



IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

HELD AT MBABANE

CASE NO. 415/14

In the matter between:

REX

VS

NTOKOZO MHLONGO

FIRST ACCUSED

SIPHO LUKHELE

SECOND ACCUSED

Neutral Citation: *Rex vs Ntokozo Mhlongo & Another [415/14] [2021] SZHC 49*
(7 April 2021)

Coram: LANGWENYA J

Heard: 10 August 2020; 11 August 2020; 24 September 2020; 28
September 2020; 8 February 2021; 22 March 2021; 29
March 2021; 7 April 2021

Delivered: 7 April 2021

Summary: *Criminal law-Criminal Procedure-accused found guilty of
murder with dolus eventualis-first accused is chief
perpetrator-
second accused a socius.*

Criminal Procedure-provocation considered in mitigation despite that trial court has already rejected defence of provocation-contrition, remorse penitence-fact that accused is socius are factors considered in mitigation.

First accused sentenced to eighteen (18) years imprisonment-second accused sentenced to fifteen (15) years imprisonment-Sentences take into account period accused persons spent in pre-trial incarceration.

JUDGMENT ON SENTENCE

Brief Background

- [1] On 22 March 2021 this Court found both accused guilty of the murder of Bongani Shabangu with *dolus eventualis*.
- [2] On 7 November 2014 Bongani Shabangu was taken from a grocery shop by both accused persons against his will. He was fully dressed when he was taken from the grocery shop. He was subsequently taken to Mweni area where he was assaulted by the accused persons. The main perpetrator of the assault was the first accused. The first accused, the court heard, assaulted Bongani Shabangu using the blunt side of a bush knife all over the body; he jumped atop Bongani's body several times; he assaulted him with kicks and with his hands and Bongani fell on a fire which had been made by the first accused; Bongani sustained burns as a result. The first accused, the court heard, then stripped Bongani of his clothes leaving him half-dressed when he finally dropped him off at the bus stop. When two elderly women Crown

witnesses requested the first accused to stop the assault and report the matter to the law enforcement agencies, the first accused did not stop the assault; instead, in not so many words, he told the Crown witnesses not to get involved in the matter. Bongani was in the hands of the accused persons for a period of time before he was allowed to go home.

- [3] The second accused, the court found was an active *socius* in the grievous assault of Bongani Shabangu. At kaMthokazi grocery, the second accused grabbed Bongani, tied him with a rope and both accused persons took Bongani to the vehicle they were driving. At Mweni area where further assault of Bongani took place, the second accused held Bongani using the rope which tied his leg while the first accused assaulted him. At some point, the court heard, the second accused held Bongani by his neck while restraining him as the first accused continued to assault him. When the accused persons were advised to report the matter to the police and not take the law into their own hands, the second accused is said to have told two elderly women who were Crown witnesses that Bongani was a seasoned criminal who could steal from the Crown witnesses too. The court found that by word and by deed the second accused is associated with the brutal assault of the deceased.

Personal Circumstances of the first accused

- [4] The Court was told that the first accused is a first offender; he is thirty-six years of age, married with five minor children. The first accused was a commercial farmer who had thriving business prior to Bongani Shabangu's death. As a result of the death of deceased, the first accused suffered loss to the estimated amount of E380 000 when his properties were burnt down by

members of his community. When members of his community burned down his property, the first accused submitted, society was punishing him for the death of the deceased.

- [5] It was submitted on behalf of the first accused that he had a good relationship with the deceased before deceased betrayed his trust by stealing from the first accused. In assaulting Bongani, the first accused thought he was chastising him and forcing him to return the stolen property. The first accused punished the deceased with fatal consequences. The first accused admits he was wrong to use too much force on the deceased.
- [6] It is settled that provocation can be considered in mitigation despite that the trial court has already rejected the defence of provocation. In this matter, this court has already found that the first accused had not so lost self-control in response to provocation that he had not formed the requisite intention for murder. In the second stage of the test of provocation this court has found that the action of the first accused was not partially excusable on the basis that the reasonable person would not have reacted similarly in the same circumstances by intentionally killing the deceased.
- [7] It is trite law that courts in their determination of possible mitigating factors, in deserving cases, a verdict of murder with *dolus eventualis* is such a factor, either alone or together with other features depending on the particular facts of the case¹. When applying these principles to the present facts and regard being had to the first accused's continued assault of the deceased as a result of the alleged theft and breach of trust by the deceased, I accept the invitation to consider, and in fact find that the murder herein was committed

¹ *S v Sigwahla* 1967 (4) SA 566 at 571(H).

with constructive intention and that, taken together with other factors is a mitigating factor.

