



IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.3/99

IN THE MATTER BETWEEN:

REX

VS

SIPATJI MANDLA MOTSA

CORAM	:	MASUKU J.
FOR THE CROWN	:	MS S.W. NDERI
FOR THE ACCUSED	:	MR M. MAHLALELA

JUDGEMENT ON EXTENUATING CIRCUMSTANCES

13/03/2000

The accused person has been found guilty and convicted of murder. Section 295 of the Criminal Procedure and Evidence Act 67/1938 reads as follows:-

- (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

- (2) In deciding whether or not there are any extenuating circumstances, the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.

Extenuating circumstances have been described by Nathan C.J. in the case of **R v VILAKATI AND ANOTHER 1977 – 78 SLR 133 AT 134 D** in the following terms:

“I considered the question of extenuating circumstances, in relation to this Order in my judgement in R v ENOS KHUMBULA SHONGWE 1977 – 1978 SLR 60, and there came to the conclusion that concept bears very much the same meaning as it does in murder cases, the question being whether there are any circumstances, not too remotely or indirectly related to the commission of the crime which bear upon the accused’s moral blame worthiness in committing it.”

Extenuating circumstances may also be referred to as any factors bearing on the commission of the crime, which morally, although not legally, reduce an accused person’s blameworthiness or degree of guilt.

In the case of **DANIEL DLAMINI v R** Appeal Case No.11/98, Leon J.A. states as follows at page 2 to 3.

“In these circumstances, it seems to us to be quite inappropriate to determine the issue by raising the question of onus. The duty falls upon the Court”.... we find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on an accused person and..... the question of onus is inappropriate to the enquiry.

In the case of **DAVID KALELETSWE AND 2 OTHERS v THE STATE** Criminal Appeal 26/94, the Botswana Court of Appeal, whose decision has been adopted by our Court of Appeal stated as follows:-

*“We note in particular that there is therefore an overriding 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 enquiry is *inter alia* to probe*

*enquiring mind. The purpose of the enquiry 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 of the enquiry. It will then make its "value or moral judgement."*

Holmes J.A. in the case of **S v LETSOLO 1970 (3) SA 476 (AD)** stated the issues that the trial Court must consider on the question of extenuating circumstances and these are stated at paragraphs G –H on page 476. These are:

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

In this phase of enquiry, Mr Mahlalela, fulfilling his duty of assisting the Court, submitted that there were two extenuating circumstances in this case, namely immaturity and that the accused acted in the way that he did because he subjectively was of the belief that the deceased was responsible for breaking into the accused's house and of stealing therefrom.

In support of the first factor, it was submitted that the manner in which the accused acted showed signs of immaturity. Miss Nderi, correctly argued that this was not demonstrated anywhere during the hearing of the case. I agree. People who are licensed firearm holders are not expected to conduct themselves immaturely regarding the firearms they are licensed to possess. In fact, they are granted licences on the basis of their maturity amongst other considerations. There is no indication in the

state that he knew that injuries inflicted using firearms are normally fatal and further conceded that he foresaw a risk to the deceased's life. I hold therefore, on an objective assessment of this case that immaturity, as an extenuating factor should fail.

Regarding the accused's subjective belief that it was the deceased who broke into his house and stole items therefrom, I find merit. This is clearly borne out by the evidence. I find that this subjective belief did bear upon the accused's moral blameworthiness in committing this crime. Miss Nderi also supported this finding, properly so in my view.

Miss Nderi further submitted that the accused's anger also ought to be regarded as an extenuating factor since it is clear from the evidence, that amongst other things, the accused was extremely angry at the deceased hence he committed this crime. Miss Nderi, in support of this submission, referred the Court to the case of **S v MANYATHI 1967 (1) SA 435 AD**, where anger, in addition to other factors was considered as an extenuating factor. For her sense of justice and fairness, Miss Nderi must be commended.

In the circumstances, I find that the subjective belief that reigned in the accused's mind about the deceased being the culprit who broke into his house, together with his anger, in my view constitute extenuating circumstances sufficient to abate the accused's moral blameworthiness. The accused will therefore escape the mandatory sentence prescribed in our Criminal Procedure and Evidence Act, 1938, as amended and it is so ordered.



T.S. MASUKU
JUDGE