



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No.323/2011

In the matter between:

REX

Applicant

VS

AFRICAN NKALABEZI MSIBI

Respondent

Neutral citation: *Rex vs African Nkalabezi Msibi (323/2011) [SZHC205] [2013]*
[9th August 2013]

Coram: **MAPHALALA PJ**

Heard: **2011**

Delivered: **9th August 2013**

For the Crown: **Mr. B. Magagula**

For the Defence: **Mr. N. Dlamini**

Summary: (i) Ruling on extenuating circumstances after accused person was found guilty on a plea of guilty where the Crown led evidence in terms of section 236 of the *Criminal Procedure and Evidence Act, as amended*.

- (ii) The accused through his attorney contended that on the facts of the matter intoxication, provocation, low level of education were factors to be taken by the court as extenuating circumstances.
- (iii) The Crown concedes the point that there are extenuating circumstances as stated by the accused.

It was held:

In the result, the court finds that there are extenuating circumstances and sentence the accused and order that accused advance factors in mitigation of sentence in accordance with the law.

Cases referred to in the judgment

- (i) *Rex vs Ntokoza Adams Criminal Appeal No.16/20 [2010] SZSC 10;*
- (ii) *Roy Mandlenkosi Zwane vs R 1970-76 SLR.*

RULING

(on extenuating circumstances)

- [1] For decision before this court presently is whether on the facts the accused African Nkalabezi Msibi has proved extenuating circumstances to escape the sentence of death as provided for by the law in this country.
- [2] The Crown concedes that there are extenuating circumstances in this matter which reduces the moral blameworthiness of the accused.

- [3] The accused in proof that there are extenuating circumstances did not say anything in this respect. He stated that the death of accused occurred because he was trying to avoid an assault by the deceased. When asked by his attorney whether he believed in witchcraft he stated that he did not. However the attorney for the accused Mr. Dlamini in making his submissions contended that the accused was drunk when he committed the offence.
- [4] That as a result of this fact the provisions of section 236 of the *Criminal Procedure and Evidence Act* apply on the facts of this case. However, in the Heads of Arguments filed by his attorney he went at great length to outline a series of factors as extenuating circumstances.
- [5] On the 23rd March 2013 the attorneys made their submissions as stated above and the court postponed the matter to the 5th April 2013 for them to make further submissions and file Heads of Arguments on the point raised by the attorney for the accused in his submission that there is an extenuating factor of intoxication.
- [6] Be that as it may, in view of the inexperience of the attorney for the accused I have taken this factor sneaked in in argument by the attorney for the accused as an extenuating circumstance. I must also state that this was not the only blunder in accused's defence. The plea itself leaves a lot to be desired when

one consider the facts stated by the accused in proof of extenuating circumstances.

[7] In the Supreme Court case of *Rex vs Ntokozo Adams Criminal Appeal No.16/20 [2010] SZSC 10* the following *dicta* was pronounced:

“1.2 The evidence before this Honourable Court is that the accused committed murder after committing theft with another person. He had been drinking alcohol with his co-perpetrator in respect of the theft before committing it. Two occupants of the house where the theft had been committed chased after the accused and his co-perpetrator. One of the people giving chase was the deceased. The accused was cornered by the deceased. The accused took out a knife and stabbed him and then ran away.

It is on this basis that the Crown concedes that an extenuating factor does exist in this matter.”

[8] In view of the above *dicta* the attorney for the accused contended that the next step the court had to adopt in these cases is to determine whether there existed extenuating circumstances or not. If the response was affirmative, the court had to be guided by the facts which might be relevant to extenuation such as drug abuse, immaturity, intoxication, provocation, belief in *muti* or witchcraft.

[9] In light of the above submission the attorney for the accused contends that indeed intoxication, provocation, and low level of education coupled with a rustic background in their cumulative effect probably had a bearing on the accused's state of mind in killing the deceased.

[10] The Crown in argument as reflected in the Heads of Argument filed by Mr. Magagula contends that there is an extenuating factor in this matter which reduces moral blameworthiness of the accused. Mr. Magagula in support of this legal proposition cited the Court of Appeal judgment of *Boy Mandlenkosi Zwane vs R 1970-76* where it was held that in murder cases the consumption of alcohol can operate to diminish an accused person's blameworthiness when it is not indulged in for the purpose of giving the consumer a false species of courage to do what his unimpaired will would successfully forbid him to do if he were sober.

[11] The Crown Counsel has stated the following facts at 1.2 of his Heads of Arguments:

“The evidence before this Honourable Court is that the accused committed murder after committing theft with another person. He had been drinking alcohol with his co-perpetrator in respect of the theft before committing it. Two occupants of the house where the theft had been committed chased after the accused and his co-perpetrator. One of the people giving chase was the deceased. The accused was cornered

by the deceased. The accused took out a knife and stabbed him and then ran away.

It is on this basis that the Crown concedes that an extenuating factor does exist in this matter.”

[12] All in all, therefore on these facts I find that there are extenuating circumstances on the facts of this case and further supported by the Crown as stated in paragraph 1.2 of the Crown’s Heads of Arguments.

[13] In the circumstances therefore, I find the accused guilty of murder with extenuating circumstances as outlined above in paragraphs [9], [10] and [11] of this judgment. Furthermore, I rule that accused ought to advance factors in mitigation of sentence in accordance with the provisions of the *Criminal Procedure and Evidence Act (as amended)*.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE