



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Criminal Case No. 29/2012

In the matter between:

SENZO NHLABATSI
WANDILE DLAMINI
vs
REX

1st Appellant
2nd Appellant

Respondent

Neutral citation: *Senzo Nhlabatsi & Another v Rex (29/2012) [2014] SZSC 11 (30 May 2014)*

Coram: **RAMODIBEDI CJ, EBRAHIM JA and TWUM JA**

Heard: 02 May 2014

Delivered: 30 May 2014

Summary : *Criminal Law : Appellants convicted of murder and rape. First Appellant is convicted of murder and rape. Sentenced to 25 years for murder and 18 years for rape. Second Appellant sentenced to 25 years for murder only. Cumulative sentence of 43 years for first appellant contrary to s.18 (2) of Constitution as being inhuman sentence – Sentence for rape reduced to 10 years. First appellant to serve 35 years. Second appellant’s sentence reduced to 17 years.*

JUDGMENT

DR SETH TWUM

Introduction

[1] This appeal arises from the convictions of the appellants by Mr Justice Maphalala J, sitting at the High Court, Mbabane on 5th July 2012. The two accused persons had been tried for the offences of murder and rape. The first appellant, Senzo Nhlabatsi was convicted on two counts of murder and rape. The second appellant was convicted of only the murder charge. The learned trial judge found that the murder was accompanied by extenuating circumstances. The first appellant was sentenced to 25 years imprisonment for the murder conviction and a further 18 years for the rape conviction. The second appellant was sentenced to 25 years in prison for his conviction of murder. Each of the two appellants has appealed to this Court saying that they accept their convictions but are only praying for reductions in their respective sentences.

Background Facts

[2] (i) The deceased, Mary Lungile Ginindza, was aged 73 years. The appellants were cousins but it is not clear how they were related to the deceased. The second appellant said that he believed that the deceased was a witch and that she had used her witchcraft to kill both his grandfather and his brother. He said he feared that he might be the next victim.

(ii) On the night of the murder the appellants primed themselves with beer to get Dutch courage. When the deceased was alone they cornered her in her room and interrogated her amidst assaults to extract a confession from her if she was really responsible for those deaths in the family. According to the second appellant she confessed that she caused the deaths, whereupon they decided to kill her. The deceased was badly beaten with a sjambok in her room. When she was very weak they dragged her out into the yard and placed her near a fire they had lit. They put a disused lorry tyre in it. When it caught fire, it was hung around her torso and it burnt her badly. And as if that was not enough, the first appellant confessed that whilst she was writhing in pain and agony on account of her beatings and burns, he raped her before she died after he had removed the tyre from her body. She was then left in the yard where the fire had been lit, partially naked with her

underpants exposed. She was found dead the next morning. Needless to say she died a cruel, painful and lonely death, apparently rejected by her own kith and kin.

- (iii) In due course, Police investigations led to the arrest of the appellants. They confessed to killing her. It was upon their own uncontroverted admissions that they were convicted and sentenced by the learned trial Judge as particularised above.

The Appeals

[3](i) On 31st July 2012 the first appellant, Senzo Nhlabatsi lodged an appeal against his sentences of 25 years and 18 years, respectively. In essence, he wanted his two sentences to be made to run concurrently, instead of consecutively, as ordered by the trial Judge. His ground of appeal was that the cumulative sentence of 43 years was too harsh and severe for him to bear. I shall revert to this anon.

(ii) In his Heads of Argument filed on 11th April 2014, he argued that the sentence was “more punitive than corrective, rehabilitative, restorative and reintegrating”. He said the commission of the offences was not

premeditated. He blamed his callousness on his state of drunkenness, which, of course, was self-induced to give him Dutch courage to do what he did. He claimed he was the sole breadwinner for his three minor children. He concluded by saying that he was only 23 years old when he committed the offences.

- (iii) The second Appellant, Wandile Dlamini, also appealed against his sentence on 31st July 2012. He appealed for a reduction of 10 years from his sentence of 25 years. He supported this by saying that the sentence of 25 years was too harsh and severe for him to bear.

- (iv) In his Heads of Argument, the second Appellant said that the commission of the offence stemmed from his belief in witchcraft. He suspected that it was the deceased who killed his grandfather and his brother. He said the learned trial Judge recorded it in the record of proceedings that he committed the offence as a result of his belief in witchcraft. For good measure, he also added that he was the sole breadwinner to his two minor children and that he had to be there to provide for them.

Respondent's Submissions

- (v) Counsel for the Crown's submission was short. He argued that the learned trial Judge took into account the personal circumstances of the appellants. He concluded by saying that the sentences imposed by the court a quo were "appropriate in the circumstances", considering the manner in which the murder was committed.

Judgment of this Court

[4](i) The learned trial Judge accepted the appellants' belief in witchcraft as constituting an extenuating circumstance. It was for that reason, notwithstanding the provisions of section 15(2) of the Constitution, that the appellants were convicted of murder with extenuating circumstances.

- (ii) During the hearing before the Court a quo, Crown Counsel submitted that the appellants had set out to get drunk so as to get Dutch courage to commit the murder. That was an aggravating circumstance which should properly be factored into the sentencing equation.

- (iii) The court a quo correctly considered the triad of sentencing – i.e. the personal circumstances of the accused, the interests of society and the seriousness of the offence committed. I agree entirely with the learned trial Judge that this was a very brutal and senseless murder committed against a defenceless old woman. My own view of the behaviour of the first appellant is that he was heartless and evil. He unleashed unimaginable bestiality and shame on the woman. It was depravity of the deepest dye. Quite frankly I am unable to fathom by what steel nerves he could conjure up an erection to be able to rape that hapless 73 - year old woman – literally gasping for her last breath of life.
- (iv) My disgust for the behaviour of the appellants notwithstanding, judges of this Court, as elsewhere, are sworn to uphold the law and to do justice to all manner of persons without fear or favour, affection or ill-will. There is no running away from the fact that the cumulative sentence of 43 years in prison meted out to the first appellant, cannot stand.
- (v) In Criminal Case No. 22/2012, Ndaba Khumalo v Rex, the appellant had appealed for reduction in sentence. I researched into the principles that inform a court in dealing with such appeals. This is what I wrote them. I

wish to reproduce it here so that it may be easily accessible for future reference.

“[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.”*

(vi) After a very careful and anxious consideration of section 18 (2) of the Constitution I admit that the cumulative sentence of 43 years imposed on the first appellant subjects him to “inhuman or degrading treatment or punishment.” The two sentences for murder (25 years) and rape (18 years) each considered alone, might have been unobjectionable. Cumulatively, it would break the appellant. In the circumstances, I will reduce the sentence for the rape to 10 years. I am not persuaded that this was an aggravated rape. This will reduce the cumulative sentence to 35 years. Equality is equity, I will also reduce the sentence for the second appellant by 8 years so that his sentence would be 17 years, all from the date of commencement of the sentences as ordered by the learned trial Judge.

Ordered accordingly.

Dated at Mbabane on the 30th May, 2014.

DR. S. TWUM
JUSTICE OF APPEAL

M.M. RAMODIBEDI
CHIEF JUSTICE

A.M. EBRAHIM
JUSTICE OF APPEAL

For Appellant : **In person**

For Respondent : **Miss N. Masuku**