

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/T/001**

**5/20**

In the matter between:

**REX**

**CROWN**

**AND**

**REENTSENG RAPILETSA**

**ACCUSED**

**No.1**

**THABO RAPILETSA**

**ACCUSED**

**No.2**

**TS'EPO RAPILETSA**

**ACCUSED**

**No.3**

**TUMELO RAPILETSA**

**ACCUSED**

**No.4**

**TELLO RAPILETSA**

**ACCUSED**

**No.5**

Neutral Citation: Rex v Rapiletsa and 4 Others [2022] LSHC 90 Crim (22 March 2022)

**CORAM:** RANTARA P. - ACTING JUDGE

**DATE OF HEARING:** 22/03/22, 25/03/22, 12/04/22 and 13/04/22

**DATE OF JUDGMENT:** 21/04/22 and 22/04/22

## **SUMMARY**

**CRIMINAL LAW:** *murder and attempted murder-doctrine of common purpose part of our law- act of one perpetrator in committing a crime imputed on co-perpetrators as a matter of law- self-defence.*

## **ANNOTATIONS:**

### **STATUTES:**

Criminal Procedure and Evidence Act No.9 of 1981

Penal Code Act No.6 of 2010

### **CASES:**

Ramaema v Rex 2000-2004 LAC 710

Ntsane & Others v Rex (C of A (CRI) 3/09

S v Mgedezi & others [1989] 2 ALL SA 13 (A)

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

R v Difford 1937 AD 370

**BOOKS:**

Burchell and Milton-*Principles of Criminal Law 2<sup>nd</sup> Ed @ 393*

Snyman *Criminal Law 4<sup>th</sup> Ed*

**[1]** The accused are before this court indicted of two counts as follows:

**COUNT 1:**

**Contravening of S.40 (1) R/W S. 26 (1) of the Penal Code Act No.6 of 2010** in that upon or about the 26<sup>th</sup> December, 2018 and at or near Ha Ramorakane in the district of Maseru, the said accused sharing a common intention or purpose to pursue an unlawful purpose together and in the pursuit of such purpose did perform an unlawful act or omission with the intention of causing the death of **Lefu Joshua Tsie**, the said accused did commit the offence of murder of the deceased, **Lefu Joshua Tsie**, such death resulting from their act or omission, the said accused did thereby contravene the provision of the code as aforesaid.

**COUNT II:**

**Contravening S.22 (1) of the Penal Code Act No.6 of 2010** in that upon or about the 26<sup>th</sup> day of December 2018 and at or near Ha Ramorakane in the district of Maseru, the said accused with intent to commit murder, did an act, which was more than preparatory to the commission of the offence, namely, murder.

Accused all entered plea of not guilty in all counts. There were six accused persons, one accused, Maliea Rapiletsa could not be traced and an application for separation of trial was made by the Crown and successful.

**[2]** PW1 Leshota Simione Tsie testified that he is resident at Ha Ramorakane and works in Rustenburg. On 26/12/18, he was at Ha Ramorakane at Nthabeleng Tsie's place (deceased). Deceased full names are Nthabeleng Ranko Lefu Tsie and they were sitting next to the kraal. Accused No.1 and No.6 arrived next door at Taeli's place and Hlahlamiso joined them. It was around 9:00 AM and after sometime, they parted. Hlahlamiso came back and jumped a fence to Deceased's place talking to himself that "today someone must die".

Deceased is his uncle's son as their fathers are siblings. At around 12:00 midday, he went to a shop with deceased within the village and they sat there. They came back at around 6:00 PM, they passed Tlhoriso's place and they met

people along the way. As they pass Tlhoriso's place, Accused No.1, Accused No.2 whom they know as Thabo Khabo, Maliea Rapiletsa and Accused No.6 came out of Tlhoriso's place running to them and pelting stones at them. They (him and deceased), were wading those stones and fighting back by going to them and threw stones at them. One of them got closer to him and slashed him with a sable above the left eye and he fell down. After he fell down, they all assaulted him and others went to deceased. Deceased ran to a yard they were passing, accused were still pelting stones at deceased, and he was pelting back. After he fell down, he does not know what happened to deceased. He was assaulted by three (3) of the accused and he did not see how many followed deceased. One was assaulting him with a battle stick, one with stones and the other stabbed him with an iron bar. He became unconscious and regained it at home when deceased was to be buried. After deceased was buried, he went back to work in Rustenburg and to date; he does not know the cause of the fight.

