IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/0050/2015**

In the matter between:

REX

AND

RETHABILE RALEE **ACCUSED**

Neutral Citation: Rex v Rethabile Ralee (CRI/T/2015) [2021] LSHC 106 (01 OCTOBER 2021)

JUDGMENT

CORAM: **MOKHESI J**
DATE OF HEARING: **VARIOUS DATES**
DATE OF JUDGMENT: **01 OCTOBER 2021 and 17 FEBRUARY 2022**

SUMMARY

CRIMINAL LAW: Murder- *Accused charged with two counts of murder- raising defence of Insanity and failing to prove it on the balance of probabilities- Accused found guilty as charged of the two counts of murder- Accused raising a constitutional argument that there was trial unfairness owing to the fact that he was not assessed by an expert psychiatrist and forensic psychologist to determine the veracity of his*

defence of insanity- Held , in the circumstances of this case the State had provided the accused with adequate facilities for preparation of his defence.

Sentence- The court found the existence of extenuating circumstances- Accused accordingly sentenced to two life sentences.

ANNOTATIONS:

Legislation:

Criminal Procedure and Evidence Act 1981

Penal Code Act No.6 of 2010

Cases:

Bratty v A–G for Northern Ireland [1963] 3 ALL ER 523 (HL)

R v Harris 1965 (2) SA 340 (A.D)

S v Cunningham 1996 (1) SACR 631 (A)

S v Stellmacher 1982 (3) SA 181 (SWA) at 187H (translation)

S v Trickett 1973 (3) SA 526 (TPD)

Holthauzen v Roodt 1997 (4) SA 766

S v Zinn 1969 (2) SA 537 (A)

S v Rabie 1975 (4) SA 855 (AD)

Letuka v R 1991 – 1996 LLB & LB 346

S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 SCA

S v Kumalo 1993 (3) SA 697 (A)

S v Ndlovu 1970 (1) SA 430 (A)

Books:

Jonathan Burchell and John Milton ***The Principles of Criminal Law*** **2nd ed.**

Steytler ***Constitutional Criminal Procedure***

S.S Terblanche ***A Guide to Sentencing in South Africa 3rd ed***

INTRODUCTION

[1] The accused is facing two counts of murder. In the first count, he is alleged to have contravened the provisions of section 40 (1) of the Penal Code Act No.6 of 2010, read with subsection 2 thereof. It is alleged that on or about the 1st day of May, 2014 and at or near Ha-Mohasoa in the district of Maseru, the said accused did perform an unlawful act or omission with the intention of causing the death of Tšaletseng Mohasoa, such death resulting from his act or omission, the said accused did thereby contravene the provision of the Code as aforesaid.

[2] **Count 2**

He is charged with contravening the provisions of section 40 (1) of the Penal Code Act No.6 of 2010, read with subsection 2 thereof, in that upon or about the 1st day of May 2014, and at or near Ha-Mohasoa in the district of Maseru, the said accused did perform an unlawful act or omission with the intention of causing the death of Lineo Thamae, the said accused did commit the offence of murder of the deceased Lineo Thamae, such death resulting from his act or omission, the said accused did thereby contravene the provisions of the Code as aforementioned.

[3] The accused pleaded not guilty to both charges. The Crown's case was anchored on the oral testimonies of three witnesses plus witnesses' statements admitted in terms of Section 273 (1) of the **Criminal Procedure and Evidence Act 1981**. The witnesses' statements were duly read into the record and marked exhibits "A" to "E" respectively. A black table knife and iron rod were also admitted and marked Exhibit "1" collectively.

(i) Exhibit "A" is the statement of arrest by No. 51564 D/P/C Molongoana.

(ii) Exhibit "B" Identification statements of Tšeliso Mohasoa and Rantefeleng Mohasoa.

(iii) Exhibit "C" Identification statement of Moseli Thamae.

(iv) Exhibit "D" is a crime scene statement of No. 9241 D/Inspector Mahloane. In essence he says he responded to a call that two elderly women had been killed at Boqate Ha-Mohasoa. On arrival he found that the accused had already been arrested by the villagers and was in their custody. He went to the home of one of the deceased, Mrs Lineo Thamae. He found the deceased lying dead on her back, in her house. She was covered in a blanket. He examined the body of the deceased and made saw:

(a) Two open wounds on the throat;
(b) Two open wounds on the left cheek;
(c) Open wound on the left breast;
(d) Two open wounds behind the left armpit;
(e) Two open wounds on the back of the neck; and
(f) Three open wounds "on the backbone".

[4] Upon arrival at the second deceased's home, Mrs. Tšaletseng Mohasoa, D/Insp. Mahloane, found her lying dead on her back, in her house. Upon examining her, he found that, the deceased had:

(i) Open wound on the right breast;
(ii) Open wound on the chest next to the left breast;
(iii) Open wound below the lower lip;
(iv) Cut on the left cheek; and
(v) Open wound behind the right scapula.

