



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Criminal Appeal Case No. 02/2013

In the matter between:

MANDLA BHEKITHEMBA MATSEBULA

APPELLANT

V

REX

Neutral citation : Mandla Bhekithemba Matsebula v Rex (02/2013) [2013]
SZSC 72 (29 NOVEMBER 2013)

Coram : A.M. Ebrahim J.A., S.A. Moore J.A., P. Levinsohn J.A.

Heard : 4 November 2013

Delivered : 29 November 2013

SUMMARY

Appellant convicted for the offences of Murder Without Extenuating Circumstances and for Rape - Sentenced to 25 years imprisonment for Murder Without Extenuating Circumstances and to 10 years imprisonment for the offence of Rape - Sentences ordered to run consecutively - Appellant sentenced to a total of 35 years imprisonment - Law relating to Consecutive Sentences explained – Factors amounting to Extenuating Circumstances in decided cases identified and set out in tabular form – Sentencing judge required to make a diligent search for Extenuating Circumstances by looking closely at all of the material upon the record – No onus resting upon the accused to prove that Extenuating Circumstances are present upon the record of the case – This Court finds that Extenuating Circumstances did exist upon the record which the trial judge should have considered and applied in determining the appropriate sentence – Failure to do so amounted to a material misdirection – Judges under a duty to consider and apply sentencing guidelines for murder set out in *Tesla v Rex* [2012] SZSC 13 and to give reasons if, in the exercise of their sentencing discretion, they decide not to do so - Judges must also consider sentences sanctioned by this Court, the principles of Parity and Proportionality of Sentences, the degrees of gravity of recently committed offences of Murder With Extenuating Circumstances and the penalties confirmed by this Court in those cases and seek to ensure that cumulative sentences are not markedly disproportionate or manifestly excessive– Appeal allowed – Sentence of 25 years imprisonment for Murder Without Extenuating Circumstances set aside – Sentence of 20 years imprisonment for murder With Extenuating Circumstances substituted – Ordered that sentences run concurrently rather than consecutively – Appellant to serve a total of 20 years on the two offences for which he was convicted.

JUDGMENT

MOORE JA

INTRODUCTION

[1] MandlaMatsebula was clearly a very troubled young man who demonstrated an unfortunate proclivity for raping middle aged women. At the relatively young age of 23 years, he stood indicted with three major offences:

- Murder of SibongileSihlongonyane on the 26th October 2008
- Rape of SibongileSihlongonyane , a female aged 48 years on the 26th October 2008

- Rape of Juana Mathonsi, a female aged 50 years on the 3rd July 2008.
- [2] Detective Constable 3540 AbnerShabangu who was the investigating officer into the July report of rape admitted receiving that report on the 5th July 2008. He conceded in evidence that he “did not bother” himself taking note of the name and surname of the husband of a potential witness when it was his clear duty to do so: particularly in the early stages of his enquiries when it is settled practice to collect as much information as possible before the winnowing begins to separate the irrelevant chaff from the evidential grain.
- [3] At all events, this constableShabangu conducted his investigations with such slothfulness that by the time that the appellant had committed the October rape, he had not yet arrested him for the July rape even though the victim of the July rape had furnished the good constable in her initial report on the 5th July with full details of the name, place of residence, and a detailed description of the physical characteristics of her attacker who was her neighbor.

[4] This officer's attempts at the trial to explain why, armed with all of the information which he had at his disposal, he had failed to arrest the appellant before he could commit yet another rape and a murder some three months and three weeks later, were wholly unconvincing and unsatisfactory. The trial judge rightly described this officer's evidence in relation to the October rape as a "brief muddled account which took the matter nowhere." He was undoubtedly correct when he wrote:

"One would not be faulted for saying had the police acted timeously and swiftly on the report of the rape of Joanah Mathonsi, particularly taking into account conclusion I have reached in this matter, the deceased would still be alive."

The appellant was accordingly acquitted on the count of rape which had been so poorly investigated and prepared by constable Shabangu.

[5] The lack of urgency in the investigation and prosecution of rape cases has become a matter of concern to this Court. In *Rex v Bongani Gecevu Mhlanga and Others* Criminal Case No. 93/03, multiple crimes of gang rape against sub-teenaged school children, waylaid on their way home from school, which began in August 2002, were allowed to continue until November of

that year even though reports had been made to their parents and the police following the first set of gang rapes in August. Prompt action by both police and community would have spared those unfortunate children the repeated rapes between August and November.

THE APPEAL

[6] At the end of the trial, the appellant was found guilty of the murder - without extenuating circumstances - of Sibongile Sihlongonyane, and the rape of Juana Mathonsi. The relevant portions of the record read:

“Count1: Murder - The accused be and is hereby sentenced to 25 years imprisonment.

