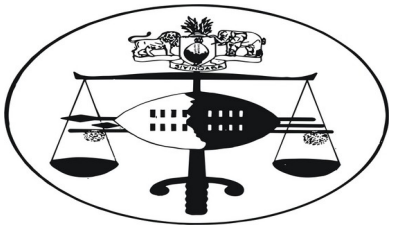

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CRIM. APPEAL CASE NO: 5/10**
CITATION: [2010] SZSC 19

In the matter between:

GERALD MVEMVE VALTHOF **APPELLANT**

AND

THE KING **RESPONDENT**

CORAM: **FOXCROFT, JA**
TWUM, JA
FARLAM, JA

FOR THE APPELLANT **B.S. DLAMINI**
FOR THE RESPONDENT **P. DLAMINI**

Summary

Criminal Law – Murder and attempted murder - Murder – presence or otherwise of extenuating circumstances – Section 15 (2) of the Constitution 2005 – sentences by court a quo disturbingly inappropriate. – Setting aside – substituted sentences by Court of Appeal – backdating of sentences. Section 16 (9) of Constitution.

JUDGMENT

DR. S. TWUM J.A.

Introduction

[1] This is an appeal against the judgment of the High Court, Mbabane, presided over by M.C.B. Maphalala, J delivered on 9th February, 2010. It convicted the appellant of two counts of murder and one count of attempted murder. The appellant was then sentenced to 20 years imprisonment on each of the two counts of murder and to a further term of 10 years imprisonment for the offence of attempted murder. The sentences for the murder charges were ordered to run consecutively with each other and the third sentence of 10 years was ordered to run concurrently with the sentences for murder. The court a quo took into consideration the appellant's lawful pre-trial incarceration and ordered that the sentences should commence on the date of the appellant's arrest; i.e. 27th December, 2004

The Facts

[2] The facts leading to the above convictions and sentences were that the appellant and one Sihle Zandile Shabangu, who testified during the trial as PW3, had been lovers for a "long time". During this period they had two children. The elder child was called Nondumiso and the younger one was called Nellie. It is common cause that these lovers lived together but their relationship soured. PW3 claimed that the appellant was abusive and sometimes assaulted her. Consequently she left the appellant and was living apart in rented accommodation not too far away from where the appellant lived.

[3] On 25th December 2004, the children were living with their mother, PW3. They were in her legal custody and control. At about 6 pm on Christmas day the appellant called on PW3 and asked her to allow him

to take the children away to spend Christmas with him. She agreed and the appellant took them away. It was part of PW3's testimony before the court a quo that while the appellant and his children were leaving PW3's residence, the appellant asked the elder child to go back to her mother and tell her the appellant says that would be the last time she would see her children. PW3 said she was alarmed by that message but her fears were allayed by her brother-in-law who assured her that the children would come to no harm as the appellant was their father. Consequently PW3 did not intervene and the appellant went away with the children.

[4] PW3 further testified that the appellant returned to her premises at about 11 pm that day. PW3 was in her room and the appellant was outside. PW3 said the appellant shouted to her that he was setting her room on fire and that when she died he would commit suicide. PW3 said she sniffed petrol. When she opened her door she realised that indeed a fire

had been lit in front of her room. She said she also noticed the appellant carrying a beer bottle in his hand as well as a container which she suspected contained petrol the appellant had used in starting the fire. PW3 said with the help of others who were then in the house the fire was put out and only a few clothes got burnt.

[5] Not long after the fire had been put out, the appellant's brother called on PW3 and informed her that the children had been taken to hospital. He added that indeed, one had died and was in the mortuary. He said the other one was critically ill. She was invited to go to the hospital with him to see the children but she declined to go with him, explaining that she did not know where the appellant was and she feared he might try to kill her too.

[6] The next morning PW3 claimed that a police officer went to confirm to her that her children were in hospital. Later she found her children at the

Nhlangano Hospital. Nellie, the younger of the two, then aged 2 years had died and the older one, aged 7 years, was alive but very unwell. This child complained of serious stomach pains and PW3 stayed in the hospital for about a week to nurse her until she was discharged. Three days after her discharge, she was taken ill again, vomiting and excreting a black substance. She was admitted at Hlatikulu Hospital but she died a month later. The record shows that the younger child who died on 25th December had extensive burns on her head, face, front portion of the trunk, on the back and front portion of both the upper limbs. The elder girl claimed that the appellant forced them to drink acid. According to the medical report on her, she suffered from upper gastro intestinal inflammation and ulceration which could have been caused by the acid.

[7] The appellant was arrested and charged with 3 counts; namely, the murder of his two children, Nondumiso and Nellie, respectively, and one count of

attempted murder of Sihle Zandile Shabangu, PW3. He made a statement before a Judicial Officer admitting the offences and after a mini-trial, it was admitted in evidence as having been made by him freely and voluntarily. In it the appellant admitted killing his two children.

