IN THE COURT OF APPEAL OF SWAZILAND

APP. No. 49/85

In the natter of:

MJONISENI MKHABELA Appellant

and

REGINA Respondent

CORAM: VAN WINSEN J. A.

WELSH J. A.

AARON J. A.

VAN WINSEN J.A.

JUDGEMENT

(13/3/36)

Appellant was convicted of the murder of a child, Njani Kunene, and, in the absence of a finding that extenuating circumstances existed, he was sentenced to death. His appeal is directed solely to the finding of the High Court that no extenuating circumstances are present in his case. The facts relevant to the issue of extenuating circumstances are the following.

Appellant made a statement to a Magistrate which amounted to a confession implicating him in the murder of Njani. Despite objection by counsel for appellant at the trial, the Court allowed the confession to be proved. Nothing turns on this issue since in his evidence before the Court, appellant confirmed much of the contents of the confession.

It appears that Njani was a child of some seven years of age and was the son of appellant's sister. Appellant had in the spring of 1982 requested Ijani's mother to allow the child to live with him in order to look after his cattle. She approved of this proposal and from then on Njani stayed with appellant.

In 1983 Chief Shongwe, under whose jurisdiction appellant lived, approached appellant and asked him to allow Njani to go to his, the Chief's, homestead to herd the Chief's cattle, but he refused the request as he needed the boy himself. Subsequently he was again approached on behalf of the chief by one Maniki Dlamini who asked if appellant understood what the chief was saying. This question elicited an angry response from appellant who stated that the child was not his. Thereafter the chief ordered him to come at about 5p.m. with his nephew to "the end of the grazing land fence." He complied with the chief's request. In his evidence in-chief he said that he was not told why he should bring the boy. However, in his confession he had said that Maniki had told him that the boy was required for muti to strengthen the chief, and he confirmed this under cross-examination in the High Court.

When he arrived at the fence, seven people were there, including the chief, a sangoma and soneone whom he described as "a Zionist." Both he and the boy were given muti and they were led down the valley to the rocks near the river where the boy was throttled and, without going into detail, his body was subsequently put into a sack. There is no evidence to show that appellant took any part in the killing of his nephew.

The motives operating on the mind of appellant in regard to the handing over of Njani appear more fully from his confession.

3

Therein he says that after he had refused the first tine to hand over the boy and when he was subsequently again apprcached by the chief, he was offered an ox by the latter if he would agree to the handing over. At the sane tine he was threatened that if he maintained his refusal he would be chased away from the chief's jurisdiction. Despite this promise and threat he did not give his consent to the handing over. The pressure on him was, however, maintained by another visit from Maniki. On this occasion he seems to have thrown in his hand and he responded to the renewed request by saying "since they had appointed me as the chief's runner they can do as they please with the child as my leaders but I was not happy about it." After appellant had already handed over Njani he was promised five head of cattle by the chief and E200 by Maniki.

Appellant gave evidence in extenuation of his conduct and testified the he had lived all his life within the jurisdiction of chief Shongwe and the latter had threatened to drive him. out if he failed to comply with his, the chief's, request. He further testified that he was cscared of the chief whom he regarded as his senior and of whom he was a subject. He said he had no option but to obey him. He was also scared to report to the police the fact that he was being threatened by the chief.

The trial court held that appellant had failed to discharge the onus resting upon him to prove the existence of extenuating circumstances. The fear that he would be expelled from the jurisdiction of the chief did not, in the opinion of the Court, serve to reduce his moral blameworthiness since it only served his self-interest.

In my view this is too harsh a view to take of appellant's conduct. The appellant appears to be a simple peasant who at no stage in his life enjoyed the benefit of any formal education.

4

The bonds of tradition could be expected in such a person powerfully to affect the course of his conduct. Indeed it is to his credit that he resisted the pressure brought to bear upon him to the extent that he did. To expect him to report his chief to the police and inform then of the latter's plans in regard to the boy would, I think, be flying in the face of the tradition of loyalty to his chief and would would have constituted a course of conduct that would have taxed the emotional resources of a much more sophisticated individual than appellant was.

That appellant played no part in the murder of his nephew is also a factor, which tends towards extenuation. All the above circumstances qualify to be regarded as "factors not too remotely or too faintly or indirectly related to the commission of the crime" with which he was charged, Rex vs FUNDAKUBI 1948 (3) S.A. 810 (A) at page 818. Collectively regarded they in my view constitute extenuating circumstances and the Court a quo erred in not treating then as such. The sentence of death passed by Court is set aside and a sentence of 8 years imprisonment is substituted therefore..

I agree

WELSH J.A.

I agree

AARON J.A.