IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/1/10**

In the Matter Between:-

REX **CROWN**

AND

LEBOCHE LESENYA **1ST ACCUSED**

TŜOANELO LESENYA **2ND ACCUSED**

JUDGMENT

CORAM **: MOKHESI J**

DATES OF HEARING **:17th ,18th ,19th,.08.2020,**

DATE OF JUDGMENT **:08th OCTOBER 2020**

SUMMARY

CRIMINAL LAW**:** *murder- accused charged with murder- circumstantial evidence against A1- approach to it- approach to evaluating evidence-youth as a mitigating factor*

ANNOTATIONS

STATUTES:

Criminal Procedure and Evidence Act NO. 9 of 1981.

CASES:

Small v Smith 1954 (3) SA 434 (SWA)

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)

S v Mavinini (224/2008) [2008] ZASCA2009 (1) SACR (SCA) 523

S v Mkohle 1990 (1) SACR 95 (A)

S v Chabalala 2003 (1) SACR 134 (SCA)

S v Kubeka 1982 (1) SA 534 (W) 537

Rex v Lepoqo Seoehla Molapo 1997 – 98 LLR 208

R v Difford 1937 AD 370

R v Blom 1939 AD 288

MOKHESI J

[1] The first accused (A1) Liboche Lesenya and T'soanelo Lesenya, second accused (A2) and the deceased are related. The two accused are blood brothers, the older one being A1 who happens to be a member of the Lesotho Mounted Police Service (LMPS) at the rank of Inspector. The deceased was A1's wife.

[2] The two stands accused of murdering the first accused's wife. The charge sheet alleges that they are charged with the crime of murder, in that upon or about the 22nd day of November 2008 and at or near Ha-Lekhobanyane in the district of Maseru, the said accused did one, the other or both of them unlawfully and intentionally kill one 'Mantai Lesenya.

[3] When called upon to plead, A1 pleaded not guilty to the charge, while A2 pleaded guilty. The Crown did not opt for the separation of trials but accepted both pleas and led evidence. In respect of A2, the Crown led evidence in terms of the provisions of section 240 (1)(a) of the Criminal Procedure and Evidence Act No. 9 of 1981 (the Act) which provides that where in a charge of murder the prosecutor accepts the accused's plea of guilty, the court may bring a verdict after hearing evidence.

[4] Admissions were also made in terms of section 273(1) of the Act, and these related to the following:

a) The Post-mortem examination report by Dr Moorosi (forensic pathologist), wherein it is recorded that the deceased's cause of death was multiple gunshots wounds with hemopneumothorax and lung collapse. He also made the following observations:

"*External appearances:* Body of a female adult – obese with multiple wounds in the anterior aspect of the chest. (photos and form A) the wounds are mostly oblong in shape and exhibit peripheral abrasion and darkening. A similar oblong wound with peripheral abrasion and darkening is present in the left jaw (see photo and form A). A wound connecting with right pleural cavity is present in the armpit area and in line with it is a wound perforating through the right upper arm with an associated fracture of the humerus. A superficial skin wound is present in the mid left forearm, the wound shows peripheral bruises. Two wounds are present on the left side of the thorax posteriorly with protrusion of subcutaneous tissues through them. A bruise present right periorbital area infero-laterally. Wounds are labelled 1 – 12.

Skull and its contents (10) Periorbital bruise. Comminuted fracture left mandible in association with wound No. 12

Pleurae, pleural sacs, and lungs:

Right: Demonstrable pneumothorax.

Blood in pleural entire cavity with total lung collapse

Left: Congestion.

Organs, parts, or material reserved for further investigation, and how disposed of: Two bullets identified with the help of X-Rays (see photos) were removed from the right shoulder area and left breast and handed over to the investigating police officer."

b) The ballistic examination report by Senior Inspector Pali. He records that, Detective Trooper Ncheke had handed in one 9mm x 19mm Vektor SP1 pistol SN S101688 together with two (2) x 9mm fired bullets and one bullet jacket fragment which were found at the crime scene. His conclusion was that the bullet jacket fragment had insufficient marks for comparison. He however concluded that the fired bullets were fired from the pistol which is mentioned above.

