IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/144/2017**

In the Matter Between:-

REX

AND

TANKI MOABI **ACCUSED**

JUDGMENT

CORAM **: MOKHESI J**

DATE OF HEARING **: 06TH /06/2019, 08th/08/2019, 20th /08/2019, 13th /11/2019**

DATE OF JUDGMENT **: 12th DECEMBER 2019**

***Summary*: Criminal Law- Murder- whether inadequacy of medical treatment can constitute *novus actus interveniens*-**

Annotations:

STATUTES **:**Criminal Procedure and Evidence Act no.9 of 1981

BOOKS :Jonathan Burchell and John Milton *Principles of Criminal Law* 2end Edition (Juta)

CASES **:**S v Tembani 2007(2) SA 291 (SCA); [2007] 2 ALL SA 373 (SCA)

R v Nthama CRI/T/1/1980 [1980] LSHC 101 (1ST August 1980)

S v Shoba 1982 (1) SA 36 (A)

TahlehoLetuka v Rex 1997-98 LLR & LB 346

S v Letsolo 1970 (3) SA 476

PER MOKHESI J

[1] The accused is charged with the crime of murder of his brother Thabang Moabi, which occurred on the 11th day of February 2016.The events which led to the accused being thus charged are quite bizarre to say the least. The fight which led to the deceased's death was over two eggs which the deceased ate without the accused's approval.

[2] The events of that fateful day were narrated by Mrs 'Makhomo Moabi (pw1) who is the two brother's aunt. She stayed in the same house with the two brothers. The events took place at night. Also present on that day was Mokoena Moabi (PW 2) who is PW 1's husband, 'Masebolai Mokoena and Seipati Moabi whose police statements were admitted and read into the record of proceedings.

[3] PW 1 testified that the accused arrived home at night, and walked straight to the fridge. After opening it, he enquired as to who ate his two eggs. Angered by the absence of his two eggs, the accused started hurling insults. The deceased who was not present in the house at the time entered and admitted to have eaten the eggs. Some angry conversation was exchanged between the two brothers, which eventually led to the accused rushing to the bedroom where he took a spear. Immediately PW 2 (Mokoena Moabi) sprang up to intervene by grabbing the accused and pushed him back into the bedroom. Pw2 also pushed the deceased outside. After PW 2 had pushed the accused back into the bedroom and the deceased outside, the accused emerged carrying a spear and took out a knife from the shelf where cutlery was kept. The accused who was very angry at this time, charged at PW 2 who was standing between the two warring brothers. The accused overpowered pw2 as he attempted to go outside where the deceased was. After overpowering pw2, the accused met the deceased at the doorway, and as PW 2 tried to separate the two brothers by getting in between them, pw2 got stabbed by the accused on the shoulder. At this time the deceased who had gone behind pw2, slipped and fell to the ground where the accused stabbed him while he was on the ground.

[4]PW 1 actually witnessed the events up to the point where the accused was stabbing the deceased with a knife on the stomach and neck. Her version is consistent with that of PW 2. At the point where the accused was stabbing the deceased, PW 1 ran to alert the neighbours about what was happening. Upon her

return she could see that the deceased bowels had fallen to the ground, and that a shawl was used to collect them. The fact of bowels coming out is not supported by post mortem report which records that the wound on the stomach area was 3cm long. It is highly improbable that a 3cm long wound would allow bowels to fall out. Such a crucial fact was only witnessed by her, not even by pw2 who was administering first aid to the deceased. I think PW1 may have exaggerated the extent of wounds in the stomach area. The fact of the accused stabbing the deceased while on the ground is corroborated by Seipati Moabi whose statement was admitted and read into the record. All witnesses testified to the fact that the deceased was bleeding profusely, frothing from the mouth and could no longer talk.

[5] PW 2's (Mokoena Moabi) evidence is similar to that of PW 1 and Seipati Moabi. He testified that after he had tried to separate the fighting brothers, the accused overwhelmed him and stabbed him on the shoulder in the process, and that as the deceased tried to evade the accused, the former slipped and fell to the ground where the accused managed to get to him. The accused stabbed the deceased as he lay on the ground. Pw2 was part of people who rushed the deceased to Morija hospital, where he was attended to and transferred to Tśepong hospital. I found all state witnesses generally credible and reliable. Cross-examination of both pw1 and pw2 did not yield anything of significance. They were largely unshaken.

