IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL CASE NO. 18/97

In the matter between

JAMESON SIPHO DLAMINI APPELLANT

And

THE KING RESPONDENT

Coram: Kotzé P

Schreiner J A

Browde J A

For Crown Mr. Maseko

For Defence Mr. Thwala

JUDGEMENT

(01/10/98)

BROWDE J A:

This appeal arose from the following circumstances. The appellant was indicted in the High Court on a charge of murder. He was tried by Matsebula J and found guilty. The learned judge was of the view that no extenuating circumstances had been shown to exist and he therefore sentenced the appellant to death. An appeal was noted to this court against both the conviction and the sentence. We heard the appeal during the April 1998 session and dismissed the appeal against the conviction, which was therefore confirmed. On the question of sentence, however, we found that there had not been an adequate

enquiry into the existence or otherwise of extenuating circumstances and we issued the following order:

"Upon hearing counsel for the appellant and the respondent it is ordered that the appeal against the conviction is confirmed. (This was the wording of the Registrar and was obviously intended to indicate that the appeal against the conviction was dismissed and the conviction confirmed). The appeal against the death sentence is upheld and the matter is remitted to the court a quo to fully investigate whether extenuating circumstances are present and thereafter to impose sentence afresh "

It is common cause that when the matter came before Matsebula J pursuant to that order the following occurred. The appellant, as he did in the original trial, protested his innocence and consequently refused to say anything regarding extenuating circumstances. As a result Matsebula J affirmed his finding previously made that no extenuating circumstances were present. The learned judge then asked the appellant whether he wished to say anything before sentence of death was imposed on him. At that point the appellant asked if he could have a discussion with his counsel, Mr. Thwala. Mr. Thwala, who appeared before us on behalf of the appellant, informed us that during that discussion, for the first time, the appellant informed him that he wished to "make a clean breast of it" and wanted an opportunity to tell the court what had motivated him to murder the deceased. Mr. Thwala, as it was obviously his duty to do, then requested Matsebula J to hear the evidence which the appellant wished to give. The learned judge, however, refused this request and did so on the basis that in his opinion, having declared that there were no extenuating circumstances, he was functus officio. The learned judge thereupon pronounced the sentence of death.

It is against that decision and sentence that the matter has come before us again.

During the course of argument before us, in which Mr. Thwala appeared for the appellant and Mr. Maseko for the crown, the former handed up an affidavit deposed to by the appellant, in which he offers to give evidence before us regarding the facts which were in his mind when he murdered the deceased. In the alternative he asks that the case be once again remitted to the court a quo to hear the evidence. Mr. Maseko opposed both courses submitting that there must be finality in these matters and that by his attitude in the court a quo the appellant had forfeited all his rights to lead evidence regarding extenuating circumstances. I cannot agree with that submission. Earlier this week a judgement was delivered in the case of Daniel Dlamini v Rex by Leon J A in this court concerning the nature of the enquiry which should take place in the trial court into the question of the existence or otherwise of extenuating circumstances. He made it clear in that judgement that the concept of onus is inappropriate in the enquiry and that it is the duty of the presiding judge to consider all the circumstances relevant to the commission of the offence, the aggravating and the mitigating, and then to arrive at a moral value judgement as to whether or not extenuating circumstances exist. With that in mind it was plainly wrong for Matsebula J, to regard the onus to have been on the appellant and then, having

correctly asked the appellant whether there was anything he wished to say before the sentence of death was pronounced, to refuse then to listen to what the appellant did wish to say.

Mr. Maseko somewhat tentatively suggested that when the question is put as to whether the accused in a capital case wishes to say anything before he is sentenced to death, that is merely done in order to conform with tradition but is otherwise meaningless. I cannot agree with that suggestion. If, as I have pointed out, it is part of the trial judge's duty to make full enquiry, he cannot be carrying out that duty properly if he refuses to hear all that the accused wishes to say regarding extenuating circumstances. That, in my view, certainly applies to all the accused wishes to say before the death sentence is finally pronounced.

On that basis we were of the opinion that since a further remittal would involve a considerable delay with the possibility of a further appeal to this court, it would best meet the demands of justice if we ourselves heard the evidence which the appellant wished to give.

