

IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

CASE NO. 350/11

HELD AT MBABANE

In the matter of:

REX

Versus

PHIWA NTJALINTJALI

Neutral Citation: *Rex vs Phiwa Ntjalintjali [350/11] [2020] SZHC 169 (2 September 2020*

Coram: M. LANGWENYA J

Heard: 28 November 2018; 12 December 2018; 6 March 2019; 25 June 2019; 25 March 2020; 9 June 2020; 25 June 2020; 13 July 2020; 29 July 2020; 12 August 2020; 24 August 2020

Delivered: 2 September 2020

Summary: *Criminal law-Criminal Procedure-extenuating circumstances defined-principles of sentencing-consideration of relevant factors to sentencing-afford appropriate weight thereto and strike a balance between the various interests in the matter-consideration of the 'triad'-interest of the accused, gravity of*

the crime and interest of society-interests of society and gravity of offence outweigh accused's personal circumstances-accused sentenced to eighteen years imprisonment-sentence to take into account of time accused spent in pre-trial incarceration.

JUDGMENT

- [1] On 12 August 2020 the accused was convicted of the murder of his two years old daughter, Xoliswa Ntjalintjali.
- [2] On 24 August 2020 the accused testified under oath to prove the existence of extenuating circumstances as well as mitigating factors. The accused testified that he is a first offender; that he has two minor children and that his girlfriend is pregnant with his third child. The accused told the court that he is responsible for the maintenance and support of his children as well as of his mother who is unwell currently. The accused is employed as a kombi driver. It was the accused's evidence that if he is sentenced to a term of imprisonment, no one will take care of his dependents.
- [3] The accused testified further that he has no illness other than the disease of the mind he told the court about. The court has found, however that the accused suffered from no disease of the mind when he committed the offence charged. The reasons for this finding are set out in the judgment.

[4] At the time the offence was committed, the accused was twenty six years old. He testified that since the death of his daughter in his hands, he has not found peace as he is still distraught about the incident. He reiterated that the deceased was his child whom he loved.

[5] Mr. Dlamini on behalf of the accused submitted that the accused showed remorse by asking for forgiveness for the gruesome murder of his child. The accused was arrested on 18 August 2011 and released on bail on 22 December 2011. He spent four months in pre-trial incarceration.

Extenuating Factors-the law

[6] The Criminal Procedure and Evidence Act 1938 does not define 'extenuating circumstances.' However, a number of decided cases have given meaning to the phrase. The key indicator is not the accused's legal guilt for the crime; rather his moral blameworthiness for the crime convicted of. In the South African case of *S v Letsolo*¹ his lordship Holmes J defined extenuating circumstances in the following terms:

'...any facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from legal culpability.'

[7] At this stage, this court must consider (a) whether there are any facts which might be relevant to reducing moral blameworthiness of the accused, such as for example immaturity, intoxication, provocation, or low education coupled with a rustic background among others; (b) whether such facts in

¹ 1970 (3) SA 476(A) at 476G

their cumulative effect probably had a bearing on the accused person's state of mind in doing what he did.

[8] Put differently, in determining the existence or otherwise of extenuating factors the court is required to exercise a moral judgment and dare I say the standard at this stage is fluid. The countervailing consideration is that this court must not only consider extenuating factors but it must also consider aggravating factors in the commission of the crime.

[9] My moral judgment on the issue is that this tragedy was a murder by a father who exterminated his daughter in a most gruesome manner, perhaps to spite the mother who was now in a love relationship with someone else.

[10] What makes the killing so despicable is that it was as senseless as it was gruesome. It was inexplicable as compared to other equally foolish murders².

[11] I know that the accused has two children and that his girlfriend is pregnant with his child. I know that it is a terrible thing to deprive children of the comfort and upbringing of their father who doubles up as a breadwinner. It is with regret that I find that I will have to part you from your children, your girlfriend and your family. It is sad for me and you but my duty is clear.

² See *Tsobane v The State* [2008] 3 BLR 142, CA for example where there was at least a motive: the father wanted to get rid of his maintenance obligations to his daughter.

[12] From the evidence, the accused is a man of little education with a rustic community background, his religious beliefs notwithstanding. These facts, in my view serve as extenuating circumstances.

Principle of the *triad*

[13] The sentence to be imposed is in the discretion of this court and is guided by well distilled principles of sentencing and the objectives of sentencing. The court needs to consider the well-known *triad* in sentencing: of the crime; the offender and the interests of society. The punishment must fit the offender, the crime, be fair to society and be blended with a measure of mercy³.

[14] I remind myself that the purposes of punishment are prevention, retribution, reformation and deterrence. The sentence should be consistent and individualized in accordance with the circumstances. It is required that a balanced sentence should be imposed considering the circumstances of the crime against the personal circumstances of the accused and the interests of society.

[15] The seriousness of the crime, the circumstances in which it was committed in this case before court and the interest of society are in my view of such a nature that the personal circumstances of the accused need to be accorded less weight. I am alert to the fact that the accused is a first offender. I will

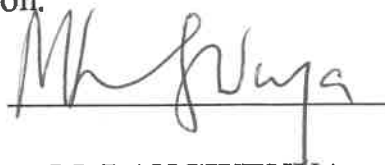
³ *S v Rabie* 1975 (4) SA 855(A) at 857D-F.

take your previous unblemished record into account. I will also take into account the fact that you spent four months in pre-trial incarceration.

[16] The crime was committed nine years ago. It is not your fault that the wheels of justice have been grinding so slow in bringing you to trial and to the subsequent finalization of the matter. It is on record that you tried to apologize to the mother of your deceased child and that your family tried to apologize to the family of the mother of your deceased child.

[17] Mr. Ntjalintjali, you in the most unimaginably severe, violent, brutal and barbaric manner with the aid of an axe mutilated the head of your two year old daughter, the deceased. In an unconstitutional manner you took away the life of your daughter-the person you were supposed to love and protect.

[18] In the result you are sentenced to eighteen (18) years imprisonment. The sentence will take into account the period of four (4) months that you spent in pre-trial incarceration.



M. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Mr N. Lukhele

For the Defence:

Mr M. Dlamini