IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 125/98

In the matter between

REX

And

BONGANI MKHWANAZI & 3 OTHERS

Coram S.B. MAPHALALA - J

For the Crown MR. J. MASEKO

For the Defence MR. S. MAGONGO

RULING ON EXTENUATING CIRCUMSTANCES

(02/02/01)

Maphalala J:

At this stage of the proceedings the court has to establish whether there are extenuating circumstances for the accused to escape the sentence of death as prescribed by the provisions of the Criminal Procedure and Evidence Act (as amended). The proper approach of determining extenuating factors was enunciated in the case of the Appeal Court in Daniel Dlamini vs Rex Appeal Case No 11/98 where their Lordships after considering a number of decided cases (Biyana 1938 EDL 310 at 311, S vs Letsolo 1970 (3) S.A. 476 (A), R vs Fundakubi and others 1948 (3) S.A. 810 at 818 and the landmark decision of the Botswana Court of Appeal in David Kaleletswe and others vs The State Criminal Appeal 26/94). They came to the conclusion that no onus rests on the accused person to prove extenuating circumstances. That it was the duty of the court. In that case Daniel Dlamini (supra) their Lordships had this to say:

"We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on an accused person and, as mentioned earlier herein, the question of onus is really inappropriate to the enquiry. This is made clear by what was said in that case about the duty of the Court".

"We note in particular the significance which Scheiner J A ascribes to the "subjective side" and that no factor not too remote or too faintly or indirectly related to the commission of the crime" and which bears on an accused's moral guilt can be ignored (R vs Fundakubi (supra).

It seems to us that there is therefore an over-riding responsibility on the Court and its officers - Counsel - to ensure that the second phase of the process - the enquiry as to the presence or absence of extenuating circumstances - is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is inter alia to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above... when all the evidence is in, the Court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating ...This would include evidence tendered during the second phase enquiry. It will then make its "value or moral judgement".

In casu the accused gave evidence under oath to prove that there are extenuating circumstances. His

story although it was not put to any of the crown witnesses and only came at this stage is as follows: He told the court that on the night before the commission of the offences he went to his traditional healer (inyanga) for consultations. He has been seeing this inyanga for sometime in respect of various maladies. There Had developed a strong bond between himself and his inyanga, which is akin to that of doctor and patient. The name of the inyanga was one Sketi Jackson Dlamini who was to be the fifth crown witness but was not called by the Crown. After he was treated for his complaint that day the inyanga told him that a certain man by the name of Elliot Dlamini was bewitching his family (inyanga) and as a result of this many of his children and those of his brothers have died. The inyanga then asked if the accused would come to their assistance. The inyanga asked him if he could help them in killing this troublesome man. The accused was taken aback and at first declined to be involved in this scheme. However, after much persuasion he agreed to be involved. The court asked him what made him agree and he answered that because he felt that he owed the inyanga for his treatment he was obliged to help the inyanga. He was then given directions as to where he would find the man. He was also given a gun. The inyanga further "cleansed" him with "muti". After the cleansing ceremony he felt awesome powers and had so much courage that he was prepared for anything. He told the court he was not himself after then. He was in some trance.

The following day he. proceeded to Swaziland where he committed the offence by killing the deceased and injuring the other man. He then crossed the border back to South Africa and handed the gun to the inyanga. He went back home to Durban after committing the offences.

It appears to me that the defence submissions on this question are based of this so-called "automatism" (if one were permitted to use this word) and the accused age. It was submitted that the accused was 22 years old when he committed the offence. It was argued that the influence of the "muti" which was administered by the inyanga on the accused was such that he could not exercise his own faculties and reason. The court was told that the accused person believed in the power of traditional medicine such that he would not be held responsible for his actions.

It was further argued in this regard that this story was to be put to PW5; however, the Crown did not call him. I must say, that this is a fallacious proposition to make in that throughout the trial accused was denying having committed these offences or for that matter to have been to Swaziland. His defence was that he was abducted from South Africa by the Swaziland Police and brought to this country where he was forced to make a confession against himself.

My view on this matter is that this story is a complete fabrication and it would be folly for this court to accept it for purposes of establishing extenuating circumstances. This court is not going to be hood-winked into believing it. I thus reject it in toto as a complete fabrication not worthy of any consideration. Even if one were to examine it one finds so many inherent improbabilities. The accused tells the court that the before the commission of the offences he was given the gun by the inyanga and the following day he crosses the border to Swaziland where he committed the offences. This begs a question as to who taught him as to how to use it as he had told the court prior to this; he has never been involved with such things. He portrayed himself as an innocent young man from Mlazi Location who was unduly influenced by an older man to commit these offences. With the greatest respect, I am unable to accept this story.

Now coming to the accused age as an extenuating factor. The court was told that when the offences were committed the accused was 22 years old. In this connection I have sought refuge in South African decided cases. It appears that in the age group between 18 and 21 the courts in South Africa have invariable found extenuating factors depending on the facts of each case (see S v Lekaota 1978 (4) S.A. 684 (A) and S v Lehnberg 1975 (4) S.A. 553 (a)). It would appear to me that the age group above 21 years are for all intents and purposes regarded as adults. I thus come to a finding that the age of the accused in the present case does not constitute extenuating circumstances.

In the totality of things, therefore I find that there are no circumstances in this case.

SENTENCE

Before passing sentence in this case I wish to make a few remarks. These two offences indeed were, heinous offences. The deceased, an old man was killed in cold blood by a man he did not know who deceived him that he was to go with him to South Africa as his daughter was in trouble. The complainant in Count two nearly died after being shot three times by a man he did not know. His only sin was to help this man in finding the deceased. The complainant was grievously injured such that he told the court when giving evidence that he had not recovered two years after the fact. These offences were committed in such a chilling manner and a lot of calculation on the part of the accused was applied. Surely, the courts ought to intervene to protect innocent citizens from unknown gun-totting bandits with unclear motives.

Your attorney has submitted before the court, that in imposing a sentence I should consider imposing a life sentence. However I must tell you that I cannot do that because according to the law I am enjoined by Section 296 of the Criminal Procedure and Evidence Act to impose the ultimate sentence, being that of hanging.

After soliciting the advice of counsel in respect of how to structure the sentences, my view is that I am going to sentence you separately.

Count 2

I sentence you to ten (10) years imprisonment.

Count 1

In terms of the Section 297 of the Criminal Procedure and Evidence (as amended), you are hereby ordered to be returned to a place for safety where you will be kept until the day of which you will be hanged by the neck until you are dead.

May the Lord be with your soul.

S. B. MAPHALALA

JUDGE