Count3: Rape - The accused be and is hereby sentenced to 10 years imprisonment.

The first sentence to be served of the two shall take effect from the date of the accused person’s arrest, which I was informed was the 28th October 2009.”

[7] By letter dated 24th January 2013 under his own hand, the appellant filed an ‘application for appeal.’ The relevant portions in the body of the letter read:

‘I accept my conviction on both counts but only appeal against the harshness and severity of my sentences.’

My two(2) sentences are too harsh for me to bear.’

Counsel for the respondent grounded his opposition to the appeal upon the well- established principle articulated by Ramodibedi C.J. in **Makwaka v Rex** Criminal Appeal No. 2/2006 which reads:

‘..sentence is pre-eminently a matter within the discretion of a trial court. A court of appeal will not generally interfere unless there is a material misdirection resulting in a miscarriage of justice.’

[8] Section 300 of the Criminal Procedure and Evidence Act empowers the court to impose cumulative or concurrent sentences. It reads:

(1) “If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him

to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(2) If such punishment consists of imprisonment the court shall direct whether each sentence shall be served consecutively with the remaining sentence.”

Though the judge did not say so in so many words, he undoubtedly imposed consecutive sentences of 25 years plus 10 years amounting to a net sentence of 35 years imprisonment.

EXTENUATING CIRCUMSTANCES

[9] A convenient starting point in an attempt to identify extenuating circumstances may be by reference to the dictum of Schreiner J.A. in the Appellate Division in **Rex v Fundakubi and Others** SA Law Reports 3 1948 810 at page 818 which reads:

‘..no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration. That a belief in witchcraft is a factor which does

materially bear upon the accused's blame worthiness I have no doubt;'

[10] In **R v Adams**[2010] SZSC 10, TwumJA adopted the dictum of Lansdown, JP in **Rex v Biyana** (1938, E.D.L. 310 which had itself been cited with approval by Schreiner, JA in **Fundakubiand Others** at page 815:

“In our view an extenuating circumstance in this connection is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt. The mentality of the accused may furnish such a fact. A mind, (which) though not diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the case of a mind of normal condition. Such delusion, erroneous belief or defect would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance ... when we find a case like this, where there is a profound belief in witchcraft, and that the victim practiced it to grave

harm, and when we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as persons laboring under a delusion which, though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance.”

[11] In paragraph [1] of his “Judgment on the existence or otherwise of extenuating circumstances and on sentencing”, the learned judge *a quo* was content to declare that;

“It suffices that I conducted both enquiries where after having found that there were no extenuating circumstances, I in exercise of the discretion afforded me by section 15(2) of the Constitution went on to pass what I considered an appropriate sentence.”

The above passage makes it abundantly clear that the judge proceeded to consider the matter of sentence upon the footing that there were no extenuating circumstances in the case before him. In doing so he misdirected himself materially because, as will emerge in due course when the evidence and other circumstances of the case are set out and considered, there was abundant material before him upon which he was duty bound to find

extenuating circumstances based upon binding authorities emanating from this Court, and from the highly persuasive and authoritative dicta from sister jurisdictions. These matters will be discussed more fully *infra*.

[12] It is apposite to set out the material which lay before the judge upon the totality of which he ought properly to have found extenuating circumstances:

- It is common cause that the appellant was 23 years old when he committed the offence.
- Youth in this context is a relative term.
- The judge holding that the appellant “is a relatively young man”.
- The judge’s finding that “the accused was shown to have taken alcoholic drinks on the fateful day”.
- The judge had before him the evidence of several witnesses - including that of the shebeen keeper Maphilibane Matsenjwa himself - to the effect that the appellant had spent several hours at the shebeen on the day of the murder. He had left some time before the deceased who was also there.
- The accused was both a purchaser and consumer of alcohol.
- Altercations and fights sometimes occur at the shebeen.

- The appellant was unsophisticated and had gone only as far as grade 2 at school.
- The accused was a first offender.
- There was no evidence that the murder was premeditated. It was open to the judge to find that it was committed in the course of a rape which had gone tragically wrong.
- The accused had cooperated with the police. He led them to the scene of the murder and pointed out relevant locations.
- He had also pointed out two items which might have been used in committing the murder.

