IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 370/11

In the matter between

REX

V

NHLONIPHO MPENDULO SITHOLE

Neutral citation: *Rex v Nhlonipho Mpendulo Sithole (370/11)* [2012] SZHC 172

Coram: OTA J.

Heard: **8th August 2012**

Delivered: **10th August 2012**

Summary: **Accused convicted of Murder extenuating circumstances found. Accused sentenced to 12years imprisonment.**

Judgment on Extenuation

[1] In the case of **Daniel Dlamini v Rex Appeal Case No. 11/98**, the erstwhile Court of Appeal of Swaziland held that no onus rests upon the Accused to prove the existence of extenuating circumstances. This was the same stanze adopted by the **Botswana Court of Appeal in the Case of Kelaletswe and Another v The State (1995) B.L.R 100 (CA),** where the court said the following:-

‘‘ *It seems to us that there is therefore an overriding responsibility on the Court and its officers – Counsel to ensure that the second phase of the enquiry as to the presence or absence of extenuating circumstances – is conducted with diligence and with an anxiously enquiring mind. The purpose of the enquiry is inter alia to probe into whether or not any factor is present that can be considered to extenuate an Accused’s guilt within the context and meaning described above - when all the evidence is in, the court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating---. This would include evidence tendered during*

the second phase of the enquiry. It will then make its ‘‘value or moral judgment’’.

[2] The basis for extenuation is to enable the court exercise the Constitutional discretion which is entrenched in Section 15 (2) of the Constitution of Swaziland Act, 2005, which states that this court is not obliged to hand down a death sentence in every case. However, case law has demonstrated that even where no extenuating circumstances exist the court still has a discretion whether or not, to impose a death sentence. See **R v Celani Maponi Ngubane Criminal Case No. 42/2002.**

[3] What then are extenuating circumstances?

I find an apt and very precise description of what constitutes extenuating circumstances in the case of **The King vs Sandile Mbongeni Mtsetfwa, Criminal Trial No. 8/10 paragraphs 64,66 and 67** where the court stated as follows:-

‘‘ *(64)---what I consider to be the most classical definition of extenuating circumstances, fell from the lips of Holmes JA., in the celebrated Case of* ***S v Letsolo 1970 (3) S.A. 476 AD at 476 F-H,*** *where the legendary Judge of Appeal said:-*

‘‘ *Extenuating circumstances have more than once been defined by this court as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the Accused, as distinct from his legal culpability. In this regard the trial court has to consider:-*

(a) whether there are any facts which might be relevant to extenuation such as immaturity, intoxication or provocation (the list is not exhaustive);

(b) whether such facts, in their cumulative effect, probably had a bearing on the Accused’s state of mind in doing what he did.

c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the Accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances''

(66) In the ***Botswana Court of Appeal Case of Fly v The State (CCCLB-009-08) (2010) BWCA, at paragraph 35, Dr Twum JA*** *added a further factor which may be considered as extenuating. The learned judge of Appeal said:*

''Low education, coupled with a rustic background may do!''

(67) In yet another ***Botswana Court of Appeal case of Tsobane v The State, the court said at page 20-21*** *of the judgment:*

> ‘‘ *In conducting its enquiry, the court must do so with diligence and an anxiously enquiring mind---. The court must in its enquiry, as set out above, consider and weigh all the features of the case both extenuating and aggravating and then make a moral or value judgment as to whether extenuating circumstances exist or not---- should the court be in doubt as to whether such circumstances exist or not and such doubt is reasonable and not the doubt of a weak or ‘‘vacillating mind’’ it should give the benefit of the doubt to the Accused’’.*

[4] In casu, from the totality of the evidence tendered and the address by learned defence counsel, it is clear that when the offence was committed the Accused was a young man of 23 years. I have no doubt that his youthfullness and immaturity, played a role in his stabbing the deceased in the way and manner that he did on the day of this incidence, thus bringing about his death. It is also clear that the Accused is a person of low education. Infact he is semi illetrate

having attained education only to the level of standard 6. This virtual lack of weighty education must be weighed into the balance.

[5] There is also the fact that he has little or no exposure. I have found in my judgment on conviction that both the Accused and deceased were drunk at the material time of this incidence. I have also found it as a fact that the Accused did not have direct intention to kill the deceased. It appears to me therefore, that the extenuating circumstances *in casu*, are youthfulness, immaturity, low education lack of exposure and intoxication.

[6] These factors to my mind when weighed together in the balance, served to contribute to the commission of the offence by the Accused. These extenuating factors, accord me the discretion to pass a sentence on the Accused person other than the death sentence.

