IN THE HIGH COURT OF SWAZILAND

CRIM.CASE. NO 63/96

THE KING

VS

JAMLUDI MKHWANAZI

CORAM : DUNN J.

FOR THE CROWN : MR. NGARUA

FOR THE ACCUSED : MR L. MAZIYA

JUDGMENT ON EXTENUATING CIRCUMSTANCES

16TH OCTOBER 1996

The accused has been convicted of the murder of Donkana Shiba on the 3rd April 1994. The court must now enquire into whether or not there are extenuating circumstances in the case.

The onus Of establishing, on a balance of probilities, the existence of extenuating circumstances rests on the accused. It is settled practice that in its enquiry, the court may decide the issue on evidence led at the main trial or on evidence led specifically on the issue at this stage of the trial or on a combination of both. It. is further settled, that any evidence led specifically on the question of extenuation may differ from the evidence led at the main trial. It is in the circumstances permissible for an accused who has throughout the main trial, maintained his innocence and denied all knowledge of the crime alleged against him to resile from that position if he so elects and

to give evidence on which he wishes the court to make a finding on the issue of extenuating circumstances. The procedure to be followed in the enquiry will, by and large, be determined by the defence. If the defence position is that sufficient evidence of extenuating circumstances is apparent from the main trial and such evidence is not challenged by the crown, it will in most cases be sufficient merely to refer the court to that evidence without any further evidence from the accused. Where no such evidence is apparent or where, if it does exist, it requires explanation for consideration in a particular context, it may be necessary for a decision to be taken by the defence whether or not to call the accused to give evidence on oath. In the present case, Mr Maziya who represents the accused elected to address the court from the bar on evidence led at the main trial. Before dealing with his submissions, it-might be useful to set out the words of Holmes JA. in S V. LETSOLO 1970(3) S A 476 (A) dealing with the matters to which the court will have regard in considering the question of extenuating circumstances. The learned judge stated at pp 476F - 477B -

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 blameworthness of the accused, as distinct from his legal cupability. In this regard a trial Court has to consider-

a) whether there are any facts whien 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 judgement. 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 judicially 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 step of ordering him to foreit 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

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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.

Mr Maziya's first submission is that the accused had been drinking on the Sunday when he was at his sister's place. He has urged the court to find that the accused must have been drinking from the early morning!: of that Sunday until the early evening when he left the homestead. The second submission is that there has been no evidence of premeditation in this case. There was no evidence to suggest that it was anticipated that the deceased would be travelling upon that particular route at that particular time or that the witness Lindiwe would be met at the place she was found. This set of facts, taken together with the evidence of Shiba which was accepted by the court that he was informed by the accused that the accused had entered the deceased's motor vehicle with his gun cocked and that the gun went off accidentally, indicated it was submitted the absence of premeditation. The absence of premeditation was, it was submitted, also evidenced by the absence of any evidence suggesting any plan between the accused and somebody else that the deceased should be killed. The final submission, also based on what Shiba stated he was informed by the accused, is that the intention of the accused was to rob the deceased and not to kill him.

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The crown's position is that there are no extenuating circumstanced to the case.

Some difficulty is posed by some of the submissions made by Mr. Maziya. The submission that the accused must have been 1 drinking from the early morning until the evening is not supported by any evidence. There was a beer drink at Thokoza's homestead. The accused did drink. How much he drank and for how long he drank and what effect the beer had on the accused are matters that have not been established. No attempt was made to solicit such evidence in the main trial. This court cannot be asked to speculate on these matters nor is defence counsel permitted to give evidence from the bar under the guise of making submissions. The other point is with regard to the gun having

gone of accidentally. This is what Shiba states he was told by the accused. The accused denied that such a statement had been 2 made by him. Shiba's evidence has been accepted by the court. The truth of the accused's statement to that effect would of course be relevant to the present enquiry. The accused did not deal with it in his evidence nor has he seen it proper to deal with it at this stage of the trial. Here again the court is being asked to speculate on what the position was.

Turning to the submission on the absence of premeditation, similar difficulties arise. Mr Maziya has referred to Lindiwe's evidence and submitted that her meeting with the two men was purely fortuitous. Lindiwe has not identified

the two men. The accused has not stated that he was one of the two men. One cannot conclude that what was told to Shiba was a continuation of events from when Lindiwe met the two men. The accused has elected not to give any evidence which may explain the circumstances under which the events which he described to Shiba took place. How and why did the accused get into the vehicle?

Why was it necessary to have the gun cocked? Why if the intention was to rob, was the vehicle not taken at whatever time the accused first met with the deceased? These are some of the questions which in the circumstances of this case can only be answered by the accused. Evidence on these matters would provide a basis for a decision on the existence or otherwise of extenuating circumstances.

I am alive to the fact that in deciding the question of extenuating circumstances consideration must be given to the cumulative effect of what ever factors are placed before the court. The position in this case is that the factors put forward by Mr Maziya all have the basic flaw that they are not supported by the evidence in the main trial. The submission based on the gun having gone off accidentally does not put an end to the enquiry, for the court has not been informed of the circumstances under which that took place. The fact that a gun goes off accidentally may or may not provide the basis for a finding or extenuating circumstances, depending on the circumstances of each particular case. Sight cannot be lost in the present case of the robbery of which the accused has been convicted.

The accused has not in my view discharged the onus of proving the existence of extenuating circumstances.

B. DUNN

JUDGE