HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL CASE NO.200/07

THE KING

VS

MUSA KOTSO SAMUEL DLAMINI

CORAM		**MAPHALALA PJ**
FOR THE CROWN	**:**	**MR. MASINA**
FOR **THE ACCUSED**	**:**	MR. **S. MAGONGO**

JUDGMENT ON SENTENCE 29 MAY 2009

[1] Serving before court is a criminal case of murder which occurred on the 20 June, 2006 resulting in the death of one Sipho Kawu Mntambo (hereinafter called the deceased).

[2] At the commencement of the trial the accused did not dispute the question of *actus reus* that the deceased died in his hand. All that was disputed was intention to kill *[mens red).*

[3] Evidence was led; written submissions and arguments were heard on the question of intention *(mens red)* on 14 October, 2008. On the 27 February, 2009 judgment was handed down and the court found that the accused had the necessary intention *(mens rea)* to kill the deceased and the matter was postponed to the 5 February, 2009 for consideration of the existence or non-existence of extenuating circumstances.

[4] On the 4 February, 2009 this court directed that written submissions be made in respect of extenuating circumstances following the submission that the death sentence is no longer a mandatory sentence upon conviction of murder in terms of the Constitution of the Kingdom of Swaziland.

[5] There are two issues to be decided by this court in this judgment as follows:

1. Can this court correct a patent error in its judgment?

2. In light of Section 15(2) the Constitution of Swaziland Act No.l of 2005 which states as follows:

"*the death penalty shall not be mandatory*" is extenuation still necessary or relevant?

[6] On the first inquiry both parties are in agreement that this court at this stage is not *functus officio* and can correct a patent error in its judgment given earlier on the guilt of the accused. The Crown states that at the commencement of trial the Crown withdrew charges on count two and three against the accused person. This fact can find support on the court record and tapes. The fact that charges were withdrawn by the Crown demonstrates that the court committed an error in pronouncing that the accused person was guilty on charges that had earlier on been withdrawn.

[7] In this regard the Crown cited Rule 42(1) (b) of the High Court Rules read together with the case of *Cape of Firestone*

South Africa (Pty) Ltd vs Genticurd A. G. 1977(4) SA 288(AD) at page 306-307.

[8] The legal proposition around Rule 42(1) and the case of *Firestone (supra)* is that this court can *mero motu* or on application of any party affected, rescind on vary an order or judgment in which there is an ambiguity, or a *patent error* or omission but only to the extent of such ambiguity, *error* or omission.

[9] On the basis of the above arguments on the error made by the court it is accordingly corrected as stated by the parties.

[10] I now proceed to consider the main argument whether the death sentence is still obligatory where no extenuating circumstances has been found in view of the new Constitution of the Kingdom of Swaziland.

[11] The Crown contends that the death sentence is still a sentence open to our courts to impose in appropriate cases of murder. That Section 15(2) of the Constitution has not abolished the death sentence in Swaziland. It has only made it discretionary on the part of the court. In other words, post Constitution, when a court finds no extenuating circumstances exist it is no longer obligated at law to sentence the accused to death. Invariably, even post time Constitution,

in exercise of its discretion where no extenuating circumstances exist, a court can still impose the death sentence.

[12] In light of the above, the Crown submits that notwithstanding, the provisions of the Constitution of Swaziland, it is still relevant and necessary for extenuation to take place as a separate issue procedurally, as has always been the case.

[13] On the other hand it is contended for the accused that our Constitution being the Supreme Law of Swaziland and taking into account Section 2(1) of the Constitution of the Kingdom of Swaziland Section 29(1) of the Criminal Procedure and Evidence Act, 1938 is not consistent with the Constitution and as such it is void to the extent of the inconsistency. Also put differently, with the interpretation of the Constitution in Swaziland, the position of the law regarding the death sentence has been changed from making the death sentence a mandatory penalty for murder.

