IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 20/10

In the matter between:

SAMKELISO MADATI TSELA **APPELLANT**

v

REX **RESPONDENT**

Neutral citation: Samukeliso Madati Tsela v Rex (20/10) [2011] SZSC 13 (31 May 2012)

Coram: EBRAHIM J.A., MOORE J.A. and M.C.B. MAPHALALA J.A.

Heard: **2 MAY 2012**

Delivered: **31 MAY 2012**

Suumary: **Murder - Appropriate sentence for murder in Swaziland - Appropriate range identified -**

Sentences should fall within range except for good reason - Consecutive sentences - Not appropriate to this case - Concurrent sentences ordered instead - Principles explained.

MOORE J.A.

INTRODUCTION

[1] The Appellant was indicted on the 28th May 2008 upon one count of murder and one count of attempted murder. The particulars on the count of murder alleged that on or about the 30th December 2007 at or near KaZulu area he did unlawfully and intentionally kill Mpopoli Gweje Maseko by inflicting upon him injuries from which he died on the 6th January, 2008. The attempted murder count charged that the appellant, on or about the 30th December 2007 at or near KaZulu area, did with intent to kill, unlawfully assault Margaret Maseko on the back of her head. It is to be noted at once that both acts of the appellant were said to have taken place on the same date and place. It will be necessary to consider this circumstance later on in this judgment.

THE EVIDENCE

[2] The witnesses for the prosecution testified that on the 30th of December 2007 a cleansing ceremony was taking place at KaZulu Mahlangatsha at the Tsela homestead. It is common cause that at about 10.00 o'clock in the morning of the day in question, the appellant hit the deceased on his temple with a log. The deceased died on the 6th January 2008 as a result of that blow. There is also evidence upon the record that the appellant struck Margaret Maseko the wife of the deceased a blow to the back of her head which caused an injury to that part of her body. Though the appellant had been indicted for the attempted murder of Mrs. Maseko, the judge *a quo* convicted him for the offence of assault with intent to do grievous bodily harm. This appeal is only against the sentences passed by the trial court against the appellant.

THE APPEAL

[3] The notice of appeal was prepared by the appellant in person and, it would appear, without any professional assistance. His grounds of appeal as gleaned from his layman's presentation are:

i. The sentence of twelve years imprisonment for the offence of murder is unduly harsh and severe.

ii. The court *a quo* erred in ordering that "a sentence of two years imprisonment half of which was suspended for a period of three years on condition he was not found guilty of a similar offence" must run consecutively to the sentence of twelve years imprisonment for the offence of murder.

iii. The cumulative sentence of thirteen years imprisonment is unduly harsh and severe.

RESPONDENT'S HEADS OF ARGUMENT

[4] It is true that Heads of Argument should not be unduly prolix or tediously lengthy. For this reason, they are referred to as skeleton arguments in other common law jurisdictions. But this latter expression is not entirely apt since an appropriate degree of fleshing out is often necessary if these written arguments are to be of maximum assistance to this Court. Bald recitations of legal principle, augmented by bare references to pages and paragraphs of the record, are hardly sufficient without any comment upon, or analysis of the

law involved, or assessment of the relevant evidence, or critique of the processes by which the court *a quo* reached its conclusions.

THE APPROPRIATE SENTENCE FOR MURDER

[5] This segment of the judgment begins with a re-statement of the much repeated truism that sentencing is essentially a matter which lies within the discretion of the judicial officer who has conduct of the trial. From the vantage point of the bench, he or she is in the best position to have acquired a reliable feel for the overall texture of the case. But, after applying the principles contained in the so-called triad - a consideration of the offence, the offender, and the public interest - a sentencer must seek to achieve an acceptable measure of uniformity by pitching the penal award within the prevailing range which is current within the jurisdiction at the time when the sentence is passed.

[6] The fashioning of an appropriate sentence is more in the nature of an art rather than a science. Nevertheless, a fitting sentence must be founded upon the several relevant factual bases and circumstances upon which a proper sentence must necessarily be premised.

[7] One sure method of discovering what the prevailing range is at any given time, is to have regard to the sentences which have been passed for the offence under review within the recent past. The expression recent within this context must be invested with some measure of elasticity. Sentences which are too remote in time may be less helpful than those of more recent vintage. It is with these principles in mind that I have constructed a table which affords a sentencer a ready appreciation of the range of sentences which have received the sanction of this Court between the years 2002 and 2011.

