

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

HLEPHE MOSOLA

NTAI MPEPI

JUDGMENT

Coram: Hon. Hlajoane J

**Dates of hearing: 13th September, 2007, 13th November, 2011,
1st June 2009, 13th November, 2013, 14th
November, 2013, 2nd April, 2014**

Date of Judgment: 28th May, 2014.

Summary

The accused charged of murder – Accused 1 being discharged in term of section 175 (3) of the Criminal Procedure and Evidence Act 1981 – Crown evidence having established that it was the accused who was seen assaulting the deceased with a stick and sjambok – Accused may have not intended the results but must have foreseen that death might

occur but became negligent – Accused thus found guilty of murder of the deceased.

Annotations

Statutes

- 1. Sexual Offences Act 3 of 2003**
- 2. Criminal Procedure and Evidence Act 9 of 1981**

Books

Cases

- 1. Matsoai and Others v R 1967-70 LLR 70 at 75**
- 2. Rex v Biyana 1938 EDL 310**
- 3. Masaile and Others v Rex 1971-73 LLR 148 at 164**
- 4. Thebe v Rex 1985 -1990 LLR 523 at 532**
- 5. Lefaso v R (1990 -94) LAC 44**
- 6. Lekoloane v The State (1985) B.L.R. 245 at 249**
- 7. S v Thonga 1993 (1) SACR 365**

[1] The accused appeared before Court charged with the murder of one Tšepang Komanyane, in that upon or about the 16th day of

August, 1999 and at or near Seforong in the district of Quthing they both did unlawfully and intentionally kill the deceased.

- [2] The accused pleaded not guilty to the charge and the crown led evidence of three crown witnesses to prove their case. P.W.1 Maruping Lichaba told the Court that he found the deceased already arrested by both accused and he was kept at accused 1's place. They had been summoned by the Chief to assist accused 1 to search for his missing horse.
- [3] When P.W.1 arrived at accused 1's place he found the deceased already tied on both hands with a rope and many people had already gathered at that place. Deceased was labelled as the person who had stolen accused's horse. P.W.1 showed he observed that the deceased had already sustained some injuries on his head. The wounds were at the back of deceased's head and on the forehead. P.W.1 had asked the deceased as to how he sustained the injuries and deceased replied by saying that it was accused 2 who had hit him with a stone at the back of his head and on the forehead.
- [4] When P.W.1 confronted accused 2 about the injuries on the deceased, accused 2 admitted that he was responsible for the injuries as deceased wanted to run away. That he used a stone at

the back and a stick on the forehead. For the first day deceased was left with accused 1 and 2 at accused 1's place.

[5] The next day when P.W.1 and Ralikoeba Maba went to accused 1's place they found out that they had left the place and they followed them to the place where the soldiers were stationed. P.W.1 witness when the soldiers asked the deceased to rollover. The deceased had directed the soldiers to a place where he said the missing horse would be found but the horse could not be found at that place. Deceased had said the horse would be found at Ha Seboneloa but when he was taken there it was discovered that he did not even know the person he had referred to as he was pointing at a different person, and different place. Even the person he pointed at did not even know the deceased himself.

[6] The villagers were allowed to put questions to the deceased as he was taken into a kraal. When the deceased was not giving them what they wanted he was tied with a rope on both hands and they moved over to Stanford as the leader of anti-stock-theft unit. P.W.1 then untied the deceased and ordered that no one should tie him again.

[7] Stanford came and asked the deceased about the horse and deceased said it was with Smith, but Standford said he had yet

not told the truth and that he was eventually going to tell the truth. P.W.1 saw accused 2 tie the deceased with a rope a pattern known as *lehahla-hahla*.

[8] The witness demonstrated what *lehahla-hahla* is. That it was a rope that would be tied around the waist, going between the legs to separate the balls into two, then up around the arm and neck and when that rope is pulled there would be so much pain to ones' private parts. That person would not be able to walk up straight in that state.

[9] P.W.1 tried to talk to both accused 1 and 2 to stop what they were doing to the deceased but they just ignored him. The torture took one to two hours. He then saw accused 1 and 2 chasing the deceased with their horses and beating him up in the process with sjamboks. He heard the deceased crying out bitterly and asking for help.