[14] The above are the vexed issues of law for consideration by the court and I think it is imperative to outline *in extenso,* the arguments

of the parties for a proper understanding of the issues before the court.

[15] Counsel for the accused presented his arguments by sketching a constitutional framework in this country. That before the introduction of the Constitution the position of the law was that upon conviction of murder, the court had the duty to look into extenuating circumstances which militates against imposing a death sentence.

[16] Counsel for the accused cited Section 296(1) of the Criminal Procedure and Evidence Act, 1938 as amended which provides the following:

> "Sentence of death by hanging **shall** be passed by the High Court upon an offender convicted before or by it of murder...
>
> Provided also that where a court is convicting any person of murder is of opinion that there are extenuating circumstances it may impose any sentence other than the death sentence."

[17] That from the reading and simple understanding of Section 296(1) the sentence that comes to mind upon conviction of murder is death sentence unless there are extenuating circumstances, then the court in its discretion pass any sentence other than the death sentence.

[18] This discretion is hinged upon the use of the word *may* on the proviso quoted above. It is clear from the reading of Section 296(1) that death sentence was mandatory upon conviction of murder unless there exist extenuating circumstances. This is derived from the usage of the word *shall* on the above quoted section.

[19] In this regard the court was referred to the cases of *S v Mavhungu 1981(1) SA 56 (a); and that of Mandla Maphalala and Another vs Rex Appeal Case No.21/1988.*

[20] Counsel for the accused further argued that in the Republic of South Africa before the amendment of Section 277 by

Section 4 of Act 10 of 1990, where an accused person has been convicted of murder and the court found no extenuating circumstances it was obliged to impose the death penalty. After convicting the accused of murder, the Judge and assessor had to consider the question of extenuation in a second phase.

[21] In this regard the court was referred to the cases of *S vs Mavhungu 1981(1) SA 56 (A)* and that of *S vs Theron 1984 (2) SA 868(A).* On this

point the court was further referred to the case of *S vs DC Dricks 1981 (3) SA 940* to the proposition that upon finding that there were no extenuating circumstances present, the death sentence was the *only* competent verdict.

[22] Counsel for the accused further outlined the new approach by the courts in South Africa. That in 1990, the court pointed only an entirely new approach to the imposition of death sentence for murder. See *S vs Malinga 1990 (4) SA 709 (A).* In the case of *S vs Senonotti 1990 (4) SA 727* the death sentence was only imposed when no other punishment was appropriate and in deciding when the death sentence to be proper sentence, the court took into account the abolition by the legislature of a mandatory death penalty for murder and this was an indication that the death sentence would in future be imposed only in cases of exceptional circumstances.

[23] The court held that the Crown bore the *onus* of establishing the presence of aggravating factors beyond a reasonable doubt and also carries the *onus* of exercising beyond reasonable doubt the presence of mitigating factors.

[24] Counsel for the accused argued that in 1995, the death sentence was found and declared to be a cruel, inhuman and degrading punishment and accordingly invalid. The result, of this was that no court in South African would impose a death penalty. In this regard the court was referred to the case of *S vs Makwayane and Another 1995(3) SA 391 (CC).* The court was also referred to the textbook by *Ian Currie and Johan de Waal, The Bill of Rights Handbook 5th edition, 2005* at 280.

[25] Coming closer home Counsel for the applicant cited Section 15(1) of the Swaziland Constitution which reads as follows:

> "Protection of Right of Life
> A person shall not be deprived of life intentionally in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted."

[26] Subsection 2 provides as follows;

> "The death penalty shall not be mandatory."

[27] Section 18 of our Constitution provides as follows:

> Subsection 1; The dignity of every person is inviolable;
> Subsection 2: A person shall not be subjected to torture or to inhuman
> or depriving treatment or punishment.

[28] That the above was the cornerstone of the case in *S vs Makwayane & Another 1995(3) SA 391 (CC)* and was the basis for the invalidation of the death sentence.

