



**THE HIGH COURT OF SWAZILAND**

**REX**

**Vs**

**MAJAHONKHE MAJOR MAZIBUKO  
MANDLA NGWENYA**

Criminal Case No. 3/2002

Coram

For the Crown

For the Accused

S.B. MAPHALALA – J

MR. FAKUDZE

MR. M. NXUMALO

**SENTENCE**

**(26/06/2003)**

Having found that there are extenuating circumstances in this case based on intoxication and the accused's youthfulness what remains for me is to impose an appropriate sentence in the circumstances.

In the case of *S vs Rabie 1975 (4) S.A. 855 (A)* at 862 *G Holmes JA* summed up, in general, and with admirable brevity, as follows; and I quote:

“Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances”.

In the same case Corbett JA, after agreeing with the reasons given by Holmes JA, stated at 865 and I quote:

“... Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in *S v Zinn 1969 (2) S.A. 537 (A)* at 541). A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case”.

What must be considered is the *triad* consisting of the crime, the offender and the interest of society (see *S vs Zinn 1969 (2) S.A. 537 (A)* at 540 G and *S vs Scheepers 1977 (2) S.A. 154 (A)*). The elements of the *triad* contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less.

The guidelines that I have referred to stem from the importance of the legal principles applicable in sentencing an offender.

Therefore, all the elements of the *triad*, although not identical are indissociable.

In considering **the offender**, due regard must be heard *inter alia* to the following:

- i) His/her age and background;
- ii) Level of education, attainment, and position in society;
- iii) Family circumstances, whether married or not and the question of dependants;
- iv) Motive in committing the offence, whether for personal gain or for reasons of avarice, or being actuated by some moral or laudable objective;
- v) Whether the offender stood to gain by the offence;
- vi) The question of accused being a first offender;
- vii) The effect of punishment on the offender, and more particularly if a sentence of imprisonment is imposed;
- viii) The prospect of reformation and correction, and becoming a useful member of society;
- ix) The presence or absence of remorse or contrition;
- x) A perceptive understanding of the accused's human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed (see *S vs Sigwahla 1967 (4) S.A. 566 (A)* at 571 E – F).

The above list is not exhaustive, but I believe that it contains pragmatic tests for the truth of the assertion of considering the position of the offender.

In considering **the crime**, the court must take into account the moral and ethical nature of the crime, and the gravity of the offence. It is accepted and indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgement. A process of arid intellectualism is insufficient. Mere theorising is not sufficient. What matters finally is how the court views the crime on its own merits, and all the relevant proven facts and circumstances must be carefully considered and assessed.

Conjoined to the nature of the crime are also the consequences of the crime. If the consequences are serious or indeed incalculable, the aggravating circumstances will be viewed more seriously by the court. On the other hand, if there were no serious consequences or results flowing from the crime, the aggravating circumstances recede.

The sentence therefore must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment (see *S vs Zinn (supra)* and *S vs Haas Broek 1969 (1) S.A. 356 (E)*).

**The interest of the community.** The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquillity in the land needs to be taken into account.

Reverting to the circumstances of the present case accused's attorney *Mr. Nxumalo* has addressed the court in mitigation from the bar. A number of factors were advanced in mitigation of sentence.

Firstly, it was submitted on behalf of the accused that the court in the circumstances should impose a sentence that is correctional and one that does not induce a sense of shock. That whatever sentence the court imposes should be backdated to the date of accused incarceration.

Secondly, that the accused has learnt a lesson and is remorseful for what he has done.

Thirdly, that the accused has a minor child who is born from a mother who is unemployed.

Lastly, that the accused was self-employed before his arrest.

I have considered the above personal circumstances of the accused person *vis a vis* the other competing interests I have outlined earlier on in this judgment. It cannot be gainsaid that the offences the accused has committed are of a very serious nature. A life has been lost in the process under very tragic circumstances. These courts are duty bound to come in and protect members of the community from gun-toting bandits like the accused person. People who do not respect the sanctity of life. There is no doubt that the motive of this murder was extreme greed. A security officer is killed whilst trying to protect the property of his employer. Surely, the court should

come on the side of such a vulnerable group as security officers who risk their lives to protect property. This calls for a severe sentence to send a clear message to others who might be plotting similar ventures that it is not worth it. I have considered all the elements of the *triad* and I sentence the accused person as follows:

- i) For Count One (Murder) - 18 years imprisonment without the option of a fine;
- ii) For Count Two (Armed Robbery) - 15 years imprisonment without the option of a fine;
- iii) For Count Three (Possession of a firearm) - 5 years imprisonment;
- iv) For Count Four (Possession of live rounds of ammunition) - 1 year imprisonment.

The sentences are to run concurrently and backdated to the 23<sup>rd</sup> September 1999.

  
S.B. MAPHALALA  
JUDGE