

THE DEATH PENALTY IN LESOTHO: THE LAW AND PRACTICE
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I. INTRODUCTION

The death penalty is one of the oldest forms of punishments. It has also become one of the most controversial ones, at least since the end of the Second World War when the United Nations adopted the Universal Declaration of Human Rights. Today more than 40% of the countries of the world have abolished the death penalty.¹ But virtually none of these countries hails from Sub-Saharan Africa.² This paper is an attempt to outline the law regarding the death penalty and its application in Lesotho. It focuses on the salient features of that law, identifying in particular the problems and issues that confront the practitioners of the law in the field and their attempts to look for solutions in that process.

The first part of the paper looks at the national law governing the death penalty vis-à-vis international standards; the second part of the paper identifies the problems one encounters at the pretrial, trial and post trial stages and examines the attempts to solve some of these problems; the final part looks at present trends in the application of the death penalty and draws tentative conclusions as to the future prospects of the death penalty in Lesotho.

II. NATIONAL LAW AND INTERNATIONAL STANDARDS

A. International Standards

Lesotho is a signatory to the United Nations Universal Declaration of Human Rights, the African Charter on Human and People's Rights, and in particular the International Covenant on Civil and Political Rights, all of which provide for the sanctity of the right to life. These international instruments recognise however, that states signatory thereto may impose the death penalty. Article 3 of the International Covenant on Civil and Political Rights provides, for instance, that a state that has not abolished the death penalty may impose the death penalty but only pursuant to a final judgement rendered by a competent court. It is only the Second Optional Protocol to the International Covenant on Civil and Political Rights that enjoins all the state parties to take all necessary measures to abolish the death penalty. Lesotho is not a signatory to this Protocol and even if it were it would need to pass enabling local legislation to bring it into effect. This would in turn necessitate amending local legislation including the Constitution to abolish the death penalty.

B. National Law

Section 5 of the Constitution provides that every human being has an inherent right to life and that no one shall be arbitrarily deprived of his life, but then adds that no one shall be regarded as having been arbitrarily deprived of his life where he dies in execution of the death penalty pursuant to a sentence imposed by a court of competent jurisdiction. Section 297 of the Criminal Procedure and Evidence Act (hereinafter 'the CP&E') provides for the imposition of the death penalty in respect of murder and treason while section 32 (a) (vii) of the Sexual Offences Act³ provides for the death penalty in respect of an accused person convicted of rape, who knowingly commits the crime knowing that or having reasonable suspicion to believe that he is infected with HIV.⁴ The death penalty cannot be carried out in respect of a person below 18 years of age or a pregnant woman in terms of section 297 (b) and 299 of the CP&E respectively. One of the salient features of the law regarding the death penalty in Lesotho is with regard to the provision for extenuating factors.⁵

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¹ Amnesty International Against the Death Penalty (1989)

² South Africa abolished the death penalty in 1994 in the landmark decision of the Constitutional Court in *Makwanyane v. State* 1995 (3) SA 391.

³ Act No. 3 of 2003

⁴ The Lesotho Defence Force Act provides for the death penalty in respect of members of the armed forces who, in various ways assist the enemy.

⁵ The same provision exists in Botswana, Namibia, Swaziland, and Zimbabwe and also applied in South Africa before the abolition of the death penalty.

1. *Extenuating Factors*

Having made provision for the imposition of the death penalty, section 297(3) of the CP&E states that where an accused person has been convicted of a capital offence, the High Court may impose any sentence other than death where it is of the opinion that there are extenuating circumstances. Extenuating circumstances have been defined as 'any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability.'⁶

Once a court has convicted the accused of a capital offence it must then embark on the second phase of the inquiry, namely whether there are extenuating circumstances which would warrant the imposition of a sentence other than the death penalty. Indeed, it has been argued that any modern penal policy must take into account the severity of the crime, the interests of the community and equally importantly, the individual circumstances of the accused. It is trite however that a mandatory death sentence falls short of these lofty objectives of modern penal policy for the simple reason that it ignores the peculiar circumstances of each individual accused. This is where the provision for extenuating circumstances becomes highly relevant. This is particularly why the Court of Appeal has always pointed out that no factor which bears on the accused's moral guilt can be ignored. As the court observed in *Letuka v. R*⁷,

It seems to us that there is therefore an overriding responsibility on the court and its officers-Counsel-to ensure that the second phase of the true process-the inquiry as to the presence or absence of extenuating circumstances-is conducted with diligence and with an anxiously inquiring mind.

