IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 24/11

In the matter between:

WILLIAM MCELI SHONGWE **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *William Mceli Shongwe v Rex (24/11) [2012] SZSC43 (30 November 2012)*

CORAM: M.M. RAMODIBEDI CJ, DR. S. TWUM JA, M.C.B. MAPHALALA, JA

Heard **5th November 2012**

Delivered **30th November 2012**

Summary

Criminal Appeal – appellant convicted of murder and sentenced to fifteen years imprisonment – appeal against conviction and sentence – appeal dismissed.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant was convicted in the Court *a quo* with the crime of murder and sentenced to fifteen years imprisonment. In his Notice of Appeal, he submitted that the Crown had failed to prove the commission of the offence beyond reasonable doubt; he further submitted that the sentence imposed was excessive and induced a sense of shock.

[2] During the hearing of the appeal, appellant's counsel argued that the Record of Proceedings was so incomplete that no reliance could be placed in prosecuting the appeal. He highlighted three deficiencies in the record: Firstly, that there is no record of the evidence as well as the cross-examination of PW1 and PW2; Secondly, that there is no record of closing arguments made by the defence; thirdly, that there is no record of submissions made by the defence in mitigation. It was therefore argued that the deficiencies highlighted herein would prejudice the appellant on the basis that this Court would be denied the opportunity of analysing and assessing the missing evidence.

[3] However, this Court is satisfied that the evidence on the record against the appellant is overwhelming to warrant a dismissal of the appeal; in the circumstances the Court is satisfied that the missing evidence would not prejudice the appellant in anyway whatsoever.

[4] In the case of *S V. Collier* 1976 (2) SA 378 CPD at 378-379, His Lordship Burger J sitting as an appeal court with *Diemont J* stated the following:

> **"I am in respectful agreement with the practice that where the whole record or a very material part thereof has been lost prior to review or the appeal being concluded, the proceedings and sentence should be set aside. In such cases the court of appeal or review is clearly unable to consider the case. But it seems to me wrong that the same result should follow where only some answers of a witness on matters which are apparently not of vital importance are not recorded. It would lead to an absurd result. In practice the records of criminal cases as a true reflection as to what happened at the trial vary considerably. On the one hand one has a mere summary of the evidence compiled by the magistrate, then one may have a verbatim record of question and answer of portions of the evidence, and today the verbatim record, recorded by automatic recorders are becoming general. But even these are not perfect as these machines can only hear but not perceive in any other way. In all cases there is the possibility that there is some evidence in favour of the accused which does not appear from the record, the possibility being less probable where the evidence has been automatically recorded."**

[5] His Lordship continued at page 379 of the judgment and stated the following:

> **"It would however create an impossible situation if an appeal by an accused were to be upheld in all cases where the record is not perfect or complete, because a possibility exists that evidence favourable to the accused does not appear on the record. In my opinion the court of appeal should deal with the case on the best available record unless it appears that evidence placed before the lower court does not appear on the record, that such evidence is material to the adjudication of the appeal and that the issue as to the missing evidence cannot be settled by way of**

admissions or in some other manner. Where material evidence is not on record and the defect cannot be cured, the appeal should succeed."

[6] The Collier case reflects the correct legal position in this country with regard to defective or incomplete records on appeal. The Court of Appeal of Swaziland, as it then was, in the case of *Sipho Computer Dlamini v. Rex* Criminal Appeal No. 20/2000 upheld an appeal on the basis that the record was poorly prepared and unreliable as a purported transcript of the proceedings. The Court also found that "there were many instances in the transcript of pages being repeated on the following page for no apparent reason and in some instances the obvious repetition is not quite in the same words". The Court concluded that the record could not be a true reflection of the proceedings in the Court *a quo* and had the effect of denying the appellant his right of appeal.

[7] In the case of *Celani Maponi Ngubane and Others v. Rex*, Criminal Appeal No. 6 of 2006, the Supreme Court of Swaziland had occasion to deal with the issue of an incomplete record. The Crown argued that there was a substantial amount of evidence in the record as it stands which incriminates the appellants and that the record sufficiently provided a body of evidence which warranted the conviction of appellants. It referred the Court to the cases of *Sipho Computer Dlamini v. Rex* (supra); *S v. Phukungwana* 1981 (4) SA 209 Bop at 209 as well as *Benedict Sibandze v. Rex* Appeal case no. 10/2002 in support of its submissions. In the Phukungwana case (supra) it was held that where no

record exists and the record cannot be reconstructed to support a conviction, the appeal must succeed and the conviction must be set aside.