- [3]** Under cross-examination, he denied that on the day in question, they had alcoholic drinks but had soft drinks. He does not know if some of these accused were at another shop. Accused approached them from the right side. He denied accused's story that next to Rapiletsa's place, A1 and A3 were walking in front of them and A6 coming from behind. A6 alerted A1 and A3 that they are about to attack

them and they did attack A1 and A3. A6 joined to assist his brothers and A2, who was from a football match also joined. A4 and A5 came from Rapiletsa's place to rescue their brothers. He confirmed that on that day, they were wearing blankets and carrying battle sticks but they did not attack accused with those sticks. He denied that accused overpowered them and took those sticks and used them to assault them. The sword A4 assaulted him with is not his. He does not know about the feud between deceased and Rapiletsa family or any fights between them over a piece of land where deceased assaulted Belina, Thabo and Simone Rapiletsa. He does not know if that incident was reported to the chief and police. He is not aware that deceased was known as Nkalakatha as he was a bully in the village. While at the shop on this day, he did not hear deceased saying he is going to buy doom and kill some cockroaches.

- [4]** PW2 'Makatleho Phomane testified that on 26/12/18 there was a soccer match at ha Ramorakane and she went to watch it with her sister relative, 'Mapaseka. On their way down to the soccer field, they met PW1 and deceased who told them they are going to Malise's shop to meet someone. After the match, they each went to their homestead. At home when her husband was about to braai wors, she phoned deceased and asked him if they are back from the shop and he said they are on their way back, just about to

pass Malise's shop. It was around 8:00 PM. After she ended the call and was outside the house, she heard some noise and she went to the corner of the house where the noise was coming. She witnessed a fight and went there where she found PW1 and deceased being assaulted by accused. Some chased deceased and she did not see where he ran. They assaulted PW1 until he fell down. These accused had weapons; knobkerries, battle sticks, spears and a ticker. The assault took place within the road and accused continued to assault PW1 after he fell down. One Tseko Sekeshe arrived and told them to stop and A6 suggested that they listen to his uncle. They stopped and Tseko assisted her to take PW1 to a forecourt of nearby house. She phoned deceased's wife, 'Maramonts'o Tsie and PW1's wife who is also deceased and told them what happened. They both came and other villagers. She went to look for deceased with 'Maramonts'o and some children showed them where he fell. They went there and found deceased lying down with face down in a pool of blood. They shook him and turned him supine and he was not moving at all. They tried to carry him to no avail and his brother Mashabutla arrived and assisted them to take him to one relative's home. She went to Tseko Sekeshe and asked him to phone police as his daughter is a police officer. Police arrived and confirmed deceased is dead after checking him. Police officers asked them to secure transport to convey PW1 to a doctor and they did. Thabo Khabo is

before court and one with a yellow facemask. She does not know if he is using another surname,

**[5]** Under cross-examination, she said deceased is her brother and PW1 is her grandfather's son. She was not there when the fight began and do not know who started the fight. When she met deceased and PW1 earlier, they were wearing blankets and carrying battle sticks. She did not see if they were carrying weapons under the blanket. She did not see if A6 sustained injuries and bleeding on the face in that fight. She knows accused is called Nkalakatha but do not know why. She is not aware that deceased had a fight with Rapiletsa family members before this incident and the matter was eventually reported to Police. She does not know that deceased was called Nkalakatha because he was a bully.

**[6]** PW3 Tseko Sekeshe testified that on 26/12/18, he was at home at his parents' home at Ha Ramorakane when he was called by Tokelo who is deceased's brother-in-law to come and intervene as some people are killing someone. Tokelo was from his place and called him when he was going out of the gate. He went and saw A1, A4, A5 and A6 and do not recall others. A1 had a battle stick, A5 a spear. PW1 was on the ground and he saw A1 assaulting him. He asked accused



to stop and they all left. After that, he left to get a phone to call police. He then received a message that there is another person assaulted and fallen at a certain spot and he did not get to that spot as police officers arrived. Later he heard that Ranko is deceased.

