



**IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE**

HELD AT MBABANE

CASE NO: 193/2019

In the matter between:

THE KING

Versus

- 1. MENZI PATRICK MAVIMBELA**
- 2. NDUMISO GAGASHI SIMELANE**

Neutral Citation: *The King vs Menzi Patrick Mavimbela [193/19] [2022]*
 SZHC 149 (12 July 2022)

Coram: LANGWENYA J

Heard: 29, 30 March 2021; 2, 3, 9, 10, 16 June 2021; 30
November 2021; 21, 22, 23 February 2022; 1 March
2022; 28, 29 March 2022; 7 April 2022; 12 July 2022.

Delivered: 12 July 2022

Summary: *The accused were found guilty of murder with direct intention-extenuating circumstances found to exist-principle of the triad restated-accused sentenced to twenty-four years-sentences backdated to the time they were first taken into custody.*

JUDGMENT ON SENTENCE

Introduction

- [1] The accused persons were found guilty of the offence of murder with direct intention. The offence of murder of Zinhle was committed by the accused persons on 29 April 2019 at kaPhunga in the Shiselweni district. The accused acted in furtherance of a common purpose.

Establishment of extenuating circumstances

Submissions on behalf of the first accused

- [2] It was submitted on behalf of the first accused that his belief in witchcraft; and the fact that he is from the rustic background is an extenuating factor. The Crown submitted that no extenuating factors exist in favour of the first accused. It was the Crown's contention that there is no evidence before the court suggesting that the first accused believed in witchcraft. I disagree. The court, through the evidence of Mr Shabalala heard that the first accused believed he was being bewitched by his in-laws through the deceased's daughter. That, in my view shows that the first accused believed in witchcraft.
- [3] On the issue that the first accused was from a rustic if rural background, it was submitted on behalf of the Crown that at the time he committed the offence he has been convicted of, he was no longer resident at kaPhunga as

he had completed his high school education and was now a member of the Ubutfo eSwatini Defence Force and a law enforcement officer. He was no longer resident at kaPhunga on a full-time basis. The Crown submitted further that, as a law enforcement officer, the public looked up to him for protection. For the reasons set out by the Crown, it was submitted that the first accused cannot be viewed as an ordinary person from the rural community of kaPhunga. In my considered view, the fact that the first accused would only come home when he was not on duty does not mean that he was no longer part of his rural community that he even set up his home with his deceased wife in the same area means he was a member of this rural community. The court heard that he participated in social activities like football at kaPhunga. Aside his work commitments, the first accused seems to have been steeped in the way of life of his community warts and all- if Mr Shabalala's evidence is anything to go by.

- [4] The first accused's rustic background and his belief in witchcraft are in my view extenuating factors and I so find.

Submissions on behalf of the second accused

- [5] It was submitted on behalf of the second accused that it is an extenuating factor that the accused is a person of low education as he went up to Grade 3 and therefore unsophisticated. It was urged also that he grew up in rural Mankayane. The twin problem of limited education and unsophistication because of one's rural background is enough to establish that extenuating factors have been proved on behalf of the second accused.
- [6] For the reasons set out above, I find that extenuating factors in favour of the second accused exist.

The Law-Extenuating Factors

[7] The Criminal Procedure and Evidence Act¹ states as follows:

‘[295 (2)] ‘In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.’

[8] The import of the above provision is that the court may not turn a blind eye on the background and standards of behaviour of the accused viewed through the lens of the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.

[9] In *S v Letsolo*² Holmes JA stated as follows:

‘Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduces the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard, a trial court has to consider: (1) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive); (2) whether such facts, in their cumulative effect, probably had a bearing on the accused’s state of mind in doing what he did; (3) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.’

Establishment of Mitigating Factors

Consideration of the triad

[10] In sentencing the accused I am required to consider the *triad* of factors comprising the crime, the offender and the interests of society. In *Sifiso Malaza and Others v Rex*³ the Court referred to the *triad* of factors in the following terms:

¹ Act 67/1938 Section 295(2).

² 1970 (3) SA 476 (AD) at 476-477

³ Criminal Appeal No. 30/2010

'It is of critical importance that the sentencing of an accused person should be premised on a thorough investigation of all the relevant facts surrounding the commission of the offence. The personal circumstances of an accused person obviously need to be taken into account. However, the degree of his moral guilt is also dependent on the gravity of the offence as well as the mitigating and the aggravating features of the offence. If the court process does not elucidate the factors, the court sentencing the offenders may fail to do justice to an accused or *per contra* to ensure the protection of the public.'

- [11] The factors constituting the *triad* must be considered equally and one should not be heavily relied upon over the other⁴.
- [12] Regarding the crime, the punishment imposed must not be disproportionate to the offence⁵.
- [13] The court should consider the personal circumstances of the offender and ensure that the sentence fits the offender.
- [14] The sentence imposed should not so much serve the community's wishes as it should the public interest⁶. The interests of society are not served by too harsh a sentence, but equally so, they are not properly served by one that is too lenient. Put differently, the public interest requires that punishment imposed should serve as a deterrent to other would-be offenders; serve as a preventative measure to crime as well as serve to rehabilitate offenders⁷.
- [15] The court is further enjoined to consider the element of mercy.

Submissions in mitigation on behalf of the first accused

- [16] In mitigation of sentence, the court was entreated to consider that the first accused is thirty-four years old. He has three children who are minors and who are dependent on him for support and maintenance. Two of the first

⁴ *S v Holder* 1979 (2) SA 70A.

⁵ *Dodo v S* 2001 (3) SA 381 (CC) at paragraph 37.

⁶ *S v Makwayane* 1995 (2) SACR 1 (CC).

