IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 294/2007**

In the matter between:

THE KING

VS

SIMANGA NGWENYA

CORAM:	**SEY, J**
FOR THE CROWN	**MR. M. D. NXUMALO**
FOR THE ACCUSED	**MR. M. S. DLAMINI**

J U D G M E N T

SEYJ.

[1] The accused Simanga Ngwenya is charged with six counts to wit Murder, Robbery, two counts of Attempted Murder, Unlawful possession of firearm and unlawful possession of 15 live rounds of ammunition.

[2] In respect of the Murder charge, the accused is alleged to have unlawfully and intentionally killed one Thembi Maphosa upon or about 4th September, 2005 at or near Phophonyane area. On the Attempted Murder charges, the Crown has alleged that the said accused did unlawfully and with intent to kill shoot Bhekinkhosi Sihlongonyane and Muzi Sihlongonyane. On the Robbery charge it is alleged that the said accused did unlawfully assault Bhekinkhosi Sihlongonyane by intentionally using force and violence to induce submission by Bhekinkhosi Sihlongonyane and did take and steal from him an Alcatel cell phone valued at E400 and cash amounting to E700 his property or in his lawful possession, and did rob him of the same. Finally, in count five and count six, the accused is charged with the crime of contravening sections 11(1) and 11(2) respectively as read with section 11(8) of the Arms and Ammunition Act 24/1964 as amended.

[3] The accused person pleaded not guilty to the indictment. In support of its case, the Crown led the evidence of ten (10) witnesses and at the close of the Crown's case, the accused gave evidence under oath in his defence and he did not call any witnesses.

[4] The Crown by consent of the defence submitted a post mortem report showing the cause of death of Thembi Maphosa as it was common cause that she was shot on the head. The said report was admitted in evidence as Exhibit Z9. Also, two medical reports for Bhekinkosi Sihlongonyane (PW8) and Muzi Sihlongonyane (PW9) were submitted by consent as there was no dispute that they were shot with a gun. Further, the Crown also by consent of the defence submitted photographs of the deceased showing one shot wound on the head.

[5] PW1 Olebile Edward Sereo was an Expert witness. He testified that he is a Captain in the South African Police Service and he is attached to the Ballistics Unit of the Forensic Science Laboratory as a Senior

Forensic Analyst. On 7/11/2005 he received a parcel from Royal Swazi Police containing a 9mm Parabellum Calibre Norinco Model 213 semi automatic pistol, the serial number of which was obliterated. He said he also received three fired cartridge cases and his duty was to examine and determine whether the fired cartridges were fired from the aforementioned pistol. He further testified that the results of his forensic examination showed the three cartridges were indeed fired from the said pistol.

[6] PW2 was Ncamsile Dlamini who testified that she was called by the police to witness when the accused was pointing out certain exhibits. She stated that the accused showed a gun to the police using his head and thereafter using his foot since he was handcuffed. She said the accused further showed them 15 live rounds of ammunition, a black jacket and a pair of khaki trousers. She said another thing that was found was a can which the accused said he had used to burn and destroy the

identity card, the bank card and a driver's licence. She identified all the said items which, except for the firearm, had been produced in Court.

[7] Under cross examination the witness said that the accused freely and voluntarily showed the police all the items. She agreed that there were other people, including two brothers of the accused, who were present when she was called by the police to accompany them to the mountain that is next to the accused person's home. PW2 maintained that it was the accused who led the police to the spot where the gun and ammunition were found.

[8] PW3 - PW5 are all police officers responsible for the movement of the gun from Swaziland to South Africa and back. PW3 confirmed that some of the exhibits do not go to South Africa and that they are tested here in Swaziland, particularly in situations like the present case, where the accused had taken the police to the place where he had hidden the ammunition. PW5 further explained that RCCI is the Register of Crimes

Investigated and that each matter is given one RCCI number and that it is not possible for different RCCI numbers to be given to one scene of crime. He confirmed that the RCCI for this matter was RCCI 1555/2005 and he produced and tendered a copy of the station book which was admitted in evidence as Exhibit Z8.