[13] The case of **R v Adams** [2010] SZSC 10, a decision of this Court, is highly instructive, persuasive and binding in the context of this case. The trial judge had found that no extenuating circumstances existed in the case before him. The question which this court had to decide was whether or not he had misdirected himself in coming to that conclusion. After setting out the individual items of evidence each of which was an extenuating circumstance, Dr. Twum J.A. was undoubtedly correct when he expressed the 'view that ***cumulatively*** these matters had a bearing on the accused's

state of mind in killing the deceased.’ Emphasis added. Dr. Twum also declared at paragraph [14] that:

‘In determining the existence or non-existence of extenuating circumstances the court was to consider:

- *“whether there are any facts which might be relevant to extenuation, such as drug abuse, **immaturity,intoxication**, provocation, belief in muti or witchcraft.”*
- *Whether such facts, in their cumulative effect, probably had a bearing on the accused’s state of mind in doing what he did.*
- *Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.”*

In deciding (c) the trial Court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances.... The general rule is that it is for the accused to lead evidence which would show extenuating circumstances in the crime of murder even though it is also true that the court is not limited to

*circumstances appearing from the evidence led by or on behalf of the defense. **On the contrary, the court must also have regard to all the relevant evidence, including even the evidence led on behalf of the Prosecution.** The time for gauging the existence of the extenuating circumstances, is of course, the time of the commission of the crime. **This means that there must have been a real possibility that the accused at the time of committing the crime was in fact in a state of mind which lessened his moral blameworthiness.***

In sum, the court probes the mental state of the accused to determine extenuating circumstances.

Finally, it is well settled that this Court will not interfere with a trial court's finding of absence of extenuating circumstances unless such finding is vitiated by misdirection, irregularity or is one to which no reasonable court could have come.'

[14] As the table in paragraph [19] amply demonstrates, the number of factors capable of amounting to extenuating circumstances, is much greater than those enumerated above which are merely examples of those factors. The list of those factors can never be exhaustive because of the incalculable

number and variety of circumstances which may exist in any given case. A court must also consider whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did.

[15] Two points particularly stand out from this Court's judgment in **Adams**. First, a trial court must consider the cumulative or total effect of all of the factors and circumstances which have a tendency to reduce the moral blameworthiness of the accused. In so doing the court must not look for proof beyond a reasonable doubt. A consideration of the possibilities suffices. Secondly, this Court also mandated that the judge consider whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

[16] In deciding the above question the court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances. This court also made it clear that there is no onus of proof resting upon the accused to establish the existence of extenuating circumstances.

[17] In **Adams**, the two principal factors capable of amounting to extenuating circumstances were the youthfulness of the offender together with his state of intoxication. There was some degree of uncertainty concerning the actual age of the accused in that case. That notwithstanding, on the question of youthfulness this court re-stated the principle that:

“Prima facie, a young man, as the appellant was, is presumed to be immature...”

This Court gave the youthful appellant:

“The benefit of the doubt that indeed his immaturity made him react the way he did when he was reprimanded by the deceased that he had kept too long in returning from an errand. It is clear that he was further anguished by the deceased claim that he was merely eating her food. It is my view that cumulatively these matters had a bearing on the accused’s state of mind in killing the deceased.”

[18] The essence of this Court’s judgment in **Adams** is that the following separate and discrete factors were individually, and more so collectively or cumulatively, capable of amounting to extenuating circumstances. These were:

- (i) Youthfulness
- (ii) The deceased yelled at the accused (somewhat akin to provocation in this context)
- (iii) The deceased complained that the accused was lazy and was only interested in her food.
- (iv) The conduct of the deceased in factors (ii) and (iii) produced a feeling in the mind of the accused of belittlement and discomfort.
- (v) The accused became angry at being yelled at.

This Court concluded that that combination of circumstances, cumulatively, amounted to extenuating circumstances.

EXTENUATING CIRCUMSTANCES THROUGH THE CASES

[19] A study of the factors which appellate courts in Swaziland and surrounding countries have held to be extenuating circumstances will undoubtedly be of assistance to trial courts. The table below shows at a glance some of the factors which those courts have found to amount to extenuating circumstances.

NAME OF CASE	EXTENUATING CIRCUMSTANCE
R v Fundakubi et al 1948 3 SA 810	Belief in witchcraft. The mentality of the accused.
Rex v Biyana (1938, E.D.L. 310) some erroneous belief or some defect	A mind which may be subject to a delusion, or to
Mbhamali v R [2013] SZSG 61	Belief in witchcraft
Masono v State [2006] 1BLR 46 (CA)	Absence of pre meditation
Simelane and Masuku v Rex [2011] SZSC 61	Intoxication – Drink but not “read drunk”
Ttfwala v R [2012] SZSC 15	<p>(i) Merely 19 years of age when offence was committed. Young and immature.</p> <p>(ii) Provoked by the deceased. Irritated by the jokes comments and gestures of the deceased whom he said was drunk.</p> <p>(iii) He believed that he was faced with imminent physical attack from the deceased and his friends.</p> <p>(iv) No evidence that the appellant was drunk or well.</p>
R v Adams [2010] SZSC 10	
Serango v The State [2003]	<p>(i) An appellant consumed by helplessness and enveloped by a fog of confusion.</p> <p>(ii) That although aged 23, he seems to have been rather immature</p> <p>(iii) That the victim was his first lover, and has refuse to speak to him must have pained him.</p> <p>(iv) That his background of a lack of education and the loss of his</p>

