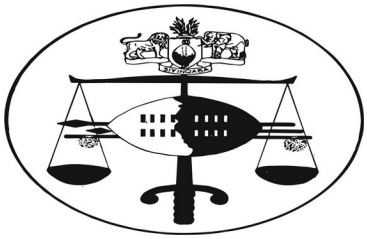

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 32 /2012

In the matter between

ZWELITHINI TSABEDZE **Appellant**

and

REX **Respondent**

Neutral citation: *Zwelithini Tsabedze v Rex* (32/12) [2012] SZSC 73 (30 November 2012)

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

Heard: **8 November 2012**

Delivered: **30 November 2012**

Summary: Criminal Appeal; appellant shot and killed a colleague teacher; appellant gives 3 defences for his action – self-defence, accident and stranger shot deceased; contradictory evidence of DW1, appellant's girl friend; strange behaviour of appellant – trial court disbelieved appellant's defence; convicted and sentenced him to 28 years imprisonment sentence disproportionately inappropriate – reduced to 18 years.

DR TWUM J.A.

[1] This is an appeal from the judgment of MCB Maphalala, J.A. sitting at the High Court, Mbabane dated 6th August 2012, whereby the appellant was convicted of the murder of one Ntokozo Maseko and of two other offences relating to unlicensed possession of a gun and one round of ammunition. He was sentenced to 28 years imprisonment on the charge of murder and ordered to pay fines for the possession of a pistol and one round of ammunition without appropriate permits. Sentences were ordered to run consecutively.

[2] He appealed against his conviction and sentence to this Court.

These are his grounds:-

> "1. The court a quo erred both in fact and in law by finding and holding that the Crown had proved the charge of murder against the Appellant beyond a reasonable doubt as the evidence presented in court does not support such finding.
>
> 2. The court a quo erred both in fact and in law by not accepting the version of the Appellant and instead finding and holding that the same was false beyond a reasonable doubt when the same had not been disputed by crown witnesses and as such remained uncontroverted.
>
> 3. The court a quo misdirected itself in law by equating a version and/or defence to utterances made to people whom Appellant was not even obliged to explain anything to.

4. The court a quo erred both in fact and in law by failing to appreciate that Appellant's version did not need to be true and / or believed by the trial court for it to be accepted so long as same was reasonably and possibly true.

5. The court a quo erred both in fact and in law by finding and holding that the Appellant did not offer any explanation to the court why the deceased could attack him with his girlfriend when in the circumstances of the matter such an explanation was not requisite.

6. The court a quo misdirected itself in law by finding and holding adversely against Appellant the fact that he and DW1 had discussed a false version of events yet the said false version was never traversed in court.

7. The court a quo erred both in fact and in law by finding and holding that the Appellant had failed to show that the pistol was fired accidentally and that he was under imminent danger yet his evidence as corroborated by DW1 indicates the reverse.

8. The court a quo erred both in fact and in law by failing to appreciate that whenever a person is faced with imminent danger and / or he has some apprehension of danger he accordingly prepares to defend himself.

9. The court a quo misdirected itself in law by finding and holding that the Appellant did not raise the issue of self defence during the trial when on the other hand it found and held that the circumstances of the matter and / or perceived attack on the Appellant was not imminent.

10. The court a quo erred both in fact and in law by finding and holding that Appellant and DW1 presented contradictory evidence when in actual fact the said evidence corroborated each other in all material respects.

11. The court a quo erred both in fact and in law by failing to appreciate that DW1 was an eye witness whose presence at the scene was corroborated by PW1 who stated that there was a female at the time of the occurrence of the incident.

> 12. The court a quo erred both in fact and in law by finding and holding that there was sufficient light and / or visibility (for purposes of identification) when the incident occurred yet according to the evidence of some of the Crown witnesses it was dark and visibility was not possible.
>
> 13. The court a quo erred both in fact and in law by finding and holding that the first mobile call received by PW1 was from the school chairman Philemon Ngcamphalala when in actual fact the MTN Swaziland print – out showed that Appellant had called PW1 ten (10) minutes before his (the latter) mobile call exchanges with Philemon Ngcamphalala."

There are 13 grounds here. I have refrained from attempting to deal with each one of them seriatim. In my view, this judgment answers all the so-called grounds of appeal.

After the appellant was charged, the prosecution and defence counsel signed a "Statement of Admitted Facts". This was admitted in evidence as Exh 1. In it the appellant asserted that while walking with his girlfriend from her parents' homestead to the school they were attacked by a stranger and he fired a shot at the stranger in self-defence without any intention to kill anyone.

[3] The prosecution did not accept the appellant's explanation as to how he came to kill the deceased. In the result the "Statement of Admitted Facts" was of limited value in shortening the trial. The prosecution which had the

burden of proving the appellant's guilt beyond reasonable doubt, called a number of witnesses to prove the murder charge against the appellant.

[4] The prosecution's case was built up from the pieces of evidence which were purely formal – the recovery of the gun from where the appellant had hidden it, the retrieval of the cartridge, photographs of the scene of the crime, the body of the deceased and the autopsy report. It also contained viva voce evidence by same 5 people – PW1 to PW5.

[5] The appellant's defence comprised his statement to the police given on the 28th of October 2011, his information about the tragedy to this house-mates at the Teacher's quarters, his affidavit in support of his application for bail, as well as his viva voce evidence at the trial. In these pieces of evidence, the appellant put up three (3) separate lines of defence.

(i) That the deceased was killed by unknown criminals after he and the deceased had gone to the bush for the deceased to relieve himself because there was no water in the school and so the latrine could not be used. In it he said that he himself was shot at and he had to duck the shot by lying down prostrate before escaping home.

