IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE	Appeal Case No. 125/1998
In the matter between	
BONGANI MKHWANAZI	**Appellant**
vs	
REX	Respondent
Coram	LEON, JP STEYN, JA ZIETSMAN, JA
For Appellant For Respondent	ADV. THWALA MR. N. MASEKO

JUDGMENT

STEYN, JA

This matter came before us at the last session of the Court of Appeal. Counsel for the appellant urged us to hold that the High Court had erred in finding that it had jurisdiction to try the matter. It was his contention that on the evidence

adduced at the trial it was established that the appellant had been unlawfully arrested by the Swazi authorities by invading the sovereignty of a neighbouring state (the Republic of South Africa) and had arrested the appellant on South African soil. Having kidnapped him they abducted him and brought him into Swaziland unlawfully.

The Court *a quo* had ruled that because the appellant had not raised the objection against jurisdiction at the time he pleaded, he was debarred by virtue of the provisions of the Criminal Procedure and Evidence Act (the Act) from raising this special plea. The plea had been raised pursuant to evidence given by the appellant before judgment.

Because the issue had been raised at a late stage during the trial and because the Court had decided that the appellant could not as a matter of law raise it when he did, the facts pertaining to how, when and where the appellant was arrested were never properly investigated. We accordingly decided to refer the matter back to the Court *a quo.* We defined the issues upon which the Court should make its findings as follows:-

> *"It is the conflicting versions as to how, when, where and in what circumstances the appellant was arrested that require to be resolved."*

This Court went on to request the High Court to hear such evidence as it deemed relevant for such purposes and requested it to record its findings and forward those to us.

The Court *a quo* proceeded to enquire into the matters set out above and having done so reported its findings as follows:

"THE FINDINGS OF THE COURT

Having considered the evidence led before me in court, my observation at the inspection in ***loco*** *and the submission made by both counsel in this matter I thus make the following findings:*

i) *The appellant was arrested on the 18th March 1998, at the Lavumisa border by the Investigating Officer Super Dlamini who effected the actual arrest of the appellant inside the Swaziland Immigration building of the Swaziland side of the border;*

ii) *The appellant was tricked into the border by the telephone call made by accused No. 4 asking him to come to the border to collect his money. Accused No. 4 was forced to make this phone call by the Police led by Detective Super Dlamini;*

iii) *From the facts of the matter a reasonable inference may be drawn that both Swaziland and South African border officials were acting in tandem in the arrest of the appellant and thus the apparent ease in which the appellant was able to pass through the South African side of the border without a passport and enter Swaziland. The Immigration Laws of both South Africa and Swaziland were not observed in this particular case."*

Whilst initially there was some disagreement as to the validity of these findings,

counsel for the appellant and for the Crown ultimately agreed that findings 1 and 2 were broadly speaking correctly made. Insofar as "finding 3" was concerned it was common cause that there was no evidence to support any finding that there was any complicity on the part of the South African Government in facilitating appellant's entry into Swaziland. It was common cause that the comments made in par. 3 above were speculative and unsupported by any evidence.

Before I proceed to consider the implications of the finding made under para. 2 above, and in order to evaluate the sustainability of the legal contentions advanced by counsel, it is necessary to record the nature of the criminal charges upon which the appellant was tried and the findings that the Court made in respect of such charges.

The appellant was charged together with three others on the following counts:

Count 1: Appellant and his co-accused in the Court below were charged with the murder of one Elliot Dlamini by shooting him with a pistol.

Count 2: All four accused in the Court below were charged with the crime of attempted murder. It was alleged that on the same occasion at the same place and at the same time they shot and attempted to murder one Samuel Mgudeni Mabuza.

The two other charges are not relevant for the purposes of this appeal.

All four accused in the Court below pleaded not guilty to both charges. The appellant was convicted on both counts. No extenuating circumstances having been found, the appellant was sentenced to death. On the charge of attempted murder he was sentenced to 10 years imprisonment. Appellant's three co-accused were found not guilty and discharged.

Initially the appellant denied that he was involved in any way with the murder of the deceased or the shooting of Mr. Mabuza, the complainant in count 2. However after conviction and pursuant to the enquiry as to whether extenuating circumstances were present or not, the appellant gave evidence under oath during which he admitted his guilt in respect of both charges. He testified as to

the circumstances in which he came to be involved in the shooting of the deceased and the complainant in count 2. I will deal with this in detail later in this judgment. As indicated above, the Court held that no extenuating circumstances were present in respect of the murder charge and it was therefore obliged to sentence the appellant to death.

It is also relevant to record that it was the Crown's case that accused No. 4 in the Court below (No. 4), a blind man, had been one of the instigators of the crime of the murder of the deceased and that he had been involved in engaging the services of the appellant as the executioner. It was also common cause, however, that the mandate to kill did not extend to the complainant on count 2.