[10] As they were moving on, they met some soldiers at a place called "*sekoti sa masimo*". Deceased was no longer tied the *lehahla-hahla* way. The soldiers once more made the deceased to roll. He was even made to sing with some school children.

[11] The soldiers asked that deceased be taken for a bath in the river. They thought he was going to tell where the horse was after that.

Accused 2 went with a sjambok. They took a long time at the river and a messenger was sent for them. When they came back deceased had sustained a fresh injury above his right eye. The school children aged from 6 to 8 years were asked to beat up the deceased with sticks.

[12] Under cross examination P.W.1 denied when it was suggested to him that in fact he was the one who asked that deceased be tied *lehahla-hahla*, but instead asked accused to stop tying deceased *lehahla-hahla*. He however admitted that he was the one who handcuffed the deceased as he was said to be running away.

[13] P.W.2 Matooane Thaba is the father to the deceased. He knew the accused as his co-villagers. He said as he went for work one day he met a person who told him that his son, the deceased was at accused 1's place under arrest. When he got there accused 1 told him that if deceased was not going to give him his horse he was going to kill him.

[14] P.W.2 was invited into accused 1's house to see his son. He saw his son with what he described as a deep wound above his son's left eye. P.W.2 left for work. As P.W.2 was working at Hareeng High School he heard school children making noise and were holding sticks. He noticed accused 2 amongst the children. After a short while he saw the children disperse back

to school premises as they were boarders. The deceased had also been in that group of students.

[15] When the witness knocked off at around 12:00 noon he saw accused 2 and the deceased at accused 1's place. The deceased was fastened and accused 2 was assaulting him with a sjambok. There were only the two of them. P.W.2 passed them to his place. The witness went to report to the Chief, Chief Hareeng Tšepo Nkuebe.

[16] The next day on a Sunday P.W.2 went to accused 1's place with deceased's younger brother to check on the deceased. He was met with the same words that should deceased not take out the horse he was a dead person. Deceased came out with a rope around his neck. He was walking with such difficulty as though something was holding him on his private parts. P.W.2 went back to the chief to report that the accused were going to kill his son considering the state of health he was in.

[17] P.W.2 said he could see that the rope from deceased's neck was going down his tummy. The chief did not take the witness seriously as he kept on saying he was waiting for the accused to come and report to him. After P.W.2 had left the chief's place he saw accused 1, accused 2 and one Mahlomola, escorting the deceased. The deceased was singing as they were chasing after

him on foot. P.W.1 and Ralikoerbe joined them. P.W.2 said he last saw the deceased as he went passed driven by accused 1, accused 2, P.W.1, Sootho and Ralikoerbe. P.W.2 came to know of deceased's death from the chief after accused 1 and 2 had reported to the chief.

[18] P.W.2 went to where the dead body was at Likhohlong where he found P.W.1 and some boys joined him. The witness then said to accused 1, "you have fulfilled your wish of killing my son" or something to that effect. Accused remained silent. The chief came in the afternoon, police vehicle came to take the deceased away. The witness concluded his evidence by showing that P.W.1 was his brother-in-law as his wife comes from Maruping family and that also his younger brother has married sister to Maruping. But that the relations between P.W.1 and the deceased has always been good.

[19] P.W.2 said though he did not see the actual killing of his son, he was convinced that he was killed by the accused considering what accused 1 had been saying.

[20] D/Tpr Lewisa became P.W.3. He visited the scene after receiving the report about the death of the deceased at Seforong. He went out with colleagues and went via the chief's place who detailed his messenger to accompany the police to the scene. At

the scene they found a dead body lying on its back. On examining the body he observed a wound on the middle of the head and another on the forehead. Both were open wounds.

[21] On further examining the body the witness observed that both hands and feet were swollen. His private parts were also swollen as though had been tempered with. The body was conveyed to Qacha's Nek mortuary. Before they left the place the investigations led to the two accused.

[22] It was P.W.3 who identified himself to the accused and cautioned them. They gave him an unsatisfactory explanation. He then charged them of murder and arrested them. The witness showed that he never made any promises or threats to the accused prior to demanding for their explanation. Accused had said were suspecting the deceased for their missing horse and they went with him to where he had said the horse was kept.