While it is true that the burden of proving extenuating circumstances lies on the party asserting their existence, namely the accused, yet the Court of Appeal has gone out of its way to admonish the High Court for using the burden of proof imposed on an accused to avoid considering extenuating circumstances. As the court pointed out in *Letuka v. R*⁸,

However, the ready invocation of the onus as the determining factor seems to me to be a course to be avoided by judicial officers. It will tend to inhibit the employment of an inquiring mind directed at investigating the presence or absence of extenuating circumstances.

In that case, the Court of Appeal also took occasion to list the factors that a trial court should take into account severally, or collectively, in determining the existence of extenuating circumstances. These include the following;

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.⁹

The provision on extenuating circumstances has had a very profound effect on the application of the death penalty in practice in Lesotho. Of the 915 murder charges brought before the courts in the last five years, there is at the moment not a single convict on death row¹⁰, partly due to the courts always looking for and *finding* extenuating circumstances. On the few occasions that the High Court imposed the death penalty, it was set aside on appeal and substituted with life imprisonment on the ground that there were extenuating circumstances.¹¹

⁶ *Letuka v. R.* 1991-96 LLB &LB 346

⁷ *ibid* 360

⁸ *ibid*

⁹ *ibid* 363.

¹⁰ Information obtained from the High Court criminal registry.

¹¹ See for example *Letuka v. R* (n 6) and *Mphasa v. R* (Cr. App. 5 of 2003 unreported.)

III. ISSUES, PROBLEMS AND ATTEMPTED SOLUTIONS

A. Pretrial Stage

One of the major problems faced by the criminal justice system is the inordinate period of time spent by suspects in detention awaiting trial. This problem is directly traceable to lack of resources and dearth of qualified staff particularly at the investigative and preparatory examination stages.

1. Investigations

It goes without saying that an efficient investigating department is a prerequisite to a professional criminal justice system that not only upholds the rule of law but restores the faith of victims of perpetrators of crime in the criminal justice system. Investigations must be carried out speedily and efficiently so that innocent suspects are cleared and the guilty are punished. This in turn calls for modern equipment and qualified staff particularly in cases involving the death penalty. Lesotho has one police laboratory which processes all the requests from the CID units all over the country. In terms of personnel the country has one ballistics expert, one finger-print expert, no handwriting expert, one psychiatrist and two forensic pathologists. The upshot of this is that investigations are inevitably held up because of the workload with which the few qualified personnel have to contend. At times samples have to be sent to Pretoria for analysis and one may have to wait several months for the results. This is especially the case where DNA testing is called for. There is no alternative to accurate forensic investigations because a wrongful execution of an innocent accused can never be corrected. Obviously, there is greater need for investing further resources into forensic investigation both in terms of equipment and training not to mention a remuneration package that would attract and retain the highly qualified staff needed in this area.

2. Preparatory Examinations

Section 92 of the CP&E provides that no person shall be tried by the High Court unless he has been committed for trial by a magistrate after the holding of a preparatory examination (hereinafter 'PE'). In effect all cases involving the death penalty must start with a PE before trial. The idea behind holding a PE is certainly laudable. It enables a preview of the case against the accused so that should it turn out to be frivolous, the accused is discharged. It provides relevant facts to enable the DPP to determine what charge to bring against the accused should he decide to commit him for trial and it informs the accused of the nature of the case against him to enable him to prepare his defence.