- [7]** Under cross-examination, he said he does not know if PW2 mentioned a knobkerrie, as they did not discuss their evidence. He is saying it unequivocally that A1 was carrying a knobkerrie. He does not recall if he did not mention it in his statement. He does not know who started that fight.
- [8]** PW4 Mabitle Ramorakane testified that in December 2018, Thetsane Police Officers arrived with A1, A3 and A4. They asked him to accompany them and witness a pointing out of weapons by those men. They first went to A4's place where he pointed out an okapi knife and gave it to those police officers. They proceeded to A3 and A4's place but could not get there due to bad road. They met A3 and A4's brother, Mandela and they asked him to bring the battle sticks from under the bed. Mandela brought two battle sticks and gave them to them. They in turn gave them to those Police officers. One battle stick still had bloodstains. The mood was calm as these accused even asked their brother Mandela to buy them tobacco and they did.

**[9]** There was no cross examination to this witness. By consent, five statements were admitted as part of evidence as well as a post-mortem and a medical form of PW1.

**[10]** Statement of 'Maramonts'o Tsie (**AD '1'**) is to the effect that on 26/12/18 she was at home with one Khauhelo Tsie who stays in the same yard as hers getting ready to go to the soccer field. She left Leshota (PW1) at home bathing as he told her he would be going to Malise's shop with Nthabeleng (deceased) to get some drinks. They left the soccer field at around 6:00 PM and walked home together with 'Makatileho Phomane. Upon arrival at home, she received a phone call from 'Makatileho Phomane (PW2) that some people are assaulting Simione (PW1). She proceeded there with Khauhelo and found PW1 lying down. She asked about Nthabeleng (deceased) and they showed her where he ran to. She went to that direction and found him lying down and she phoned Thetsane Police. This incident is caused by a land claim between deceased and the Rapiletsa family. The Rapiletsa family used to say they would kill Deceased before the end of the year.

**[11]** Statement of Rephethile Rapiletsa (**AD '2'**) is to the effect that in December 2018, police officers arrived with A3 and A5 to get battle sticks. They could not get to their home due

to bad road and A3 and A5 asked him to bring their battle sticks underneath the wardrobe. He went and did find two (2) battle sticks, one with bloodstains. He took the battle sticks to A3 and A5 and they left.

**[12]** Statement of Tsietsi Ts'olo (**AD '3'**) is to the effect that on 08/01/19 at around 9:00AM he was at Queen II hospital where a post mortem on Lefu Tsie was to be conducted after he was assaulted in the village. He identified the corpse of Lefu Tsie before post mortem is conducted as Lefu Tsie is his brother's son.

**[13]** Statement of No.10722 D/P/C Rakeiti (**AD'4'**) is to the effect that on 27/12/18 while on duty, a case of murder of one Nthabeleng was reported at Thetsane Police Station. The report was that it happened on 26/12/18 at around 2000Hrs. He proceeded there to ha Ramorakane with Sgt. Lelimo and P/C Matekane. On arrival at the scene, they found deceased lying down on his stomach in a pool of blood. He was taken to Queen 'Mamohato hospital where he was confirmed dead. On examination, he observed that deceased sustained seven (7) open wounds at the back of his body and two (2) open wounds on the head above the right ear. A case of attempted murder of Simione Tsie was also reported. On 29/12/18 while on duty, these accused including Thabo

Rapiletsa freely and voluntarily led them to Ha Ramorakane for pointing out. A5 pointed out a battle stick, homemade sword and hlathe stick at his home. A3 with the assistance of Rephethile Rapiletsa pointed out a hlathe stick and battle stick. A4 pointed out an okapi knife. Mabitle Ramorakane who was representing the chief was there during the pointing out and other villagers. The said weapons were seized as exhibits.

**[14]** The statement of L/Sgt. Mothunts'ane (**AD '5'**) is to the effect that on 27/12/18 he was on duty at Thetsane Police Station when these accused including Thabo Rapiletsa surrendered themselves. He cautioned them and gave them a charge of murder of Nthabeleng Tsie who was assaulted on 26/12/18 at Ha Ramorakane. He also preferred a charge of attempted murder of Leshota Simione Ts'iu (PW1).

**[15]** The medical form report of PW1 Leshota Tsie (**EHX "A"**) by Dr. Tshibuabua Serge Ngoy recorded that he sustained a 3cm laceration on the right side of the forehead, 1cm laceration on the left side brow, 0.5 cm laceration on the right cheek, 2cm laceration on the chin, 1cm laceration on the occipital, 2cm laceration on the right mithorax, 3cm laceration on the back of the hand. The degree of force inflicted, degree of injury to life and degree of immediate

disability were severe. No degree of long-term disability detected. He was hospitalized from 27/12/18 to 31/12/18.