He further stated that while transporting the two deceased to the mortuary, there was no accident which added to the wounds the deceased had already sustained. As the accused had been badly assaulted by the villagers, he was taken straight to St. Joseph's Hospital. He also seized a black table knife and an iron rod which were allegedly used by the accused to commit the two murders.

[5] Exhibit "E" was post-mortem report in respect Mrs. Lineo Thamae. In it, the pathologist states that the deceased died as a result of shock due to blood loss. He remarked that the deceased:

> *"REMARKS (8) She was stabbed and had on the head: penetrating wound: 1 on the nose, left parietal; 2 lacerations, 1 on the breast, 2 on the arms, 3 lacerations on the back, left shoulder, 2 lacerations, 2 lacerations on the neck. On the chest 2 penetrating wounds."*

[6] Exhibit "E" is the post-mortem in respect of the deceased, Mrs. Tšaletseng Mohasoa. In it, the pathologist records that the deceased died as a result of hemoperitoneum. He remarked that:

> *"REMARKS (8) she was stabbed and had penetrating wound on the third intercostal space."*

[7] PW1, Phamole Mohasoa lived with his grandmother, Mrs. Tšaletseng Mohasoa. He was 22 years at the time. He knew the accused very well as they come from the same village of Ha-Mohasoa. His home is in the same village, a short distance from his grandmother's house. His grandmother's house has a number of rooms. He sleeps in one of the its bedrooms. On the 01 May 2014, in the morning, while still in bed, he heard someone knock on the door of the main house. He responded to the knock by going to the door. Upon opening the door, he discovered that it was the accused who was knocking. As it was in the morning and clear, he could see that it was the accused. The accused asked for the witness' grandmother's whereabouts. When the witness replied that the deceased was still in the house, he asked him to go and call her for him. The witness went and woke up the deceased and told her that the deceased wanted to talk to her. The deceased duly woke and went to the door where the accused was left standing.

[8] The witness told the court that he went back to his room to put on his shoes. From where he was, he could hear that there was a conversation between his grandmother and the accused even though he could not hear what they were talking about. He could only hear the question the accused posed to the deceased "What do you want from me?" After a short while he heard a scream from the deceased which immediately prompted him to rush back to see what could have happened. To his shock, his grandmother was lying on the floor. The accused was not there. There was a lot of blood in the sitting room. He ran out of the house to inform his father about what had happened, and on the way, he met other villagers who told him that the accused had already kiled Mrs. Lineo Thamae as well. At the time, the accused was fleeing and was being chased by the villagers. The witness told the court that there had not been frictions between him and his family, apart from the fact that the accused was at one point convicted and sentenced for raping his 10-year-old sister.

[9] Under cross-examination it was put to the witness that after the accused had a history of being admitted at psychiatric hospital (Mohlomi), to which the witness denied any knowledge. It was also put to the witness that after attacking the witness' grandmother, the accused attacked his mother and his late grandmother. The witness denied that this was the case.

[10] PW2, Mr. Ramabanta Mohasoa, is the village chief of Ha-Mohasoa. He knows the deceased and the accused. On the fateful day after 6:00 a.m. accused's mother arrived at his home in the company of the accused's wife. They had come to report that they saw the accused coming from Mrs. Lineo Thamae's place and because he was bloody, they suspected that he might have killed her. He went to Mrs. Tšaletseng Mohasoa's place where he found her lying in a pool of blood, dead near the doorway. He proceeded to Mrs. Lineo Thamae's place where he found her lying down dead. He called the police after the villagers had effected citizen arrest of the accused.

[11] Under cross-examination, he conceded that he knew that the accused once attacked his mother and grandfather and that he caused the injuries to the former.

[12] PW3, Mr. Rantefeleng Mohasoa, is the son of the deceased in Count 2, Mrs. Tšaletseng Mohasoa. He stays in the same village. On the fateful day, one Mahase arrived at his place and told him that the accused was at his mother's place and wanted to break the doors. After relaying the message, the said Mahase went back. After a short while Mahase came to inform him that the accused had stabbed Mrs. Tšaletseng with a knife. When the witness turned around, he saw the accused. He asked the accused to wait for him so that they could talk, but the latter did not respond, instead he fled. He tried to give a chase, but the accused outran him. He then decided to go to his mother's. He found his mother lying at the doorway in a pool of blood. She had sustained four stab wounds. Her throat was cut. After the accused was caught by the villagers, he had in his possession "a spear" and a knife. He testified that two of his children who stayed with deceased are still traumatised by what they saw. This witness' evidence, like others, was unchallenged.

[13] After the closure of crown's case, Adv. Mafaesa, for the accused applied that the accused be referred for psychiatric examination at Mohlomi Hospital to determine his mental state when he committed the two murders. That order was made on the 27th August 2019, and with the combined effects of a long waiting list, the advent of the coronavirus and concomitant lockdowns, accused's examination could not happen in due time. Two witnesses were called, who had examined the accused. Although they were subpoenaed at the behest of the accused and the crown, respectively, I took the decision to turn them into the witnesses of the court, so that if they give an opinion which the accused would want to rebut, he would be free to call witnesses in rebuttal. I took this position to turn the two witnesses into court witnesses because of the seriousness of this case and its ramifications to the accused should he be found guilty of the two murders. I wanted the issue of the deceased's mental capacity to be dealt with thoroughly. It should, however, be said that even after the testimonies of the two expert witnesses, the accused decided not to proffer

any evidence in rebuttal. At one point the accused had lined up a medical doctor as his witness but decided not to call her to testify. The two witnesses are a medical doctor and psychologist.