In practice, PE's have proved to be a real bottleneck in the speedy disposal of cases involving the death penalty. In *Mphasa v. R*¹², the accused was arrested in 1992 but could only be brought to trial in 1995 largely because of the difficulties experienced in holding a PE. The Court of Appeal was moved to observe that

It is a truism that justice delayed is justice denied. Unnecessary delays in the disposal of criminal matters bring the whole administration of justice into disrepute. The Registrar is requested to refer the matter, together with a copy of our remarks to the DPP to investigate the reasons for the delays in bringing this matter to finality in the High Court, and to take such measures as may be considered appropriate to prevent similar delays occurring in future.¹³

An investigation with the DPP's office reveals that part of the problem is lack of resources and adequate staff at the magisterial level. At least two hundred murder dockets are opened each year all of which must go through the PE process. The testimony of witnesses who may number as many as 20 have to be taken down in the magistrate's handwriting after which they are sent to the DPP's office where a decision is taken to commit the accused for trial. The magistrate's handwritten depositions have to be sent back to the magistrate's court for typing where the docket gets bogged down because of the few available secretarial

¹² *Mphasa* (n 11).

¹³ *ibid* 7

staff. Eventually the matter gets to the High Court having spent on average two to four years at the PE stage.

The interesting aspect of this whole PE procedure is that although it is theoretically a judicial investigation and could result in the discharge of an accused, in practice it has become merely an administrative exercise. No magistrate ever discharges an accused after the PE. The decision to commit is in practice that of the DPP who invariably commits or orders further investigation and of course a further PE should he feel that the evidence in the docket would not sustain a charge.

Moreover the advantage associated with a PE as opposed to a summary trial, namely that the accused is informed at the PE of the case he has to meet during the subsequent trial has largely been overtaken by further developments in so far as an accused's access to the police docket is concerned. It was always held at common law that the statements of crown witnesses contained in the police docket attracted privilege so that the accused's access to such statements depended solely on the discretion of the prosecuting attorney.¹⁴ Now, however, the High Court has ruled¹⁵ that the blanket docket privilege is unconstitutional because it violates the fair trial provisions of the Constitution.¹⁶ Consequently and save for the protection of police informers and secret police investigative methods that might be contained in the police docket an accused has full access to the police docket and does not require a PE to inform him of the case he is likely to meet.

It is therefore proposed that either the number of magistrates and secretarial staff are increased to deal with the backlog of PEs or that the conducting of PEs becomes the exception rather than the norm. Already, section 144 of the CP&E permits the DPP to order a summary trial rather than a PE where in his opinion there is danger of interference with or intimidation of witnesses or he considers it to be in the interest of safety of the State or in the public interest to order a summary trial. Increasingly, the DPP has had to have recourse to this provision to circumvent the delays inherent in the PE procedure.¹⁷

3. *Bail*

Section 12 (2) (a) of the Constitution provides that every person shall be presumed innocent until he is proved or has pleaded guilty, yet the period a suspect spends in pre-trial incarceration belies this presumption. It is true that a suspect must be charged within forty eight hours of his arrest in terms of section 32 of the CP&E but if he has been brought before a magistrate his further detention on remand is perfectly lawful. Fortunately, the High Court in terms of section 109 of the CP&E is empowered to grant bail in respect of those cases involving the death penalty. The main consideration in granting bail is whether the accused will attend his trial. Investigation with the DPP revealed that in more than 90% of the applications his office does not oppose bail, which the courts invariably grant with a cash bond as low as Maloti 250 (approximately US\$35).

Perhaps, because of what was perceived as leniency on the part of the courts in granting bail in cases involving the death penalty, the legislature has moved to tighten the circumstances for grant of bail. The CP&E Amendment Act¹⁸ provides that where the accused is charged with murder and the killing was premeditated and the victim was a law enforcement officer or a potential witness in a serious crime or the death occurred in the course of a robbery or a rape or was gang related then the accused shall not be granted bail unless he adduces evidence that satisfies the court that exceptional circumstances exist which, in the interest of justice permit his release.

It should, perhaps, be pointed out that even where the conditions for grant of bail appear to be lenient, not everyone can afford the cash bail. It is worth noting that the courts are increasingly beginning to factor in the period of pre-trial incarceration into the sentence of imprisonment where the accused is convicted as a partial solution to this perennial problem.

