



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

Criminal Case No, 2010/2014

In the matter between

REX

V

ANTHONY SHISAKI

Neutral citation: *Rex v Anthony Shisaki (210/14) [2019] SZHC-168[2019] (JO"*
September 2019).

Coram **D Tshabalala J**

Heard :

13/09/19 Delivered

:

20/09/19

SUMMARY: Criminal law - murder - extenuating circumstances - relevant factors - youthfulness per se not an extenuating circumstance - cumulative effect of factors to be considered include intoxication, however the accused's evidence

of

intoxication appeared for the first time in his evidence and was never put to crown witnesses, therefore of no probative value.

SENTENCE

[1] The accused person pleaded *not guilty* and was on the 10 September 2019 convicted of murder of one Clifford Tsela by stabbing him with a knife. The crime was committed on the 26 September 2013, at Ticanthwini in the Manzini region. Counsels for the crown and the defence opted to submit written submissions before sentence.

[2] The accused and the deceased were tenant and landlord, respectively. The fatal stabbing took place inside deceased's house. Prior to that the two had intermittent argument over payment of electricity and power outage on the premises that evening. The accused who was irritated by the power blackout blamed the deceased for it. He became discourteous, poured food over the deceased and called him a fool. The deceased reacted by attacking the accused with a grass slasher. They were separated and the two retired to their respective houses within the homestead grounds. Eye witnesses for the crown believed that blows from the slasher did not hurt the accused because they intervened and held the deceased. The accused however maintains that he sustained an injury to the nose. The court accepted the accused's version as more likely on this point that he was injured by the deceased.

[3] Following the scuffle the accused later came from his house armed with a +40cm long knife and headed to the deceased's house. He pushed his way through the door and fatally stabbed him on the neck and chest. Prior to the stabbing, efforts

of PW1, PW3 and others to dissuade the accused from his mission failed as the accused threatened them with the knife.

[4] The accused raised the defence of provocation. He claims that the deceased insulted him. Not only did the accused fail to state the insult uttered by the deceased, but the credible evidence of eye witness Paul Malindzisa points to the contrary, that it was the accused who labelled the deceased stupid and a called him a fool. The court rejected the accused's claim and defence of provocation and accepted the crown evidence in this regard.

[5] The court made a finding that the deceased's attack on the accused with a slasher was provoked by the accused's action and utterances - pouring food over deceased and labelling him a fool. In rejecting the accused's defence of provocation in terms of section 2 of the Homicide Act the court noted that the defence was not available to the accused because he initiated and prompted the aggression that followed from the deceased. The court also found that the accused was reckless whether the attack on the deceased resulted in death.

[6] The cause of death is stated in the pathologist's report as due to stab wounds to the neck and chest. The multiple injuries inflicted by the accused per the said report can be summarised thus: stab wound with sharp margins on the middle and right side of the neck above the collar bone, stab wound on the left portion of the chest, muscle deep stab wound on the front and middle portion of left thigh, muscle deep stab wound on the backside of the left thigh, linear cut injury on the upper surface of right shoulder, abrasion on the upper surface of left shoulder. According to the evidence the accused pushed the door which caused the deceased who was standing by it, to

fall back on to a chair. The accused then proceeded to stab him. There is no doubt that the attack on the deceased was vicious as much as it was lethal.

[7] It is a relevant factor for sentencing that the attack was launched when the deceased posed no threat to the accused, their prior altercation having been quelled by those present. In passing sentence I take into consideration personal circumstances of the accused articulated on his behalf by his counsel. These were stated as follows:

His youthfulness, 24 years, at the time of commission of the offence, low education (grade 3), has two young children, now aged 8 and 6. The children previously lived with accused's mother following the death of their mother who passed on after the accused was taken to custody. The accused's mother has since died and the kids are now on their own. The accused is a first offender, he cooperated with police, and he is remorseful for causing the deceased's death. It is also stated that the accused was drinking alcohol prior to commission of the offence and that his reaction may have been impaired.

Extenuating Circumstances

[8] Following conviction of the accused for murder, both the crown and defence counsels made written submissions to the court on whether extenuating circumstances exist. The defence submits that extenuating circumstances exist. Extenuating circumstances have been described by the courts at different instances. In the case of **S v Letsolo**¹ the court defined the principle as follows:

¹1970 (3) SA 476 (A).

" ...any facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability ..." Relevant factors for consideration by the court include immaturity, intoxication, provocation etc.² The question is whether such factors in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did.³ The bearing of those factors must be sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.⁴

[9] The defence counsel referred to the elusive definition of extenuating circumstances in the case of **R v Biyana**,⁵ as

" .. *.a fact associated with the crime which serves in the minds reasonable men to diminish morally, albeit not legally, the degree of prisoner's guilt. Mentality of the accused may furnish such a/act...*"

[10] Defence counsel submitted that the court in viewing the facts subjectively should be able to look beyond the brutality and savageness that accompanied the crime and find that these aspects of the case do not prove calculated cruelty.

[11] In relation to the accused's age of 24 at the time the offence was committed, which defence counsel stated as a personal factor in accused's favour, the court in **Rex v Mthobisi Bo-boy Dlami ni**⁶ observed that youthfulness per se may not be considered as an extenuating circumstance, noting that "*at 24 years old, the accused was not so young as to lack proper judgment.*"⁷ the point that the accused *in casu*

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ 1938 E.D.L. 310.

⁶Case No 428/2010.

⁷ibid.

was not so young as to lack proper judgment is buttressed by the fact that at the time of committing the offence the accused was a married man with two children.

[12] I must express appreciation for both counsels' helpful submissions with reference to authorities. In consideration of the relevant facts in this case and the applicable principles the court has not been able to find existence of extenuating circumstances in this case.

[13] In passing sentence the court follows the triad which embodies competing interests that the court must take into account, namely the offence, society and the accused person himself. Concerning the offence, I echo the words of the crown counsel that termination of deceased's life was heinous and brutal. The defence counsel acknowledges this in his submissions on extenuating circumstances. It is of great concern that offences of brutal murders are prevalent and ever increasing in the country.

[14] Society needs to be protected from violent criminals through appropriate sentences. At the same time the fact that the accused person is a first offender, his age and the fact that he has young children need due consideration.

[13] In the exercise of its discretion the court is also guided by the sentencing range for murder in this jurisdiction, within the recent past. The Supreme Court in the case of **Tsela v Rex**⁸ made quick review of sentences the Supreme Court had approved for murder between 2011 and 2002 and found that the most lenient sentence was 5 years imposed in 2004, and stated that such could hardly be appropriate in *"today's*

⁸ Case No. 20/2010.

relatively more violent environment." The most severe sentence of 25 years was imposed in 2010. The Supreme Comt per Moore JA noted that the mean between the lenient and harshest sentences was 15 years. The learned JA noted that the cold figures in the table did not represent any refined study nor provided insight into various considerations which the court would take into consideration in awarding sentence.

[13] Having considered the triad and having found no existence of extenuating circumstances in the case, and in exercise of its discretion the court considers the appropriate sentence to be twenty years imprisonment, calculated from the date the accused was taken to custody. It is so imposed.

SENTENCE: twenty years imprisonment. Sentence is backdated to the 26 September 2013, the date when the accused was firsr taken to custody.

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D Tshanbalala

Judge of the High Comt.