value judgments and questions of moral blameworthiness.

At this stage, as Mofokeng in *Criminal Procedure Through Cases* pages 401-2 has crisply stated the court can,

“Ignore, if is found to be false what the accused himself says in his defence and look at all evidence in the case and other surrounding circumstances, to see, irrespective to what he says or does in extenuation, if there are factors favourable to him.”

Indeed as Cotran CJ said *Blyth Monanthane* CRI/T/14/77 as quoted in Mofokeng *Criminal Law and Procedure through Cases* at page 242

“an accused may, if he so elects, resile from a position taken during trial and adopt a completely different stance...”

When dealing with this question every factor that affected the accused's mind and all surrounding circumstances that are closely connected with the crime have to be taken into account.

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It is not part of our law and culture for a child to be punished for the evil of his parents. It is true in the Bible the Lord said He punishes children because of the iniquity of parents *Exodus 20-5*. Even by the time the New Testament of the Bible was written, there was already an emphasis on the importance of an individual. Life has always been sacred (by that I mean the life of an individual). The function of the State is to protect life, liberty and property, and life comes first. If people were to be encouraged to victimise innocent children for the evil of their parents, the world would be a sad place.

I have already found that accused was or at any rate, must have laboured under intense smouldering resentment because of what Ta Hua Company of which the deceased Xu Wenda was part, had done to him. He had been taken from China by Ta Hua Company with a promise that he would be got into South Africa through Lesotho. He had been told if this did not happen, then he would be got a work permit for Lesotho as a stepping stone towards going to South Africa which was a land of opportunity. This evidence was not challenged. For this service, accused had paid a great deal of money. Accused had waited for more than a year for a service that he had paid for, but there was no prospect of it being delivered. When he lost patience he must in a blind rage, have gone for Xu Wenda's family

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and exterminated it.

I was greatly worried about the killing of an innocent boy along with parents because of the activities of Ta Hua Company. Yet in *S.M. Maliehe & 2 Others v Rex (supra)* the Court of Appeal accepted that frustration of Bank employees which led to the killing of an assistant Bank Manager was an extenuating circumstance. Unless the facts are identical, I am not bound to follow this view because every case revolves on its own merits. All the law expects me to do is to act reasonably.

Accused's future had been jeopardised by this Ta Hua Company's Southern African venture where Chinese are taken by plane loads only to come and cut sorry figures, neglected and friendless in foreign countries when they had paid for a service that is not being rendered by Ta Hua Company.

Accused did not kill Xu Wenda's family in order to enrich himself or to gain any advantage for himself. Nothing has been shown that would lead to the conclusion that accused killed deceased out of pure revenge and that he planned and executed this evil design in a morally depraved fashion. The surrounding circumstances disclose a building up frustration and a smouldering resentment that

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was bound to cause the explosion that led to the extermination of Xu Wenda's family. This is a crime of passion, and like all such killings, it is characterised by senseless or extreme brutality.

In the light of the foregoing, my Assessors and I have no hesitation in finding that there are extenuating circumstances in this case.

SENTENCE

- (a) Accused is sentenced to 10 years' imprisonment for the murder of Xu Wenda (Count I) and sentenced to 12 years' imprisonment for the murder of Ha Ya Mei (Count II). These two sentences to run concurrently.
- (b) Accused is sentenced to 15 years' imprisonment for the murder of the boy Jiao Yi Xu (Count III).
- (c) In all, accused will serve a total term of imprisonment of 27 years.


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W.C.M. MAQUTU
JUDGE

In that upon or about the day 6th day of August 1994 and at or near Top-Top, Lekhaloaneng, in the district of Maseru, the said accused did unlawfully and intentionally strangle Yiao Yi Xu with a rope with intent to murder him.”

Before the accused pleaded, Mr. *Phoofolo* for the accused challenged the court's jurisdiction to try the accused because he claimed the accused had been abducted from South Africa and handed to the Lesotho police. This could according to Mr. *Phoofolo* have been done by the South African police or agents of the Lesotho police.

At the time the objection was made, Mr. *Phoofolo* was not sufficiently equipped with authorities to back up his objection to the court's jurisdiction. He promised to bring authorities on which he founded his application. I dismissed his objection and promised to give my reasons later while giving him the right to bring the authorities on which he based his application.

Roughly speaking my reason for dismissing this application was that there has always been an exchange of non-political prisoners between the Lesotho and South African police forces. There was no extradition treaty at the time. Nevertheless criminals knew that they could not commit crimes and hope that just by crossing the border they were safe from the arm of the law. Somehow a suspect used to pitch up at the border for the police who wanted him to receive him into custody.

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For the Crown : Mr. A.M. *Lenono*
For the accused : Mr. E.H. *Phoofolo*