IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 35/14

Held at Mbabane

In the matter between:

SIBONISO CASPER MASUKU	**Appellant**
and	
Rex	**Respondent**
Neutral citation:	Siboniso Casper Masuku v. Rex [35/2014]SZSC16[2017]
CORAM:	**M.C.B. MAPHALALA, CJ**
	DR B.J. ODOKI, JA
	J.P ANNANDALE, JA

SUMMARY

Criminal Appeal – Murder - appeal against both conviction and sentence of eighteen years imprisonment – court a quo found that extenuating circumstances exist on account of youthfulness – the general principles applicable to extenuating circumstances as well as sentencing considered;

Held that the court *a quo* misdirected itself in finding, as it did, that extenuating circumstances exist in view of the youthfulness of the appellant – that youthfulness on its own does not constitute an extenuating circumstance unless it is combined with other factors:

Held further that the onus rests upon the accused to establish the existence of extenuating circumstances – that in the present case, the appellant has failed to establish that his youthfulness had a bearing in the

commission of the offence, and, that it had the effect of abating his moral blameworthiness.

Held further that a finding of mens rea in the form of dolus eventualis may, in a proper case, depending on the circumstances of the case, constitute an extenuating circumstance; and, that this is not a proper case where this finding constitutes an extenuating circumstance;

Held further that section 5(3) of the Court of Appeal Act 74/1954 gives this Court power to quash a sentence passed by the trial court and substitute it with a sentence it considers to be appropriate in the circumstances in light of the evidence;

Held that the appeal on both conviction and sentence is hereby dismissed, and, that the sentence of eighteen years imposed by the trial court is set aside and

substituted with a sentence of twenty five years imprisonment.

JUDGMENT

M.C.B. MAPHALALA C J

[1] The appellant was convicted of murder by the court a quo on the 9th September 2014; and, he was subsequently sentenced to eighteen years imprisonment on the 12th September, 2014. He has appealed to this Court on both conviction and sentence.

[2] The grounds of appeal are outlined in the Notice of Appeal dated 1st October, 2014 and lodged on the same day. With regard to conviction, the grounds of appeal are as follows: Firstly, that the court a quo erred in law and in fact in finding that the appellant was the aggressor when the evidence of Pw1 was to the effect that the deceased was aggressive and confrontational when approached by the appellant.

[3] The second ground of appeal is that the court a quo erred in law and in fact in finding that the appellant

failed to put his case to the Crown witnesses when he had done so to Pw1 and Pw5 under cross-examination. Thirdly, that the court a quo erred in law and in fact in failing to consider the cross-examination of Crown witnesses when assessing the evidence.

[4] The fourth ground of appeal is that the court quo erred in law and in fact in not considering that self defence applies to the defender as well as a third party in Pw1. Fifthly, that the court a quo erred in law and in fact in holding that the threats were made a long time ago yet the deceased had threatened the appellant with death wherever he met him in accordance with the evidence of Pw1 under cross-examination.

[5] With regard to the sentence, the appellant averred that the sentence was severe to a person of his

circumstances such that it induces a sense of shock. It is apparent from the evidence that the appellant was properly convicted of murder.

[6] However, the sentence imposed by the Court a quo was lenient. It is for this reason that the defence was invited by this Court during the hearing of the appeal to make submissions why the Court should not invoke its powers under section 5(3) of the Court of Appeal Act no. 74 of 1954 and increase the sentence accordingly. This legislative provision gives the Court power, on an appeal against sentence, to quash the sentence passed by the trial court and substitute it with a proper sentence.

[7] The evidence of the Crown is that Pw1 was married to the appellant, and, that they were in separation when the offence was committed. Subsequently,

Pw1 fell in love with the accused just six months into the separation.

[8] It is the evidence of the Crown that on the 20th November 2008, Pw1, Pw5 and the appellant were walking home from Mhlosheni Clinic when they came across the deceased who was sitting under a tree next to the side of the road. The deceased stood up and walked towards Pw1, and, the appellant blocked him; the deceased told the appellant that he wanted to speak to Pw1.

