



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 05/2013

In the matter between

MAZWI MESULI MBATHA

1st Appellant

SIKELELA MSIBI

2nd Appellant

And

REX

Respondent

Neutral citation: *Mazwi Mesuli Mbatha and Another vs Rex (05/2013) [2013] SZSC 04 (31May 2013)*

Coram: S.A. MOORE JA. , E.A. OTA JA. and B.J. ODOKI JA.

Heard 06 MAY 2013

Delivered: 31 MAY 2013

Summary: **Criminal Law: Murder charge:** The appellants were found guilty of the offence of murder with extenuating circumstances and robbery: They were sentenced to 15 years imprisonment respectively for the offence of

murder: Appeal against this sentence only: Appeal dismissed.

JUDGMENT

OTA. JA

- [1] This is an appeal from the judgment of the High Court per **Monageng J**, rendered on 29 October 2009. The Appellants were convicted and sentenced on two counts of offences viz, murder and robbery. They were sentenced respectively to 15 years imprisonment on the count of murder and 7 years imprisonment on the count of robbery, which sentences were ordered to run concurrently and were backdated to 6 March 2007, the date of arrest and incarceration of the Appellants.
- [2] It is the sentence of 15 years for murder with extenuating circumstances that the Appellants decry in this appeal.
- [3] The facts of this case are apposite at this juncture for a proper consideration of the matter at hand.

[4] On 5 March 2007, Mfanimpela Dlamini a security guard at an Asisitane Shop belonging to one Thandi Ngwenya, was murdered and the shop robbed. The Appellants together with a third Accused person, Mbongeleni Tso Msibi, were arrested and charged with the crimes. The third Accused subsequently turned an accomplice witness and testified as PW1.

[5] As so happens in this Kingdom as a prelude to this vile offence, the Appellants and PW1 had been imbibing traditional marula brew from around midday on the fateful day. By midnight, having consumed about 50 litres of the potent brew and being drunk, the trio proceeded to the Asisitane Shop manned by the deceased who is their friend to buy cigarettes. They knocked until the deceased answered and told them that the shop was closed and there were no cigarettes. It was at that juncture that PW1 left the two Appellants and went home.

[6] The facts show that after PW1 departed the scene, the two Appellants broke into the shop where they stabbed the deceased with two knives (described *a quo* as okabi and Rambo respectively), inflicting multiple wounds on him; after which they left him lying on the floor and proceeded into the main shop. Inside the shop they took the following items; some packets of

cigarettes, candles, batteries and other food items worth about E777.00 and departed. They deposited the stolen items in a pit in PW1's homestead and thereafter fled the jurisdiction to PW3, 1st Appellants sister who is resident at Piet Retief in South Africa.

[7] The facts also show that the deceased managed to escape from the shop whilst the Appellants were still in there and proceeded to the homestead of his employer the owner of the shop which is about 5 minutes walk from the shop, where he reported to the owner and PW2 her daughter, that he had been attacked and stabbed by the Appellants and PW1. The deceased was bleeding from the wounds inflicted on him. He was taken to the hospital where he eventually died.

[8] Suffice it to say that the police were alerted and PW1 was apprehended. The Appellants eventually came back from Piet Retief South Africa and surrendered themselves to the police, thereafter they made confessional statements. On arraignment, they pleaded guilty to the charge, however the learned trial Judge as she is required by law to do in view of the connotations of the offence of murder charged, entered a plea of not guilty and the trial proceeded as such.

[9] It is upon the foregoing facts that the court *a quo*, correctly in my view, convicted the Appellants for murder with extenuating circumstances and robbery, and sentenced them to 15 years imprisonment for the offence of murder which is the bone of contention in this appeal.

[10] The Appellants filed identical notices of appeal by way of letters addressed to the Registrar of the High court, obviously drafted by either the Appellants themselves or the now very well perceived '*prison lawyers*'. We are very much alive to this group of the prison populace, judging by the deluge of notices of appeal and heads of argument that beset this court in which the unrepresented Appellants progressively in recent times, seek to adopt legal language and in some instances, urge authorities which are completely out of context.