	father at an early age may have resulted in his rejection by his first lover assuming freases proportion that might otherwise be the case.
S v Ntobo	<ul style="list-style-type: none"> (i) The accused is a first offender aged 35 years. (ii) He was very cooperative with the police investigation. (iii) Through his full cooperation he freely and voluntarily led the police to the murder weapon. (iv) Factors which show some measure of remorse. (v) An unsophisticated young man aged 37 years. (vi) A rural peasant of low intelligence. (viii) Limited education. (ix) A dropout who left school prematurely. (x) Casual and irregular employment. (xi) Irregular in court based on the volume of business. (xii) Some measure of compassion in the mind of the accused. (xiv) He did not compound the murder by helping himself to the large amount of cash that lay in the open safe at the deceased house. (xv) No evidence to show the accused actually received any payment at all either before or after the killing of the deceased.
Rex x TelloMabusela and others	Appellant at all times under the domain influence of his co-accused
Rex v Koano and Another	Some powerful influence operating on the state of mind of the accused at the time. On the evidence the only possible source of that influence was anger and frustration arising from what, over the preceding years, had occurred between him and the deceased involving what he, by necessary inference, regarded as the deceased's unlawful and intolerable conduct. That (in the court's opinion) objectively moved, diminished the appellant's moral guilt. The trial court ought therefore to have found that there were extenuating circumstances.

It is to be hoped that the above table is of assistance to trial courts in determining whether, in any particular case, extenuating circumstances do in fact exist.

CUMULATIVE SENTENCES

[20] Judicial officers are frequently required to design appropriate sentences following convictions for several offences at the same trial. The basic and underlying principle is that an appropriate sentence must be tailor made for each individual offence. But multiple sentences cannot be combined in a manner which renders the cumulative total sentence disturbingly inappropriate and unjust.

[21] In **Ndwandwe v Rex** [2012] SZSC 39, the appellant complained against a cumulative sentence of 32 years which was essentially a compound of individual sentences of 5, 12, and 15 years imprisonment which Hlophe J had ordered to run consecutively. This court reduced that gross sentence to one of 24½ years because, “the cumulative sentence of 32 years imposed *a quowas* indeed startlingly inappropriate.” See paragraph [36] on Swazilii.

[22] In construing this court’s judgment, Ota JA cited some of the leading judgments on the captioned topic in which succeeding generations of judges, both in this kingdom and beyond, have laid down the law and explained its underlying rationale with such clarity, that it is a matter of considerable

concern that judicial officers still seem to experience continuing difficulty in avoiding the pitfall of excessive sentences.

[23] It is unclear whether these difficulties arise out of a laudable revulsion from the unspeakable crimes for which the convicts before them stand condemned, or from a misguided and impermissible determination to exorcise those crimes by the imposition of draconian penalties beyond the scope of the discretion which every sentencing officer undoubtedly possesses, but which discretion is circumscribed by laws prescribing maximum penalties, by the sentencing conventions extant within this jurisdiction, and by the elastic ranges indicated by the judgments of this Court.

[24] It is for these reasons that whereas sentences of life imprisonment, plus 1,000 years imprisonment, plus the confiscation of property, plus a fine of US\$ 100,000:00 were imposed upon the convicted kidnapper and rapist Mr. Castro following a plea bargain in Cleveland Ohio in the USA, such penalties would be wholly inappropriate here in Swaziland. Judicial officers must therefore lower their sentencing sights to the prevailing norms,

practices and precedents of this Kingdom. The sentencing discretion which they undoubtedly enjoy is not limitless or unfettered. It can only be validly exercised within its proper bounds: free from any misdirection of law or fact.

[25] Section 300 of the Criminal Procedure and Evidence Act is captioned ‘Cumulative or Concurrent Sentences’. It reads:

‘(1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(2) If such punishment consists of imprisonment the court shall direct whether each sentence shall be served consecutively with the remaining sentence.’

The wording of subsection (2) is mandatory in as much as the court is required to direct whether each sentence shall be served consecutively with any remaining portions of part served sentences. It must be noted that the court is not mandated to direct that a new sentence must run consecutively to sentences the accused is currently serving, but which have not yet been

served in full. Subsection (2) confers a discretion upon a sentencing court. That court may, or may not, depending upon the circumstances of each particular case, order that a fresh sentence, or some part of it, be served consecutively with any pre-existing sentence or part thereof. The factor which courts have consistently considered in deciding whether to order consecutive sentences or not, is whether or not such an order would result in the accused being burdened with an overall term which is startlingly inappropriate, or manifestly excessive, or harsh, oppressive or inhuman.

