



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Criminal Case No. 220/2020

In the matter between:

REX

Applicant

And

SONNYBOY SHAIN HARRIS

Respondent

Neutral Citation: *Rex vs Sonnyboy Shain Harris* (220/2020) [2023] SZHC 218
(10/08/2023)

Coram: J.M. MAVUSO J

JUDGMENT ON SENTENCE

10/08/2023

J.M. MAVUSO J:

- [1] In its Judgment delivered on the 21st July 2023, the Court, found the accused guilty of the unlawful and intentional murder of Thoko Margareth Maseko on the 18th November 2018 at or near Thembelihle area, in the Shiselweni Region.
- [2] The Court is now called upon to hand down sentence in the matter. Both Counsel for the Crown and Defence, have filed comprehensive heads of arguments to help the Court reach and hand down, a fair and just sentence. The heads of arguments, primarily address the issues of extenuating circumstances, accused person's mitigation as well as providing the Court with guidelines on sentencing.
- [3] (i) Before handing down sentence, it is apposite to state that, the right to life is constitutionally protected by the Constitution of the Kingdom of Eswatini Act 1 of 2005. Under the Protection and Promotion of Fundamental Rights and Freedoms, contained in Chapter 111 of the Constitution, is the protection accorded to the "*Right to Life*".

- (ii) Article 15 of the Constitution deals specifically with the protection of the right to life. The Article states thus:-

“15 (1) A person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Eswatini of which that person has been convicted.

(2) The death penalty shall not be mandatory.

(3) A sentence of life imprisonment shall not be less than twenty-five years.

(4) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are mentioned in this subsection, a person shall not be regarded as having been deprived of life in contravention of this section if death results from use of force to such extent as is reasonably justifiable and proportionate in the circumstances of the case;

- (a) *for the defence of any person from violence or for the defence of property;*
- (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- (c) *for the purpose of suppressing a riot, insurrection or mutiny; or*
- (d) *in order to prevent the commission by that person of a serious criminal offence.”*

[4] Just to take a step backwards, Article 14 and in particular, section 2 thereof, on the Protection and Promotion of Fundamental Rights and Freedoms, provides thus:

“14 (2) The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislative and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Eswatini, and shall be enforceable by the courts as provided in this Constitution.

(3) *A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of individuals contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest.”*

[5] The Court is certain that the deceased Thoko Margareth Maseko, qualified for protection of, her right to life, under this article.

[6] (i) Section 295(1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) provides as follows:

“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.

295(2) In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standard of behavior of an ordinary person of the class of the community to which the convicted person belongs.”

- (ii) His Lordship Chief Justice M. Ramodibedi (as he then was) in Criminal Appeal Case Number 17/2010, involving Bhekumusa Mapholoba Mamba v Rex at paragraph 7 of the Court’s Judgment, cited with approval the Judgment by Holmes JA. In S v Letsolo 1970 (3) SA 476 at 476, where the Learned Justice, observed as follows:

“Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduced the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard the trial court has to consider:

- (a) Whether there are any facts which might be relevant to extenuation such as immaturity, intoxication or provocation (the list is not exhaustive);*

(b) Whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;

(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did;

(d) The trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

(iii) In Daniel Dlamini v Rex Appeal Case No. 11 of 1998 after referring to the Botswana Court of Appeal Case between Kaleletswe and 2 Others vs The State, Criminal Appeal Case No. 26 of 1994, the Court came to the conclusion that, the duty, falls upon the Court to determine, the existence or non-existence of extenuating factors.

[7] In the present case, the Court has been implored by Defence Counsel to find that there are extenuating circumstances which reduced the moral

blameworthiness of the convict, Mr. Sonnyboy Shane Harris. In Counsel's submission, the following constitute, extenuating circumstances, that:

“7.1 the Court did not find that the murder was pre-meditated.

7.2 the accused had no true positive desire to kill the deceased.

7.3 from the evidence before court, the then accused, had a belief that the deceased was responsible for bewitching his family.”

In support of the foregoing, Counsel, cites the **South African Case of Rex vs Fundakubi & Others 1948 (3) SA 810 AD at 818** where Shreiner JA stated as follows:

“The subjective side is of very great importance and that no factor not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration. That a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness I have no doubt.”

