APPEAL NO. 10/90

IN THE COURT OF APPEAL OF THE KINGDOM OF SWAZILAND

HELD AT MBABANE

In the matter between:

S. M. MBHAMALI Appellant

And

THE KING

Respondent

Coram: WELSH,

KOTZE and

LEON JJ.A.

Date of Hearing: 1st October, 1991 Date of Judgement: 2nd October, 1991

Appearances: For the Crown : MRS FRUHWIRTH

For the Appellant : MR NKAMBLILE

JUDGEMENT

WELSH, J.A.: On 26th February, 1989, the appellant murdered Sub-Inspector Nimrod Ndzimandze of the Royal Swaziland Police. He was charged jointly with two other persons in the High Court before Mr Justice Dunn not only on this charge but also

also on a charge of robbery and the unlawful possession of arms of war. He was found guilty of murder. The learned judge inquired into the question of extenuating circumstances and found that there were none and accordingly imposed the death sentence on the appellant.

He also found the appellant guilty of theft on the charge of robbery and sentenced the appellant to three years' im-prisonment on that charge, and he found the appellant guilty under the Arms and Ammunition Act of 1964 of being in unlaw-ful possession of a firearm. The firearm in question was a self-loading pistol of Russian origin; and although there was police evidence that this weapon was used and issued in Eastern bloc countries to armies, the learned judge found that it was not one of the arms of war mentioned in the statute. He sentenced the appellant on this count to five years' imprisonment, to run concurrently with the three years' imprisonment on count 2.

We need not concern ourselves with any of the charges other than the charge of murder. An appeal was noted in respect of the conviction for theft; but counsel for the appellant has not pursued that appeal. The appellant was one of three persons who were involved in the commission of this crime. The third accused person did not appeal to this Court at all. The second accused person did appeal but did not appear before this Court and was not represented, and we were told that he had

had served his sentence. Nor has the appellant appealed against his conviction on the charge of murder. The only question, therefore, which this Court has to consider is the learned judge's finding that there were no extenuating circumstances and the sentence of death which he imposed on the appellant.

It is very well settled in this Court, as it was in the Courts of the Republic of South Africa before recent changes to the law there, that an Appeal Court does not exercise a general appeal jurisdiction where it has to consider a question of sentence or even where the question arises before it whether the trial Court was correct in finding that there were no extenuating circumstances. There is ample authority for the view that it is essentially the function of the Court of first instance to make the decision whether or not there are extenuating circumstances and that, unless the trial Court has committed an irregularity or misdirected itself, the Court of Appeal will not interfere with its finding as to the non-existence of extenuating circumstances. I refer to two of the most recent decisions of the Appellate Division of the Supreme Court of South Africa: S. v. Mkhonza, 1981 (1) S.A. 959 (A.D.), and S. v. Ndwalane, 1985 (3) S.A. 222 (A.D.), at p. 227. Despite

Despite this rule, this Court has given the most anxious consideration to all the evidence in this case, in view of the fact that a death sentence is involved. The conclusion to which I have come is that this Court cannot and should not interfere with this sentence, and my reason for saying that is that in my opinion the evidence amply justified the finding of Mr Justice Dunn that there were no extenuating circumstances in this case.

I will repeat very briefly the effect of the evidence. The appellant, together with the other two accused persons, was in a motor vehicle on the day in question. He was not driving the vehicle. No. 2 accused was the driver. The appellant was sitting in the middle and No. 3 was sitting on the left hand side.

The deceased was a sub-inspector in the Royal Swaziland Police and was accompanied by two police constables. He went out in a motor car and they encountered the motor vehicle in which the appellant was driving. These two vehicles were travelling in opposite directions and it seems from the evidence that the three police officers had reason to suspect that the three accused persons were in unlawful possession of the vehicle in which they were travelling.

After a very brief encounter, the vehicle in which the three

three accused persons were travelling moved rapidly off. The police vehicle turned around and pursued them. I must interpose here to say that the police vehicle was not marked as a police vehicle, nor were the three police officers in uniform. Nor were any of them armed. They pursued the vehicle in which the three accused people were travelling. Eventually that vehicle reached a bridge over a river and the bridge had been swept away and the accused persons could go no further and thus they were cornered. The learned judge found that the police officers identified themselves as being members of the Royal Swaziland Police Force. The deceased sub-inspector advanced towards the motor vehicle in which the accused persons had been travelling. He had picked up a stone. There was a suggestion that he threw it at the accused persons but that suggestion found no support in the evidence at all.

