IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 36/2011

In the matter between:

MANDLA TFWALA **Appellant**

versus

REX **Respondent**

Neutral citation: *Mandla Tfwala v Rex (36/2011) [2012] SZSC 15 (31 May 2012)*

Coram : S.A. MOORE JA, S. TWUM JA, E.A. AGIM JA

Heard : 9 MAY 2012

Delivered : 31 MAY 2012

Summary **: *Conviction for Murder with extenuating circumstances – Appeal against sentence of 15 years imprisonment for being too harsh and high– source of power of this court to interfer with sentence – How power is exercised – Judicial approach to***

punishment − Appropriate punishment − use of methodology of comparison with previous cases in determining Judicial trend in sentencing − 15 years imprisonment for murder not too harsh or high in the circumstances of this case − Appeal dismissed.

AGIM JA

[1] Following the conviction of the appellant for a count of murder and a second count of unlawful possession of fire arms on the 27th June 2011 in Criminal Case No. 231/09 by the High Court per M.C.B. Maphalala J, he was on the 14th July 2009 sentenced to a prison term of 15 years on the count of murder and another term of 5 years on the second count of unlawful possession of fire arms, with both terms to run concurrently.

[2] Dissatified with the part of the judgment of the High Court relating to the 15 years sentence of imprisonment for murder, the appellant commenced this Appeal No. 36/2011, by a notice of appeal, contained in a letter he wrote to the Registrar of the High Court dated 9th August 2011 and bearing the Registrar's stamp with a date thereon showing that it was recieved on the 15th August 2011.

The said notice of appeal which is at page 1 of the record of appeal contains a ground of appeal in the following words – " **I humbly appeal for my fifteen (15) years sentence to be reduced…I accept being convicted for the offence but I only request the Honourable Court to reduce the sentence because it is too harsh for me and I didn't have an intention of committing the offence."**

[3] The appellant prosectuted this appeal in person. His heads of argument are contained in a letter to the Registrar of this court dated 30th April 2012 delivered to the court during the hearing of this appeal in open court on the 9th of May 2012. He relied on his heads of argument in support of this appeal. The respondent's heads of argument filed on the 19th April 2012 was relied on by Learned counsel for the respondent against this appeal.

[4] The appellant contends in this appeal that the sentence of 15 years imprisonment for murder is too harsh and too high and thereby challenged the exercise of discretion by the trial court. The respondent on the other hand argues that –

(a) the sentence of 15 years for murder falls within the range of sentences imposed by courts for the offence of murder

(b) This court should not interfer wih the sentence because it is the result of a proper exercise of discretion

(c) The sentence is appropriate in the circumstances of this case.

The issues arising for determination in this appeal are as follows –

1. whether the trial court properly exercised its discretion
2. whether the sentence of 15 years imprisonment for murder is too harsh or too high or inappropriate in the circumstances of this case.

[5] Let me start with the first issue. The apellant has urged this court to reduce the sentence of 15 years for murder imposed by the trial court. Does this court have the jurisdiction to do so? There is no doubt that this court has the jurisdiction to reduce or otherwise interfere with a sentence imposed by a trial court in appropriate circumstances. The jurisdiction and power to do so exist by virture of –

i) S. 146 (1) and (2) of the 2005 Constitution of the Kingdom of Swaziland as part of its general jurisdiction to hear and determine appeals against decisions of the High Court

ii) S. 5 (3) of the Court of Appeal Act No. 74 of 1958 as a power specifically to deal with appeals against sentence. The scope of this power and how it should be exercised has been restated in a plethora of cases. For example, Masuku v R (1977-1978) SLR 86 and 89, Siboniso Sandile Mabuza v The King (Crim. App. No 1/2007 decided on 9-5 2007), Eric Makwakwa v Rex (Crim. App. No. 2/2006), R v Perly Stanley Pyan Dlamini (1977-1978) SLR 28 at 26, and Bhekizwe Motsa v Rex (Crim. App. No. 246/2008 delivered on 31-5-2012).

[6] It is not an unfettered or unimpeded discretionary power. It is a discretionary power that can be exercised to interfere with the discretion of the trial court only when it is shown that the trial court in sentencing did not exercise its sentencing discretion judicially and judiciously or properly or that the sentence imposed is the result of an improper exercise of that discretion. A complaint that the sentence is too harsh or high, or that it results from a misdirection or error of law or fact or that no reasonable tribunal or court would have imposed such sentence is essentially or in substance a complaint that the trial court did not properly exercise its discretion.

[7] So this court has to be satisfied that the trial court did not exercise its discretion judicially and judiciously in imposing the sentence of 15 years for murder or that the sentence is the result of an improper exercise of discretion before it can interfere with the said discretion of the trial court.