c) The statement of the deceased's neighbour Mr Thibile Lekhehle who responded to alarm and went to the deceased's house whereat he found the deceased lying prostrate outside her house, next to the kitchen door. The deceased was lying in a pool of blood. The kitchen door as broken.

d) Statement by Detective trooper Setlai who attended the scene of crime. He found the deceased in the condition described by Mr. Lekhehle. He observed fifteen (15) open

wounds on the deceased. There was a "long bread knife" next to the deceased which was covered in blood. All these items were seized as exhibits.

e) Statement of Detective trooper Ncheke who was present when Dr. Moorosi performed an autopsy on the deceased. He took the two (2) leads which were retrieved from the deceased. D/Tpr Ncheke took the leads and submitted them for ballistics examination together with the 9mm Parabellum S/N 5101688 which was handed over to him by Detective Trooper Lieta.

f) The statement of Trooper Moneuoa who was an amourer at Mafeteng Police Station, which is to the effect that A1 was issued with a service pistol vektor SP1 9mm S/N 5101688 plus ten (10) rounds of ammunition.

g) Statements of Trooper Kulehile and Trooper Jankie who went to Mafeteng Police Station to report about the murder of A1's wife.

[5] CROWN'S CASE

The Crown led *viva voce* evidence of two witnesses, namely: Senior Inspector Mokotjo and Detective Trooper Lieta. Before Mokotjo could testify, Mr. Tlali informed the court that he was going to testify as an accomplice witness. As a result, he was given necessary warnings in terms of the provisions of section 236 of the

Act. Mokotjo is a childhood friend of A1 and his colleague in the LMPS and knew A2 very well. The genesis of the saga that is this case started when A1 had a quarrel with his deceased wife. The quarrel related to the family car, and as a result, the deceased poured boiling cooking oil on A1 which scalded and inflicted serious burn wounds on him. As he was stationed at Mafeteng Police Station, he left his matrimonial home at Mazenod Ha-Lekhobanyane and headed back to Mafeteng where he would normally be quartered while on duty.

[6] On the day A1 arrived at Mafeteng from Maseru while reeling from the shock and anguish of what had just happened to him, he visited PW1 to tell him about his ordeal. A1 informed Pw1 that he had a quarrel with his wife over a car, a quarrel which led the deceased to pour hot oil on him. Pw1 told the court that, as the source of the quarrel was the car, he advised A1 to sell it. He told the court that A1 expressed the desire to kill his wife in revenge. PW1 admonished him for harbouring such thoughts. On the 21st November 2008 PW1 met both accused who told him that on that day they were going to kill the deceased. He again admonished them, and they parted ways.

[7] At dawn on the 22nd November 2008 PW1 was shocked to receive a short message service (SMS) from A1's cellphone which concisely said, "I have executed the plan come and fetch me." He testified that in the morning he went to A1's place of abode and he

found him there. He asked A1 about the plan he said he executed. A1 retorted by saying that if Mokotjo got an SMS, the message was from A2 as his phone was with him in "Maseru to execute the plan I said they should not execute." He said A1 asked him to go to Maseru and fetch A2 and bring him to Mafeteng. PW1 went to Maseru, and after some search, he found A2 at the junction at Masianokeng.

[8] PW2 was Police Constable Lieta, who was the investigator in this matter. His testimony in brief was that he attended the scene of crime where he observed that the deceased had sustained gunshot wounds. He was present when postmortem examination was conducted. A fragment and a shell were retrieved from the deceased's body from where they were trapped, and these, together with the service pistol, which was taken from A1, were taken for ballistic examination, the results of which were alluded to above. He took both accused for confessions before the magistrate as they admitted that they killed the deceased. He told the court that all the exhibits (firearm, lead and shell) got lost when they migrated their offices from Mabote Police Station to where they are currently stationed, Flight One Mazenod. Cross-examination of this witness did not leave him shaken. PW2 was an honest and reliable witness.

