

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Crim. Case No.

195/05

In the matter between

REX

vs

SIFISO DUMSANI KHUMALO

Accused

CORAM

Mamba J

FOR Crown

Mr. M. Nxumalo

FOR Accused

Mr. M. Dlamini

Heard and Delivered

8<sup>th</sup> June, 2011

Ruling on Extenuation, Mitigation and Sentence

[1] Mr Khumalo, upon your conviction for murder on 28 April 2011, your counsel successfully applied for a postponement till today in order for him to have time in preparing to assist the court on whether or not extenuating circumstances do exist in your case. In view of the importance of the pending inquiry -on extenuation - and the fact that the court was to be on recess for the whole month of May, I allowed the application and the matter was postponed to today.

[2] Extenuating circumstances have been described as those factors that are not too remotely connected with the commission of the offence and have a mitigating bearing on your moral blameworthiness. In other words, they reduce or abate your moral blameworthiness; leaving your legal guilt or liability intact. See R v ZABINE MKHOMBENI DLAMINI, 1970-1976 SLR 440 at 441E-H.

[3] You have given evidence on oath. Three factors in that evidence are relevant in this inquiry namely : (a) your age, (b) your intoxication and (c) your reason for killing the deceased, your erstwhile friend and confidant. It is of course trite that you bear no burden or onus to satisfy this court on the existence or otherwise of extenuating circumstances in this case. The duty lies with me. In doing so, I am not restricted to or bound by the evidence that you have just led, but I have to consider all the evidence that is before me in this case. See DANIEL MBUDLANE DLAMINI v REX (Court of Appeal 11/1998, MPOSTOLI ZAZA SIMELANE v REX High Court Cr. Appeal 25/2008, both judgments yet unreported. However, in considering your evidence, I do not think that I am entitled to accept all and every bit of what you have said. This is also true in respect of the issues in mitigation which is the next step after this enquiry. I am mindful of the recent judgment of our Supreme Court in SITHEMBISO SHONGWE v REX, appeal case number 21/2010 delivered on 31 May 2011, where Justice Farlam JA with whom Dr. S. Twum JA concurred, stated obiter that "...it is not permissible to have regard to what was said by the appellant in his plea in mitigation in the High Court. In this regard I agree with the ratio decidendi of the decision of

the South African Appellate Division in *S v MOOI and Another*, 1990(1) SACR 592 (A) in which it was held at 61 OH that

"evidence given in extenuation can not at any stage be relied upon to set aside, vary or substantiate the preceding finding on the guilt of a person on a murder charge. This conclusion, one need hardly add, does not affect the right to apply to lead further evidence..." Whilst this dictum refers to a court of appeal, it applies with equal force to a court of first instance.

I am therefore entitled to take into account or accept your evidence led in extenuation or mitigation only insofar as it is consistent with the findings of fact I have already made in rendering the verdict. Those findings remain and may not be disturbed by your evidence at this stage.

[4] The evidence in this case is that at the time of the commission of this offence you were in your early twenties having been born around 1981. This means that you were about 24 years old at the time of the commission of the offence in 2005. I note that in your evidence today you have said you were about 21 years old at the time. I do not think a firm finding on this issue is essential for purposes of this enquiry. Whilst I cannot say that you were a baby at 24 years, I am certain that you could properly be described as youthful.

[5] There is also the unchallenged evidence, that you had taken some intoxicating liquor in the form of castelo wine at the time of the commission of this offence and you were intoxicated. I accept that. I,

however, reject your evidence as false that you killed the deceased after he had attacked you with a knife. The findings of this court is that you killed him in order to silence him from exposing your identity and criminal past. Your initial version of course was a complete or total denial of having killed the deceased. Your suggestion that you acted in self-defence is clearly a lie and an after thought and is hereby rejected as it is inconsistent with the findings of fact this court has already made.

[6] I have referred above to the reason why you killed the deceased. You perceived him and his new-found friends as a threat to your safety. Whilst there was no evidence that the deceased intended to expose your identity and past life, you honestly, even if mistakenly, believed he would do so. Based on this belief, you decided to eliminate him to save yourself. You acted on your inherent animal instinct of self-preservation.

[7] Not without any reservation, I am of the view that your youthfulness, intoxication and reason or motive for killing the deceased, taken and considered cumulatively do constitute extenuating circumstances in this case. Each of these facts taken individually and separately do not constitute such circumstances though.

[8] In mitigation of sentence I take in your favour the following:  
(a) Your age;

(b) intoxication;

(c) That the deceased was once your friend. His death will always, trusting you have a conscience, forever haunt you-that you killed someone who was once close to you;

(d) Your personal and family circumstances which your counsel has urged me to consider and the interests of justice as a whole. That, however, must be taken and contrasted and compared with the following.

(i) The heinousness or brutality of the offence you committed. You killed the deceased by striking him on the head with an axe more than once.

(ii) Your motive for killing him. You wanted to keep a close and tight lid on your identity and criminal past in South Africa. But there was no evidence that the deceased wanted to expose this. You acted on your own suspicions.

(iii) After murdering the deceased you wrapped his corpse in a blanket and carried it in a wheelbarrow and hid it away from his house in an attempt to distance yourself from his murder. The corpse was clad only in what was described in evidence as a BVD - not a Bovine Viral Disease or Boy's Ventilated Diapers, but a pair of men's trunk in the nature of a Boxer brief that derives its name from its manufacturers; Bradley Voorhees and Day. This court cannot ignore that after murdering the deceased you looted his belongings and gave one of his pair of trousers to Wethu as a gift. All your actions were heartless and savage.

[9] Your case cries out for a considerable term of imprisonment and having considered the nature of the offence, the interests \_ of society and justice and your personal circumstances, I am of the view that a term of 15 years of imprisonment will meet the justice of this case. This sentence is backdated to the 18<sup>th</sup> March, 2005; that being the date on which you were arrested and taken into detention.

**MAMBA J**