

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. S. 176/80

In the matter of:

REX

vs.

PHINEAS SIMELANE & 3 OTHERS

JUDGMENT ON EXTENUATING CIRCUMSTANCES

H/L: I have given much thought to the question as to whether or not extenuating circumstances have been proved by the accused in this case. Our law is quite clear that the onus of proving the existence of extenuating circumstances rests upon the accused. This must be established by a balance of probabilities and not beyond any reasonable doubt. Our law has drawn a distinction between mitigating or aggravating circumstances on the one hand and extenuating circumstances on the other. Extenuating circumstances relate to the actual commission of the offence and the question is whether in that commission it has been shown that there is an absence of moral blameworthiness or the reduction of moral blameworthiness. Now bearing this principle in mind and having also in mind the number of statements which have been made by learned Judges in this country and in South Africa concerning the presence or absence of any extenuating circumstances I have come to the following conclusions. In respect of accused No.1 I can find no extenuating circumstances. He was the leader of a callous murder of the deceased; as a prominent member of the community and as one occupying an important position as the head Induna of the Tea Plantation and as a man of some intelligence he was undoubtedly aware of the penalty he would have to incur if this crime was successfully laid at his door. He decided to disregard this and he must now be prepared to pay the price exacted by our law as it presently stands.

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I am fortified in this, for me, a very difficult conclusion, by the knowledge that my views are fully shared by my two Assessors.

In so far as No.3 Accused is concerned, I consider that the role which he has played in the actual killing of the deceased although forming an integral part of the actual crime was not as important or significant as that played by others in this offence. I do not wish to minimise that role. As Mr. Donkoh has correctly pointed out that he was a leading member of the community as he was a leading Inyanga to whom people turned in time of need and he had their confidence. His participation in the crime limited as it has been still constitutes a serious crime.

Nevertheless in the light of his somewhat limited role and the fact that he did not take part in the actual killing of the deceased, nor in the actual conspiracy, I am satisfied that he has met the requirements of the law in that he has established by a balance of probabilities the presence of extenuating circumstances. I may add that although a particeps criminis he remained aloof for the major part .

In this respect I may, as indeed my Assessors consider, have erred too much on the side of mercy. They indeed hold the view that there were no extenuating circumstances present, more particularly because they feel that No.3 Accused is as equally guilty as No.1 Accused. And especially so because in their view ritual murders can never take place without the advice or presence of an Inyanga. Grateful as I am for their views and their guidance, I nevertheless feel that the primary responsibility rests upon my shoulders and I must act in accordance with what I consider to be the position both in fact and in our law.

Accused No.1 is therefore guilty of murder without extenuating circumstances.

Accused No.3 is guilty of murder with extenuating circumstances.

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I think Accused Nos. 6 and 7 can leave the dock - they have already been discharged.

#### JUDGMENT ON SENTENCE

H/L: Accused No.3 will you please stand up.

In deciding on the sentence I must take into account certain of the contentions raised by the Crown in urging that you should be found guilty of murder without extenuating circumstances. I have to send you to prison for quite a long period of time. I would have made it longer if it was not that I know that you are not a very healthy man and that you are no longer a young man. In connection with your health you will be afforded adequate medical treatment in prison and in case of need the prison authorities will, I have no doubt, treat you with humane consideration. For the rest I can find no real mitigating circumstances. The fact that you are grossly illiterate, as your Counsel has suggested, does not influence me. You do not have to be a learned man or be able to read or write to know that there can be no more serious thing in the world than to play any role in depriving another human being of that which is his most precious and most treasured possession, namely, that of life itself. Even the most ignorant and most illiterate and the most irreligious of us know that fact very well indeed.

I must take into account that you have no previous record; I take into account that you are a leader in your community and that as a result of this conviction you will be disgraced and lose your position and that your family will feel that humiliation which by your conduct you have brought on thorn.

On the other hand the high position you hold demanded a higher sense of responsibility. By your conduct you have betrayed your community and helped to undermine the confidence in those who appointed you to an important post and helped to undermine their

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their confidence in those who have been appointed to places of high authority.

The Inyanga still plays an important role in the lives of the people of this country. And your conduct serves to undermine the trust and confidence which people have in the inyanga. Moreover knowledge of the availability of Inyangas to guide and assist in the commission of ritual murders encourages others to commit this kind of offence which has been strongly condemned by His Majesty on several occasions and indeed by all right thinking members of the community.

Your sentence is 12 years imprisonment. H/L: You may sit down Accused No.3.

H/L: Mr. Registrar, I am about to pass the death sentence on Accused No.1. Please stand up Accused No.1. Ask him Mr. Registrar if he has anything to say before the death sentence is passed. Registrar: Phineas Simelane (Accused 1) do you have anything to say before the death sentence is passed on you?.. Yes My Lord. H/L: Say it please.

Accd.1: In this world and to my ancestors and to God in Heaven I am certain that I know absolutely nothing about the offence charged against me. On earth the body will be dissolved. My soul has a place in heaven. Whatever the court has decided or concluded I swear before his Lordship that I present myself before God now. I have nothing further to say My Lord.

H/L: Phineas Simelane, I have listened attentively to what you had to say; you are a Believer according to what you have said, and I pray that when your hour comes God may have mercy on your soul. What you have said will be passed on to the authorities upon whom the decision whether the sentence I am bound

by law to pass on you will finally rest. I have only one thing to perform and that is to pass the sentence which our law has imposed on me; that is a duty and function from which I cannot escape.

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The sentence which I am to pass may not necessarily be carried out. In the first instance you will be entitled to appeal to the Swaziland Court of Appeal which may disagree with the verdict which I have passed this afternoon.

You may, if your appeal fails, petition to the Prerogative of Mercy Committee to recommend to His Majesty that the sentence of death be commuted,, His Majesty will give due consideration to that Committee's recommendation. But in any event he may form his own opinion.

I am assuming that you will lodge an appeal to the Court of Appeal as this has become almost automatic in our procedures. Therefore, pending the determination of that Court's decision, I order that you be treated as an ordinary prisoner and not be confined to the condemned cello

It is always a painful task for a Judge to pass sentence of death on a fellow human being and I now do so with a heavy heart.

The sentence of the court is that you will be returned to custody and be hanged by your neck until you are dead. DECISION ON ESTREATMENT OF BAIL.

H/L: I am very happy indeed, Mr. Donkoh, with the attitude which you have adopted in not asking for the bail money to be estreated. I think it is a correct attitude. The accused had been granted bail by my brother, the Chief Justice, and this was withdrawn by me. The accused has since the withdrawal of the bail behaved himself and not done anything to justify the estreatment of the bail. It is accordingly order that the bail money be restored to the accused.

#### DECISION ON GRANTING THE TV/O ACCOMPLICES EXEMPTION FROM PROSECUTION

The remaining question is whether the two accomplices should be exempted from liability in terms of Section 234 of the Criminal Evidence & Procedure Act. This poses something of a problem because the two of them, so I have been led to understand, will be called

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called upon to testify in the trial of the remaining accused. I think that it would be invidious if at this stage I make a final ruling. This is so far several reasons, the main one being that the judge who presides over the case of the other accused and I may have conflicting views as to whether or not they have satisfactorily complied with the requirements of the section and this may lead to some confusion. In these circumstances I leave this question open until the subsequent trial has been disposed of, save to state that as far as this case is concerned, both the accomplices, and especially so LaMalindzisa. sufficiently satisfactory to enable me to rely on it.

D. COHEN

(JUDGE OF THE HIGH COURT OF SWAZILAND)

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