B. Trial

¹⁴ *R. v. Steyn* 1954 (1) SA 324

¹⁵ *Molapo v. DPP* 1997-98 LLR & LB 384

¹⁶ s12 of the Constitution

¹⁷ The last treason trial, *Molise and Others v. R* CRI/T/91 of 1999 (unreported) was a summary one.

¹⁸ No. 10 of 2002

1. *Legal Representation*

Legal representation is always guaranteed in a case involving the death penalty. Once an accused has been committed to the High Court for trial, the Registrar will find out from him whether he can afford the services of an attorney. If he can not afford one, he is asked to choose an attorney to represent him. The Registrar approaches such an attorney with a view to his being appointed as *pro deo* counsel. Invariably these indigent accused persons choose the more famous attorneys whom they have heard of and who are too overloaded to represent them. But working with the Registrar they eventually settle on an attorney who is available to represent the accused. It may be that these are the younger, relatively less experienced attorneys, but the bottom line is that in a capital offence, there is always legal representation even for the indigent.

2. *Evidence*

The evidence law is largely derived from English common law.¹⁹ Of significance, however, is the provision on the admissibility of confessions. The general principle is that for a confession to be admissible it must have been made by the accused freely and voluntarily and without his being unduly influenced thereto. However, past experience showed that confessions were often obtained by the police through improper methods, sometimes by torturing suspects in their custody. In order to alleviate this problem section 228 (2) of the CP&E provides that a confession made to a policeman shall not be admissible in evidence unless it is reduced in writing before a magistrate. Although this may not always safeguard suspects from torture while in police custody, the fact that the police know they have to pass through the magistrate to tender an alleged confession in court certainly has salutary consequences for the rule of law. Indeed, a magistrate taking down an alleged confession is enjoined to investigate the circumstances leading to the accused's decision to make the confession by interviewing him. In this way the police are denied the use of tortured confessions.

What earlier was not clear was whether a tortured pointing-out was nevertheless admissible. It frequently happened that after being tortured a suspect would make a confession and then take the police to a particular spot and point out some incriminating piece of evidence in the nature of a murder weapon or a cache of stolen goods or even the body of the deceased. Section 229 (2) of the CP&E provides that a pointing-out shall be admissible in evidence even though it forms part of inadmissible evidence. The courts interpreted this provision to mean that while a tortured confession was inadmissible the pointing-out made in consequence of the confession would nevertheless be received.²⁰

It was argued that the fact that the accused pointed-out incriminating evidence meant that the accused had knowledge of the crime either through participation in its commission, or at least as an accessory and this rendered the pointing-out reliable, although it was obtained through torture. This was quite likely to encourage the police to torture suspects in order to force a pointing-out. The matter was finally resolved by the Court of Appeal in *Mabope v. R*²¹ where the court observed that a pointing-out is a confession by conduct and cannot be treated differently from an oral confession. In either case the confession had to be made freely and voluntarily as a condition for its admissibility. All that section 229 (2) of the CP&E provided for was that once the pointing-out was free and voluntarily made it would be admissible even if it formed part of an inadmissible oral confession. This could, for example, occur where the oral confession preceding the pointing-out; was made before a policeman but not reduced in writing before a magistrate; or where the improper method used to induce the oral confession had ceased to operate on the mind of the accused by the time he made the pointing-out.

Partly because of these evidence provisions and partly because human rights instruction has become part of the curriculum at the Police Training College, there is a marked decline in the allegations of torture of suspects in police custody. In addition, there have been short courses in Human Rights organised for working police officers by the Ministry of Justice and Human Rights in conjunction with the Danish Centre

¹⁹ For instance s 276 of the CP&E provides that the law as to the admissibility of evidence which was in force in criminal proceedings in England prior to the 4th day of October, 1966 [date of independence] shall apply in any case not expressly provided under that Act.

²⁰ *R. v. Samhandu* 1943 AD 608

²¹ 1993-94 LLR & LB 154

for Human Rights and the National University of Lesotho. There is, of course, room for improvement and more such courses would go a long way towards ensuring a proper administration of criminal justice.