[14] Court Witness no.1, Dr Tun Shwe Kyaw, is a Senior Medical Officer (Specialist) at Mohlomi Hospital. He is an Infectious Diseases Specialist. He was the understudy of a psychiatrist who was responsible for Mohlomi Hospital, for two years when he first arrived in the country, and when that psychiatrist left, the witness was left to fill for him as there are no qualified psychiatrists in the Kingdom. He told the court that he has got experience as medical doctor dealing with neurological and psychiatric disorders. Dr Kyaw was responsible for examining the accused on the 18th February 2020 after being referred by this court, to determine whether the accused was insane when he committed the two murders in 2014.

[15] He reviewed the accused's case and discovered that the accused had been a patient at Mohlomi Hospital since 2012. He had been transferred from Tšepong Hospital with a history of aggressiveness. The accused had no history of being admitted at Mohlomi for psychiatric problems. He did not have a history of mental illness per the hospital records. The only history he had was of aggressiveness which was induced by abusing marijuana. He subjected the accused to an intelligence test. He sought information from the accused about his life: The accused said he could not remember anything about the two murders as he was told that he killed two people. He had been an epileptic patient since 2008. He started using dagga in 2004 – 2005. He was undergoing epileptic treatment at Tšepong Hospital.

[16] The process of assessing the accused was done in collaboration with the clinical psychologist. He found accused's intelligence higher than other people. Accused could remember everything that happened in the past and the details, such as when he was imprisoned for rape. The accused said he had no recollection of the two murders, despite recalling minute details of things which happened long in the past. Dr Kyaw concluded that the accused's recent, intermediate and remote memory was

good. He was orientated both in time and place. He did not show any mental abnormalities. The accused could answer every question relating to what happened since he was seventeen years old. He could even recall that on the day of the two murders he did not suffer from any epileptic seizures nor did he use dagga.

[17] Adv. Mafaesa's, for the defence, questions during cross-examination were directed at showing that, because the accused had a history of running away from hospital, that shows that he has mental medical condition. Dr Kyaw's answer was that, medically, that does not mean anything. Cross-examination was further, predominantly, directed as showing that Dr Kyaw was not qualified to assess the accused as he was not a psychiatrist, to which he replied that apart from his experience as a medical doctor, he had on hand the help of experienced clinical psychologists, who contributed to compiling the report on the accused, which therefore, meant that their assessment of the accused was above board.

[18] Adv. Mokuku's cross-examination was directed as the witness explaining his findings. The witness reiterated his stance that the accused was mentally stable when he examined him, because he could understand, narrate everything, he could explain everything in a logical order.

[19] Court witness, no.2 Ms Pulane Mphatšoe is a clinical psychologist. She holds two Master's Degrees, one in clinical psychology and another in public health. Her evidence was that since she was not a forensic psychologist, she could not determine whether the accused at the time he committed the crimes suffered from mental illness. She determines the mental status of the patient at the time such a patient is brought in for assessment. She however, conducted IQ assessment, intelligence assessment and clinical interviews to determine the accused's state of mind: the baseline IQ assessment found that it was on the high average range.

[20] His mental state assessment revealed no concerns regarding his memory. The conclusion was that the accused's cognitive functions were "fine". Regarding the

alleged murders, the accused said he had no recollection even though he could recall in details the events which took place years earlier. But based on the assessment and previous events he was asked about, when testing his memory, the accused was able to recall. Ms Mphatšoe attributed accused non-recollection of the incidences surrounding murders to incongruence, because in view of the positive memory test, his non-recollection of the murders could not tally.

[21] Adv. Mafaesa's focus as it is customary in this case, was the highlight to the witness that the Mohlomi Hospital does not have a qualified psychiatrist and to show that the witness was not qualified to give an opinion as a psychologist. After this witness's testimony and cross-examination, Adv. Mafaesa for the defence intimated to the court that the accused was closing his case without testifying nor calling any witnesses to testify in support of his defence. The accussed's defence is pathological criminal incapacity (insanity). He argued that he was insane at the time he committed the two murders. It is apposite at this point to detail out the law which governs the matter.

[22] **The law**

Penal Code Act No.6 of 2010 (hereinafter "the Act") in terms of section 19 provides that:

> *"19. (1) For the purposes of subsection (2), every person is presumed to be of sound mind and to have been of sound mind, until the contrary is proved.*
>
> *(2) No person shall be convicted of a criminal offence if he or she proves on the balance of probabilities that at the time of the commission of the offence he or she was suffering from mental disorder of such a nature that he or she was substantially unable to appreciate the wrongfulness of his or her actions or that he or she was unable to conduct himself in accordance with the requirements of the law.*

(3) Where proof of mental disorder is established, the court shall return a verdict of insanity and order the detention of the person in terms of section 172 of the Criminal Procedure and Evidence Act 1981."