It is against this background that the evidence surrounding the arrest of the appellant has to be evaluated.

The investigating officer was one Detective Constable Super Dlamini. He gave evidence that he had been informed that there was still some money owed by No. 4 to the appellant in respect of the murder of the deceased. He said that an arrangement was made that No. 4, accompanied by his nephew, would meet the appellant at the Lavumisa Border post so that he could hand over the balance of the money owing to the appellant. A phone call was made by No. 4 to the appellant to put such an arrangement in place.

Accompanied by certain other police officers and on the 18th March 1998, Super Dlamini went with No. 4 and his nephew to the border post. The witness observed the appellant crossing the Swaziland/South African border and entering the immigration offices of the Swaziland Kingdom on the Swaziland side of the border. That was where he arrested him.

The Crown also called Sub-Inspector Ndzinisa, the supervisor of travel documents at the Lavumisa Border gate. His duties inter alia involve the giving of forms for completion for those entering Swaziland. He says that on the date in question, i.e. the 18th of March 1998, he was on duty. He observed a young man entering the office. Immediately upon entering he was taken away by

some men who took him out of the office. He recognized the persons who arrested the young man as policemen; one of them was Super Dlamini. He affirmed that when he was arrested, the appellant (because it is clear that this is who it was) was "already in Swaziland".

This evidence was not challenged, neither did the appellant testify himself at this stage of the proceedings to rebut the evidence of these two witnesses. However, No. 4 was called to give evidence. He says that he was arrested on the two charges of murder and attempted murder. He alleges that he was assaulted by the police who tried to force or coerce him to admit that he was involved in the commission of these crimes. He made a statement but the Court ruled that the statement was not admissible.

In so far as the phone call was concerned he alleged that it was Super Dlamini who made the phone call to the appellant. After the call was made "he called me to come over and said that I should call this person……(the appellant) and that he was on duty and that I should just do what he says."

The witness denied that the reason for the meeting at Lavumisa was to pay the balance of the money to the appellant for killing Elliot Dlamini (the deceased). However he failed to furnish any other reason why the rendevouz had been arranged or what the expectations of the parties were as to the outcome of the meeting.

It was on this evidence that the Court made the findings recorded above.

It is clear from the evidence cited above that the Court *a quo* correctly found as a fact that the appellant had been arrested whilst within the borders of the Kingdom of Swaziland. It is true that when he gave evidence in the High Court during the enquiry as to the existence of extenuating circumstances, he alleged that he was arrested on the South African side of the border. However, as pointed out above, there was no real challenge directed at evidence that he was arrested in the Swaziland immigration offices and that these are located within the borders of the Kingdom. The appellant did not himself give evidence again to refute the uncontroverted testimony of the two crown witnesses as to where he was when he was arrested.

It follows also that the factual dispute which arose at the trial of the appellant and was as yet unresolved when the matter came before us on appeal at the last session, has to be resolved in favour of the Crown. There was accordingly no breach of the principle of the sovereignty of nations. It is not a case in which a Court in this country is being asked to exercise criminal jurisdiction over a person captured, kidnapped or apprehended within the territory of a foreign state. See the *locus classicus* in this regard i.e**. *S. v Ebrahim*** 1991(2) S.A. 553(A). See also ***Ndlovu and Another v Minister of Justice and Another*** 1976(4) SA 250 (N) and ***Nduli and Another v Minister of Justice and Another*** 1978(1) SA 893(A). The special plea challenging the jurisdiction of the Court to try the appellant cannot be upheld on this ground.

Counsel for the appellant advanced an alternative argument. He requested the Court to decline to exercise its jurisdiction. Relying on the finding 2 above, he submitted that the appellant was "fraudulently deprived of his liberty" by the Swaziland police. The practice adopted in the present case – so he contended – violated international ethical norms and it "imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations." Counsel relied on *Ebrahim'*s case cited above for this proposition.

I should say at once that the comments in *Ebrahim*'s case relied on were made in the context of a proven case of the abduction of an accused by agents of the South African state from his home in Mbabane in Swaziland for the purpose of a criminal trial in South Africa. Counsel was unable to refer us to any authority for the proposition that to induce a citizen of a foreign state to enter the territory of another in circumstances such as the present was a violation of "international ethical norms" or of the extradition treaty between the two states involved and therefore tainted the process to such a degree as to compel the Court to decline

to exercise jurisdiction.

In any event the stratagem employed by the police to entice the appellant to return to Swaziland was hardly such as to merit the excessive degree of disapprobation visited on it by defence Counsel. It is true that No. 4 testified that he was coerced to make the telephone call to the appellant and that this coercion occurred after a confession had been extracted from him by unlawful means. However, No. 4 was unquestionably an untruthful and unreliable witness. Care has to be taken in assessing and giving appropriate weight to his testimony.