[9] However, the appellant blocked the deceased with a view to prevent him from talking to Pw1. Without any provocation by the deceased, the appellant took out a bushknife which was in his possession and hacked the deceased on the right arm. The appellant and the deceased fell down; however, the appellant stood up and continued hacking the deceased and

inflicting fatal injuries as he lay on the ground. PW1 tried to intervene but the appellant told her that he wanted to finish with the dog; this shows that the accused had an intention to kill the deceased. The appellant, PW1 and PW5 left the deceased lying on the ground and went back to the appellant's parental homestead.

[10] The evidence of Pw1 is corroborated by the evidence of Pw5 in all material respects. In particular both agree that the deceased was not the aggressor, and, that he did not attack the appellant but he wanted to talk to Pw1.

[11] It is apparent from the evidence that the attack by the appellant was not provoked. The deceased, as he lay on the ground after being hacked with the bushknife, pleaded for his life and asked the appellant to forgive him; however, the appellant continued hacking the

deceased with the bushknife repeatedly and inflicting fatal injuries. The conduct of the appellant shows that he had the intention to kill the deceased. In addition the appellant uttered words to the effect that he wanted to finish with the dog, meaning that he wanted to kill the deceased.

[12] It is the evidence of Pw1 and Pw5 that the deceased was left lying on the ground helplessly, weak and bleeding with fatal injuries. There was no attempt by the appellant to assist the deceased or call an ambulance to transport him to hospital. Pw2 corroborates the evidence of Pw1 and Pw3 that upon his arrival at his homestead, the appellant told family members that he had killed the deceased. Thereafter, the appellant told his family that he wanted to flee and leave the area; however, his mother advised him to report the incident to the Hluti Police Station, which he did. The bushknife as well as the T-shirt

which the appellant was wearing on the day in question was taken by the police as exhibits.

[13] The intention of the appellant to kill the deceased is further demonstrated by the evidence of Pw3, Detective Sergeant Mkhabela, the Scenes of Crime Officer. Pw3 was called to the scene by police officers based at Hluti Police Station in order to examine the deceased body and take photographs for purposes of the criminal investigations. He found the deceased's body lying by the side of the road in a bushy area, and, it was covered with a white cloth.

[14] The body of the deceased had a gaping wound on the left side of the neck, another gaping wound at the back of the head behind the left ear, a further gaping wound on the left shoulder as well as another gaping wound over the right cheek. The left arm was fractured. The fourth left finger had a cut. Pw3 took

photographs of the injuries sustained by the deceased as well as the other exhibits. The photographs were admitted in court as part of his evidence. The defence did not challenge the evidence of Pw3.

[15] The evidence of Pw3 was corroborated by Pw4, the investigating officer, who was present with Pw3 at the Scene of Crime. After the accused had been arrested and cautioned about his legal rights, he led Pw4 and, other police officers to his parental homestead where he pointed out exhibits including the bushknife and clothes which he was wearing during the commission of the offence; the clothes were soaked in blood.

[16] The post-mortem report was admitted in evidence by consent, and, it shows that the deceased died due to multiple injuries. The extent of the multiple injuries sustained, the lethal weapon used as well as the

location of the injuries leave no doubt that the appellant had the intention to kill the deceased.

[17] The following artemortem injuries sustained were observed by the Pathologist, Dr. Reddy. Firstly, bloodstains over scalp, face neck and left upper limb. Secondly, a cut wound over left-side scalp behind left ear 8 x 1.74 cm skull vault deep. Thirdly, a cut wound extending from the right chest to neck below right ear 27 x 1.1 cm tissues deep involved muscles, blood vessels and nerves. Fourthly, a cut wound outer aspect to midline 6 x 3.2 cm vertebral deep involved muscles, blood vessels, nerves, vertebra and spinal cord. Fifthly, a cut wound over left shoulder 7 x 1.5 cm and 3 x 1.2 cm muscle deep; and, lastly, a cut wound over left forearm, backbone 8.5 x 3 cm involved muscles, blood vessels, nerves and bones.

[18] The appellant's defence that the deceased was the aggressor has no merit, and, it is not supported by the evidence as discussed in the preceding paragraphs. The evidence shows that the appellant was the aggressor, and, that he did not act in self-defence. Furthermore, the appellant killed the deceased without provocation and in cold blood.