[9] Accused's Case: A1

After the Crown had closed its case, both accused opted to testify in their defence and they were the only witnesses. A1's evidence was to the effect that he was burnt with a hot oil and that this evoked serious emotions of revenge on the part of his younger brother, A2. He says A2 expressed his desire to avenge this assault, but he (A1) admonished him against doing that as it would reflect badly on him as the police officer. On the fateful day he took off his uniform (including the firearm) and put them where he normally does and left to the public bar only to return when the bar closed at midnight. Upon his return he discovered that A2 was not around, but he did not bother as he thought he had visited his friends. At around 05hrs00 in the morning he was awaken from his sleep by a knock of a police officer colleague who told him that he should report at the office. At the office he was told that his wife had been murdered. He returned home to prepare to go to Mazenod. On arrival A2 was there preparing breakfast. He found his firearm where he left it and took it. Together with A2, in the company of other police officers they went to Mazenod where he found the body of his wife lying on a body bag. He confirmed that in the process of investigations his service pistol was seized.

[10] In his evidence in chief, A1 seemed to want to recant his confession whose lawfulness was not put in issue. He vacillated between saying the confession was free and voluntary to half-heartedly suggesting that it was not. In fact, he admitted that the

learned Magistrate undertook all the precautionary steps to ensure that it was free and voluntary.

[11] ACCUSED 2's CASE

A2's evidence is basically a regurgitation of Crown's evidence to a large extent, but with more details. A2 confirmed that his brother was badly burnt with a hot oil by his wife. He however said it was PW1 who advised A1 to kill his wife. He said he was pressurized into killing A1's wife by PW1 and he succumbed to it. A2 took A1's firearm which had ten (10) rounds of ammunition. He said PW1 replaced the ten rounds with seven of his. This, he said, happened at PW1's place. A2 was given an induction course on how to use the firearm by PW1 and how to locate where the shells would have fallen so that he could collect them. He said PW1 agreed that he would fetch him after "finishing my work". On the fateful day when he got to Mazenod, A2 says he had to delay executing his plan because there were a lot of people moving around. He executed his plan when it was quiet and opportune. A2 admitted that he went to Mazenod where he broke the door and shot the deceased three times. He collected the three shells as instructed and left. He said he fled to Ha-Abia and SMSed PW1 with his brother's phone to come and fetch him as agreed. At the scene A2 had picked up three shells and three leads. PW1 fetched him and ferried him back to Mafeteng. He put the firearm where A1 normally puts it and hid the matchbox which contained leads and shells. When A1 arrived,

he told A2 that he got the message that his wife is deceased. Both him and A1 went to Mazenod in the company of A1's colleagues.

[12] There is a feature of A2's case which I find problematic; when he was in the witness-box, Mr. Lephuthing (for A2) did not put it to PW1 that he actually trained A2 on how to use the firearm and that he replaced A1's ammunition with his, and further that all these happened at PW1's residences. The attempt by A2 at making PW1 to be complicit in this crime is a feeble one and is doomed to fail; firstly, it is improbable that PW1 would replace A1's ammunition with his, I find no probable reason for doing so other than that it is an attempt by both accused at pulling PW1 into their sordid act.

[13] I revert to the legal aspect of Mr Lephuthing not putting a version of A1's story to PW1 while in the witness box. It is salutary that a cross-examiner should put so much of his case to the witness whilst still in the witness-box so as to give him or her an opportunity of dealing with it and not to wait for the time when he is not in the witness-box, and therefore, not in a position to explain or defend himself to then argue that certain imputation of character *should be made against him or her:*

> *"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other*

witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character…." ***(Small v Smith 1954 (3) SA 434 (SWA) at 438 E – H****) See also:* ***President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) at para. 61****)*

In ***S v Mavinini (224/2008) [2008] ZASCA 2009 (1) SACR (SCA) 523 (1ST Dec. 2008) at paras. 13 – 14*** the court said:

"[13] …. The general requirement that a witness must be confronted with damaging imputations is not a formal or technical rule. It is a precept of fairness. That means it must be applied with caution in a criminal trial: If, despite the absence of challenge, doubt arises about the plausibility of incriminating evidence, the accused should benefit.

[14] One exception to the confrontation requirement is where a witness's tale is so far-fetched and improbable that it can be rejected on its own standing without the need for cross-examination. That exception should clearly be applied with greater liberality in determining whether the state has proved its case against an accused beyond reasonable doubt."

A2 did not cross-examine A1. However, be that as it may, I turn to evaluate the evidence against the accused.

