IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 29/2011

In the matter between:

MBABANE J. TSABEDZE	**1st Appellant**
SANDILE W. DLAMINI	**2nd Appellant**

v

REX	**Respondent**

Neutral citation:	Mbabane J. Tsabedze, Sandile W. Dlamini v Rex (29/2011) [2011] SZSC 12 (31 May 2012)
Coram:	MOORE J.A., TWUM J.A., and AGIM J.A.
Heard:	0**9 MAY 2012**
Delivered:	**31 MAY 2012**

Summary: **Murder - First appellant sentenced to 15 years imprisonment - Second appellant sentenced to 8 years imprisonment - Both first appellant and second appellant equally responsible for death of deceased - Disparity of sentences - Sentence of 15 years reduced to 11 years imprisonment - Increase of sentence - Principles explained - To be ordered sparingly and only if such an order does not adversely affect the fairness of the hearing of the appeal - Sentence - Mature age may be taken into account in mitigation of sentence.**

MOORE J.A.

INTRODUCTION

[1] The first appellant hereinafter Tsabedze, was convicted for these offences:

Count 1: Murder

Count 2: Assault with the intention of causing grievous bodily harm

[2] He was sentenced by M.C.B. Maphalala J to fifteen years imprisonment in respect of the first count, and three years imprisonment for the second count. The learned judge ordered that "both sentences will run concurrently". The beneficence of the trial

judge notwithstanding, through some miscommunication or error, Tsabedze wrote:

> "I hereby humbly appeal for the concurrence of my 8 - year sentence and my 7 - year sentence that were imposed upon me … for a murder offence and attempted murder offence respectively".

[3] It would appear that Tsabedze was labouring under the misapprehension that the sentence of fifteen years imprisonment in respect of the murder count was a composite of two separate consecutive sentences of eight years and seven years imprisonment respectively. This is simply not the case. This court therefore gave leave to the unrepresented Tsabedze to amend his Notice of Appeal to reflect an appeal against the concurrent sentences of fifteen years and three years imprisonment imposed by the trial judge. The sole ground emerging from Tsabedze's "Application for Appeal" is that the sentences are harsh and unduly severe. That ground was amplified in his written heads of argument which he presented at the hearing. He urged this court to consider that:

i. He pleaded guilty on both counts.

ii. The offences were not premeditated.

iii. He was sincerely remorseful for having committed the offences,

iv. He surrendered himself and cooperated fully with the police during the investigation into the matter.

v. He was provoked.

vi. He was offended.

vii. He was threatened.

viii. He was attacked.

ix. A long term of imprisonment would have an adverse effect upon his dependent family.

[4] The second appellant, hereinafter Dlamini, appealed against both the conviction and sentence of 8 years imprisonment imposed upon him on his charge for murder. His grounds of appeal on his conviction are:

i. He was erroneously, wrongly and unlawfully convicted and sentenced.

ii. He pleaded not guilty to the charge of murder because he had not committed that offence.

iii. He did not participate in the killing of the deceased.

iv. The deceased had a dispute with Tsabedze and not with him. He therefore had no reason to kill the deceased.

v. The deceased was killed by Tsabedze who admitted to the killing and took full responsibility for it.

vi. Tsabedze also made it clear that he, Dlamini, was not involved in the killing.

vii. There was no evidence of any prior agreement or antecedent plan to kill the deceased.

viii. The principle of common purpose did not apply in his case. The court *a quo* was therefore in error in convicting him on that basis.

ix. His mere presence at the scene of the murder was insufficient to render him liable for that offence.

[5] Dlamini's grounds of appeal against sentence are that:

i. His sentence of 8 years imprisonment was unduly severe.
ii. He was young at the time when the murder took place.

iii. Because of his immaturity, he did not betake himself timeously from the scene of the dispute between Tsabedze and the deceased before their altercation degenerated into violence involving the death of the deceased.

iv. He had remained on the scene out of concern for the welfare of Tsabedze who was his elder.