**[16]** The post-mortem report (**EXH "B"**) by Dr. L.F Phakoana dated 08/01/19 recorded that the cause of death is traumatic subdural haematoma. The skull had subdural collection of blood. On physical appearance, he sustained abrasions and wounds on the head.

**[17]** The LMPS 12 filled and signed in relation to the seized weapons, okapi knife, homemade sword, Mosinabelo stick, mosinabelo stick with blue tape, brown and yellow battle stick and yellow battle stick. However only an okapi knife is presented before court and Adv. Mots'oane informed court that the other exhibits could not be presented as their tags were eaten by the rats in police storeroom. Adv. Makara admitted the LMPS12 with reservations and it was marked **EXH "C"**.

This is the crown case. At the close of crown case, Adv. Makara for accused applied for discharge and the application was not successful.

**[18]** DW1 Tello Rapiletsa testified that he resides at ha Ramorakane. He lost his job and now unemployed. At school he did only Form B. Joshua Letsie is from his neighbourhood

at ha Ramorakane. They had a bad relationship since childhood and he once injured him. He was known as Nkalakatha, Sketch and Ranko. He was called Nkalakatha because he was bullying everyone including riding horses on other people's fields. Lefu Tsie's closest neighbours are Taeli and Senate whom he is related to. Lefu (deceased) had a good neighborly relationship with those people. To his knowledge, the feud started after the passing away of Taeli as deceased wanted to take Taeli's yard. There were even physical confrontations. One day PW1 was from the mines and arrived at home with a truck loaded with bricks that drove through Taeli's yard without the family's permission. The discussion between them failed and the matter was reported to the chief of ha Theko. Deceased did not listen to the chief. The chief referred the matter to Rothe but deceased did not attend, resulting in that issue remaining unsolved. Deceased also had a physical confrontation with some of the Rapiletsa family members including him and Hlahlamiso and that was reported to Police.

**[19]** On 26/12/2018, he and A1 were drinking beer at Morakane's shop. Maliea Rapiletsa arrived around 4:00- 5:00 PM and bought them two quartz. After that, Maliea offered to buy them more beer at Malise's shop and he told him he is fine. Maliea left with A1 and he got inside the shop to buy tobacco. When he got out, he saw PW1 and deceased some

distance up carrying sticks. PW1 was in front running around with his stick up and blanket rolled on his arm (a thala). He waited for them to pass and as they pass behind the shop, they met his elder brother and blocked his way. He had to walk by the farrow on the side of the road. Deceased said he does not want smaller cockroaches but bigger ones than his brother. He walked behind them and as they approach Malise's shop, he saw A1 and pass the shop. When PW1 and deceased were passing next to his father's toilet, Maliea and A1 were walking pass a water tap near Pofane's place. He warned them that deceased and PW1 are behind them. PW1 asked him what he is saying and he told him he is talking to A1. Deceased and PW1 came running to him carrying sticks and he got into his parents yard near the toilet. They came to him and he ran towards PW1. PW1 assaulted him with a stick on the head while deceased assaulted him on the back and hands. He held and got hold of PW1's stick as he attempted to strike him again. He used that stick to defend himself. He was bleeding down his face but he managed to strike PW1 once. After that he could not see properly but saw PW1 running across the road to a nearby homestead. PW1 did not get to where he was running, as they were many and they assaulted him on the side of the road with his brothers. One Tseko (PW3) arrived and intervened calling him. He told his brothers to listen to Tseko and stop the assault.

**[20]** Under cross-examination, he said he told police that he was assaulted and was taken for medical attention at ha Tikoe. He assaulted PW1 with Maliea and Malise. He denied that PW1 and deceased attacked Maliea and A1 but they attacked him. This is the defence case.

### **CROWN CLOSING SUBMISSIONS:**

**[21]** In closing submissions, Adv. Mots'oane submitted that the crown presented evidence that proved the case beyond reasonable doubt that accused intentionally and unlawfully killed the said Lefu Ranko Tsie and attempted to kill PW1. There is evidence that the said murder and attempted murder are secondary to assault perpetrated by these accused with the exhibited weapons. Further, that in committing these offences, accused were acting in common purpose. Their self-defence is not working in their favour as they exceeded the boundaries of self-defence by assaulting PW1 even after he fell on the ground defenseless and chasing deceased and assaulted him to death.

