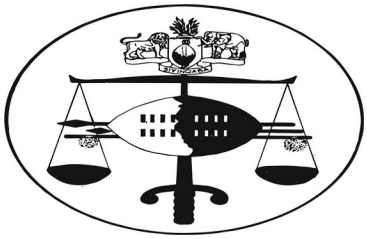

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 38/2010

In the matter between

BOYBOY BONGINKOSI MAVIMBELA **Appellant**

and

REX **Respondent**

Neutral citation: *Boyboy Bonginkosi Mavimbela v Rex* (38/10) [2012] SZSC 31 (31 May 2012)

Coram: EBRAHIM JA, MOORE JA and DR. TWUM JA

Heard: **25 May 2012**

Delivered: **31 May 2012**

Summary: Criminal law and procedure, application of s.165 of the Criminal Procedure and Evidence Act, appellant sentenced to be kept in custody as criminal lunatic by reason of "mental illness", appeal against sentence, sentence irregular and set aside, s 5(3) of the Court of Appeal Act applied, new sentence of 15 years imprisonment.

TWUM J.A.

[1] On 1st March 2008, the appellant killed his sister by hacking her with a bush knife all over her body. Needless to say the end result was a gruesome site. The appellant was arrested and charged with her murder. He was also accused of the attempted murder of Nelsiwe Simelane. The appellant pleaded not guilty to both offences. Certain pieces of evidence were admitted into the record of the proceedings by consent pursuant to section 272 (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended).

[2] The appellant made the following formal admissions:

> "1. The accused admits that on the 1st March 2008 and at or near Mndobandoba area in the Lubombo region he did unlawfully kill Zandile Mavimbela.
>
> 2. The accused admits that on the 1st March 2008 and at or near Mndobandoba area in the Lubombo region he did unlawfully assault Nelsiwe Simelane.
>
> 3. The accused admits he recorded a statement to Magistrate M.A. Mkhaliphi on the 2nd March 2008 at Simunye Magistrate's Court.

4. The statement made by the accused to the Judicial Officer was made freely and voluntarily without having been unduly influenced and must therefore be admitted as a confession.

5. The report on post mortem examination on the body of the deceased in count one which was conducted on the 4th March 2008 be wholly admitted and considered as part of the evidence.

6. The report on the medical examination on the complainant in count 2 which was compiled on the 7th March 2008 be wholly admitted and considered as part of the evidence.

7. The photographs which were taken by the scenes of crime officer be wholly admitted and considered as part of the evidence."

[3] A number of witnesses were called by the Crown to prove its case. The appellant elected to give evidence on oath in his defence and called a number of witnesses, including his wife and the Psychiatrist who examined him.

[4] At the conclusion of the trial, the court noted that in view of the admissions by the appellant the only issue for decision by the court was as mentioned in the report of the Psychiatrist dated 15th June 2009 wherein he stated as

his opinion that the appellant, Bonginkosi Boy Boy Mavimbela, had mental disorder at the time of the alleged offence (1st March 2008)". Another issue for decision by the court was whether the appellant was provoked by the deceased and the other victim to act as he did.

[5] The court received voluminous legal submissions on the larger issue of the mental responsibility of the appellant when he committed the offences with which he was charged. A professional report by Dr Walter Mangezi, a Psychiatrist at the National Psychiatric Hospital from whom the appellant was receiving treatment and medication for mental disorder was carefully examined and commented upon by both the Crown Counsel and the defence counsel. The court also had access to considerable academic publications on the mental conditions of accused persons charged with murder. The conclusion was unanimous among the lawyers that at the end of the day the court is not bound to accept an expert's opinion and that the court alone was responsible for finding of fact and law.

[6] The learned trial judge stated in paragraph 46 of the judgment that after considering the learned exposition, he was inclined on the facts of the case to accept the findings of Dr Walter Mangezi, that the appellant had "mental disorder" at the time he committed the alleged offences. He continued by saying that "in the circumstances of the case I have come to the considered

view that the evidence of the doctor should be adopted by this court." He also took into consideration the fact that the appellant was being treated for a mental condition. He concluded by saying that "in the circumstances, therefore the court is duty bound to return a finding of "not guilty by reason of mental illness"" and further the court is obliged to order that the accused be kept in custody as a criminal lunatic in terms of subsection (2) of section 165 of the Criminal Procedure and Evidence Act as amended.

[7] On 18th November 2010, the appellant appealed against the sentence meted out to him by the court a quo. He filed two grounds, namely:

"1. The Honourable Court *a quo* erred in law in ordering that the Appellant be sent to a criminal asylum and to stay there at his Majesty's pleasure whereas Appellant had been acquitted and discharged of the charges he was facing by the very same Court.

2. The Honourable Court erred in law in Ordering that Appellant be sent to a Criminal asylum and to remain there at his Majesty's pleasure when there was no medical evidence led to suggest and/or prove that up until the time the Court *a quo* acquitted Appellant, the latter was still suffering from the mental defects he was labouring under during the occurrence

of the offences the Appellant was facing which he was subsequently discharged and acquitted of."

[8] The appellant's Heads of Argument were filed on 16th April 2012. In paragraph 4, the appellant submitted that the learned judge in his judgment did not return a special finding to the effect that the appellant did the act charged. As counsel for the Crown rightly pointed out in the Respondent's Heads of Argument, it was the appellant himself who raised the defence of his insanity during his trial. He called evidence which on a balance of probabilities satisfied the court that he was insane at the relevant time. P.W.3, Dr Walter Mangezi, a Psychiatrist at the National Psychiatrist Hospital had interviewed the appellant between the months of April and May 2000. He stated in his opinion to the court that the appellant had "***mental disorder"*** at the time of the alleged offence. There was no argument that the appellant hacked the deceased to death. That much was admitted in the formal admission, made by the appellant and admitted into the record. What was in issue was the appellant's criminal capacity. The words used by Dr Walter Mangezi, the Psychiatrist to describe the appellant's criminal capacity was that the appellant had ***"mental disorder"*** at the time of the alleged offence. On the other hand, the trial judge wrongly assumed that the expressions, "mental condition" "unsound mind", "mental disorder" "mental illness" were all synonymous with the word

"insane" used in s.165 of the Criminal Procedure and Evidence Act (as amended). Indeed, no medical professional had actually used the word "insane" during the trial. The learned judge inadvertently erred when he departed from the strict wording of the section and held that in the circumstances, the court was duty bound to return a finding of "not guilty by reason of ***"mental illness".*** That made the sentence irregular. Section 165 applies only if there is a finding that the accused is insane. It is, of course, equally wrong for defence counsel to suggest, as he does in the appellant's Head of Argument, that the court acquitted the appellant. That is not recorded anywhere in the judgment.

[9] S. 5 (3) of the Court of Appeal Act provides:-

> "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 thereof as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[10] In the circumstances, the sentence passed on the appellant by the court a quo is set aside. In its place I find the accused guilty of the murder of his

sister with extenuating circumstances. I am persuaded that he laboured under some mental problem and in my view that provides extenuation.

However, in my view, the gruesomeness, savagery and brutality with which the appellant butchered his sister calls for a severe sentence to serve as a deterrent for all would-be murderers with a proclivity for killing a human being on the least pretext.

The appellant is sentenced to 15 years imprisonment to be back-dated to the day he was taken into pre-trial incarceration.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

_____
A.M. EBRAHIM
JUSTICE OF APPEAL

I also agree.

_____
S.A. MOORE
JUSTICE OF APPEAL

COUNSEL:
Appellant: **M. Dlamini**
Respondent: **D.M. Nxumalo – D.P.P.**