[8] The offence of murder covers a wide spectrum of unlawful acts varying in degrees of seriousness from the most depraved, cruel and reprehensible, such as the terrorist bombing with its accompanying mayhem of a soft target like a kindergarten school, to acts which, though falling within the parameters of this umbrella offence, are lacking in those characteristics which excite the greatest revulsion in the minds of right thinking members of society.

[9] An example of the latter type of what might be described as a murder of a lower degree, is a case of a sudden fight where the offender, getting the worse of the encounter, in the heat of the moment, kills his victim by an unpremeditated blow, struck with an object which inadvertently happened to be near at hand.

[10] It is for this reason that the circumstances of the particular murder under review must be carefully considered by a sentencer, who must tailor his or her award to suit the circumstances of the offence, the offender, the public interest, and the prevailing sentencing norms in the Kingdom at the particular time.

[11] In **Badelisile Mkhulisi v Rex** Cri. Appeal No. 13/2010; **Mkhulisi v R** [2011] SZSC 55 30 November 2011 Swazilii.org in paragraphs [12] at et seq, this Court - Ramodibedi CJ, Moore JA, and Farlam JA - critiqued a number of authorities of this court, the Court of Appeal of Botswana, and of Her Majesty's Privy Council, sitting as the apex court of a number of Commonwealth Caribbean jurisdictions. The established principles governing sentences in general, as well as the principles applicable to sentences for culpable homicide and for

murder, were authoritatively laid down. They are of such importance for the guidance of sentencers in this jurisdiction that I restate them here:

> "[25] In the Privy Council case of **Reyes v R** (Belize) [2002] UKPC 11 (11 March 2002) their Lordships were considering the appropriate penalty for murder. Theirs was a ground-breaking judgment which has already saved, and will in the future, spare many persons from what used to be regarded as the mandatory penalty of death for murder.
>
> [26] By a critical analysis of the Constitutions and the relevant statutes, their Lordships concluded that it was now the duty of the judge in cases of murder to determine whether in the particular circumstances of the case before him, death was the appropriate penalty. See also **Fox v R** (Saint Christopher and Nevis) [2002] UKPC 13 (11 March 2002); **Hughes, R v** (Saint Lucia) [2002] UKPC 12 (11 March 2002).
>
> [27] Although Lord Bingham of Cornhill was writing for the court in the context of a conviction for murder, his analysis is equally apt in determining the appropriate penalty for culpable homicide which, like murder and cancer, cover a wide variety of factual characteristics involving levels of gravity ranging from the most egregious to those bordering upon inadvertence

or an ache. In equal measure, culpable homicide includes cases of the grossest negligence bordering upon recklessness as well as those where the negligence is so slight as to be just on the wrong side of an accident or mishap. The Privy Council's analysis is applicable *mutatis mutandis* to the offence of culpable homicide, and I apply it with the necessary adaptations, to the case of culpable homicide before this court.

[28] The relevant excerpt of the advice of the Privy Council is to be found in **Reyes v R** at paragraphs 10 - 16 under the caption "The Penalty for Murder." The exposition of these principles is so lucid and timeously relevant to the offence of culpable homicide in this Kingdom of Swaziland that I set it out in its entirety:

"The Penalty for murder

10. Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once colonies of the crown.

11. It has however been recognized for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It

covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous. The Royal Commission on Capital Punishment 1949 - 1953 examined a sample of 50 cases and observed in its report (1953) (Cmd. 8932) at p. 6, para. 21 (omitting the numbers of the cases referred to):

> "Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly … the facts of 50 cases of murder that occurred in England and Wales and in Scotland during the 20 years 1931 to 1951. from this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic borderline cases, or insane, and each case the mentally abnormal

> may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust jealousy, anger, fear, pity, despair, duty self-righteousness, political fanaticism, or there may be no intelligible motive at all.

A House of Lords Select Committee on Murder and Life Imprisonment in 1989 observed (HL Paper 78-1, 1989 in para. 27:

> "The Committee considers that murders differ so greatly from each other that it is wrong that they should attract the same punishment."

[12] An independent enquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust and chaired by Lord Lane in 1993 reported, at p. 21:

> "There is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder."

It made reference at page 22 to research showing that in England and Wales "murder is overwhelmingly a domestic crime in which men kill their wives, mistresses and children, and women kill their children."

