IN THE HIGH COURT OF SWAZILAND

CRIM. CASE 37/97

In the matter between

THE KING

VS

1. ROBERT MUSA MDLULI

2. PATRICK WANDERBOY NGWENYA

CORAM : DUNN J.

FOR THE CROWN : J. MASEKO

FOR ACCUSED NO.1 : E. THWALA

FOR ACCUSED NO.2 : G. MASUKU

JUDGMENT ON EXRTENUATING CIRCUMSTANCES

15TH AUGUST 1997

The two accused have been convicted of the crime of murder.

Section 296(1) of the Criminal Procedure and Evidence Act No. 67/1938 provides in part.

Sentence of death by hanging shall be passed by the High Court upon an offender convicted before or by it of murder, ...

Provided also that where a court in convicting any person of murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the death sentence.

In S. v. LETSOLO 1970(3) S.A. 476 HOLMES J A said, at p.476.

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 distinct from his legal culpability. In this regard the 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 deciding (c) the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.

Such an opinion having been expressed, the trial Judge has a discretion, to be exercised judiciously on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme

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step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence. The possibility of such an alternative should be considered by the trial Judge, in view of the words "the court may impose any sentence other than the death sentence" in the proviso to sec. 330(1) of the Code. And it should be weighed with the most anxious deliberation, for it is, literally, a matter of life and death. Every relevant consideration should receive the most scrupulous care and reasoned attention; and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion, that is to say unless the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

The onus of establishing, on a balance of probabilities, the existence of extenuating circumstances rests on an accused person. In dealing with the question of extenuation, the court may look to the evidence led at the main trial and to whatever other evidence an accused may elect to lead specifically on extenuation, at this stage of the trial.

The accused in this case have given evidence on oath on the question of extenuating circumstances.

Accused No.1 has adopted the contents of the confession he made to the magistrate and whose admissibility was the subject of the trial within the trial. He states that the contents of the confession are the truth, and not what he was taught by the

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police as previously maintained. He is of course entitled at this stage of the trial to resile from whatever position he may have taken earlier in the trial. In the confession he stated that he and accused No. 2 were sent by Sikelela Kunene to go and try to get a motor vehicle. He states that Sikelela gave him a gun and showed him how to operate it. He was encouraged by Sikelela to use the firearm if necessary for purposes of getting a vehicle. Accused No.1 goes on to explain in the confession how accused No.2 then suggested that the firearm be used in order to take the deceased's vehicle. He points out that he hesitated for some time before first shooting at what he said was the deceased's foot. He thereafter shot the deceased in the shoulder.

Accused No.1 told the court that he is 22 years of age. From the court's own estimation that appears to be correct. 1 must, however, point out as I have done in the past that if the age of an accused person is to be relied upon for whatever purpose at this stage of the trial, the defence should ensure that proper and admissible evidence as to age is available. The evidence of an accused as to his age is hearsay evidence.

Accused No.1's homestead is at Ngwazini in the rural areas. In Manzini, he was drawn into Sikelela's company and car theft syndicate resulting in his being accommodated at Sikelela's homestead. He became part of Sikelela's household and all his meals and lodging were provided for. It is his evidence that the idea was that if they managed to

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steal a car, as happened on one occasion, he and the others would return the vehicle to Sikelela and

they would be paid for their services by Sikelela. The relationship of employer / employee between accused No.1 and Sikelela is demonstrated by what happened after Sikelela learnt of accused No.1's confession to Ellas Simelane. Sikelela stated that he did not wish to have anything further to do with accused. He, as it were, dismissed him from his employ.

The same, to some extent, can be said of the relationship between Sikelela and accused No.2.

Accused No.2 looked up to Sikelela. Sikelela is the man who had the wherewithal.

Accused No.2's own position at this stage of the trial is that he only became aware of the pistol when accused No.1 came up with the idea that the deceased's vehicle be taken. He places responsibility for the murder on accused No.1.

The fact that the accused were on their way to Mhlume to steal cars is not in dispute. There is merit in Mr. Thwala's submission that the decision to take the deceased's motor vehicle along the way to Simunye came about suddenly without any prior planning. The idea was to rob the deceased of his car but because of hesitation, inexperience and immaturity the accused bungled the operation and brought about the death of the deceased.

It appears to me that the accused are no good lay abouts (idle hands) who fell into the hands of Sikelela. These are

self-confessed car thieves and thugs. Sikelela provided food and lodging and expected results. He clearly-influenced the accused in their outlook of finding absolutely nothing wrong in moving about Manzini and the Republic of South Africa for that matter, stealing cars.

The accused's conduct is chiefly attributable to immaturity and vuluerability to the bad influence of the streetwise, seasoned and experienced likes of Sikelela and his ilk. All that there was for the accused if the deceased's car was taken was some reward and a possible continuance of food and lodging at Sikelela's homestead.

The absence of premeditation in the actual murder, the influence of Sikelela and his friends are factors which I consider reduce the moral as opposed to the legal blameworthiness of the accused persons.

I find that extenuating circumstances are present in this case .

B. DUNN

JUDGE