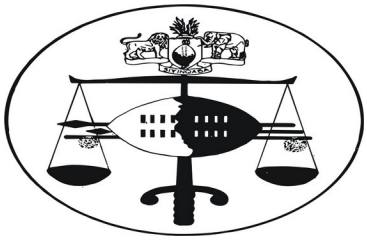

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 22/12

In the matter between

NDABA KHUMALO **Appellant**

and

REX **Respondent**

Neutral citation: *Ndaba Khumalo v Rex* (22/12) [2012] SZSC 37 (30 November 2012)

Coram: DR. TWUM JA, M.C.B. MAPHALALA JA and LEVINSOHN JA.

Heard: **6 November 2012**

Delivered: **30 November 2012**

Summary: Criminal Appeal; conviction for murder with extenuating circumstances; appellant sentenced to 18 years imprisonment back-dated to 8th December 2008 – the date of his pre-trial incarceration; appellant appeals to this court for reduction in sentence; principles that inform court in dealing with such appeals.

TWUM J.A.

[1] This is an appeal from the judgment of Sey J. sitting at the High Court, Mbabane, on 7th June 2011. The appellant was convicted of the offence of murder with extenuating circumstances and was sentenced to 18 years imprisonment without the option of a fine.

[2] The appellant has appealed to this court against his sentence only, praying that his sentence of 18 years imprisonment was too harsh and severe for him to bear. Consequently he would like the sentence to be reduced by 10 years.

[3] The facts of this case are that on 28th November 2008 the appellant and a friend of his went on a drinking spree in Mbabane. By noon that day it became clear to the friend that the appellant was drunk. He started to be a nuisance to other road-users and accosted women he met in the street. One of those women took umbrage and phoned the police to come and arrest him but before the police arrived, he smelt a rat and ran away. Meanwhile, the appellant had purchased two (2) knives from a shop. He offered no explanation then for the purchase. It was one of these knives that was used to commit the murder.

[4] When school closed that afternoon at about 2 pm, perhaps still trying to avoid the police, the appellant entered a pathway that ran through a forest. This pathway led ultimately to the Mhlatane High School. As ill-luck would have it, two school children on their way home from school used this pathway. Suddenly the appellant appeared behind them from the forest and threatened to kill them. The appellant grabbed the older of the two girls, aged about 12 years, and the younger one started to run away from the appellant. The appellant let go of the older girl and chased the younger one. When he caught up with her he stabbed her indiscriminately on her chest, arm and neck. The older girl raised an alarm and two people rushed to their rescue. The appellant once again bolted away leaving the younger one bleeding profusely from her stab wounds. She died from those wounds.

The appellant quickly collected his bag from his friend and absconded to the Republic of South Africa, whence he was later repatriated on 29th November, 2008, tried as convicted as stated above.

[5] During his trial, the appellant pleaded "not guilty" and a total of some 13 witnesses testified for the prosecution in proof of the charge preferred against him. The appellant was represented by Counsel and he called two witnesses. In sum he denied having stabbed any girl to death. He testified that he could not remember that he stabbed any girl that day. He said what

he remembered was that about 1 pm that day he left for the Republic of South Africa in response to an urgent call from his employers to resume duty. He claimed that he did not remember anything else. He said in his view, the prosecution witnesses had merely fabricated evidence against him.

[6] After a very careful and impartial evaluation of the totality of the evidence, the learned trial judge held that the appellant was evasive in his answers and did not impress her as a witness of truth. She rejected his outright denial of the commission of the offence. In her opinion the prosecution had proved its case against the appellant beyond reasonable doubt and found him guilty. She convicted him of murder with extenuating circumstances, having regard to the fact that he was drunk at the time he committed the offence. He was sentenced to 18 years imprisonment.

[7] On 23rd February 2012, the appellant filed his appeal to this court. In it he stated that he accepted his conviction and was only appealing against "the severity and harshness of (his) 18 years sentence". In his so-called Heads of Argument, he blamed the commission of the murder on his state of insobriety. He said he was remorseful and that he was a first offender. He pleaded for leniency and a short prison sentence.

[8] It is well established in this jurisdiction, as in many other judicial systems all over the world, that sentencing is a matter within the discretion of the trial judge. It is also clear to me that young men who spend long periods of time drinking alcoholic beverages and getting very drunk cannot expect society as a whole, represented by the courts to exonerate them from the consequences of their self-induced drunkenness which embolden them to commit criminal acts. The fundamental human rights and freedom of the individual enshrined in the Constitution guarantee respect for life, equality before the law and equal protection of the law.

[9] Where an appeal is lodged against a decision of the exercise of a discretion by a sentencing court, well established grounds exist to guide the appellate court in the delicate act of reviewing a sentence passed on a person lawfully convicted of a crime. At the time of composing this judgment, the following grounds were noted. The list is not meant to be exhaustive but it provides some guidance; viz

(i) That the sentence is startlingly inappropriate, or disturbingly inappropriate; or

(ii) that the sentencing court had no sentencing jurisdiction to impose that particular sentence. (See s.292 (2) of the Criminal Procedure and Evidence Act); or

(iii) that the sentence breached a statutory limitation, eg s. 185 bis (1) – minimum of 9 years imprisonment for rape accompanied by aggravating circumstances – eg not using a condom and exposing the victim to HIV/Aids,

(iv) that the sentence was unlawful – eg s.296 (2), proviso – sentencing a child under 14 years of age to imprisonment; or

(v) that the sentence, considered alone, or with others consecutively, subjects a person to torture, inhuman or degrading treatment or punishment – see s.18 (2) of the Constitution; or

(vi) that there is a striking disparity between the punishment given by the trial judge and what the appellate court in all the circumstances, would have given; or

(vii) if the punishment was irregular, or if the trial court misdirected itself.

[10] I am persuaded that there is a misconception abroad among appellants that any sentence above 10 years is an aberration and should be reduced. Let me disabuse the minds of such people. Sentence for murder may be the death penalty, though no longer obligatory or it may be life imprisonment and under s.15 (3) of the Constitution a sentence of life imprisonment shall not be less than 25 years.

[11] In casu, the learned trial judge fully appreciated the enormity of the crime. It was as senseless as it was horrendous for the appellant to run after, catch-up with and systematically snuff out all life from a 10 year old school girl who was completely innocent in the full meaning of the word; without any evil or guile and having little or no experience of the evil forces of this dark world, particularly of sexual matters, or of unpleasant things. She died a painful death as she lay on that pathway with those stab wounds inflicted on her by the appellant for some sadistic pleasure (or what). This is bestiality of the deepest dye. And the parents could not even afford the sum of E500.00 for her burial and yet were supporting her education.

[12] I cannot fault the learned trial judge on the considerations that informed her to sentence the appellant to a term of 18 years in prison. None of the grounds I had catalogued above can be applied in the reduction of the sentence. It is my view that the appellant deserves the punishment meted out to him.

The appeal against sentence (or for its reduction) is accordingly dismissed. The sentence of Sey J is hereby affirmed.

DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I also agree.

P. LEVINSOHN
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**In Person**
For Crown:	**Mr. A. Makhanya**