[23] S.19, thus, provides the starting point from which to deal with cases where the defence of pathological criminal incapacity is raised by the accused. The basic principle which is explicitly stated in the section is that every man is presumed to have acted voluntarily when he committed the crime. For the fact of this presumption of sanity, if the accused raises the defence of insane automatism, the law places an evidentiary onus on him, to be discharged on the balance of probabilities, that when he committed the crimes with which he is charged, he was suffering from mental illness which rendered him to be incapable of appreciating the wrongfulness of his conduct (cognitive aspect) or while suffering from mental illness which does not debilitate his ability to distinguish between right or wrong, he nonetheless due to its effects, is rendered incapable of acting in accordance with his appreciation of the distinction between right or wrong. 'Mental disorder' has been defined S.3 of the Act as "*a condition which involves a temporary or permanent disruption of the mental state, excluding a condition which has an incidental effects."* This is the test of insanity. The learned authors Jonathan Burchell and John Milton *The Principles of Criminal Law* 2nd ed. State the test of insanity aptly as follows, at p.240:

"The test of insanity thus requires an enquiry into whether the mental illness the accused suffers from has the effect of impairing the accused's capacity for insight into the nature of his act or the capacity to control his actions in accordance with his insight."

[24] In **S v Cunningham 1996 (1) SACR 631 (A)** at 635h – 636c, Scott, J. A, provided a summary of principles and approach to these matters:

"Criminal responsibility presupposes a voluntary act (or omission) on the part of the wrongdoer. Automatism therefore necessarily precludes criminal responsibility. As far

as the onus of proof is concerned, a distinction is drawn between automatism attributable to a morbid or pathological disturbance of the mental faculties, whether temporary or permanent, and so-called 'sane automatism' which is attributable to some non-pathological cause and which is of a temporary nature. In accordance with the presumption of sanity the onus in the former is upon the accused and is to be discharged on a balance of probabilities. Where it is sought to place reliance on the latter, the onus remains on the state to establish the voluntariness of the act beyond a reasonable doubt. See S v Mahlinza 1967 (1) SA 408 (A) at 419 A – C; S v Campher 1987 (1) SA 940 (A) at 966 F – I; S v Trickett 1973 (3) SA 526 (T) at 530 A – D.

In discharging the onus upon it the State, however, is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology. See S. Trickett (supra at 532G – 533A, 537D – F). It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused's criminal responsibility for his actions. In doing so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused's actions during the relevant period. See S v Kalagoropoulos 1993 (1) SACR 12 (A) at 21i – 22a; S v Potgieter 1994 (1) SACR 61(A) at 72h – 73b."

[25] As to what constitutes mental illness for purposes of the defence of pathological criminal incapacity, there is no definition. Much depends on medical evidence and the facts of each case. The guiding principle, however, is that mental illness refers to:

"[A] Pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation." **S v Stellmacher 1982 (3) SA 181 (SWA) at 187H (translation)**

[26] In the present matter it is an uncontroverted evidence of the State that on the fateful day, per PW1 Phamole Mohasoa, the accused knocked at the door of his grandmother's house. PW1 opened to see who it was. At the door was the accused who asked to see the witness's grandmother. PW1 called his grandmother who duly went to the door to talk to the accused. For a short period while the witness was putting on his shoes, the accused had delivered several fatal stabs with a knife or spear to the most critical parts of the deceased's body. So quick and decisive were the accused's stabs that when PW1 returned to see what the squabble at the door was all about, the accused had all but vanished, and the deceased was lying dead on the doorway bleeding profusely and lifeless. Similar fatal stabs had been delivered with the same savagery in respect of the other deceased, Mrs. Lineo Thamae. All this evidence is uncontroverted.

[27] As already stated, the accused's counsel had requested a referral of the accused to Mohlomi Hospital for psychiatric examination. Tests were conducted on the accused but given the serious of the implications to the accused should he be convicted I subpoenaed the medical doctor and a psychologist who conducted the examination to appear and testify as the court's witnesses. The idea was to give the accused an opportunity to call evidence in rebuttal of their evidence should he have questions relating to their testimonies. On the conspectus of the crown witnesses' uncontroverted evidence, it is doubtless that the Crown has proved beyond a reasonable doubt that the accused committed the two murders.

Evaluation and Discussion.

