IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 11/98

In the matter between:

DANIEL DLAMINI

VS

REX

CORAM : R.N. LEON J A

: J.H. STEYN J A

: P.H. TEBBUTT J A

FOR THE DEFENCE :

FOR THE CROWN :

JUDGEMENT

Leon J A:

On the question of extenuating circumstances the appellant did not testify and his attorney relied upon the evidence which had been given. As to that, it was urged on behalf of the appellant that he had acted under the instructions of Mabuza, who was his employer, and therefore a person in authority. In dealing with the submission the learned Judge said this:-

"The position in this case is that the accused in his confession simply states that he was told to grab the boy etc. He does not set out what he subjectively felt at the time. If he willingly followed his employer's instructions with no threats or warnings up to the time of the death of the deceased. I can find nothing which can be said to reduce his moral blameworthiness. The accused has throughout the trial maintained his innocence. He has elected not to give any evidence which may assist the Court in explaining the contents of his confession. I find that the accused has failed to discharge the onus of establishing extenuating circumstances."

Quite apart from the question of onus, which I shall deal with later, I am of the opinion that the learned Judge misdirected himself on the facts by failing to take into account relevant evidential material which he ought to have taken into account. It is true that the appellant himself did not by not giving evidence assist the Court in any way. But there was evidence

of his state of mind. Having convicted the appellant on his own confessions the Court was bound to have regard to the whole of such confessions unless any part thereof was so improbable that it could not reasonably be true. This is not such a case. In his confession to PW4 the appellant told him that he had acted on the instructions of his employer, Mabuza and that he had held the feet of the deceased when they were removing parts of the body because he was afraid. And he told Joseph Mtshali that he had got into the situation of taking part in a murder because he was afraid

that his employer might chase him away. Such expressions of fear by the appellant are fortified by the Magistrate's impression of him being a very humble person and his educational level was Standard 2. I consider that the learned Judge ought to have taken into account, at least at the level of it being a reasonable possibility, that the appellant was indeed afraid of his employer. Moreover the appellant did not instigate this crime: he was dragged into it and his role was that of an accessory not a principal.

I turn now to discuss the question of onus but it becomes necessary, before doing so, to say something about the concept of extenuating circumstances and the duty of the Court in considering this question. The accepted general definition of an extenuating circumstance is one which morally, although not legally, reduces an accused person's blameworthiness or the degree of his guilt (See e.g. BIYANA 1938 EDL 310 AT 311, S VS LETSOLO 1970(3) SA476 (A), R VS FUNDAKUBI AND OTHERS 1948(3) SA810 AT 818 and the landmark decision of the Botswana Court of Appeal in DAVID KALELETSWE AND 2 OTHERS VS THE STATE CRIMINAL APPEAL 26/94 where many of the cases on this topic are collected.

In reaching a conclusion as to whether or not extenuating circumstances are present t he Court makes a value or moral judgement after considering all the relevant facts and circumstances both mitigating and aggravating in order to make such a judgement. In these circumstances it seems to us to be quite inappropriate to determine the issue by raising the question of onus. The duty falls upon the Court.

In South Africa it was consistently held, before the death sentence was abolished, that there was an onus resting upon an accused person to prove on a balance of probabilities the existence of such circumstances. That was based upon the decision in R VS LAMBETE 1947(2) SA603 (A) where Greenberg J A held that this conclusion was supported by the general rule that the onus rests upon the party who asserts the affirmative. With due deference to so distinguished a Judge we find ourselves in respectful disagreement.

The history and the evolution of the topic is fully set out by the Botswana Court of Appeal in the aforementioned case including the circumstance, which is an important one, that at the time when Lambete's case was decided, juries were charged with determining the facts associated with the commission of the crime. The relevant provision of the applicable South African legislation (Act 31 of 1917) at the time reads:-

"Where the jury, in convicting the accused of murder, has in terms of Section 206(2) expressed the opinion that there are extenuating circumstances, the Court may impose any sentence other than the death sentence."

It was held in Lambete's case that the jury was only entitled to find such circumstances when they come to the conclusion that such circumstances exist and are not entitled to do so merely because the Crown has failed to prove that they do not exist.

We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on an accused person and, as mentioned earlier herein, the question of onus is really inappropriate to the enquiry. This is made clear by what was said in that case about the duty of the Court-

"We note in particular the significance which Schreiner J A ascribes to the "subjective side" and that no factor not too remote or too faintly or indirectly related to the commission of the crime" and which bears on an accused's moral guilt can be ignored. (R VS FUNDAKUBI (supra).

It seems to us that there is therefore an over-riding responsibility on the Court and its officers - Counsel - to ensure that the second phase of the process -the enquiry as to the presence or absence of extenuating circumstances - is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is inter alia to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above ... when all the evidence is in, the Court is obliged

to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating.... This would include evidence tendered during the second phase enquiry. It will then make its "value or moral judgement."

In making our value or moral judgement we have borne in mind:

1. The appalling nature of the offence;

2. The expressed fear of the appellant which would be probable and very real in a person like the appellant who is a very humble person and of very limited education;

3. The fact that the appellant did not initiate this offence but was dragged into it;

4. The degree of participation on the part of the appellant.

Our value or moral judgement is that extenuating circumstances are present and that the death sentence must be set aside. But the crime remains a very serious one and a sentence of 15 years' imprisonment is appropriate.

The appeal against the conviction fails and the conviction is confirmed. However we find extenuating circumstances were present. Accordingly the sentence of death is set aside and is substituted by a sentence of 15 years' imprisonment.

R. N. LEON J A

I agree:

J. H. STEYN J A

And so do I:

P.H. TEBBUTT J A

Delivered in open Court this 29th day of September 1998.