Therefore it becomes necessary at this juncture to consider if the exercise of discretion to levy 15 years prison term for murder was proper.

To enable me determine this question. I will rely on certain established judicial criteria that courts have adopted across jurisdictions to ensure that the objective of criminal law is realised. This court in Bhekizwe Motsa v Rex (supra) restated these criteria in the following concise statement –

> **" The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principle and sentence will depend on the**

peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of society and the personal circumstances of the accused, other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment."

[8] This court in Xolani Zinhle Nyandzeni v Rex (Crim. App. No. 29/2010 decided on 31-5-2012) stated per Ramodibedi CJ that " This court has repeatedly stressed the fundamental principles that the imposition of sentence is primarily a matter which lies within the discretion of the trial court. This is however, a judicial discretion which must be exercised upon a consideration of all the relevant factors. In particular, the trial court is enjoined to have regard to the triad consisting of the offence, the offender and the interest of society. This Court in Musa Kenneth Nzima v. Rex (Crim. App. No. 21/2007 delivered on 14th November 2007) approved and adopted the often – quoted and celebrated statement of the South African Court of Appeal per Holmes JA in S. v Rabie (1975) 45 CCA 855 (A) at 862 (9) that " punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances." In Thapelo v Motoutou Mosilwa v R (Crim. App. No. 0124/05 -) the Botswana Court of Appeal per Moore JA stated that –

“ It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence’s message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them from serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated.”

[9] In Musa Kenneth Nzima v Rex (Crim. App. No. 21/07 delivered on 14 – 11- 2007) this Court per Tebbutt JA adopted and applied the statement of Corbet JA in the South African Court of Appeal Case of S v Rabie (supra) that “ **a Judicial officer should not approach punishment in a spirit of anger nor should he strive for severity. Nor on the other hand, surender to misplaced pity. While not flinching from fiimness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”**

[10] The Botswana Court of Appeal in Ntesang v The State (2007) 1 BLR 387 at 390 stated per Lord Coulsfied that “ one of the fundamental principles of justice in sentenceing is that the courts should strive to impose the right sentence for the particular circumstances of the case.”

These are general guidelines applicable in all cases. Through the cases special guidelines have been developed to deal with the peculiarities of each case.

Let me now proceed to consider how the trial court exercised its sentencing discretion in imposing a custodial sentence of 15 years on the appellant.

[11] S. 296 (1) of the Criminal Procedure and Evidence Act provides that the maximum sentence for the offence of murder is death by hanging. But the High Court has the discretion to impose a lesser sentence by virture of S. 15 (2) of the 2005 Constitution of the Kingdom of Swaziland which provides that the death penalty is not mandatory. This point is Judicially settled in Ntokozo Adams v The King (Crim.App. No. 16/2010) by this court per Twum JA. It is therefore well within the discretionary power of the trial court to choose to levy life imprisonment (which is not less than 25 years by virture of S. 15 (3) of the 2005 Constitution) or a term of imprisonment more than 15 years. But the trial court deemed it fit to impose a term of 15 years imprisonment for murder. Yet the appellant is complaining that it is too harsh and high. It is well within the right of the appellant to so complain if he feels that the gravity of the offence, notwithstanding, he was entitled to a lesser sentence. When the trial court on the 27th June 2011 convicted the appellant it did not specify that in its opinion extenuating circumstances exist as required by S. 295 (1) of the Criminal Procedure and Evidence Act. However on the 14th July 2011 when it sentenced the accused it stated that the accused is convicted for murder with extenuating circumstances. The failure of the trial court to

comply with the said S. 295 (1) did not affect the validity of the conviction and sentence by virture of the third proviso to S. 295 (2) of the Criminal Procedure and Evidence Act which states that "provided that any failure to comply with the requirements of this Section shall not affect the validity of the verdict or any sentence imposed as a result." Moreso as the trial court specified during sentence that "the accused has been convicted of murder with extenuating circumstances"

[12] The trial court stated the extenuating circumstances proved by the appellant and the mitigating circumstances put forward by him as follows −

> **"The accused has proved the existence of extenuating circumstances, that he was merely 19 years of age when he committed the offence and was still very young and certainly immature; he was provoked by the deceased and he believed that he was faced with imminent physical attack from the deceased and his friends.**
>
> **In mitigation of sentence the defence submitted that the accused was a first offender; he was young at the time of commission of the offence; that he showed remorse by co-operating with the police and further surrendering the weapon to the police; and that he has been in custody since his arrest on the 3rd February 2009."**

[13] The trial court then went on to consider the nature of the crime and the interest of the society in the following words −

“ Both of these crimes are very serious; they involve the loss of an innocent human life. The unlawful possession of firearms has brought about misery, suffering and the death of many innocent people; those in possession of the firearms use them at the slightest possible provocation even when their lives are not in danger. The courts have a duty to protect members of society against the unlawful possession of deadly firearms which result in unnecessary loss of human life. In arriving at the appropriate sentence, I will also take into account the personal cicumstances of the accused.”