### **DEFENCE CLOSING SUBMISSIONS:**

**[22]** Adv. Makara for accused made very confusing submissions. He submitted without elaborating on the effect of absence of



exhibits when an LMPS is presented before court as proof of the existence of such exhibits and seen by the clerk of court. In my view, such is conclusive evidence of existence of exhibits. He submitted that the prosecution failed to prove the charges preferred against accused beyond reasonable doubt in that the crown only relies on oral evidence of one witness and the other witnesses' statements are immaterial since they did not witness the fight. The crown failed to implicate accused in cross-examination as to what role accused played in the commission of these offences and whether their participation had any link to the death of Lefu Tsie. The prosecution relies on the defence evidence where he implicates himself and his co-accused. Such should not be taken into account based on the principle that no man shall hang by the words of his own mouth. The prosecution did not rebut defence evidence that accused had been drinking alcohol prior to this incident. That raise the issue of extenuating circumstances, which rules out the charge of murder and give rise to a lesser charge of culpable homicide, which crown also failed to prove. That in Crown's desperate attempt to prove intention, the crown attempts to give the impression that accused had a premeditated intention of killing the deceased. However, the witness failed to state which of these accused uttered such words and to who. He submitted that PW1 is a single witness who is a blood brother to the deceased. PW1 concealed to the court that he

and deceased were carrying sticks and that is material evidence. He further submitted on issue of discharge with references and the court decided not to get to them to avoid further confusion. Accused should be acquitted as the crown failed to prove their participation in the charge.

### **EVALUATION OF EVIDENCE:**

**[23]** It is trite that in criminal cases, the onus rests on the crown to prove its case beyond reasonable doubt. Accused has no burden of proving the truthfulness of his explanation and the court cannot convict merely because the accused explanation is improbable, but that it is beyond any reasonable doubt false. In *R v Difford*<sup>1</sup>, Watermeyer AJA succinctly stated the law in the following words:

**‘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, even if that 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.’**

In a criminal trial, the proper approach in assessing evidence is to weigh up all the elements that point towards the guilt of

---

<sup>1</sup> 1937 AD 370 @ 373

the accused against all that which is indicative of their innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide 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***).

**[24]** Armed with these authorities, it is now time to make a considered analysis of the evidence before court. The issue for determination is therefore whether the crown has established the guilt of these accused beyond reasonable doubt. It having been common cause that accused were witnessed assaulting deceased, Lefu Joshua Tsie and PW1 on this fateful day. The result of that assault is murder of deceased and attempted murder of PW1. There is no evidence that this assault was perpetrated in execution of any lawful command. Therefore, the unlawfulness and intentional elements are satisfied. The evidence before court is that there has been a feud between deceased and accused family members over Taeli's site. Again, DW1 testified that deceased has been bullying everyone in the village since his childhood and the name Nkalakatha comes from this bullying. However, the crown opted not to challenge this issue as it was put to crown witnesses from

PW1 and why it has not been resolved through legal means. Defence Counsel also threw such allegations without substantiating them though he alleged that deceased once assaulted Rapiletsas including one Belina and that was reported to police.

**[25]** There is no direct and independent evidence before court as to how and who started the fight on this fateful day as a matter of common cause. PW1 testified that accused attacked them as they were passing Tlhoriso's place despite his evidence that they met people on their way. DW1 on the other hand testified that Deceased and PW1 attacked him after he warned A1 and Maliea that deceased and PW1 are behind them. So both PW1 and accused claim self-defence. On this issue, the court considered the circumstances surrounding the assaults. It is common cause that deceased and PW1 were wearing blankets and had battle sticks on this day. Defence Counsel put to PW1 that the sword that A4 assaulted him with is his and accused took possession of those weapons, two sticks and a sword and defended themselves with them. From their evidence, their story is that deceased and PW1 attacked them and they were unarmed. However, PW1's story that accused attacked them armed is corroborated by PW3 that A1 had a battle stick, A5 a spear. Also PW4 who was standing in for the chief during pointing out where A3 pointed out an okapi knife, A1 and Maliea two battle sticks brought by their brother Mandela

**(AD '2')** from under the bed. D/P/C Rakeiti (AD '4') also testified that A5 pointed out a battle stick, homemade sword and Hlathe stick at his home. Accused in total pointed out six weapons, while they argue that they took two battle sticks and a sword from deceased and PW1. The severity nature of injuries sustained by PW1 complement the weapons used as PW1 sustained several lacerations (skin cuts) as deep as 3cm according to **EXH 'A'**. This evidence makes accused's version so improbable and beyond any reasonable doubt false that they were attacked and had to defend themselves. Therefore, their self-defence story falls away.

