



# **IN THE HIGH COURT OF SWAZILAND**

CRIM. T. NO. 204/94

HELD AT MBABANE

In the matter between:

REX

VS

AARON KUNENE

BHEKUMUZI KUNENE

## **JUDGMENT ON EXTENUATING CIRCUMSTANCES**

15/03/95

I have convicted the two accused of murder. I am now called upon to consider whether there are extenuating circumstances. The onus is on the accused to establish on a balance of probability that there are extenuating circumstances in the present case. The accused were at liberty to tender evidence but did not.

The courts have defined extenuating circumstances as any facts which have a bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal capacity.

Defence counsel argued that the accused's ages are a factor to be taken into account in considering whether there are extenuating circumstances. The court must consider whether youthfulness per se can be an extenuating circumstance. The accused ages are 20 and 21 years. They are above 18 years, and in terms of Section 296 of Act 67 of 1938 they qualify to be sentenced to death. In the case of **SV LEHNBERG AND ANOTHER 1975 4 SA 553** the headnote reads as follows:-

"The death sentence ought only to be imposed on a teenager, who has committed murder, if it actually appears that he killed out of inherent wickedness. Such an approach does not mean that in such a case no onus rests on the accused with regard to extenuating circumstances. It only means that a teenager is prima facie regarded as immature and on that ground extenuating circumstances can be found unless it appears that the wickedness of deed rules out immaturity. The youthfulness of a teenager will serve as extenuating especially if other factors influences his personality on account of youthfulness. It also means that a person of 20 years of age or older can show by acceptable evidence, that he was psychologically immature to the extent that his immaturity could serve in extenuation"

The court must look to the evidence as a whole to decide if there are any facts which can be taken as extenuation in addition to the youthfulness of the accused. In **SV MANYATHI 1967 SA 435 AD AT P.439 LORD WILLIAMSON J.A.** said the following:

"To consider properly whether an accused person was such that his conduct was less blameworthiness that it might normally be obviously requires a consideration of the cumulative effect of all the relevant circumstances. A failure by a court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances in the case such as the present would amount to the court misdirecting itself on the question in issue".

In the present case accused no. 1 fell in love with pwl in 1991. The deceased did not approve of this affair. The affair continued despite the disapproval of the deceased. The deceased indicated that she wanted her daughter to marry another man. The man once went to fetch pwl from no.1 with a taxi. Although pwl and no. 1 were young, their affair was accepted by the community. At the time of the deceased death no.1's family had accepted pwl and no.1's wife. She was cooking officially as no.1's wife. Deceased came on the day she died and demanded her daughter pwl. Her intention was to take her to the man she wanted to marry her. To no.1 this meant the deceased was taking his wife whom she had married and accepted by his family and the community. Pwl also encouraged him to prevent her mother from taking her and hence the plan to kill the deceased was made. No. 2 who was a friend of no.1 was recruited to help no. 1 against the deceased who wanted to deprive him of his wife.

I come to the conclusion that the two accused thought the best way to prevent the deceased from taking away pwl was to kill her. They were also encouraged by pwl. Their youthfulness is also demonstrated by the fact that they revealed the murder within a short time. They did not attempt to deny or escape. I come to the conclusion that there are extenuating circumstances.

  
A.F.M. THWALA

JUDGE