3. *Inordinate Delay*

Delay in the criminal justice process does not stop with committal of an accused to trial. It is experienced even after such committal. In *DPP v. Lebona*²² the accused was served with an indictment which indicated that the trial date was 4th September 1994. By 26th March, 1997 after several postponements the trial had not started. The accused applied to have the indictment dismissed for want of prosecution. The Court of Appeal confirming the High Court's decision to dismiss the indictment noted that,

Unreasonable delay almost inevitably leads to injustice. Witness memories fade, or they die and evidence is irretrievably lost. The guilty go free because of the inability of the system to operate efficiently. The citizens lose confidence in the capacity of the State to protect them from crime. The enforcement of civil claims becomes a procedural nightmare because of inefficiency and delays which are the enemies of fairness.²³

The problem, like pre-trial delays, stems from inter alia, lack of resources and adequate staff. There are only nine judges in the High Court. Lawyers may find that they have to appear in several cases at the same time. Witnesses may not all be available when the hearing commences. This inevitably leads to adjournments and consequent delay. A typical murder trial may be scheduled to last two weeks. For one or other reason the trial is not completed within the scheduled time. If that is the case, as indeed it often is, the case will be postponed to the next available slot in the judge's diary, which will invariably be more than eighteen months hence. Moreover, the problem does not stop there. Once the trial is completed, there is then the long wait for delivery of judgement. While it is true that the testimony of witnesses is tape recorded, they are not transcribed except in preparation of the court record for appeal purposes. The judges have to record these depositions sometimes extending over thousands of pages in long hand. In addition, there is no comprehensive law reporting. Judges have to refer to unreported decisions which are not collated or indexed in any way to provide easier access.

Attempts are being made to deal with some of these problems. The legislature has passed the Speedy Trials Act²⁴ which provides inter alia that a charge shall be filed within 48 hours of the time of the arrest, but if not so filed then it must be filed within 90 days from the date of first appearance before a judicial officer.²⁵ Section 4 provides that a person shall not be remanded in custody for more than 60 days and once the trial commences it shall continue from day to day until completion in terms of section 5. Section 9 excludes from computation of these time limits such period of delay as occasioned by absence of witnesses, illness of the accused, interlocutory motions and a period of postponement granted by a judicial officer. In the latter case the judicial officer may postpone a hearing on the grounds specified under section 9(3) including such factors as the complexity of the case and granting an accused opportunity to obtain legal representation. In particular section 9 (4) expressly states that no postponement shall be granted due to general congestion of the court's calendar, double-booking by counsel, lack of diligent preparation or failure to obtain a witness on the part of the prosecution.

It is interesting to note the sanctions imposed for non-compliance. Section 12 provides for dismissal of the indictment and further pointedly imposes fines on defence or crown counsel as the case may be, who among other things willfully fails to proceed with the trial without justification, in addition to suspending such counsel from appearing in court. It may also be pointed out, apropos law reporting, that the Law Society has begun publishing the Lesotho Law Reports and Bulletin with the latest edition containing decisions of the High Court and Court of Appeal up to 1999. These measures should contribute towards a more efficient administration of criminal justice.

²² 1991-96 (1) LLR 262

²³ *ibid* 294

²⁴ Act No. 9 of 2002

²⁵ *ibid* s 3

C. Post Trial

1. Appeal

In terms of the Court of Appeal Act²⁷ both the accused and the crown may appeal against conviction and or sentence of the High Court. Appeal against a death sentence is automatic and legal representation of an accused is guaranteed by way of *pro deo* appointment of counsel if an accused can not afford one of his own.

Except for one local judge²⁹ who was appointed recently, the entire Court of Appeal is composed of South African judges who sit only in April and October of each year unless there is an emergency session. They normally manage to dispose of all matters filed at the time they are in session. The problem, however, is to have all pending cases filed before them during the limited times that they sit. The most serious problem is lack of secretarial staff to transcribe the voluminous amount of witness testimony in the course of preparation of the trial record in time for their session. Perhaps, because all these judges hail from a jurisdiction that has abolished the death penalty, they are quite loath to confirm a death sentence and invariably find some extenuating circumstance that enables them to substitute the death penalty with life imprisonment.