**[26]** Even if they acted on self-defence in committing these offences, it does not work in their favour as they exceeded the boundaries of self-defence as submitted by Crown. It is trite that self-defence is a complete defence as provided in the Penal Code Act<sup>2</sup>. If indeed there was an unlawful attack by deceased and PW1, accused used force in repelling that attack which was not reasonably necessary in the circumstances and thus not proportional based on their number, the weapons they used and continuing to assault deceased and PW1 after deceased fled and PW1 had fallen down. They continued to assault PW1 and were only stopped by PW3. Deceased and PW1's alleged attack by then was complete and there was no need for accused to use force to

---

<sup>2</sup> No.6 of 2010, Section 20(1)

repel it. Accused were no more in imminent danger. They had a reasonable means of retreat from that attack as the fight took place by the road, in an open space and close to their home. There is no evidence that they tried to run away. It is true that the right to life must be respected and protected, including the right of the victim of the attacker. One way for the victim to protect his/her life, property of life of others is by acting in self-defence. However, such is not boundless and limitless.

**[27]** Per the post mortem report, the cause of death is traumatic subdural haematoma and deceased had external injuries. PW1 on the other hand sustained severe injuries. There is no evidence before court that a certain accused's blow caused this traumatic subdural haematoma and these severe injuries to PW1. However, on the principle of common purpose, this result is imputed on all the accused. Accused had a common intention of assaulting deceased and PW1 and all of them were aware that they possessed the weapons used in these assaults. Their minds were *ad idem* in the commission of these offences and none of them disassociated himself from these unlawful acts, either by words or actions. There is a plethora of authorities on the doctrine of Common purpose<sup>3</sup>.

---

<sup>3</sup> Eg Ramaema v Rex 2000-2004 LAC 710, Ntsane & others v Rex (C of A (CRI) 3/09 [2010] SCA

**Burchell and Milton**<sup>4</sup> defined the doctrine of common purpose in the following terms:

*"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."*

**CR Snyman**<sup>5</sup> states the essence of the doctrine of common purpose in the following terms:

*"... if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others."*

The prerequisites in order to attract liability in a case based on the doctrine of common purpose are set out in **S v Mgedezi**<sup>6</sup> in the following terms:

- (i) The accused must have been present at the scene where violence was committed.
  
- (ii) He or she must have been aware of the crime committed.

---

<sup>4</sup> Principles of Criminal Law 2<sup>nd</sup> Ed at 393

<sup>5</sup> Criminal Law 4<sup>th</sup> Ed at 261

<sup>6</sup> 1989 (1) SA 687

- (i) He or she must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others.

In my view, accused have satisfied all the requisites of common purpose and all liable for the murder of deceased and attempted murder of PW1. They are accordingly found guilty as follows;

Accused No.1: Count I- guilty of murder

Count II- guilty of attempted murder

Accused No.2: Count I- guilty of murder

Count II- guilty of attempted murder

Accused No.3: Count I- guilty of murder

Count II- guilty of attempted murder

Accused No.4: Count I- guilty of murder

Count II- guilty of attempted murder

Accused No.5: Count I- guilty of murder

Count II- guilty of attempted murder

**[28]** Now, the last issue to decide on the conviction of murder is whether extenuating circumstances exist. It is settled law that the onus rests on the accused person to prove that



extenuating circumstances exist<sup>7</sup>. Extenuating circumstances are defined as “any facts associated with the commission of the crime, whose effect in the minds of reasonable persons will reduce the moral blameworthiness of the Accused as distinct from the Accused’s culpability”<sup>8</sup>. Furthermore, the court is at liberty to consider all evidence before it in order to determine whether such circumstances exist. **Steyn P**<sup>9</sup> listed factors to be considered in order to establish the existence of extenuating circumstances including youth, absence of *dolus directus* and absence of premeditation or planning. In expounding on the court’s duty in establishing the existence of extenuating circumstances, Steyn P<sup>10</sup> had this to say;

“Each factor must be weighed and assessed in the light of the evidence as a whole and its relevance to the conduct and state of mind of the accused, as well as cumulatively with any other factor associated with the commission of the offence.”

