



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 352/2022

In the matter between:

THE KING

VERSUS

SIPHO ALEX SHABANGU

JUDGEMENT ON SENTENCE

Neutral citation: *The King vs Sipho Alex Shabangu (352/2022) SZHC 17 (31st January 2025).*

Coram: *S.M. MASUKU J*

Date heard: *31st January 2025*

Date delivered: *18th February 2025*

Summary: *Criminal Procedure and Evidence- Sentencing . Accused found guilty of murder with dolus eventualis.*

Held: *The murder with dolus eventualis is an extenuating factor in this case.*

Held further: *That the convicted person is sentenced on the crime of murder with extenuating circumstances to eighteen (18) years imprisonment. The period spent in custody pre-trial and during trial be taken into account when computing the sentence.*

- [1] On the 31st January 2025, this court found the accused guilty of Murder of the mother of his children Futhi Nkambule with *dolus eventualis*.
- [2] Having convicted the accused person with the offence of Murder as charged, the court has to consider whether or not there are extenuating circumstances and determine an appropriate sentence.
- [3] Section 295 (1) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended (the CP & E Act) provides that;
“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...”
- [4] In Sibusiso Kukuza Dlamini v The King (18/2019) [2024] SZSC (3rd June,2021), the court at paragraph 21 stated as follows;
“Although section 295 of the Criminal Procedure and Evidence Act enjoins a court which has convicted an accused person of murder to state whether in its opinion there are any extenuating circumstances, they are not defined. It is trite law that the determination of the presence or absence of extenuating circumstances involves a three-fold enquiry first, whether there were at the time of the commission of the crime facts or circumstances which could have

influenced the accused's state of mind or mental faculties and could serve to constitute extenuation. Second, whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind what he did. Lastly, whether this influence was such a nature as to reduce the moral blame worthiness of the accused in doing what he did. In deciding the last issue the trial court exercises a moral judgement".

[5] At paragraph 22 of Sibusiso Kukuza Dlamini case (Ibid) the court stated further that;

"[a] trial court must consider dolus eventualis in the context of all the relevant surrounding circumstances. In my view, the court a quo's failure to apply its mind to dolus eventualis as a possible extenuating circumstances constitute misdirection which entitles this court to interfere and consider the issue afresh".

[6] A more direct proposition of the above is made by her Ladyship Langwenya J in Rex v Ntokozo Mhlongo and Another [415/14][2021] SZHC 49 (7 April 2021) stating thus:-

"It is trite law that courts in their determination of possible mitigating factors, in deserving cases a verdict of murder with dolus eventualis is a factor, either alone or together with other features depending on the particular facts of the case". See also S.v Sigwahla 1967 (4) SA 566 AT 571 (H).

[7] The defence persuading the court to find extenuating circumstances *in casu* submitted that, the convicted person was not armed at the time he arrived at Pw1's homestead but only armed himself once the fight between them ensued. That the foregoing should be construed as an extenuating factor hence he was convicted of murder with *dolus eventualis*. The defence submitted that the deceased assaulted the convicted person with a stone and held him on to his *genitals* thus negating any cold blooded assault giving rise to her death.

- [8] It was a conclusion of this court that although it could not be proved whether the convicted person brought the lethal weapon (screw driver) used to stab the deceased with him or he pounced on it on the tool box behind the door as the deceased ran off the house, he admitted as much that he armed himself with the weapon once he got hold of it. He pursued the deceased and stabbed her mindlessly or countlessly because he said the deceased fought back. He was convicted of murder with *dolus eventualis*.
- [9] The Crown on the other hand had argued that the post-mortem report and album showed that the inflicted injuries were all over her body even on the face. That showed, intention in the form of *dolus directus* and those were sure signs of how aggravating and fatal the stab wounds were.
- [10] There is two version of evidence on the source of the weapon. Whilst Pw1 testified that it came with the convicted person, the accused testified that he picked it up from a tool box in the house behind the door. There is no evidence of a third person brought to confirm or corroborate either version. The convicted person admitted as much that he armed himself with the weapon once he got hold of it. He pursued the deceased and stabbed her mindlessly or countlessly because he said the deceased fought back. He was thus found guilty of murder with intention in the form of *dolus eventualis*. I find that the murder with *dolus eventualis* is an extenuating factor in this case.
- [11] What is then appropriate or befitting sentence that has to meted out to the convicted person in the circumstances? In sentencing the court has to balance the three pillars of the triad, the competing aspects are the convicted person's personal circumstances, the nature of the crime and the interest of society. Ota J. In the case of Rex v Nhlonipho Mpendulo Sithole. Criminal case No. 370/2011 had this to say:-

“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”.