[19] In her evidence in-chief, Pw1 admitted that she was married to the deceased as his wife, and, that the marriage was still subsisting; they were merely living in separation. The appellant was aware that Pw1 was married to the deceased. The deceased had arrived at the parental homestead of the appellant looking for Pw1, and, on two occasions, he had informed the appellant and his family about the marriage. Notwithstanding this, the appellant had maintained his relationship with the deceased's wife.

[20] The defence conceded that the deceased did not threaten the appellant or provoke him on the day that he was killed. It is further not disputed by the Crown that the deceased had once confronted Pw1 when he found her in the appellant's bedroom; Pw1 was visiting the appellant. The deceased had slapped Pw1 twice on the face; Pw1 reiterated and slapped the deceased once on the face.

[21] The appellant's evidence that the deceased had threatened to kill him for having a relationship with his wife was correctly rejected by the court a quo on the following basis: firstly, that the said incident had occurred a month earlier according to the evidence of Pw1, and, it was not communicated directly to the appellant but allegedly to Pw1. The veracity of this allegation cannot be established on the ground that PW1 had an interest in the matter because of her relationship with the appellant. Secondly, the issue

was not put to Crown witnesses; hence, it is considered to be an afterthought and inadmissible.

[22] His Lordship Justice M.C.B Maphalala JA, as he then was, in the case of Elvis Mandlenkhosi Dlamini v. Rex[1] had this to say with regard to the failure by the defence to put its case to prosecution witnesses:

"22, ***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***

23, His Lordship Macdonald JP in S.V. P. 1974 (1) SA 581 (1) SA 581 (RAD) at 582 said:

" It would be difficult to over-emphasize 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

[1] Criminal Appeal Case No. 30/2011 at para 22 and 23

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 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."

[23] The evidence shows that the deceased was not armed when he was killed. Similarly, the deceased was not armed when he confronted Pw1 a month earlier at the

parental homestead of the appellant. However, it is not in dispute that the appellant was armed with a bushknife on the day when he committed the offence. He hacked the deceased with the bushknife repeatedly even when he was lying helplessly on the ground bleeding with multiple injuries and pleading for his life.

[24] The deceased subsequently died at the scene of crime after sustaining multiple fatal injuries. The appellant conceded that he was carrying a bushknife on the day in question because he expected to meet the deceased along the way, and, that he wanted to defend himself from an unlawful attack by the deceased; however, the reality is that he wanted to kill the deceased in order to keep the deceased's wife to himself.

[25] It is apparent from the evidence that the appellant had mens rea in the form of dolus eventualis when he

committed the offence. His Lordship Hannah CJ in the case of Mazibuko v. Rex[2] had this to say with regard to mens rea in the form of dolus eventualis.

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

[26] Cohen ACJ in Beale v. Rex[3] defines legal intention or mens rea in the form of dolus eventualis as follows:

" Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not. The requirements according to the learned authors are (i) subjective foresight of (ii) possibility and (iii) recklessness. In so far as subjective foresight is concerned, they emphasise that intention is invariably judged subjectively. The subjective test … takes account only of the state of mind of the accused, the issue being whether the accused himself foresaw the consequences of

[2] 1982 – 1986 SLR 377 (CA) at 380

[3] 1979 – 1981 S.L.R (CA) 35 at 37

his act…if the accused in foresaw the possibility of the consequences in question and was reckless as to whether or not they did result, he intended them in the legal sense."

[27] The evidence shows that when the appellant hacked the deceased with a bushknife repeatedly even when he had fallen to the ground and pleading for mercy, he actually foresaw the possibility of his death but was reckless whether or not the deceased died. The post mortem report shows that the deceased died due to multiple injuries sustained. In addition when Pw1 tried to intervene, the appellant told her that he wanted to finish with the dog, referring to the deceased.