[9] PW7 D/Sgt. 1640 S.V. Ginindza testified to the effect he was responsible for the armoury in Piggs Peak and that on the 7th of January 2008 he had received a firearm which he had gathered had been used in a crime of murder and robbery. He said he kept the said gun in the armoury but on the 13th day of October 2009 robbers broke into the armoury and stole some money and firearms including the pistol in relation to this case. The evidence of this witness was to give a reasonable explanation as to why the gun was not before the Court as an exhibit.

[10] Under cross examination PW7 stated that items in the armoury are only recorded on entry and not when they are taken out. He also maintained that he had seen the gun before the said robbery and that, according to the entry in Exhibit Z8, it was 2039 WPC Sgt. Grace Ndlovu who had brought the gun to the armoury.

[11] PW8 was Bhekinkosi Sihlongonyane who is the complainant in count 3 which is the Attempted Murder charge. He was the only witness who could identity the accused during the commission of the said crimes of Murder, two Attempted Murder and Robbery. He told the court that he knows the accused very well since the accused used to visit his girlfriend next to the shop where PW8 was working. He testified that on various occasions when the accused had gone to his shop, the accused used to send a child of mis witness to call the accused's girlfriend. He also said mat the accused used to request for change from him so as to make phone calls as there was a public phone outside the shop.

[12] PW8 further testified that, on the day in question, after closing his shop at Phophoyane he went to his house and that on arrival he put the money in the bedroom and he went to the sitting room. He said whilst he was seated with the deceased Thembi Maphosa and his brother PW9 Muzi Sihlongonyane listening to the radio, the accused came into the house and he was carrying a gun. He further testified that the accused was wearing khaki trousers and that he had covered his face with a light brown panty hose. PW8 went on to state that when the accused entered he made a shot on the ground and the bullet bounced to the roof. He then pointed the gun at him and demanded money. Then the deceased told the witness to go and give the accused the money.

[13] Testifying further PW8 said that when he stood up and was opening the door to the bedroom the accused shot him on his left leg. He said that he jumped and went inside to take the money and then he came out and gave the money to the accused. After that he went back into the room and closed the door behind him and that whilst he was in the

bedroom waiting for the accused to go he heard two gunshots in the sitting room. He waited for few minutes and then he went out and found that the deceased and PW9 had been shot. He identified the exhibits taken from his house as an Alcatel 311 cell phone, a calculator and money. In respect of the calculator, PW8 said he could fully identify it because at one time when his seven year old daughter was in his shop she was misbehaving and she had had taken the calculator out of its bag and had bitten it. He showed the Court the said bite mark.

[14] As regards the cell phone PW8 said he had bought it for the deceased and he was able to identify it to the police by producing the cell phone box which tallied with the numbers on the phone. He read out the numbers as 332288532075165. The witness then went on to give a detailed description of the money he had given to the accused. He said the money was E640.00 in notes and the balance was in coins totalling E700.00 and that it was in a money bag. He also said he could identify the money by the fact that there was blood on it. The witness testified

that when the accused shot him he had touched his leg and so his hand was full of blood and that everything he touched was stained with blood. He said when he put his hand inside the money bag which was already torn the money became stained with blood. The witness pointed out the blood stains on the money to the Court.

[15] PW8 further stated that there was enough light in the sitting room and so he could easily see the accused and that he had time to look at him for about three minutes. He added that he was able to tell that it was the accused because the panty hose was small and tight and that when the accused had shot on the ground he was looking from side to side and he could see that the accused had big dread locks at the back of his head.

[16] PW8 was cross examined at length and in answer to questions put to him he was unfazed and he told the Court that anyone who knows the accused could have easily identified him from beneath the light brown panty hose he was wearing. He also said that it was when the accused

had stopped and pointed the gun at him that he had a chance to take a proper look at him. The witness maintained that even though it was dark outside, the source of light in the house was electricity and that he was able to identify the accused because he knew him very well.

