

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

HELD AT MBABANE

CASE NO:

162/23

In the matter between

REX

Versus

DUMSANI MBHOLOFIDI GININDZA

Neutral Citation: *Rex v Dumsani Mbholfidi Ginindza (162/2023)*
[2023] SZHC 328 (23 October 2023).

Coram: M. S. LANGWENYA J

Heard: 9, 23 August 2023; 21 November 2023

Delivered: 21 November 2023

Summary:

Criminal law-Criminal Procedure-Murder with dolus eventualis – Sentencing – aspects of the triad – extenuating factors exists – intoxication – accused uneducated and from a rustic background – accused sentenced to a term of imprisonment of eighteen years – the sentence will take into account the period that the accused spent in pre-trial incarceration at the time of sentencing.

JUDGMENT ON SENTENCE

- [1] The accused is a seventy-four year old male and stands convicted of murder of his wife, Mshugu Ginindza by stabbing her with a knife. Despite pleading not guilty to the charge, the accused at the end of the trial was convicted of murder on the basis of having acted with intent in the form of *dolus eventualis*. The court now has to pass sentence.
- [2] It is trite that in sentencing the courts have regard to the personal circumstances of the offender, the crime committed and the circumstances under which it took place, and the interests of society. These factors are generally referred to as the *triad*. The courts are simultaneously enjoined to consider the objectives of punishment being prevention, deterrence, reformation and retribution and must decide what punishment would best serve the interest of justice. When coming to that conclusion, a balance must be struck between the interests of the accused person and that of society.
- [3] It is a well-established principle that these factors need not be given equal weight and one may be emphasised at the expense of the other. This would usually be the case when serious offences are involved and where

the interest of justice dictate that in circumstances of a particular case, specific punishment must be meted out. The rule is that:

'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'¹

- [4] In determining an appropriate sentence, the court should not be over influenced by the seriousness of the type of sentence under consideration and fail to properly consider other factors relevant to sentence.²
- [5] The accused person's personal circumstances were placed before the court through written and oral submissions from the Bar. The court heard that the accused was seventy-three years of age when committing the offence in August 2022. He is seventy-four years old now. He is a first offender. The accused has no formal education and managed to maintain his family – his wife and his grandchildren through subsistence farming and livestock rearing.
- [6] The court heard that in addition to PW1, the accused had three other daughters who are now dead. The deceased's daughters left behind eight children that the accused and the deceased were caring for at the time of the commission of the offence that is the subject of these proceedings. It was submitted on behalf of the accused that two of his grandchildren are in Grade two; three are in Grade four, while the remaining three grandchildren are below the age of six years and not enrolled at school yet.
- [7] The court heard that even though the grandchildren who are enrolled at school are the beneficiaries of the free primary education policy, the accused and his deceased wife provided the grandchildren with food, clothes and health care. After he was incarcerated the accused submits that

¹ S v Rabie 1975 (4) SA 855 (AD) at 862 G-H

² S v Fass 1980 (4) SA 102 (c) at 104 A-B

his livestock is not properly cared for because his minor grandchildren are the only people taking care of the livestock which include cattle and goats. The accused used his livestock to support and maintain his family including his grandchildren.

- [8] It was submitted on behalf of the accused that he is remorseful; and that the death of his wife in his hands will haunt him forever. As a sign of his remorse, the court was told that the accused did not evade arrest and that he cooperated with the investigating officers in this matter.
- [9] The accused committed the offence against his own wife whom he attacked with a knife and stabbed once in the abdomen. The seriousness of the injury is evident from the deceased's death which ensued shortly after she sustained the injury.
- [10] The court has no idea why the accused stabbed his wife to death because the accused asserted his right to silence and offered no explanation of the events leading to the stabbing incident. From the evidence it would appear that the deceased was not armed at the time she was stabbed with a knife by the accused. The deceased was therefore a defenceless and vulnerable person when attacked by her husband for reasons unknown.
- [11] The accused and the deceased were an elderly couple. The accused was 73 years old while the deceased's age was estimated to be 77 years old when the crime which he is charged with was committed.³ The couple had adult children who had children of their own. It would appear the accused and his deceased wife had been together for a considerable period of time having established a home at Antioch. Against this background the accused's behaviour that fateful day becomes even more reprehensible; for instead of being her protector, he became her attacker and ultimately her

³ See page 1 of Post Mortem Report – Exhibit "A"

murderer. Not only is the accused responsible for ending an innocent life, but he also deprived his remaining children as well as his grandchildren of the affection and care of their mother and grandmother.