[14] EVALUATION

PW1's cross examination by Mr. Maieane, for A1, was geared at suggesting that he was part of the conspiracy to kill the deceased, and further, to show that his testimony is inconsistent. The example of inconsistency being that in his statement to the police PW1 said A1 confided in him that he gave his firearm to A2 to go and kill his wife. This PW1 did not tell the court. This is how the exchange unfolded:

> *"Q: I did earlier ask you if I did hear you, that you told My Lord that A1 at one given point in time told you that he gave A2 firearm to go and kill his wife, and your answer was in the negative?*
>
> *A: It is so*
>
> *Q: In a statement you deposited before the police, you told the police that A1 told you that he gave A2 a gun to go and kill his wife, do you understand?*
>
> *A: I do understand*
>
> *Q: Did A1 ever told you that he gave his firearm to A2 to go and kill his wife?*
>
> *A: It is so*
>
> *Q: Why didn't you tell this court this aspect of your knowledge?*

A: I thought that would be brought by the investigator when he talks about the exhibits."

[15]It is this inconsistency between what Pw1 said in the statement before the police and what he told this court that animated Mr. Maieane to say that Pw1's evidence should be rejected. It needs to be stated that contradictions *per se* do not warrant a rejection of the witness' s evidence. There are various reasons which could be responsible for this: It could be an error on his part which accounts for this, but it does not follow that merely because there are contradictions in a witness's testimony or contradiction between what a witness says in court and what he told the police, that his testimony should be rejected.

*"Contradictions per se do not lead to the rejection of a witness's evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576 B – C, they may simply be indicative of an error. And at (576 G – H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence." (**S v Mkohle 1990 (1) SACR 95 (A) at 98 E – F)***

[16]The contradiction in question is material to the issue whether A1 indeed participated in the killing of his wife, but despite this, I

am convinced that PW1 was a credible witness. This is the only contradiction I could discern from the whole testimony, but when the totality of the Crown evidence is considered A1's participation is in no doubt. I have observed PW1 and I am convinced that he testified truthfully to what he knew. Apart from this contradiction, PW1 remained unshaken by Mr. Maieane's cross-examination. Even Mr. Lephuthing's cross-examination (for A2) was not effective, and left PW1 unshaken.

[17] A1's testimony did not deal with PW1's evidence that he met him and A2 on the fateful day where they told him that they were going to kill A1's wife. A1 did not deal, further, with PW1's evidence that on the morning after his wife was killed, PW1 arrived at his place and asked him about the SMS, and that A1 even asked him to go and fetch A2 at Maseru.

[18]A1's cross-examination unraveled his true character as it was to be expected, given his demeanor in the witness-box; In his testimony A1 said when he returned from the bar A2 was not present and he thought he might have gone to visit friends, however this contradicts what he told the magistrate in the confession; and this is the exchange between him and Mr. Tlali (for the Crown).

> *"Q: In your evidence you said you knocked off from your work and put off (SIC) your uniform and your issue?*
>
> *A: It is so*

Q: From there you went to the bar to consume liquor?

A: It is so

Q: And you returned to where you stayed around midnight only to find your brother not present?

A: It is so

Q: You thought he had gone to visit his friend?

A: It is so

Q: Let me tell you that you told the Magistrate in your confession "My sibling said he wanted to take decision to kill my wife because these didn't sit well with him. I did not agree with and advised him that it will put me in danger as the policeman. He took my firearm and he said he is going to Mazenod at my matrimonial home. It was around 6 – 7 p.m when my brother left Mafeteng where I stayed at Government house." You are telling Magistrate that you were fully aware that A2 took your firearm?

A: I understand

Q: You also told the Magistrate that you knew when A2 left to your matrimonial home?

A: I understand

……

Q: In your evidence you didn't tell this honourable court that at any stage you asked A2 whether or not he was involved in the killing of your wife?

A: I did not ask him

Q: I put it to you that you did not ask him because it was not necessary for you to do so?

A I did not ask him.

Q: It was not necessary because you knew what happened to your wife?

A: I did not know what happened."