⁷ *R v Rabie* 1975 (4) SA 855(A) at 866A-C.

accused's minor children currently reside with his elderly mother at kaPhunga. Mr Mavimbela's elderly mother is unemployed. The accused was a breadwinner and his prolonged incarceration will have a negative effect on his children-so it was urged.

- [17] I acknowledge that the first accused has minor children who will be adversely affected if the accused is sent to prison as the children will not only grow without their father being present, but they will also be without a breadwinner in the accused person. Regrettably, the distress and hardship that the accused's misdeeds have brought upon his family in general and to his children in particular is an unfortunate consequence of crime. The court cannot allow its sympathy for the accused's minor children to deter it from imposing the kind of sentence dictated by the interests of justice and society.
- [18] The court was told also that the first accused cooperated with the police as he admitted that the car which Mr Zwane subsequently brought to Matsapha Police station belonged to the first accused person. This, it was submitted was a sign of contrition on the part of the first accused.
- [19] The accused persons have been in custody since 2 May 2019. It was urged that a lengthy pre-custodial stay is punishment enough on its own and it should be taken into account when the accused are sentenced. I agree.
- [20] Both accused persons the court heard are first offenders.

Submissions on the personal circumstances of the second accused

- [21] With regard to the personal circumstances of the second accused, the court was told that he has four minor children and was their breadwinner and responsible for their maintenance and support. He is thirty-one years old. His education level is standard one. I reiterate my view that commission of crime

affects one's family and especially minor children adversely when the breadwinner is imprisoned. This however is the unfortunate consequence of criminality. The accused should have thought about his children before committing the crime of murder.

- [22] It was submitted on behalf of the second accused that the court should punish but not break the accused. Punishment meted out should be tampered with mercy.

Accused persons' failure to show contrition

- [23] Both accused persons did not verbalize their remorse and neither have I, during the trial and at this post-conviction stage observed them to be remorseful. Their attorneys however submitted that the accused were remorseful. I am of the view that the accused are more regretful than they are remorseful. But then, there is a difference between regret and remorse as ably stated by Ponnan JA in *S v Matyityi* in the following terms:

'There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. The genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is the surrounding actions of the accused, rather than what he says in Court, that one should rather look. In order for remorse to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

- [24] The post-mortem report revealed that Zinhle Mndzebele died due to constriction of the neck. The Court has found that the death of the deceased was made to look like a suicide. It has found also that the accused persons acted in furtherance of a common purpose in planning and finally executing the death of the deceased.

The first accused's failure to adhere to biblical injunction

[25] That the first accused is responsible for the death of his wife is most appalling. The court heard that the first accused and his deceased wife were members of the Evangelical church kaPhunga when the deceased met her death. The first accused went against the biblical injunction that husbands should love their wives, just as Christ loved the church and gave himself up for her⁸. Through marriage, you were expected to be your wife's protector only to be her executioner. In murdering your wife, you made an orphan of her minor child.

Consideration of the triad

[26] In considering the triad, I accept that the offence committed by the accused persons is very serious when taking into consideration that a human life was lost in a most brutal way. What makes this offence more tragic is that it is a result of gender-based violence.

[27] The prevalence of the crimes of murder of women by their intimate partners is forever on an upward trend and continues to cause widespread outrage in our society. The respect for life as such and the rights of women has become non-existent to those criminals who, as the accused persons in this instance, only serve their own interests or need. These criminals are as much as anyone else part of society and when they transgress and become a threat to society, the natural indignation of interested parties and the community at large should receive some recognition in sentences the courts impose, lest the administration of justice may fall into disrepute⁹. When it comes to punishment, there is need for the courts to fully take into account the

⁸ Ephesians 5:25 NIV Bible

⁹ *R v Karg* 1961 (1) SA 231 (AD).

important need of society to root out gender-based violence within the home. To this end, I am however careful not to make the accused persons scapegoats of all those making themselves guilty of similar conduct but, based on the crime and the degree of the accused persons' moral reprehensibility, the court must decide what punishment would be just and fair in the circumstances that brought the accused persons before court.

- [28] I have considered the personal circumstances of both accused persons coupled with the impression I have of them-namely that they both lack remorse. It is my view that a substantial term of imprisonment will give the accused persons time to ponder and reflect on what they have done and hopefully realize the folly of their ways and that there is no place for such brutality in our society. I also consider that during their sojourn in the correctional facility they will learn their lesson through the hardship they will experience there and will have time to reflect upon their actions.
- [29] To you Mr Mavimbela for your peace of mind, and as a church goer I would urge you to offer an apology to your in laws for the grief you have caused them; that is if you have not done so already. This will not bring the deceased to life but it will allow you to live peaceably going forward and would be a sign of your contrition. I have no doubt that this incident will haunt both accused persons for the rest of their lives.
- [30] Having made the observations above, I consider in favour of both accused persons that they are first offenders.
- [31] I consider the following sentence to fit the accused persons, the offence and to take into account the interests of society:

[32] Accused number 1 Menzi Patrick Mavimbela, you are hereby sentenced to twenty-four years imprisonment; and the three years and two months spent in pre-trial incarceration will be taken into account in the computation of your sentence.

[33] Accused number 2 Ndumiso Gagashi Simelane, you are hereby sentenced to twenty-four years imprisonment and the three years and two months spent in pre-trial incarceration will be taken into account in the computation of your sentence.


M. S. LANGWENYA

JUDGE OF THE HIGH COURT

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| For the Crown: | Ms L. Hlophe assisted by Ms F. Gamedze |
| For the first accused: | Ms N. Ndlangamandla |
| For the 2 nd accused: | Mr A. C. Hlatshwako |