



IN THE HIGH COURT
OF ESWATINI
A

HELD AT MBABANE

CRIMINAL CASE NO. 83/2012

In the matter between

REX

V

SIKHUMBUZO NHLANHLA MKHABELA

Neutral citation: Rex v Sikhumbuzo Nhlanhla Mkhabela (83/12) [2019] SZHC 95 [2019] (07 June 2019).

Coram D TshabalalaJ

JUDGEMENT ON

For the Crown M Matsebula

For Defence L Dlamini

Heard 05/04/2019

Delivered 07/06/2019

SENTENCE

[1] The Accused was convicted of eight counts comprising murder,¹ attempted murder,² two counts of assault with intent to cause grievous bodily harm,³ theft of a firearm,⁴ malicious injury to property,⁵ unlawful possession of a fire arm in contravention of Arms and Ammunition Act of 1964 as amended⁶ and unlawful possession of live rounds of ammunition in contravention of the Arms and Ammunition Act of 1964 as amended.⁷ He pleaded Guilty to all the charges except for the one concerning murder. The judgment in this case was delivered on the 05 April 2019. There is no need to repeat the facts of the case. These reasons for sentence form part of the judgement and should be read together therewith.

[2] Of the eight counts in which the Accused was convicted, three involved serious violence against his girlfriend, namely, attempted murder wherein he fired several gun shots at her in her home, assault GBH, wherein he first hacked her with a bush knife and subsequently hit her with a bottle and then assaulting her with an umbrella until it broke, causing her to bleed profusely. All these attacks took place on diverse occasions. According to the Accused he was prompted by jealousy to attack his girlfriend Bongiwe Simelane whom he blamed for bragging to him about her sexual relations and escapades with other men. Concerning the attempted murder, the Accused claims that he returned from Ngwavuma where he had fled from justice⁸

¹ Count one.

² Count two.

³ Counts six and seven respectively.

⁴ Count 5

⁵ Count eight.

⁶ Count three.

⁷ Count four.

⁸ After the second seriously attacking and injuring the complainant with a bush knife.

armed with a fire arm to kill his girlfriend because she had called him on the phone and threatened him with dgj|h.

- [3] In passing sentence this Court is mindful of its duty to consider the triad, to balance personal circumstances of the Accused as the crime perpetrator, the community and the interests of justice.⁹
- [4] The Crown noted that the Accused was a first time offender. The Crown also noted that the crimes committed by the Accused were serious and further that they were committed against a defenceless woman and child in the safety of their home. Mr Matsebula for the Crown highlighted what he termed the Court's duty to protect society. He referred this Court to the cases of *Tonny Mamba V Rex Case No. 2/2017* instructive on the range of sentences for similar offences. Mr Matsebula also stressed the Court's discretion in sentencing and the governing principle on whether sentences in respect of multiple counts should run concurrently or consecutively.
- [5] Mr Dlamini for the defence urged the Court to find existence of extenuating circumstances on the murder count. He based his argument on the fact that conviction was based on intention in the form of *dolus eventualis*. The defence Counsel pleaded with the Court to exercise its discretion in favour of the Accused, and in so doing follow the cases of *Tsabedze V Rex*¹⁰ wherein a sentence of 12 years was passed on a conviction for murder.
- [6] The Court was also told to consider that the Accused was 30 at the time of commission of offences, has been in custody for 7 years; has three minor children and was a first offender. The defence also motivated that sentence

⁹ See Rex v Mpendulo Matsenjwa Crim Case No. 164/2007 and the cases cited therein.

¹⁰Case No. 15/2004.

for the following counts should be ordered to run concurrently: counts 3¹¹, 4¹² and 5¹³ and that the Accused be given an option to pay a fine; and that, sentences in respect of counts 6¹⁴ and 7¹⁵ should also be ordered to run concurrently even though they formed separate transactions. Counsel also urged the court to impose a sentence with an alternative to pay a fine in respect of count 8.