[28] The next issue to determine is whether the accused has managed to adduce evidence, proving on the balance of probabilities, that, at the time he committed the two murders, he was suffering from mental illness or disorder. We have seen from Dr Kyaw and Ms Mphatšoe's uncontroverted evidence, that the accused has no record of suffering from any mental illness. His medical history is reveals that he had been

admitted at Mohlomi Hospital for aggressiveness related to abuse of dagga, and epilepsy. It is an uncontroversial evidence of Dr Kyaw that:

"CW1: On my assessment I also asked him whether he was using drugs at the time of the offence, he said no; whether he had seizures or epilepsy he said no. In my opinion, we cannot say definitely what was the mental state at the time, but in my opinion, he was not insane at the time because, he could answer and narrate everything regarding everything he did since he was 17 years old. That's how we concluded."

[29] The clinical psychologist, Ms Mphatšoe's opinion on the fact that accused could recall everything including the fact that on the fateful day, he did not use any drugs nor did he suffer any epileptic seizure, but not the two murders. She attributed this to incongruence. This is what the witness said during cross-examination by Mr. Mokuku, for the Crown:

"CW2: I can give my professional opinion which is why he was referred to me in the first place. He was referred to me from the doctor to assess whether he can be able to stand trial, and thus said with IQ assessment and with the mental status assessment, there were no concerns as far as his memory , as far as his ability to express himself. So, professionally I would like to say I saw no concerns with the presentation that he gave as far as expressing himself and as far as his memory and his logical. He would have been able to trial. With regards to the incongruence, it is just me highlighting that what presented in the session, in the assessment is not in line with him not remembering the events that he said he didn't remember.

CC: So, you can't say he doesn't remember because everything says he should?
CW2: He presented with no problems with his memory as far as the clinical assessment is concerned."

[30] The defence counsel submitted that the accused has managed to upset the inference of voluntariness on his part by reference to Dr Kyaw's lack of skill in psychiatry, as his medical history shows that he has been aggressive towards other people. He referred to Lord Denning's statement in **Bratty v A–G for Northern Ireland**

[1963] 3 ALL ER 523 (HL) at 534 that *"any mental disorder which manifested itself in violence and is prone to recur is a disease of the mind."* In that case Lord Denning made that statement when dispelling the notion that epilepsy or cerebral tumour are not diseases of the mind, even when they manifest themselves in violence. It must, however, be stated that, this statement is irrelevant for present purposes because there is uncontroverted evidence that the accused did not suffer epilepsy on the day. That the accused's counsel feels that he has disturbed the inference of voluntariness by reference to the fact that Dr Kyaw is not a psychiatrist shows the lack of appreciation of the accused role when the defence of insanity is raised. The fact that the accused was assessed by a medical doctor who is not a psychiatrist by academic qualifications, cannot logically count as *his* evidence towards discharging the onus which is cast on him to prove the defence of insanity on the balance of probabilities. In any event the notion that Dr kyaw was not a qualified expert on psychiatric matters should be jettisoned on the score that it is unfounded. Dr Kyaw's evidence was admissible as an expert, his experience in psychiatric matters is undoubted, even though he does not have an academic qualification in psychiatry. The following remarks which were made in **Holtzhauzen v Roodt 1997 (4) SA766** at 772g-h:

> *"Third, is that the witness must be qualified expert. It is for the Judge to determine whether the witness has undergone a course of special study or has experience or skill as will render him or her an expert in a particular subject. It is certainly not necessary for the expertise to have been acquired professionally."*

In the present matter, I am satisfied that Dr Kyaw is an expert in psychiatry given his experience in dealing with psychiatric patients.

[31] As already shown above, by reference to **S v Cunningham (supra),** in discharging the *onus* cast upon him, the accused expected to lay a proper factual basis (evidence), for the defence of insanity to prevail. Lord Denming in **Bratty v A–G Northern Ireland**

(supra) at 535 E – F, explained the issues of presumptions of mental capacity and *onus*, flawlessly, when he said;

> *"What, then, is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out: for "blackout" as Stable, J., said in Cooper v McKenna (55) "is ne of the first refuges of a guilty conscience, and a popular excuse …"*

[32] In **R v Harris 1965 (2) SA 340 (A.D)** at 365 A – C, the court stated that:

> *"…[M]edical testimony relating to the state of man's mind at an anterior point in time is often largely – albeit in the present case perhaps not altogether entirely – based upon the hypothesis that the accused has given a truthful account both of his symptoms at the relevant time and of the part actually played by him in the events under consideration. Moreover, while the opinions in relation to psychiatric matters … merit the closest attention, it must also be borne in mind that …. in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a mater to be determined, not by the psychiatrists, but by the court itself. In determining that issue the court …. must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period."*

[33] All these authorities quoted above emphasize two important things: that for the accused to discharge the onus proving pathological mental incapacity, factual basis must be laid out by him, and secondly, inasmuch as medical psychiatric evidence is indispensable, it must be assessed together with the facts of the case, especially the account of the accused's symptoms of the disease at the relevant time and the part

he played in the events under scrutiny(See: ***S v Trickett 1973 (3) SA 526 (TPD) at 536G-H).***