[11] Be that as it may, both Appellants respectively contend for a reduction of 5 years of their 15 years sentence on grounds that the sentence is too harsh and severe for them to bear. The gravamen of this cause is that they are first offenders; were very young and immature when they committed the crimes; are remorseful as evidenced by the fact that they surrendered themselves to and cooperated with the police and pleaded guilty; the commission of the

crime was not premeditated and they were *non compos mentis*, being very drunk both prior to and during the commission of the offence.

[12] I must say, that I am far from impressed with these factors which in my view, constitute the now very familiar, old and tired repertoire of songs rendered by such Appellants, who labour under the misconception that the Supreme Court is a fountain of mercy, where they can just swing in and pick up a reduction of sentence; notwithstanding the gravity of the offence committed, its prevalence, the public perception of it; and most importantly, the sentencing discretion which the law ascribes pre-eminently to the trial court which saw the witnesses and heard their evidence.

[13] The learning is that this court cannot usurp this discretion merely upon its own whims and caprices. Its power to interfere is circumscribed within the parameter of a material misdirection or irregularity in the exercise of same, resulting in a miscarriage of justice. For instance, where the trial court was biased; or where it considered irrelevant facts or failed to consider relevant ones; exceeded its sentencing discretion; imposed a sentence not permitted by law or where the sentence imposed is so unreasonable or disturbingly dissappropriate to the gravity of the offence committed that it induces a

sense of shock. See **Sam Dupont v Rex Criminal Appeal No. 4/08**, **Jonah Tembe v Rex Criminal Appeal No. 18/08**, **Vusumuzi Lucky Sigudla v Rex Criminal Appeal No. 01/2011**, **Xolani Zindle Nyandzeni v Rex Criminal Appeal No. 29/2010**.

[14] The sentencing discretion is as such not an arbitrary discretion. It is a judicial and judicious exercise predicated upon a consideration of all the relevant factors, more particularly, the triad of circumstances consisting of the offence, the offender and interest of the society. See **S v Zinn 1969 (2) SA 537 (A)**, **Bhekiwe Motsa v Rex Criminal Appeal No. 37/2010**, **Chicco Fanyanya Iddi and Others v Rex Criminal Appeal No. 3/10 and 09/10**.

[15] I should also observe here, that section 5 (3) of the Court of Appeal Act 74/1954, confers additional power on the court on an appeal against sentence to pass such other sentence warranted in law as it thinks ought to have been passed in the first place.

[16] Now, in my respectful opinion, the court *a quo* delicately balanced the triad, which included the same mitigating factors which the Appellants advance in this appeal. This, the court did in a bid to achieve the middle course which

lies between the too much and too little in its sentencing tenure. To this end, her ladyship paid homage to the tendency of youthful exuberance borne out of the Appellants ages of 23 and 21 respectively, at the time the offences were committed. The fact that the 2nd Appellant is a first offender and that both Appellants technically pleaded guilty to both counts of offences. She also considered their remorse and cooperation with the police.

[17] As she is mandated by law to, her ladyship went a step further to weigh the aggravating factors in the balance. The fact that a human life had been brutally snuffed out for goods worth only E777.00 and the fact that the 1st Appellant is a subsequent offender having been convicted for the offence of house breaking and theft in 2005. It was after this measured process that the court imposed the assailed sentence. I cannot fault the trepidation with which the court *a quo* approached this issue.

[18] I am also unable to agree with the Appellants that the sentence of 15 years imposed is so unreasonable or startlingly inappropriate to the gravity of the offence committed that it induces a sense of shock.

[19] The facts of this case are disturbing enough. The deceased was a friend of the Appellants who ended his life unceremoniously and thereafter fled these shores without any show of contrition. The way and manner this barbaric act was orchestrated is horrendous. The post mortem report demonstrates a vicious attack with several serious stab wounds on the left side of the neck, chest, umbilicus, heel of the right foot, left forearm, lungs, medistinum and upper arm. The deceased died from complication of these multiple stab wounds. The deceased was in plain language, massacred as though he were a wild animal. The Appellants displayed absolutely no respect for his life as a human being.

