IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 29/2010

In the matter between

XOLANI ZINHLE NYANDZENI **Appellant**

and

REX **Respondent**

Neutral citation: Xolani Zinhle Nyandzeni *v Rex (*29/2010) [2012] SZSC 3 (31 May 2012)

Coram: RAMODIBEDI CJ, MOORE JA, and AGIM JA

Heard: **03 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Criminal law – Murder – Sentence – Appellant sentenced to 30 years imprisonment for the murder of his own brother – Appeal against sentence on the ground that it is too harsh in the circumstances of the case – Appeal upheld – The sentence of 30 years**

imprisonment set aside and substituted with a sentence of 25 years imprisonment.

RAMODIBEDI CJ

[1] This appeal arises out of a gruesome murder committed by the appellant against his own brother in the course of which he literally cut off his head completely with a knife.

[2] The appellant was tried in the High Court on a single count of murder. It was alleged in the indictment that upon or about 22 September 2008, and at or near Mbulungwane area in the Shiselweni Region, the appellant unlawfully and intentionally killed one Nkululeko Nyandzeni ("the deceased").

[3] The court *a* quo convicted the appellant of murder with extenuating circumstances and sentenced him to 30 years imprisonment backdated to 23 September 2008, being the date of his arrest.

[4] The appellant has appealed to this Court against his sentence. He relies on a single ground of appeal that the sentence is too harsh in the circumstances of the case.

[5] In order to determine the appropriateness or otherwise of the sentence imposed on the appellant it is necessary, first, to outline the relevant facts. The Crown relied principally on the evidence of Siboniso Ndlangamandla (PW1) who witnessed the deceased's murder. On the evening of the fateful day in question, he was in the company of one Ndumiso Nyandzeni and the appellant. They were joined by the deceased who entered the house carrying a box of dagga which the appellant had sent him to collect for him. The two men then started quarrelling over the dagga as the appellant said that the deceased had reduced its quantity. The appellant further accused the deceased of having burnt down his house.

[6] At that point the appellant ordered the deceased to face the wall. He then tied him with a rope around the hands, behind the back and around the legs. Thereafter, he assaulted him repeatedly with a hammer on the head and felled him to the ground. At that point PW1 and Ndumiso ran away and went to raise an alarm.

[7] It is convenient to digress there and observe that the Crown also relied on a confession admittedly made by the appellant freely and voluntarily. In a nutshell, the appellant alleged in the confession that one Bheki Simelane had burnt down his house in June 2008 in the company of the deceased. He also

said that a week before the fateful day in question the deceased had unsuccessfully tried to stab him with a bushknife.

[8] The appellant admitted in his confession that he assaulted the deceased with a hammer. He hit him four (4) times on the head. He then "proceeded to take a knife and cut his head off from the body, when he was lying on the ground." He added, for good measure, that the deceased was still alive when he cut off his head.

[9] D/Sgt 2750 Nhlanhla Mkhabela (PW2) attended the scene of the crime. He found the dead body of the deceased lying on top of a mat and blanket inside one of the houses of the Nyandzeni homestead. Shockingly, the head was lying 30 metres away from the body. The following items were found next to the body: a rope, a hammer, and a knife. Both the hammer and the knife were bloodstained.

[10] The post-mortem report disclosed that death was due to multiple injuries. The report further confirmed that the deceased's head had been "separated from the body."

[11] Turning now to sentence, this Court has repeatedly stressed the fundamental principle 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 interests of society. See S V Zinn 1969 (2) SA 537 (A). This Court will generally not interfere with that discretion in the absence of a material misdirection resulting in a miscarriage of justice. See, for example, such cases as Sam Dupoint v Rex, Criminal Appeal No. 4/08; Jonah Tembe v Rex, Criminal Appeal No. 18/08; Vusumuzi Lucky Sigudla Criminal Appeal No. 01/2011, reported on line in [2011] SZSC 24.

[12] It is further useful to observe, as this Court has repeatedly held, that s 5 (3) of the Court of Appeal Act 74/1954 confers additional power on the Court on an appeal against sentence to pass such other sentence warranted in law as it thinks ought to have been passed in the first place.