(ii) Subsequently he changed that and said that he accidentally shot and killed the deceased while struggling with him.

(iii) In his statement to the police, he alleged that the deceased was shot in self-defence.

[6] Two major issues surfaced from the lines of defence adopted by the appellant. The first was the state of the visibility on the night of the crime. The second was illumination from the light coming from the administration block.

[7] The prosecution called Mr Mavuso, P.W. 1, the security person at the school. In his evidence he insisted under intense cross-examination that the weather was such that visibility was not impaired and that one could see for a distance of about 5 metres. He also thought the light from the administration block gave enough light to the place where the deceased's body was. The Headteacher of the school, P.W. 5 also said the light from the administration block was good and sufficient to provide lighting for the appellant to have seen that the alleged stranger he claimed to have struggled with, was in fact the deceased. P.W. 2 and P.W.3, however, said it had been raining and visibility was poor. That was countered by P.W.1, P.W. 4 and P.W.5 who insisted that the light from the school gave sufficient illumination at the scene of the crime. The appellant himself stated in his

testimony that after the killing, whilst returning to the school after he had gone to the Teacher's quarters to inform his colleagues, he could see the body of the deceased before he jumped the fence to get into the compound.

[8] In his viva voce evidence during the trial, the appellant abandoned his original explanation of the tragedy that the deceased had been shot by armed criminals. It was in the court that he admitted he shot the deceased, albeit accidentally. In his evidence-in-chief, he told the court that when the stranger was a metre or two away from him, he blocked him by kicking him.

[9] The appellant's girl friend, D.W.1 who was said to be with the appellant at the time of the killing, gave a statement to the police in which she claimed that she had been collected from her parent's homestead to the school when she saw a stranger standing by the school fence. She said when the stranger was a metre or so away from the appellant, the appellant kicked him in the stomach. Even though the appellant held her hand and assured her not to panic, she ran away to the Teacher's quarters. Obviously, according to that statement, she could not have seen the details of the struggle.

She admitted in the further police statement that she had a "mix-it" communication with the appellant and it was after it that she decided to tell

the police the same version which the appellant told them. That new version left out the bit about the two men pushing and pulling each other.

[10] In my view this revelation was very serious. The appellant sought, and succeeded in suborning DW 1 to falsify her evidence in the matter. In those circumstances, it lies ill in the mouth of the appellant to complain as he does in paragraph 4.5 of his Heads of Argument that the prosecution failed to call D.W 1 as a prosecution witness notwithstanding her statement to the police that she was an eye witness.

[11] The legal position is clear. It is not incumbent upon the prosecution to call as their witness people who have confessed to having been suborned to give false evidence. There was clearly a conspiracy between the appellant and his girl friend to over-reach the criminal justice system by giving perjured evidence after the "mix-it" communication.

[12] The appellant has sought to play down his advice to DW1 to tell the same story as he would do by saying that it was intended not to involve DW1 in the case. That was clearly an afterthought. In my view, the appellant wanted to ensure that his evidence was the only eye-witness account. He could not take the chance of being contradicted by another eye-witness. In

any event, the contradictions had already surfaced in their respective police statements.

[13] I agree entirely with the learned trial judge that the reason for the attack on the deceased would probably never be known. From the appellant's Heads of Argument, the point was made that there was no eye-witness to the shooting and therefore his version of events ought to be believed as reasonably true. In my view, the learned trial judge was right in holding that in view of the many contradictions in the explanations given by the appellant in court, and I may add, his original statement, it was not reasonably probably true. It was beyond any reasonable doubt, false.

[14] There can be no possibility that the pistol fired accidentally. If indeed, it did, the appellant could foresee it happening. According to the appellant he and DW1 passed the so-called stranger. At that point there is no evidence that they were in any danger. The stranger did not assault them or even threaten them with any weapon. Further, under cross-examination, the appellant told the court that when the stranger ran to him, he blocked him when he was about a metre away and they collided. The stranger then fell down. There is no evidence that the stranger tried to get up. The appellant claimed to have then shot the deceased accidentally. Does it mean he took an aim or the pistol went off accidentally?

[15] In all the circumstances the learned trial judge was correct in concluding that the prosecution proved its case against the appellant on the murder charge beyond reasonable doubt. The appellant's defence was not reasonably probably true. On counts 2 and 3 the appellant pleaded guilty and he was sentenced to fines. All sentences were ordered to run concurrently.

Extenuating circumstances

[16] I have serious doubts whether in the midst of all the variegated permutations of the circumstances, it can be said that there were no extenuating circumstances. However, that is no longer critical for sentencing and I will not pursue it.

The Sentence

[17] The learned trial judge held that there were no extenuating circumstances. He also held correctly in my view, that under s.15 (2) of the Constitution, the court in the circumstance need not impose a death sentence. I do not read s. 15 (3) to mean that in a murder trial if the accused was convicted of murder without any extenuating circumstance, the court should sentence him to life imprisonment.

[18] The court a quo sentenced the appellant to 28 years. That may contravene the Constitutional protection under section 14(1) (d) i.e. inhuman or degrading treatment.

[19] Admittedly, this was a dastardly and serious offence but in my view this sentence is really disproportionately inappropriate. I will reduce it by 10 years to 18 years imprisonment from the date of his arrest. Sentences for counts 2 and 3 to run concurrently with sentence for count 1.

Ordered accordingly.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

_____
S.A. MOORE
JUSTICE OF APPEAL

I also agree.

_____
E.A. OTA
JUSTICE OF APPEAL

COUNSEL

For Appellant: **Mr. M. Mabila**

For Respondent: **Mr. M. Nxumalo**