[8] *Browde JA* in the *Maponi Ngubane* case (supra) stated the following:

> **"...the mere fact that a record is defective does not ipso facto have to result in the acquittal of the appellant. It depends on the extent of the defects and whether or not it is reasonable to rely on the record as it stands to warrant a finding that it provides sufficient evidence on which to base a verdict one way or the other."**

[9] In the case of *Benedict Sibandze v. Rex* (supra), the Court ordered a reconstruction of the substance of the missing evidence and refused to set aside the convictions. Beck JA stated the following:

> **"The record that has been transcribed is, as I have said, fairly lengthy and no criticism can be levelled at the accuracy of the transcription that is before us. More importantly, there is substantial amount of evidence in the record as it stands which does incriminate the appellant and which, arguably, might well be sufficient to support the convictions. Under the circumstances I do not consider that justice requires us to set aside the convictions at this stage..."**

[10] From the authorities it is apparent that the mere fact that the record is incomplete or defective on appeal should not automatically result in the appeal being upheld and the conviction and sentence set aside. Such a situation, if it allowed, would lead to absurd consequences which would undermine the

criminal justice system. The Court has a duty to consider the extent of the defect and ascertain if the record as it stands does not contain a substantial amount of evidence which incriminates the appellants to warrant their conviction. Alternatively the Court could order a transcription of the record in an attempt to cure the defect. It should only be in very exceptional circumstances that the appeal should be upheld on the basis of a defect in the record. For that to happen, the appellant should satisfy the Court that the whole record or a very material part thereof is lost and that the transcription of the record is impossible or that the transcript is so poorly done that it does not reflect the proceedings in the Court *a quo;* and, that reliance on the record is highly prejudicial and consequently constitutes a failure of justice.

[11] The evidence of PW1 Lomhlangano Ndlovu, the mother of the deceased, is well summarised in the Summary of Evidence to the indictment at page 9 of the Record. On the 19th March 2009 she went to the appellant's homestead to call the latter's wife so that they could attend a community meeting; she was approached by the appellant who told her that he was a soldier and that he joined the army for the purpose of killing. The appellant further told PW1 that the deceased was refusing to pay him for a pair of shoes which he took from him. PW1 made an undertaking that she would talk to the deceased about the matter. Later that day PW1 discussed the matter with the deceased, and, he told her that the shoes were given to him by force since they were a smaller size; however, they resolved that the deceased would pay the appellant the

following day. On the 21st March 2009 PW1 heard that the deceased had been assaulted by the appellant and was in hospital.

[12] The evidence of PW2 Jabulani Fakudze also appears in the Summary of Evidence at page ten of the Record. On the 20th March 2009 he went to the homestead of the appellant together with PW3 Bongani Dlamini as well as the deceased. Their mission was to get money from DW2, Nokuphila Shongwe, the daughter of the appellant. They knocked at DW2's house and introduced themselves; they told her that they had come to get their money as previously arranged. She told them that the money was with her mother, but that she was reluctant to knock at her house since it was late at night.

[13] They asked her to give them the radio which was used as security for the debt; then, they walked to the appellant's house. They heard the appellant speaking from his house and asking for their names, and, they told him; then, the appellant came out of the house. He looked at them without uttering a word; and, then he went back to his house. He came back with a knobkerrie. PW2 and PW3 retreated backwards and the deceased remained. The deceased told the appellant that they had not come to cause trouble at his homestead. Nonetheless the appellant without uttering a word hit the deceased several times with the knobkerrie on the head. PW2 and PW3 ran away and came back later. When they tried to assist the deceased who was lying on the ground, the appellant chased them away and said he wanted only the police, and, nobody

else. Attempts were made to call the police; however, an ambulance from the Fire and Emergency department came and conveyed the deceased to hospital.

[14] I now turn to deal with the evidence on the record which incriminates the appellant and warrant his conviction. PW3, Bongani Dlamini, told the court that during the festive season of 2008, he together with PW2 and the deceased conducted a liquor business at the homestead of the appellant with his permission. The appellant and his wife borrowed E71.00 (seventy one emalangeni) from them. The appellant's daughter, DW2, and her boyfriend also borrowed E70.00 (seventy emalangeni) from them; and, they gave them a small radio as security for the debt. As agreed with the appellant, they stopped the liquor business when the festive season ended.