[17] PW9 was Muzi Sihlongonyane the complainant in count 4, which is the second Attempted Murder charge. He was the only one present in the sitting room when the shooting and the robbery took place. He corroborated the evidence of PW8 on all material issues and he further testified that after PW8 had given the money to the accused, the latter walked to the table where the deceased was seated and he took a cell phone from the deceased and then shot her. He said the accused told him to lie face down on the ground and then the accused shot him on the head and he collapsed. The evidence of this witness shows that no other person entered the house except the accused who was fully identified by PW8 as this witness did not know the accused. He also corroborated

PW8 as to how the items were identified at the police station. He said the panty hose had four holes at the front and two at the back.

[18] PW10 was 1950 D/Inspector K. Hlatshwayo. He testified that he was the main investigator in this case and he outlined all the actions he had taken from the time he had received the report about the murder case and the robbery. He told the court that he and other police officers, one of them being R. Nxumalo who knew the suspect well, went to Mshingishingini in the early hours of the 5th of September, 2005. They found the accused collecting water next to his homestead and introduced themselves as police officers and cautioned the accused in terms of the Judges Rules before searching him. In the accused's pocket they found a panty hose, two cell phones and money amounting to E640. He said he had observed that the money was stained with blood. He also said he had found E310 and some coins which amounted to El 70 in the pocket of the accused.

[19] PW10 went on to testify that upon further investigations, and after the accused had once again been cautioned in terms of the Judges Rules, the accused led them to a spot about 30 metres behind his house where he used his head and his foot to point out the gun that was used to commit the crimes. When PW10 removed the gun he noticed that it was a 9mm Parabellum pistol. Also around the same spot there were two magazines of which one was loaded with 7 live rounds of ammunition and the other loaded with 8 live rounds of ammunition. Just nearby there was a blanket, a black jacket, a black T-shirt with red colours, a calculator and a pair of khaki trousers.

[20] PW10 thereafter produced and tendered, without objection from defence counsel, all the exhibits into Court as part of his testimony and they were admitted in evidence and marked as follows:

> Alcatel cell phone marked as Exhibit 1, calculator Exhibit 2, E640 in notes as Exhibit 3, El07 in coins as Exhibit 4, panty hose marked as Exhibit 5, khaki trousers as Exhibit 6, black jacket as Exhibit 7,

two cartridges with magazines marked as Exhibits 8A and 8B, Empty box of cell phone as Exhibit 9, blanket as Exhibit 10 and T-shirt as Exhibit 11.

[21] During cross examination the defence put it to this witness that the pointing out was not freely and voluntarily made as he was assaulted at Horo Police station before being taken to the mountain. The defence further put it to this witness that during the pointing out a police officer happened to kick a hard object which turned out to be the gun that the police alleged was used to commit the crimes. Needless to say that PW10 denied all these allegations.

[22] The accused person testified in his own defence and called no witnesses. He stated that he was at home at the time the alleged crimes were committed and he denied that P.W.8 knew him in the manner he had described him. He also denied that he had led the police to the exhibits and he also denied seeing the gun alleged to have been used. He

stated that he never pointed to any gun or live ammunition or cartridges in the presence of the police and that he had never volunteered any information to PW10. The accused also testified that the only crime he was aware of committing at the time of his arrest was that of being in possession of dagga. He said he was earning his living through selling dagga.

[23] The accused further told the court how he was arrested next to a water tank by his homestead and then taken to Horo Police station where he was assaulted and tortured. He said his hands were tied to his back and he was made to lie on a bench facing up and then all the police officers sat on him. Later after the assault he was taken to Pigg's Peak police station where he was charged and detained before he eventually appeared in Court.

[24] Let me pause here for a moment to consider the contentious issue raised by the defence in relation to the pointing out of the exhibits by the

accused. In short, the defence has contended that there was no pointing out at all on the day in question. The accused denied that he led the police to the exhibits and he said he had never pointed out any gun or live ammunition and cartridges in the presence of the police. The accused also denied everything including seeing PW2 on that day and he said that the exhibits before the Court were not known to him.