[13] Judicial statements to the same effect are not hard to find: see, for example, in **Ong Ah Chuan v Public Prosecutor** [1981]AC 648, 674, PER Lord Diplock; **R v Howe** [1987] AC 417 at 433 F, per Lord Hailsham of St Marylebone LC; **Rajendra Prasad v State of Uttar Pradesh** [1979] 3 SCR 78 at 107, per Krishna Lyer J. The differing culpability of different murderers is strikingly illustrated by statistics published by the Royal Commission on Capital Punishment on pp. 316-317 of their report referred to above: these show that of murderers sentenced to death and reprieved in England and Wales between 1900 and 1949 twice as many served terms of under five years (in some cases terms of less than a year) as served terms of over 15 years.

[14] This problem of differential culpability has been addressed in different ways in different countries. In some a judicial discretion to impose the death penalty has been conferred, reserving its imposition for the heinous cases. Such was the solution adopted in South Africa before its 1993 constitution, when it was held that the death penalty should only be imposed in the most exceptional cases where there was no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence: **State v Nkwanyana** 1990 (4) SA 735 (A) at 743E-745G. Such is also the solution adopted in India where the rule has been expressed by Sarkaria J in the Supreme Court in Bachan Singh v State of Punjab [1980] 2 SCC 475 AT 515 in these terms:

1. The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

2. While considering the question of sentence to be imposed for the offence of murder under section 302. Penal Code, the Court must have regard to every relevant circumstances relating to the crime as well as the criminal. If the Court

finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."

[14] In other countries the mandatory death sentence for murder has been retained but has only been carried out in cases which are considered to merit the extreme penalty. Such was the case in the United Kingdom when the death penalty was mandatory of those convicted of murder and sentenced to death in England and Wales between 1900 and 1949, 91% of women and 39% of men were reprieved: see report of the Royal Commission, at p. 326. No convicted murderer was executed in Scotland between 1929 and 1944: ibid, at p. 302. Such has also been the practice in many other countries. In **Yassin v Attorney General of Guyana** (unreported), 30 August 1996, Fitzpatrick JA, sitting in the Court of Appeal of Guyana, said at pp. 24-25 of his judgment.

"Add to this the notorious fact that in Guyana for some years as a matter of executive policy the death penalty is only implemented in some, not all, cases of persons convicted of murder, and the 'sifting out' of those cases in which the [offenders] are found not to warrant the ultimate penalty is done by means of the exercise of the prerogative of mercy rather than by amendment of the law relating to capital punishment."

The Board was told that there has been no execution in Belize since 1985.

[16] In other countries a distinction has been drawn between murders, described as capital (or first degree), which carry the mandatory death penalty and others (non-capital or second degree) which do not. Such was the solution applied in the United Kingdom between 1957 and 1965. It is a solution favoured by a number of American states. And it is the solution adopted in 1994 by Belize, as noted above. Even where a murder is classified as capital or first degree, the prerogative of mercy may be exercised to mitigate the extreme penalty."

In that case, reference was made to binding authorities which need not be repeated here.

CONSECUTIVE SENTENCES

[12] This court rejected the submission of counsel for the Crown that consecutive sentences should be ordered because:

i. "The counts occurred on the same day but they constitute different digressions of the law.

ii. There was “no issue of splitting charges in this case.

iii. The first count relates to the contravention of the common law and the other three counts” relate to specific contravention of statutory provisions.

iv. These are four distinct charges with differing elements altogether and this court will not be committing any error whatsoever in hearing them on a stand above basis and the sentence to be imposed may be made to follow.”

The governing principle established by the authorities and by academic writers is that consecutive sentences are ordinarily permissible only if they relate to separate incidents or transactions. In determining whether offences are part of one incident or transaction the court takes a broad view. Applying these principles in the **Dlamini** case, this court ordered that the sentences on the second, third and fourth counts be ordered to run concurrently with the sentence on the first count. But a judge retains a residual discretion, for good and sufficient reasons, to order consecutive sentences in appropriate cases. See Oliver v The Queen (The Bahamas) [2007] U.K. P.C 9.

[13] Once a sentencer bears the above principles in mind and applies them correctly, an appeal court will be slow to interfere with the sentence of the trial court since the appropriate sentence lies primarily and principally within the direction of the trial judge. An appropriate sentence will be upheld on appeal even though the appellate court may have itself imposed a sentence of greater or less severity.

