IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 12/2013

In the appeal between:

MANDLA MLONDLOZI MENDLULA **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Mandla Mlondlozi Mendlula vs Rex (12/2013) [2013] SZSC 60 (29 November 2013)*

CORAM: **M.M. RAMODIBEDI, CJ**
M.C.B. MAPHALALA, JA
E.A. OTA, JA

Heard : 04 November 2013

Delivered : 29 November 2013

Summary

Criminal Appeal – murder – appellant convicted of murder without extenuating circumstances and sentenced to twenty years imprisonment – appeal against sentence on the basis that it is harsh and severe and that it induces a sense of shock – held that the sentence imposed by the court *a quo* is within the range of sentences for such offence in this jurisdiction – held further that there was no misdirection by the court *a quo* – appeal dismissed and sentence confirmed.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant was convicted in the court *a quo* of murder without extenuating circumstances; he was sentenced to twenty years imprisonment. He has lodged the present appeal against sentence on the ground that the sentence imposed is "too harsh and severe, and, that it induces a sense of shock".

[2] During the hearing of the appeal, he reiterated mitigating factors which were considered by the court *a quo* before imposing sentence. In particular the appellant argued that he is married with four minor children to support, and that he is the sole breadwinner in the family. He further argued that he is a first offender, and, that he deserved to be given a second chance in life. He asked the Court to reduce his twenty- year sentence by eight years.

[3] The appellant and the deceased were in a love relationship since 2005; however, they were not married to each other. They resided in a home which they had built together at Sivunge area in the Lubombo region. The appellant was also married to another woman Tengetile Mavuso, with whom they had three children; they lived at his parental home at Mavalela area in the Lubombo region.

[4] On the 8th August, 2011, at Sivunge area, the appellant brutally killed the deceased using a spear-head. The appellant made a confession before a

Judicial Officer as well as recorded a statement with the police, both of which were admitted as exhibits in the court *a quo*. It is apparent from the evidence that on the 8th August 2011, the appellant received a tip-off that the deceased was in love with another man at Sivunge village by the name of Luke Nkente Makhanya, a sugar cane cutter employed by Sivunge Sugar Cane Farm. On the 8th August 2013, he left his parental homestead at 1800 hours and proceeded to Sivunge village; he was armed with a spear-head.

[5] The appellant arrived at Sivunge Village at 1900 hours, and hid himself at a nearby bush by the roadside where the deceased and Nkente Makhanya would pass on their way to the deceased's homestead. It was already dark outside but there was a moonlight. After fifteen minutes, he saw the deceased and Nkente Makhanya passing the bush where he was hiding. He says that he felt angry seeing them walking together; and, his suspicion that they were in love was confirmed. The appellant took out his cellphone and called the deceased; however, she did not answer his call. Immediately thereafter, she called him and asked who he was, yet she knew his cellphone number which was identifiable on her cellphone; he says that this again made him angry since she knew his cellphone number. He told her that he was on his way to their homestead.

[6] The appellant came out of the bush where he was hiding and followed them. Along the way he met Nkente Makhanya going back, and, hit him with a fist on

the chest without uttering a word; when Nkente Makhanya realised that it was the appellant who was hitting him, he ran away. The appellant tried to chase after him, but he outran him. The two men knew each other very well; they used to play cards together, and, Nkente Makhanya knew the relationship between the appellant and the deceased.

[7] The appellant followed the deceased and soon caught up with her not very far from where he had attacked Nkente Makhanya. Without uttering a word, he grabbed one of her shoulders from the back and held her firmly against him; she shouted for help several times and further pleaded with him not to kill him on the basis that she was not in a love relationship with Nkente Makhanya and, that he was merely accompanying her. On appellant's own version, the deceased told him that Nkente Makhanya was still proposing love to her. The appellant stabbed her with the spear-head under her left arm-pit; then he asked her the number of times Nkente Makhanya had accompanied her because he had seen them together on four occasions. At that time she was getting weaker and was sitting down facing the ground crying and writhing in pain.

