THE HIGH COURT OF SWAZILAND

THE KING

VS

DOUGLAS MFANUKHONA MSIBI

Criminal Case No.171/03

Coram	**S.B. MAPHALALA - J.**
For the Crown	**Mr. P. Dlamini**
For the Accused	**Mr. B. Simelane**

REASONS FOR SENTENCE

31st August 2005

[1] The Accused person has been convicted of the wrongful killing of his wife, who he had married in terms of Swazi Law and Custom in 1995, and they had 4 minor children. The circumstances of the case as reflected in the statement of agreed facts is that accused stabbed his wife because he suspected her to be having an extra marital affair with one Mavimbela whom he saw drop deceased at the bus stop. Accused accepts that deceased died as a result of the stab wounds she sustained. The contents of the medical report was handed in by consent and the photos which were taken by the scene of crime officers. The post mortem report records in paragraph 10 thereof the cause of death to be "due to multiple stab injuries." Further in paragraph 20 thereof these injuries are particularized in some detail. What can be said is that these were indeed grievous injuries and showed that Accused used "his full might" in inflicting them.

[2] The issue which concerns the court presently is the question of sentence.

[3] The general principles in determining a proper sentence were clearly enunciated by *Holmes J.A.* in *S vs Ruble 1975 (4) S.A. 855 (A) at 861 A - 862F* which contain a comprehensive and useful guideline of the principles. The learned Judge of Appeal, and with admirable brevity, summed up the principles at 862 G, as follows:

"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 circumstance. "

[4] (See also the comments by *Corbett C.J., and Kotze A.J.A.* who concurred in the same case of *S vs Rabie (supra)* - See further *S vs Zinn 1969 (2) S.A. 537 (A) at 540G; S vs Scheepens 1977 (2) S.A. 154 (A)* and that of *S vs Sono 1980 1980 (3) S.A. 143 (T) at 145 E -F).*

[5] In a landmark case decided in the former Bophuthatshwana by *Friedman J.* in *S vs Banda and others 1989 -1990 B.L.R.* at page 290 the following was said, and I quote:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will 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.

In regard to what has been termed the 'approach of mercy', I merely wish to say that I have always understood it to be the duty of a judicial officer, called upon to impose punishment upon an offender, to consider to what extent the particular circumstances of a given case require that justice should be tempered with mercy.

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, 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."

[6] Mr Simelane who appears for the accused person has advanced a number of factors in mitigation of sentence on behalf of the accused. Firstly, that the accused has pleaded guilty to the offence thus showing remorse. Secondly, that accused is a first offender with a clean record. Thirdly, that the accused has been in custody since 1st September 2003, and therefore whatever sentence to be imposed should be backdated to that date. Fourthly, it was submitted that the accused has four children and was employed as a driver. Lastly, and most importantly Mr Simelane argued that the accused was provoked in acting the way he did because he suspected that his wife to be having an extra marital affair by one Mavimbela whom he saw drop deceased at the bust stop. In this regard he relied on what was said by *B.T. Steyn J.* in the case of *S. vs Mdindela 1977 (3) S.A. 322 at 323* as follows:

"Man, in the sense of the male of the species, no longer possesses his wife as part of his chattels, but still prides himself on being the sole possessor of her affections and the sole recipient of her favours. It can truthfully be said that next to life itself the affectionate and unfailing fidelity of his wife is man's most precious personal possession. A deprivation thereof, or a firm albeit erroneous, conviction of such deprivation, usually causes deep distress and often also the great wrath bom of hurt pride.

The accused clearly fell victim to both those emotions and sought to ease his travail by doing violence to complainant's body. This violence was also intended to make her mend her ways, but that cannot excuse his actions, because a husband no longer has the right to administer even a moderate corporal correction to an erring wife (cf. Palmer v. Palmer, 1955 (3) S.A. 56 (O))."

[7] In the above-cited case the Accused was convinced that his wife had misconducted herself sexually during her absence and was deeply affronted at her infidelity. The Accused had been convicted of assault on his wife, with intent to do grievous bodily harm by stabbing her with a dangerous weapon, to wit a class knife.

[8] Mr Dlamini in the main a confirmed the submissions advanced for the accused. But however, contended that the defence used in *S vs Mdindela (supra)* cannot be available to accused on the facts of the present case. The argument by the Crown is that in the circumstances of this case the accused merely suspected that his wife had an affair not that she found her red-handed with the suspected lover and therefore the *dicta* in *Mdindela (supra)* does not apply.

[9] These are issues before the court. I have considered them in *toto* and also the legal principles outlined above. This is a very serious offence where a life has been lost under very violent circumstances. This, I must say is a very gruesome killing and showed at I have stated above that Accused used his "full might"

in inflicting the injuries on the deceased. There is no justification at all in law for the accused to have inflicted such injuries on a defenceless woman. It is my considered view that the *dictum* in *Mdindela (supra)* does not assist the accused on the facts of the present case. The case in my view borders on murder under the principle of *dolus eventualis.* Although accused is first offender I am of the view that a substantial period of imprisonment is called for on the facts of the present case.

[10] In the result, the accused is sentenced to 10 years imprisonment without the option of a fine. The sentence is backdated to the 1st September 2003.

S.B. MAPHALALA

JUDGE