[26] The cases in which this process has been employed are legion and do not bear repetition. The court *a quo* unfortunately misdirected itself as evidenced by paragraph [26] of its judgment in these terms:

‘I must clarify that the extent of both sentences was influenced more as well by the fact that they could not realistically be made to run concurrently nor even be treated as one for purposes of sentence when considering their serious nature for the latter principle and the fact that they had not been committed as part of the same transaction for the former principle, as they happened months apart.’

The above passage suffers from the misconception that a court is powerless to order concurrent sentences for several offences unless they are “committed as part of the same transaction.” The judge therefore felt himself inhibited from passing concurrent sentences because the two offences before him “happened months apart.” This misdirection vitiates the sentences imposed by the trial judge and places upon this court the duty of substituting appropriate sentences for those awarded by the trial court.

PROPORTIONALITY

[27] In **Tison v Arizona** –48121.5.137 (1957) Justice Brennan of the United States Supreme Court decided that it was necessary for a sentencing court to determine whether a given punishment was disproportionate to the severity of a given crime. The principle of proportionality also required the court to determine, in cases where the accused is convicted upon several counts in a given indictment, whether the totality of the punishment meted out is proportionate to the severity of the crimes committed. At page 481 U.S. 179 – 180 that doyen of the progressive wing of the Court wrote:

‘In Solani v Helsin 463 U.S.277,463 U.S. 292 (1983, the court summarized the essence of the inquiry:

In sum, a court’s proportionality analysis under the Eight Amendment to the United States Constitution should be guided by objective criteria including

“(i) the gravity of the offence and the harshness of the penalty;

(ii) the sentences imposed on other criminals in the same jurisdiction;

(iii)the sentences imposed for commission of the same crime in other jurisdictions.’

To the list I would respectfully add: the sentences imposed for offences of comparable or enhanced gravity, and the differing sentences imposed by a particular judge. As the material under the heading THE SENTENCE FOR MURDER will illustrate, the sentences imposed in this case of 25 years for murder, and more so of the cumulated sentence of 35 years’ imprisonment, cannot be said to have passed the proportionality test.

THE JUDGE’S REASONS

[28] The judge *a quo* was undoubtedly correct when he referred to and set out the provisions of section 295 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 which reads thus:

“295 (1) If a court convicts a person of murder, it shall state whether it is of its opinion there are any extenuating circumstances, and if it is of the opinion that there are such circumstances, it may specify them.”

A direction of that brief but all important provision makes clear that:

- (i) It is mandatory that the judge state whether in his or her opinion there are extenuating circumstances.
- (ii) If he or she is of the opinion that there are such circumstances, the judge may specify them.

The word opinion as used in the subsection must not be interpreted to mean that the judge’s whim, or fancy, or intuition or conjecture. It refers to his or her deliberate conclusion based upon a rational and reasoned assessment of all the material upon the record which is capable of leading him or her to a logical finding that extenuating circumstances do in fact exist.

[29] The cases have all made it clear that in the search for extenuating circumstances the court must explore every nook and cranny of the record. No circumstance, however remote or minute must be overlooked and excluded from anxious consideration. The approach must be to explore the record to uncover all of the extenuating circumstances which do exist, rather than to scour that material in an endeavour to demonstrate that extenuating circumstances are nowhere to be found.

[30] The judge **a quo** correctly cited excerpts from **S v Letsolo** (3) (SA) 476 (AD) at 476 G – H. This is one of the most widely quoted passages on the subject of extenuating circumstances. It reads:

“Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from this legal culpability. In this regard a trial court has to consider:-

(A) Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);

(B) Whether such facts, in their cumulative effect, probably had a bearing in the accused's state of mind in doing what he did;

(C) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.”

Looking closely at (A) the phrase ‘might be relevant to extenuation’ calls for close attention. In (B), so does the phrase “probably had a bearing in the accused’s state of mind”. In (c) the phrase “sufficiently appreciable to abate the moral blameworthiness of the accused” must be underscored. None of these three phrases is cast in absolute or mandatory terms. They speak only of probabilities or even of possibilities. Properly applied, their effect is that once a factor or circumstance could possibly operate as an extenuating circumstance, in any given case, it must be applied as such in that case.

[31] In seeking to apply the principles which were clearly relevant, the judge inadvertently concluded that a fact relevant to extenuation must have *had* a bearing in the accused’s state of mind and that the court *had* to consider

whether it was appreciable to abate the accused's moral blameworthiness. This is how he put it at paragraph [10] of his judgment on extenuation.