[28] Furthermore, the appellant hacked the deceased in very delicate and sensitive parts of the body resulting in his death. His Lordship Justice M.C.B. Maphalala JA, as he then was, in the case of William Mceli

Shongwe v. Rex[4] considered mens rea in the form of dolus eventualis, and, he had this to say:-

" *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."***

[29] Consequently, I have no doubt in my mind that the appellant hacked the deceased repeatedly on sensitive and delicate parts of the body with the intention to kill him. He foresaw the possibility of his death but was reckless of the consequences of his death. After committing the offence, he left the deceased to die on the side of the road. The trial court cannot be faulted

[4] Criminal Appeal Case no. 24/2011 at para 46

in convicting the appellant with the offence of murder.

[30] The Court is enjoined by law to exercise a discretion in determining whether extenuating circumstances exist, and, to further specify them if they exist. This duty is imposed upon every trial court which has convicted an accused of murder. In deciding the existence of extenuating circumstances, the court is enjoined to consider the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.[5]

[31] His Lordship Justice M.C.B. Maphalala JA, as he then was, in William Mceli Shongwe v. Rex[6] deals with the discretion given to a court to determine the existence of extenuating circumstances. His Lordship had this to say:

[5] William Mceli Shongwe (Supra) at para 51

[6] Supra at para 52

"52. ***His Lordship Ramodibedi CJ in the case of Bhekumusa***

Mapholoba Mamba v. Rex Criminal Appeal Case No. 17/2010

quoted with approval the South African Case of S.V. Letsolo 1970(3) SA 476 AD at 476 G-H where Holmes JA defined

extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blame worthiness of the accused as distinct from his legal culpability.

The trial Court has to consider three factors: firstly, whether there are any facts, which are relevant to extenuation such as drug abuse, immaturity, intoxication or provocation; but the list is not exhaustive.

Secondly, whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he doing what he did. Thirdly, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did; in deciding this factor, the trial court exercises a moral judgment."

[32] The question in this case is whether the youthfulness and immaturity of the appellant had a bearing on the appellant's state of mind, in doing what he did, and, whether such youthfulness had the effect of abating his moral blameworthiness. Similarly, this court has to consider whether the finding by the court a quo that the appellant had mens rea in the form of dolus eventualis when he committed the offence had a bearing on the appellant's state of mind in doing what he did and whether this had an effect of abating his moral blameworthiness

[33] It is well-settled in our law that a finding of dolus eventualis may in a proper case, depending on the circumstances of the case, constitute an extenuating circumstance; however, this is not a proper case in which a finding of mens rea in the form of dolus eventualis could constitute an extenuating circumstance in the light of the evidence considered

together with the conduct of the appellant when he commited the offence.

[34] Dr S. Twum JA in Ntokozo v. Rex[7] had this to say with regard to extenuating circumstances:

"14.(*v*) ***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 defence. On the contrary the court must have regard to all relevant evidence including even 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.***

[7] Criminal Appeal Case no. 16/2010 at para 14 (v) and (vi)

(vi) In sumary the court probes the mental state of the accused to determine extenuating circumstances."

[35] His Lordship Justice M.C.B. Maphalala J, as he then was, in Rex v. Celani Sicaca Nkambule[8] had this to say:

"*45.* ***…..The onus of proving the existence of extenuating circumstances rests upon the accused. It is well settled that youth alone cannot be an extenuating circumstance unless combined with other factors; however, It has to be proved that it had an effect on the accused's state of mind and emotions in committing the offences."***

[8] Criminal Case no. 101/2011 (HC) at para 45

[36] In coming to that conclusion in Rex v. Celani Sicaca Nkambule,[9] His Lordship followed the judgment of Nkosi Sifiso v. Rex[10] and Mbhamali v. Rex[11] where both appellants were twenty years of age. In both cases the Court held that the accused had failed to discharge the onus that extenuating circumstances existed on account of youthfulness. The Court had considered whether the youthfulness of the appellants had a bearing on the commission of the offence which could reduce their moral blameworthiness. Similarly in the present case, the appellant has failed to discharge the onus that his youthfulness had a bearing on the commission of the offence which could reduce his moral blameworthiness.

[37] It is the finding of this Court that there are no extenuating circumstances which exist in this matter;

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[9] Rex v. Celani Sicaca Nkambule

[10] Criminal Appeal 1987-1995(4) SLR 303 (HC) at 309

[11] 1987 – 1995(3) 58 at 62 (CA)

hence, an interference with the sentence imposed by the court a quo is warranted pursuant to the material misdirection by that court which, in my humble view, resulted in a miscarriage of justice.