[25] It is pertinent to note that during cross examination of PW10, the defence did not deny that there was a pointing out by the accused. Their contention was that the pointing out was not made freely and voluntarily. Defence counsel had also questioned PW10 as to why he had chosen PW2 Ncamsile Dlamini to witness the pointing out instead of Thulani and Sabelo who were brothers of the accused. In response PW10 had told the Court that he just wanted an independent member of the community since Thulani and Sabelo were related to the accused.

[26] Moreover, the defence put it to this witness that the pointing out was not freely and voluntarily made as he was assaulted at Horo Police station before the pointing out. The defence further put it to this witness that during the pointing out a police officer happened to kick a hard object which turned out to be the gun that the police alleged was used to commit the crimes. It is therefore apparent to me that the defence at that stage did not deny that there was a pointing out. However, when the accused took the witness stand he changed the story and said that there was no pointing out at all and he even denied seeing PW2 on that day.

[27] It would also be recalled that in her evidence in chief PW2 had testified that she was called by the police to witness what the accused wanted to show them. It was put to her, under cross examination, that the accused never pointed out the items and that it was one police officer who had kicked something hard which turned out to be a gun. She denied the allegation and she maintained that it was the accused who had showed the police the ammunition. It is note worthy that even though in

his defence the accused had denied seeing PW2 on the day of his arrest, under cross examination he admitted that he last saw PW2 on the day of his arrest when she was called by the police.

[28] At this stage, I should add that Crown counsel also relied on the provisions of Section 227(1) and (2) of the Criminal Procedure and Evidence Act 67/1938. This Section reads as follows:

> ***"Admissibility offacts 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.***
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> ***(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."***

[29] When dealing with the issue of pointing out in the Court of Appeal of Swaziland case of **Alfred Shekwa and Another** v **The King CA No. 21/1994, Browde JA** made the following pronouncement:

> "In the case of **July Petros Mhlongo and others v The King (Case No. 185/92)** in this Court, the judgment in **S v Sheehama 1991 (2) SA 860** was approved and followed. In that case the Appellate Division in South Africa said:
>
> > A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of section 219A of the Criminal Procedure Act 51 Of 1977, requires that it be made freely and voluntarily."

[30] In the present case, it seems to me that the fact that the accused took PW10 to the Mshingishingini area next to his homestead and then pointed out the exhibits in the presence of PW2, makes it clear that such

pointing out was part of an overall confession by the accused. That being so, it would be inadmissible unless it was shown by the Crown that it was freely and voluntarily made. In this regard, I must state that I believe the evidence of PW10 that he had warned the accused in terms of the Judge's Rules before the pointing out was made. Furthermore, I have had the opportunity of observing both PW2 and PW10 in the witness box. They both gave their evidence extremely convincingly and they were substantially unshaken in cross examination. On the whole, I have found their evidence to be credible, reliable and corroborative and I accept it.

[31] On the other hand, I must state that the accused did not make a favourable impression on me as a witness of truth. I find that he has told a number of untruths, coupled with glaring inconsistencies in his testimony and these can be seen as evidence of his guilt. Invariably, the untruthfulness of the accused is a factor which a Court can properly take

into account as strengthening the inference of guilt. See the case of **Ndlovu v The State 2000 (2) [BLR] 158.**

[32] Although the Court is mindful of the fact that people may lie to bolster up a just cause, out of shame, or out of a wish to conceal disgraceful behaviour, as per the directions in the English case of **R v. Lucas 1981 QB 720, 73 Cr. App. R. 159 CA,** I find that the lies told by the accused in this case were deliberate and were not told for an innocent reason, but rather to evade justice. I so hold.