THE EVIDENCE

[6] The judgment of M.C.B. Maphalala J contains a careful and detailed account of the evidence presented before him by the prosecution and for the appellants. It is not necessary to reproduce all of it here. Suffice it to say that it fully justifies the finding of the trial judge that the offence of murder was fully proved against both appellants, and that the conviction and sentence of Tsabedze for the offence of assault causing grievous bodily harm cannot be faulted. Nor can his sentence.

[7] The kernel of the evidence relating to Dlamini who appealed against both conviction and sentence is succinctly set out in paragraphs [27] *et seq* of the judgment of the court *a quo* which reads:

"The second accused denies participating in the commission of the offence and states that he was a mere spectator. I have been referred to the case of **R v Sifundza** 1970 1976 SLR 394 at 395 where his Lordship Nathan CJ stated the following:

> 'It is clear law that the onus of negativing self-defence rests upon the Crown … a person is entitled to apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack. The test whether he has acted reasonably is objective. But the Court does not measure this with precision: it looks at the circumstances as a whole',

I am in full agreement with this statement of the law by His Lordship. However, the evidence of PW2, PW3, PW4 and PW5 shows that the first accused did not act in self-defence as alleged; furthermore, the second accused was not a spectator but participated in the commission of the offence. The evidence of the above crown witnesses shows that the first accused, after his encounter with the deceased at the Ndlovu homestead, formed an intention to kill the deceased. I accept the evidence of PW3 that the first accused came to her homestead looking for the deceased and threatening to kill him; that he walked on the path leading to the main road hoping to

meet the deceased. The evidence of PW4 that he saw the first accused walking across the river is corroborative in this respect.

The conduct of the first accused when he met PW3 on the scene telling him not to come closer to him lest he shoot him shows the requisite intention that he intended to kill the deceased; such conduct cannot be reconciled with his assertion that he wanted to settle the dispute he had with the deceased amicably through the intervention of PW3. It cannot be true therefore that when PW3 approached the first accused to talk to him he was attacking him.

I further accept the evidence of the Crown that PW3 and PW4 arrived at the scene and found the second accused waiting for the first accused who was walking in the path from the deceased's home; and that the deceased arrived shortly thereafter. I accept the evidence of PW3 and PW4 that the second accused hit the deceased with the back of the shotgun and he fell; that when the first accused drew a knife, PW3 retreated and PW4 was stabbed. The first accused proceeded to stab the deceased who was then lying on the ground. I reject the evidence of the first accused that he was grabbed by the deceased and not PW3.

The evidence of PW1 corroborates that of PW3, PW4 and PW5 that the deceased sustained an injury caused by a blunt object in

addition to the stab wounds. The stab wounds on the deceased are inconsistent with the evidence of the first accused that he used the knife to ward off his attackers. After the deceased had been stabbed, the first and second accused left the scene without rendering any form of assistance to the deceased; such conduct can only be consistent with an intention to kill the deceased.

In the case of **Vincent Sipho Mazibuko v R** 1982 -1986 SLR 377 AT 380 Hannah CJ stated the following:

> 'A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not'.

> When the first accused stabbed the deceased several times with the knife and leaving him for dead lying on the ground bleeding, he appreciated that he would die but acted recklessly as to whether or not death resulted.

I reject the evidence of the first and second accused that the deceased had in his possession both the knife and a handgun. The knife came to the scene with the first accused; there is no evidence that the deceased was armed when he arrived at the scene. I am convinced that the explanation given by both

accused are not only improbable but that beyond any reasonable doubt they are false.

See **Rex v Difford** 1937 A-D 370 AT 373.

There was no prior agreement proved that the first and second accused set out to kill the deceased; however, the Crown has succeeded in proving active association of the second accused in the conduct of the first accused in respect of the first count. Active association suffices in establishing liability in terms of the doctrine of common purpose."