[6] Beside oral testimony of PW 1 and PW 2 Crown evidence was based on the admitted statements of; 'Masebolai Moabi and Seipati Moabi, NO. 11846 D/P/C Mpete is the neighbor who attended to a call for help, and that when he arrived, found the deceased leaning against PW 2 who was trying to stop a heavy flow of blood. He says the deceased was lying in a pool of blood. He instructed that a shawl be used to contain the deceased for transportation to the hospital.These statements were admitted in terms the provisions of section 273 of the Criminal Procedure and Evidence Act 1981.

[7] The postmortem report records that the deceased's death was due to "stab wounds with fatal loss of blood."

[8] The accused testified in his own defence. His defence in a nutshell is that he acted in self-defence. He further pleaded *novus actus interveniens*. The net

effect of the accused's evidence is that on the fateful day upon arrival at home the deceased attacked him unprovoked, and that he had to defend himself. He said the deceased stabbed him with a sharp object on the elbow. In order to defend himself he took a bread knife and stabbed the deceased. He says they were near the door, inside the house when the fighting took place. He stabbed the deceased as he forced himself into the house. He denied ever stabbing the deceased while the latter was lying on the ground, he however gave evidence that he stabbed him three times as they were standing. The accused's version that he was attacked by the deceased unprovoked is simply not true as can be gleaned from the exchange between him and Advocate Fuma (for the crown) during cross- examination. The said exchange bears reproduction.

"Q: whose eggs were these?

A: It was my eggs from where I was working

Q: what happened to those eggs that day?

A: I found the eggs were fried and I did not say anything.

Q: You told this Court that you were furious?

A: It is so

Q: I understand that this is one of the reasons you were furious, that your brother ate your eggs?

A: It is so

Q: And you confronted him for that?

A: Yes I confronted him

Q: It is that confrontation that led to a fight between you and your brother?

A: That is so

Q: Still furious you ended up taking a knife and stabbing him?

A: It is so."

[9] This exchange makes it plain that it could not be true that the accused was attacked unprovoked as he said in evidence in chief. Given that he admitted that he was "furious" on finding that his two eggs had been consumed, and that he attacked the deceased as a result, his version that he was attacked first cannot be true. The injury he sustained at his elbow was sustained as the deceased tried to ward off his attack. Crown's version that when the accused entered the house and found his two eggs missing, he became so enraged to the extent that he actually attacked the deceased upon the latter professing to have eaten the eggs, is unshaken, and it is further confirmed by the accused's admission during cross examination as evidenced by the exchange quoted above.

[10] In his submissions Adv. Lesutu, for the accused, argued that there was *novus actus interveniens* as the deceased was not given blood transfusion both at Morija and Tśepong Hospitals after it was clear that he had lost a lot of blood.

[11] Legal Causation:

Novus actus interveniens has a bearing on legal causation. A *novus actus interveniens* (or *nova causa*) is an abnormal intervening act which serves to break the chain of events. The abnormality of the intervening act is judged against the standards of general human experience (**Jonathan Burchell and John Milton *Principles of Criminal Law* 2nd ed. Juta at 123**). As in all criminal cases, the burden of proof of showing that the chain of causation was not interrupted is on the crown, and this it does by proving all elements of the crime including that the accused caused the deceased's death evidence. Evidential burden only shift when the Crown has adduced *a prima facie* evidence proving causation. But when after all evidence is considered, there is a reasonable doubt that the accused caused the deceased's death, the accused is entitled to acquittal.

[12] There has always been a divergence of views (which will not be dealt with in this judgment) regarding the best approach to *novus actus,* however, a more sensible approach was articulated by Cameroon JA (as he then was) in ***S v Tembani (116/02) [2006] ZASCA 123; [2007] 2 ALL SA 373 (SCA)***, where after reviewing authorities, stated the following, at para. 25:

"On the contrary, it seems to me to illuminate well the basis for imputing liability both in ***Smith*** and in present case. The deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must in my view generally lead to liability for an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is substandard or negligent, unless the victim so recovers that at the time of the negligent treatment the original injury no longer poses a danger to life. In the latter event, as was found in ***Smith***, the original wounding merely provides a setting in which a further cause takes substantial effect. In the present case, the trial court rightly found that at the time of the deficient treatment, the original wound was still an operating and substantial cause of death, and that it could not be said that it merely provided the 'setting' within which the negligent conduct of the hospital staff operated.