[15] After two months DW2's boyfriend collected the radio and told them to fetch their money at the appellant's homestead. They went with him to the appellant's homestead and found the appellant and DW2. The appellant told them to fetch the money on the following day, being the 19th March 2009. On the day in question, they went to the appellant's home with PW2; and, he told them that he wanted to kill the deceased because he owed him money in respect of shoes which he had given to him. The appellant boasted that he was a soldier, and, that he took an oath to kill.

[16] PW3 was in the company of Lindokuhle Shongwe and PW2. They met the appellant's wife along the way to her homestead; and, she told them that her husband wanted to beat the deceased. She further told them that she was on her way to the deceased's homestead to inform them about this. Lindokuhle didn't enter the appellant's homestead but walked past it. They found the appellant and DW2 who told them that DW2's boyfriend had left the country. The appellant and DW2 told them that they would get their money on the next day being the 20th March 2009.

[17] They returned to the appellant's homestead on the 20th March 2009 at about 7pm together with the deceased. They had waited for him to return from work. They told the deceased what the appellant had said about him; the deceased insisted that he would go with them so that he could inform the appellant that he would pay him on the following Monday when he would receive his monthly salary.

[18] On their arrival at the appellant's homestead, they alerted them of their arrival in accordance with the traditional salutation. DW2 was the first to respond, and, they went to her house. She did not come out of the house or open the door, but she told them to go to her father's house for the money. On arrival at his house, they alerted him that they had arrived; he asked for their particulars, and PW3 told him. The appellant came out of the house and looked at them; then, he went back to his house. He returned carrying a knobstick; PW2 and

PW3 retreated backwards when they realised that he was armed; however, the deceased remained behind standing.

[19] The appellant hit the deceased on the head and neck with the knobkerrie without saying a word. According to PW3, "when he came out of the house, he did not say anything; he just proceeded to hit the deceased". PW3 told the court that the appellant hit the deceased five times, and, he fell down. When they tried to assist the deceased, the appellant threatened to assault them using the knobkerrie; he told them that he didn't want anyone next to the deceased except for the police. During the assault the deceased told the appellant that they had come in peace but he continued assaulting him repeatedly and viciously.

[20] PW3 then phoned the police and reported the incident; and, they promised to come to the scene. The first person who arrived at the scene was Simo Fakudze who found the deceased lying on the ground where he had fallen; he raised an alarm, and then ran to the deceased's homestead to report the incident. The deceased's brother, Nkhululeko Ngwenya subsequently arrived at the scene. The deceased was subsequently taken to the RFM hospital in Manzini in an ambulance from the Fire and Emergency Department. He was later transferred to Mbabane Government hospital during the night using the same ambulance. He died whilst undergoing treatment at the hospital, four days later.

[21] Under cross-examination PW3 explained that there was nothing abnormal by going to the appellant's home at night because it was a sheeben, and, that one could go there anytime; however, he explained that the appellant had stopped selling traditional alcohol after the incident. He reiterated his evidence that the appellant had allowed them to sell beers at his homestead during the festive season because patrons preferred beers during this period and not traditional liquor.

[22] He conceded that the appellant had no interests in their business joint venture; however, the appellant had promised to talk to them after the festive season with regard to a token of appreciation for the use of his homestead in conducting the business.

[23] He denied that PW3 was in possession of a knife when they arrived at the appellant's home; he told the court that if this was true, they could have used the knife on the appellant because of what he had done to the deceased. Furthermore, he denied that they had consumed alcohol for "Dutch Courage" before going to the appellant's home; he explained that only PW2 had taken alcohol with his friends during the course of the day. However, he denied that PW2's consumption of alcohol was related to their subsequent meeting with the appellant.

[24] He explained that the reason which made them to retreat with PW2 when the appellant came out of his house was the fear that he would hit them with the knobkerrie. He dismissed the allegation by the defence counsel that they had planned the attack on the appellant or that they were rowdy and chaotic when they arrived at the appellant's homestead. The evidence of PW3 corroborates the statements of PW1 and PW2 in all material respects.

[25] PW4 Detective Constable David Tsabedze, a police officer based at the Manzini Police Station, testified that on the 20th March 2009, they received a report of a fight between four people in which one of them was injured. They proceeded to the appellant's homestead with another police officer and found the appellant with his family; they introduced themselves and further told him that they were investigating an assault case against the deceased. They cautioned him in accordance with the Judges' Rules. Initially the appellant was not co-operative and responded harshly to them; however, after the caution, he became relaxed. Thereafter, they arrested him and took him to the Manzini Police Station. Before they left the scene, the appellant told them that the deceased was seriously injured and had since been taken to the R.F.M. hospital by officers from the Fire and Emergency Department. From the police station they took the appellant with them to the RFM hospital to inspect the deceased; they found that he had since been transferred to the Mbabane Government hospital.