[29] Counsel for the accused argued that our Constitution being the Supreme Law of Swaziland and taking into account Section 291) of the Constitution of the Kingdom of Swaziland Section 29(1) of the Criminal Procedure and Evidence Act, 1938 is not consistent with the Constitution and as such it is void to the extent of the inconsistency.

[30] Also put differently, with the introduction of the Constitution in Swaziland, the position of the law regarding death sentence has been changed from making death sentence a mandatory penalty for murder. The wording of the Constitution is clear and unequivocal and needs no extrinsic means to interpret it. The obvious starting point for determination of a provision of Bill of Rights is the test itself. In this regard the court was referred to the case of ***S** vs Zuma 1995 (2) SA 642 (CC).*

[31] Counsel for accused further dealt with the effect of Section 15(1) of the Swaziland's Constitution in paragraphs 1, 2, 3, 4 and 5 of paragraph H of the Heads of Arguments. On paragraph [1] of the Heads of Argument court advanced that the accused is a first offender and that from the evidence of PW4 and PW6 it is clear that this was not a premeditated murder. (See also paragraph 1, 2, 3, 4 and 5 paragraph [1] of the Heads of Arguments).

[32] The Crown on the other hand also advanced a formidable argument by Senior Crown Counsel Mr. Masina. The gravamen of the argument of the Crown is that the death sentence is still a sentence open to our courts to impose in appropriate cases of murder. Section 15(2) of the Constitution has not abolished the death sentence in Swaziland. It has only made it discretionary on the part of the court.

[33] In other words, post time Constitution, when a court finds no extenuating circumstances exist it is obligated at law to sentence the accused to death. Invariably, even post time Constitution, in exercise of its discretion, where no extenuating circumstances exist, a court can still impose the death sentence.

[34] In light of this submission, it is the Crown's contention, that notwithstanding, the provisions of the Constitution of Swaziland, it is still relevant and necessary for extenuation to take place as a separate issue, procedurally, as has always been the case.

[35] To support the above cited arguments the Crown cited a number of decided cases in Botswana including that of *Losane vs The State [1985] BLR 281, Keleletswe & Others vs The State Botswana Criminal Appeal No.25 of 1994 [1955] BWC A6.* The court has further referred to the cases of *S vs Letsolo 1970 (3) SA 476,* that of *Lekolwane vs The State 1985 BLR 245* at 249 and that of *David Sejaman vs State 1966 BLR 153.*

[36] In the present case the court has to consider the vexed arguments of the parties as outlined above. In arguments before me I put it to counsel on both sides to research on the position of courts in neighbouring countries especially South Africa which had a vigorously pr actice the death sentence prior to the promulgation of the 1994 Constitution in that country. The idea I had in mind was to find a precedent in practice of what the courts did from the death penalty period to the

discretionary effect ushered by the country's recent constitutional dispensation.

[37] It appears to me that this is the position of the law in this country where a dilemma has been ushered by a liberal constitutional dispensation. Are the courts supported to bury their heads in the past or wake up to the new constitutional order brought about by the new Constitution?

[38] It appears to me that there is wisdom in Mr. Magongo's first argument that our Constitution being the Supreme Law of Swaziland and taking into account Section 2(1) of the Constitution of Swaziland Section 29(1) of the Criminal Procedure and Evidence Act, 1938 is not consistent with the Constitution and as such it is void to the extent of the inconsistency.

[39] I also heard counsel in arguments before me that this matter ought to have appeared before a Full Bench of this court because of weight attached to that court and the nature of the enquiry. However, it became apparent to me that referring a case like this to a Full Bench would have been cumbersome and time consuming. In view of these considerations I

decided to hear the matter as a single Judge as I am entitled to in law.

As a final point, it appears to me that with the introduction of the Constitution in Swaziland, the position of law regarding the death sentence has been changed from the death sentence as mandatory penalty for murder.