The matter stood down for that purpose and at the resumed hearing the appellant gave evidence which in summary was the following:

The appellant and the deceased were old friends and were both inyangas. In about 1994 the deceased stayed in the house of the appellant. One day the appellant's mother told him that the deceased was causing trouble because he wanted to sleep with her. The appellant warned the deceased to desist from that conduct. Shortly thereafter his mother died and because he thought there was something mysterious about the death the deceased went to see a diviner to ascertain why it had happened. The diviner told the appellant that the deceased had caused his mother's death. The appellant, believing as he said he does in witchcraft, accepted that his mother had been bewitched but did not believe that it was the deceased who had done it.

Sometime later, in May 1995, the appellant was in the company of the deceased on their way to the homestead of the former's relative when an argument ensued between them. It was then that the deceased told the appellant that he had caused his mother's death and that he would also cause his (appellant's) death. The appellant obviously believes in witchcraft which, as I understand it, is the ability of persons with supernatural powers to cause harm to others who have, for one reason or another become their enemies. He stated, for example that he firmly believed that there were people who could cause the death of others by their control over lightning - and he went on to say the deceased could do that. He was, therefore very frightened of the deceased '"who was much more powerful" than he was.

On the fateful day they arrived at the homestead at about 2pm and then left for Siteki where, so he said, they drank together for about six hours. They then went back to the homestead where they shared a room for the night. During the night he felt the deceased attempting to throttle him. He broke away, picked up an axe and killed the deceased by

hitting him on the head. He then disposed of the body in a sewerage pit and left before any others on the property were awake.

The appellant was thoroughly cross-examined by Mr. Maseko for the crown. Whether everything he deposed to before us is the truth is certainly not clear. The appellant had only a standard 1 education and admitted to having been very confused after the death of the deceased. Despite valid criticisms of the appellant's conduct throughout the proceedings in the court a quo, levelled by Mr. Maseko I am of the opinion that something must have triggered off the incident leading to the fatal assault. The probabilities are that the quest for muti, which was deposed to at the trial and the mutual belief in witchcraft which both the deceased and the appellant entertained, which was also alluded to, played a part in the events leading to the crime. What the appellant said about the death of his mother and his fear of the powers of the deceased cannot be rejected, nor can the reasonable possibility that both were strongly under the influence of liquor as they shared the room that night.

Having regard to that evidence the question we must ask ourselves is whether the circumstances recounted by the appellant reduce his moral blameworthiness. In order to properly evaluate the evidence we must attempt to put ourselves in the position of the appellant with his background and his beliefs. He believed that the deceased had bewitched his mother and caused her death. He also believed that he was next in line to be bewitched by the deceased. It was those beliefs that played a part in leading the appellant to commit what was undoubtedly a gruesome crime. The belief in witchcraft is commonly known to be widespread in Africa and has, in matters of this kind, often been regarded by the courts to be an extenuating circumstance. Hunt in Vol. II of SA Criminal Law & Procedure 2nd Ed at p. 3379 puts it thus:

"In determining the issue of extenuating circumstances, nothing which in fact influenced X's mind or emotions and thus his conduct can be ruled out of consideration merely because it was unreasonable for him to allow it to influence him or because on policy grounds it is thought

inadvisable to treat it as an extenuating circumstance. For instance, if X was motivated by a belief in witchcraft that consideration may not be rejected on the grounds either that a belief in witchcraft is unreasonable, or that it is contrary to policy to make any allowance for those who believe in witchcraft".

In Rex v Fundakubi and others 1948 (3) SA 810 at p. 818 Schreiner J A said.

"That a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness I have no doubt".

I am satisfied that the appellants beliefs coupled with his excessive intake of liquor constitute extenuating circumstances.

5

In the result the appeal against the sentence of death succeeds and that sentence is set aside. I have already stated that the murder was a gruesome one - it involved the killing of the deceased with an axe and the dismembering of the body which, although denied by the appellant, was probably carried out by him. A long period of imprisonment is clearly called for.

In my judgment justice will be done if the sentence of death is substituted by a sentence of 15 years imprisonment to run from the date that the appellant was arrested and taken into custody i.e. the 9th May, 1995.

BROWDE, J A

I agree

KOTZé, P

I agree

SCHREWER, J A

Delivered at Mbabane this 1st. day of October 1998