[33] It is also pertinent to note that defence counsel could have objected to the production and tendering of the exhibits by PW10. This Court would then have had occasion to conduct a "trial within a trial" to determine their admissibility. Regrettably, however, this was not done. In the circumstances, I find that the only inference that can be drawn from the evidence adduced before this Court is that there was indeed a pointing out by the accused on the day of his arrest and the said pointing

out of the exhibits before this Court has been proved to have been freely and voluntarily made. I accordingly reject the accused's denial about the pointing out as being nothing other than an afterthought with the sole aim of misleading the Court. I so hold.

[34] Another contentious point raised by the defence relates to the identification of the accused by the witnesses. Defence counsel has submitted that since it is in evidence that the accused had covered his face with a pantyhose, it was not possible for PW8 to have positively identified the accused. Counsel further submitted that PW8 could not have had time to stare at the accused because he was faced with a robbery situation which only lasted about three minutes. It is also submitted that even though PW9 had taken time to look at the robber he could only describe the clothes he was wearing as khaki trousers and he could not positively identify the accused.

[35] In **S v Mthetwa Crim. Appeal 1972 (3) SA 766 at page 768 A, Holmes JA** opined that because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. His Lordship further pronounced that it is not enough for the identifying witness to be honest:

> "the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."

[36] In the case of **Rex v Mzuba James Mamba, 1979-81 SLR 154 at page 155, Nathan CJ** quoting from the judgment of **Williamson JA** in **S v Mehlape 1963 (2) SA 29 (A) at 32 – 33** stated that "it has been stressed more than once that in a case involving the identification of a

particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification."

[37] The Court in **Rex v Mzuba James Mamba** (supra) went on to state that the nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of the reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation or prior opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags connected with the person observed, and so on, may have to be investigated in order to

satisfy a Court in any particular case that an identification is reliable and trustworthy as distinct from being merely *bona fide* and honest.

[38] It should be noted that the Crown is not required to satisfy all these requirements in order to prove its case beyond reasonable doubt. At the very least, one of these requirements would suffice. In this instant case, the evidence of PW8 shows that he knew the accused very well prior to the incident. Moreover, at the time the accused entered his home and shot and robbed him at gunpoint, PW8 could identify the accused because there was electricity lighting in the house and so he could easily see the accused from beneath the panty hose which was small and tight. He had also testified that he had enough time to look at the accused for about three minutes before he stood up to go and fetch the money from the bedroom.

[39] At this stage, I must state that I am mindful of the fact that it is competent for a Court to convict on the evidence of a single witness.

Section 236 of the Criminal Procedure and Evidence Act 67 of 1938 provides, inter alia, that "the Court by which any person prosecuted for any offence is tried, may convict him of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible

> witness:.....". However, it is established law that such a conviction can only follow if the evidence of the single witness is clear and satisfactory in every material respect. It must be borne in mind that the ultimate enquiry is whether the Crown on the strength of the single witness had discharged the onus of proving the guilt of the accused beyond reasonable doubt. See **Khumalo and Others v R, 1979 -1981 SLR 259.**

[40] It has been submitted by Crown counsel that PW8 was a competent and credible single witness and his evidence concerning the identification of the accused was coherent and reliable. Judging from the facts adduced before this Court, I must state that I am inclined to agree

with counsel's submission. Moreover, I believe the evidence of PW8 and I find that his identification of the accused is reliable and trustworthy. From the foregoing it is clear to me that the accused committed the offences levelled against him.

[41] In respect of the Murder charge, although direct intention to kill was not established in the circumstances, judging from the nature of the injury to the head of the deceased and the weapon used, I find that mens rea in the form of *dolus eventual is* has been proved by the Crown beyond reasonable doubt. I so hold. In arriving at this conclusion, I have placed reliance on the pronouncement by their Lordships in the case of **Vincent Sipho Mazibuko v R. 1982-1986 SLR 372** (CA) **at page 380** C that:

> "A person intends to kill if he deliberately does an act which in fact he appreciates might result in death of another and acts recklessly as to whether such death results or not."