[14] Having listened attentively to the submissions of the prosecution and the defence, Hlophe J approached the matter of sentence with the greatest care. This is how the judge put it in paragraph 4 of his judgment as it appears in the record:

> "[4] When it comes to sentencing, courts the world over, have repeatedly confirmed that same is a difficult task in every criminal trial. In approaching this subject I tried to observe the triad principle consisting of balancing up the three competing interests being those of the community, those of the accused as well as the offence itself. By so doing I tried to avoid approaching the issue of the accused person's sentence in the spirit of anger just as I tried to avoid falling into what judgments of this court refer to as misplaced pity."

[15] The judge then proceeded to conduct the balancing exercise which is such an essential component of the sentencing process. He considered in mitigation that:

i. The appellant was a first offender who had, up to the commission of the instant offences, lived an exemplary life.

ii. He was a relatively young man of thirty years who still possessed the capacity to reform himself and to pursue a useful and productive life after he had served his sentences.

iii. There was an absence of premeditation in the commission of these offences.

iv. All the parties concerned had consumed substantial quantities of alcohol over a period of approximately one and half days. His inebriation undoubtedly impaired the appellant's self control in committing these offences.

v. He was labouring under the hurt of being branded a goat thief by the deceased. This slander was particularly galling in the absence of any evidence substantiating that allegation.

vi. The appellant has shown contrition of high value since he had displayed it when he pleaded guilty at the very beginning of the

trial to the offence of culpable homicide. That plea was in the event rejected by counsel for the Crown hence the ensuing trial. A profession of contrition at that stage of the trial carries far greater weight than one which is made when all is evidently lost much later in the day and is desperately thrown out as a last ditch effort at damage control.

vii. He had pleaded guilty to the charge of attempted murder of Margaret Maseko in count two of the indictment. The judge mercifully convicted him of assault with intent to do grievous bodily harm on this count.

[16] Having given such ample consideration to the mitigating factors, the judge, as was his plain duty, then reflected upon the aggravating factors of the case. These were:

i. The murderous behaviour of the appellant resulted in the death of an innocent man who was old enough to be his grandfather.

ii. He had displayed the clear intent to kill the deceased by hitting him over the head with a weapon which was so heavy that it required the use of both of his hands to bring it crashing down upon the pate of the deceased.

iii. The prevalence of offences of murder which were on a disturbingly upward trajectory.

iv. He had seriously eroded his own self-control by the voluntary consumption of alcohol the whole of the day before the murder and again on that very morning. He had evidently paid no regard to the risk to which he had exposed those about him of the violence of which his intoxication was a major contributing factor.

v. The disturbing prevalence of the excessive consumption of alcohol as a precursor to offences of violence against the person.

ONE TRANSACTION - AN UNBROKEN SEQUENCE

[17] The topic of consecutive sentences was a fully dealt with by this court in **Dlamini v The King** [2011] SZSC 57, Judgment Date: 30 November 2011 Swazilii.org. The judge in the court *a quo* delivered his judgment on sentence on the 10th April 2012 but the **Dlamini** case was not cited by either of the counsel appearing before him. Indeed, the most 'recent' authority laid before the trial judge was a stale and mouldy relic from the latter half of the last century.

[18] Counsel for the defendant's unhelpful submission in his heads of argument was that:

"The assault of the accused person's victims was not a result of a single transaction but it was shown that the evidence led before the court shows that it culminate (sic) from different factors/transactions".

[19] An analysis of the evidence as set out hereunder shows that the events in which the two relevant offences were encased moved sequentially and seamlessly from their intemperate commencement to their catastrophic conclusion without any significant temporal break, and involved attacks by the appellant upon the deceased and his wife who were the victims in his convictions for murder and for aggravated assault. These critical events unfolded in the following way:

i. Deceased (murdered) and wife Margaret (assaulted) were together at the cleansing ceremony.

ii. They entered the house and drank traditional brew together.

iii. Hostilities commenced about 10.00 a.m.

iv. Appellant struck deceased on the temple. That blow caused his death on 6.1.2008 - one week later.

v. Appellant struck deceased with a 'baton' using both hands to hoist the heavy beam above his head before lowering it onto the skull of the deceased.

vi. Wife checked on husband after he had fallen upon being clobbered by appellant.

vii. Appellant assaulted wife of deceased with a knobkerrie after she had asked him why he would kill the father of her children.

viii. Wife went to hospital with husband.

ix. Wife followed husband to Tsela homestead.

x. PW5 the father of the appellant dispossessed appellant of knobkerrie.

xi. PW5 took knobkerrie to his homestead.

xii. Deceased apparently conscious - sitting before he was taken to hospital.

xiii. There were many people both inside and outside the house who held the appellant as his father took the knobkerrie.

xiv. In answer to the court the appellant admitted that after the shock of hitting the deceased so that he fell, he struck the wife of the deceased at the back of the head with the knobkerrie. His contention is that he did so while trying to wrest it from her after she had allegedly struck him over the head with it.