- [8] The first accused person is in agreement that the offence is serious because a life was lost. He also accepts his responsibility for what has happened but says it was never his intention to kill as he thought he was merely chastising the deceased. I have dealt with the issue of chastisement in the main judgment and I need not repeat myself here. The deceased was treated shockingly, cruelly and brutally by the accused persons.
- [9] The first accused, it was urged has shown contrition and remorse. He sent the young Magutshwa to convey the deceased to hospital. During the funeral of the deceased, the first accused could not help out because at the time, he was in police custody already. It was also not possible for the first accused to assist with Bongani's internment because the death created acrimony between his family and that of the deceased. It took the Chief of the area to personally intervene before peace between the families was restored.
- [10] The Court in *S v Seegers*² and as per Rumpff JA on remorse as mitigating factor said (at 511G-H):

'Remorse as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when of a sentence on the accused is adjudged. But in order to be a deterrent effect of a sentence on the accused is adjudged. But in order to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

- [11] Remorse, repentance, an endeavor to assist the victim before the victim's death are factors which may be mitigatory only if combined with other

² 1970 (2) SA

factors³. I have no doubt in my mind that in this case, remorse, albeit demonstrated only after conviction is genuine and sincere. Through submissions made by his legal representative, the first accused accepted legal and moral responsibility for his wrongdoing. In my view, the amount of repentance demonstrated by first accused is an indication of sincere remorse. To this end, I am satisfied that there is no real likelihood that the accused will reoffend. However, the weight accorded to this factor must be considered against the gravity of the crime committed and, in my view, falls short of realizing sufficient retribution for the accused person's wrongdoing.

[12] The Court was told that the first accused spent six months in pre-trial incarceration before he was admitted to bail. His community opposed his bail. The community temperature cooled after six months when the first accused was allowed out on bail. Though I do not consider the period unreasonably long, it remains a factor favourable to the accused and one the court will take into consideration in that it leads to a reduction in sentence.

[13] It was submitted on behalf of the first accused that Bongani Shabangu is dead and no amount of years of imprisonment of the first accused will bring him to life. It was urged that the first accused should be taught a lesson which will bear fruitful results for the betterment of society.

Personal Circumstances of the Second accused

[14] Mr. Nzima for the second accused submitted that the second accused is a first offender; he is married and has five minor children. At the time of the commission of the offence, the second accused was employed as a herd-boy. Before he was convicted for the offence he was employed as a bus

³ *S v Jaure* 2001 (2) ZLR 393(H).

conductor. The second accused is forty years of age. It was urged on the court that the accused played a minimal role in the commission of the offence. It was submitted that it is trite that he did not assault the deceased; he only held on the rope which tied deceased's legs; he also held deceased by the neck. The court was told that the whole affair was not planned; in the words of Mr. Nzima, it just happened.

[15] The Court was urged to consider the unfortunate background of the second accused in his favour. His level of formal education is standard five. The nature of the jobs he did at the time of the commission of the offence and immediately prior to his conviction tells the story. It is the second accused's unfortunate background, it was submitted, that he kowtowed to the request from his uncle (the first accused), and someone who had money. Such is the texture of the man.

[16] It was submitted that murder with indirect intention is a factor to consider as mitigating the accused's moral blameworthiness. I agree that a constructive intent to kill is a factor which must be put in the credit side in the accused's favour in that weighing-up process. In *S v Sigwahla*⁴ it was said that depending on the circumstances, conviction of murder with *dolus eventualis* on its own or together with other factors may constitute extenuating circumstances and or mitigating factors.

