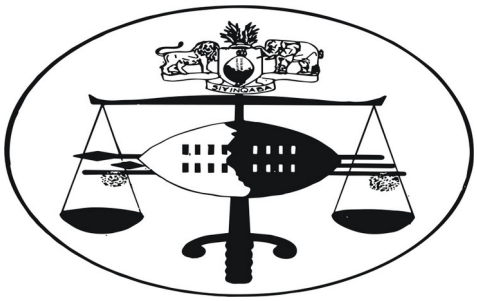

IN THE SUPREME COURT OF SWAZILAND

CRIMINAL APPEAL NO.17/2010

CITATION: [2010] SZSC 15

HELD AT MBABANE

In the matter between:

BHEKUMUSA MAPHOLOBA MAMBA APPELLANT

AND

REX RESPONDENT

CORAM : RAMODIBEDI, CJ
EBRAHIM, JA
DR. TWUM, JA

HEARD : 2 NOVEMBER 2010

DELIVERED : 30 NOVEMBER 2010

SUMMARY

Criminal law – Murder – Extenuating circumstances – Principles involved – Appeal against court a quo's finding that no extenuating circumstances existed – Appeal upheld and sentence of 25 years imprisonment reduced to 18 years.

JUDGMENT

RAMODIBEDI, CJ

[1] The appellant in this matter was convicted by the High Court on two counts comprising (1) murder and (2) housebreaking with intent to steal and theft respectively. On count 1 he was convicted of the murder of his girlfriend Nelisiwe Fakudze ("the deceased") on the allegation that upon or about 13 August 2005 and at or near Sigcaweni area in the Lubombo region he did unlawfully and intentionally kill the deceased with a bushknife. No extenuating circumstances were found to exist. Relying on section 15(c) of the Constitution to the effect that the death penalty shall not be mandatory, the Court *a quo* sentenced the appellant to 25 years imprisonment.

[2] On count 2 the appellant was convicted of housebreaking with intent to steal and theft as charged.

It was alleged that upon or about 26 July 2005 and at or near Sigcaweni area in the Lubombo region the appellant did wrongfully and with intent to steal break and enter the house of one Doris Dlamini and did unlawfully steal her bed valued at E600.00.

[3] This appeal challenges the correctness of the court *a quo*'s decision that no extenuating circumstances exist in the matter. The sentence imposed on the appellant is also challenged on the ground that not only is it excessive but also that it induces a sense of shock in the particular circumstances of the case. In order to do justice to these issues it is necessary to refer briefly to the relevant facts.

[4] The appellant and the deceased had been lovers for a period of two years since 2003. The prosecution relied mainly on the evidence of two eyewitnesses, namely, Sibongile Eunice Fakudze (PW1) and Lundi Fakudze (PW2). It was their evidence that on the fateful day in question they went to the river to wash clothes. They were later joined by the deceased who also washed her clothes. Thereafter, the appellant arrived. He requested the deceased to accompany him to a soccer match but she refused. After nagging her for a while in

vain he then hit the deceased with a bushknife on the back of the neck. Thereafter, he ran away. The deceased died on the spot. The post-mortem report revealed that death was “due to cut injury to neck on back involved vertebra, spinal cord”.

[5] The appellant testified on his own behalf to the following effect: - He is illiterate. The deceased was his girlfriend from 2003 until her death on 13 August 2005. On that fateful day he left home where he had been building a house. He proceeded to the river looking for some logs for the house he was building. It was there that he found the deceased washing her clothes. Crucially, he greeted her, an indication suggesting, in my view, that he was not in a fighting mood. He then requested her to accompany him to a soccer match. At that stage she told him that she was ending their relationship. Furthermore, she said that she had aborted his child because he could not afford to maintain it since he was not working. The appellant testified that he became angry. As a result he hit the deceased with the bushknife he was carrying to cut the logs.

[6] As can be seen from his evidence, the appellant did not deny that he killed the deceased. In fact he tendered a plea of guilty to culpable homicide. The plea was, however, rejected by the Crown which went on to prove murder beyond reasonable doubt. As indicated earlier, the primary issue for determination is whether the court *a quo* was correct in finding that no extenuating circumstances existed in the matter.

[7] A *locus classicus* exposition of extenuating circumstances was in my view made by Holmes JA in **S v Letsolo 1970 (3) 476 (A)** at page 476, in the following terms:-

> *"Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a 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.

In deciding (c) the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."

See also **Benjamin B. Mhlanga v Rex, Criminal Appeal No.12/07.**

[8] In coming to the conclusion that extenuating circumstances did not exist in the matter the trial court started from the wrong premise in the first place. It wrongly regarded the deceased's killing as a revenge on the appellant's part for the fact that the deceased had jilted him. According to the court the appellant had a "grudge" against the deceased. In this regard the court said the following:-

> *"[38] The big cut on the neck shows that the single blow of the bushknife was great, since the vertebra and spinal cord were cut; and the deceased died instantly. The only reasonable inference that could be drawn is that the accused had a grudge against the deceased for ending the relationship and he wanted to revenge."*

[9] In my view it does not necessarily follow that simply because the deceased sustained serious fatal injuries the only reasonable inference to be drawn is that the appellant had a grudge against the deceased for ending the love affair between the two of them and that he wanted to revenge. Such a finding is not supported by the facts. In any event it overlooks the Crown's own evidence that apart from greeting the deceased as indicated earlier, the appellant was in a good mood. In this regard the record of proceedings reveals the following at pages 40–41:-

> *"CC: Go back. Can you tell this court as to how was the mood of the accused person when he came and found you doing the washing there as you said you know him?*

PW1: He was in a good mood."