[42] Also, in the case of **R. v. Jabulane Philemon Mngomezulu**

1970 - 1976 SLR 6 at **7 (HC), Troughton ACJ** had this to say:

> "The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased."

[43] With regard to the Attempted Murder charges, I accept as a fact that the medical reports, which have been admitted in evidence, show gunshot injuries on the leg and head of PW8 and PW9 respectively. I also find as a fact that the said injuries were inflicted on them by the accused at the home of PW8 on the 4th day of April, 2005 at Phophonyane area. I so hold.

[44] In order to support a conviction for Attempted Murder, "there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action

contemplated coupled with recklessness as to whether or not the risk is fulfilled in death." **per Schreiner JA** in **Rex v Huebsch 1953 (2) SA 561 (A) at 567.**

[45] In **Henwood Thornton v Rex 1987-1995 SLR 271 at 273** the Supreme Court of Swaziland approved and applied **Rex v Huebsch** (supra) as reflecting the law in the Kingdom of Swaziland. Delivering the majority judgment, **Kotze JA** opined thus inter alia:

> ".....it suffices for the prosecution to prove in a charge of Attempted Murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death."

[46] Having considered the totality of the evidence adduced, I find that when the accused shot both PW8 and PW9, he must have appreciated that there was some risk to their lives but he was reckless as to whether the said risk was fulfilled in death. In the circumstances, I therefore find the accused guilty of the two counts of Attempted Murder as charged.

[47] In the result, I find that the accused committed all the crimes as charged in the indictment as he deliberately and intentionally killed Thembi Maphosa and then with intent to kill, shot Bhekinkosi Sihlongonyane and Muzi Sihlongonyane respectively. I also find that the accused robbed Bhekinkosi Sihlongonyane and he was also found in unlawful possession of a gun and 15 live rounds of ammunition.

[48] In my view therefore, the Crown has discharged its onus of proving beyond reasonable doubt that the accused is guilty as charged on all six counts. I find that the Crown has proved that the accused person's denial of commission of the offences is beyond reasonable doubt false. I accordingly find the accused guilty of all the offences and convict him as charged.

[49] In respect of the murder charge, I must state that, in the light of the locus classicus exposition of extenuating circumstances made by **Holmes JA** in the case of **S v Letsolo 1970 (3) SA 476 (AD) at 476 G-**

H, the Court is enjoined to look for any facts which might be relevant to extenuating circumstances and whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did to the deceased Thembi Maphosa.

[50] The Swaziland Court of Appeal case of **Daniel M. Dlamini v Rex Criminal Appeal No. 11/98** is authority that "no onus rests on an accused person who is convicted of murder to establish extenuating circumstances." It would appear therefore, that in reaching a conclusion as to whether or not extenuating circumstances are present, the duty falls upon the Court.

[51] I shall now proceed to try and execute that duty. As a starting point, it is in evidence that the accused had testified that the only crime he was aware of committing at the time of his arrest was that of being in possession of dagga. I have not found any facts which might be relevant to extenuation, such as drug abuse or intoxication. Be that as it may,

however, the evidence shows that the accused seems to be a person devoid of education and who undoubtedly lived a rustic life full of ignorance and backwardness. This was clearly borne out from his testimony that before his arrest he was selling dagga as an occupation. He said he used to buy it from the people who are cultivating it and after that he would package it and transport it to other countries. According to **Dr. Twum JA** in the Botswana case of ***Fly v The State*** **CLCLB-099-2008,** a rustic background, coupled with low education can serve as an extenuating circumstance.

[52] In my considered view therefore, there are extenuating circumstances in this case and I so return this opinion as required by **section 295 (1) of the Criminal Procedure and Evidence Act, 1938, as amended.**

[53] At this juncture, I deem it necessary to commend both counsel for their commitment and resourcefulness in urging relevant authorities

upon the Court thereby aiding it in the smooth and timeous dispensation of justice in this case.

M.M. SEY(MRS)

JUDGE OF THE HIGH COURT