[26] Back at the police station, they again cautioned the appellant; then they asked him for the weapon used in the commission of the offence. After he had told them that it was at his homestead, they further cautioned him with regard to the pointing out of the weapon. They went to his homestead where the appellant handed the knobkerrie to them. The police subsequently learnt that the deceased had succumbed to death on the 24th March 2009, four days after the assault. During the trial, the knobkerrie was admitted in evidence as an exhibit.

[27] Under cross-examination PW4 denied that the deceased and his two companions had attacked the appellant at his homestead; he told the court that according to his investigations, the young men had gone to the appellant's home to fetch their money from the appellant. He further denied that they had taken liquor as alleged.

[28] The appellant opted to lead evidence in his defence. He told the court that in December 2008, during the festive season, the three young men asked for permission to sell beer at his homestead; they conducted their business until the 1st January 2009. He told the Court that they had promised to give him a token of appreciation for using his homestead as a business outlet; he conceded that it was not agreed what they would give him in return. He further told the court that his homestead was suitable for the business because it was situated next to the shop and the main road; hence, it was easier to attract sales from the people.

[29] He denied borrowing money from the young men. He further denied selling shoes to the deceased as alleged. Similarly, he denied threatening PW1 for the debt owed to him by the deceased in respect of the shoes.

[30] He told the Court that on the 20th March 2009, he was asleep at around midnight when he heard noise coming from the house used by his daughters. He came out of the house and saw the three young men walking from his daughters' house towards his house. The deceased shouted out saying that they were looking for him; he walked until he reached the door to the appellant's house. The appellant went back to the house allegedly to put on clothes since he was only wearing an underwear. When he closed the door, the deceased banged the door and it was damaged; the deceased further insulted him. This made him to take his knobkerrie which was close to the door and confronted the deceased.

[31] When he came out of the door, he found the other two young men standing behind the deceased, who was fiddling with the door handle saying he wanted to break the door. When the appellant opened the door, the deceased tried to push the door backwards; in the process, the deceased fell on the door steps of the house. The appellant beat him with the knobkerrie on the head as he was lying down; when he tried to stand up, he hit him on the back. When they were outside the house, again he hit him on the head, and he fell to the ground. The appellant alleged that he had hit the deceased because he was fighting with

him; however, this allegation is not supported by the evidence including his own evidence.

[32] He admitted that after he had hit the deceased for the first time, PW2 and PW3 ran away and stood at a distance; however, when the deceased lay injured on the ground, the two young men wanted to fight him particularly PW2 who took out a knife and proceeded towards him. He had told his family to call the police who were unable to locate his home. In the morning, he went to Sigodvweni Police Station where he reported the incident; however, this evidence is in sharp contrast to that of PW4 who told the court that they arrested the appellant during the same night, immediately after the deceased had been conveyed to the RFM hospital.

[33] According to the appellant, after he had reported the matter to the police, he went back home with the police; thereafter, they went to the homestead of the deceased where they did not find anyone. The police left him at his homestead; he was only arrested in the evening of the following day.

[34] Under cross-examination he conceded that the defence counsel did not dispute the evidence of the Crown witnesses that he borrowed money from the three young men. He further conceded that he never instructed his Attorney that he did not borrow money from the young men. Similarly, he conceded that the Defence Counsel did not dispute the evidence of Crown

witnesses that he sold shoes to the deceased. The Crown further referred him to the evidence of PW1 who told the court that the appellant had made a threatening statement to her with regard to the debt owed by the deceased in respect of the shoes

[35] The appellant denied that he borrowed money from the young men; however, he could not suggest any reason why they could fabricate the story against him. He further conceded that the defence counsel did not dispute the evidence of the Crown witnesses that the young men arrived at his homestead at 7pm and not 12 midnight. Similarly, he could not dispute the evidence of PW2 and PW3 that when they arrived at his homestead, they made a traditional salutation signifying their presence and further knocked at his daughters' house.

[36] The appellant's allegation that the young men were making noise and further using force to open his daughters' house is not supported by the evidence; the Crown's evidence which is corroborative is that DW2 told the young men to get their money from the appellant in the main house. Similarly, the appellant in his evidence in-chief, testified that when he came out of the house, he saw the young men walking towards his house.