[23] Further in his evidence the witness pointed out that the accused had told him that they had assaulted the deceased until he died. The defence objected to the statement by the accused to the witness as a confession. Though the crown insisted it was not a confession as it did not exclude all possible defences, the Court ruled in favour of the defence in that the statement was a

confession as was made to a police officer and therefore inadmissible.

[24] The witness showed that he was given an explanation and some weapons were handed over to him by the accused voluntarily. He also said accused 1 produced a green and white rope, a black sjambok grey at the handle, and a broken stick. The exhibits had been handed in to the Magistrate at the Preparatory Examination (PE) but before this Court he could only hand in the sjambok as the other exhibits could no longer be found in the exhibit room.

[25] P.W.3 who had told the Court that he had been a Police Officer since 1994, though had said he had handed in the exhibits at the P.E proceedings was referred to the P.E record which never revealed that the exhibits were handed in in those proceedings. But the witness insisted that the accused handed over to him their weapons though he might have forgotten that he never handed them in at the P.E.

[26] It was at this stage that the crown reported about the passing on of two of his witnesses and even handed in proof of such deaths as confirmation for the two crown witnesses. The deposition of one of those witnesses was by consent of both sides read into the recording machine to form part of the evidence. When this was

done it was in the absence of accused 2 whom the record showed that he was aware that he was supposed to come to Court but had decided to absent himself.

[27] The deposition of Private Khohlooa was to the effect that as a member of the Lesotho Defence Force he remembered the day of 15th August, 1999 when a group of men came to his duty station at Sekhalabateng driving one Tšepang Thaba as a suspect. He noticed that the suspect had been physically molested and even had an injury on his forehead. There was one man amongst the group who claimed to be the owner of the stolen horse.

[28] The report showed that the suspect admitted to have stolen the horse. When he asked him if he could go and show them where the horse was he answered in the positive showing the horse was with one Sebonelo. The witness and the group of men including the suspect were taken to where suspect said the horse was. But when he got there at Seforong the suspect appeared not to know where the horse was and seemed also not to know the person with whom he had said the horse would be found. That person also did not know him.

[29] The group came back and the witness took them before the chief and handed them over with the suspect for safe keeping. The

next day the accused and the suspect and others went back to the witness's work station. But they came late in the afternoon of that day. Their explanation was that the suspect had been taking them up and down with empty promises of showing them where the horse was.

[30] The statement showed that Khohlooa then observed that the suspect's physical condition had worsened possibly due to having been subjected to assault during the best part of the day. The soldiers indicated that they were not going to keep the suspect in that bad state, but advised that he be taken to their chief or the police.

[31] According to the statement it was already dark, and looking at the suspect he was full of bruises such that he could virtually do nothing and his feet were also swollen such that he could hardly walk. He learned of the suspect's death later.

[32] The post mortem examination was also handed in by consent. It showed cause of death as due to assault. External appearances showing wounds on right frontal part 3cm, and right parietal regions of 3cm. Also a wound on left frontal region 4cm. The skull showed congested brain and subdual haemorrhage.

[33] The crown at this stage chose to close its case. The defence applied for the discharge of the accused as it was said there was no *prima facie* case against accused 1. Also that there had been contradicting evidence against accused 1.

[34] The crown supported the application for the discharge of accused on the basis that accused 1 had always been present throughout the arrest of the deceased and there has been no evidence directly linking him to the assaults. On the basis of both submissions the application for the discharge of accused 1 was accepted. Accused 1 was therefore at the end of crown's evidence found not guilty acquitted and discharged.

[35] The last piece of evidence was dealt with in the absence of accused 2. A warrant of arrest was thus authorized against accused 2. Accused 2 remained at large since 2009 only to be arrested in April 2013. Accused alleged he had been in Natal and that he was hospitalized for three months without showing proof of such. The matter was set for hearing in November same year and accused kept in prison.

[36] The case proceeded in November 2013 and accused Ntai Mpepi took the witness stand. In his evidence he admitted to have defaulted in appearing before Court. He said though they had an anti-crime unit at his village he was not a member of it.

