



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

HELD AT MBABANE

CASE NO: 13/21

In the matter between

THE KING

Versus

MAJAHENDLALAMBI M. MOTSA

Neutral Citation: *Rex v Majahendlalambi M. Motsa (13/2021) [2023]
SZHC 278 (9 October 2023).*

Coram: M. S. LANGWENYA J

Heard: 13 – 14 June 2023; 11 – 12 July 2023; 24 July 2023; 9
October 2023.

Delivered: 9 October 2023

Summary:

The accused was found guilty of one count of murder and of two counts of attempted murder – Consideration of existence or otherwise of extenuation circumstances – Section 295 of Criminal Procedure and Evidence Act 67 of 1938 – extenuation factors exist – accused a young man of twenty-two years old at the time of commission of offence.

Criminal Procedure – Sentencing – Consideration of the triad – accused person's personal circumstances outweighed by interests of society – accused sentenced to fifteen (15) years imprisonment for murder and to seven years imprisonment for each one of the attempted murder in count two and count three respectively.

The period of imprisonment will take into account the time that the accused person spent in pre-trial incarceration.

JUDGMENT ON SENTENCE

- [1] The accused has been found guilty of the crime of murder of Gift Shongwe and of two counts of attempted murder of Mthobisi Petros Thwala and Maxwell Mlondi Shongwe respectively. The crimes that the accused person has been convicted of are said to have taken place at Madelezini area on 15 January 2021.
- [2] The accused person did not lead evidence in extenuation and in mitigation of sentence. Counsel for the accused prepared written submissions and made oral submissions on behalf of the accused person. The crown also prepared written submissions and made oral submissions.

Concept of Extenuation Circumstances

- [3] The concept of extenuation circumstances is defined as that which morally, although not legally, reduces an accused person's blameworthiness or the degree of his or her guilt.¹
- [4] The court must now consider all the relevant factors and circumstances – both mitigating and aggravating – in order to make a value or moral judgment about the existence or otherwise of extenuating factors in this matter. Such an inquiry must not be done haphazardly but it must be conducted with due diligence and with an enquiring mind. The inquiry probes whether or not any factor is present that can be considered to extenuate an accused person's guilt after conviction – such factors include but are not limited to – immaturity, intoxication, provocation or abuse of drugs². The court should also consider whether such facts have had a cumulative effect in having a bearing on the accused person's state of mind in committing the offences. Coupled with all these considerations, the court must also evaluate whether such facts were sufficiently appreciable to abate the moral blameworthiness of the accused person in doing what he did.
- [5] At this stage of the proceeding, the court is required to consider whether the extenuation circumstances exist in terms of Section 295 of the Criminal Procedure and Evidence Act 67 of 1938. Section 295 of the Act states as follows:

- [1] **If a court convicts a person of murder, it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances it may specify them:**

Provided that any failure to comply with the requirements of this Section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

¹ Daniel Mbudlane Dlamini v Rex Court of Appeal
Case No. 11/1998; R v Fundakubi & Others 1948 (3) SA 810, 818

² Mciniseli Jomo Simelane v Rex Supreme Court Case No. 3/2014

[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 community to which the convicted person belongs.

[6] It is the law in our jurisdiction that no onus rests upon the accused to prove the existence of extenuating circumstances. The court – that is the Judicial Officer, the Crown and the Defence must work together to determine if there are extenuating factors or not³.

[7] In *Kalaletwe and Another v The State*⁴ the court stated as follows:

"It seems to us that there is therefore an overriding responsibility on the court and its officers –to ensure that the second phase of enquiry as to the presence or absence of extenuating circumstances is conducted with diligence and with an anxiously enquiring mind. The purpose of the enquiry is *inter alia* to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above – when all evidence is in, the court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating. This would include evidence tendered during the second phase of the enquiry. It will then make its value or moral judgment."

[8] I am of the view that extenuating factors exist in this matter. At the time of the commission of the offence of murder, the accused was a young man of twenty-two years of age; he was a resident of rural Timphisini area. These two factors in my view contributed to the commission of the offence and are therefore extenuating factors which allow this court to pass a sentence other than a death sentence on the accused person.

[9] It was submitted on behalf of the accused that he is a first offender. The accused was twenty-two (22) years old when the offences were committed. Accused is currently aged twenty-four years old. He spent a month in pre-trial incarceration.

[10] The court heard that the accused is remorseful for his actions. That as a sign of remorse, after the death of the deceased, the accused person's family went to the deceased person's family to pass its condolences and to

³ Daniel Mbudlane Dlamini v Rex Appeal Case 11/1998

⁴ (1995) BLR 100 (CA)

apologise for accused's actions. The accused person's family also bought a coffin for the deceased; they further gave the deceased person's family a cow as a sign of their son's contrition.

