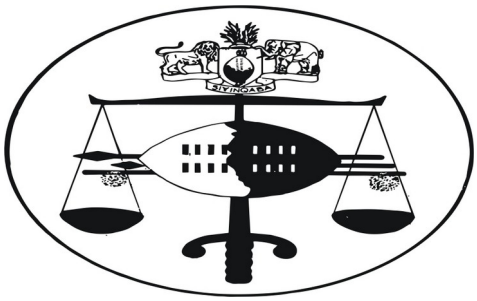

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CRIMINAL APPEAL NO. 27/11**

In the matter between

SIBUSISO SHADRACK SHONGWE **1ST APPELLANT**

NQABA SIFISO SHONGWE **2ND APPELLANT**

AND

REX **RESPONDENT**

CORAM : **RAMODIBEDI CJ**
MOORE JA
MCB MAPHALALA JA

HEARD : **1 AND 11 NOVEMBER 2011**

DELIVERED : **30 NOVEMBER 2011**

SUMMARY

Criminal appeal – Murder charge – The appellants killing the deceased in furtherance of a common purpose - Both convicted of murder and sentenced

to 22 years imprisonment each – Appeal against sentence only – Appeal allowed and sentence reduced to 15 years imprisonment each.

JUDGMENT

RAMODIBEDI CJ

[1] This appeal is a chilling reminder of the adage that there is no honour amongst thieves. Often the consequences of their clandestine activities are ghastly as will become apparent shortly.

[2] The appellants have appealed against sentence only. They both rely heavily on youthfulness and immaturity. Indeed the parties are on common ground that the first appellant was only 17 years of age at the time of the commission of the offence. The second appellant was in turn 16 years old as the court *a quo* correctly found.

[3] The facts perhaps follow the usual pattern which one commonly finds amongst thieves. The appellants conspired with the deceased to go and commit a crime of housebreaking and theft at a certain Dlamini homestead. The targeted house belonged to one Levion Dlamini. I should add that this conspiracy was hatched by the deceased himself who wanted the appellants to go and steal clothing and a bed for him from the

homestead in question. It is the appellants' version that the deceased had promised to pay them an undisclosed amount of money for committing the offence.

[5] As matters turned out, the appellants broke into Mr. Dlamini's house. They stole 4 trousers and 3 shirts and reported to the deceased with these items on the same night. He promised to give them their money the following day. On the next day, however, he told them point blank that he was not going to be able to pay them. He subsequently became violent towards them, insulting them and insisting that they must go and steal a bed for him as he had originally told them to do, failing which he threatened to report them to the police for the criminal offence they had committed.

[6] It was at that point that the appellants claim to have panicked, no doubt to their horror as the unfortunate subsequent events unfolded. They hatched a heinous scheme to kill the deceased. They then approached him at a place where he worked as a security guard. They pretended to him that his girlfriend was calling him at a certain spot near the river. The trick worked and the deceased duly accompanied the appellants to the spot.

[7] When they arrived at the river, however, the appellants viciously attacked the deceased. The first appellant tied him up with a wire around his neck and chest, securing the arms towards the back in the process. Thereafter, the second appellant assaulted him with a knobkerrie, thus admittedly killing him in the process. The two appellants then threw the deceased's body into the donga and covered it with sand.

[8] After a period of about 6 to 7 months, on first appellant's version, or 3 to 4 months on second appellant's version, the appellants dug out the remains of the deceased and placed them next to a path "so that people could find him" and so that he could be "buried."

[9] Although they pleaded not guilty to the charge of murder, the appellants were found guilty as charged, correctly so in my view. Extenuating circumstances were, however, found to exist in respect of each appellant on the basis of youthfulness and immaturity.

[10] As this Court has stressed time and again, the imposition of sentence is a matter which pre-eminently lies within the discretion of the trial court. In general,

this Court is loath to interfere with such sentence in the absence, of a misdirection resulting in a miscarriage of justice. This principle is now so well-established in this jurisdiction that it is hardly necessary to cite any authority for it. But it must also be remembered, as this Court stated in **Vusumuzi Lucky Sigudla v Rex, Criminal Appeal No. 01/2011**, that in terms of s 5 (3) of the Court of Appeal act 74 of 1954, this Court has the additional power to quash the sentence passed by the trial court if it thinks that a different sentence should have been passed. In such a situation, this Court has the power to pass "*such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.*"

[11] In passing sentence in the present matter the learned Judge *a quo* commendably reminded himself of the triad consisting of the offence, the offender and the interests of society as stressed in **S v Zinn 1969 (2) SA 537 (A)**, a case which has frequently been followed in this jurisdiction. The factors which he took into account in favour of the appellants on the one hand were youth, immaturity, the fact that they were remorseful as well as the fact that the deceased had sought to blackmail them. On the other hand the learned Judge *a quo* considered aggravating factors

against the appellants. These were the serious nature of the offence committed where a life had been lost, the prevalence of the offence – hence the need for deterrence, the fact that the murder was premeditated as well as the fact that both appellants had previous convictions. It turned out however, that the previous convictions in question were for housebreaking and theft and not for murder. I am, therefore, prepared to accept that the learned Judge *a quo* misdirected himself by taking them into account. Hence this Court is at large to consider sentence afresh.