[34] The accused has failed to lay a factual basis of his mental illness symptoms nor has he provided evidence of the role he played in the events leading to the death of the two women. The accused elected not to testify nor lead evidence. I am fully mindful that he has a constitutional right to elect to testify but exercising that right of election in favour of not testifying in the face of damning evidence always carries with it a huge risk. Upon a proper examination of the facts of this case, the accused does not seem to be displayed any sign of mental illness on the fateful day: He left his place, went to the home of the late Mrs. Tšaletseng Mohasoa knocked at the door and asked her grandchild to call her to the door. Upon the deceased heeding to the call, she was brutally and wantonly stabbed to death. Mrs. Lineo Thamae was killed in a similarly callous manner. It is clear that the accused had specific targets in mind, he wanted to kill the deceased. He was not acting indiscriminately, but with a clear mind set on accomplishing his mission on specifically selected targets. He was acting consciously when he committed the two murders. His statement that he does not remember what happened on the fateful day is merely a convenient shelter for his quilt conscience because he could clearly recall that he did not suffer from any epileptic fits nor did he use any drugs or marijuana that day. He chose not to call even his family members who present on the day, to shed light on his state of mind even though those individuals are still alive and available. The accused failed to adduce evidence to show, on the balance of probabilities, that he was suffering from mental illness when he committed the two murders. This court find that, on the other hand, the Crown has proved beyond a reasonable doubt that the accused committed the two murders.

Constitutional question regarding trial fairness.

[35] The accused's counsel had raised a constitutional issue regarding the fairness of the proceedings because Dr Kyaw is not a qualified psychiatrist. The essence of his argument from paragraph (iii) of his heads of argument is that:

"(iii) There was failure on the part of the State to comply with section 12(2)(c) of the Constitution in that no facilities were provided to assist the accused in his defence consequently there was failure of justice. The Dr. explained that Lesotho does not have qualified psychiatrist expert and in the end he did not rule out that the accused was insane as at the time of commission of the offence. Further, the evidence of the psychologist did not assist the court and he/she confessed that the question of criminal liability can only be performed by forensic psychologist and psychiatrist. She went further and stated that Lesotho does not have such experts."

[36] In terms of S.12(1), the Constitution of Lesotho 1993 provides that every person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court. Under S.12(2)(c), it provides that every person who is charged with a criminal offence *"shall be given adequate time and facilities for the preparation of his defence."* In the present matter, the accused complains about not being afforded adequate facilities to prepare for his defence, in view of the fact that there is no qualified psychiatrist in the country to evaluate his claims that he was suffering from a mental illness when he committed the two murders.

[37] Section 12(2) (c) embodies an important principle of equality of arms between the State and the accused. It ensures that the accused comes to trial fully prepared armed with adequate information to inform his decision in the conduct of his trial. Equality of arms ensures that the accused has access to the same information to which the State has access, for him to prepare for his defence. I turn to deal with adequacy of facilities to enable the accused to prepare for his defence.

[38] **<u>Adequate facilities for preparation of defence</u>**

This case implicates only the aspect of adequacy of facilities for preparation of defence. What then does the Constitution mean when it says the accused shall be entitled to adequate facilities to prepare his defence? This section imposes a positive obligation on the State to provide the accused with adequate facilities to prepare his

defence. This means that for arms to be balanced between the State and the accused, the latter must have access to the information to which the former has access. The term "facilities" is wide enough to cover even expert witness, and for present purposes, psychiatric expertise. The need for State assistance is even more pronounced, as in this case, where the accused is indigent and in prison. However, according to **Steytler *Constitutional Criminal Procedure*** pp. 235 – 236, the State's positive obligation to provide the accused with adequate facilities to prepare his defence, is circumscribed in three ways: (i) the right arises only where the accused can show that because of his indigency and the fact of him being in prison, he is in need of a particular facility; (ii) the facility needed must be relevant for preparation of defence, (iii) the State's positive obligation is dependent on "adequate facilities", in which case the court will determine whether, owing to particular circumstances of each case, the facility is adequate or not.

[39] In the present matter the accused requested and was provided with available medical and psychological expertise. He was assessed and his medical history scrutinised. His medical history does not show that he ever had mental illness. Of particular relevance to the present case is the fact that no factual basis upon which this court would infer that he had mental illness on the fateful day, has been adduced, not even from his relatives who were with him on the day of the incidents. It is a fact that Lesotho does not have an academically qualified psychiatrist at the moment, but does that fact mean that, given the circumstances of this case, the accused was not afforded adequate facilities by being assessed by a medical doctor who is not a psychiatrist by academic qualifications, but who has a substantial experience assessing mental illness patients, and a clinical psychologist. The answer to this question should in the negative: with no factual basis for sustaining the defence of pathological criminal incapacity, I do not see how the conclusion that the accused has failed to prove his defence on the balance of probabilities would be cast in doubt merely because of the fact that he was not assessed by an academically qualified psychiatrist. It should be recalled that, ultimately, this court is the final arbiter of criminal responsibility, not the experts. The medical evidence is not determinative

on its own, as it must be evaluated in conjunction with other facts surrounding the incidents which culminated in the murders. To make matters worse for the accused, this court was informed that a medical doctor whose qualifications were not disclosed had been lined up to testify in his defence, however, for some inexplicable reasons the accused decided against calling such witness, but instead elected to close his case without calling any witness at all. Owing to the circumstances of this case, the facilities which were afforded to the accused were adequate, and therefore, I find that the argument that the accused was not afforded trial fairness is baseless and is rejected.