For the above reasons I find that the question of extenuating circumstances upon conviction of murder falls away and the court should look into mitigating and aggravating factors.

I must further state that I agree *in toto* with Masuku J in *Rex vs Maponi Celani Ngubane and Others Criminal Case No.46 (2002)* on the question of Section 15(1) of the Constitution where he stated the following:

> "In my view, Section 15(2) grants the Court a discretion in so far as the imposition of a death penalty is concerned. Whereas the position before the advent of the Constitution was that where there are no extenuating circumstances in a capital offence, the Court "shall" impose the death penalty, the post-constitution scenario is that the Court is at large to exercise a discretion, even where there are no extenuating circumstances and decide whether in all the circumstances of the case, both mitigating and aggravating, taken individually and/or cumulatively, it is proper to impose the irreversible supreme penalty. It would be hazardous, in my view to attempt to draw a numerous clauses of the factors that the Court may take into account at that stage,

as the circumstances appertaining to cases differ from case to case.

> The discretion given to the Court by the Constitution, should, as in all other cases, be exercised judiciously. There must, in my view, be cogent reasons why the judge, in a particular case, is of the opinion that notwithstanding the absence of extenuating circumstances, the supreme penalty is inappropriate. The decision not to impose the said penalty, it would seem to me, must not be informed or based solely on the severe nature of the penalty, nor on the particular Judge's predilections or idiosyncrasies or the subject. If that were to be the case, the question whether or not to impose the penalty would be arbitrary and a 'judge -shopping' exercise would ensure, in order to find a judge who is perceived to be against a death penalty, to preside and this would be undesirable."

[43] In view of the above reasoning I now come to address the mitigating factors which were also argued by counsel with the arguments on extenuating circumstances. It was submitted for the accused that he is a first offender that there was no premeditation of his part. His age was put at 32 years old.

[44] The accused attacked a person in his own home and killed him in cold blood. His actions were very chilling to the person who was with the deceased and the whole family.

In my view this is at the very high end of robbery where a person is attacked at his own home.

Therefore a sentence that fits the crime should be imposed in this case.

The general principles in this regard are trite and were forcefully enunciated in the "*triad of Zinns case*"*(S vs Zinn 1969 (2) SA 537 (AD) at 540 G)* where the court laid down the following criterion: **What has to be considered is the triad consisting of the crime, the offender and interest of society".** Furthermore the Appellant Division in the case of *R vs Swanepoel 1945 AD 444 at 454* summed up the position as follows;

> "The ends of punishment are four in number, and in respect of the purposes to be served by it, punishment may be distinguished as 1. deterrent, 2. preventive, 3. reformative, 4. retributive of these aspects the first is the essential and all important one, the others being merely accessory".

The *triad* was also expanded upon in the case of *S vs Qamata and Another 1997 (1) SA 479* where Jones J refined it as follows:

> "It is now necessary for me to pass sentence. It is proper to bear in mind the chief objectives of criminal punishment namely, retribution, the prevention of crime, the deterrence of criminals, and the reformation of offender. It is also necessary to impose a sentence, which has a dispassionate regard for the nature of the offence, the interests of the offender, and the interests of the society. In weighing these considerations should bear in mind the need:

3. to show an understanding of and compassion for the weaknesses of human beings and the reasons why they commit serious crimes, by avoiding an overly harsh sentence;

4. to demonstrate the outrage of society at the commission of serious crimes by imposing an appropriate and. If necessary, a severe sentence; and

5. to pass a sentence, which is balanced, sensible, and motivated by sound reasons and which therefore meet with the approval of the majority of law-abiding citizens. If I do not, the administration of justice will not enjoy the confidence and respect of society."

[46] Having considered the facts of the case and the principles of law cited above in paragraph [44] of this judgment I find that an appropriate sentence to be a period of 18 years imprisonment backdated to the date accused was arrested and so it is ordered.

SOT^HALALA

PRINCIPAL

JUDGE