[38] His Lordship M.C.B. Maphalala JA, as he then was, in the Case of Elvis Mandlenkhosi Dlamini v. Rex[12] had restated the general principles applicable to an appeal on sentence as follows:

"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***

[12] Criminal Appeal Case No. 30/2011 at para 29.

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."

[39] His Lordship Ramodibedi CJ in the case of Xolani Zinhle Nyandzeni[13] had this to say with regard to sentencing:

"11….. ***this Court has repeatedly stressed the fundamental principle that the imposition of sentence is primarily a matter which lies within the discretion of the trial court. This is, however, a judicial discretion which must be exercised upon a consideration of all the relevant factors. In particular, the trial court is***

[13] Criminal Appeal Case No. 29/2010 at para 11 and 12

enjoined consisting to have regard to the triad consisting of the offence, the offender and the interests of society.

See S v. Zinn 1969(2) SA 537 (A). This court will

generally not interfere with that discretion in the absence of a material misdirection resulting in a miscarriage of justice …..

12. It is further useful to observe, as this court has

repeatedly held that s5(3) of the court of Appeal Act

74/1954 confers additional power on the Court on

appeal against sentence to pass such other sentence

warranted in law as it thinks ought to have been passed

in the first place."

[40] The killing of the deceased by the appellant was brutal, vicious, horrific and cold-blood murder. Without provocation and acting with aggression, the appellant hacked the deceased with a bushknife repeatedly even when he had fallen to the ground

weak, bleeding and pleading for mercy. The deceased was not armed, and, he was merely seeking an opportunity to speak with his estranged wife; he was not fighting either his wife or the appellant.

[41] The evidence of the post-mortem report shows multiple injuries on the head, neck and a fractured arm; the injuries were deep and fatal, inflicted upon the most sensitive and delicate parts of the body. The extent of the injuries sustained were severe. The circumstances leading to the death of the deceased constitute aggravating factors, and they outweigh the mitigating factors advanced by the appellant. During the hearing of the appeal, this Court invited the appellant to make submissions on the possible increase of the sentence in accordance with section 5(3) of the Court of Appeal Act.

[42] There are similar cases decided by this Court where the appellants had killed the deceased in cold-blood, and, in a vicious and gruesome manner such as Xolani Zinhle Nyandzeni v. Rex[14] and Gerald Mvemve Valthof v. Rex[15]. In Valthof's case the appellant had murdered his two minor children by setting alight the house in which they were sleeping after an altercation with their mother. This court reduced the sentence of forty years imposed by the court a quo to twenty five years. The appellant had been convicted on two counts of murder and one count of attempted murder.

[43] In the Xolani Nyandzeni case, the appellant had murdered his brother and cut off his head with a knife after hitting him with a hammer repeatedly. They were quarreling over dagga. This Court reduced his

[14] Supra at para 36

[15] Criminal Appeal Case no.5/2010

sentence of thirty years imposed by the court a quo to twenty five years imprisonment.

[44] Having regard to the triad consisting of the offence, the offender and the interests of society as propounded in S.V. Zinn, discussed above, a sentence of twenty five years imprisonment would be appropriate in the circumstances. The constitution[16] provides that the death penalty shall not be mandatory in the absence of extenuating circumstances in convictions of murder; hence, this Court has accordingly exercised its discretion not to impose a death penalty on the appellant.

[45] The following order is hereby made:-

(a) The appeal against conviction and sentence is dismissed.

[16] Section 15 (2)

(b) The sentence of eighteen years imprisonment imposed upon the appellant by the court a quo is set aside and substituted with a sentence of twenty five years imprisonment.

M.C.B. MAPHALALA, CJ

Dr. B.J. ODOKI, JA

J.P. ANNANDALE, JA

FOR APPELLANT: **Attorney Sifiso Jele**

FOR RESPONDENT: **Senior Crown Counsel**

Elsie Matsebula

Judgment delivered in open court on the 22nd May 2017