



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal case No: 140/2015

In the matter between:

REX

VS

TONY ZOLA MAMBA

Neutral citation: *Rex v. Tony Zola Mamba (140/15) [2015] SZHC 265 (23rd December, 2016)*

CORAM: M.C.B. MAPHALALA, CJ

Summary

Criminal Law – Murder – Extenuating circumstances – accused convicted of murder – factors determining the existence of extenuating circumstances considered;

Held that the cumulative effect of the absence of premeditation, intoxication and the feud between the accused and the deceased’s family had a bearing on the accused’s state of mind in committing the offence, and, that the existence of these factors reduced his moral blameworthiness;

Accordingly, the accused is convicted of murder with extenuating circumstances.

**JUDGMENT ON EXTENUATING CIRCUMSTANCES
23rd DECEMBER 2016**

[1] The accused was convicted of murder on the 14th October 2016. This court found from the evidence that the Crown had proved beyond reasonable doubt that the accused had unlawfully and internationally killed Kaylor Glover on the 15th March 2015 at Nhlangano in the Shiselweni Region.

[2] It is well-settled that upon a conviction on a charge of murder, the Court should determine, on the basis of the evidence, whether extenuating circumstances exist in the matter.

[3] The Criminal Procedure and Evidence Act¹ provides the following:

“295. (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances, and, if it is of the opinion that there are such circumstances, it may specify them:

¹ Section 295

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”

[4] His Lordship Ramodibedi, CJ in *Bhekumusa Mapholoba Mamba v. Rex*² quoted with approval the decision of Holmes JA in *S. v. Letsolo*³ where the Learned Judge had this to say:

“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.**

² Criminal Appeal Case No. 17/2010 at para 7

³ 1970 (3) SA 476 (A) at 476

In deciding (c) the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

[5] In the Bhekumusa Mapholoba Mamba case⁴, His Lordship Justice Ramodibedi CJ had this to say⁵:

“13. It is further of crucial importance to a determination of extenuating circumstances that the court *a quo* found that this was a case of *dolus eventualis* as opposed to *dolus directus*. Now, a finding of *dolus eventualis* as opposed to *dolus directus* may, in a proper case, constitute an extenuating circumstance. *In casu*, I consider that *dolus eventualis* coupled with provocation constitute extenuating circumstances.

....

15. Now it is well-settled that the absence of premeditation, depending on the circumstances of each case, may constitute an extenuating circumstance.”

[6] Schreiner JA delivering a majority judgment in *Rex v Fundakubi and Others*⁶ quoted with approval the decision of Justice Lansdown, JP in *Rex v. Biyana*⁷ where the learned Judge had this to say:

⁴ Footnote 2 above

⁵ At para 13 and 15

⁶ 1948 AD 810 at 815

⁷ 1938 EDL 310

“I am not aware that any definition has been given by Parliament or the court of the terms extenuating circumstances. In our view an extenuating circumstance in this connection is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner’s guilt. The mentality of the accused may furnish such a fact. A mind, (which) though not diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the case of a mind of normal condition. Such delusion, erroneous belief or defect would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance . . . when we find a case like this, where there is a profound belief in witchcraft, and that the victim practised it to grave harm, and when we find this has been the motive of the criminal conduct under consideration. We feel bound to regard the accused as a person labouring under a delusion which, though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance.”

[7] His Lordship Justice Twum in *Ntokozo Adams v. Rex*⁸ had this to say:

“The general rule is that it is for the accused to lead evidence which would show extenuating circumstances in the crime of murder even though it is also true that the court is not limited to circumstances appearing from the evidence led by or on behalf of the defence. On the contrary, the court must also have regard to all the relevant evidence, including even the evidence led on behalf of the Prosecution. The time for gauging the existence of the extenuating circumstances, is of course,

⁸ Criminal Appeal case No. 16/2000 at para 14 (v) and (vi).

the time of the commission of the crime. This means that there must have been a real possibility that the accused at the time of committing the crime was in fact in a state of mind which lessened his moral blameworthiness.”