The high-water mark of his evidence was that he did not make the telephone call freely and voluntarily. What he had done by conducting the telephone conversation was that which he had been instructed to do. This does not seem to me to be conduct by the police which is so reprehensible as to invalidate the subsequent arrest of the appellant when he succumbed to the inducement to come and collect the outstanding balance of the fee due to him for carrying out his mandate to kill the deceased. Therefore, even if it were possible for the Court to refuse to exercise jurisdiction where, e.g. a foreign national had been subjected to reprehensible conduct, such as harassment or coercion to enter the territory of a foreign state for purposes of an arrest, the present is not a case justifying such a refusal.

I should add that crown counsel also relied on the provisions of Section 227(1) and (2) of the Criminal Procedure and Evidence Act. This Section reads as follows:

"Admissibility of facts discovered by means of inadmissible confessions.

227. (1) Evidence may be admitted of any fact otherwise admissible in evidence notwithstanding that such fact has been discovered and come to the knowledge of the witness giving evidence respecting it, only in consequence of information given by the accused person in a confession or in evidence which by law is not admissible against him, and notwithstanding that such fact has been discovered and come to the knowledge of the witness against the wish or will of such accused.

(2) Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."

In view of the approach to the matter outlined above it is not necessary to decide whether this section could legitimately be invoked on the facts *in casu.*

For these reasons I conclude that the alternative ground upon which this Court was asked to decline to exercise jurisdiction can also not be upheld.

I have not dealt with the Crown's contention in the Court below – which was upheld – that the plea against jurisdiction had to be raised *ab inititio* and could not be raised later. Although this was raised in the Crown's heads of argument it was not pursued before us. It would in any event seem to us to be unacceptable to interpret the relevant provision of the Criminal Code in this restrictive manner. The question of the presence or absence of jurisdiction may only become apparent during the course of the trial and to preclude it from being raised when it is obvious that to continue would only lead to a mistrial being decreed on appeal, would clearly be unacceptable.

As indicated above, the appellant had during the process of the enquiry into extenuating circumstances admitted his guilt in respect of both the murder and attempted murder charges. The Court held that there were no extenuating circumstances and sentenced him to death. This finding has also been challenged before us and I proceed to deal with this issue.

In his evidence the appellant explained how he came to commit the offences in question. He said that he went to visit a traditional healer one Sketi Jackson Dlamini in Tembisa in South Africa. (He had previously on two occasions visited him in Swaziland). The healer treated him for epileptic fits as a result of which he "felt much better". He subsequently visited him at his homestead in Swaziland because he needed his help on other matters. They discussed these and then the healer told him that he had a brother who was troublesome here in Swaziland. The appellant went on to testify as follows: "He told me that he (the brother) was bewitching them and they have lost a lot of children through

his witchcraft practices………He then told me that he wanted us to make a way of eliminating him. I was reluctant, My Lord, and I told him that I did not agree with what he was saying to me but he persisted. He promised me a lot of things that if I agree to do that he was asking me to do, he was going to cleanse me". According to the appellant the healer then gave him some muti and he gained so much courage "which I did not know where I got it from."

He was then given a gun and shown the homestead where the deceased was residing.

In cross-examination crown counsel put it to the appellant that the offence "was something carefully planned, premeditated by you (the appellant) and this other man Jackson. (Subsequently the Crown did suggest to the appellant that the person who arranged for his services was Dumsani Dlamini (No. 4 mentioned above) not Jackson Dlamini (the healer).

Appellant re-affirmed that the cleansing ritual that he went through took place the night before the murder. Its objective was to help him "so that police officers would not find (him)".

No evidence to contradict the testimony of the appellant was tendered by the Crown. The Court *a quo* found the evidence of the appellant incredible and rejected it as a complete fabrication. The findings of the Court in this regard read as follows:-

> "My view on this matter is that this story is a complete fabrication and it would be folly for this court to accept it for purposes of establishing extenuating circumstances. This Court is not going to be hood-winked into believing it. I thus reject it in *toto as a complete fabrication not worthy of any consideration. Even if one were to examine it one finds so many inherent improbabilities. The accused tells the Court that before the commission of the offences he was given the gun by the inyanga and the following day he crosses the border to Swaziland where he committed the offences. This begs a question as to who taught him as to how to use it as he had told the Court prior to this:*

> *he has never been involved with such things. He portrayed himself as an innocent young man from Mlazi Location who was unduly influenced by an older man to commit these offences. With the greatest respect, I am unable to accept this story."*

Mr. Thwala who appeared for the appellant submitted that this rejection was unjustified. He pointed to the fact that Siketi Jackson Dlamini was identified as PW5 (and henceforth referred to as such), a witness to be called by the Crown at the trial of the appellant. He was therefore available to be called as a witness to contradict the evidence of the appellant but was not called. This argument was also advanced in the Court below at the enquiry into extenuation. The Court's response to this proposition was the following. The learned Judge says:-

> *"I must say, that this is a fallacious proposition to make in that throughout the trial the accused was denying having committed these offences, or for that matter to have been in Swaziland".*

I do not believe that this approach to the matter is sustainable. The question is why did the State not call the witness to contradict the evidence of the appellant when he had truthfully admitted the commission of these two serious offences at the second phase enquiry. It was at this stage of the proceedings a live issue as to whether PW5 had played a part in the instigation of the crimes. This issue could, and in my view should have been resolved by calling this witness.