[7] It is trite that the Court should determine and state in respect of a murder conviction whether or not any extenuating circumstances exist. Counsel for the Accused submitted that it follows from the finding of guilty based on *dolus eventualis* that extenuating circumstances were present. However, counsel did not elaborate on his submission.

[8] *The Supreme Court described extenuating circumstances in Masuku v Rex¹⁶ by reference to the decision in S v Letsolo¹⁷ as, any facts bearing on the commission of a crime which reduce the blameworthiness of the accused as distinct from his legal culpability. Another guideline from Masukus case¹⁸ on the subject is that the trial court has to consider three factors, firstly whether there are any factors relevant to extenuation such as drug abuse, immaturity, intoxication or provocation,¹⁹ secondly, whether such facts in their cumulative effect probably had a bearing on the Accused's state of mind in doing what he did; and thirdly whether such bearing was sufficiently appreciable to abate moral blameworthiness of the Accused in doing what he did. I have considered whether there are any of the factors or similar*

11Unlawful possession of firearm.

12Unlawful possession of ammunition.

13 Theft of a fire arm.

14 Assault GBH with bush knife.

15Assault GBH with bottle and umbrella.

16(35/2014) SZSC 16 (2017) (10 June 2017).

171970 (3) SA 476.

18Ibid.

19 The list is not exhaustive.

factors in the case of the Accused which have the effect of reducing his moral blameworthiness when he fired several shots in the room where the complainant and the deceased slept resulting in the killing of the deceased. There is no evidence before this court of the state of mind of the Accused, be it whether he was drunk, intoxicated, immaturity or of a young age, etc. The evidence from the Accused's confession is to the effect that while in Ngwavuma he planned to kill the complainant because the complainant had called him and threatened to kill him. In exercising the moral judgement to determine existence or otherwise of extenuating circumstances, this court does not consider the reason furnished by the Accused to be sound and sufficient to abate the moral blameworthiness of the Accused in going to the lengths that he went in planning the murder and executing his plan. The time for gauging existence of extenuating circumstances, according to *Masuku's case* is the time of the commission of the crime.²⁰

[9] It is well-settled in our law that a finding of *dolus eventualis* may in a proper case, depending on the circumstances of the case, constitute extenuating circumstances.²¹ The Supreme Court in *Masuku's case* refused to interfere with the sentence imposed by the trial court, holding that there were no extenuating circumstances. The Supreme Court found in that case that there was no evidence that the Accused's youthfulness had a bearing on the commission of the offence which could reduce his moral blameworthiness. The Supreme Court held in a revenge murder of the deceased, in *Vilakati v Rex*²² that there were no extenuating circumstances and confirmed life imprisonment in terms of Section 15 (3) of the Constitution.

20 Supra at paragraph [34].

21 *Masuku's case* at Paragraph [33]

22 Crim Appeal No. 9/22.

[10] Having considered the matter in the light of the relevant principles espoused by the authorities, I come to the conclusion that this is not a proper case where a finding of guilty based on *dolus eventualis* constitutes extenuating circumstances. I therefore find that no extenuating circumstances exist in respect of the murder charge.

[11] In sentencing the Accused I consider the mitigating factors highlighted by his counsel, including that he is a first offender, he pleaded guilty to all the charges but one. In relation to counts one and two I find that the aggravating factors and the interest of society outweigh the mitigating factors. This court cannot ignore that the Accused meticulously planned and prepared to commit the offence that gave rise to counts one and two. Premeditation in this case constitutes an aggravation that outweighs the mitigating factors.

[12] The court also takes into account against the Accused, prevalence of violent crimes against women perpetrated by either their spouses or lovers. This court considers that a deterrent sentence is warranted in the interests of society. In *Sacolo v Rex*²³ the Supreme Court quoted with approval from the judgment by Moor JA:

“It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentences message should be crystal so that the full effect of deterrent sentence may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offences. By the same token a sentence should not be out of proportion to the offence or be manifestly excessive, or to break the offender...” (*Emphasis added*)

