IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **NO: 267/2022**

In the matter between:

REX

VS

MFANASIBILI CLEMENT MSIMANGO

Neutral Citation: *Rex vs Mfanasibili Clement Msimango (267/2022) [2023] SZHC 378 (6th May 2024)*

CORAM: **NM MASEKO J**

FOR CROWN: **MS NQOBILE MHLANGA**

DIRECTOR OF PUBLIC PROSECUTIONS CHAMBERS

FOR DEFENCE **MR. SB MOTSA**

SB MOTSA ATTORNEYS

DATE HEARD: **15th APRIL 2024**

DATE OF DELEIVERY OF EX TEMPORE JUDGMENT ON SENTENCE: **17TH APRIL 2024**

DATE OF DELIVERY OF FULL JUDGMENT ON SENTENCE: 6TH MAY 2024

Preamble: Criminal Procedure- Sentence- Accused convicted of murder of his biological brother on suspicion that the deceased stole his dagga which was stored in a five (5) litres container kept in the main house. The accused assaulted his brother with a crowbar and left him for dead in the early hours of the morning. He never solicited any medical assistance for his badly injured brother. During the trial the accused raised the defence of provocation because of the alleged theft of dagga which was not proven – Th *triad* which consists of the interest of society, seriousness and prevalence of the crime and the personal circumstance of the accused were all considered – The accused also raised the defence of intoxication which this court accepted and treated as an extenuating circumstance in *casu.*

JUDGMENT ON EXTENUATING CIRCUMSTANCES AND SENTENCE

MASEKO J

[1] On the 15th April 2024 the accused was found guilty of the murder of his biological brother Vusi Msimango whilst they were at their

parental home situate at Lugongolweni area in the Lubombo District.

[2] On the 17th April 2024 I imposed a sentence of forty (40) years imprisonment on the accused backdated to the 8th June 2023 this being the date when his bail was revoked by this court after he had pleaded to the Indictment, and this is in terms of Section 145 of the Criminal Procedure and Evidence Act No.67/1937 As Amended. This was after I had afforded Defence Counsel Mr SB Motsa an opportunity to address the court on why section 145 aforesaid, should not be invoked by this court.

[3] On the 17th April 2024, I postponed the delivery of the full judgment on extenuating circumstances and sentence to the 26th April 2024, and on the said date I further postponed same to the 6th May 2024. This is the judgment on extenuation as well as on sentence.

[4] Extenuating circumstances have been defined by the court as those factors that reduce the moral blameworthiness of an accused person who has been convicted of murder. The main effect of the presence of extenuating circumstances is to negative pre-meditation which then induces the court not to impose a death penalty in jurisdictions where the death sentence is still in force.

[5] In *casu* there exists extenuating circumstances because the accused had been imbibing in alcohol since 1100 am on the 15th February 2022 until the following early morning 16th February

2022 at 0100 am when he committed the murder of his brother Vusi Msimango on the allegation or suspicion that the deceased had stolen the accused's dagga which was supposedly in a bedroom in the main house. There is no doubt that the accused had imbibed alcohol beverages during the period between 1100hrs on the 15th February 2022 to 0100hrs being the early hours of the 16th February 2022. During his evidence in his defence, he testified that he was at Ka Ndawo Bar where he was waiting for his dagga customer from Botswana who had already paid a deposit of E 3,000.00 through e-wallet and the balance of E 4,000.00 was going to be paid upon delivery of the dagga. The accused was very much aware of his actions and was not dead drunk.

[6] Prosecuting Counsel Attorney Ms Nqobile Mhlanga referred to the case of **Rex v Mduduzi J Zwane Crim Trial No.68/09** where Masuku J, stated as follows at paragraphs 44 – 47 where His Lordship dealt with extenuating circumstances, I quote:

> "[44] In R v Hugo 1940 W.L.D 285 at 286, Schriener J said following of extenuating circumstances:
>
> "One dictionary meaning is circumstances which lessen the seeming magnitude of an offence, which tend to diminish culpability. This is not very helpful because it is difficult to affirm that any particular circumstances lessen culpability unless one has some idea of a normal or ordinary degree of culpability and that is what it is almost if not quite impossible to arrive at. Certainly, the mere fact that one can imagine worse or more diabolical murders than the one that was under consideration would not warrant the conclusion that extenuating circumstances were present."

