IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Criminal Trial No. 253/2002

In the matter of

REX **j**

vs

SIPHO DOUGLAS GAMA AND
MATTHEWS MPANZA

Coram ANNANDALE, ACJ

For Crown Mr. S. Fakudze Mr. B.J.
For the First Accused Simelane Mr. M.J. DIamini
For the Second Accused

JUDGMENT ON EXTENUATION

In a written judgment of the 8 September 2004 the two accused persons were convicted of a number of crimes, including murder. Due to the imperative wording of Sections 295 and 296 of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) ('The Act'), the court has no discretion other than imposing the death penalty in respect of the murder

convictions, unless extenuating circumstances are found to exist. The Sections read that:-

> "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.
>
> Provided that any failure to comply with the requirements of this Section shall not affect the validity of any sentence imposed as a result thereof.
>
> 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 belong.
>
> 296(1) Sentence of death by hanging shall be passed by the High Court upon an offender convicted before or by it of murder.
>
> Provided also that where a court in convicting any person of murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the death sentence."

Otherwise put - unless extenuating circumstances are found to exist, the court has no choice but to impose the death penalty in respect of the two accused due to their convictions of murder.

In order to so decide, the court is obliged to make an assessment of moral blameworthiness instead of legal blameworthiness, as was the position when considering their guilt. An extenuating circumstance is one which morally, though not legally, reduces an accused person's blameworthiness or the degree of his guilt - see Biyana 1938 EDL 310 at

311; S v Letsolo 1970(3) SA 476(A); R v Fundakubi and others 1948 (3) SA 810 at 818.

The court is enjoyned to reach a conclusion after considering all the relevant facts and circumstances, both mitigating and aggravating, in order to make such a judgment.

In past legal history, there was the requirement for many years that the onus to prove the existence of such circumstances rested squarely on the accused person - "he who alleges is to prove." See R v Lambete 1947(2) SA 603(A), per Greenberg^ J A.

In Swaziland, this position is no longer so. The Court of appeal has repeatedly followed the landmark decision of the Botswana Court of Appeal in David Kaleletswe and 2 others v the State, Criminal Appeal 26 of 1994. There is no onus on the accused to prove that extenuating circumstances do exist, just as there is no onus on the prosecution to prove its absence. It is the duty of the court, with a diligence and with an anxiously enquiring mind, to probe into whether or not any factor is present that can be considered to extenuate an accused person's guilt when making its value or moral judgment.

It is in this context that I have particular regard to the evidence heard during the course of the trial equally as much as to what counsel as officers of the court had to say in submissions.

As was pointed out and found by this court in its judgment, it is the first accused who was the instigator and driving force in the commissioning and planning of the crimes. The second accused followed in his footsteps

and shadow. Their roles differed significantly enough to conclude that the second accused, in as much as he participated, played a secondary role, especially so when it came to the killing of the deceased. He also did not fire the fatal shot. I readily conclude that this in itself is sufficient to reduce his moral guilt or blameworthiness to the extent that it can properly be held as an extenuating factor.

That much as is said about the first accused lends towards an opposite *prima facie* finding. But the enquiry does not end there. As was indicated in the judgment on the merits, there is preciously little information about the **actual** shooting, of what transpired at the time.

It is unknown what actually caused the first accused to pull the trigger when the fatal shot was fired. It remains unknown whether the deceased put up any sort of resistance that may have raised a fear in the accused of himself becoming a victim. If it was so, he did not say so. If he was in any way remorseful, he also did not say so.

All that is known is that he followed the victim to the inside of the house, where she was thought by her co-habitant to have gone in order to call for help. He then shot her with a stolen shotgun. There is no evidence of any form of resistance by her, nor any other evidence that favours a finding of anything else than a coldblooded senseless murder. Even so, an inevitable conclusion remains a conclusion and does not stand evenly with a factual finding which is based on proven facts. As said, what actually transpired at the time of the killing and what induced the first accused to shoot at his victim remains unknown to the court.

There is however one further aspect that requires diligent scrutiny, namely the motive behind the tragic events at the Mtupha homestead. In Ndimande v R 1970-76 SLR 100 the Court of Appeal held, per Schreiner P, that:-

> "In considering whether extenuating circumstances were present in murder, the weight to be given to the fact, if it be a fact, that the mental element did not involve an aiming of death has been considered ... in S v Sigwahla 1967(4) A 566 and S v De Bruyn en 'n ander 1968 (4) SA 498(A). I understand from those cases that the fact that death was not aimed at is relevant, in the accused's favour, to the issue of extenuating circumstances but such fact does not of itself and considered in isolation, connote a lesser degree of blameworthiness than in a case where death was aimed at, and therefore is automatically an extenuation (per Holmes JA in de Bruyn's case at pp 511-512)"

In consonance herewith, Steyn, J, as he then was, held in S v Arnold 1965 (2) SA 215(c) that where the court found a constructive intention to kill and not a true positive desire to kill, it might in the circumstances of a particular case be regarded as an extenuating circumstance.

In this particular case, as said, it was the overall aim and intention to rob money from the Mtupha homestead. The primary objective was not to kill, but to rob. Nevertheless, in the course of committing the primary crime, the deceased was shot, but the court is left in the dark as to the true reason for the killing.

Mr. Simelane correctly argued that moreover, there is no indication of any premeditation to murder. Yet, the death was a foreseeable consequence under the prevailing circumstances.

When all of Ihe above considerations are weighed and when the consequence of an adverse finding is added, the scales only but barely tip in favour of a finding that extenuating circumstances can be found to exist. The margin is narrow, but if I were to err, it is my considered view to rather err on the side of caution.

For these reasons, it is found that in respect of both the accused persons extenuating circumstances do exist. The court shall therefore proceed to hear argument and/or evidence in respect of sentence regarding both accused in respect of the^different counts they were convicted on. The matter is referred to the registrar to allocate a suitable date for that purpose. Both accused are ordered to remain in custody until then.

ACTING CHIEF JUSTICE