[10] Mr. Gama for the appellant has consequently submitted that something must have happened which suddenly triggered the appellant to assault the deceased. I see much force in that submission. In my view, the appellant's explanation may reasonably possibly be true that he was provoked by the deceased's remarks to the effect that she had aborted his child since he could not afford to maintain it because he was unemployed. Crucially, no credibility findings were made against the appellant. The two Crown eyewitnesses on the other hand could only say that they did not hear the deceased's remarks. This, in my view, is a far cry from categorically stating that the remarks were not made at all, bearing in mind also that both witnesses admitted that they were behind the two lovers when the remarks were allegedly made. Indeed PW2 readily conceded under cross-examination that she "could not hear everything" that the two lovers talked about.

[11] It is important to observe that in several passages in its judgment the trial court found that there was provocation in the sense that "the abortion was a

wrongful act but which could not deprive a reasonable man the power of self-control and induce him to assault the deceased". The court concluded that "the provocation was not commensurate with the violence following it". So far so good insofar as conviction is concerned.

[12] The correct test insofar as extenuating circumstances are concerned is not whether or not the provocation is commensurate with the resultant violence. The real question is whether the provocation had a bearing on the appellant's state of mind, subjectively speaking, in doing what he did and whether such provocation reduced his moral blameworthiness as opposed to his culpability. This involves a moral judgment. Viewed in this way, I have come to the inescapable conclusion that the trial court adopted a wrong approach and thus misdirected itself in finding that provocation did not constitute an extenuating circumstance in the matter. Indeed it is important to recall the following salutary remarks of Schreiner JA in the celebrated case of **Rex v Fundakubi 1948 (3) SA 810 (A)** at 818:-

"But it is at least clear that 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."

[13] It is further of crucial importance to a determination of extenuating circumstances that the court *a quo* found that this was a case of *dolus eventualis* as opposed to *dolus directus*. Now, a finding of *dolus eventualis* as opposed to *dolus directus* may, in a proper case, constitute an extenuating circumstance. *In casu*, I consider that *dolus eventualis* coupled with provocation constitute extenuating circumstances.

[14] Furthermore, the appellant was not challenged in his evidence that he had no knowledge that the deceased was washing clothes at the river on the fateful day in question. He simply proceeded to the place to cut logs. The Crown witnesses confirmed that he did cut logs before assaulting the deceased. It follows that there was no premeditation.

[15] Now it well-settled that the absence of premeditation, depending on the circumstances of each case, may constitute an extenuating circumstance.

[16] All things being considered, I am satisfied that extenuating circumstances existed in the matter by virtue of a cumulative effect of provocation, *dolus eventualis* and lack of premeditation. Accordingly, the verdict should, in my view, be altered to one of guilty of murder with extenuating circumstances.

[17] Although sentence is pre-eminently a matter which lies within the discretion of the trial court, I am satisfied that this court is at large to consider the matter afresh. Logically, a finding that extenuating circumstances exist in this matter entitles the Court to reduce the sentence.

[18] In considering an appropriate sentence it is always necessary to have regard to the triad consisting of the offence, the offender and the interests of society. With regard to the former the Court must bear in mind that this is a very serious offence indeed. It calls for an appropriately severe sentence as a deterrent. As was

cautioned by Corbett JA (as he then was), however, in **S v Rabie 1975 (4) SA 855 (A)** at 866, one must be careful not to approach the question of sentence in a spirit of anger. The reason for this, as succinctly illustrated by the learned Judge, is that such an approach can only deter one from keeping the delicate balance between the triad consisting of the crime, the offender and the interests of society.

[19] In sentencing the appellant to 25 years the trial court made the following remarks in paragraph [53] of its judgment:-

> *"There is a sudden increase in this country in the killing of women by their spouses and fiancées at a rapid rate; and, this Court cannot ignore such a pain-chilling development."*

It is common cause, however, that the appellant was neither a spouse nor a fiancee to the deceased. They were simply just ordinary lovers. It follows that these remarks by the trial court amount to a misdirection, a point which was fairly and properly conceded by Mr. Makhanya for the Crown.

[20] Doing the best I can in keeping a balance between the offence, the offender and the interests of society, I consider that a sentence of 18 years imprisonment is appropriate in the circumstances of the case.

[21] In the result the appeal is upheld and the following order is made:-

(1) The verdict of the trial court to the effect that there are no extenuating circumstances in the matter is altered to read:-

> "Guilty of murder with extenuating circumstances."

(2) The sentence of 25 years imprisonment recorded by the trial court is set aside and replaced with a sentence of 18 years imprisonment.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I AGREE : _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE : _____

DR. S. TWUM

JUSTICE OF APPEAL

FOR APPELLANT : MR. L. GAMA

FOR RESPONDENT: MR. A. MAKHANYA