



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 28/2010

CITATION: [2010] SZSC

11

In the matter between:

MUSA KHOTSO DLAMINI

APPELLANT

and

REX

RESPONDENT

CORAM

: J.G. FOXCROFT J.A.
A.M. EBRAHIM J.A.
DR. S. TWUM J.A.

FOR THE APPELLANT

: IN PERSON

FOR THE RESPONDENT

: MR. MDUDUZI MATHUNJWA

HEARD

: 3 NOVEMBER 2010

SUMMARY

*Criminal Law - Murder. Sentenced to eighteen years imprisonment - No misdirection by the learned Judge **a quo** - Sentence held not to be excessive.*

JUDGMENT

Ebrahim J.A.

The appellant was convicted in the High Court of Murder and sentenced to eighteen years imprisonment. His sentence was backdated to 31st July 2006.

The appellant was to be tried with a co-accused but at his trial the prosecution withdrew the charges against his co-accused and called him as a state witness. In addition to the charge of Murder the appellant was also charged with two additional counts, namely, a contravention of section 11 (2) of the Arms and Ammunition Act No. 24/1964, that is, for being in unlawful possession of 8 rounds of ammunition and on the third count for contravening section 7 of the Opium Habit Forming Drug Act No. 37/1922. These charges were

also withdrawn by the Crown at the commencement of the trial.

The appeal is directed only to sentence.

The brief facts in this matter are that the appellant having secured possession of a pistol proceeded with his co-accused (the accomplice witness) to where the deceased resided. On arrival there a fracas took place between the deceased and the appellant, and the accomplice witness. Whilst the deceased was embroiled in a struggle with the accomplice the appellant fired two shots at close range, from the pistol he was carrying. This resulted in the following injuries being sustained by the deceased as reflected in the Pathologist's report.

"The following antemortem injuries seen:

- 1. Entry wound 0.5 cm below left ear with exit wound on right side neck irregular 2.1 cm present, track**

involved muscles, vertebral body surface, blood vessel effusion blood in soft tissues, left to right direction.

- 2. Entry wound 1.9 cm over right side chest below outer end of clavicle track involved muscles, shoulder joint structures, entered the right arm bullet embedded in soft tissues effusion blood in soft tissues present above down wards laterally.”**

The deceased's death was “due to multiple firearm injuries involved (sic) right shoulder joint and neck structures”.

The appellant has appealed against the sentence imposed on him only. He submits that a period of nine years of his sentence be suspended. I cannot agree.

“The determination of an appropriate sentence lies within the discretion of the trial court. A court of appeal will only interfere if the sentence imposed by the trial court is

substantially different from the sentence it would have imposed, or if the trial court has misdirected itself or has imposed an improper sentence” as per ZIETSMAN JA in *Zwelithini Dlamini v Rex Criminal Appeal no. 5/08*.

In the case of *Musa Bhondi Nkambule v Rex Criminal Appeal no. 6/09 RAMODIBEDI, ACJ* (as he then was) stated:

“In several of its decisions this Court has upheld the principle that the imposition of sentence is a matter which primarily lies within the discretion of the trial court. An appellate court will not generally interfere with such a sentence unless there is a material misdirection resulting in a miscarriage of justice. Put differently, an appellate court will not interfere unless the sentence is so grossly harsh or excessive as to warrant interference in the interests of justice. See, for example, such cases as **Vusi Muzi Lukhele and Another v Rex Criminal Appeal No. 23/04; Benjamin B. Mhlanga v Rex Criminal Appeal No. 12/07; Sifiso Zwane v Rex Crim. Appeal No.**

5/08; Vusi Madzalule Masilela v Rex Criminal Appeal No. 14/08; Bheki Goodwill Gina v Rex Criminal Appeal No. 2/09.

See also Musa Kenneth Nzima v Rex Criminal Appeal No. 21/07.

I also have regard to what was said by 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”.

Also pertinent is the caveat of Van der Linden’s supplement to the commentary on the *Pandectae* by Johannes Voet at 5.1.57 where he said about sentencing by 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 sentence imposed on the appellant before us does not reflect anything to the contrary to the principles I have outlined supra.

The deceased was shot at close range with a pistol, with an inherently dangerous weapon, particularly when fired as it was at close range. The deceased was shot in the vicinity of the neck and the chest. The appellant would not have been in any doubt what the end result of his conduct would be. It is also apparent that the appellant had only recently been released from prison and that prior to proceeding to the deceased's homestead he had armed himself with a pistol and indicated to his accomplice that he wanted to get a DVD player from the deceased. There seem little doubt that the appellant went to the deceased's homestead intent on robbery.

It is my view that the sentence imposed does not induce a sentence of shock and cannot be said to be manifestly excessive.

In the result the appeal is dismissed.

A.M. EBRAHIM JA
JUSTICE OF APPEAL

I agree

J.G. FOXCROFT JA
JUSTICE OF APPEAL

I agree

DR. S. TWUM JA
JUSTICE OF APPEAL

Delivered this 30th day of November 2010