[20] The sworn testimony of the appellant is the clearest evidence of the continuity of the transaction or train of events linking the acts of the appellant which caused the death of the deceased and those which caused the injuries to the wife of the deceased and grounded his conviction for an aggravated assault. He swore that he moved away from the deceased as he fell and stood about 10 meters from that spot. He said that as he was moving away from the deceased, the wife of the deceased Margaret Maseko then approached him carrying a knobkerrie which belonged to him and asking what he was doing to her husband. His version is that after the wife of the deceased had so addressed him, she then hit him with the knobkerrie. It was then, said he, that she was also hit.

[21] The principles of uniformity of sentences did not escape the trial judge. He undoubtedly had that precept in mind when he wrote at paragraph [10].

> "I imposed the sentences I did having taken into account the sentencing trend of this court in similar matters as well as the circumstances of the matter at hand."

[22] Hlophe J was careful not to buck the prevailing sentencing norms established by recent awards upheld by this court. He pitched the sentence imposed upon the appellant at 12 years imprisonment upon the count of murder which, as the table below clearly illustrates, is well within the boundaries of appropriate sentences approved of by this court.

SENTENCES FOR MURDER		
2011		
CASE NAME	**DATE**	**SENTENCE**
Dlamini v R [2011] SZSC 29	30.11.2011	15 years
Dludlu v R [2011] SZCS 40	30.11.2011	15 years
Nkomondze v R [2011] SZCS 55	30.11.2011	20 years
Sihlongonyane v R [2011] SZCS 45	30.11.2011	15 years
Simelane v R [2011] SZSC 61	30.11.2011	20 years
Masuku v R [2011] SZSC 61	30.11.2011	18 years

2010		
R v Dlamini [2010] SZSC 24	30.11.2010	15 years
R v Adams [2010] SZSC 10	30.11.2010	20 years
R v Dlamini [2010] SZSC 11	30.11.2010	18 years
R v Dludlu [2010] SZSC 12	30.11.2010	16 years
R v Mamba [2010] SZSC 15	30.11.2010	18 years
R v Sihlongonyane [2010] SZSC 17	30.11.2010	12 years
R v Valthof [2010] SZSC 19	30.11.2010	25 years

2009
NIL

2008
NIL

2007		
Tsabedze v R Appeal Case No. 4/2006	15.5.2006	12 years
Dlamini v R Appeal Case No. 12/2005	14.6.2005	10 years
Gamedze v R Appeal Case No. 1/2005	15.5.2006	20 years
Khoza v R Appeal Case No. 25/04	18.11.2004	18 years
Nhleko v R Appeal Case No. 12/04	12.11.2004	10 years
Makhabane v R Appeal Case No. 9/04	23.11.2004	13 years

2006		
Tsabedze v R Appeal Case No. 4/2006 Dlamini v R Appeal Case No. 12/2005 Gamedze v R Appeal Case No. 1/2005 Khoza v R Appeal Case No. 25/04 Nhleko v R Appeal Case No. 12/04 Makhabane v R Appeal Case No. 9/04 Mazibuko v R Appeal Case No. 1/04	15.5.2006 14.6.2005 15.5.2006 18.11.2004 12.11.2004 23.11.2004 23.11.2004	12 years 10 years 20 years 18 years 10 years 13 years

2007		
Ngubane v R Appeal No. 6/06; [2007] SZSC 37	14.11.2007	Heavy sentences of imprisonment - Number of years N/A - Justified in the circumstances.a

2004		
Shabalala v R Appeal Case No. 32/2002	23.11.2004	1st App. 7 years 2nd App. 5 years

2002		
Mavimbela v R Case No. 17/2002 Ngcamphalala v R Case No. 17/2002 Bataria v R Case No. 8/2002 Dlamini v R Dlamini v R Case No. 1/2002	7.6.2002 7.6.2002 7.6.2002 7.6.2002	8 years 7 years 1st 15 years 2nd 15 years 3rd 10 years 1st 18 years 2nd 15 years