*“It is clear that it is not just that a fact which could be relevant to extenuation is in existence that matters but whether such a fact **had** a bearing in the accused's state of mind and whether it was appreciable to abate the accused's moral blameworthiness in doing what he did, which is what the **LETSOLO (Supra)** case referred to above is known for.”* Emphasis added.

In the above formulation, the word “had” in line 2 would have to be read to mean “capable of having” and in line 3, the word “sufficiently” which was perhaps inadvertently omitted by the trial judge, would have to be reinstated in order to being the judge's formulation within the ambit of the segment of *Letsolo*. The manner in which the judge applied the word “had” and the unwitting omission of the word “sufficiently”, as has been demonstrated, amounts to a material misdirection in the context of this case.

ALCOHOL

[32] There appears to be more than a sufficiency of material upon the record which mandated a consideration by the trial judge that the moral

blameworthiness of the appellant had been impaired by alcohol. The Summary of Evidence of Maphilisane Matsenjwa of Maphungwane reveals that this witness was a chief's runner who owns a shebeen. *Prima facie* this marks him as a responsible member of the community in the absence of any evidence to the contrary. There is no such contrary evidence upon the record. This witness had spotted the appellant among other people who were drinking traditional brew at this homestead on the day of the murder. He testified that he knew the appellant who was present at his home on the day of the murder and left prior to the deceased. He admitted that fights sometimes broke out in the shebeen. Counsel for the Crown in his submissions on extenuating circumstances and sentence accepted that the appellant was at the home of Matsenjwa where traditional brew was being sold on the day of the murder. The accused had left sometime in the evening before the deceased left. Quite rationally, counsel reasoned that "we are left to assume he may have taken part in drinking alcohol." He demurred however that "*we are..unclear how much he took and whether such did havea bearing in his committing the offence he did.*"

[33] It is a notorious fact, confirmed by the courts, that the consumption of alcohol reduces a person's moral blameworthiness for his actions. Scientific

studies show “a significant correlation between crime and substance abuse revealing that a substantial percentage of persons arrested for serious non-drug crimes test positive for drug use or alcohol at the time of the offence. It is recognized that in some instances, the habitual long-term use of intoxicants can result in permanent mental disorders that are symptomatically and organically similar to mental disorders caused by brain disease.” The foregoing quotation is an extract from a study entitled ‘Drugs, Alcohol and the Insanity, Defense: The Debate over “Settled” insanity by Charlotte Carter-Yamauchi, Research Attorney – Legislative Reference Bureau, State Capital Honolulu Hawaii’

[34] In his testimony, the appellant gave details about a visit which he made to the home of MaphilisaneMatsenjwa at around 12 noon in the company of one Ida Maziya where they had bought alcoholic beverages on sale there. What is more, he named several persons who were also present at the shebeen on that day. This testimony finds support in the Summary of Evidence and in the evidence of prosecution witnesses.

[35] In considering the effect of alcohol the trial judge pursued the impermissible approach of requiring that it be shown to have **had** (rather than that it was capable of having) a bearing on the accused person's state of mind. Paragraph [12] of the judgment bears reproduction if only to be properly critiqued.

'When considering the circumstances of this matter, I came to the conclusion that although the accused was shown to have taken alcoholic drinks on the fateful day, there was no evidence on how much of it he drank nor on the effect same had in his mind and in the commission of the offence he did. In fact as observed above the accused himself had not given any evidence on the amount of, and the effect the alcoholic drinks had had on him or his mind and how they had caused him to commit the offence he did. In the circumstance it will be a mere conjuncture to conclude that the alcoholic drinks taken by the accused had an effect on his mind and thus a bearing on his moral blameworthiness.'

The above paragraph suffers from the following misconceptions:

- (i) That for the consumption of alcohol to operate as an extenuating circumstance, there must be evidence of how much of it the accused had drunk, and or of the effect it had - as distinct from the effect it was capable of having or possibly had - on his mind.
- (ii) That the onus lay upon the accused person in such circumstances to give evidence on the matters set out by the judge.
- (iii) That the accused should provide proof of the effect that alcohol had on his mind in doing what he did.

Those misconceived conclusions are not consonant with the governing principles laid down in **Letsolo** supra and must accordingly be rejected.

YOUTHFULNESS

[36] The judge's approach on this question seems to have been that even though the accused before him was a relatively young man of twenty-three years of age, he had lost the benefit of his relative youth being considered an extenuating circumstance because "*he was a major who for purposes of the law was or ought to be responsible for his actions.*" Under this heading also,

the judge committed the fatal error of insinuating that an onus of proof lay upon the accused in establishing extenuating circumstances. This is how he puts it at paragraph [13].