I have considered evidence before court on this issue that accused were ruled by anger and animosity against deceased. During the assault to PW1, they listened to PW3 when he reprimanded them to stop. After the commission of this offence, they surrendered themselves to police and

---

<sup>7</sup> Rex v Malefetsane Potlaki 1980(1) LLR

<sup>8</sup> Letuka v Rex LAC 1995-1999 @ 405 G

<sup>9</sup> Letuka v Rex-supra @ p.422

<sup>10</sup> Letuka above @ 423

voluntarily pointed weapons they used to commit these offences. This in my view is a sign of remorse and taking responsibility for their actions. The Crown on the hand by PW2 and PW1 tried to establish that this incident was premeditated. However, absence of corroboration by other independent evidence leaves such questionable based on their relationship with deceased. Further, that the crown failed to state which of these accused uttered such words, where and to who as submitted by Defence Counsel. Based on these factors, the court accepts that the appropriate finding is that extenuating circumstances exist herein.

My assessors agree.

### **SENTENCE:**

**[29]** I now comes to a stage of passing an appropriate and just sentence. The purpose for which the sentence is intended to serve must be informed by proper consideration of the triad of factors, viz, the seriousness of the crime, the interests of the community and the interests of accused person. **(S v Zinn 1969(2) SA 537 (A))**. The objects of punishment, namely retribution, deterrence, preventative or rehabilitative also ought to be balanced.

**[30]** In light of the above, I have considered that in mitigation, the court was invited to consider that accused are sole breadwinners in their families though it was not stated how they earn their living. They are first offenders and three of them were intoxicated when they committed this offence. They are not educated and come from humble background. Unfortunately, up to this stage the age of all accused is unknown to the court due to the inelegance in drafting the charge, as their age is not stated. The Defence Counsel also did not include it in mitigation submissions.

**[31]** The crown submitted that deceased left a wife and a son who will never see him and they have been struggling financially since his passing, as he was the sole breadwinner. PW1 on the other hand is still under medical care as a result of this assault. She invited the court to consider a sentence, which will serve as a deterrence and regain the society's trust in the justice system.

**[32]** I concede that all these factors have to be properly taken into consideration. However, I cannot turn a blind eye on the seriousness of these offences. Murder is a serious offence where life taken cannot be replaced. Society is thus looking up to the courts to protect them by imposing commensurate punishment to the perpetrators of these offences so as to

send a strong message that crimes, especially serious offences like murder cannot be tolerated. As submitted by the crown, recently Lesotho is ranked number six in the world for murders, with only a population of 2 million people and has more homicide than countries in conflict<sup>11</sup>. Unfortunately, some of the victims of these brutal murders are law enforcement officers like police and army officers. This situation is blamed, among others, on ineptness of the judiciary to tackle murder cases. To me a way to protect society from the activities of these criminals is by confinement for a considerable length of time in order to mark the disapproval of society. Criminals must be reminded that life cannot be taken away willy-nilly without consequences and that there are legal means of resolving conflicts, not take law into their own hands. Section 5 of our Constitution protects life by providing that everybody have an inherent right to life. In imposing the appropriate sentence therefore, the interests of society also needs to be protected.

In the circumstances, accused are sentenced as thus;

Accused No.1: Count I- 20 years imprisonment

Count II- 15 years imprisonment

Accused No.2: Count I- 20 years imprisonment

Count II- 15 years imprisonment

---

<sup>11</sup> <https://worldpopulationreview.com/country-rankings/murder-rate-by-country>

Accused No.3: Count I- 20 years imprisonment

Count II- 15 years imprisonment

Accused No.4: Count I- 20 years imprisonment

Count II- 15 years imprisonment

Accused No.5: Count I- 20 years imprisonment

Count II-15 years imprisonment

The sentences imposed in respect of count II are to run concurrently with the sentences imposed on count I. Effectively, accused are to serve 20 years imprisonment.

-----

**RANTARA P.**

**ACTING JUDGE**

**FOR THE CROWN: ADV. MOTS'OANE**

**FOR ACCUSED: ADV. R.G MAKARA**