[40] In the result:

(a) The accused is found guilty as charged on the two counts of murder.

My Assessors agree

JUDGMENT ON SENTENCE

[41] The accused was convicted of two counts of murder of two elderly women by stabbing them with a sharp object and a knife. He was convicted of these crimes on the 01 October 2020. It is now time for him to be sentenced accordingly.

[42] The determination of a suitable sentence is not an easy task to carry out as given it involves careful balancing a number of competing interests. It is trite that the sentencing court has to consider a triad of factors in order to mete out an appropriate sentence. In terms of the well-known case of **S v Zinn 1969 (2) SA 537 (A)**, the sentencing court is bound to consider and take into account the accused's personal circumstances, the nature of the crime and, thirdly, the interests of the community. The court is enjoined to temper this sentencing exercise with mercy while at the same time trying to meet the objectives of sentencing, namely, retribution,

prevention and deterrence of crime, and rehabilitation of the offender. As it was authoritatively stated, the punishment "…. should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances." **(S v Rabie 1975 (4) SA 855 (AD)** at 862 G – H).

[43] In this jurisdiction, a person who is convicted of murder is punishable by death, however, in terms of S.297 (3) of the Criminal Procedure and Evidence Act No.9 of 1981, the court may impose any sentence other than death upon any person convicted of murder if it is of the opinion that there are extenuating circumstances. Extenuating circumstances are "any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability" **(Letuka v R. 1991 – 1996 LLB & LB 346).** In **Letuka v Rex (***ibid at 363***)** the court listed factors which a trial court should consider, individually and collectively, as having the effect of reducing the accused's blameworthiness:

> *"youth, liquor, emotional conflict, the nature of motive, provocation, sub-normal intelligence, general background, impulsiveness, a lesser part in the commission of the murder, the absence of dolus directus, belief in witchcraft, absence of premeditation or planning, "heavy confrontation" between the accused and the deceased before the murder, the rage of the accused."*

[44] It is equally trite that the accused bears the burden of proving the existence of extenuating circumstances (**Letuka v Rex** *ibid***)**. I now turn to consider the triad of factors alluded to above, firstly, I will deal with the accused's personal circumstances. The accused chose to testify in mitigation of sentence and his counsel made oral and written submissions on the existence of extenuating circumstances: The accused is thirty-one years old (31yrs). He has been in prison awaiting finalization of this case, for seven years. It should be stated that when this matter was allocated to this court the accused had already been awaiting trial for four years, and as the matter finally kicked off there were several challenges, among which is the advent of Covid-19, which hampered the smooth progress of

this matter. However, be that as it may, the accused is a married man with one child, who is currently six years old. As a result of his long imprisonment, the accused's marriage all but collapsed, as his wife returned to her maiden home. The accused's child has been growing without the presence of his father for all this time.

[45] The accused testified about his torrid upbringing which saw him grew up without his father. He grew up not knowing his father as the latter was estranged from his mother. He said this experience was painful as he had to be taken to this aunt's to be fostered by her. He was not treated well by the said uncle as he constantly experienced discriminatory treatment in relation to his cousins. As an example of this, he was only allowed to start his standard one at the age of nine (9 yrs) when his cousins of the same age were far ahead with their schooling. He told the court all these experiences made him very angry.

[46] He told the court that his mother was all along staying at Welkom in South Africa and when she came back home, she bought the place which is now his home. His mother stayed with a man who abused her badly in his presence. He told the court that he ultimately got to meet and knew his father and they reconciled. He further informed the court that as a sign that he is rehabilitated, he is given a role of keeping an eye on other inmates on behalf of the prison warders. He is also the coordinator between the prison warders and the inmates. He got appointed into this role by other inmates due to his good behavior. He is also a Secretary General of the Council of religious denominations in prison. He is now a devout Christian who has realized that committing crimes does not pay. The accused's role in prison was confirmed in an affidavit by Chief Officer at Maseru Central Correctional Institution in Rehabilitation section, Mr Kheleli Phakiso, who also stated that the accused is not a member of any prison gang. I turn to consider the crimes.

[47] The victims of the accused's crimes were two elderly women who were also his neighbours. Their murders were violent, callous and brutal, and quite frankly, numbing to one's senses: Mrs. Tšaletseng Mohasoa was stabbed, resulting in her

sustaining a penetrating wound on the third intercostal space on the right side which led to her death. She died after bleeding to death in a matter of minutes. She met her death in a violent way imaginable.

[48] In respect of Count 2, the same level of violence was meted out on the deceased: She died as a result of blood loss after being stabbed on the head, nose, breast, arms, neck, chest. She had penetrating wounds which caused her to ultimately bleed to death as well, within a very short space of time.