[37] Similarly, he failed to substantiate his allegation that the young men were fighting with him. However, he conceded that the defence counsel did not

dispute the Crown's evidence that the young men were not fighting with him but they had come to collect their money in terms of a promise made by the appellant. He couldn't dispute the evidence of the Crown that during the assault, the deceased pleaded with him to stop hitting him with the knobkerrie because they had not come to fight with him but he continued assaulting him. He admitted hitting the deceased three times on the head as well as the back.

[38] DW2 Nokuphila Shongwe, the appellant's daughter, testified that on the 20th March 2009, the young men arrived at her parental homestead and knocked at the door; they further introduced themselves to her. They hit the door very hard, but she didn't open the door because it was late at night; then they walked to her father's house. She conceded that she didn't witness what unfolded subsequently between the appellant and the young men. However, she denied that they borrowed money from the young men with her boyfriend and used the radio as security. She told the court that the young men borrowed the radio from her boyfriend.

[39] Under cross-examination, she initially denied that the appellant sold alcohol at his homestead; however, as the cross-examination progressed, she conceded that the appellant allowed the young men to sell alcohol at his homestead because he had stopped selling traditional brew in 2008.

[40] Contrary to her evidence in-chief, she initially denied that the young men knocked at her door when they arrived; however, she subsequently admitted that they did. She further conceded that the young men asked for the radio which her boyfriend had taken because it was used as security for the debt. She denied owing them and alleged that the debt was owed by her brother in-law Solo; however, she failed to explain how they were involved with her boyfriend in a debt owed by Solo.

[41] She confirmed making a statement to the police on the 24th March 2009; in the statement she admitted that on the 19th March 2009, she told PW3 to come and collect the money on the following day from her mother. She admitted their indebtedness with her boyfriend to the young men. She further admitted knowledge that the deceased owed money to the appellant for the shoes; and, that the deceased did not give him the money which he had promised to pay at the end of the month. She maintained her evidence with regard to "the shoes story" even during re-examination.

[42] The appellant in his own evidence further told the Court that when he came out of the house for the first time and saw the three young men, he returned to the house without saying anything to them; he came back armed with the knobkerrie. When he opened the door, the deceased fell on the door steps, and he hit him repeatedly on the head and at the back with the knobkerrie. He further told the court that after he had hit the deceased for the first time, the

other two young men ran away. The allegation by the appellant that PW2 was armed with a knife is not supported by the evidence; PW3 told the court that if PW2 had been armed with a knife, they would have used it on the appellant because of what he had done to the deceased.

[43] The appellant doesn't dispute the *actus reus*. He admits assaulting the deceased, and, that he died consequent upon the assault; there was no intervening cause. The only issue in dispute is *mens rea* in the form of intention. Having regard to the evidence before me, I am convinced that the appellant, when committing the offence, had *mens rea* in the form of intention. The appellant testified in his evidence in-chief that when he opened the door to his house, the deceased fell on the door steps, then he beat him on the head with the knobkerrie as he lay on the ground; when the deceased tried to stand up, he hit him on the back. He hit him again for the third time on the head; and, the deceased fell to the ground. There is no evidence that they were fighting or that the deceased was armed. PW3 told the Court that during the assault, the deceased pleaded with the appellant to stop hitting him with the knobkerrie because they had not come to his home to fight him; but, he continued hitting him viciously and repeatedly.

[44] There is no evidence that the appellant took any steps to assist the deceased as he lay on the ground with serious injuries. Worse still when the two young men tried to assist the deceased, the appellant attempted to beat them using the

knobkerrie, and further told them that he didn't want anyone next to the deceased except the police. It was through the efforts of the two young men, Simo Fakudze as well as the family of the deceased that he was later conveyed to RFM hospital in an ambulance from the Fire and Emergency Department. Due to the seriousness of the injuries inflicted upon him by the appellant, the deceased had to be transferred to Mbabane Government hospital during the same night where he subsequently succumbed to his death on the 24th March 2009.

[45] The post–mortem report which was admitted by consent states that the cause of death was "due to injuries to head"; and the police pathologist, Dr. Komma Reddy recorded three injuries, to the forehead, on top of the head as well as on the neck. The pathologist further stated that the left temporary bone, left parietal bone as well as the occipital bone were fractured.

[46] In determining *mens rea* in the form of intention, the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased. See the case of *Rex v. Nkosinathi Nel* Criminal Case No. 225/08.