- [12] His Lordship Mamba JA in the case of Johannes Mfanikhona Dlamini and another v The King (18/2019) [2023] SZSC 5 (23 February 2023) stated:-
“It has been repeatedly stated that the issue of sentences is a matter pre eminently within the discretion of the sentencing court... In deciding what would be appropriate sentence in each case, the court must always bear in mind the competing interest of society, the accused and the offence for which the accused has been convicted... To say that the court ought to take into account the whole circumstances pertaining to the offence.”
- [13] In this regard the court should also bear in mind the standard or practice of the range of sentence employed or used in this jurisdiction on similar cases.
- [14] In persuading the court to find the convicted person guilty of murder with aggravating circumstances, the Crown cited the case of Mandla Mlondolozu Mendlula v Rex Appeal case No.12/2013 where the court stated as follows;
“needless to say there is regrettably growing trend in this country in the killing of women by their spouses male friends with impunity and without lawful cause. It is a frightening development against the women folk requiring the urgent attention of the courts as well as the society as a whole. In all these deaths the women are not armed and being weaker sex are unable to defend themselves. In the present case as may in others the assailant has no remorse for what he has done. The courts have a duty to uphold the constitution by protecting the right to life”.
- The Crown argued for a sentence of twenty years in the circumstances. It submitted further that where extenuating circumstances exist the minimum sentence should not be less than twenty years.

- [15] In Sibusiso Kukuza Dlamini case (*supra*) the Supreme Court upheld a sentence based on *dolus eventualis*, with the sentencing range for such cases generally falling between 10 and 20 years depending on aggravating and mitigating factors. The court maintained a balance between individual rehabilitation and public deterrence.
- [16] In the King v Ntokozo Batista Dlamini (277/2022) SZHC -236 [21/11/2024] the court opined at paragraph 32 page 17 as follows:
“The Supreme Court has set a precedent indicating that for cases involving murder with dolus eventualis, sentences typically range from 10 to 20 years with variations depending on intent, recklessness and other circumstances... Where no aggravating factors are present, sentences near 10 years may be considered appropriate for the first offenders, particularly in cases involving strong mitigation”. (underlining my own).
- [17] In mitigation, elaborating the convicted person’s personal circumstances, the defence submitted that he is first offender and is remorseful. It was stated that remorse can be gleaned from the fact that he handed himself over to the police. That he has learnt his lessons since he has been in prison awaiting trial since 2018. The court should also take into account that the couple’s children will be left without parents in case of long imprisonment.
- [18] The Crown on the other hand submitted that the convicted person lacked remorse for the offence committed. This is said to be deduced from the manner in which he stabbed the defenseless deceased. My understanding though is that remorse is measured on how the accused conducts himself after the incident, all the way to trial, mitigation and sentencing. Hardly during commission of the offence.

The offence and Interest of Society.

- [19] A conviction of murder with or without direct intent is of no small measure it is a serious offence in our society. Gender Based Violence is of great concern in our society and the courts are expected to play a part to curb it by imposing stiffer sentences.
- [20] Although the convicted person was found guilty of murder with *dolus directus*, he gruesomely stabbed to death mindlessly an unarmed woman partner who was trying to escape his confrontation at the house. He persued her until she slipped and fell thereby stabbing her. The fight that ensued was not one that the deceased was reiterating to harm him but she was fighting for her life in order to repeal him. The convicted person in his recklessness, repeatedly stabbed her and the stab wounds were on the head, all over the body.
- [21] In sentencing the court should take into account public revulsion that surrounds the many gruesome cases of murder of women that have reached the court in recent times. The courts have and should in turn imposed hush sentences to deter would be offenders.
- [22] In that regard the convicted person is sentenced on the crime of murder with extenuating circumstances to eighteen (18) years imprisonment. The period spent in custody pre-trial and during trial must be take into account when computing the sentence.



S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Prosecution: Mr C.Ngwenya – DPP's Chambers

For the Accused: Manica Attorneys.