[12] This court views crime committed in a domestic relationship in a serious light and will increasingly impose heavier sentences in order to try and bring an end thereto. The trend of domestic violence in society seems to continue unabated. The message to the accused and other would-be offenders, who simply disregard the rights of others and who treat their spouses or partners like property belonging to them, must get the message loud and clear: That the courts will not shy from its duty to impose severe punishment in deserving cases; and that courts will not hesitate to remove from society, for considerable periods of time those persons making themselves guilty of committing heinous crimes against other – more so when these offences are committed within the family structure or what is considered to be a domestic relationship.

[13] Murder in itself is considered by the courts to be a serious offence. By law, sentences for murder in our jurisdiction attract a custodial sentence and permit no suspended sentence or an option of a fine.

[14] Whereas, the accused and the deceased had been enjoying themselves by drinking traditional home brew from Saturday until the Monday when the deceased was stabbed and died, there seems to be a possibility that intoxication could have played a role in the accused's commission of the crime. Although it would, in the absence of reliable evidence, be difficult to determine the extent it might have impacted on the accused and lessened his moral blameworthiness, the court cannot ignore the possibility and therefore, should take it into consideration as both a mitigating factor and extenuating factor when sentencing the accused.

- [15] The circumstances under which the crime was committed are relevant and in this instance a knife was used against a defenceless elderly person. The deceased was stabbed once in the abdomen. According to the autopsy report, the stab injury entered the abdominal cavity and fractured the eleventh rib in the process, perforating the liver. It would appear that substantial force was used as the eleventh rib was fractured. The nature of the injury is indeed such that it resulted in death shortly thereafter.
- [16] There could not have been any justifiable or acceptable reason for the accused to use a knife against his wife – let alone killing her. Any disagreement or misunderstanding that may have arisen between the two while the *umphahlo* ceremony was ongoing could have been sorted out amicably and the use of a lethal weapon against a defenceless spouse in these circumstances bears testimony of disrespect and cowardice on the part of the accused.
- [17] The court takes a dim view of people resorting to the use of lethal weapons to settle scores – more so in a domestic relationship – and in this case as in many other like cases, lives are consequently lost unnecessarily. Unfortunately, this practice is prevalent all over eSwatini⁴ and it must be discouraged through the imposition of stiff sentences.
- [18] There can be no doubt that the minor grandchildren of the accused and the deceased have suffered tremendously already as a result of the deceased's death and the incarceration of the accused since that fateful day. Unfortunately, this situation will not improve in the near future due to the punishment to be imposed on the accused today. These grandchildren have to forgo the care, support and maintenance they used to get from their

⁴ See: Rex v Aaron Khopho Msibi (347/20) [2020]SZHC 140 (2020) (23 July 2020); R v Henry Mcolisi Javas Max (305/2014) [2020] SZHC 148 (5 August 2020); Rex v Menzi Patrick Mavimbela and Another (193.19) [2020] SZHC 61 (7 April 2022); Rex v Japhter Sithembiso Ntshalintshali (18/22) [2022] SZHC 203 (4 October 2022); Rex v Catherine Thuli Hlatshwayo (62/17) [2020] SZHC 276 (7 December 2020)

grandparents (since their own parents are dead) – not as a result of their doing. One cannot but feel deeply for the grandchildren who are now left to fend for themselves even though they are minors. Regrettably, one cannot allow one's sympathy for them to deter one from imposing a fitting sentence dictated by the interests of justice and society.

[19] Society justifiably expects that the accused be punished for the crime he committed and in the circumstances of this case a lengthy custodial sentence seems inevitable. The accused is a first offender and has an unblemished record of seventy-three years before committing an offence. These indeed are important factors weighing in his favour in sentencing.

[20] Old age in appropriate cases may be regarded as a mitigating factor in sentencing of an offender. Authority that old age does not exclude criminal liability but that it can serve as a mitigating factor are legion⁵ - notwithstanding the argument that with the elderly having greater experience of life one would expect potentially greater awareness of the consequences of their actions.

[21] It has been said that the rationale for the reduction in sentence where the accused is an elderly person is compassion. In *S v Heller*⁶ the following was said concerning a sentence of imprisonment of the elderly:-

“that it evokes a note of compassion in considering the bleak recompense of imprisonment in the afternoon of his years.”

