IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO. 8/2008

In the matter between:

LUCKY SICELO NDLANGAMANDLA AND TWO OTHERS

VERSUS

REX

CORAM: TEBBUTT, JA

ZIETSMAN, JA

ANNANDALE, AJA

APPELLANTS: ALL THREE IN PERSON

FOR RESPONDENT: MR. T. MASINA

JUDGMENT

22nd MAY 2008

ANNANDALE AJA

[1] On the 1st April 2005 the three appellants and the deceased were drinking at a homestead in Zombodze. As often happens during such drinking sessions, an argument ensued but as also happens, they settled the quarrel and quaffed some more liquor in celebration of their newly restored peace.

[2] However, this peace was short-lived. The three appellants left the homestead and were soon thereafter followed by the deceased, one Mathunjwa, and two of his friends. As the latter trio walked along, they were ambushed by the three appellants, who were armed with sticks and a knobkerrie. The deceased all along had a slasher in his possession. When the three armed ambushers pounced upon them, the two friends of the deceased ran off, leaving him to fend for himself. It remains unknown to what extent he might have used his slasher in defence but he lost the fight by a long margin. He was killed.

[3] The three appellants were particularly vicious in their attack. According to the pathologist who conducted a *post mortem* examination of the deceased, Dr. Reddy, there were numerous different injuries to be noted, all sustained before the victim succumbed.

[4] There were three open wounds on his face, together with a contusion. Further contusions were present on his shoulder, two more on his chest, a further two more on his lower abdomen, two more contusions on a fore arm, three more on the other side of that arm, and an abrasion on one hand. Further contusions were noted on the other hand, the left thigh, three more on an upper leg and a final contusion around the left eye. In all, some twenty-five different external injuries were sustained, as well as haemorrhage of the brain. Death was as a result of the multiple

injuries, which were inflected by the trio of appellants in the course of their attack upon the deceased.

[5] All of this is common cause in the matter and which was confirmed by the appellants in a written statement of agreed facts which was accepted by the prosecution at their trial in the High Court. They each pleaded guilty to the crime of culpable homicide, avoiding the potential risk of being convicted of murder.

[6] The trial court was alive to this scenario when each of the appellants were sentenced to imprisonment of ten years, which was further ordered to be backdated to the 2nd April 2005, the date when two of the three were arrested. The learned Chief Justice imposed the sentences with further regard to the individual personal circumstances of each of the men who appeared before him, which was put forth on their behalf by *pro deo* counsel.

[7] The first appellant, late in the twenties, has four children, is a self employed breadwinner and a brother of the third appellant, who is also a single man, with one child. At the time of the incident, he was a young man of only nineteen years of age and still school going. The second appellant was then eighteen years old and also school going.

[8] It was submitted by their counsel that all three demonstrated remorse, (by implication) through their pleas of guilty and that it saved the Court of valuable time in order to evaluate their guilt in the event that the matter had to go on trial.

[9] However, saving of Court time does not equate to automatically being elevated to a level that by necessity has to result in a diminishment of sentence *per se.* What has occurred is that by pleading guilty to the lesser crime of culpable homicide and not disputing the material facts as outlined above, each of the accused persons who were arraigned in the High Court avoided the agony of recounting the tragic events by prosecution witnesses. It also avoided a potential protracted trial which would have kept the family of the deceased in prolonged suspension. Apart from being a demonstrated sign of remorse, it further advanced their cause by being exempted from more severe punishment that would have followed a potential conviction of murder, which crime they originally were indicted with. It also enabled the court to deal with other matters that otherwise would have had to await enrolment in due course. Nevertheless, a remorseful accused person, especially when guilt is readily admitted, will invariably be sentenced with a greater degree of leniency than otherwise.

[10] That the eventual sentences which were meted out were on a par with each other is also not criticise able. The individual personal circumstances of each did not suffice to differentiate between the three individuals to the extent that their equal sentences could be faulted. The previous convictions of serious assault by the second and third appellants were not coupled with suspensive conditions and furthermore, the previous sentences did not justify an inference that they were more than isolated incidents, not an established pattern of ongoing violent behaviour. This was also considered by the Court *a quo* when it imposed the sentences, further considering that the relatives of the deceased were assisted in the financial burden of his funeral by the father of two of the convicted persons.