[12] In my view, I consider that the very fact that young offenders aged 17 and 16 years respectively were sentenced to a manifestly harsh sentence of 22 years each means that the court *a quo* placed little or insufficient weight to their relative youth and immaturity in particular. But then Mr. Mathunjwa for the Crown relies on the case of **Mbhamali, S v R 1987 – 1993 (3) SLR 58 (CA)** for his submission that the sentence in the instant matter should not be disturbed. It seems quite clear to me, however, that the case in question is distinguishable from the present case. It was a case of the murder of a policeman in the course of his duty committed by a 20 year old young man. There were no extenuating circumstances found as a

result of which he was sentenced to death. In the instant matter both appellants were far younger and clearly immature. Extenuating circumstances were found to exist in their favour.

[13] Mr. Mathunjwa sought to urge the Court to pass sentences appropriate to the respective ages of the appellants, not at the time of the commission of the offence, but at the time of sentence. He relied for this proposition on the following statement made by this Court in **Bheki Masuku and Another v Rex, Case No.22/2011**.

> *"[14] Of course this does not mean that a child of fifteen who commits a crime and is tried some years later, when he is twenty (as is the case here), has to receive the sentence appropriate for a fifteen year old; see in this regard* ***Oodira v S Criminal Appeal 035 of 2005) [2006] BWCA 27****, a judgement of the Botswana Court of Appeal."*

Quite clearly, counsel read this passage out of context. The very next sentence in the same passage states the following salutary principle which serves as useful guidance for the courts in this country:-

"But it does mean that in passing sentence on such offender the trial court must have regard to mitigating factors flowing from the Accused's age at the time the offence was committed."

[14] Indeed, in **Oodira's** case (supra) which has since been reported as **Oodira v The State [2006] 1 BLR 225 (CA)**, the Court quoted with approval the following remarks which I had occasion to make in the Court of Appeal of Lesotho in **Mohale and Another v Rex 2005 – 2006 LAC 196**:-

"[26] A person who was aged below 18 years at the time of the commission of the offence but who, to quote a random example, is aged 30 years at the time of sentence (not an impossible scenario by any means when one has regard to delays which sometimes occur in prosecution of cases) would similarly have to be sent to a juvenile centre or approved school to the detriment of minor children thereat. Such an interpretation is in my view not only untenable but is plainly absurd. In this regard it is useful to bear in mind the nature and scheme of the Children's Act which is to ensure that children or unmarried persons

below the age of 18 years do not mix with adults in detention centres or prisons. The mischief sought to be remedied here is the danger of putting children at the risk of being corrupted by adults or hardened criminals.

[27] Although the primary rule in the construction of statutes is that the language of the Legislature should be given its ordinary meaning, this rule is itself subject to exceptions. One such exception is that where the language of the Legislature leads to absurdity so glaring that it could never have been contemplated by the Legislature then the court is justified in departing from such meaning. ***See R v Venter 1907 TS 910; Shenker v The Master and Another 1936 AD 136****. I am therefore satisfied that a construction that accords with common sense is called for in this matter.*

[28] It follows from these considerations that the correct interpretation of section 26(1) of the Children's Act, in my judgment, is that if at the date of sentence the accused had attainted the age of 18 years, it is within the court's discretion to impose whatever sentence it deems appropriate in the circumstances. Put differently, the relevant

age for consideration for the purposes of section 26(1) is the age on the date of sentence."

[15] Doing the best I can in balancing the triad consisting of the offence, the offender and the interest of society in the special circumstances of the case I am disposed to the view that a sentence of 15 years imprisonment for each appellant would adequately meet the triad in question.

[16] It follows from these considerations that the appeal is upheld and the sentence imposed by the court *a quo* is altered to read:-

"The accused are sentenced to 15 years imprisonment each."

_____
M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

_____
S.A.MOORE
JUSTICE OF APPEAL

I agree

_____
MCB MAPHALALA
JUSTICE OF APPEAL

For Appellants : In person

For Respondent : Mr. S. Magagula