[8] M.C.B. Maphalala J then proceeded to examine and apply some of the authorities which had a bearing on the case before him. Paragraphs [36] to 41] of his judgment read:

"[36] Johathan Burchell in the South African Criminal Law and Procedure Volume 1, Third Edition defines the doctrine of Common Purpose at page 307 as follows:

"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their Common Purpose to commit the crime.

If the participants are charged with having committed a consequence crime, it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which causally contributed to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their number with the requisite faulty element *(mens rea).* If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants.

Furthermore, it is not necessary to establish precisely which member of the Common Purpose caused the consequences, provided that it is established that one of the group brought about this result."

[37] Botha J.A. in the case of **S v Safatsa** and Others 1988 (1) S.A. 868 (A) at page 898 A and B stated:

"In my opinion these remarks constitute once again a clear recognition of the principle that in cases of Common Purpose the act of the participant in causing the death of the deceased is imputed, as a matter of law, to the other participant … It is well established that a common purpose need not be derived from an antecedent agreement, but can arise on the spur of the

moment and can be inferred from the facts surrounding the active association with the furtherance of the common design."

[38] At **page 899 E** and **F, Botha J.A.** stated;

"Association in a Common illegal Purpose constitutes the participation - the *actus reus.* It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all …

Moreover, it is not necessary to show that there was a causal link between the conduct of each party to the common purpose and the unlawful consequence…"

[39] **Botha J.A.** in the case **S.v. Magedezi** and **Others 1989 (1) S.A. 687 (A)** at page **705-706** stated:

> "In the absence of proof of a prior agreement, accused No. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12 can be held liable for those events, on the basis of the decision in **S.v. Safatsa** and **Others 1988 (1) SA 868 (A)** only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12.

> Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea;* so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of associating with recklessness as to whether or not death was to ensure."

[40] **Chief Justice Hull** in the case of **R.v. Dlamini Sandile** and **Others (2) SLR 305 (HC)** approved and applied the principles of the doctrine of Common Purpose as laid down in **S.v. Mgedezi** and **Others 1989 (1) SA 687 (A)** at **page 705-706** as reflecting the law in this country.

[41] In the case of **R.v. Simelane** and **Others (1) SLR 221** at **222 - 223H (HC), Cohen J** said the following:

> "Now it is our law that the mere presence of a person at a crime does not by itself constitute an aiding or abetting - there must for this purpose be participating and proof of such knowledge or of such presence is merely evidence tending to show participation…. But as was stated by **Gardiner AJA** in the case of **Rex v. Mbande** and **Others 1933 AD 362** at **393**

> quoting with approval the remarks of **Juta J.A.** in **Rex v. Jackelson 1920 AD 486** at **491**: ‘If a person assists or facilitates the commission of a crime, if he stands by ready to assist although he does not physically act, as where a man stands outside a house while his fellow-burglar breaks into the house, if he gives counsel or encouragement, or if he affords the means for facilitating the commission; if in short there is any, co-operation between him and the criminal, then he aids the latter to commit the crime.”

[9] M.C.B. Maphalala J then expressed his conclusion in terms with which I am in complete agreement when he wrote at paragraph [42] of his judgment.

> “[42] In the circumstances, it is my finding that the Second accused actively associated himself with the activities of the first accused by hitting the deceased with the back of the gun; he assisted and facilitated in the commission of the offence.”

[10] It is abundantly clear from the trial judge’s lucid exposition of the law and from his correct application of that law to the facts as he rightly found them from the evidence, that there is no merit whatever in Dlamini’s appeal against his conviction which must accordingly be

dismissed. As will emerge later in the course of this judgment, his appeal against sentence is an ungracious complaint against a benign sentence for which he ought to have been earnestly thankful rather than resentfully appellant. That appeal too must be and is hereby peremptorily dismissed.

SENTENCE

[11] It must be noted at the outset that the trial judge imposed different sentences upon Tsabedze and Dlamini for the offence of murder. In fact, the sentence of 15 years imposed upon Tsabedze is almost double that of eight years imprisonment imposed upon Dlamini. That manifest disparity in the sentences meted out to these two offenders who were equally guilty of the murder immediately raises the question as to whether such a glaring difference in the treatment of these two offenders can be justified: particularly so, in light of the trial judge's correct finding that they both participated, each in substantial measure, in the killing of the deceased.