[8] Thereafter, the appellant left the scene and went to their homestead with the deceased. He found the deceased's daughter Philile Matse, PW1, and her baby as well as her brother Mcolisi Mavuso, PW2; the appellant arrived at the homestead and said "knock, knock", and then he forcefully opened the door. The house was lit with a paraffin lamp. He told them that he had killed the

deceased and further showed them a blood-stained spear-head that he had used in committing the offence. He directed them to the place where he had killed and abandoned the deceased next to a dam where there are bushes, about one-hundred and fifty metres from the homestead. He directed PW2 to take the child from PW1 so that he could kill her as well; however, PW2 refused and told him to kill both of them because nobody would look after the child. Meanwhile PW1 became unconscious when the appellant was threatening to kill her as well.

[9] The appellant left the homestead saying that he would hand himself over to the police. Meanwhile PW1 and PW2 reported the incident to their uncle Bongani Maziya. It is not in dispute that the appellant subsequently left Sivunge Village and went to his parental homestead at Mavalela area. On arrival he reported the incident to his wife Tengetile Mavuso; thereafter, he slept at a Matse homestead in the area. It is further not in dispute that on the following day, Absalom Matse, PW3, at the instance of the appellant, accompanied him to Tikhuba Police Post where he surrendered himself to the police. He further handed the murder weapon to the police; it was contained in a bag which he was carrying. The bag and the murder weapon were subsequently handed as exhibits to Detective Sergeant Mandla Dlamini, PW4, who was the investigator in the matter as well as a Desk Officer of the Criminal Investigation Division at Big Bend Police Station.

[10] The police found the deceased's body at the scene of crime lying down facing upwards; and, members of the public had gathered at the scene. The police preserved the scene overnight in order to enable the Scenes of Crime Officers to take photographs of the scene; those photographs were subsequently admitted in the court a quo as exhibits and marked exhibits D1 – D10.

[11] PW4 further handed into court a statement made by the appellant to the police; it was recorded by Constable Vilakati. The statement was read into the court record by PW4. The statement was similar to the confession subsequently made by the appellant. The defence did not challenge the admissibility of the statement and it was admitted in evidence and marked Exhibit A.

[12] Similarly, the post mortem report was admitted in evidence by consent and marked Exhibit B. The deceased's body was identified by PW4, the investigator, as well as the deceased's brother Mandla Maziya. The Post-mortem examination was conducted by Dr. Komma Reddy; a Pathologist employed by the Government of Swaziland and based at the Police Headquarters in Mbabane. The cause of death was due to stab wounds to the chest.

[13] The pathologist identified the following ante-mortem injuries: firstly, a stab wound of 2 ½ x 2 cm present on the middle portion of the left side of the chest, which was 25 cm from the middle line, 32 cm from and above the umbilicus

and 117 cm from the heel of the left foot. Secondly, as stab wound of 1 x ½ cm present on the medial side of the middle portion of the front and lower 1/6th portion of the right side of the chest, which was 4 cm from and above the umbilicus.

[14] The pathologist in examining the deceased's chest found that the left side of the diaphragm as well as the mediastinum and thymus were ruptured. There was a stab wound of 1 cm length present on the lower lobe of the right lung. Similarly, there was a stab wound of 2 cm length present in the lower lobe of the left lung. Furthermore, there was petechial haemorrhage present on the heart, and, the Abdominal Aorta cut in the upper portion.

[15] The confession made by the appellant before a judicial officer, Magistrate N.J. Dlamini on the 10th August 2013 was also admitted in evidence by consent and it was marked Exhibit C. The confession is consistent with the facts as found by the court a quo. The appellant confirmed that the confession was made freely and voluntarily without any undue influence; and, that no threats or promises were made to induce him to make the confession. He further confirmed that he was not assaulted by the police since his arrest, and, that he did not incur injuries whilst in police custody.

[16] The appellant admitted in the confession that he had received a tip-off that the deceased was having an affair with Nkente Makhanya and that he had also seen

them together on four previous occasions. He waylaid and ambushed them, hiding in a bush by the roadside where they had to pass. He was armed with a spear-head. He saw them passing his hide-out, and later followed them. Along the way he met Nkente Makhanya who was going back home and hit him with a fist without uttering a word, and, he ran away. He followed the deceased and stabbed her on the chest two times without uttering a word. Before she died the deceased asked for mercy not to be killed and further denied that she was in-love with Nkente Makhanya; she said he was merely accompanying her. The confession is consistent with the statement made by the appellant to the police.

