



IN THE HIGH COURT OF SWAZILAND

JUDGMENT
On extenuation

Case No. 428/10

In the matter between

REX

Crown

and

MTHOBISI BOYBOY DLAMINI

Accused

Neutral citation: *Rex v Mthobisi Boyboy Dlamini* (428/10) [2012]
SZHC 138 (20 JUNE 2012)

Coram: Mamba J

Heard: **20 June 2012**

Delivered: **20 June 2012**

[1] Criminal law - murder - extenuating circumstances - test subjective.

[2] Criminal law - Murder - youth per se not an extenuating circumstance

[3] Criminal procedure - extenuating circumstances - cumulative effect of factors to be considered in determining whether such qualify to be such circumstances. Extreme or enormous stress, anger, frustration, youthfulness, immaturity, feeling of

helplessness and rejection – may cumulatively qualify as extenuating circumstances.

- [1] The accused, a 26 year old male has been convicted of the crime of murder. He murdered his 10 months old son and this occurred on 11th September 2010, when he, the accused, was 24 years old.
- [2] The circumstances under which this crime was committed are common ground. The only issue, for purposes of the judgment is whether there are, from the established or proven facts, extenuation circumstances. Counsel for the crown has submitted that there are no such circumstances whilst counsel for the defence has submitted to the contrary.
- [3] It is perhaps appropriate at this stage to remind one's self or to define or set out what constitutes these facts or circumstances. Although speaking obiter, Schreiner JA in *Rex v Fundakubi and others, 1948 (3) SA 810 at 818* stated that "it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out of

consideration,” this has been, over the years, taken as a definition of extenuating circumstances, generally. And “it is well established that a trial court should consider the cumulative effect of possible extenuating circumstances and not deal with such facts in isolation, and it is on this basis that ... those incidents of this case which fall within the description of extenuating circumstances.” (Per Johnston AJ in *R v Mafa Mabuza and Another*, 1970-1976 SLR 51 at 51-52) See also *Philemon Mdluli and others v R*, 1970-1976 SLR 69 at 75D where the court referred with approval to what Holmes JA said in *S v Letsolo*, 1970 (3) SA 476 (A) that “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 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 judgment. 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 forfeit his life or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformatory aspects of sentence."

See also *R v Sipho Isaia Lukhele*, 1970-1976 SLR 162, *R v Zabine Mkhombeni Dlamini*, 1970-1976 SLR 440, *R v Mthembu*, 1982-1986 (1) SLR 17 and *Rex v Sifiso Dumsani Khumalo*, Crim case 195/2005, a judgment of this court delivered on 8th June, 2011 and the cases therein cited.

[4] Now, to the facts of the present case. The accused stated in court and in the statement he made to a magistrate after his arrest that he murdered the deceased out of extreme or

enormous stress, anger and emotion, state of helplessness, alienation and rejection. These were brought to bear on him by the conduct of the mother of the deceased and her mother; deceased's grandmother. He stated that he very much loved the mother of the deceased but was extremely frustrated by what he viewed as interference in their affair by her mother. The mother disapproved of their love affair. She told them both that it was against her religious beliefs that they should be engaged in a love affair and cohabit outside wedlock and whilst the deceased's mother was pursuing her university education. She called upon them to end the affair. In particular she told her daughter to stop visiting or seeing the accused. She reasoned that such visitations could result in her further pregnancy outside marriage. The accused protested against this decree but unfortunately, at the end, she was convinced, by the deceased's mother's actions that she was ready to end the said love affair. On the day he took the deceased and decided to murder him, the deceased's mother refused to go with him to his place to discuss their love affair and for a long time, she had refused to have sex with him. This convinced him that their love affair was over, thus the spirit of rejection and worthlessness. He said noone cared for him. He decided that the best way out of this morass or situation was to kill the deceased and thereafter kill himself too.

He succeeded in killing the infant but failed to take away his own life.

[5] Whilst the deceased's grandmother's demands or advice to her daughter cannot be said to have been unreasonable, I cannot, objectively speaking, say the accused's reaction thereto was not unreasonable. The reality of the situation though is, that is how he reacted to it. It is this subjective or personal response that carries the day in this enquiry. Whilst it may not have been a reasonable reaction, it was, however, not so unreasonable as to be not worthy of any consideration or belief. It further demonstrates his level of immaturity and lack of sophistication. At school, he went as far as standard five.

[6] Again, I should point out that at 24 years, the accused was not so young as to lack proper judgment. He was, nonetheless, youthful at that age and whilst youthfulness per se may not be considered as an extenuating circumstance, (See *Nkosi, Sifiso v R, 1987-1995 (4) SLR 303 and Sifiso Khumalo (supra)*), I have no doubts that the accused felt, subjectively, stressed, angered, betrayed, alienated and frustrated. He described his situation in this emotive language. Cumulatively, these factors and his

immaturity and youthfulness constitute extenuating circumstances and I so find or hold.

MAMBA J

For the Crown:

Mr. S. Dlamini

For the Defence:

Mr. J. Mavuso