[22] Furthermore, old age can sometimes be seen as a second childhood, a time when some elderly become less responsible. Added thereto, the elderly are more sensitive to some forms of punishment, especially imprisonment.

⁵ See: Terblanche “A guide to sentencing in South Africa” 2nd Ed. (2007) at page 137.

See also: *S v Munyai* 1993 ISACR 252 (A); *S v Du Toit* 1979 (3) SA 846 (A); *S v Heller* 1971 (2) SA 29 (A); *S v Tshatsha* [2007] JOL 19598 (CK); *Mfengu v S* [2005] JOL 148 13 (E); *Mgudu v S* [2002] JOL 10060 (JK); *S v Mukua* 1993 ISACR 160 (T); and *S v Berliner* 1967 (2) SA 193 (A).

⁶ 1971 (2) SA 29 (A) at 55 C-D

[23] Van der Merwe notes that “this factor (of old age) really means that the sensitivity of the offender to punishment is higher, that he would suffer more given a specific quantum of punishment and that imprisonment for a certain period might really turn out to be life imprisonment.⁷ Courts have however, warned against misplaced pity.⁸

[24] In considering the length of imprisonment for an elderly accused, it is important to also consider the principle of equal impact. It is appreciated that the same penalty would have a radically different effect on various offenders. As imprisonment of an elderly offender would cause greater hardship than to a younger person, it strikes a chord of injustice and as such the proportionality of the sentence should be considered within the “circumstances of influencing sensibility” – one of which is age. This, according to Ashworth⁹ would be a ground for a shorter custodial sentence.

[25] The penalty is adjusted to take into account the character of the particular circumstances:

“the aim would not be equity mitigation based on compassion and quasi – retributive reasons, but rather making adjustments in sentence to deal with certain foreseeable differential impacts.”¹⁰

The above construction is however not without controversy.¹¹

[26] Old age is, however, no guarantee to be spared imprisonment as the final decision depend, in various circumstances of the matter especially the seriousness of the offence. In and of itself, old age cannot justify the

⁷ Van der Merwe 5 – 26 A

⁸ S v Mnyai 1993 ISACR 252 (A) at 255 i – j.

⁹ Ashworth ‘Sentencing and Criminal Justice (2005) at pp.274, 276. See also; Thomas “Principles of Sentencing” (1979) at p.196.

¹⁰ See: Von Hirsch and Ashworth “Proportionate Sentencing. Exploring the Principles” (2005) at p.176.

¹¹ See: Easton “Dangerous Waters: Taking Account of Impact in Sentencing” (2008) *Criminal Law Review* 105 at 115; Piper “Should Impact Constitute Mitigation; Structured Discretion versus Mercy” (2007) *Criminal Law Review* 141.

imposition of a non-custodial sentence and should not lead to the unacceptably insubstantial sentence.¹²

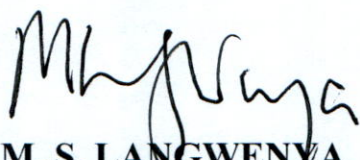
[27] The court heard that prior to the incident leading to the death of the deceased, the accused was in the habit of visiting violence on his wife when he returned home from his drinking sprees. The deceased would at times be forced to seek refuge in neighbours' homes when the accused acted violently towards her. It is the violence of the accused towards his wife that cost the deceased her life. Clearly, the act of being violent against the deceased by the accused was not an isolated incident. In these circumstances the emphasis should fall on deterrence and on prevention.

[28] It was submitted by both counsel for the Crown and counsel for the defence that extenuating circumstances exist in this matter. I agree. The accused was intoxicated when the offence was committed; the accused is an elderly man of seventy-three years old; he is uneducated and is from a rustic background. It is trite that all these factors taken singularly and together constitute extenuating factors.

[29] I am, however, of the view that this is a case where the court should show mercy in sentencing the accused due to his age. The court has not been told that the accused suffers from any chronic illnesses as a result of his old age.

[30] Accordingly, the accused is sentenced to a term of eighteen (18) years imprisonment. The period of twenty five (25) months spent in pre-trial incarceration will be taken into account in the computation of his sentence.

¹² See: Feltoe: "A Guide to Sentencing in Zimbabwe (1990) page 124.


M. S. LANGWENYA
JUDGE OF THE HIGH COURT

For the Crown: Mr A. Mkhaliphi

For the Defence: Mr D. Dlamini