[37] The accused and Hlephe Mosola had arrested the deceased on suspicion of having stolen Hlephe's horse as according to him the rope and halt for that horse were found by both of them with the deceased. He said they found deceased at Khoalinyane. When they met him he became violent as he was asked about the horse. They took his stick and showed were not fighting. He stood up and left them there.

[38] As deceased left accused told him that there was a sign that he had been riding on a horse as there was sweat between his legs and he had the rope for the missing horse. He said they fought with the deceased as they realized he had the items for the missing horse. Accused said deceased even hit him with his stick on the left side of his head and that the wound is still visible.

[39] The accused further showed that after he was hit by the deceased he hit back and deceased fell to the ground. They both then tied the deceased. They took him before the chief to show they had found the person they had been looking for. The witness confirmed that they followed P.W.1's advice of taking the deceased to the military base for safe keeping. He also confirmed that they together with the soldier approached one

Sebonela for the missing horse as deceased had said he had given the horse to him.

[40] In putting the events in their chronological order the accused showed he first arrested the deceased at Qhoalinyane. On the second day they remained at home. The 3rd day they went to the military base and at Ha Motšieloa. On the 4th day they proceeded to Standford place where deceased was fastened *sehoalohoalo*. He described *sehoalohoalo* as fastening one from shoulder to between the legs and to the back. That the soldiers had fastened bricks on the deceased and he was made to roll with those bricks. That the treatment of rolling took the whole day. The soldiers had invited the mob to join in assaulting the deceased by using whips. The soldiers even ordered deceased to sing for the school children who were there.

[41] The witness saw that the deceased had bruises all over his body. The school children had also joined in assaulting the deceased. He was made to roll down to Qhoalinyana dam, and he became wet. He was allowed to rest at around 3:00 p.m. since being there from 10:00 in the morning.

[42] When all other people left in the evening the accused, Hlephe Mosola and the deceased remained behind. Soldiers ordered them to leave after 5:00pm. Since there were only two horses,

the accused allowed the deceased to use his horse and he proceeded on foot.

[43] On their way the accused had asked the deceased to get off the horse as the place was sloppy, but the deceased fell in the process. It had become dark, so that the accused could not see where the deceased had rolled to. They left him there intending to come for him in the morning. They left and slept at Mosola's place.

[44] When they went for the deceased the next day they found that he had died. He and Mosola had arrived home late the previous day, but it was still possible to have alerted the villagers to go and look for the deceased but they just felt they would check on him the next day.

[45] The matter was reported to the chief and the police. Police came and took the body away. Accused and Mosola were later arrested.

[46] The accused said when they first arrested the deceased, he was well and had no injuries. But that at the time of his death he had sustained injuries for assaults. He had visible bruises all over the body. Accused said he assaulted the deceased on the frontal part of his head to cause him submit to the arrest.

[47] He said he was not a member of the anti stock-theft unit (*mahokela*). Even Mosola did not belong to such a unit. Though he had said there existed such a unit at his village, under cross examination he said he was not aware if they had such a unit.

[48] Accused however explained the duties of '*mahokela*', as being where people with stolen animals would report and '*mahokela*' would look for such animals and effect arrest and suspects would end up being handed over to the police. The chief would have to make a letter referring suspects to the police. He said he only arrested the deceased because Mosola asked him to, and ended up assaulting the deceased. He admitted that the assault was unlawful.

[49] It was accused's evidence that when P.W.1 joined them the deceased had already been captured. P.W.1 even asked as to why deceased had injuries at the back of his head and on the forehead. He even asked why deceased was fastened.

[50] Accused was reminded of the response to the questions above. That it was said it was because the deceased was fleeing from arrest and that Mosola hit him with a stone on the head causing him to fall. As he rose accused hit him with a stick on the

forehead. He did not deny that the deceased had always been in their custody until he died.

[51] Accused said they did not take the deceased to the police once he was arrested because it was for the soldiers to deal with the situation at the time. Accused however failed to explain why he was saying the soldiers had to deal with suspects during that time. He said they had to deliberate on where to take the deceased as he had realized that the police were not doing their job. Also that the police were busy with their shootings, but the Court could not take a judicial notice of the alleged shootings as were not a notorious fact but only known to the accused.