[23] The table shows that the most lenient sentence for the offence of murder was 5 years imposed in 2004. The sentences of 7 years and 5 years past in November 2004 appear to be explicable on the basis of their own peculiar circumstances. They can hardly be regarded as

appropriate in today's relatively more violent environment. The most severe sentence of 25 years was imposed in 2010. The mean between 5 and 25 is 15 years imprisonment which is the midpoint of the range. In the instant appeal, the sentence of 12 years imprisonment is well within the range and, if anything, on the low side of the midpoint. It therefore follows ineluctably, that no breach of sentencing principles being discernible in Hlophe J's faultless exposition and application of those principles, the appeal against the sentences of the court *a quo* must inevitably fail and accordingly be dismissed.

[24] It is true that the cold figures in the table do not provide any insight into the many considerations which this court took into effect in upholding or varying awards of the courts below. A more refined study must await another day when researchers, enjoying the necessary facilities, are able to analyze and assess all the relevant components of the sentencing process, including the sociological and societal elements that underline, but which do not necessarily explain criminal behaviour.

[25] Be that as it may, the table nevertheless serves a useful purpose since it does indicate the range within which the sentences emanating from this Court fell within the period under review, and which provides a useful guide for sentencers in the courts below.

[26] It should however be borne in mind that a residual discretion remains within the competence of every sentencing officer which enables him to adjust an appropriate penalty either below or above the extremities of the range, provided always that such a course is justified by the peculiar circumstances of the particular case and provided also that the sentencer provides clear and cogent reasons upon the face of the record for the sentence which he or she imposes.

[27] The discernable trend which this survey reveals is that over the ten year period under review, - 2002 to 2011 - there appears to have been a controlled ratcheting upwards of sentences for the offence of murder. These increased penalties are evidently a reaction to the burgeoning prevalence of unlawful killings in this Kingdom coupled with a disturbing degree of brutality in the manner in which some of

them were executed. Three recent examples will suffice for the purpose of illustration.

[28] In **Xolani Zinhle Nyandzeni v Rex** (29/2010); [2012] SZSC 3 (31 May 2012) a sentence of 25 years imprisonment was imposed for what Ramodibedi CJ described as "a gruesome murder by the appellant against his own brother in the course of which he literally cut off his head completely with a knife." This was after the appellant had trussed up his victim like a lamb going to the slaughter, and bashed his head in repeatedly with a hammer until he fell to the ground.

[29] In **Ntokozo Adams v Rex** [2010] SZSC 10 30 November 2010 Swazilii.org Twum JA narrated how the victim was brutally murdered. Paragraph [35] of this Court's judgment made chilling reading:

> "The multiple stab wounds unleashed on a woman who was eight and one half months pregnant were gruesome and horrendous in the extreme. The foetus she was carrying also died."

Twum JA opined that "in this case, the offence called for a very severe sentence". This Court imposed a sentence of 20 years imprisonment.

[30] In **Simelane & Another v R** [2011] SZSC 61 30/11/2011 the appellants set upon the elderly deceased woman after one of them had demanded of her "dog where is our land?" They then beat her with burning fire wood all over her body and kicked her. The post-mortem report noted multiple injuries which covered the whole of her body. The frontal bone as well as the left temporal bone were fractured. This Court imposed a sentence of 20 years upon the 1st appellant and the penalty of 18 years imprisonment upon the 2nd appellant.

[31] The trial judge sought to justify his order that the sentences run consecutively in this way.

> "I was of the view that the manner in which the offences were committed, though on the same day do not justify the sentences having to run concurrently because of the fact that the assault on the accused person's victims was not a result of a single

transaction but is shown by the evidence as having been brought about by different reasons. For instance whilst the accused alleges the deceased had provoked him, the evidence shows that the "wrong" by the victim of the assault was merely her having inquired why the accused was assaulting the deceased who happened to be her husband".

[32] I am in respectful disagreement with the above passage. As the analysis of the course of this transaction illustrates in paragraphs [20] to [21] above, these happenings flowed along a continuous and unbroken sequence of events beginning with the attack upon the husband in count 1, and ending with the assault upon the wife in count 2. The continuum of events in this case is reminiscent of that in **Dlamini v R** at paragraph [25] where I expressed the judgment of this Court in these words:

> "The sentences were ordered to run concurrently because" as in this case, "the evidence showed that the two offences were inextricably linked in terms of the locality, time, protagonists and importantly that they were committed with one common intent. See for example **S v Brophy and Another** 2007 (2) SACR 56 paragraph 14. In the case before us, the possession by the appellant of the two firearms and ammunition, were

inseparable in any way from the commission of the crime of attempted murder."