‘There was no merit on the contention that his age was responsible for his having committed the offence concerned. It is a fact that no reliance whatsoever has been placed on any alleged immaturity, which itself should be demonstrated through evidence. In the circumstances, it cannot be said that the alleged youthfulness of the accused had a bearing on the commission of the offences including the accused’s moral blameworthiness.’

In **R v Adams** [2010] SZSC 10, Twum JA expressed a principle of widespread application when he wrote that: *‘Prima facie, a young man, as the appellant was, is presumed to be immature.’*

As the table at paragraph [19] amply demonstrates, courts in Swaziland, Botswana, Lesotho, South Africa and Zimbabwe have all concluded that youthfulness is a powerful extenuating circumstance reducing the moral blameworthiness of an immature person.

THE SENTENCE FOR MURDER

[37] In **Adams** supra, the circumstances of the killing was particularly gruesome. The accused in that case had killed his heavily pregnant victim by stabbing her several times with a spear. This unfortunate lady received some 13 stab wounds from which both she and the unborn child she was carrying perished. The trial judge having found that there were no extenuating circumstances sentenced the accused to 30 years imprisonment without the option of a fine for the offence of murder without extenuating circumstances. This court, having found that there were indeed extenuating circumstances in that case, reduced the sentence to 20 years imprisonment for murder with extenuating circumstances. This court reached that conclusion even though it found that this was a particularly serious crime which it described in this way at paragraph [35]

‘There is no doubt whatsoever that this was a particularly heinous crime. The details of the murder chronicled at pages 16-21 make chilling reading. The multiple stab wounds unleashed upon a woman who was 9½ months pregnant were gruesome and horrendous in the extreme. There was a wound on the cheek, there were wounds on both sides of the chest, the middle portion of the abdomen, the right side of the abdomen, two stab wounds in the lungs, a stab wound in the left of

the heart, on the back, leg, the loin region and arms. They were directed at vital and vulnerable organs of that poor and helpless pregnant woman.'

Addressing his mind to the appropriate sentence in the circumstances of that case, Dr. Twum wrote at paragraph [36]:

'I agree that 30 years imprisonment is unduly long and could expose this particular offender to hardened criminals...I will reduce the sentence of 30 years imposed on the appellant to 20 years from the date of his conviction and sentence to take account of human frailties.'

[38] In **Mbhamali v Rex** [2013] SZSC 8 this court upheld a sentence of 20 years imprisonment imposed by Hlophe J who was the trial judge in the instant appeal. The facts and circumstances in **Mbhamali** made that case a far more gruesome and heinous case of murder than the case before us. In **Mbhamali**, case this court found that:

[6] The circumstances of the offence could hardly have been worse. Here was a hale and hearty young man in the prime of his life: at the age of induction to disciplined forces, or of fitness for manual labour,

launching a brutal attack against an unarmed woman who could hardly be expected to defend herself, let alone mount a counter attack. or do the appellant any physical harm. He chose for his weapon of offence one of the most feared and lethal objects commonly available in Swaziland- the awful bush knife.

[7] The Report on Post Mortem Examination described the cause of death on page 1 in cryptic terms: “Due to multiple injuries.” But pages 2 and 5, listing the five ante-mortem injuries which were observed upon the body of the deceased, tell a grim tale of the savage and merciless attack which the appellant mounted upon the hapless deceased. The list makes sad reading. I set it out, not to excite maudlin curiosity, but rather to illustrate that, taken together with all of the other grievous elements of this case, it affords ample justification for Hlophe J imposing a sentence of measured severity.

[8] The injuries listed in the Report are:

- 1. Cut wound over left side scalp to right eye obliquely present bone deep 16 x 2.2 cm. It involved skull with brain intracranial hemorrhage.*

2. Cut wounds over left ear to face 13 x 2 cm, 12 x 2 cm. bone deep involved muscles vessels obliquely placed.

3. Cut wound below left ear to mouth 18 x 2.3 cm. bone deep involved muscles, lips, vessels, nerves, teeth, tongue.

4. Cut would extending from left side front of neck upper region to right obliquely place 10 x 3.2 cm. involved muscles, blood vessels, nerves, trachea, esophagus, vertebral body surface.

1. Abrasion over buttocks 3.1cm, 2 x 1.7 cm.

[9] In his sworn expert testimony, Dr. R.M. Reddy, an experienced Police pathologist, described the effects of the injuries he listed in his report. Each of the four wounds inflicted with the bush knife was fatal in itself. Cumulatively, they were even more so. The abrasion, which the Doctor characterized as aggressive, evidenced the final indignity suffered by the deceased as her buttocks crashed to the rocky ground upon which she lay inert as the appellant, vicious but cowardly, fled the scene.