[52] When asked as to why he reported of the deceased's death to the police and not the soldiers, he said the soldiers had expelled him. He also did not deny that the soldiers had asked them to take the deceased to the river to wash after being made to roll over a hip of ashes. Also that the soldiers released the deceased to them as he had been with them since and had become tired.

[53] The second defence witness was Thabang Mosola who had been in attendance throughout the proceedings. To him a military base was established around 1994-1998 specifically to deal with cases of stock theft between Lesotho and South Africa. That soldiers were patrolling the borders as a measure of combating

stock theft and cases for such were reported to the soldiers. He said such soldiers were working together with the '*mahokela*'.

[54] Under cross examination he was told that he had expressed his opinion in his evidence of things not documented anywhere and the answer was in the positive. He said he was not very certain of what he had said in evidence on the relationship between police and the soldiers.

[55] The crown in his submissions pointed out that the death of the deceased was a result of unlawful assaults on him in the hands of the accused and Mosola. Mosola was the 1st accused but was acquitted at the close of the crown as the crown at the time did not oppose the application for discharge.

[56] The crown identified only two issues for determination in this case; being

- (a) Was the death intentional
- (b) Whether accused caused the death of the deceased.

[57] P.W.1's evidence had briefly been to the effect that when he joined the team in search of Mosola's stolen horse he found the deceased at Mosola's place already arrested by accused and Mosola. Deceased had already sustained head injuries.

[58] P.W.1 also witnessed when they had gone out with accused and Mosola with the deceased for the deceased to point out the person to whom he had claimed he had taken the horse, accused fastening the deceased at his private parts with a rope. He saw when deceased was being chased away with a horse in that uncomfortable situation by both accused.

[59] P.W.2, the deceased's father witnessed when his son was held prisoner by the accused and Mosola. He told the Court that Mosola even told him on two different occasions that if deceased did not produce the horse he was going to be killed. As was said by P.W.1, P.W.2 also said he observed when deceased was tied with a rope around his neck and walking with difficulty as though something was holding him at his private parts.

[60] P.W.2 also saw accused assaulting the deceased with a sjambok whilst deceased was still fastened.

[61] P.W.3 confirmed that when he visited the scene he found the deceased dead with swollen hands, feet and private parts. He had two open wounds, one on the forehead and another on the middle of the head. His investigations led to the arrest of accused and Mosola. He testified to having seized the weapons

from accused and Mosola though they were not produced in evidence.

[62] The deposition of the soldier, Private Khohlooa, was admitted in evidence by consent together with the post mortem report.

[63] The defence on the other hand without denying that accused and Mosola had arrested the deceased and had kept him at Mosola's place submitted that it could not be denied that the arrest of the deceased had some interruptions. That the accused and Mosola clearly demonstrated their intention of only recovering the stolen horse as they even handed the deceased to Peace Officers at Qhoalinyane Military Base.

[64] The defence further showed that when deceased was taken to Sebonela, the person to whom he had alleged the horse was to be found, showed that the soldiers were indeed following on the leads by the deceased for the missing horse. That the lawful act by the soldiers was taking the deceased from the hands of the accused and Mosola as an intervening cause.

[65] Also the fact that the evidence has revealed that even the soldiers subjected the deceased to some form of torture that must also be taken as enough intervening cause. The defence submitted that from the crown's evidence there has been no

proof that death resulted from the assaults by the accused. Submitted also that even the post-mortem report exonerated the accused as it has shown that there was no fracture of the skull. So that death of deceased could not be attributed to the assaults.

[66] The defence further pointed out that it could not also be said that the falling of the deceased from the horse was foreseeable. The reason being that Mosola also dismounted his horse as they passed at that area for fear of falling from the horse as accused who had allowed the deceased to ride on his horse advised deceased to dismount. That it was a risk which no reasonable man could have guarded against. He thus asked for the acquittal of the accused as his co-accused was set free at the close of crown's case.

[67] Murder has been defined as the unlawful and intentional killing of another human being. We know of two forms of intention being:

(a) *Dolus directus*

(b) *Dolus eventualis*.

The former being where causing death was premeditated and the latter where death was foreseen.