[8] The Court, on its own accord and per Defence Counsel's submission, on the existence of extenuating circumstances, in particular, accused person's benighted belief in witchcraft; is of the considered view and/or finds that, such belief, reduced the moral blameworthiness of the accused person. It is to be considered as an extenuating factor, in this case. Having made the finding aforesaid, the Court finds it unnecessary to consider other factors, which could possibly be found to be extenuating factors, in the circumstances of this case, as the finding on witchcraft is sufficient.

[9] In mitigation, it has been submitted that:

- (i) The accused was 38 years of age at the time of commission of the offence.
- (ii) He is married with two minor children aged 7 years and 5 years, respectively and that he was solely responsible for the maintenance and general upkeep of the minor children. No reason has been advanced as to why the upkeep of his children is his sole responsibility, nor is an explanation given, of, how in his absence (due to incarceration) they have managed to cope, in everyday life.

(iii) The accused is said to have no previous convictions. Indeed the Crown confirms his being a first offender.

(iv) The accused has been in custody since the 22nd November 2018, which is the day he was arrested on.

[10] The Crown on the other hand, submits that murder is a serious offence. It submits that aggravating the offence, is the fact that the deceased was the accused person's aunt and that the manner in which her life was terminated, was very gruesome. The Crown draws the Court's attention, as an aggravating factor that whilst the accused was about thirty-eight (38) years old, when he committed the offence, the deceased was an old woman of about seventy (70) years of age, almost twice the accused person's age, thus making her defenceless against the youthful accused person's aggression. The Crown after submitting that the cause of death was strangulation opines that the old woman must have suffered great pain before taking her last breath and passing on.

[11] On the range of sentences to be meted out in such cases, the Crown relies on the case of Nhlanhla Dlodlu vs Rex Criminal Appeal No. 05/23 at paragraph 41 where the Court states as follows:

“The appropriate sentence....based upon principles articulated in the foregoing paragraphs, and upon the comparison with other sentences sanctioned by the court (sic), and upon the range of sentences for murder established by Tsela, this court is satisfied that, in the (sic) instant case, a sentence of 20 years for murder with extenuating circumstances would be appropriate.”

[12] In Tsela v Rex 2012 SZSC 13 at paragraph 18 of the Judgment, the Court stated as follows:

“A sentence of twenty five years imprisonment was at the upper end of an elastic scale. Such sentence must be inevitably be saved for the most serious cases coming before the courts.”

[13] In passing sentence, the Court has been implored by the Crown to pass a sentence which takes into account the triad. In S v Rabie 1975 SA 855 (a)

cited with approval in many local cases, especially in the area of sentencing, the triad is said to take into account the criminal person's personal circumstances, the seriousness of the crime and blending both with a measure of mercy according to the circumstances.

- [14] A silent feature of this case, which was not pursued by the Crown, is that there was seemingly a deceased estate dispute raging between the parties, primarily in which the accused wanted to take over, probably as his own, certain immovable property, upon which his aunt, the deceased resided upon.

In his evidence in chief, the accused told the Court that when he met the deceased, she seemed uneasy. Due to her uneasiness, accused told the Court that he threw down the axe he was carrying. Notwithstanding deceased not buying into accused person's small talk, from this stance, accused told the Court that the deceased (Thoko Margareth Maseko) said she had nothing to do with him as he was just a child who was giving her a problem in her life and further went on to say that:

“My elders left her there and there was no way I could remove her from there.”

The impression the Court has, arising from the foregoing is that the accused murdered his aunt, for his own personal gain. The Court's view is that the foregoing justifies a sentence in the lower middle scale of the sentencing range, in cases of murder with extenuating circumstances.

[15] Taking into account the submissions made by the Crown and Defence Counsel on extenuating factors and in mitigation, and with a view to deter other would be offenders, the Court is of the considered view, that a sentence of, twenty-two (22) years, without the option of a fine, back dated to the 22nd November 2018, when the convicted person, was incarcerated, is appropriate in the circumstances.

J.M. MAVUSO
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicant: MS. NCAMSILE MASUKU PROSECUTING COUNSEL

(DPP'S CHAMBERS)

For the Respondent: ZONKE MAGAGULA & COMPANY (C/O DUNSEITH

ATTORNEYS)