[26] In my view, the justification for this approach may be found in two interconnecting considerations of policy. The first relates to the culpability of the assailant; the second to the context in which he harms his victim. First, an assailant who deliberately inflicts an intrinsically fatal wound embraces, through his conscious conduct, the risk that death may ensue. The fact that others may fail to intervene to save the injured person does not, while the wound remains mortal, diminish the moral culpability of the perpetrator, and should not in my view diminish his legal culpability. That is so even where those others fail culpably in breach of a duty they independently owe to the victim. It would offend justice to allow such an assailant to escape the consequences of his conduct because of the subsequent failings of others, who owe no duty to him, whose interventions he has no right to demand, and on whose interventions proficiency he has no entitlement to rely. Their failings in relation to the victim cannot diminish the burden of moral and legal guilt he must bear.

[27] The second consideration reinforces the first. In a country where medical resources are not only sparse but grievously

> maldistributed, it seems to me quite wrong to impute legal liability on the supposition that efficient and reliable medical attention will be accessible to a victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. Such an approach would misrepresent reality, for it presumes levels of service and access to facilities that do not reflect the living conditions of a considerable part, perhaps the majority, of the country's population….
>
> [28] I therefore endorse the views of those writers who regard improper medical treatment as neither abnormal nor extraordinary and hold that the supervention of negligent treatment does not constitute an intervening cause that exculpates an assailant while the wound is still intrinsically fatal."

In ***R v Nthama CRI/T/1/1980 [1980] LSHC 101 (27th August 1980)***at p.11 Cotran CJ said:

> "The main enquiry of a murder trial is to find out if the accused factually and legally caused death. It should not, in my view degenerate into a medical enquiry about treatment or lack of it unless there is some evidence that treatment if given was so grossly negligent and but for it death would not have occurred….I find it too fanciful to assume that if evidence of treatment is lacking, that sufficient probability of a *novus* emerged, when other medical evidence discounted such a possibility, and when the nature of the wound(or wounds) as disclosed on post mortem , clearly indicates that it was dangerous and may lead to death."

[13] It is uncontroverted evidence as evidenced by the post mortem report that the deceased died of blood loss. Crown witnesses' testimony corroborates the fact that the deceased suffered a heavy loss of blood. It is an uncontroverted evidence of Seipati Moabi that due to loss of blood, the deceased could not speak, was covered with blood and was frothing from the mouth. In the post mortem report, Dr. Moorosi, recorded the following observations:

a) Sutured wound 4 cm long. Laceration of right common carotid artery.

b) Sutured wound 3 cm long with penetration into peritoneal cavity and perforation of transverse colon. There was blood in the peritoneal cavity.

c) Sutured wound, 3 cm long confined to subcutaneous adipose tissue.

[14] It emerged during PW 2's cross-examination that the deceased was sutured at Morija Hospital before being transferred to Tśepong Hospital. From Ha-'Mantśebo to Morija Hospital is a distance of about 17 kilometers, and from Morija to Maseru it is a distance of about 44 kilometers. Given the Pathologist's findings above, it is evidently clear that the laceration of common carotid artery was potentially deadly. It is a critical artery which carried blood to the brain, crucially. With this artery lacerated the deceased must have lost a critical supply of blood to a critical part of the body. This was a serious wound. The Pathologist also found blood in the peritoneal cavity owning to a 3 cm long wound which penetrated into this cavity. It is not surprising that blood was found in this area. Wound on the subcutaneous adipose tissue was not serious, but a combination of the other two wounds was potentially deadly, given that the deceased bled heavily before transport was secured to ferry him to Morija Hospital, which is about 17 kilometers away.

[15] Other than that his wounds were sutured at Morija hospital, there is no evidence about the deceased's other treatment at both hospitals, however, the lacerated common carotid artery, a penetrating wound into peritoneal cavity and perforation of transverse colon were intrinsically dangerous wounds from which a victim is likely to die without medical attention. There is evidence of the deceased having bled profusely to the point where he was rendered immobile and speechless. PW 2 tried in vain to stop the heavy flow of blood. When the deceased was transported 17 kilometers away in this potentially mortal state, to Morija hospital, where he only received suturing, only to to be transported further to Tśepong Hospital for a distance of about 44 kilometers, my considered view is that he must have bled terribly. The absence of the record of treatment at both Hospitals cannot serve to absolve the accused from liability. It is a well-

known fact our life in this country that, Tśepong Hospital is the only and the 'best' referral hospital, and, therefore, given the seriousness of the wounds, the deceased was bound to be transferred there. The situation of the deceased would have terribly gotten worse as he was transported over these long distances. In my view the two wounds referred to above were still the operating and substantial cause of death. The two wounds had occasioned severe loss of blood. It is a well-known fact in this country that hospitals' blood banks often run dry. The fact that the deceased may have supposedly received a substandard treatment in not being given blood transfusion, cannot serve as an abnormality which serve to break the chain of the accused's legal culpability in the former's death.