[11] It is important also to consider the reaction of the accused person immediately after he had shot his victims. His evidence is that after he had fired a shot at his victims; he saw them *basaphaka* – that is – they were scattered and some of them fell to the ground. The accused testified that soon after firing a shot at his victims he left the scene. The accused would not be bothered to help his victims, at the scene let alone drive them to the hospital. His action soon after the offences were committed was anything but a sign of contrition.

[12] It was further argued that since 2021 until 2023 the accused person has had this matter hanging over his head like the sword of Damocles ready to strike at any moment. That, alone it was submitted was punishment on its own.

[13] It is trite that sentencing involves a very high degree of responsibility which should be carried out with equanimity. In *S v SMM*⁵ the court emphasized that the imposition of sentences entails a fair process. The following was stated:

“It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interest of society....”

[14] It is apt to also refer to *S v Rabbie*⁶ where it was emphasised that:

⁵ *S v SMM* 2013 (2) SACR 292 at para 13

⁶ 1975 (4) SA 855 (A) at 866 A-C

“A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from fairness where fairness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”

- [15] An appropriate sentence will be arrived at after a consideration of the judge-made guiding principles known as the *triad*⁷. In *S v Zinn*, the Appellate Division held that in imposing a sentence “what has to be considered is the *triad* consisting of the crime, the offender and the interest of society.” These factors must be considered equally and one should not be heavily relied upon over the other⁸.
- [16] Regarding the crime, the punishment must not be disproportionate to the offence⁹.
- [17] In as far as the offender is concerned, the court should consider the personal circumstances of the offender and ensure that the sentence fits the offender.
- [18] In as far as the society is concerned, a sentence that is imposed should not so much serve the community’s wishes as it should the public interest.¹⁰ The interests of society are not best served by too harsh a sentence, but equally so, they are not properly served by one that is too lenient. Differently put, the public interest requires that punishment imposed should serve as a deterrent to other would-be criminals; serve as a preventative measure to crime as well as serve to rehabilitate offenders.
- [19] An important consideration is that punishment should fit the criminal as well as the crime; that it should be fair to society and be blended with a measure of mercy according to the circumstances¹¹. Put differently,

⁷ *S v Zinn* 1969 (2) SA 537A

⁸ *S v Holder* 1979 (2) SA 70A

⁹ *Dodo v S* 2001 (3) SA 381 (CC) at para 37

¹⁰ *S v Makwanyane* 1995 (2) SACR 1 (CC)

¹¹ *S v Rabie* 1975 (4) SA 855 (A) at 866 A-C

punishment should be tempered with compassion and humanity as the aim is not to take revenge or to destroy the offender.

- [20] Murder and attempted murder are in the same league as they are serious crimes. The accused negated Gift Shongwe's right to life by shooting and killing him. At the time of his death, Gift Shongwe was a young man of eighteen (18) years of age.¹² He had his life and future ahead of him. The post mortem report reflects that the deceased died due to firearm injuries on the backside of the body. The deceased had injuries on the neck, chest, lungs, heart and the spinal cord. The deceased person's chest bone was fractured; his mediastum and thymus was ruptured; his trachea and bronchi had a perforated injury in the middle portion of the oesophagus and trachea. The right lung had three perforated wounds while the left lung had two perforated wounds. The heart had two perforated injuries. The pathologist noted that there were fourteen entrance wounds on the backside of the deceased person. The nature of the injuries is indeed that it resulted in death shortly thereafter. The court has found that the injuries suffered by the deceased was a result of the accused person's doing.
- [21] The courts are duty bound to send a clear message to other potential murderers that the courts are determined to protect the right to life of all people.
- [22] The courts must never create the impression through its sentences that human life in the eyes of the law is cheap.
- [23] Courts are expected to be responsive to the outlook of the community to which they belong. Society cries out for protection against all types of criminals and expects that convicted offenders should do time in the correctional facilities for all serious crimes so that on return they respect

¹² See Page 1 of Exhibit B – the post mortem report

the right to life of all people living in the country. Society and the Law require that criminals who have committed serious crimes such as the ones under consideration should be ideally removed from society for a long time. In that way, courts would be fulfilling their role in protecting the society against lawlessness.

[24] The court has considered the submissions made on your behalf in extenuation and mitigation of sentence. Against this backdrop, despite the accused being relatively young at twenty-two years old at the time of commission of the offences, when weighed against the circumstances of the offences and the interests of the community, the latter criterion displaces the personal circumstances of the accused.

[25] In the result, the accused is sentenced as follows:

Count one – Murder: Fifteen (15) years imprisonment.

Count two – Attempted murder: Seven (7) years imprisonment

Count three – Attempted murder: Seven (7) years imprisonment.

[26] The sentences will run concurrently and will take into account the period of one month which the accused spent in pre-trial incarceration.


M.S. LANGWENYA

JUDGE OF THE HIGH COURT

For Crown: Mr Mandla Dlamini

For Defence: Miss Noncedo Ndlangamandla