The trial court proceeded to sentence the accused. It is obvious that the sentence resulted from the court’s consideration of the extenuating circumstances, the personal cirmstances of the appellant and the interest of society. This satisfies the checklist in the triad of punishment restated in a long line of cases that the punishment should fit the criminal as well as the crime, be fair to society and blended with a measure of mercy according to the circumstances. However I must state that it is necessary that the reasoning behind the sentence reflect a review, evaluation and analysis of the extenuating, mitigating and aggravating facts, the personal circumstances of the convict, a balancing of the interest of society against the personal circumstances of the convict, the factor that tipped the scale for or against the appellant.

[14] The appellant in his heads of argument argues that he was still young at the time he committed the crime and that he is a first

offender. But these matters were considered by the trial court in imposing the sentence in question. The court regarded them as extenuating and mitigating circumstances as can be seen from the portions of the judgment reproduced above. The appellant in this appeal has not complained that there were not adequately considered or that they were not considered at all. The trial court has relied on them in arriving at the said sentence. This is evident from the judgment. I think those facts weighed heavily on the mind of the trial court and influenced it to impose the said sentence of 15 years.

[15] The circumstances of the commission of the crime are such that it would have attracted a higher sentence but for the extenuating and mitigating circumstances. The accused was irritated by the jokes, comments and gestures of the deceased whom he said was drunk. As the trial court held, there is no evidence that the appellant was drunk as well.

As a result of the irritation, the appellant shot the deceased at a blank range (a distance of 10 metres), three times in quick succession. The trial court found as a fact that the deceased and his two friends, PW1 And PW3, were not armed. According to the trial court " what is apparent from the evidence is that the deceased in his drunken state uttered certain words to the accused who responded by shooting him to death; he shot the deceased three times in succession." The three times shooting shows the vehemence and determination of the appellant to terminate the life of the deceased for irritating him. It is clear that the appellant killed the armless, drunk man in cold blood. A man who kills another in such a callous manner at the slightest irritation is certainly a danger to society. A reasonable man will refuse to respond to the irritating jokes of a drunken person and

simply walk away ignoring him. There is nothing in the evidence to suggest that the appellant was not a reasonable man at the time. As the trial court found, he was not drunk. His easy recourse to killing a drunken man for irritating jokes shows that he is person with extraordinary and dangerously volatile intolerance. In spite of the circumstances and seriousness of this offence the trial court was still moved by the extenuating and mitigating facts to considerably lower the custodial sentence to just 15 years. In my view the learned trial Judge judicially exercised his discretion. Therefore I have no reason to interfere with such proper exercise of discretion.

I do not need to belabour issue No. 2 in view of my above decision under issue No. 1. Let me add that in addition to the triad of punishment and the legally recognised objectives of sentencing, judicialism in Swaziland has developed a further criterion that will enable the courts, while fulfiling the triad of punishment in prusuance of the objectives of sentencing ensure uniformity, parity, consistency and certainty of sentences. This pathway was cleared by the famous, oft-quoted and celebrated formulations of the very erudite Moore JA in Mgbubane Magagula v The King (Crim. App. No. 32/2010 delivered on 3-11-2011) that a trial court in imposing a sentence and appellate courts in assessing the appropriateness of sentence imposed by a trial court, should have regard to the range of sentences imposed by other courts for the same offence bearing in mind the peculiar circumstances of each case. This formulation was adopted and used by this court in Bhekizwe Motsa v Rex (Crim. App. No. 37/2010 delivered on 31-5-2012). The underlying idea of this formulation is that a sentence imposed should not be disturbingly outside the range of sentences previously imposed

for a similar offence. It is a path to the right direction. Therefore I must follow it to consider if the 15 years imprisonment for murder is within the range of sentences previously imposed by courts for murder.

[16] The Learned DPP has in his heads of argument for the respondent assisted this court in this inquiry with a list of decisions containing previous sentences by courts for murder. I will reproduce his list here. The Court of Appeal (as it then was) observed that a sentence of 12 years imprisonment in respect of Murder with extenuating circumstances was a lenient one in **Noah Mkhulisi Tsabedze v Rex, Criminal Appeal 4/2006**