[11] The appellants came before this Court on appeal against their sentences only. They submitted that they were drunk at the time of the incident, that the deceased provoked their attack upon him through his pugnacious behaviour and that they therefore deserved at least a portion of their sentences to be suspended. In addition, the third appellant pleads to be HIV positive and that he would therefore be better off if released to be at home.

[12] All of this was known to the learned Chief Justice when he imposed custodial sentences of ten years for each of the three appellants. This court would only consider to interfering with the sentences in the event that a misdirection by the Court *a quo* was made in that regard, or if it imposed sentences which were shockingly disproportionate with the crime, startlingly different from that which this court would have imposed, had it been in the position of the trial court. This is not so.

[13] Had this court been in the position to initially impose appropriate sentences, it would also have been alive to the often cited *dictum* of Holmes JA in S V Rabie 1975 (4) SA 855 (A) at 862 G when he held 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*".

That a judge should refrain from punishing in severity and in a spirit of anger, akin to what a lawless society would mete out in mob justice in the absence of a respected criminal justice system, the *caveat* of Van der Linden's supplement to the Commentary on the *Pandectae* by Johannes Voet at

5.1.57 remains appropriate in this day and age. He said about

sentencing judges that:

> "*Nor should he strive for severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality*".

The sentences of the appellants before us do not reflect anything otherwise than an adherence to this.

[14] In my respectful view, the imposition of individualized sentences by the courts of law, which take into account the severity of the offence, the personal circumstances of the offender and the seriousness of the crime, blended with mercy, remain a cornerstone of our criminal justice system, intertwined with independence of the judiciary, to exercise meaningful consideration of appropriate sentencing.

[15] A judiciary which is haltered by legislation that predetermines sentences, removing the discretion of judges to impose sentences through consideration of appropriate factors which are by necessity to be borne in mind, such as the so called "triad", will inevitably result in a loss of confidence in the criminal justice system and lead to "*Mbayiyanism*" or mob justice in our society. Ultimately, the discretion to mete out appropriate punishment is to remain within the realm of trial courts, steeped in the atmosphere of a trial or during curtailed proceedings such as the present which followed upon pleas of guilty. The public must remain assured that adequate measures have been taken to protect them from serious offenders while at the same time, proportionate punishment is meted out which does take into

account all prevailing circumstances. Should it be necessary, the established procedures of appeal and review remain as measures of safety to correct improper sentences.

[16] It is in this sense that the sentences imposed by the court *a quo* cannot be faulted. Though brief reference might have been made to the prevailing personal circumstances of each of the appellants, the learned Chief Justice, respectfully, did not err, in my view, to have visited the wrongs of the perpetrators of this most vicious crime in the manner he did.

[17] The sentences do not induce any sense of shock and he did not misdirect himself either, especially so when regard is given to his reasons for sentence. Unlike the submissions made before us, it would not have been appropriate to suspend the sentences, or portions of it, whereby the inevitable result would be that the appellants are sooner to be released back into the society from where they come.

[18] In addition, the contention by the third appellant that his HIV positive status should allow him to now be released does not hold water either. It is accepted as a given fact that the Correctional Services Department is obliged to provide him with the necessary antiretroviral medication, as well as an appropriate diet. Furthermore, his healthcare has become the inevitable responsibility of the detaining authorities, which in turn must result in strict observance of his medicative regimen, conceivably placing him in a better position to survive his ailment than what an unemployed and survive his ailment than what an unemployed and unqualified ordinary citizen would otherwise be in. He has not demonstrated to this court that he stands to be worse off health wise, under the hands of his institution, in comparison to being released back home.

[20] In view of the aforegoing, the appeals of all three appellants against their sentences stand to be dismissed, and it is so ordered.

Jacobus P. Annandale
Acting Judge of Appeal

I agree

P.H. TEBBUTT
Judge of Appeal

I agree

N.W. ZIETSMAN
Judge of Appeal

Handed down in open court at Mbabane on this the 22nd day of May 2008.