The appellant was armed with a pistol of Russian origin which he said he had "picked up", to use his own words, near the border of Mocambique. It is clear from the evidence that this pistol was loaded with at least six rounds of ammunition. The appellant fired this pistol. In the process, he fired a bullet into the back of No. 2 accused, who was sitting on his right hand side in the motor vehicle, and he fired apparently about five shots at the approaching police

officer who was mortally wounded and died.

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What happened next was that the three accused fled. The two surviving policemen had escaped temporarily into the bush. The deceased was apparently not yet dead but the appellant and his two companions, one of whom was wounded, took the vehicle in which the police had been travelling in order to make their escape from the scene. No. 2 accused seems not to have played an active part in these proceedings. As I have said; he was wounded and he was put into the back seat of the police vehicle and, in making their escape, the appellant drove the police vehicle away. The appellant made no attempt to assist the police officer whom he had mortally wounded. He was concerned merely in getting away and later he and his companions were apprehended by the police.

It is quite clear that he had committed the crime of murder and it is also clear that the burden of proof rested on him to satisfy the trial Court that there were extenuating circumstances. The appellant himself gave evidence before the trial Court about this. He said: "I didn't kill the deceased intentionally. Although I killed the deceased, I had panicked and had had a shock. I had not premeditation." Then the trial judge asked him: "What is your age?" He replied: "I am twenty years of age", and he stated, in answer to a further question, that he was born on 16th June, 1969. The crime was,committed on 26th February, 1989,

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when the appellant was more than nineteen and a half years old. The trial was held in May, 1990, by which time the appellant was nearly twenty-one.

The appellant's testimony about extenuating circumstances proceeded as follows. His counsel asked him: "You are telling the Court that when you committed the offence you

were not thinking rationally because you had had a shock",

to which he had answered: "Yes." The learned judge then asked him: "What had shocked you?" Then he replied: "First of all, it is because those people chased us and we did not know them. Secondly, I had a shock because these people fired at us and in the process I was injured in the hand. This is what made me to make this mistake."

I pause here to say that the learned judge rejected the evidence of the appellant. The learned judge found that the three police officers were unarmed and never fired any shot in the direction of the three accused persons.

Then the appellant said: "I really had no intention of committing this offence." He was then asked: "Why were you carrying the firearm?" He answered: "I had just collected it from where I had put it." The next question was: "Where were you taking it to?" The answer of the appellant was: "The intention was to take the firearm to my house but it was still in my possession while I was

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travelling with my friends." And then counsel put it to him: "You were staying in Manzini and were travelling to Siteki to collect an engine. From there you would travel via Ngomane to see Brenda's boyfriend. Where were you taking the revolver to?" And the appellant's answer was: "In fact on Saturday morning I fetched the firearm from Ngwane Park with the intention of taking it to my house but unfortunately I did not get an opportunity to take it to my house so I had to go to Siteki." This was the not very plausible explanation which the appellant gave for his being in possession of this lethal weapon.

At the hearing before us two circumstances were suggested which might have been regarded

as extenuating circumstances. One was the youth of the appellant and the other was that the appellant may have panicked. Arguments to this effect were considered by the trial judge.

As to youth, the learned judge said this (and it was suggested that there was a misdirection in what he said): "The accused states that he is twenty years of age." I pause here to say that that statement was correct. The accused did state that he was twenty years of age at the time of the trial. The learned judge then said: "He could in my estimation be a year or two older but I do not consider

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that much turns on this. He is in his early twenties." The learned judge saw the appellant and he made this estimate and it is in accordance with the appellant's own evidence that he was nearly twenty-one at the time of the trial. The learned judge was well aware that the appellant, according to his evidence, was slightly under twenty when this crime was committed.