[12] In the matter of **Keith Ndou v The State** [2008] BWCA 60 the Botswana Court of Appeal dealt comprehensively with the matter of

disparity of sentences. At paragraphs 31 of the judgment Moore JA describes the complaint of the appellant in these terms:

> "31. His grievance is that although no reason, or no sufficient reason has been advanced for the course adopted by the learned Chief Justice, his sentence has been frozen at 10 years imprisonment whereas the sentences of his co-appellants in the High Court have been effectively reduced by fifty percent in breach of the principle of uniformity of sentencing."

[13] The judgment, with which Tebbutt JP and Twum JA concurred, then went on to discuss the principles of uniformity in sentencing at paragraphs 32 et seq which read:

> "32. There is no doubt but that sentencers should strive in so far as is possible to achieve a measure of uniformity in sentencing. This principle was expressed by Lord Coulsfield JA in **Dimpho Rapula Ntesang v The State** Criminal Appeal No. CLCLB-036-06 at page 6 of the computer generated version in this way:
>
> "…it has always been recognized that it is salutary for the courts to aim at a measure of uniformity in sentencing, *whenever this can reasonably be done."* Emphasis added.

33. The italicized words make it clear that though uniformity is a desirable goal in itself, the appropriate sentence in a given case may at first blush appear to be more severe or lenient than sentences meted out to co-accused in the same case, or to persons convicted for similar offences decided within the same time frame.

34. On page 673 of South African Law and Procedure Vol 16th edition under the rubric "Uniformity of Penalty", the learning reads:

"Subject always to the principles stated in the preceding paragraphs effort should constantly be directed to the elimination of lack of uniformity in sentences - cf. **R v Mazibuke**, 1952 P.H. 127 (N) - and this, particularly in cases where the Legislature has fixed a maximum penalty. Thus, regard to the judgments of the appropriate division of the superior court will sometimes enable a more or less uniform standard of penalty to be arrived at where an offence of a like character is frequently committed in similar circumstances, e.g. theft of one or two head of small stock in circumstances showing no particular aggravation.

Subject to the considerations as to the personal element set forth above, where there are two or more accused concerned in equal degrees in an offence, discrimination between them in the

matter of quantum and quality of penalty should in general be avoided. But, as very clearly enunciated in the judgment of the English Court of Criminal Appeal in **R. v Ball** (C.C.A. 19.11.1951), the circumstances of the respective cases may justify and require discrimination: a penalty suited to the one case may be quite unsuited to the other or others. There is no principle in terms of which the sentence of the receiver should be more severe than that of the thief **- R v Sosibo,** 1955 (4) S.A. 427 (N).""

RESPECTIVE PROFILES

[14] As recorded in the judgment of the court *a quo* on sentence, Tsabedze was a mature man of fifty three years, married with nine children and the head of a household which included two dependent nephews who were students. Dlamini, on the other hand, was a young man of twenty two years who, compassionately thought the judge, committed the offences due to his immaturity.

[15] There is a plethora of cases where youthfulness has been applied as a mitigating factor in sentencing. The Botswana Court of Appeal only recently, in the case of **Ramosweu Moatlhaping v The State,** Criminal Appeal No. CLCLB-009-10 decided that advanced age - a

relative term - could also be taken into account by sentencers as a mitigating factor. In the case before us, Tsabedze's advanced age could operate as a mitigating factor as can the relative youthfulness of Dlamini.

