



IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

HELD AT MBABANE 484/2016

In the matter between:

THE KING

And

MKHANYISENI MGWILI MAMBA

Neutral Citation: The King vs Mkhanyiseni Mgwili Mamba [484/19]
[2021] SZHC 175 [30th September 2021]

Coram: LANGWENYA J

Heard: 8 March 2021; 11 March 2021; 17 March 2021; 12 April 2021; 28 April
2021; 8 June 2021; 7 July 2021; 21 September 2021; 30
September 2021.

Delivered : 30 September 2021

Summary: The accused was convicted of murder with dolus

eventualis-consideration of sentence-objectives of
sentencing-consideration of the triad-accused sentenced to
six years imprisonment-sentence to take into account five
years of pre-trial incarceration.

JUDGMENT ON SENTENCE

[1] At the end of a trial, the accused was convicted on one count of murder with dolus eventualis. It is now my duty to sentence the accused.

[2] In sentencing the accused, the court is required to consider the personal circumstances of the accused, the seriousness and circumstances under which the crime was committed, and the interests of society. After having considered each factor the court must decide the objective or purpose of punishment to impose, and what sentence, in the circumstances of the case, would be fair and just to the accused. During this exercise, equal weight need not be given to the often competing factors and the court may emphasise one factor at the expense of others; provided that the sentence ultimately imposed is a well-balanced one with due regard to the interests of the accused and that of society.

[3] The accused testified in mitigation of sentence and stated that he is currently forty-three years of age and not married but has three minor children who are still school going. The ages of these children range between seventeen years and nine years. Prior to his arrest in September 2016 the accused financially supported all his children. When the accused was first taken into custody, his children were left under the guardianship and custody of accused's brother. The court heard that accused's brother died in July 2020. Before the accused was arrested, he worked as a mechanic for tractors and eamed El ,800 per month.

[4] The inescapable consequence of the crime committed by the accused is that the accused's children have experienced hardship during the period of his

incarceration. This is one of the consequences of crime and usually brings about more hardship to innocent persons.

- [5] The accused dropped out of school in Form 3. His home is in rural kaZombodze, eMahlabatsini. It was submitted on behalf of the accused that his low level of education had a bearing on his inability and failure to assess and avert the situation resulting in the death of the deceased in his hands.
- [6] The accused is a first offender and has been in custody awaiting trial since September 2016-a total of five years to date. It is trite that the period an accused spends in custody awaiting trial, especially if it is lengthy, is a factor favourable to the accused and which normally leads to a reduction in sentence.
- [7] It is the evidence of the accused that before he was arrested, he showed contrition and remorse. He asked his brother and uncle to go to deceased's family and commiserate with them on his behalf. It is the evidence of the accused that his family was advised against going to deceased's family by the police who intimated that deceased's family's tempers' were still high and that they were not going to be well received.
- [8] Ms Hlophe for the Crown did not contest the genuineness of the accused's contrition and remorse in her submissions.
- [9] It is trite that before remorse could be considered a mitigating factor, there must be some indication that it is genuine. This usually manifests itself by the accused expressing remorse to the person and the family he wronged through his unlawful act among others. The accused's sincere expression of

remorse under oath, may move the sentencing court to take same into account in considering mitigating factor favourable to the accused.

[10] In this case, during the trial and prior to his conviction, the accused spoke about his remorse and contrition and he placed himself at the scene of crime. The accused did not deny that he stabbed the deceased with a knife; what he argued was that he acted in self defence. Despite inflicting a single stab wound on the chest of the deceased, it is apparent that severe force was used by the accused. The court found that the accused clearly exceeded bounds of self defence as he must have foreseen that his conduct would result in the death of the deceased when he stabbed him in the manner he did with fatal consequences.

[I 1] In view of the above, I am persuaded the accused's professed remorse and contrition is sincere hence it should be accorded due weight and is deemed a mitigating factor. The contrition shown by the accused should be rewarded with a lenient sentence.

[12] The accused further deserves a greater measure of leniency as a first offender. I am of the view that the sentence to be imposed in this matter should be rehabilitative rather than retributive. The accused committed the crime he has been convicted of on a spur of the moment. The factors surrounding the commission of the offence are unfortunate. The deceased person was not only drunk but was also one of the aggressors who verbally abused the accused while he was inside his girlfriend's flat. The deceased was abusive to the accused and uttered vulgar words and profanities at the accused without any provocation from the accused. When the deceased was

stabbed, he was carrying a log when the accused approached him. The accused tried to disarm deceased of the log and failed. The accused took preemptive action. A single albeit fatal stabbing was delivered.

- [13] The stigma now attached to the accused that he has blood of the deceased on his hands will forever haunt him. In the eyes of the general public, he will be viewed as a murderer.
- [14] There is nothing to suggest that the accused is an inherently wicked person. There is, therefore no need for this court to punish the accused to the point of breaking him. Instead a proper balance between the mitigating factors and the interests of society as well as the nature of the crime must be struck and the accused be allowed to pick the pieces as it were and be rehabilitated.
- [15] Giving preference to the rehabilitative aspect of punishment does not imply the crime committed is disregarded. The crime of murder is not only serious but is prevalent eSwatini. It is now common place to find that, at the slightest provocation, people resort to kill others. The assaults with knives are often carried out in the most brutal manner imaginable during which fundamental rights are simply swept aside as if unimportant and nonexistent. This, the courts do not countenance.
- [16] It is often said that the prevalence of a specific crime in a particular community is another factor that may and ought to be taken into account in sentencing. The view taken by the courts when considering sentence in relation to the prevalence of specific offences such as murder, is to impose heavier sentences, the ratio being deterrence and aimed at deterring other potential offenders. Ms Hlophe for the Crown said so much about

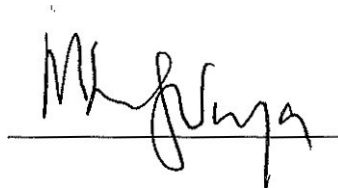
deterrence. An increase in sentence in respect of an offence that has become more prevalent, should serve a general deterrence to others in society!

S v 1980 (3) SA 770 (SWA); S 1982 (I) 99(A).

[17] The court must, however, guard against making an accused a scapegoat of all offenders who make themselves guilty of committing similar offences, for the accused should not be sacrificed on the proverbial altar of deterrence for crimes he did not commit. For reasons outlined in the above paragraph, I will not over emphasize the importance of a deterrent sentence in this case.

[18] The community expects that a serious crime will be punished, but also expects at the same time that mitigating circumstances must be taken into account. The accused person's particular position also requires thorough consideration.

[19] I have anxiously considered the three aspects of the triad coupled with the objectives of punishment in this matter. I am of the view that a sentence of six years imprisonment meets the justice of this case. The sentence will take into account the period of five years which the accused has spent in pre-trial incarceration,

A handwritten signature in black ink, appearing to read 'M. S. Langwenya', written over a horizontal line.

M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Ms L. Hlophe

Advocate L.

For the Defence:

Maziya