The question is whether the youth of the appellant can be treated as an extenuating circumstance, having regard to the facts of this case. The learned judge said about this: "Youth in itself is not an extenuating circumstance but it may, in conjunction with other factors, amount to an extenuating circumstance." In my opinion, that was a correct direction. The learned judge was referred during the course of argument to a case in South Africa which is sometimes referred to as "the scissors murder", in which a young woman aged eighteen had been concerned in the perpetration of a murder. She had been sentenced to death by the trial Court and the Appeal Court found that extenuating circumstances ought to have been found. The judgement of the Appeal Court was delivered by the then Chief Justice who said that the death sentence should only be imposed on a teenager who had committed a murder if it appeared that the accused had killed the deceased person out of inherent wickedness. I am referring to the

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case of s. v. Lehnberg, 1975 (4) S.A. 553, at pp. 560-562. The judgement was delivered in the Afrikaans language and the learned Chief Justice used an Afrikaans expression which I have translated as "wickedness". It conveys in the Afrikaans language a peculiar connotation of evil. Indeed, the word is used to denote the evil one or the devil. I mention this case for the guidance of the Courts in this country because it seems to me that the test propounded by the learned former Chief Justice of South Africa is entirely inappropriate and impracticable. The Courts of law are not equipped to go into questions such as whether a teenager committed a crime as a result of inherent evil or vice or devilry or wickedness. We have to adopt much more pragmatic standards and it seems to me to be important that young people in their late teens should not think that they are liberty to prowl around armed with deadly weapons and to do what was done in this case, namely, to fire a series of shots from a pistol at unarmed men who had announced themselves as policemen. In these circumstances, I consider that the youth of the appellant is not an extenuating circumstance.

Nor, finally, do I consider that there is really any substance in the suggestion that he panicked. No doubt he was firing this weapon somewhat wildly but he knew that these three persons had announced themselves as policemen and that they wanted to make inquiries or to

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apprehend him and his companions, and what he really wanted to do was to make a getaway and he wantonly killed this police officer. In short, I can find no material misdirection in the judgement of Mr Justice Dunn and for these reasons, in my opinion, this appeal must be dismissed.

R. S. WELSH JUDGE OF APPEAL

I agree. G. P. C. KOTZE

JUDGE OF APPEAL

LEON, J.A.: I have had the privilege of listening to the judgement of my brother Welsh and I find myself in respectful disagreement on the question of extenuating circumstances.

As this is a minority judgement, my reasons will be very brief. Before doing so, let me say at once two things. Firstly, I agree with what the learned judge has said about Lehnberg's case. Secondly, it is plain from the lengthy recital which the learned judge gave of the facts of this case that this is indeed a serious crime. Nothing can gainsay that. However, an undue preoccupation with the seriousness of a crime can cause a Court to give insufficient weight to other considerations. This is, in

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my view, precisely what happened to the learned trial judge in this matter.

On the question of youth, the accused gave his date of birth, from which it appeared that he was nineteen years of age at the time when the crime was committed. He was not asked a single question in cross-examination on the topic. Nor, I might add, by the Court. The case had to be approached upon the basis of the date of birth given by him, which means upon the basis that he was nineteen years of age and no older at the time when the offence was committed. That was the crucial inquiry. What does the learned judge say about this? The learned judge says this: "The accused states he is twenty years of age. He could, in my estimation, be a year or two older. I do not consider that much turns on this. He is in his early twenties." That was not the inquiry at all. The inquiry was not what age he was at the time he gave evidence. The inquiry was what was his age at the time when he committed the offence. That was the inquiry. In totally ignoring this question, it is plain to me that the learned judge misdirected himself in applying his mind to the wrong inquiry.

Where a Court fails to take into account a material matter which it ought to take into account, that is a misdirection and that, in my view, is precisely what occurred in this case. I may say that both with regard to this question and the question of extenuating circumstances generally,counsel for

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the Crown, as I understood her argument, conceded that there were extenuating circumstances in this case. This Court is not bound by the concessions made by counsel for the Crown but it is nevertheless in my view an important consideration which cannot be ignored. Having found, as I do, that there was a misdirection, this Court is now free to form its own opinion on whether or not there are extenuating circumstances. In my view, there are.

In this regard I do not rely upon youth alone, but that is a most important consideration. There are other factors. This was not a premeditated killing. This was not a cold-blooded merciless act but it was an act which occurred on the spur of the moment by a young man who, I believe, was to some extent in a panic. Evidence of this is the fact that he shot his friend in the back. He acted wildly, impulsively and as an immature person might act in those circumstances.

Giving this matter the best attention that I can, I have come to the conclusion that extenuating circumstances are present. I would allow the appeal and I would alter the sentence to one of twenty years' imprisonment.

R. N. LEON

JUDGE OF APPEAL