[17] During the hearing of the trial, the Crown and defence agreed that it would not be necessary for three Crown witnesses to give their evidence as reflected in the Summary of Evidence attached to their indictment on the basis that the evidence was not in dispute. The said evidence constitutes admissions by the appellant. The first admission is that of Joseph Bhekimphatfo Mngometulu, employed as a security guard at Sivunge Sugar Cane Farm, came across the body of the deceased on the 8th August 2011 at about 1900 hours and raised an alarm. The police were called and attended the scene. He was walking from his workplace to the Sivunge Village.

[18] The second admission relates to the evidence of Luke Nkente Makhanya as reflected in the summary of evidence attached to the indictment. He is employed as a sugarcane cutter at Sivunge; and, on the 8th August 2011 at

about 1850 hours, he accompanied the deceased towards her homestead. Along the way they came across the appellant who was a boyfriend to the deceased; and, the appellant was offended and attacked him. He ran away leaving the deceased behind with the appellant. He heard the deceased crying out aloud and begging the appellant not to kill her. At about 0023 hours the police arrived at his house and informed him that the deceased had died.

[19] The third admission relates to the evidence of Ronnie Elijah Matsenjwa as reflected in the Summary of Evidence attached to the indictment. He was employed as a Support Staff at Tikhuba Police Post. On the 9th August 2011, at about 1330 hours, two men arrived at the Police Post and introduced themselves as Mandla Mendlula and Absalom Matse; and, Matse told him that he had accompanied the appellant who had come to surrender himself to the police for killing his wife. He phoned the Police at Big Bend Police Station, and, they came and took over the matter.

[20] The fourth admission relates to the evidence of Constable Maxwell Mthethwa as reflected in the Summary of Evidence attached to the indictment. He is the police officer who preserved the scene of crime and, further guarded the body of the deceased overnight pending the arrival in the morning of the Scenes of Crime Police Officers.

[21] The last admission relates to the evidence of Mandla Maziya, now deceased. He was the brother to the deceased, and, he was called to the scene where he identified the dead body of his sister. He further identified her body during the post-mortem examination on the 9th August 2011 at Good Shepherd hospital.

[22] The appellant gave evidence in his defence which sought to exonerate him from the offence. His evidence differed in material respects to the confession and the statement he recorded with the police, notwithstanding that these exhibits were admitted in evidence by consent. He told the Court that he was actually invited by the deceased to meet her along the road since she would work till late that day. Before reaching the compound, he went to the bush to relieve himself; thereafter, he saw Nkente Makhanya and the deceased walking together along the road.

[23] Under cross-examination, he denied that he waylaid and ambushed the deceased and Nkente Makhanya after receiving a tip-off that they were in-love with each other. However, this was not put to Crown witnesses and constitutes an after-thought. The correct version is the confession and the statement recorded with the police because these documents were admitted in evidence by consent. Furthermore, when the confession and statement were recorded, the facts were still fresh in appellant's mind.

[24] The appellant further advanced provocation as a defence in his evidence in-chief. He testified that he was angered by the deceased when she asked him on the phone who he was yet she knew his cellphone number. However, provocation was not put to Crown witnesses as a defence to the commission of the offence; and, this amounts to an afterthought. The only defence which was put to Crown witnesses was that the killing of the deceased occurred by accident. It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief.

- *Rex v. Mbedzi* Criminal case No. 236/2009 para 223 (HC).
- *Sonnyboy Sibusiso Vilakati v. Rex* Criminal Appeal No. 35/2011 at pages 4 and 5.
- *Elvis Mandlenkhosi Dlamini v. Rex* Criminal Appeal No. 30/2011

[25] In the case of *Elvis Mandlenkhosi Dlamini v. Rex* Criminal Appeal No. 30/2011, I had occasion to quote with approval the South African case of *S. v. P* 1974 (1) SA 581 (RAD) at 582 where *Macdonald JP* said:

> **"It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial. The court was entitled to see and hear the reaction of the witnesses to the vitally important allegation that the appellant was not even in possession of red**

sandals on the two occasions he was alleged to have worn them at the river. Quite apart from the necessity to put this specific allegation, there was in my opinion a duty to put the general allegation that there had been a conspiracy to fabricate evidence. It is illogical for counsel to argue that there is a sufficient foundation in fact for a submission that the possible existence of such conspiracy is such as to cast doubt on the whole of the State case but insufficient fact on which to cross-examine the principal State witnesses. The trial court was entitled to see and hear their reaction to an allegation that they had conspired with the persons and for the reasons mentioned in the course of the trial. They may have been able to satisfy the court that an opportunity to enter into such a conspiracy never existed. So important is the duty to put the defence case that, practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from the court."