[8] The appellant's defence during the trial was that he had left a bottle (originally intended to contain soft drink) but which contained battery acid on his table. He suggested that this acid may have been drunk by the children. A car battery was retrieved by the police from his room. With regard to the burns sustained by the younger child he testified that he had left a candle burning in his room and this may have caused the fire in the room and burnt the younger child. He also denied sending the elder child to go back to her mother to tell her that her father says that would be the last time she would see the children.

[9] In all the Prosecution called 8 witnesses. The appellant called 2 witnesses in addition to himself.

[10] After a very careful evaluation of the totality of the evidence the court a quo found the appellant guilty of all the three offences with which he had been charged. Counsel for the appellant addressed the court on the presence of extenuating circumstances but this was rejected by the court and the appellant was convicted without extenuating circumstances primarily for the reason that no evidence was led by the defence to prove the existence of extenuating circumstances. In mitigation of sentence, counsel prayed the court to be lenient to the appellant who was remorseful of what he had done. Counsel further urged the court to treat the three counts as one for the purpose of sentencing. In response, Crown Counsel submitted that there were no mitigating circumstances and that the offences were premeditated.

[11] Now under Section 15 (2) of the Constitution “the death penalty shall not be mandatory.” Consequently, even though the court a quo did not find the presence of any extenuating circumstances, it was lawful for it to consider other forms of punishment. The court decided to impose custodial sentences on the appellant. It accepted that the offences were premeditated. It also opined that they were very serious. The court then sentenced the appellant to 20 years imprisonment on the first count and another 20 years imprisonment on the second count. These were ordered to run consecutively. The appellant was sentenced to 10 years imprisonment on the third count. This was to run concurrently with the sentences on the first and second counts. Finally the court ordered the sentences to commence on the date of arrest; 27th December 2004.

The Appeal

[12] On or about 16th February 2010 the appellant filed a Notice of Appeal against his conviction and sentence. However, on the 1st March 2010 he filed what purports to be a fresh "Notice of Appeal" in which he "accepted his conviction on both counts but only appealed against "the harshness and severity" of his two 20-year sentences. His main grounds for the appeal were stated to be that the "two 20-years sentences were too harsh and severe" for him to bear, considering that he was a first offender and still traumatised by killing my two children unintentionally."

The appellant's Attorney Mr. B.S. Dlamini filed the "Appellant's Heads of Argument" on 15th October 2010. However, at the hearing of the appeal the appellant appeared in person and informed this Court that he was not appealing against his conviction. He rather prayed for a reduction in his sentences considering that the effective sentence of 40 years imprisonment was very long and harsh!

[13] In response Mr. Dlamini, Prosecuting Counsel, submitted that the sentences were not unduly severe or disturbingly inappropriate. He said the court a quo exercised its discretion judicially, having regard to all the circumstances of the killings.

[14] Before I consider whether this Court may lawfully interfere with the sentences meted to the appellant, it behoves me to comment briefly on the offences and the inconsiderate choice of date for their commission. Christmas, though a Christian festive occasion is mostly for children who generally expect presents from their parents. So how could any father choose Christmas day to snuff out the lives of his own children on the palpably absurd excuse that he thought their mother was having an affair with another man? And even assuming that his suspicions were well-founded, why does he visit the iniquities of their mother on those innocent souls? I am gravely appalled by the levity and frivolity with which the

appellant committed those unpardonable dastardly acts. This type of homicide must evoke a justifiable feeling of society's anguish and disapprobation.

[15] Not unnaturally, the crimes committed by the appellant call for severe sentences to act as deterrence for others who may be minded to commit similar crimes. But the criminal jurisprudence of this Kingdom, like in some other nations, requires that courts ought in appropriate cases to temper the severity of sentences they would otherwise impose, in order to take account of human frailties. The oft-quoted dictum of **Holmes J.A**. in the case of **S v. Rabie (1975) (4) S.A. 855 (A)** is apposite here – "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." Further, as **Corbett J.A**. warned in the above case, a judicial officer should not approach a punishment in a spirit of anger, "nor should he strive after severity; nor on the one hand, surrender to misplaced pity.

While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality."

[16] After a very careful and anxious consideration of the case in hand and guided by the authorities I have cited above, I am persuaded that the effective sentence of 40 years passed on the appellant by the court a quo was disturbingly inappropriate and ought to be reduced. I therefore set aside the entire sentences passed on the appellant by the court a quo and substitute the following:

Count 1 – Guilty of murder – 25 years imprisonment

Count 2 - Guilty of murder – 25 years imprisonment

Count 3 - Guilty of attempted murder– 10 years imprisonment

I further order that all these sentences should run concurrently with one another. This produces an effective total sentence of 25 years. This is sufficiently severe but not inhuman.

The period between 27th December 2004 when the appellant was taken into lawful pre-trial incarceration and 9th February 2010 when he was sentenced by the court a quo should be deducted from the sentence of 25 years imprisonment.

DELIVERED IN OPEN COURT AT MBABANE THIS 30th DAY OF NOVEMBER 2010.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree:

_____
J.G. FOXCROFT
JUSTICE OF APPEAL

I agree:

I.G. FARLAM
JUSTICE OF APPEAL