[19] From the moment A1, in chief, attempted to recant his confession, to his performance under cross-examination, it became plainly clear that this court is dealing with a pathological liar. His performance left much to be desired in terms of his demeanour; he looked uneasy even when led by his counsel. The above is a clear depiction of a desperate attempt, alas in vain, at weaving a web of lies to conceal his complicity in this crime.

[20] APPROACH TO EVIDENCE

It is apposite to state that the evaluation of evidence is a holistic exercise which must account for all aspects of evidence instead of poring over an apparently juicy aspect of evidence in total disregard of its all components which complete its mosaic. The

correct approach is to test the accused's version against the improbabilities and probabilities on both sides and to determine whether "the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt" (***S v Chabalala 2003 (1) SACR 134 (SCA) para. 15)***. The test is not whether subjectively, the court believes the accused, if his version is reasonably possibly true, he is entitled to an acquittal. Nor is it a requirement that I should reject the State's version in order to acquit him, if his version is reasonably possibly true he should be acquitted (***S v Kubeka 1982 (1) SA 534 (W) 537: Rex v Lepoqo Seoehla Molapo 1997 – 98 LLR 208 at 237***). In the off-quoted statement in ***R v Difford 1937 AD 370 at 373*** Watermeyer AJA said:

> *"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false."*

[21] CASE AGAINST A1

The case against A1 is circumstantial, in terms of which the inferential rules as developed in ***R v Blom 1939 AD*** 288 at 202 – 3, must apply. The two rules were stated as follows:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[22] The inference sought to be drawn in this case is that A1 is complicit in his wife's murder is consistent with proven facts: It is a proven fact that A2 used A1's cellphone which he used to flag that he be fetched after killing the deceased. His defence that A2 used his firearm without his permission is rejected as false beyond a reasonable doubt. Curiously, A1 has not at all sought to explain why his cellphone got to be in the hands of A2 on that day; was is taken without his consent as well, we do not know what his explanation is regarding it, but, what is clear as it emerged during cross-examination, is that, A1 was fully aware and was part of the plot to murder his wife in revenge for scalding him with hot oil. I am convinced that the State has proved its case against A1 beyond a reasonable doubt that he acted with common purpose to murder his wife. A1's version that he was not part of the plot to kill the

deceased is rejected on the score that it is false beyond any reasonable doubt.

[23] CASE AGAINST A2

Even in respect of A2 this court is convinced that the Crown has proved its case beyond a reasonable doubt.

[24] Extenuating Circumstances:

ACCUSSED 1

The fact that A1 acted in the manner he did out of revenge against his wife for pouring hot oil over him is an extenuating circumstance, and counsel for both the Crown and defence were agreement on this aspect.

ACCUSED 2:

When A2 committed these heinous acts, he was only twenty-two years of age and could have easily been impressionable due to his age.

[25] In the result:

a) Accused 1 is found guilty of murder with extenuating circumstances.

b) Accused 2 is found guilty of murder with extenuating circumstances.

My assessors Agree.

[26] Discharge in terms of section 236 (2) of the Criminal Procedure and Evidence Act NO. 9 of 1981.

Having heard PW1 testify in this trial, this court is left in no doubt that he answered questions which incriminated him in the commission of the murder to the satisfaction of this court, and is therefore, discharged from liability for prosecution for murder of 'Mantai Lesenya.

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MOKHESI J

[27] <u>SENTENCING:</u>

Mitigation: Accused 1

Mr Maieane, from the bar, submitted that there are mitigating factors in respect of A1: He submitted that A1 is the first offender with no previous convictions. He further implored this court to consider the fact that this matter has been hanging over the accused's head since 2008 until its hearing in August 2020;that the accused has a five year-old child with his current wife; that the accused is remorseful as he came to court without failure.

[28] Accused 2

Mr Lephuthing submitted that the accused is remorseful for what he did and as evidence of this, he confessed to having committed the crime, and that when this trial commenced he pleaded guilty to the charge; that the accused is about to built his family; he argued that a non-custodial sentence will suffice.

[29] EVALUATION.