[26] The defence has failed to establish provocation. According to the evidence, the appellant had seen the deceased and Nkente Makhanya together on four previous occasions; hence, he could not argue that he was provoked by seeing them together on the 8th August 2011. Similarly, the appellant cannot invoke the Homicide Act No. 44 of 1959 in the circumstances. The Homicide Act provides the following:

"**2. (1) A person who-**

(a) Unlawfully kills another under circumstances which but for this section would constitute murder; and

(b) Does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;

Shall be guilty of culpable homicide.

(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

(3) (1) Subject to this section "provocation" means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered."

[27] The court *a quo* convicted the appellant of murder without extenuating circumstances and sentenced him to twenty years imprisonment. The Crown has proved the commission of the offence beyond reasonable doubt and the court *a quo* was correct in convicting the accused of murder. It is apparent from the evidence that the appellant ambushed and waylaid the deceased and Nkente Makhanya on the side of the road, where they had to pass; he was armed with a spear-head. He was suspicious that they had a love relationship. He admitted this in the confession as well as the statement made to the police. He further admitted stabbing the deceased to death despite her plea that she was not in-love with Nkente Makhanya. The deceased was stabbed using a lethal weapon in a very delicate part of her body; thereafter, the appellant left the deceased to die on the side of the road. The ambush of the deceased

coupled with the use of a lethal weapon on the chest proves the existence of *mens rea* in the form of *dolus directus*.

[28] I had occasion to say the following in the case of William Mceli Shongwe v. Rex Criminal Appeal No. 24/2011, at para 46:

> **"46. In determining *mens rea* in the form of intention, the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased."**

See the cases of *Ntokozo Adams v. Rex* Criminal Appeal No. 16 of 2010 and *Xolani Zinhle Nyandzeni v. Rex* Criminal Appeal No. 29/2008.

[29] Similarly, *Troughton ACJ* said the following in *Rex v. Jabulani Philemon Mngomezulu* 1970-1976 SLR 6 at 7 (HC):

> **"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."**

[30] In the instant case, a lethal weapon was used, the extent of the injuries sustained were severe, and, the deceased was stabbed on the chest resulting in extensive injuries to the lungs as well as the heart; and, these are very delicate parts of the body. In addition the offence was premeditated.

[31] Similarly, I cannot interfere with the finding by the trial Court that no extenuating circumstances existed in the absence of evidence that the court *a quo* misdirected itself in that regard. At para 53 in the case of *William Mceli Shongwe v. Rex* (supra), I had occasioned to say the following:

> **"53. In *S v. Mcbride* 40/88 (1988) ZA SCA 40 (30 March 1988) *Corbett JA* who delivered the majority judgment of the court stated that in principle an appeal court cannot interfere with the finding of the trial court as to the existence or otherwise of extenuating circumstances in the absence of any misdirection or irregularity unless that finding is one which no reasonable court could have reached. This principle reflects the law in this country...."**

[32] The appellant argued that the death of the deceased occurred by accident. However, this defence is not supported by the evidence which points to a premeditated killing of the deceased. An event occurs by accident if it is caused by an unforeseeable occurrence: See *Zwelithini Tsabedze v. Rex* Criminal Appeal No. 32/2012 at para 14.

[33] In the case of *S. v. Ndiwenyu* (1990) BLR 409 at 416, *Gyeki Dako J* had this to say:

> **"... an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought under the circumstances in which it is done, to take reasonable precautions against it."**

[34] The appeal is not against conviction but only the sentence of twenty years imposed by the court *a quo*. The appellant seeks the reduction of sentence by eight years on the basis that the sentence is harsh and severe and induces a sense of shock. The principle guiding sentencing was reiterated by the Supreme Court in the case of Elvis *Mandlenkhosi Dlamini v. Rex* (supra) at para 29. In that case I had occasion to say the following:

> **"29. It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an appellate Court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as**

the yardstick for the determination of appeals brought before this Court."