[68] It has been very unfortunate that the crown counsel then did not oppose the application of discharge at the close of crown case

for accused 1. The two accused have been together in dealing with the deceased till his last days on earth. Be that as it may, the case has proceeded against accused 2 only.

[69] Accused had shown that he and Mosola arrested the deceased on suspicion of having stolen Mosola's horse. Accused was not even one of the anti-theft unit at his village 'mahokela'. Accused showed in his evidence that he was the one who hit the deceased with a stick which fell him down. They then fastened him.

[70] When the deceased was so arrested he had no injuries but was well. The accused wanted the Court to believe that the intention was to arrest the deceased. But after arresting him they took it upon themselves to be taking him up and down and assaulting him instead of handing him over to the chief or the police.

[71] The section relied on by the accused **section 42(1) of the Criminal Procedure and Evidence Act (CP&E)**¹ allows force only to effect arrest. The section reads as follows:

“When any peace officer or private person authorized or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in

¹ Criminal Procedure and Evidence Act 9 of 1981a

Part II of the first schedule, attempts to make the arrest; and the person whose arrest is so attempted flees or resist and cannot be apprehended and prevented from escaping by other means than by peace officer or private person killing the person so fleeing or resisting such killing shall be deemed justifiable homicide.”

[72] The deceased sustained the injuries in the hands of the accused and Mosola after they had kept him hostage for four days. It was not for the accused to conduct investigations as were not even members of ‘*mahokela*’. Theirs could have been to arrest and hand suspect to chief or police.

[73] Accused admitted to have used a stick on deceased’s head. He was also seen using a sjambok to assault the deceased. He even admitted to P.W.1 to have caused the injuries on deceased as he said deceased wanted to run away. P.W.1 also saw when accused tied deceased what is known as *lehahla-hahla* which injured deceased’s private parts.

[74] Evidence has further revealed that the deceased had taken the accused and his team to one Sebonela whom he said had the horse, only to find that when they got there he was not even sure of where Sebonela stayed and worse he did not even know that Sebonela. Even Sebonela seemed not to know the deceased. So that deceased may have just directed the team to someone he did

not even know due to pains from the treatment meted out to him by the accused.

[75] After the deceased had fallen from their horse if indeed he fell, the accused left him there for the night unattended only to find him dead the next morning. They did not bother to report to anyone or even the chief but went to sleep. They may have left him there already dead but decided to concoct a story that it was dark and could not see where he had fallen.

[76] The circumstances of this case show that the accused had the necessary intention to kill the deceased, though his acts were not premeditated, but through his unlawful conduct he foresaw the possibility of causing death, *dolus eventualis*.

[77] The defence wanted the Court to believe that there had been some intervention in the treatment of the deceased by the accused, *novus actus interveniens* by the members of the army and some 'mahokela'. Also that looking at the post mortem report it exonerated the accused as it has shown that there was no fracture of deceased's skull.

[78] But the most important part of the crown's evidence has been that the accused when they arrested the deceased, deceased was still well and without the injuries. Accused have always been in

deceased's company and accused did not deny that they caused the injuries on the deceased.

[79] The post mortem report has shown the cause of death as having been due to assaults. Accused caused the head injuries. The fact that there was no fracture of the skull does not mean there was no injuries on deceased's head. The report still showed congested brain and subdual haemorrhage.

[80] On the evidence presented before this Court by the crown witnesses I find that the accused is the person responsible for the death of the deceased by assaulting him and leaving him for the night in that bad condition not mindful of whether death resulted. He foresaw that what he did might cause the death of the deceased. He did not only arrest the deceased, but he assaulted him instead of handing him over to the police for them to continue with their investigations.

[81] The accused is thus found guilty of murder of the deceased Tšepang Komanyane.

Extenuating Circumstances

[82] The accused has already been found guilty of murder. The Court is under **section 296 (1) of the Criminal Procedure and Evidence Act** *supra* enjoined to state the existence or otherwise of extenuating circumstances.

[83] The section is framed thus;

Where the High Court convicts a person of murder, it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them.”

[84] The provision of the above section is mandatory as the word shall has been used. As rightly pointed out by the crown the Courts have interpreted the section as conferring discretion to

the Court in imposing a sentence other than death when such circumstances are found to exist, **Matsoai and Others v Rex**².