Judgment on Sentence

[7] In mitigation, the defence asked for leniency. They told the court that Accused is a first offender never been arrested before and has

corporated with the police from the time of his arrest. This is also evident from the Accused's plea of guilty to culpable homicide which was rejected by the crown. The Accused was a young man of 23 years at the time of this offence and was gainfully employed as a shop keeper in the Republic of South Africa. His daughter was then 3 months old and would be about 15 months old by now. That the Accused's father assisted the deceased's family in burying the deceased.

[8] **Nhlonipho Mpendulo Sithole,** the law mandates me in sentencing, to consider the triad. That is the Accused's personal interests, the interests of the society and the peculiar facts and circumstances of the case.

[9] These factors are embodied in the pronouncement of the court per **Holmes JA in the case of S v Rabie 1975 (4) S.A 855 (A) at 862 C**, 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 circumstances’’*

[10] Then there is the declaration of Moore JA in the Botswana Court of Appeal Case of **R v Motoutou Mosilwa Criminal Appeal No. 124/05,** as follows:-

‘‘ *It is also in the public interest particularly in the case of serious and prevalent offences, that the sentencer’s message should be crystal clear so that the full effect of deterrent sentences may be realised, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportions to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated’’.*

[11] In casu, **Nhlonipho Mpendulo Sithole,** I have as mandated by law, taken into consideration your personal circumstances as demonstrated in your plea in mitigation which I have set forth ante. I indeed sympathize with you in your circumstances.

[12] I however wish to point out to you that the offence you committed is a very serious one. This is because of its prevalent nature which has been decried by the courts in the Kingdom over the years. The incidence of the killings of innocent people with knives over insignificant squabbles has reached fearful dimensions and must be discouraged as a matter of paramountcy. This is in the interest of the sanctity and stability of the society.

[13] **Nhlonipho Mpendulo Sithole**, the deceased was just an innocent young man who had gone to the Sithole homestead to buy eggs on the day in question. Your unlawfulness in pursuing the deceased and stabbing him with a knife, even when he had left the premises and in the face of no provocation, resulted in the death of the deceased. The deceased was entitled to his Constitutional right to life as entrenched

in Section 15 (1)of the Constitution Act 2005. You deprived him of that right without any lawful justification.

[14] The mere fact that you were drunk at the time of this offence carries little or no weight as a mitigating factor. This is because you should have considered the risks associated with such state of drunkness, before you embarked on the drinking adventure. This is the position of the Supreme Court of Swaziland as ably demonstrated by **Ebrahim JA in the case of Mbuso Sipho Dlamini v Rex Appeal Case No. 34/2010 at page 8-9**, where the court said the following:-

> ‘‘ *---His consideration of the dangers inherent in the voluntary and excessive consumption of alcohol should have been done before he took the first sip. The subjects of this Kingdom must not be made to suffer the loss of their lives because of persons such as the Appellant’s continuing abuse of alcohol, which is a painful and mind affecting stimulant and intoxicant. He who continues to abuse alcohol to such an extent that the control of his voluntary actions is impaired,, and then commits serious*

crimes, must face the full penal consequences of his conduct. Voluntary drunkeness as a mitigating factor in cases such as this has lost it's efficacy''

[15] In passing sentence on you, I am further guided by the recent decision of the Supreme Court in the case of **Samkeliso Madati Tsela v Rex Appeal Case No. 20/10 paragraphs 23,24 and 26** where the court analysed the range of sentence for the offence of murder as follows:-

'' *(23) The table shows that the most lenient sentence for the offence of murder was 5 years imposed in 2004. The sentences of 7 years and 5 years passed in November 2004 appear to be explicable on the basis of their own peculiar circumstances. They can hardly be regarded as appropriate in today's relatively more violent environment. The most severe sentence of 25 years was imposed in 2010. The mean between 5 and 25 is 15 years imprisonment which is the mid point of the range..*

(24) It is true that the cold figures in the table do not provide any insight into the many consideration which this court took into effect in upholding or varying awards of the courts below. A more refined study must await another day when the researchers, enjoying the necessary facilities, are able to analyze and assess all the relevant components of the sentencing process, including the sociological and societal elements that underline, but which do not necessarily explain criminal behaviour.

(26) It should however be borne in mind that a residual discretion remains within the competence of every sentencing officer which enables him to adjust an appropriate penalty either below or above the extremities of the range, provided always that such a course is justified by the peculiar circumstances of the particular case and provided also that the sentencer provides clear and cogent reasons upon the face of the record for the sentence which he or she imposes''.

[16] **Nhlonipho Mpendulo Sithole**, having therefore carefully considered the triad, I am firmly convinced that a sentence of 12 years is fitting of the offence you committed to serve as a deterrent to others. This sentence is backdated to the 17th of July, 2011, the date of Accused's arrest and in carceration. It is so ordered. Right of Appeal and review explained.

For the Crown:	Q. Zwane
Accused in person	B. Dlamini

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE …….DAY OF…….2012

OTA J

JUDGE OF THE HIGH COURT