

IN THE HIGH COURT OF SWAZILAND

In the matter of: Crim. Case 78/88

THE KING

VS

MARIO OF IS TEMBE

CORAM: B. DUNN, J

FOR CROWN: MR. NSIBANDZE

FOR DEFENCE: MR. HASINA

JUDGMENT ON EXTENUATING CIRCUMSTANCES

(23rd August 1988)

After I had convicted the' accused of the murder of Sabatha Mncina, Mr. Masina called the accused to give evidence on the question of extenuating circumstances.

The onus of establishing, on a balance of probabilities, the presence of extenuating circumstances rests on the defence-It is settled that the test to be applied in deciding the question of extenuating circumstances is a subjective one. The matters to which the court will have regard in considering the question of extenuating circumstances were well summarised by HOLMES JA in S v LETSOLO 1970 (3) SA. There the learned judge stated at pp 476 F - 447 B

"Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as

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distinct from his legal culpability. In this regard a trial court has to consider-

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

In decidng (c) the trial court exercises a moral judgment"

The accused has told the court that he was deeply in love with Fikile. He stated that he realised when she left him in December 1987 that she no longer loved him and that this was further strengthened by the fact that she reported him and caused him to be arrested by the police. The accused stated that despite all this he still believed that he would have an opportunity to talk things over with Fikile and eventually marry her. The accused has further told the court that he was angered by the deceased's relationship with Fikile. He stated that the deceased's refusal to talk to him because he (accused) was a Shangaan indicated that the deceased was deliberately having an affair with Fikile. It was Mr. Masina's submission that the accused was a jealous lover who was provoked and angered by the deceased's attitude in refusing to talk to the accused about the deceased's

relationship with Fikile. The cumulative effect of the accused's jealousy, Fikile's infidelity and subsequent separation with the accused and the deceased's arrogant attitude towards the accused, it was submitted amounted to extenuating circumstances.

I am unable on a careful consideration of all the available evidence to find that the defence has discharged the onus of establishing extenuating circumstances. According to the accused's evidence he was aware of the relationship between Fikile and the deceased for an appreciable period of time during which he found the two having sexual intercourse on at least six occasions. The accused took no serious steps to settle the matter and continued his relationship with Fikile. The accused did not take the matter up with Fikile's parents with whom he was negotiating on the question of lobola he would have to pay for Fikile. Except for the occasions when the accused stated he found the deceased and Fikile having sexual intercourse and the deceased ran away the accused did not make any attempt to approach the deceased and confront him with the allegations of his relationship with Fikile. The accused appears to have approached the deceased only on one occasion, shortly before his death. According to the accused's statement to the magistrate the meeting took place at the deceased's place of employment on the day the deceased was killed.

In his evidence in court, the accused stated that the meeting took place along the road to Zeeman's homestead on the Thursday before the deceased's death. Whichever of the two occasions one chooses, it must be borne in mind that this was almost 2 months after the accused and Fikiie had separated. There is nothing in the evidence to suggest that Fikiie and the deceased maintained a relationship after Fikiie left the accused. The incident which the accused testified to in his evidence in chief of having come across Fikiie and the deceased at 4.00a.m. one day was one of the incidents which were referred to as having occurred before Fikiie left the accused. There is further no evidence that the accused made any attempt to get Fikiie to return to him. He did not approach her parents . and it is difficult to appreciate on what basis the accused assumed that he and Fikiie would have the opportunity to talk things over.

The accused did not refer in his evidence on extenuation to the circumstances leading to his meeting with the deceased in the morning the deceased died. There is nothing on the evidence to cause me to alter my finding that the accused way laid the deceased. The story that the meeting was purely fortuitous and that the knife with which the accused was armed just happened to be in his pocket at the time he left work is completely unacceptable and false. The accused had a grudge against the deceased based on the unfounded belief that the deceased had an affair with Fikiie. The accused nursed this grudge even after he had lost Fikiie and he deliberately set about and prepared himself for the murderous attack on the

attack on the deceased under cloak of darkness. In giving vent to his feelings the accused clearly thought that he would get away with the murder and showed this by the story he gave to his employer. The cumulative effect of the accused's jealousy, his belief that Fikile was having an affair with the deceased and the deceased's attitude towards the accused as testified to by the accused is not in my view such as to reduce the accused's moral blameworthiness. This was a premeditated murder stemming from feelings which the accused nursed over a period of some six months even when it was clear to him that Fikile no longer loved him. I find that extenuating circumstances have not been shown to exist in this case.

B. DUNN

JUDGE.