[85] **Rex v Biyana**³ has given the definition of extenuating circumstance as follows:

“is a fact associated with a crime which serves in the mind of reasonable men to diminish morally, albeit not legally, the degree of a prisoner’s guilt.

Similar words were echoed in the case of **Masaile and Others v Rex**⁴.

[86] The onus of proving extenuating circumstances rests on the accused. Accused can discharge the onus on him through his own evidence or putting reliance on some other proved facts in the course of the trial as in **Thebe v R**⁵.

[87] The Court in **Lefaso v R**⁶ found that there was no indication from the proved facts that any extenuating circumstances existed. Even on appeal in dismissing the appeal the Court basing itself on the surrounding circumstances and facts held that extenuating circumstances had not been proved.

² 1967-70 LLR 70 at 75

³ 1938 EDL 310

⁴ 1971-73 LLR 148 at 164

⁵ 1985-1990 LLR 523 at 532

⁶ (1990-94) LAC 44

[88] In *casu*, the Court was told that the accused was only 24 years at the time and was the youngest in the searching team. The defence counsel asked the Court to find that accused must be covered by the provisions of **section 42 (1) of the Criminal Procedure and Evidence Act** *supra*.

But in our case we were not told that deceased was fleeing. He had been detained by accused and his team for 4 days. The section does not cover accused's situation.

[89] There has been, on the facts presented before Court, no premeditation in the killing of the deceased. Also the belief by the accused that since they were detailed by the Chief to arrest the deceased and their strong belief that deceased was the thief, made them think that their acts were justified.

[90] The cumulative effect of all the above factors have been taken into account to have influenced the accused's mind in committing the offence. And following on the decision referred to by the crown of **Lekoloane v The State**⁷ consideration should not only be on extenuating circumstances but also aggravating circumstances.

[91] The aggravating circumstances as having arrested the deceased and instead of handing him over to the chief or police, accused

⁷ (1985) B.L.R. 245 at 249

found it proper to deal with him by assaulting him and leaving him injured on the way only to find him dead the next day.

[92] But balancing both the extenuating and the aggravating the Court finds that extenuating outweigh the aggravating circumstances.

[93] The Court having found the existence of extenuating circumstances alters the verdict to read,
Guilty of murder with extenuation.

Sentence 17th June, 2014.

[94] The Court has been told that accused has no previous convictions.

[95] In mitigation of sentence the Court was told that accused is a married man with children and has to maintain his family. That is the obligation of a man as husband and father to his family. But deceased in the hands of the accused has been deprived of that obligation as his life span has been shortened.

[96] As a sign of remorse accused undertakes to compensate the family of the deceased with some ten (10) head of cattle. The crown submitted that such a provision has not been spelt out in our **Criminal Procedure and Evidence Act**. True enough that is the position of our law. We only have **section 321 (1) of the**

Criminal Procedure and Evidence Act which provides for a compensation where personal injury or loss of property has been caused. Also that it has to be the person injured who has to apply for such compensation which does not even exceed M400.00. But in our case a person has lost his life.

[97] In passing sentence in this matter the Court has considered the mitigating factors, without necessarily forgetting of the plight which befell the deceased. I have used the considerations in **S v Thonga**⁸ where the Judge said;

The judgment must be reasonable, in that it must reflect the degree of moral blame-worthiness attaching to the offender as well as the degree of seriousness of the offence. Thus punishment should ideally be in keeping with the particular offence and the specific offender.

[98] The Court is also mindful of the warning that in passing sentence the Court has to jealously guard the fine line between raw revenge or emotional punishment and the judicial, reasonable and objective balanced exercise of its discretion.

[99] The appropriate sentence therefore in the circumstances of this case is as follows:-

⁸ 1993 (1) SACR 365

Sentence: Accused is sentenced to a period of eight (8) years imprisonment without the option of a fine. On the undertaking by accused to compensate the family of the deceased, accused is allowed a period of two (2) years within which to pay such compensation and when paid in full the Court will revisit its sentence.

A. M. HLAJOANE
JUDGE

For Crown: Mr Mokuku

For Accused: Mr Lephuthing