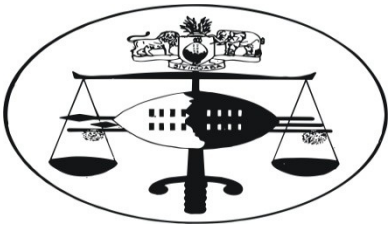

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 37/11

In the matter between:

NKOSINAYE SAMUEL SACOLO **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Nkosinaye Samuel Sacolo v Rex (37/11) [2012] SZSC50 (30th November 2012)*

CORAM: M.M. RAMODIBEDI CJ, A.M. EBRAHIM JA, M.C.B. MAPHALALA JA.

Heard 8th November 2012

Delivered 30th November 2012

Summary

Criminal appeal – appellant convicted on two counts of murder and one count of attempted murder - sentenced to twenty years and eighteen years respectively in relation to the counts of murder – sentenced to five years in respect of attempted murder –sentence not harsh and does not induce a sense of shock - appeal dismissed.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant was convicted on two counts of murder and one count of attempted murder; he was sentenced to twenty years and eighteen years imprisonment respectively without an option of a fine for the two counts of murder as well as five years imprisonment without an option of a fine on the third count of attempted murder. The sentence in count two was ordered to run concurrently with the sentence in count one; the sentence in count three was ordered to run consecutively to the sentence in count one. The appellant has appealed the sentence on the basis that it is harsh and induces a sense of shock on the basis that the commission of the offences for which he was convicted was not premeditated.

[2] *His Lordship Ramodibedi CJ* in the case of *Sam Dupont* v. *Rex* Criminal Appeal no. 4/2008 at para 13 stated the following:

> **"It is now well-settled that the imposition of sentence is a matter which pre-eminently lies within the discretion of the trial court. An appellate court is generally loath to interfere with the trial court's exercise of a discretion in the absence of a misdirection resulting in a failure of justice."**

[2.1] His Lordship further referred to numerous cases of this Court where this principle was applied including *Eric Makwakwa v. Rex* Criminal Appeal No. 2/02, *Moses Gija Dlamini v. Rex* Criminal Appeal No. 4/07 as well as *Mlamuli Obi Xaba v. Rex* Criminal Appeal No. 7 /07.

[3] The appellant pleaded with the Court to reduce his sentence by ten years in light of his personal circumstances, that he was remorseful during the whole trial; that he was a first offender and capable of reforming to a better person, that he was a breadwinner in the family, and that he co-operated with the police during their investigation. However, he doesn't state how he arrived at the reduction of ten years from the total sentence of twenty five years. Furthermore, the appellant overlooks the fact that his personal circumstances were considered by the trial court in mitigation of sentence.

[4] The appellant doesn't point to any facts or circumstances showing that the trial court did not exercise its discretion judiciously or that it misdirected itself resulting in a failure of justice. It is apparent from the judgment of the trial court that the learned judge in sentencing the appellant to a total of twenty five years for the three crimes properly considered the triad consisting of the crime, the offender and the interests of society as laid down *in S. v. Zinn* 1969 (2) SA 537 (A).

[5] The court took into account the brutal nature of the offence. There is no doubt from the evidence that the killing of the two deceased and the hacking of PW1 were spine-chilling and very gruesome; this is borne out by the photographs of the two deceased as well as PW1 which were admitted in evidence by consent. As pointed out by the trial judge, the assault on the victims was not only unprovoked but it was premeditated. In addition the victims were unarmed and defenceless against the vicious attack by the appellant.

[6] The trial judge further considered the interests of society particularly the deterrent nature of the sentence. His Lordship referred to the case of *Mosiiwa v. The State* (2006) 1 B.L.R. 214 which was decided by my Brother *Moore JA* sitting in the Botswana Court of Appeal. At page 219 of the judgment, His Lordship had this to say:

> **"It is also in the public interest, particularly in the case of serious or prevalent, offences, that the sentence's message should be crystal 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 of serious offences. By the same token, a sentence should not 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."**

[7] The trial judge further ordered that the two sentences in respect of the two counts of murder should run concurrently; these were two separate serious crimes. By so doing the trial judge complied with section 300 (1) and (2) of the Criminal Procedure and Evidence Act which deals with concurrent and consecutive sentences.

[8] The trial judge further heeded the warning of my Brother *Moore JA* in the case of *Mosiiwa v. The State* (supra) when he said the following:

> **"As a general principle, consecutive terms should not be imposed for offences which arise out of the same transaction or incident, whether or not they arise out of precisely the same facts. *Archbold op cit*, para 5-145. A court may, however, depart from the principle requiring concurrent sentences for offences forming**

part of one transaction if there are exceptional circumstances upon which she or he seeks to justify the imposition of consecutive terms.

Where an offender is convicted of two or more counts of an indictment, the Court should normally pass a separate sentence upon each of the individual counts in the indictment. The sentences passed may be ordered to run concurrently with one another, or consecutively or there may be a mixture of concurrent and consecutive sentences. The court has a duty to indicate clearly the sentence imposed in respect of each count of the indictment upon which a finding of guilt has been made."

[9] The trial judge in ordering the two sentences on the murder counts to run concurrently ameliorated the harshness or severity of multiple sentences by subsuming the sentence in count two under count one. This was done in an attempt to achieve justice and a fair overall sentence in the circumstances.

[12] Accordingly, I am unable to find that the trial judge misdirected himself resulting in a failure of justice. 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: _____

A.M. EBRAHIM

JUSTICE OF APPEAL

FOR APPELLANT	In person
FOR RESPONDENT	Senior Crown Counsel P. Dlamini

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012.