[16] In the **Moatlhaping** case the Botswana Court of Appeal allowed the appeal against sentence. The appellant's advanced age moved the court to reduce the sentence of the trial court from 15 years to 11 years imprisonment. After reviewing a number of South African cases - **S v Munyai and Others** (1993) (1) SACR 252 (A); **S v Mapukata** (2) SACR 225**;** **S v Dumba** 2011 (2) SACR 5; s V HD 2010 (2) SACR 335 and **S v Nkombini** 1990 (2) JACR 465, Moore JA, with the concurrence of Kirby JP and Gaongalelwe Ag. JA wrote at paragraph 50:

"The above survey revealed that the lowest age treated as falling into the advanced age category or, alternatively the relatively advanced age grouping, was 42 years. The use of the expression 'relatively' connotes an element of elasticity which is an essential ingredient of the sentencing process. It allows the sentencer the freedom to

exercise his or her judicial discretion based upon all of the essential matters arising out of the particular case which must be taken into account in arriving at the appropriate sentence."

[17] At paragraph 53 of the **Moatlhaping** case, I expressed the unanimous conclusion of the Court of Appeal in this way:

> "But it is his advanced age which moves this court to reduce the sentence of the trial court. We do so, because we are satisfied that the trial judge, having correctly adverted his mind to the advanced age of the appellant, would have imposed a lesser penalty if he had had the benefit of the cases and other materials which this court was able to consider. Upon mature reflection, we are of the opinion that the fitting and appropriate penalty in this case is a sentence of 11 years imprisonment."

[18] The trial judge recorded in paragraph [1] of his judgment on sentence that:

> "It is common cause that the conviction on the first count is based on the doctrine of common purpose".

[19] In most cases where the convictions of several persons are based upon the doctrine of common purpose, the evidence leads to the conclusion that they are all more or less *in pari delicto* and deserving of the same or similar sentences unless there are circumstances warranting a departure from the principle of uniformity of sentences. In some American jurisdictions for example, the person who does the actual shooting - the so called triggerman - receives more severe punishment than his accomplices who played a supporting role.

[20] In the instant appeal however, the two appellants, between whom there appears to be a close bond, acted in concert together, and complemented each other throughout the course of events culminating in the murder, and terminating when, together, they surrendered themselves to the police on the 18th February 2009. The progression of events was as follows:

i. Tsabedze and Dlamini left the former’s home together in the former’s car. They each drove the car at various stages of the unfolding drama.

ii. When Tsabedze arrived at the home of the deceased's brother Sipho Mamba, Dlamini was with him.

iii. Tsabedze's 12 bore shot gun was, at various periods, in the joint or sole possession of Tsabedze and Dlamini.

iv. After firing his gun into the air, Tsabedze threw it to Dlamini.

v. Dlamini then hit the deceased on the head with the back of the short gun.

vi. The deceased fell. Tsabedze drew a knife with which he stabbed the deceased three times on the neck as he was lying on the ground. The appellants left the scene together.

vii. The report on post-mortem examination under the hand of Police Pathologist Dr. R.M. Reddy recorded that death was "DUE TO MULTIPLE INJURIES". Significantly, Dr. Reddy observed "Contusion over right, left temporal region by scalp, 5.2 cm, 4.7 cm, parietal region 4.2 cm area with 50 ml subdural haemorrhage over brain, cut wound parietal region 5.5 x 1cm scalp deep.

viii. The injuries inflicted by Dlamini and then by Tsabedze were in the doctor's opinion both contributing causes of

death which he described under the rubric MULTIPLE INJURIES.

ix. Tsabedze and Dlamini surrendered themselves to the Police on the 18th February 2009.

AN INCREASE OF SENTENCE

[21] It must be said to the credit of counsel for the crown Ms. Qondile Zwane that she did not in her helpful heads of argument submit that the seemingly inadequate sentence of eight years imprisonment imposed by the trial judge upon Dlamini should be increased. It was only during her arguments on the patent disparity between the sentences imposed upon Tsabedze - 15 years - and Dlamini - 8 years - that the option of increasing the sentence of Dlamini as a means of addressing that disparity emerged.

[22] But once that option had surfaced and its potentially baleful implications upon the fairness of the unrepresented Dlamini's case, began to emerge, Ms. Zwane, commendably, ceased to pursue the idea of an increase of sentence with any vigor and conviction. Before long, she let the idea subside like a balloon from which the air has

escaped and finally let it rest like an experiment which, having proved to be unworkable, is eventually discarded.