[20] The foregoing picture captures the frightening trend that has permeated the Kingdom. Human life is treated as though it is worthless; a little less than one Lilangeni. It is snuffed out daily with audacity and impunity. The entire Kingdom is almost under the siege of this carnage. This is a palpable evil, lurking in the shadows, threatening to consume us all if no desperate measures are taken. I am bound to add here, that the irresponsible drinking sprees which have become the norm rather than the exception in our society, contribute in no small measures to this social ill. Such perpetrators blame it all on alcohol, which of course, cannot speak for itself. The fact remains that a life is gone; dead; buried six feet in mother earth; leaving behind loved

ones in pain and anguish and a society steeped in anger and outrage. Little wonder then this Court has commendably and persistently held that voluntary drunkenness has lost its spice as a mitigating factors.

- [21] Speaking on this issue in the case of **Mbuso Sipho Dlamini vs Rex Criminal Appeal No. 34/2010, Ebrahim JA** declared as follows:- .

“-----His consideration of the dangers inherent in the voluntary and excessive consumption of alcohol should have been done before he took the first sip. The subjects of this Kingdom must not be made to suffer the loss of their lives because of persons such as the Appellant’s continuing abuse of alcohol, which is a painful and mind affecting stimulate and intoxicant. He who continues to abuse alcohol to such an extent that the control of his voluntary actions is impaired, and then commits serious crimes must face the full penal consequences of his conduct. Voluntary drunkenness as a mitigating factor in cases such as this, has lost its efficacy”

- [22] This is in recognition of the fact that life is sacred; life is priceless; life is irreplaceable. Our Constitution Act 2005, is certainly alive to this fact. Article 15 thereof guarantees the inalienable right to life of every Swazi. That is also why the penal statutes make death the penalty for murder, though Article 15 (2) of the Constitution reserves in the Court a discretion to discount the sentence of death where it is just to do so. Article 15 (3) however drives the message home by prescribing a sentence of life for this offence, which life sentence it states shall not be less than twenty five years.

[23] The mood of the society in this respect is thus inexorably apparent from the panoply of laws paraded ante. The message is loud, clear and unequivocal, that this heinous crime must be visited with appropriately stiff sentences as a deterrent. Therefore, we all, the Swazi populace, the court and all other organs of government bear the responsibility to respect, protect and uphold this constitutional right to life.

[24] The courts in a laudable effort to achieve this aim have over the years sought to strike a balance in sentencing for this offence. What can be extrapolated from local case law is that the approved range of sentencing is between 5 and 25 years, with the midpoint at 15 years see **Samkeliso Madati Tsela v Rex Criminal Appeal No. 20/10**. This range serves as a useful guide in sentencing for same which the courts have progressively followed, the end product dependant on the peculiar facts and circumstances of each case.

[25] Thus, in the case of **Sibusiso Goodie Sihlongonyane v Rex Criminal Appeal No. 14/2010**, the Appellant hacked his 85 years old grandmother to death with a bushknife. The murder was actuated by a belief in witchcraft. The High Court imposed a sentence of 27 years, which was reduced on appeal to 15 years.

[26] Furthermore, in the case of **Khanyakwezwe Dlodlu v Rex Criminal Appeal Case No. 33/2010**, the Appellant was sentenced to 16 years for murder, which was confirmed on appeal. The evidence showed that the deceased died of hemorrhage as a result of multiple penetrating injuries to the heart and left lung. The multiple wound sustained by the deceased showed beyond any doubt that he had been subjected to a particularly vicious attack and the trial Judge noted that “*three photographs of the deceased in situ graphically depict the gory reality of a murder most foul*”.

[27] Similarly, in the case of **Xolani Zinhle Nyandzeni v Rex (Supra)**, the Appellant had assaulted the deceased his brother by hitting him four (4) times on the head with a hammer. He then proceeded to cut his head off from this body with a knife. The post-mortem report disclosed that death was due to multiple injuries and that the deceased had been decapitated. The High Court sentenced the Appellant to 30 years for murder with extenuating circumstances which was reduced on appeal to 25 years.