This honourable Court has itself observed that a sentence of 14 years imprisonment in respect of Murder with extenuating circumstances was not sufficiently severe in **Siyabonga Motsa v The King, Criminal Appeal 25/2010**. The Court of Appeal (as it then was) approved a sentence of 20 years imprisonment in respect of Murder in **Kenneth Gamedze and 2 other v The King**, **Criminal Appeal 1/2005**. This Honourable Court has itself confirmed a sentence of 20 years imprisonment in respect of Murder in **Mbongiseni Bobo Nkomondze v Rex, Criminal Appeal** 32/2011 (available at Swazilii.org). This Honourable has confirmed sentences of fifteen (15) years imprisonment in respect of Murder in **Mbuso Likhwa Dlamini v Rex, Criminal Appeal 18/2011 Themba Dludlu v Rex, Criminal Appeal 22/2011** (both available at Swazilii.org). In **Sibusiso Goodie Sihlongonyane v The King , Criminal Appeal 14/2010** this Honourable Court reduced a sentence of twenty-seven (27) years imprisonment to fifteen (15) years imprisonment in respect of Murder with extenuating circumstances. These cases state a

range of sentences imposed for murder by the Court of Appeal and this court.

However, I must observe that the Learned DPP did not show that the circumstances of the commission of the offence and the personal circumstances of the accused in those cases are similar to those in this case. Reliance on the range of previous sentences for the same offence must be subject to the pecular facts of each case especially the personal circumstances of the accused and the circumstances of the commission of the offence. According to the Swaziland Court of Appeal in Musa Kenneth Nzima v Rex (supra) per Tebbutt JA " Each case must be decided on its facts and therefore a bench-mark of a certain number of years imprisonment designed as an indication of the court's aim to ensure severity in sentences in cases where knives are used and lives are in consequence lost, without individualizing the facts of the case and the personal circumstances of the offender, is not an appropriate approach to sentencing." It behoves counsel therefore, when relying on sentences imposed in a series of cases as a bench mark of the range of appropriate sentences for an offence to show that the circumstances of the commission of the offences and the personal circumstances of the accused in those cases bear much similarity to the circumstances in the case at hand. Cases with dissimilar facts must be treated differently. This court in Bhekizwe Motsa v Rex (supra) had cautioned that "the practice of being guided by the range of sentences previously imposed by courts for the same offences does not impair in any way the dicretionary power of sentencing vested on a court by statute. So that a court can in justifiably compelling circumstances impose sentence outside the existing range of custodial sentences for that offence."

Let me consider the facts of some of these cases to see their similarity or dissimilarity to this case. The case of Musa Likhwa Dlamini v Rex (supra) bears a lot of similarity to this case. The High Court convicted the accused of murder with extenuating circumstances and sentenced him to 15 years imprisonment. He appealed against the sentence of 15 years imprisonment on the ground that it was harsh, severe and unbearable. The accused ambushed and stabbed an unarmed man to death. The deceased did not provoke the attack. The trial court took account of the facts that the convict was an unmarried young man of 21 years of age at the time of the commission of the offence, that he had no previous convictions and had surrendered himself to the police. On the other hand, the court considered the fact that the convict attacked the deceased who was unarmed without provocation. This court held that murder was a serious offence for which imprisonment of 15 years was amply warranted in the circumstances. The above case is substantially similar to our present in material paticulars. It is therefore a very useful guide here.

In the case of Mbongiseni Bobo Nkomodze v Rex (supra) in which the accused was indeed sentenced to 20 years imprisonment for murder, the appeal did not turn on the issue of the appropriateness of the sentence. Rather the issue decided was whether the sentence was back dated to include the period of pre-sentence detention.

In Sibusiso Goodie Sihlongonyane v The King (supra), the High Court convicted the appellant of murder with extenuating circumstances and sentenced him to 27 years imprisonment.

The appellant using a knife, hacked to death his unarmed grandmother who had not provoked him in any way. He believed that the woman might kill him with witchcraft. He appealed against his sentence on the ground that it was too harsh and severe for him to bear as a young man. He also said he had two little children to provide for and that he was the breadwinner of his family. This court held that the 27 years sentence was disturbingly inappropriate and reduced it to 15 years imprisonment. This case offers useful guide here too on account of substantial similarity with the facts of this case, particularly the number of years finally imposed by this court.

[17] These cases serve to show in rough and general terms, the judicial trend in sentencing for murder. In the light of the above range of sentences for murder, I am inclined to hold that the custodial sentence of 15 years for murder in this case is not too harsh or high in the perculiar circumstances of this case. I hold that any reasonable court or tribunal could have imposed even a higher sentence on the appellant considering the circumstances of the commission of the offence in this case. As it is, this court has no reason to interfere with the sentencing discretion of the trial court. I therefore refuse to disturb the 15 years imprisonment imposed by the trial court.

This appeal therefore fails and is dismissed.

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E.A. AGIM
JUSTICE OF APPEAL

I agree : _____

S.A. MOORE
JUSTICE OF APPEAL

I agree : _____

DR. S. TWUM
JUSTICE OF APPEAL

For the Appellant : In Person

For the Respondent : B. Magagula, Crown Counsel