[23] The question of this court increasing the sentence passed by the court *a quo* is now far from being purely academic. In **Mkhwanazi v R** [2011] SZSC 46 30.11.2011 Swazilii.org this court quashed the sentence passed at the trial and passed the sentence warranted in law. This court substituted the increased sentence which ought to have been passed because the sentence passed by the trial court took no account of a period of some 16 months during which the appellant was free on bail between the time of his arrest and the time of his sentence by the trial court.

[24] This court has repeatedly stressed that the passing of the appropriate sentence essentially and primarily lies within the sentencing discretion of the judicial officer. The court will only interfere if the sentence is disturbingly inappropriate or is in clear violation of some well established principle or precept of sentencing. That said however, it has been this court's experience that while upholding the trial court's exercise of its discretion, it would have passed a sentence significantly

heavier than that imposed by the trial court. Fortunately, such cases are noticeably rare. But in the prevailing atmosphere where serious rapes and murders are disturbingly frequent, this court has already given notice that in an appropriate case, serious consideration may be given to invoking the provisions of section 5 (3) of the Court of Appeal Act subject to the safeguards inherent in the fair hearing of the appeal as set out in paragraphs [27] to [29].

[25] In **Simelane & Another v R** [2011] SZSC 61 Ramodibedi CJ warned at paragraph 7 that section 5 (3) of the Court of Appeal Act was no moribund dead letter but was an effective piece of legislation which could be utilized by an appellate court in an appropriate case. This is what the learned Chief Justice said for the guidance of judicial officers, appellants and their legal advisers at paragraph 7 of his judgment:

> "[7] As a general principle, sentence is a matter which lies primarily within the discretion of the trial court. An appellate court will not ordinarily interfere with such sentence unless there is a material misdirection resulting in a failure of justice. This principle is now so well-known in this jurisdiction that it

requires no further elaboration. It is instructive to stress, however, that in terms of s 5 (3), of the Court of Appeal Act 74/1954 this Court has additional power to quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) as it thinks ought to have been passed. See, for example, **Vusumuzi Lucky Sigudla v Rex, Criminal Appeal N. 01/2011**."

[26] The case of **Oliver v The Queen** (The Bahamas) [2007] U.K. PC 9 is instructive in this regard. The opening paragraph of the judgment of the Privy Council set the scene admirably for the Board's consideration of the question whether the Bahamas Court of Appeal was justified in increasing the condign sentence of 42 years awarded by Moore J to the draconian penalty of 55 years imprisonment imposed by that internatiale court.

[27] In an affidavit which the Board accepted as correct, the Assistant Director of Public Prosecutions swore that the Appellant was asked whether he was aware that the court had the power to increase the sentence imposed by Justice Stanley Moore to which he replied in the affirmative. The issues on which the appellant was granted special leave to appeal were:

"(1) That the Court of Appeal did not have power to increase the appellant's sentence where only one sentence was appealed against.

(2) That if the court had power to increase the sentence, the power was not exercised fairly or judicially, in particular because of its failure to give any reason for the increase in penalty."

[28] Section 13 (3) of The Bahamian Court of Appeal Act is not identical word for word to the provisions of the Swaziland Court of Appeal Act No. 74/1954. But both Acts are based upon the labours of a legal draftsperson, in what was then the British Colonial Office, for reception - either through extension or by local legislation - by the disparate colonies and dependencies in the far flung corners of the Empire. It is by this process that the Bahamian Act, which applies in that mid Atlantic Archipelago, is in essence to the same effect as section 5 (3) of the Swaziland Act which holds sway in the Swaziland portion of the Southern African Peninsula and which reads:

> "(3) On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal".

[29] Their Lordships of Her Majesty's Privy Council gave clear guidelines as to the approach which should be taken by appellate courts which might be minded to increase a sentence or sentences imposed by a trial court. Their Lordships dicta - see paragraphs 16 to 17 - in this regard are both apposite and applicable in the context of the instant appeal. They express the law of Swaziland on these matters and I set them out in full.