2. Implementation of Sentence

Section 298 of the CP&E provides that the sentence of death shall be by hanging. Lesotho does not have a professional executioner and the last time a death sentence was carried out one had to be brought from abroad.³⁰ Various studies have shown that death by hanging is not a humane form of execution, which is why some jurisdictions have adopted other forms of execution, including lethal injection and the electric chair. But as one Amnesty International report points out no form of execution is humane.³¹

3. Pardons Committee

Section 102 of the Constitution provides for a Pardons Committee on the Prerogative of Mercy whose function is to advise His Majesty, the King on the exercise of clemency in terms of section 331 of the CP&E. Where a trial of a capital offence has gone through all the court processes and the death penalty has finally been confirmed by the Court of Appeal, the Pardons Committee sits to consider what recommendation to make to His Majesty regarding clemency. The Committee receives both written and sometimes taped representations from the accused, his counsel, the District Secretary of his district, the High Court judge who presided at his trial, the Court of Appeal Judge(s) who heard the appeal and the DPP. At this session the committee transcends both the legal and moral blameworthiness which informed the courts in considering the guilt of the accused and determines whether, on all the representations made before it and all the facts of the case, the accused should pay the ultimate penalty. Investigations revealed that only two cases came for consideration before the Committee in the 1990s.³² The Committee recommended substitution of the death penalty in one case, but recommended that the law take its course in the other one, where the killing was of a defenceless woman carried out with premeditation and whose sole motive was robbery of a VCR. For the last five years there has not been a single person on death row because the Court of Appeal found extenuating circumstances in the few cases where the High Court had imposed the death penalty.

4. Prison Conditions

Interviews with Prison officials indicated that there have been no unnatural deaths in prisons. Prisons are open to inspections by NGOs. However, there remains the problem of overcrowding. It may be pointed out

²⁷ Act No. 10 of 1978

²⁹ Justice M. Ramolibeli

³⁰ During the execution of Sello Nkosi in 1996

³¹ Amnesty International Publication, 1989.

³² *Sello Nkosi and Ngoanantloana Lerotholi*

that the Deputy Prime Minister informed Parliament at one of its recent sessions that the Government is aware of the problem and intends to build more prisons to alleviate the problem of overcrowding.³³

IV. CONCLUSIONS

One of the reasons why the death penalty still remains in our statute books is because it is perceived as a deterrent to crime. However, study after study has concluded 'that there is no clear evidence that in any of the figures examined that the abolition of capital punishment has led to an increase in the homicide rate or that its re-introduction has led to its fall'.³⁴ There is clearly no correlation between the death penalty and the rate of crime yet certain sections of the public continue to demand its retention, perhaps because its populist appeal enables us to turn a blind eye to the socio-economic problems that underlay these crimes particularly where they involve property. In a third world country where there are not enough resources to finance forensic investigative facilities and qualified staff, one always runs the risk of a wrong execution which by its nature can not be corrected, yet the majority of potential executees are likely to be the poor who cannot afford top flight attorneys to fight their cause.

The South African Constitutional Court decided that the death penalty is an inhumane form of punishment.³⁵ In Lesotho the provision of extenuating circumstances has effectively emasculated its impact almost to the point of abolishing it de facto. However, the possibility of its legal abolition raises so much emotional response that it is unlikely to receive balanced rational thought in the near future particularly where the killing is motivated by greed as in cases of robbery, high-jacking or medicine murder. In the short term, therefore, there is urgent need to commit more resources to training of forensic, secretarial and legal staff and to the general provision of facilities conducive to efficient administration of the criminal justice system. It need hardly be emphasised enough that a wrong execution can never be corrected.

³³ Reported in *The Public Eye* Newspaper of 25th March, 2004.

³⁴ Amnesty International Publication (n 31)

³⁵ *Makwanyane v State* (n 2)