[17] The second accused is a *socius* in the murder of Bongani Shabangu. He participated or assisted the first accused in a murder knowing that the first accused would kill or at least foreseeing the possibility that the first accused might kill. The court is required to carefully examine the nature of the

⁴ 1967 (4) SA

circumstances of the case. The fact that an accused is a *socius* and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness. The main factor to be taken into account is the extent to which the *socius* makes common cause with the principal offender.

- [18] Where the *socius* played an unimportant part in the actual commission of the crime, the moral blameworthiness of the *socius* is very much less than that of the principal offender. On the contrary, where the *socius* plays an important if greater part in the commission of the offence as to identify himself with the principal offender, his moral blameworthiness could be considered to be as great as that of the principal offender.
- [19] The second accused played the role of restraining the deceased while the first accused assaulted him. The second accused held the rope which tied deceased's legs and also held him by the neck while the first accused assaulted him. This, taken in conjunction with the fact that the second accused is an unsophisticated person based on his level of education and the types of jobs he was employed to do, are, in my view factors that make the second accused's moral blameworthiness less than that of the first accused.
- [20] The Court was informed that the second accused spent six months in pre-trial incarceration. The court was urged to backdate the sentence and take into account the period spent in custody already.

Submission by the Crown

[21] The Crown submitted that the crime that the accused persons have been found guilty of is serious because a life was lost. It was urged that the Court should mete out an appropriate sentence to deter would be offenders. The Court was told that the deceased was a young man of twenty years of age and had one minor child.

[22] Beside the information during submissions by the Crown in mitigation of sentence that the deceased had a minor child and was twenty years of age, the personal circumstances of the deceased and that of his family, the effect his death had on his dependents and whether they cope without the deceased, remains unknown to the court.

Application of law to facts

[23] Generally the objects of punishment are not achievable in every sentence passed. It is the circumstances of each case which is determinative. The one triad of sentencing may weigh heavier than the other. In *S v Khumalo & Others*⁵ the court described deterrence as the ‘essential’ ‘all important’ ‘paramount’ and ‘universally admitted’ object of punishment. The other objects of punishment, the court stated are ‘accessory’⁶.

[24] In *R v Karg*⁷ the Court observed that, while the deterrent effect of punishment has remained as important as ever, ‘the retributive aspect’ has tended to yield ground to the aspects of prevention and correction.

[25] In *S v Van Wyk Ackermann AJA*⁸ recognized the complicated task to harmonise and balance the general principles of sentencing and went on to

⁵ 1984 (3) SA 327 at 330E

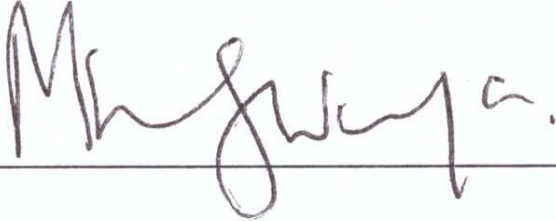
⁶ See also: *R v Swanepoel* 1945 AD at 455; *S v Van Wyk* 1993 NR 426 (SC) at 448B.

⁷ 1961 (1) SA 231(A) at 236A

⁸ 1993 NR 426 (SC) at 448D-E

say ‘the duty to harmonize and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasize one at the expense of the other.’

- [26] The law enjoins a sentencing court to blend sentencing the accused with a measure of mercy. Mercy is a concomitant element of sentencing, it tampers one’s approach when considering the crime, criminal and society.
- [27] It is important to send a deterrent message to society in general that conduct, as demonstrated by the accused will not, and should not, for the sake of law and order, be tolerated and that the imposition of a sentence of long-term imprisonment is inevitable.
- [28] In my view the following sentence meets the justice of the case:
- [29] The first accused is sentenced to a term of eighteen (18) years imprisonment. This sentence will take into account the period of six months which the first accused spent in pre-trial incarceration.
- [30] The second accused is sentenced to fifteen (15) years imprisonment. This sentence will take into account the period of six months which the accused spent in pre-trial incarceration.



M. LANGWENYA J.

For the Crown:

Mr. S. Phakathi

For the 1st Accused:

Mr. B. J. Simelane

For the 2nd Accused:

Mr. O. Nzima