

IN THE HIGH COURT OF SWAZILAND

CASE No. 25/10

HELD AT MBABANE

IN THE MATTER BETWEEN:

SIBONISO MAZIBUKO

SIYABONGA SIERA MOTSA

VS

THE KING

CORAM

Hlophe, J

For Crown

Mr. M. Nxumalo

For Defence

Mr. B.J. Simelane

JUDGMENT ON THE EXISTENCE OR OTHERWISE OF EXTENUATING CIRCUMSTANCES AND SENTENCING

1. On the 24th February 2010, I handed down a judgment in this matter wherein I found the two above accused persons guilty of murder and robbery.

2. Following subsequent addresses or submissions by both counsel, I came to the conclusion that on the question of the existence or otherwise of extenuating circumstances, there were such circumstances. I by and large agreed with the submission by Mr. Simelane for the accused persons, that extenuation in the matter could be found from the fact that the accused persons were 16 and 17 years respectively which brought about the legally recognized extenuating circumstances called youthfulness and immaturity. I also found that over and above these circumstances there was also that they were actually found guilty of murder on the basis of common purposes which indirectly means that their degree of participation was not as high as that of the fourth accused person and the fact that evidence does not therefore establish their intention as *dolus directus* but clearly as *dolus eventualis*.

3. In **R vs Hugo 1940 WLD 285 at 286, Schreiner J** (as he then was) attempted to define extenuating circumstances by relying on the dictionary definition of same which says that it is "circumstances which lessen the seeming magnitude of an offence which tend to diminish culpability". The said Learned Judge however was quick to argue that such a definition was not very helpful because for one to consider a circumstance as having the effect of lessening culpability, one must know what the ordinary degree of culpability is. The Learned Judge further observed the fact that simply

because one can imagine worse or diabolical murders than the one under consideration does not or would not make one conclude that extenuating circumstances are present.

4. In my view the most helpful definition was that advanced by **Lansdown JP** in **R vs Biyana 1938 EDL 310** who said that,

"An extenuating circumstance...is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt."

5. In **S vs Letsalo 1970 (3) SA 476 (AD) at 476 G-H, Holmes JA** stated the following:-

"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 a 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 in 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.

6. I have no doubt that the accused persons in this matter had in their favour certain facts which lessened their moral blameworthiness on the basis of their youthfulness for in my view it would take an immature person to allow himself to be directed to commit serious crimes as those the accused are shown to have been directed to commit by the fourth accused who appeared an accomplished criminal and eventually escaped from lawful custody. The absence of factors justifying a finding of *dolus directus* only puts the cumulative effect of the factors lessening the moral blameworthiness of the accused in this matter beyond doubt. According to **P.M. Hunt, The South African Criminal Law and Procedure Juta and Company, 1982** at pages 384 and 385 respectively, absence of factor establishing *dolus directus* and the youthfulness of an accused persons are examples of extenuating circumstance.

7. These factors were well established herein and I have no doubt they had a bearing on the accused persons' state of mind at the commission of the crime.

8. I have therefore come to the conclusion that there were extenuating circumstances in this matter which lessened the blameworthiness of the

accused. I can only add by way of emphasis that it was in fact mere consensus that extenuating circumstances did exist herein.

Sentence:

9. As concerns the issue of sentencing I must commence by thanking both counsel for their invaluable assistance in the submissions they made including the authorities they referred me to.

10. By way of comment, I must say that this stage is difficult in any criminal trial because the Judicial Officer is required to balance three competing interests which are the interests of the offender, those of the community or society as well as the crime itself. These competing interests are in law called a triad.

11. The idea behind sentencing is that none of the foregoing interests should be given more and or undue consideration over the others. It is for this reason that in a number of cases such as **R vs Zinn 1969 (2) SA 537 (A)** sentencing should not be approached in anger nor should the sentencing court have misplaced pity. In fact the authorities concerned talk of the sentencing court having to maintain a delicate balance between the said competing interests. This is what I set out to achieve in the sentence I meted out against the accused persons in this matter.