There is merit in the view of the Court that the evidence of the appellant is prima facie improbable. However this is not sufficient to justify its rejection, especially if it stands uncontradicted.

Mr. N.M. Maseko who appeared for the Crown very fairly conceded that he could not in the circumstances outlined above support the rejection of the appellant's evidence given during the second phase enquiry as to the presence or absence of extenuating circumstances. The determination of this issue must therefore proceed on the basis of an acceptance of his evidence. The question to be answered is does his evidence, together with such other relevant factors as may be considered, constitute extenuating circumstances.

In considering whether extenuating circumstances are present or not, the Court is guided by what was laid down by it in ***Daniel Dlamini vs Rex*** appeal case No. 11/1998 cited also by the Court *a quo* . In the judgment this Court held that no *onus* rested on an accused to prove extenuating circumstances. Leon JP who delivered the judgment of the Court, cited with approval the judgment of the Court of Appeal in Botswana in ***David Kaleletswe and Others v the State,*** Criminal Appeal 26/94 and **S v Letsolo,** 1970(3) SA 476(A). In the latter judgment the South African Court of appeal held as follows:

> *"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 the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."*

It is within this context that we approach the question whether the enquiry in the Court below disclosed the existence of extenuating circumstances or not.

That a murder was committed because of a belief in witchcraft can be held to reduce the blameworthiness of an accused has long been settled
law in Southern Africa in general and in Swaziland in particular. See in this

regard ***R v Biyana*** 1938 E.D.L. 310; ***R v Fundakabi and others*** 1948(3) SA 810(A) at 818. See also Du Toit et al: *Commentary on the Criminal Procedure Act* 28 – 14K and authorities cited op. cit. For the most recent judgment in this jurisdiction see ***Jameson Sipho Dlamini vs The King*** Criminal Appeal Case No. 18/97 at pp 3 – 4.

In this case the reliance on witchcraft as an extenuating circumstance loses some of its cogency because of the fact that the appellant was not himself, nor were any of his family affected or threatened with harm by the person thought to have bewitched others. It was the inyanga whose family had been bewitched and had died. What is relevant is that the appellant must have believed that in killing the deceased he was performing an act which would rid society of an evil person who had caused the death of many of the children of the inyanga and of his brothers.

These factors may not, if taken on their own, be sufficient to reduce the moral guilt of the appellant so as to constitute an extenuating circumstance. However if one takes into consideration the influence the inyanga would have had over the appellant and the coercion which he applied to him to commit the offence, the moral guilt of the appellant may well be sufficiently reduced so as to extenuate his conduct. It must be borne in mind that on his version the healer had been treating him with some success for his epilepsy and the moral persuasion he applied would in these circumstances have been considerable, especially coming from an older man.

The appellant was 21 at the time of the commission of these offences. Whilst his relative youth may not, if considered on its own, have constituted an extenuating circumstance, if it is coupled with the other factors found to be present; i.e. the belief in witchcraft; the influence the coercion and the encouragement of the inyanga, these do in my view cumulatively constitute extenuating circumstances.

It follows that the sentence of death imposed by the High Court is set aside. It also follows that we must consider anew what a proper sentence would be for the appellant on the premise that the extenuating circumstances identified above were present in respect of Count 1.

I proceed to consider what an appropriate sentence would be on both counts.

I have referred above to the extenuating circumstances found to be present in this case. To this must be added that the appellant is a first offender. The two

offences which the appellant committed were however both serious, premeditated and unprovoked crimes. The appellant was not himself aggrieved by the alleged unlawful conduct of the deceased. His shooting of PW10 was done for no purpose other than to protect his identity as the killer. Society requires long term protection from a person who is capable of such serious acts of violence.

In my view the appropriate sentences would be the following:-

1. On count 1 - 20 years imprisonment;
2. On count 2 - 10 years imprisonment.

Five years of the sentence on count 2 are to run concurrently with the sentence on count 1, i.e. the appellant is to serve a sentence of 25 years imprisonment. This sentence is deemed to have commenced from the date of the appellant's arrest, i.e. the 18th of March, 1998

J.H. STEYN, JA

I AGREE **R.N. LEON, JP**

I AGREE **N. W. ZIETSMAN, JA**

DATED at Mbabane this 27th day of November, 2001