[28] Then, there in the case of **Thembinkosi Marapewu Simelane and Another v Rex, Criminal Appeal Case No. 15/10** where the Appellants were sentenced to 25 years imprisonment for murder with extenuating

circumstances. Both Appellants had assaulted an innocent and defenceless woman with burning firewood. The deceased eventually died from the injuries sustained, which covered the whole of her body. Her frontal bone as well as left temporal bone were fractured. On appeal the court substituted the sentence of 25 years imposed on both Appellants *a quo*, with a sentence of 20 years for the 1st Appellant whom it found had a grudge against the deceased thus deserving a sentence disparate from the 18 years imposed on the younger 2nd Appellant who bore no such grudge.

[29] Finally, it will be remiss of me not to mention, that the courts have persistently held that murder actuated in the course of a robbery commanded more punitive measures. Therefore, in the case of **Jabulani Mzila Dlamini and Another Criminal Appeal No. 16/2011**, this Court upheld the sentences of 22 years and 16 years for murder and robbery respectively imposed on the Appellants. The Appellants had stabbed the deceased to death in the process of robbing her of a cellphone valued at E500.00 and cash in the sum of E160.00

[30] Furthermore, in the case of **Siyabonga Motsa v Rex Criminal Appeal No. 25/2010**, the trial court imposed a sentence of 14 years on the Appellant for

the murder of one David Mdluli (the deceased). Like in this case the Appellant in the company of others committed this offence in the course of robbing the deceased and they had also been drinking. Though this sentence was upheld on appeal, this court however noted that the sentence was not sufficiently severe for the circumstances of the offence. See **Siboniso Mazibuko v Rex Criminal Appeal No. 07/2011**.

[31] *In casu*, I have hereinbefore demonstrated the gruesomeness of this murder in paragraph [19] ante. It bears no repetition, save to emphasize the egregiousness of the offence committed in the pursuit of a robbery in which the Appellants terminated the sacred life of their own friend. I do not think that the learned Judge *a quo* erred in anyway in the sentences of 15 years imposed and no basis exists for interfering therewith. In my respectful view, the court *a quo* was too lenient in the face of the prevalence of this evil which we must all join hands to stamp out in the interest of public peace and order. Certainly, the offences called for more deterrent and denunciatory measures. This will serve to bolster the confidence of the Swazi populace in the machinery of justice and its ability to wholistically protect it from this sort of mayhem.

[32] In this regard, I call to mind the statement of the **Rt Hon. Lord Denning**, made in his **Memorandum submitted to the Royal Commission on Capital Punishment**, contained in the **Minutes of Evidence of December 1, 1949**; which is as follows:-

“Punishment is the way in which society expresses its denunciation of wrong doing and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the greatest majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. If that were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving, but will public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is deterrent or not ---- In my view, the ultimate justification of any punishment is, not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime”

[33] Furthermore, in *“Society’s Moral Right to punish: A Further Exploration of the Denunciation Theory of Punishment”* (1990 – 1991) (65 Tulane Law Review) 299 at 331-332, Ronald J Rychlak said this:-

“This theory holds that society must register its disapproval of wrongful acts and reaffirm the values violated by these acts. Punishment declares that this society will not tolerate this conduct, regardless of any future deterrent effect----- One of the most visible aims of denunciation is the maintenance of social cohesion. The most important aim of the denunciatory theory--- is to reassure the majority of society that the system does work ---- denunciation serves to satisfy the majority’s need to know that its rules (reflecting its values and goals) are being enforced . In other words, denunciation shows law – abiding society not only that the criminal system works, but that society itself works”

[34] Finally, in the case of **Nkosinathi Bright Thomo v Rex Criminal Appeal No. 12/2010, para 21, Ebrahim JA** succinctly put this principle as follows:-

“----- the death of a human being from unnatural causes is a very serious matter, for death is too finite. It invokes a justifiable feeling of society’s anguish and disappropriation”

[35] Indeed dire circumstances call for condign measures. The time is nigh for this. Life can be buried forever but the truth will always be found.

[36] On these premises this appeal fails and is dismissed in its entirety.

E.A. OTA
JUSTICE OF APPEAL

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

B.J. ODOKI
JUSTICE OF APPEAL

Appellants in person

For Respondents:

A. Makhanya
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