[49] The impact these crimes had on the deceased's surviving family members is immeasurable. In respect of Mrs. Mohasoa, the court had occasion to witness raw motions on display when the deceased's son and grandson were giving evidence. PW3, who is the deceased's son even testified about the trauma which his children were suffering as a result of their grandmother's gruesome murder. One of the children constantly suffers from daily nightmares, the court heard. This evidence is uncontroverted. I turn to consider the interests of society.

[50] This country is currently experiencing unprecedented levels of violent crimes, especially crimes against women. It is therefore in the interest of society for the courts to impose appropriate sentences when accused are convicted of these violent crimes, more so, when such crimes are perpetrated on the most vulnerable members of our society such as women whether young or old. A crime of murder is a serious crime, but once it is perpetrated against the women it should not be treated leisurely. The remarks which were made by the Supreme Court of Africa in **S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 SCA at 345** A–B**,** are apposite:

> *"Women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes their quality and enjoyment of their lives."*

[51] **Aggravating factors:**

Some of the factors which aggravate these offences have already been dealt with in the preceding paragraphs: The accused committed these crimes on elderly and defenceless women. They were attacked in the privacy of their homes and brutally stabbed to death in the most violent of ways. The after-effects of these crimes on the surviving members of the deceased's families cannot be doubted. The accused was convicted of a sexual offence against the minor grandchildren of the deceased in the first count. He has been convicted of the two murders after more than ten years after his previous conviction for the said sexual offence. It is trite that the proximity in time of the subsequent conviction is an aggravating factor, but a subsequent conviction more than ten years is not to be taken into account for purposes of aggravation **(S v Kumalo 1993 (3) SA 697 (A)** at 699 H).

[52] **Extenuating circumstances**

In terms of s. 297(3) of the Criminal Procedure and Evidence Act 1981, this court is enjoined to impose any sentence other than death if it is on the opinion that there are extenuating circumstances in existence. It should be recalled that accused's defence was that of insanity and nothing else. This court found that the accused was not insane at the time he committed these two murders. However, during submissions on extenuating factors, a suggestion was made by the crown and defence counsel that perhaps the accused killed the two women because of belief in witchcraft based on the following words PW1 overheard him saying to the deceased in Count 1 "what do you want from me?" I am not inclined to accept that this alone is sufficient to attribute the killing by the accused of the two women to believing in witchcraft. This aspect did not come from the accused, because even under cross-examination after testifying in mitigation he did not say he murdered the deceased because of witchcraft. His counsel, Adv. Mafaesa, raised it for the first time in his submissions on the existent of extenuating factors. There is simply no basis for this court to deduce that belief in witchcraft was the reason behind the accused committing these murders. The following views by the learned author **S.S**

Terblanche ***A Guide to Sentencing in South Africa 3rd ed.*** at p. 231 should be kept in mind:

> *"7.3.17 Belief in witchcraft and religion*
>
> *A genuine belief in witchcraft may, depending on the facts of the case, be mitigating* ***[and extenuating in our case].*** *If an alleged witch has been killed, the murder can be mitigated only if the killing was motivated by a belief in witchcraft and not by something else. Factors which have played an important role in establishing whether such belief may be mitigating include the depth and sincerity of the belief, the extent of the fear experienced by the offender, the immediacy of the perceived threat, the offender's relationship with the "witch" and the brutality with which the murder was committed."*

[53] It is trite that in determining the existence of extenuating circumstances the focus is primarily on the accused's subjective state of mind and less on the objective or factual basis for that state of mind.

[54] Importantly, in **S v Ndlovu 1970 (1) SA 430 (A)** at 433, **Holmes** J. A., said:

> *"There must be a factual foundation for a trial court's finding of such circumstances, on a preponderance of probability. This does not necessarily mean the accused must give evidence: in a proper case the trial court may be able to find the required degree of probability from the evidence as a whole or from so much thereof as it is accepted. But there must always be a foundation of probability before the court can exercise what is in effect a moral judgment in the matter of extenuating circumstances."*

[55] In view of the above discussed principles it is clear that this court is not enjoined to infer from the thin air that the accused believed in witchcraft and that was the basis for the murders. Facts have got to be present to aid the court in determining the genuineness of such belief in witchcraft where it is advanced as the basis for committing the murders. However, this conclusion notwithstanding, the utterance by the accused seen in a different light does present a picture of a young man who had emotional conflict or turbulence. Although there was no apparent animosity between the accused and the deceased, to me it is clear that there was a strong

emotional turbulence which prompted him to commit the two murders and this constituted an extenuating factor reducing his moral blameworthiness.

My assessors agree.

[56] **Sentence**

(i) In respect of Count one, accused is sentenced to life imprisonment.

(ii) In respect of Count two, accused is sentenced to life imprisonment.

(iii) In respect of the first sentence he will start to serve, four years he spent awaiting trial should be deducted.

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MOKHESI J.

FOR THE CROWN: ADV. T. MOKUKU

FOR THE ACCUSED: ADV. N. MAFAESA appearing Pro Deo