



IN THE HIGH COURT OF ESWATINI

JUDGMENT ON SENTENCE

CRIMINAL CASE NO.292/13

In the matter between:

THE KING

AND

THAMI MFUNWA NTSHANGASE

Neutral Citation: *The King vs Thami Mfunwa Ntshangase (292/2013) [2019] SZHC (121) 16th July 2019*

Coram: MLANGENI J.

Heard: **15/4/19, 16/4/19, 3/5/19, 27/6/19**

Judgement on Sentence: 16th July 2019

Summary: Criminal Law - accused charged with murder - statement of agreed facts entered in terms of Section 272 of the Criminal Procedure and Evidence Act No. 67/1938 - accused convicted of murder on the basis of the statement.

The deceased, a young girl of nineteen (19) years, was killed by her boyfriend because the relationship had gone sour.

Mitigation/aggravation of sentence: accused a first offender who was good to the deceased during her lifetime, surrendered himself to the Police and co-operated during the investigation; deceased killed in a brutal manner and society outraged by the escalation of violence against women perpetrated by those who claim to love them.

Need for sentences that are truly deterrent.

JUDGMENT ON SENTENCE

[1] On the 1st June 2013 a nineteen year old girl of Maplotini area, Lavumisa, was brutally murdered through the instrument of a hammer whose weight is between four and five kilogammes. According to the post-mortem report, she died **“due to multiple injuries to head”**. A statement of agreed facts was handed in court in terms of Section 272 of the Criminal Procedure and Evidence Act No. 67/1938. In terms of this statement the accused states that he **“assaulted the deceased with a hammer on the head from which she sustained injuries.”**¹ On the basis of the statement of agreed facts the accused, Thami Mfunwa Ntshangase, was found guilty of the murder of Phetsile

¹ At para 4 of the Statement.

Mchoco Sambo. On the 27th June 2019 I heard the parties in mitigation/aggravation of sentence. This judgment hands down sentence in respect of the matter.

- [2] The deceased was the accused's girlfriend. She lived at her parental home at Maplotini Area, Lavumisa. It is apparent that at some point in time the relationship between the two was a cosy one, to the extent that the accused made a contribution towards the construction of the deceased's one room residential structure at her parental home. Not only that. He also assisted the deceased in bringing up her baby whom she had from a previous relationship. The extent of the accused's contributions is not clear, but there is no denying that he demonstrated love, care and generosity towards the deceased.
- [3] The statement of agreed facts says nothing about the antecedents to this grisly act. The court has no idea what transpired before the occasion of this macabre incident. At paragraph 4 of the statement all that is stated is that **"on the 1st June 2013 accused assaulted the deceased with a hammer on the head from which she sustained injuries"** The next paragraph is about the accused surrendering himself to the Police on the next morning.
- [4] On the available evidence the accused, out of the blue, laid his hands on a heavy and deadly hammer and bashed his girlfriend to death. The Crown led some evidence prior to the statement of agreed facts being handed in. PW2 is the one who was sent by the accused to call the deceased out of her parental home to meet her death on the fateful evening. When the accused sent for the deceased, he used a name other than his - a decoy, so to speak. The instruction to PW2

was that she must tell the deceased that she was being called by one Ntsetselelo Mbhamali. She came out of her home on the knowledge that she was going to meet the said Ntsetselelo, not the accused. Unknown to her, armed with an instrument of death there was her boyfriend, the accused. The use of a decoy by the accused gives a hint that at that time all was not well between him and the deceased. That is the only logical reason why he would use a decoy to get his girlfriend to come out of her homestead. This, undoubtedly, is a sign of pre-meditation. The death of the deceased was planned and executed with precision. Most probably because she was drifting away from him.

[5] The accused may have done significant favours to the deceased during her lifetime, but none of those things gave him a right of ownership over the life of the deceased, so as to allow him to take her life when he was unhappy with her. The male genda must learn to walk away from disappointment by their partners, whatever form it may take. One can imagine absolute mayhem in our society if the female genda were to also bash their male partners once promises were not kept. Such state of affairs is too ghastly to contemplate, and part of the responsibility of the courts is to ensure that it does not occur.