[8] From a reading of the authorities, it is apparent that the trial court has a discretion to determine from the evidence whether extenuating circumstances exist.⁹ The onus of proving the existence of extenuating circumstances rests upon the accused.¹⁰

[9] The defence contends that extenuating circumstances exist in this matter on the basis of three factors; firstly, that this Court has found that the accused had *mens rea* in the form of *dolus eventualis* when committing the offence, and, that the Supreme Court, has held that in a proper case such a finding may constitute an extenuating circumstance.¹¹

[10] The second factor alluded by the defence is the feud which existed between the family of the deceased and the accused. Thirdly, the defence contends that the accused was intoxicated, and, that he had been drinking

⁹ Rex v. Fundakubi and Others (supra) at pp 816-818; section 295 (1) and (2) of the Criminal Procedure and Evidence Act 67 of 1938; S. v. Letsolo 1970 (3) SA 476 (A) at 476; Bhekumusa Mapholoba Mamba Criminal Appeal case No. 17/2010 at para 7, 13 and 15; Ntokozo Adams v. Rex Criminal Appeal 16/2010 at para 14.

¹⁰ Ntokozo Adams v. Rex (supra) at para 14 (v) and (vi); Rex v. Celani Sicaca Nkambule Criminal Case No. 101/2011 (HC) at para 45

¹¹ Footnote 7 as per Bhekumusa Mapholoba Mamba v. Rex (supra) at para 15.

for a better part of the day. The Crown concedes that the intoxication of the accused constitute an extenuating circumstance.

[11] It is well settled that intoxication, provocation, belief in witchcraft, immaturity as well as a finding that the accused had *mens rea* in the form of *dolus eventualis* when he committed the offence are some of the factors to be considered when determining the existence of extenuating circumstances;¹² the list is not exhaustive. It is trite that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing the offence can be ruled out from consideration.¹³

[12] Justice Benjamin Odoki JA in *Amos Mbulaheni Mbedzi*¹⁴, confirming the judgment of the court *a quo*, quoted with approval the reasoning of the Trial Judge:¹⁵

“178. In coming to the conclusion that there were no extenuating circumstances in this case, the Trial Judge stated:

36. It is apparent from the evidence that there was no premeditation in the commission of the two counts of murder; there was no *dolus directus* in the killing of the

¹² *S. v. Letsolo* supra at p. 476; *Bhekumusa Mapholoba Mamba* (supra).

¹³ *Rex v. Fundakubi* (supra) at page 818; *Bhekumusa Mapholoba Mamba v. Rex* (supra) para 12.

¹⁴ Criminal Appeal case No. 37 of 2012.

¹⁵ At para 178.

deceased. The accused was convicted on the basis of *mens rea* in the form of *dolus eventualis*. The direct intention of the accused was to bomb the bridge.

37. It is a trite principle of our law that the absence of premeditation, depending on the circumstances of each case, may in a proper case constitute an extenuating circumstance; hence, it doesn't follow that in all cases of *dolus eventualis*, extenuating circumstances would be found to exist. It is apparent from the authorities cited above that *dolus eventualis* on its own does not suffice unless it is accompanied by other facts bearing on the commission of the offence which reduce the accused's moral blameworthiness. The fact that he was not inside the motor vehicle during the explosion or that he did not physically detonate the bomb are irrelevant in light of the totality of the Crown's evidence that the accused acted in concert with the deceased. In terms of the evidence, the bomb exploded due to human error, and, it was not detonated voluntarily by any person. I am unable to find any extenuating circumstances in this matter."

[13] After a careful consideration of the evidence, I have come to the conclusion that extenuating circumstances exist which had a bearing on the accused's state of mind in committing the offence, and, that such bearing had reduced his moral blameworthiness.

[14] Accordingly, the accused is convicted of murder with extenuating circumstances.

M.C.B. MAPHALALA
CHIEF JUSTICE

For the Accused:

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