> "16 The Board has considered the question of increasing sentences on several occasions since the Court of Appeal gave its decision in July 2002. The principles which have now been established can be summarized in the following propositions:
>
> "(a) The power to increase a sentence must be sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate; in all cases the reasons for exercising this drastic power must be explained:

Kailaysur v The State of Mauritius, para 9, per Lord Steyn.

(b) An appellate court which is considering an increase in sentence should invariably give an applicant for leave to appeal or his counsel an indication to that effect and an opportunity to address the court on this increase or to ask for leave to withdraw the application: **Williams v The State,** para 10; **Skeete v The State**, para 44.

In **Skeete v The State** the appellant had appealed only against conviction and had not brought any appeal against sentence, while in **Williams v The State** the matter before the court was an application for leave to appeal, as distinct from a full appeal. In *Williams* their Lordships distinguished on the latter ground the decision of the Divisional Court in *R v Manchester Crown Court, ex parte* Welby (1981) 73 Cr App R 248, in which Lord Lane CJ stated that once the hearing of an appeal against sentence has started, it will be only in exceptional circumstances that leave to abandon it will be granted. The reason is clear, that if the law were otherwise an appellant could attack a sentence and then, if the reaction of the appellate court was unfavourable and he appeared to be at risk of an increase, he could withdraw the appeal with impunity. Their Lordships appreciate the distinction, but consider that the same principles should apply to appeals as to applications for leave to appeal, save that leave to withdraw a full appeal should be given rather

more sparingly. They have no doubt that in all cases where the appellate court is considering an increase it should give a clear indication to that effect and give the appellant or his counsel an opportunity to address them on the point, since there are specific considerations relating to a possible increase, as distinct from those relating to the imposition of the original sentence.

17. The Lordships do not consider that the present case reached the threshold of manifestly inadequate sentences required to trigger the jurisdiction to increase them. Moreover, it must have been apparent to the Court of Appeal that the appellant, at lease at the outset of the proceedings, suffered from some confusion about the sentences and the extent to which they were concurrent or consecutive and, possibly, ignorance about the power of the court to increase sentences. In these circumstances it was incumbent on the court to make the situation as clear as possible and to give the appellant a timely warning and a full opportunity to consider his position and make any appropriate submissions. The Board is impelled to the conclusion that the absence of these safeguards denied the appellant his constitutional right to a fair trial. It must accordingly allow the appeal and set aside the order of the Court of Appeal revoking the sentences imposed by Moore J on 21 March 2002 and varying them upwards. The effect will be to leave those sentences in operation as imposed by Moore J."

[30] Disparate sentences may however be justified in appropriate cases as the **Ndou** judgment illustrates at paragraph 46 of the text.

> "46 There are a number of factors which contribute to making a seemingly disparate sentence the appropriate award in the particular case with which a sentencer is dealing. Thus a difference in the sentences imposed on co-defendants may be justified by differences in responsibility for its commission or by their different roles in the offence. *R v Belton and Petrow* **[1997] 1 Cr. App. R. (S) 215, C.A.** Under the rubric "Relevant Difference in Personal Circumstances", the relevant principles are discussed at page 617 paragraph 5 - 103 of Archbold Criminal Pleadings Evidence & Practice (2008): The learning reads:
>
> *"Relevant differences in personal circumstances*
>
> It is appropriate for a court to distinguish between offenders on the ground that one is significantly younger that the other (See *R.v. Turner*, unreported, October 6, 1976), that one has a significantly less serious criminal record (See *R.v. Walsh,* **2 Cr. App. R. (S) 224**, CA), or that one another mitigating circumstance is available to one defendant which is not available to the other (see *R.v. Tremaco*, **1 Cr. App. R. (S) 286**, CA; *R.v. Strutt*, **14 Cr.App.R. (S) 56**, CA). Where the sentence on one defendant is reduced on account of mitigating

circumstances which apply only to that defendant, the sentences of the other defendants should not be reduced: *Att.-Gen's References (Nos 62, 63 and 64 of 1995) (R.v. O'Halloran)* **[1996] 2 Cr. App. R. (S) 223**, CA; and see also Att.-Gen's Ref. (No. 73 of 1999) (R.v. Charles) **[2000] 2 Cr. App. R (S) 210**, CA. The fact that one defendant is a woman is not in itself a ground for discrimination: see *R.v. Okuya and Mwaobi*, **6 Cr. App. R (S.) 253**, CA.