[13] There can be no doubt that the appellant was convicted of a horrific murder. This consideration appears to have been uppermost in the learned Judge *a quo's* mind in sentencing the appellant to 30 years imprisonment. He noted that the deceased was "brutally and viciously killed in cold blood and then beheaded." As can be seen, this was an aggravating factor. Regrettably, there is not a single passage in the judgment *a quo* to show that the court took into account the appellant's personal circumstances. In paragraph [28] of the

judgment the court merely recited the submissions made on the appellant's behalf in mitigation of sentence without more. Even so, the court omitted to take into account the fact that the appellant was relatively young at the age of 27 years when he committed the offence. He still had an opportunity to reform rather than be broken completely. I am inclined to the view that this omission amounted to a misdirection entitling this Court to interfere with the sentence imposed.

[14] The appellant deserves an appropriately stiff sentence as a deterrent in the circumstances of the case. But, in imposing sentence the Court must heed the salutary caution laid down by Voet: Selective Voet – Ganes's translation vol. 2 at p. 72 not to approach sentence in a spirit of anger *"because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little."* See S V Rabie 1975 (4) SA 855 (A) at p. 865.

[15] There is another principle on sentencing which commends itself to me. Both in the jurisdictions of Botswana (Ntesang v The State [2007] 1 BLR 387 (CA); Sekoto v The State [2007] 1 BLR 392 (CA)) and Lesotho (R v Lebina and Another 2000 – 2004 LAC 464 (CA); Ramaema v Rex (2000 – 2004) LAC 710 (CA) and the cases cited therein) respectively, the courts aim at a measure of uniformity in sentencing whenever this can reasonably and justly

be done, bearing in mind of course that no two cases can ever be exactly the same. This Court adopted the principle in the Sigudla case (supra). In this regard three cases in this jurisdiction come to mind. These are Gerald Mvemve Valthof v the King, Crim. Appeal Case No. 5/10; Sibusiso Goodie Sihlongonyane v Rex, Criminal Appeal No. 13/10 and Ntokozo Adam v Rex, Criminal Appeal No. 16/10.

[16] In Valthof's case the appellant had been effectively sentenced by the High Court to 40 years imprisonment for the murder of his two minor children whom he had fathered with his live-in girlfriend and the attempted murder of the girlfriend herself. He had set alight the house in which they were sleeping. The children died but the girlfriend survived. As can be seen, these, too, were gruesome murders of the innocent young children. On appeal this Court held that the crimes "called for severe sentences as a deterrent." However, the Court reduced the sentence to an effective sentence of 25 years imprisonment.

[17] In Sihlongonyane's case the appellant had been sentenced to 27 years imprisonment for the murder of his grandmother who was aged 85 years. The murder had been actuated by a belief in witchcraft. On appeal to this Court, the sentence was reduced to 15 years imprisonment. The appellant was 24 years of age at the time of the commission of the crime.

[18] In the case of Adams v Rex (supra) the appellant had been sentenced by the High Court to 30 years imprisonment for murder without extenuating circumstances. He was 21 years of age at the time of the commission of the offence. This Court described the crime as "heinous". The deceased, who was $9^{1}/_{2}$ months pregnant had sustained multiple stab wounds which were described as "gruesome and horrendouns in the extreme". On appeal, this Court reduced the sentence to 20 years imprisonment.

[19] Doing the best I can in balancing the triad consisting of the offence, the offender and the interests of society, as well as striving for uniformity of sentences, I consider that the sentence of 25 years imprisonment as in Valthof's case (supra) will best serve the interests of justice in the instant matter. In terms of subsection 15 (3) of the Constitution, this is equal to the lowest end of a life sentence. This subsection provides as follows:-

> *"(3) A sentence of life imprisonment shall not be less than twenty five years."*

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

(1) The sentence of 30 years imprisonment imposed upon the appellant is set aside and is substituted with the following sentence:-

"25 years imprisonment."

(2) This sentence will commence from 23 September 2008, being the date of the appellant's arrest.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

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S.A. MOORE

JUSTICE OF APPEAL

I agree

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E.A. AGIM

JUSTICE OF APPEAL

For Appellant : **Mr. N.M. Manana**

For Respondent : **Mr. S. Fakudze**