Regardless of the difficulties mentioned by the learned judge as he then was, it appears that it is now settled that extenuating circumstances are any factors that morally, though not legally, serve to attenuate the moral blameworthiness of the accused person committing the crime that he did. See S v Letsolo 1970 (3) SA 4776 (AD) at 476 G – H.

[45] In the present case, it is clear that there are some extenuating circumstances and these are apparent from the evidence led. In the first place, it is in evidence that the accused was provoked. Second, the accused, I have found, did not harbor an actual intention to kill but ruled that intention in the form of *dolus eventualis* is present. See R v Sigwahla 1967 (4) SA 566 at 571 and S v Mini 1963 (3) SA 188 (AD) at 192. Last, but by no means least, it is in evidence that the accused was a person who lived a rustic life devoid of any meaningful education. See Fly v State CLCLB – 099 – 98 (per Dr Twum JA)

[46] Having regard to all the circumstances of the present case, I come to the view that there are extenuating circumstances in the present case. I return the opinion that because these are extant, the Court is at large, without necessarily having to resort to its constitutional discretion in Section 15 (2) of the Constitution of Swaziland Act 2005 to impose any sentence it finds appropriate than one of death.

[47] In closing on this aspect of the enquiry, I will quote from the sobering remarks that fell from the lips of Marumo J – in the Republic of Botswana Case of R v Gadiwe [2005], BLR 212 at 221 D – F where the learned Judge remarked on extenuating in the following manner:

"Having said that though, I should not be distracted from a proper and careful assessment of the existence

> or otherwise of extenuating circumstances by sheer brutality of the murders. Courts ought to undertake this exercise with extreme care. They should not, as Maisels P accepted in Letsholo v The State [1984] BLR 273 (CA) permit righteous anger to becloud their judgment. The consequences of finding that no extenuating circumstances exist are far-reaching as they do, the obstruction to impose a sentence so profound and so irrevocable many will argue, not altogether flippantly, ought not to be reposed in fallible humans presiding over an imperfect justice system. It may sound more like a contradiction in terms to talk of extenuation and the grotesque level of brutality in this case in the same breath. But nevertheless, the exercise must be undertaken carefully and as far as possible, dispassionately. Experience has shown that in the vast majority of cases, factors will exist that will diminish the moral as opposed to legal culpability of the convict. That, in simple terms, is what the exercise is all about.

[7] Defence Counsel Attorney SB Motsa submitted that there are extenuating circumstances in this matter and that this court should consider the sentiments of the Supreme Court in the case of **Mandla Bhekithemba Matsebula v Rex Criminal Appeal No.02/2013** where the apex court stated at para 19 that the following factors constitute extenuating circumstances namely; a belief in witchcraft, mental delusion, absence of pre-meditation, intoxication, youthfulness and immaturity, provocation, breakdown in love relationship, a poor socio-economic background and lack of education. The apex Court stated that the list not exhaustive.

[8] Defence Counsel Motsa submitted that the accused was intoxicated with liquor owing to the fact that he had been drinking liquor from 1100 hrs on the 15th February 2022 to after midnight on the 16th February 2022.

MITIGATION OF SENTENCE

[9] Defence Counsel Motsa submitted that the accused is a first offender and forty – four (44) years of age with three (3) minor children all of whom depend on him for support. Mr Motsa submitted that the accused dropped out of school in Form 2 and is a builder by profession. Counsel submitted that he engaged in the dagga trade because of lack of employment. Counsel urged this Court to impose a lenient sentence on the accused.

THE SENTENCE

[10] The submissions by Defence Counsel SB Motsa and Prosecuting Counsel N Mhlanga clearly indicate that there are extenuating circumstances in the case.

[11] I have carefully considered the *triad* in *casu*, and I have found that there are compelling circumstances that call for a sentence that fits the offence as well as the offender. This court has considered the prevalence of murder cases in the country. The statistics are increasing at an alarming rate, and unless the courts issue deterrent sentences, people will continue to perpetuate murders without any worry or regard of the repercussions of their unlawful conduct.

[12] The courts have a duty to protect members of society from people who easily, and often times without justification, commit unlawful acts which result to loss of life. In *casu* the accused is the elder brother of the deceased, and even if the family dealt in dagga, which is prohibited in the Kingdom of Eswatini, the accused had no right to assault his brother with a crowbar and in the manner he did which eventually resulted in his death..