12. As concerns the interests of the accused persons I was informed, without it being disputed, that both of them were 16 and 17 years of age respectively at the time of the commission of the offence. This it was submitted means that the court has to be merciful to them from the point of view of their having been youthful and immature and therefore impressionable at the time, as well as the fact that they still have a long life ahead and could therefore reform and become better citizens in future. The thrust of the argument being that this court should give them a sentence that gives them a chance in life. This I must say I did take into account and construed it in the accused persons' favour.

13. I was further urged to take into account, and I did in the sentence I pronounced, the fact that both accused persons were first offenders who had been good all the years of their lives until the day they committed the offences forming the subject matter of these proceedings.

14. I also took into account the fact that their degree of participation in the murder offence in particular was not as deep as that of the fourth accused person who rendered the fatal blow. In short, I took into account that their liability for the crime of murder lied more on the doctrine of common

purpose as in my view they had, by being armed and setting out to rob, foreseen that such weapons could be used, even with fatal consequences should there be resistance thereto but carried on or persisted to associate themselves with the plan without caring or with recklessness whether or not such consequences do result.

15. I was further urged to take into account, and I did, the fact that the crimes for which the accused persons were convicted of were not pre-planned but same arose at the spur of the moment with the accused persons trying to take what they considered to be a chance. This consideration and the others raised above made me consider that the sentence I give them should not be one that breaks them but one that reforms them. This consideration however had to be taken in context which is what I tried to do.

16. Whilst I had to consider the foregoing, particularly those in the accused persons' favour, I did not have to lose sight of the fact that the accused persons had been found guilty of a serious offence. Society requires to be protected from people like the accused persons who would want to keep them in perpetual fear. This expectation therefore requires that such people be kept away for a long time.

17. Besides being serious, the offences concerned are prevalent as there is hardly a week that ends without a robbery or murder being reported in the country. In such circumstances a deterrent sentence becomes a must for the courts to give so that a proper message is sent out there to other would be offenders.

18. The accused persons did not show any remorse but instead sought to maintain their stance of dissociating themselves from the crime even after overwhelming evidence had been availed.

19. I further considered the fact that the deceased had not provoked the accused persons in anyway. He was only unfortunate to have his car develop mechanical problems at that place and time.

20. Although each matter has to turn on its own circumstances, I note that a murder arising in the course of a robbery has always been treated seriously by our courts. See in this regard **Rex vs Maponi Celani Ngubane and Others Criminal Trial No.46/2002** where the accused who killed the deceased in the course of a robbery was sentenced to a life imprisonment. I could not however give a similar sentence taking into account the age of the accused persons at the time of the commission of the crime as well as their

degree of participation. On the sentences for murder as a serious offence, see also such cases as **Rex vs Dumsani Fakudze Appeal Case**

No.9/2000 and **Rex vs Khanyakwezwe Dlodlu High Court Case**

No.6/2008.

21. Similarly on the robbery counts I considered previous sentences as can be seen in previous judgments where sentences often range between 6 and 10 years in serious robbery cases like the present. See in this regard such cases as **Rex vs Maponi Celani Ngubane [supra]. Rex vs Msibi Cobra and 4 Others High Court Case No.66/1990,** as well as **Rex vs Mthembu Richard and Others High Court Case No.88/1990.**

22. As the offences were committed as part of a single transaction, I ordered that the sentences imposed on the accused persons run concurrently. Again taking into account the age of the accused persons at the time, including the submission by the crown that they were first offenders, I ordered as well that their sentences be backdated to the day of their arrest.

23. By way of summary this is the sentence I imposed on the accused persons:-

1. On Count One:-

Both accused are sentenced to fourteen (14) years imprisonment.

1. On Count Two:-

Both accused (1 & 3) are sentenced to seven (7) years imprisonment.

3. The sentences aforesaid are to run concurrently.

4. Both sentences are backdated to take effect from the dates of their arrests which are respectively the 9th and 8th January 2008.

Dated at Mbabane on this the ..5th...day of April 2011.

N.J. HLOPHE
JUDGE OF THE HIGH COURT