The task of sentencing accused is a critical one and which falls squarely within the discretion of the court. When the court retires to consider appropriate sentence, the purpose for which the sentence is intended to serve, whether retributive, deterrent, preventative or rehabilitative, must be have been informed by a number of equally important factors to which due weight must be given, *viz*, the seriousness of the crime, the interests of the community, the interests of the accused***(Sv Zinn 1969 (2) SA 537 (A)).***

[30] ACCUSED1

Murder is a serious crime, especially when consideration is given to the manner in which the deceased met her death. She died in a hail of bullets pumped into her helpless body, in circumstances which rendered it absolutely unnecessary to do so. The society's interest is that the perpetrators of this crime must receive commensurate punishment for it, especially where the person involved is a member of the disciplined forces who is always expected to uphold the law, and further given the wanton nature

lives are taken in country-including in this case. A lenient sentence would erode public confidence in the judicial system ***(Phaloane v R LAC (1980-1984) 72 at 88C-G).*** So, deterrence and retribution assume significance in this regard.

[31] It is true that A1 is the first offender with no record of previous convictions. This case was ripe for hearing ten years ago and has religiously been coming to court on the appointed dates. This matter has been hanging over the accused's head all this time, but as Mr Tlali, for the Crown, correctly stated that the delay to this matter being heard is of A1's own making, as according to A2 when he was brought to court on the strength of the warrant of arrest, he informed this court that it was A1 who told him not to come to court and this A2 said in the presence of A1. This version was also related to Pw2 when he went to arrest A2 after supposedly being at large since his release on bail. Pw2 said this in cross-examination and was never disputed by A1 when testifying. Mr Maieane, submitted that the fact that A1 has been coming to court religiously is a marker of his remorsefulness. I do not agree that the coming to court in the manner alluded here is a sign of remorse, especially when this is looked at through the prism of his undeniable contribution to delaying the start of trial by causing the fictitious abscondment of A2; his readiness to conceal his complicity in this crime by recanting his confession, all point in the direction of absence of remorse. Remorse is more than the mere *ipse dexit* of defence counsel from the bar that the accused is

remorseful. An overt act on the part of the accused showing genuine contrition is what is called for. I do not know what generated the supposed change of heart as the crime was premeditated and actualized at his behest:

> *"[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says*

*in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."**(S v Matyityi 2011 (1) SACR 40 (SCA))**.*

[32] ACCUSED2

Mr Lephuthing submitted that the fact that A2 pleaded guilty to the charge should be taken as showing remorse. In ***Matyityi (ibid)*** it was held that a plea of guilty in an 'open and shut case' should be taken as benign. In this case evidence against the accused is so overwhelming that A2 had little or no choice when faced with it. Even without him pleading guilty, the Crown had its ducks in a row in terms of evidence implicating him. I have already said that A2 was only twenty-two years of age when he committed this crime.

He was influenced by A1 who is his older brother and a police officer. It is trite that youthfulness serves to mitigate sentence. This is so given the susceptibility of youth to peer pressure and adult influence (S ***v Mabuza and Others [2007] SCA 110 (RSA)*** (20.09.2007) at para.22. But, for purposes of sentence the court must examine the degree of immaturity in other to determine the youth's culpability in the crime ***(S v Mabuza ibid).*** At the time A2 killed the deceased he was supplementing his Form E results and was relatively young. His readiness to kill his brothers' wife at his slightest instigation, shows how easily impressionable he was. There is uncontroverted evidence that after A2 had shot the deceased, he trekked for several kilometers to Ha -Abia and back to Masianokeng, and that while being ferried by Mokotjo, apart from sleeping, he was frightened and kept on crying. This, to my mind shows immaturity on his part. If he had fully, beforehand, appreciated the consequences of his planned actions, there seems to me to no explanation why after accomplishing what he set out to do he would be so hysterical. It is as if he appreciated the magnitude of what he just did after seeing the deceased bleeding and lying lifeless on the ground. He may have premeditated this murder, but his behavior afterwards leaves me in no doubt that he was not mature enough.

[33] In the result, the following sentences are imposed on the accused:

A) Liboche Lesenya is sentenced to eighteen (18) years imprisonment without an option of a fine.

B) T'soanelo Lesenya is sentenced to fifteen (15) years imprisonment without an option of a fine.

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MOKHESI J

FOR THE CROMN: Adv. M. Tlali

FOR ACCUSED 1: Mr. T.M. Maieane assited by Ms. Khatleli

FOR ACCUSED 2: Adv. C.J Lephuthing