[13] The excuse of dealing in dagga by the accused does not, in my view amount to provocation because the whole transaction is, in law, illegal. Further, the assertion by the accused that he killed his brother because he had stolen his dagga which was contained in a five-litre container is in my view arrogant and is rejected with the contempt it deserves. People, like the accused, who deal in dagga which they knew very well to be prohibited in this country, and who go about killing family members, or other people whom they suspect of having stolen their dagga or because of competition / territory rivalry must know that if, they are convicted of murder in those unlawful and gruesome circumstances will face the full might of the law, and if convicted must brace for deterrent lengthy imprisonment sentences for their offences. The time has come that such brazen murders are met with the imprisonment sentences deserving in each particular and peculiar facts and circumstances of such senseless killing of other human beings.

[14] In the case of Mududuzi Zwane supra, Masuku J stated the following at paragraphs 48 – 49 & 53 when dealing with sentence, and I quote:

> [48] You, Mduduzi Zwane have been found guilty of the murder of your niece Zamangwe Thulisile Zwane. It is now the opportune time for this court to pronounce upon you what it considers to be a condign sentence, having due regard to all the relevant circumstances, called the *triad*, namely the interest of the society, the seriousness of the offence, and lastly, your own interests and personal facts and circumstances.
>
> [49] This is by no means an easy task for the interests mentioned above tend to pull in different directions, requiring that the Court does its best to bring them to some state of equilibrium. In recognition of this stark fact, Leon JP stated the following in Enock Mabuyakhulu and Three Others v R Crim Appeal No. 24/2000 at page 10:
>
> > "Sentencing an accused person is not an exact science but the Court must do its best to balance the various and sometimes competing considerations of the crime, the criminal and the interests of society."
>
> "[53] I do hope that this incidence will change your approach and attitude forever and that you will now have realized how sacred human life is. You will have hopefully learnt to keep your anger in check. Learn from your mistakes and do not run from them."

[15] In *casu*, I have carefully considered the *triad*, being the interest of the society, the nature of the offence and the interests of the accused. This is what I would call the proportionality test which the court must consider when imposing a sentence which it deems appropriate based on the peculiar merits of the case. This court has evaluated the mitigating and the aggravating factors

e.g. the fact that the accused killed the deceased over suspicion of theft of his (accused's) dagga.

[16] In the case of **The State v Kitja John Mathe Case No.cc 145/2017 High Court of South Africa, Gauteng Division, Pretoria,** Sardiwalla J, stated as follows at paragraphs 5 – 9

> "[5] Sentencing demands that in serious crimes of this nature that the accused must be punished but that mitigating circumstances must be taken into account and that the position of the accused and the circumstances of the offence deserve thorough consideration. We are strongly guided by the case of S v Holder 1979 (2) SA and S v Rabie 1975 (4) SA 855 (A) which was a significant case on this aspect here, the court stated that:
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> "punishment should befit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."
>
> [6] A court is therefore obliged to consider all the sentencing options. The purpose behind a sentence was set out in S v Scott – Crossley 2008 (1) SACR 223 (SCA) at para 35:
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> "Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused on the alter of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.
>
> ---it is true that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."

[7] Referring to R v Swanepoel 1945 AD 444, the court in S v Khumalo & Others 1984 (3) SA 327 (AD) at 330 D – E held that deterrence was the 'essential', all important, paramount, and universally admitted object of punishment. It further held that the other purposes of punishment are accessory to deterrence. The retributive theory has to do with punishing a past wrongful act, whilst reformative, preventive and deterrent theories are all about the future, "in the good that would be produced as a result of the punishment" as observed in Rabie, supra, at 862 A - B.

[8] It was pointed out by the court in the case of R v Karg 1961 (1) SA 231 (A) at 236 A – B that while the deterrent effect of punishment has remained as important as ever, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. The court went on further to state that if the sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may be disposed to taking the law into their own hands.

[9] That retribution and deterrence are well recognized factors in punishment, was also recognized by Nugent JA in S v Swart 2004 (2) SACR 370 (SCA) where the learned Judge of Appeal stated in para 12 that:

> "[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious

crimes will usually require that retribution and deterrence should come to the foe and that the rehabilitation of the offender will consequently play a relatively smaller role."