Where the power of the court to sentence one accomplice is restricted by reason of his age, there is not disparity if a longer sentence is passed on another accomplice to whom such restrictions do not apply: *R.V.Harper,* **16 Cr. App. R. (S) 639**, CA. Where an offender was properly sentenced to four years' imprisonment, and his co-defendant to a lesser term, the fact that the first offender was a "long term prisoner" and may have served a greater proportion of the sentence in custody did not give rise to unjustified disparity: *R.v. Ensley* **[1996] 1 Cr. App. R. (S.) 294**, CA. Where one offender was properly sentenced to a longer than commensurate sentence under the PCC (S) A 2000, s.80 (2) (b), and his accomplice to a commensurate sentence under section 80 (2) (a), there was no disparity: *R.v. Bestwick and Hunddlestone,* **16 Cr. App. R. (S.) 168,** *CA."*

CONCLUSION

[31] The disparity between the sentence of 15 years imposed upon Tsabedze and that of 8 years awarded to Dlamini in circumstances where they were equally culpable for the murder of which they were jointly convicted, is so glaring that the sentence of fifteen years imposed upon Tsabedze cannot be allowed to stand. On the face of things, it will appear to right thinking members of society that Tsabedze was unfairly and harshly treated, whereas Dlamini's penalty was unduly lenient in comparison, having regard to the degree of his involvement, which was not significantly dissimilar to that of Tsabedze.

[32] It was Dlamini who struck the first blow which felled the deceased to the ground and thus gave Tsabedze the chance to inflict stab wounds upon his victim who lay there helplessly. Dlamini's youth was offset and counterbalanced by Tsabedze's maturity and previous good character up to his 54th year.

[33] This Court has refrained from increasing the sentence of 8 years imprisonment imposed by the trial court upon Dlamini, not because

we think it is the appropriate sentence for his role in a brutal murder, which was fully comparable to that of Tsabedze: but only because by doing so this Court would have rendered the hearing of his appeal unfair for the reasons set out in paragraphs [27] to [29] above. We wish to make it abundantly clear that a sentence of 8 years imprisonment imposed upon Dlamini applies only to the peculiar circumstances of this case and is not to be cited as a precedent in any future case unless all the circumstances are identical in every way.

[34] Applying the principles applicable to sentences for murder set out in **Mkhulisi v R** [2011] SZSC 55 30 November 2011 Swazilii.org we are of opinion that the appropriate award in Tsabedze's case - depressed by the application of the rules relating to uniformity of sentence - is that he serve a sentence of 11 years imprisonment for his role in the vengeful killing of the deceased.

ORDER

The order of this Court is that:

1. The appeal of the first appellant on count 1 is allowed.

2. The sentence of 15 years imprisonment imposed upon the first appellant on count 1 is set aside and sentence of 11 years imprisonment is substituted in its stead.

3. The appeal of the first appellant on count 2 is dismissed.

4. The sentences of the first appellant on counts 1 and 2 are to run concurrently

5. The second appellant's appeals against conviction and sentence are both dismissed.

6. The sentences of both appellants are to take effect from 18th February 2009 when they surrendered themselves to the police. Any period during which they may have been free on bail between arrest and sentence by the High Court must be taken into to the reckoning in determining the earliest possible date of release.

____

S.A. MOORE
JUSTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

I agree

A.E. AGIM
JUSTICE OF APPEAL

For the Appellants : In person

For the Crown : Ms. Q. Zwane