[16] Self-defence:

The accused in this matter pleaded self-defence, but as alluded to earlier in the discussion, and in view of the finding that indeed the accused was the aggressor, the result therefore, is that, his version that he was acting in self defence is not reasonably possibly true, and is accordingly rejected on that score.

[17] Extenuation:

In terms of section 296 (1) and section 297 (3) of the **Criminal Procedure and Evidence Act 1981**, I now turn to examine whether there are any extenuating circumstances in this case. It is apposite to mention that the accused has not led any evidence in extenuation, but this does not hamstring this court from deciphering from the record whether such extenuating circumstances do exist (***S v Shoba 1982 (1) SA 36 (A) at 40 F – G; Tahleho Letuka v Rex 1997 – 98 LLR & LB 346 at 360, 361 and 365****).*

[18] As to what constitute extenuating circumstances, the decision in ***S v Letsolo 1970 (3) SA 476 (A)*** **at 476 – 477**, said:

> "Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider –

a) whether there are any facts which might be relevant to extenuation, or provocation (the list is not exhaustive)
b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."

[18] When determining whether extenuating circumstances exist the court is also enjoined to consider the existence of aggravating circumstances. I have taken into account the fact that the accused, after fatally stabbing the deceased went and sat on the kraal and did nothing to help him while his family members and neighbours tried their utmost best to save the deceased's life. This to me shows a clear lack of remorse on the part of the accused for what he did. The accused is the first offender, and his first brush with the law results in taking his own brother's life over two eggs. There is a possibility of reformation here. I do not think that the accused is a hardened criminal. This has to count in his favour.

[19] At the time of committing this offence, the accused was aged 30 years. He was quite young but not immature. The accused is an uneducated rural person and quite plainly naïve, explaining why he could so easily be anguished by his brother consuming his two eggs. I do not for a moment justify the taking of the deceased's life over two eggs. The accused came across as a person of low intelligence and of a rural background. These factors serve to diminish his moral blame worthiness in the killing of his brother.

[20] In the result I have considered that there are extenuating circumstances in this case which serve to reduce moral blameworthiness of the accused. In the circumstances the extreme step of ordering the accused to forfeit his life will be totally inappropriate.

[21] The result is that:

The accused is found guilty of murder with extenuating circumstances.

My assessors agree.

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MOKHESI J

FOR THE CROWN : ADV. FUMA

FOR THE ACCUSED: ADV.LESUTU

SENTENCE:

[22] I now turn to consider the appropriate sentence. It is trite that the issue of sentencing is preeminently a judicial task which has to be exercised with utmost care and diligence, balancing the interests of the society, the crime and the criminal. I have considered that the accused is a young man coming from a rural background of Ha-'Mantsebo. He is uneducated. Although he did not show any signs of remorse despite taking away his brother's life wantonly, I have considered that there is a possibility that he will be reformed. He is not a hardened criminal. However, the fact that I said that the accused is a good candidate for reformation, by no mean diminishes the seriousness of the offence with which he is charged. This court believes in the sanctity of life and any unwarranted deprivation of life should receive a stern disapproval in the form of commensurate punishment.

[23] The accused committed a serious crime; he killed his brother over two eggs, and when his uncle and aunts tried to intervene to stop him, he was so persistent to the point where even when the deceased had fallen to the ground, he delivered decisive blows with a dangerous weapon, a knife. Clearly, the society will not tolerate this kind of conduct as exhibited by the accused in this case, and the society will surely demand that the accused be kept in jail for quite some time to be reformed, so that when he ultimately comes out, he will be a better person.

[24] In my considered view the appropriate sentence in this case is one of eighteen years imprisonment without an option of a fine, to be reduced by three years and seven months he spent in jail awaiting trial.

ORDER

Exht.1 is forfeited to the state for destruction by the police.

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MOKHESI J

FOR THE CROWN: ADV. FUMA

FOR THE ACCUSED: ADV. LESUTU