[10] The Doctor's evidence, bolstered by graphic photographs, reinforces the prosecution contention that the killing of the deceased was the result of the appellant's deliberate intention to end her life.

As Dr. Reddy noted, the blows were aimed and landed upon vital areas: the neck – severing it – upon the scalp, and upon the face between those points. They were all bone deep, which indicates that they were inflicted with much force.’

[39] In this case, the trial judge found that there were evidential factors which suggested that the deceased in the murder case had been raped as well. Be that as it may, the prosecution failed to prove the charge of rape which was accordingly dismissed. Indeed, the circumstances surrounding the murder seem to indicate that it arose out of an attempted rape gone tragically wrong. A belt and log were found at the scene. Neither item was a weapon *per se*. Both items evidence on the spur of the moment improvisation rather than studied premeditation. A gun or a knife would have pointed strongly to premeditation. The Report on Post Mortem Examination recorded the performing doctor’s opinion that death was due to strangulation and drowning. The ante-mortem injuries were:

- i. ‘Right side of the face swollen.
- ii. A lacerated wound of 6 x 1 cms, present on the chin.

- iii. A contusion of 5 x ½ cm, present on the right side of the mouth.
- iv. Contusions of 3 x 2 cms, 2 x 1 cms and 1 x 1 cm present on the under surface of the lower jaw.
- v. A ligature mark of 16 x 3 cms, present around the middle portion of the front side of the neck.

None of these above injuries was said to be the cause of death. They are a far cry from the multiplicity of individually fatal wounds inflicted in the **Mbhambali** case. The Swaziland equivalent of the person on the Clapham Onnibus would be at a complete loss to understand how the same judge could impose a sentence of 25 years in the instant case, and one of 20 years in Mbhambali when that murder was far more horrific and gruesome than in the one before us.

[40] It follows from the foregoing comparison that the sentence of 25 years imposed by the trial judge violates the principle of uniformity of sentencing and must be set aside on this ground as well.

THE APPROPRIATE SENTENCE

[41] Based upon the principles articulated in the foregoing paragraphs, and upon the comparison with other sentences sanctioned by this court, and upon the range of sentences for murder established by **Tsela**, this court is satisfied that, in all the circumstances of the instant case, a sentence of 20 years for murder with extenuating circumstances would be appropriate. The sentence for rape is fitting and remains undisturbed.

ORDER

It is the order of this court that:

- (i) The appeal be and is hereby allowed.
- (ii) The sentence of the trial court of 25 years imprisonment for murder without extenuating circumstances is hereby set aside.
- (iii) The appellant is sentenced to 20 years imprisonment for the offence of murder with extenuating circumstances.
- (iv) The appellant is sentenced to 10 years for the offence of rape.
- (v) The sentences in (iii) and (iv) are to run concurrently.

- (vi) The appellant will therefore serve a net period of 20 years imprisonment.
- (vii) The above sentences shall take effect from the date of the arrest and detention of the appellant.
- (viii) Any period within which the appellant may have been at liberty on bail pending the hearing of his cases must be taken into account in arriving at his earliest possible days of release.

S.A.MOORE

JUSTICE OF APPEAL

I agree

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree

P. LEVINSOHN

JUSTICE OF APPEAL

For the Appellant : In Person

For the Respondent : MsQondileZwane



IN THE SUPREME COURT OF SWAZILAND

HOLDEN AT MBABANE ON THE 4TH NOVEMBER 2013 BEFORE THE HON. JUSTICES S.A. MOORE JA, A.M. EBRAHIM AND P. LEVINSHOHN

CRIM. CASE NO. 02/2013

In the matter between:

MANDLA BHEKITHEMBA MATSEBULA

V

Rex

COURT ORDER

Upon hearing Counsel for the Appellant and the Respondent **IT IS HEREBY ORDERED THAT:**

- (i) The appeal be and is hereby allowed.
- (ii) The sentence of the trial court of 25 years imprisonment for murder without extenuating circumstances is hereby set aside.
- (iii) The appellant is sentenced to 20 years imprisonment for the offence of murder with extenuating circumstances.
- (iv) The appellant is sentenced to 10 years for the offence of rape.
- (v) The sentences in (iii) and (iv) are to run concurrently.
- (vi) The appellant will therefore serve a net period of 20 years imprisonment.
- (vii) The above sentences shall take effect from the date of the arrest and detention of the appellant.

- (viii) Any period within which the appellant may have been at liberty on bail pending the hearing of his cases must be taken into account in arriving at his earliest possible days of release.

BY ORDER OF THE COURT

GIVEN UNDER MY HAND AT MBABANE

THIS 29TH DAY OF NOVEMBER 2013

REGISTRAR OF THE SUPREME COURT