[33] So, too, in the instant appeal, the attack upon the husband, followed by that upon the wife who remonstrated with the appellant for what he had done to her spouse, were both part and parcel of an ongoing orgy of lawlessness of which the husband and wife were both hapless victims.

RES GESTAE

[34] The Doctrine of *Res Gestae* has been much maligned by both judicial officers of every level and by academic writers of the highest repute. Nevertheless, its utility has been recognized as providing the justification for the reception of evidence on the grounds of relevance and contemporaneity which might otherwise have fallen foul of one of the several exclusionary rules of evidence which have been developed in order to help ensure that a trial is conducted in a manner that is fair to all of the parties concerned.

[35] The editors of Cross on Evidence Fourth Edition posit at page 502 that:

> “Unlike most of the principles of the law of evidence, the doctrine of the *res gestae* is inclusionary … the assertion that an item of evidence forms part of the *res gestae* roughly means that it is relevant on account of its contemporaneity with the matters under investigation. It is part of the story.”

At page 517, the authors recite that:

> “facts are sometimes allowed to be proved on the footing that they form part of the *res gestae*. In this context too the phrase seems merely to denote relevance on account of contemporaneity. We saw, however, in Chapter XIV, that it had a further implication in that evidence of facts forming part of the same transaction as that under inquiry may be received notwithstanding the general rule that evidence must be excluded if it does no more than show that someone is disposed to commit crimes or civil wrongs in general, or even crimes or civil wrongs of the kind into which the court is inquiring. Contemporaneity, continuity or the fact that a number of incidents are closely connected with each other gives the evidence an added relevance which renders it admissible in spite of its prejudicial tendencies.”

[36] The doctrine of *Res Gestae*, and particularly its contemporaneity element, has also been employed by courts in determining whether the course of events grounding several counts in an indictment are so closely inter-related in terms of time and surrounding circumstances as to form integral parts of a single transaction warranting the imposition of concurrent sentences, or so disparate and unrelated or segmented as to justify the imposition of consecutive sentences which, from their very nature, are more punitive and severe. The application of the res gestae principles lends additional justification for treating the events grounding the two counts as being so homogenous and interrelated as to render the imposition of consecutive sentences wholly inappropriate.

[4] In **S v Nkhumeleni** 1986 (3) SLR 102 at page 105 B Van Der Spuy AJ stated the law correctly when he wrote "if in the course of an attack an accused stabs various persons, separate charges of assault could be laid in respect of each such person." Delivering the judgment of the Venda Supreme Court upon which Klopper ACJ also sat upon review, Van Der Spuy AJ dealt with the matter of sentence for the two

separate offences which the court was considering in this way at page 105 I to 106 A:

> "The accused was sentenced to nine months' imprisonment on count 1 and to a fine of R60 (sixty rand) failing which imprisonment for a further 30 days' imprisonment on count 2. Since the two offences were closely related in time and in place and were really part of the same *res gestae*, I am of opinion that, whatever sentence was imposed in respect of the second count, it should run concurrently with the sentence on the first count. In fact I am of opinion that it was unnecessary to impose a separate fine of R60 and I find that an appropriate sentence on count 2 could have been 30 days' imprisonment without the option of a fine, but that that imprisonment should run concurrently with the sentence on count 1."

[37] For the sake of completeness, it must be said that the sentence of the trial judge on count 2 is eminently fitting and must not be disturbed particularly so since it now merges concurrently into the sentence of 12 years imprisonment for murder.

CONCLUSION

[38] In the event, the appeal against the individual sentences passed by the trial judge is dismissed except that those sentences are ordered to run concurrently rather than consecutively.

ORDER

[39] It is the order of this court that:

i. The sentences imposed by the court a quo at paragraphs 11.1, 11.2 and 11.4 are upheld.

ii. The order of the court in paragraph 11.3 is varied to read:

The sentences are to run concurrently.

____

S.A. MOORE
JUSTICE OF APPEAL

I agree

____

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant	:	In person
For the Respondent	:	Ms. Q. Zwane