[6] The Crown is arguing for a stiff and deterrent sentence. It submits that not only is the offence a serious one but it was carried out in a gruesome manner – a heavy hammer on the head of a defenceless nineteen year old girl, at the hands of her lover. There is no worse example of cruel betrayal, whatever the reasons might be. In this context the Crown made reference to the case of REX v SIFISO MATHAMBO VILAKATI² where Hlophe J. voiced his concern about the

² (91/2011) [2018] SZHC 77 (6TH June 2018)

gruesome manner in which the deceased in that case was stabbed thirteen times, resulting in her death. The Crown also highlights the persistent prevalence of deadly violence against defenceless women in this kingdom. In *SABELO KUNENE v REX*³ the Supreme Court, at paragraph 27, had this to say, per Cloete JA:-

“We read daily in the newspapers and other media of ongoing perpetration of sexual and physical violence against women and children in Swaziland. The time has come for the courts and the powers that be to have a clear strategy in dealing with this widespread scourge, failing which we would all have failed in our tasks”.

[7] In this case a sentence of twenty years for murder was upheld. Three years earlier, in 2013, similar sentiments were expressed in the High Court case of *REX v THEMBA THEMBINKOSI DLAMINI*⁴ where Mabuza J had this to say:-

“Domestic violence leading to the death of a spouse is prevalent in our society and must be stopped. Courts must pass sentences that sent (sic) a message to would be offenders to desist from such crimes”.

[8] In the case of *R v MPHENDULO MAVIMBELA*⁵, where the accused savagely assaulted the victim for the reason that she no longer wanted

³ Appeal Case No. 05/2016.

⁴ (211/2013) [2019]SZHC 22 (19TH February 2019).

⁵ (95/2016) [2018] SZHC 167 (25TH July 2018).

to continue with the love relationship, I made the following observations:-

“.....decisive measures must be taken to give more protection to the defenceless women who are increasingly subjected to this cowardly and egocentric behaviour by men. Once other law enforcement agencies have done their part, the courts are the only beacon of hope..... the time has come for sentences to truly reflect society’s abhorrence to violence, especially violence that emanates from love relationships.”⁶

In the same matter I expressed the view, and I repeat it herein, that our courts urgently need to break away from tradition and set new precedents in sentencing, precedents that are **“loud and clear in deterrence.”** There is no value in paying lip service to deterrence while meting out meek sentences.

- [9] While recognising that the accused was good to the deceased during her lifetime, that he has no record of previous conviction, that he surrendered himself to the police and co-operated fully during the investigation of the matter, that he was only 27 years old when the crime was committed and that his agreeing to a statement of facts is a sign of contrition, in my view all this is overshadowed by the brutality in which the young girl lost her life, leaving behind a young child who will have no mother to bring her up. I also do not lose sight of the fact that this murder was well-planned and executed with precise callousness.

⁶ At paragraphs 2 and 6.

[10] As I write this judgement two headlines in one of today's newspapers⁷ tell the bleak story:-

“WIFE STABBED BY HUBBY DIES”

“MURDER, SUICIDE: WIFE DIES TOO”

There is no doubt that this rate of violent crime against the female genda places this country in an extremely bad light. It is particularly worrisome that in responding to nature a good number of females write their own epitaph.

[11] It is said that the range of sentences for murder in this jurisdiction averages between twelve and twenty five years⁸. This is possibly part of the reason why violent crime is showing no signs of decrease. It is my view that in the face of rampant, constantly escalating crime, the range of sentences should not be stagnant. If the law is a living institution, it must respond to emerging challenges⁹ in a manner that ensures society's confidence in it.

[12] It is settled that courts must not approach sentencing with anger or vengeance, neither should it do so with misplaced pity or sympathy¹⁰. In the case of *GERALD MVEMVE VALTHOF v THE KING* the appellant had killed his two children for the incomprehensible reason that their

⁷ Times of Swaziland, July 3rd 2019.

⁸ *Samkeliso Mvemve Valthof v The King*, Crim. Appeal (5/2010) [2010] SZSC 19.

⁹ See *Attorney General v Dow* (1992) BLR 119 at p166.

¹⁰ Per Holmes J.A. in *S v Rabie*, 1975 (4) SA 855, quoted with approval by Dr Twun JA in *Gerald Mvemve Valthof*, supra.

mother was now in a love relationship with someone else. On appeal, he was sentenced to an effective sentence of 25 years. I defer, as I should, to the higher courts position on the matter, but I am also of the view that if there was a counter-appeal by the Crown the outcome might well have been different.

[13] I consider that a sentence of twenty-seven (27) years imprisonment, without the option of a fine, is appropriate in the circumstances of this case and I so order. I have taken into account that in 2010 when VALTHOF was decided violent crime was probably not as rampant as it is today.

[14] The sentence is with effect from 3rd May 2019 when the accused was convicted, but the calculation must take into account the period between 2nd June 2013 when he was arrested and 26th March 2018 when he was released on bail.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Crown: Mr Lukhele

For the Accused: Mr Phakathi