[47] *Troughton ACJ* in the case of *Rex v. Jabulani Philemon Mngomezulu* 1970-1976 1976 SLR 6 at 7 (HC) stated the following:

> **"The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased."**

[48] *His Lordship Cohen ACJ* in the case of *Beale v. Rex* 1979-1981 SLR 35 at 37 (CA) stated the following:

> **"Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not. The requirements according to the learned authors are (i) subjective foresight of (ii) possibility and (iii) recklessness.... The subjective test... takes account only of the state of mind of the accused, the issue being whether the accused himself foresaw the consequences of his act.... If the accused in fact foresaw the possibility of the consequences in question and was reckless as to whether or not they did result, he intended them in the legal sense."**

[49] *Dendy Young JA* in the case of *Maphikelela Dlamini v. Rex* 1979-1981 SLR 195 (CA) at 197 described legal intention as follows:

> **"As I understand the law in Swaziland, the South African concept of *dolus eventuali*s has been stated this way: if the assailant realises that the attack might cause the death and he makes it not caring whether death occurs or not, that constitutes *mens rea* or the intention to kill. And the**

way this test has been applied is whether the assailant must have realised the danger to life."

[50] *Hannah CJ* in the case of *Mazibuko Vincent v. Rex* 1982-1986 SLR 377 (CA) at 380 stated the following:

"A person intends to kill if he deliberately does an act which he in fact appreciates might result in death of another and he acts recklessly as to whether such death results or not."

[51] In light of the above authorities, it is apparent that the appellant had legal intention to kill the deceased; hence, the appellant was properly convicted by the trial court. Similarly the trial judge was correct in holding, as she did, that extenuating circumstances were present in this case in accordance with section 295 of the Criminal Procedure and Evidence Act No. 67 of 1938. In terms of the said section, it is the duty of the court to determine whether or not extenuating circumstances exist and to specify them; this duty is imposed upon every court which has convicted the accused of murder. It further provides that "in deciding whether or not there are any, extenuating circumstances, the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs".

[52] *His Lordship Ramodibedi CJ* in the case of *Bhekumusa Mapholoba Mamba* v. Rex Criminal Appeal no. 17/2010, quoted with approval the South African leading case of *S v. Letsolo* 1970 (3) SA 476 AD at 476 G-H where *Holmes JA*

defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. The trial court has to consider three factors: firstly, whether there are any facts which might be relevant to extenuating such as drug abuse, immaturity, intoxication or provocation; but the list is not exhaustive. Secondly, whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did; in deciding this factor, the trial court exercises a moral judgment.

[53] In *S v. Mcbride* 40/88 (1988) ZA SCA 40 (30 March 1988) *Corbett JA* who delivered the majority judgment of the court stated that in principle an appeal court cannot interfere with the finding of the trial court as to the existence or otherwise of extenuating circumstances in the absence of any misdirection or irregularity unless that finding is one which no reasonable court could have reached. This principle reflects the law in this country. In the present case there is no reason for me to interfere with the finding that extenuating circumstances existed in the absence of any evidence of any misdirection or irregularity found by this court.

[54] It is a trite principle of our law that the imposition of sentence is primarily a matter which lies within the discretion of the trial court; and in exercising that

discretion, the court is enjoined to have regard to the triad, consisting of the seriousness of the offence, the personal circumstances of the offender as well as the interests of society. An appellate court will generally not interfere with the exercise of that judicial discretion by the trial court in the absence of a misdirection resulting in a miscarriage of justice. See the cases of *Kenneth Nzima v. Rex* Criminal Appeal no. 21/07; *Sam Dupont v. Rex* Criminal Appeal no. 4/08 and *S v. Rabie* 1975 (4) SA 855 A.

[55] The trial judge in arriving at the sentence of fifteen years considered all the mitigating factors submitted by the defence including his personal circumstances. She further considered the seriousness of the offence including the extent of the injuries inflicted by the appellant on the deceased. Similarly she considered the interests of society and the need for a deterrent sentence. More importantly the sentence takes account of the existence of extenuating circumstances.

[57] In the circumstances I am unable to find any misdirection by the trial court. Accordingly the appeal is dismissed.

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M.C.B. MAPHALALA

JUSTICE OF APPEAL

I agree: M.M. RAMODIBEDI
CHIEF JUSTICE

I agree: DR. S. TWUM
JUSTICE OF APPEAL

FOR APPELLANT Attorney L. Gama
FOR RESPONDENT Crown Counsel M. Mathunjwa

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012.