[17] The court has also considered the interests of society and the pain which your actions caused on your family. Your unlawful actions have destroyed your family, and in particular your mother whom you know is very sickly. Your mother and brother PW 2 have lost two family members in yourself because of the lengthy term of imprisonment as well as your deceased brother Vusi.

[18] Your children as well have lost a parent and will grow up without your parenthood because of your unlawful actions. This court is unable to explain the trauma and pain that your entire family is going through. This is a tragedy which your family will live with forever.

[19] The Supreme Court in the case of **Muzi Petros Khumalo v Rex (11/2022) [2023] SZSC 40 (October 2023)**

stated as follows when dealing with an appropriate sentence to be imposed on a convicted accused person, taking into account the *triad*. JM Van Der Walt JA (MCB Maphalala CJ, SJK Matsebula JA concurring) stated as follows at paragraphs 12, 13, 14, 15:

"[12] The time-honoured *traid* of the personal circumstances of the accused person, the interests of society and the seriousness of the offence has been referred to supra and there is a plethora of authorities on this subject. The following pronouncement can be singled out:

[12.1] In the **The King v Sandile Mbongeni Mtsetfwa**

"One of the fundamental principles of justice in sentencing is that the court should strive to impose the right sentence for that particular circumstances of the case. On the other hand, it has always been recognised that it is salutary for the court to aim at the measure of uniformity in sentencing, where this can reasonably be done."

[12.2] As per Moore JA in the Botswana case of **R v Motoutou Mosilwa, Criminal Appeal No. 124/05**, which has been cited with approval in, for instance, **Rex v Nhlonipho Mpendulo Sithole**:

> "It is also in the public interest particularly in the case of serious and prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realised, and that the public may be satisfied that the court has taken adequate measures within the law to protect them from serious offenders. By the same token, sentence should not be of such severity as to be out of all proportions to the offence, or to be manifestly excessive or to break the offender, or to produce in the mind of the public the feeling that he has been unfairly and harshly treated."

[13] Murder is an extremely serious offence which upon conviction, can attract life imprisonment or even the death penalty.

[13.1] In terms of Section 15 (1) to 15 (3) of the Constitution of the Kingdom of Swaziland Act, 2005 (the Constitution):

'Protection of right to life'

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 Swaziland 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 that twenty five years.

[13.2] The Constitutional gravitas goes further, in Section 38 which stipulates that:

[38] Notwithstanding anything in this Constitution, there shall be no derogation

from the enjoyment of the following rights and freedoms:

a) Life, equality before the law and security of person;
b) the right to a fair hearing:
c) freedom from slavery or servitude:
d) the right to an order in terms of Section 35 (1): and
e) freedom from torture, cruel, inhuman, or degrading treatment or punishment.

[13.3] As regards the death penalty in neighbouring South Africa, the South African Constitution, 1993 is silent on the issue but that it had been held, in 1995, that the imposition of a death sentence is in violation of the said Constitution. Should one accelerate to the year 2022, almost thirty years later, it appears from the judgment in **African Transformation Movement v Speaker National Assembly and Others** that there is call for a referendum on reviving the death penalty in certain instances.

[13.4] Executions pursuant to judicial sentences of death penalty are still carried out in Africa for instance in Botswana. Moving further abroad, the death sentence in Japan and in some American States (Alabama, Missouri, Oklahoma and Texas.)

[14] Section 15 (2) of the Criminal Procedure and Evidence Act, 1938 (CPE) which reads:

'Nature of punishment'

296(1) Sentence of death by hanging shall be passed by the High Court upon an offender convicted before or by it of murder, and sentence of death by hanging may be passed by such court upon an offender convicted before or by it of treason.

Provided also that where a court in convicting any person or murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the death sentence.

[15] Section 295 of the CPE Act provides as follows:

295.(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 the 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.
>
> (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.

[20] These trenchant remarks made by JM Van Der Walt JA in the **Muzi Khumalo** case, supra, provide a comprehensive and informative instruction from the apex Court on the overall factors which this court must consider, within the *triad*, in order to impose appropriate sentences on persons convicted of murder, in particular because the Constitution has declared that the sentence of death is no longer mandatory, even where there are no extenuating circumstances.

[21] It is on these considerations of the *triad* that this court imposed the undermentioned sentence on the 17th April 2024:

1. Forty (40) years imprisonment without the option of a fine.
2. The sentence is backdated to the 8th June 2023.

I hand down the judgment.

NM Maseko J.
Judge.