[35] This principle has been applied by this Court in many cases including *Musa Bhondi Nkambule v. Rex* Criminal Appeal No. 6/2009, *Nkosinathi Bright Thomo v. Rex* Criminal Appeal No. 12/2013, *Mbuso Likhwa Dlamini v. Rex* Criminal Appeal No. 18/2011, *Sifiso Zwane v. Rex* Criminal Appeal No. 5/2005, *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007 as well as *Vusi Muzi Lukhele v. Rex* Criminal Appeal No. 23/2004.

[36] Similarly, it is trite that the sentence imposed as a punishment should not only fit the offender as well as the crime committed but it should further safeguard the interests of society. The public interest demands that deterrent sentences should be imposed not only to curb incidents of crime but as well as to protect law abiding citizens. However, the sentence should be proportionate to the offence and should not be manifestly unjust or excessive. In the exercise of his duties the judicial officer should be guided by the triad consisting of the crime, the offender as well as the interests of society. See the cases of *S. v. Zinn* 1969 (2) SA 537 (A) at 540, *Elvis Mandlenkhosi Dlamini v. Rex* Criminal Appeal (supra) at para 3.

[37] I am satisfied that the trial judge did not misdirect himself in any material respect resulting in a miscarriage of justice. The court *a quo* considered the triad when imposing sentence, that is, the interests of society, the seriousness of

the offence as well as the personal circumstances of the appellant. The court *a quo* further considered the fact that the crime was premeditated; and, that the killing of the deceased was gruesome and brutal. The deceased was ambushed and waylaid, and further stabbed with a lethal weapon on the chest damaging instantly the heart and lungs; in addition, the deceased was left on the side of the road to die.

[38] The court *a quo* also considered the interests of society particularly the upsurge in the killing of women as well as the need to impose deterrent sentences which would provide the safeguard against this onslaught. In the case of *Elvis M. Dlamini v. Rex* (supra), I dealt with a similar case where the appellant brutally killed his live-in-lover on a mere suspicion of infidelity which was not substantiated in court. At para 35, I had this to say:

> **"35. Needless to say that there is, regrettably, a growing trend in this country in the killing of women by their spouses and male friends with impunity and without lawful cause. It is a frightening development against the women folk requiring the urgent attention of the Courts as well as society as a whole. In all these deaths the women are not armed, and, being the weaker sex, they are unable to defend themselves. In the present case as in many others, the assailant has no remorse for what he has done. The Courts have a duty to uphold the Constitution by protecting the right to life."**

[39] It is further apparent from the judgment of the court *a quo* that the personal circumstances of the appellant were taken into consideration when imposing

sentence, that he is a first offender, that he surrendered himself to the police and was co-operative during police investigations; and, that he has a wife and three minor children to support. Similarly, the court took into account the period spent by the appellant in custody.

[40] There are many murder cases in this Court where the sentence of twenty years has been confirmed. In the case of *Mfungelwa Simon Dlamini v. Rex* Criminal Appeal No. 19/2011, this court dismissed an appeal against a twenty-year sentence for murder on the basis that it was within the accepted range of sentences which is between fourteen and twenty years. Similarly, in the case of James *Mthembu v. Rex* Criminal Appeal No. 23/2011, this court confirmed a twenty-year sentence for murder on the same basis. Furthermore, in the case of *Ntokozo Adams v. Rex* Criminal Appeal No. 16/2010 this court reduced a sentence in a murder case from thirty years to twenty years on the same basis. In the case of *Thembinkosi Marapewu Simelane and Another v. Rex* Criminal Appeal No. 15/2010, a sentence of twenty five years was reduced to twenty years on the same basis that such sentence was within the acceptable range in murder cases.

[41] Accordingly, the following Order is made:

(i) The appeal against sentence is dismissed.

(ii) The sentence of twenty years imprisonment imposed by the trial Court is confirmed.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

E.A. OTA
JUSTICE OF APPEAL

Appellant in Person

For Respondent — Senior Crown Counsel M. Nxumalo

DELIVERED IN OPEN COURT ON 29 NOVEMBER 2013