IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 05/2014

In the matter between:

ZWELITHINI NJOVANE KHUMALO **APPELLANT**

V

REX **RESPONDENT**

Neutral Citation: *Zwelithini Njovane Khumalo v Rex (05/2014) [2014] SZSC 14 (30 May 2014)*

Coram: RAMODIBEDI CJ, MOORE JA, and DR ODOKI JA

Heard: **07 May 2014**

Delivered: **30 May 2014**

Summary

Criminal Appeal – Conviction for murder without extenuating circumstances – Definition of extenuating circumstances – Whether extenuating circumstances existed – Facts established proved extenuating circumstances – Verdict of murder with extenuating circumstances substituted – Whether sentence of 25 years imprisonment harsh and excessive – Sentence of 20 years imprisonment substituted. Appeal allowed.

JUDGMENT

DR B. J. ODOKI, JA

[1] The Appellant was convicted of murder without extenuating circumstances, and sentenced to twenty five (25) years imprisonment without the option of a fine. The Appellant appealed against the sentence only on the ground that it was harsh and severe. He sought for the reduction of the sentence by ten years.

[2] At the hearing of the appeal it appeared from the Heads of Argument of the Appellant that he was pleading extenuating circumstances. The court allowed the Appellant, who was unrepresented, to raise the ground relating to the failure of the trial in the court *a quo* to find that there were extenuating circumstances in his case. I shall give reasons for this decision later in this judgment.

[3] The background to this case is as follows. The deceased had been a girlfriend of the Appellant for about five years, and they had been staying together. They had two children. The Appellant claimed that from June 2009, the deceased

refused to give him sex for seven months. The Appellant tried to look for a medical solution but he failed. He then advised the deceased that they should go to traditional healers or prophets, but she refused. This resulted in a quarrel between the Appellant and the deceased.

[4] In January 2010 the Appellant lost his job in a farm and returned to his home. He asked the deceased to collect her belongings from the house and she did so and took them to her friend's place in the neighbouring farm. Later he got a job at a neighbouring farm, of cutting logs and conveying them to a sawmill.

[5] The Appellant reported to his uncle that the reason he quarreled with the deceased was because she had refused to offer him sex since June 2009. The Appellant started dreaming that the deceased was having an affair with another man called Sifiso. He also dreamt that the deceased was pregnant.

[6] Later the Appellant asked the deceased whether she could take him to go and see their children, who were staying with their grandmother, but she said he could go alone, and even take the children to live with him, if he wanted.

[7] On 5th March 2010, the deceased went to a friend's house and the Appellant went to ask her if she would come back the following day and she replied that she did not know. The Appellant became suspicious because the deceased had

gone to visit her friend who was absent on a Friday instead of the following day.

[8] On the same day at 10:00 pm, the Appellant went to the house where the deceased was staying. He peeped through the window and saw the deceased having sex with another man, on a sponge mattress on the floor. He also saw a trousers lying by the side of a panty. The Appellant went and knocked at the door. The deceased and the man started dressing up and moved towards the kitchen. The man escaped before the Appellant could see him.

[9] The Appellant informed the deceased that what he had seen was bad, but she retorted that he had seen what he had wanted to see. According to the Appellant, when he told the deceased that she would remember him, she replied that what she could remember as he was of no help to her. The Appellant went back home feeling bad. He reported the matter to his uncle.

[10] The following day on Saturday 6th March 2010, at 1900 hours, the Appellant went to the house where the deceased was staying and found her with a friend in the kitchen. He greeted them but the deceased did not respond. The Appellant was disturbed by what he had seen his wife doing at her friend's house. He went to his house and took an axe. He went to the house where the deceased was staying. He went to the room where the deceased was staying and found the doors locked. He went and peeped through the window and saw

the deceased applying ointment on her body. He opened the window and advanced towards the deceased. The deceased stood up and the Appellant chopped her with the axe several times on the head and chest and went away with his axe.

[11] The Appellant went and reported to where he was staying that he had killed the mother of his children. He proceeded to the Police Station and surrendered himself to the police with the axe.

[12] The deceased was discovered dead with blood flowing in the room. Medical evidence revealed that the deceased had seven cut wounds on the back of the head, on the forehead, chin, cheek, chest and breast. The cause of death was due to cranio – cerebral injury.

[13] The Appellant made a long statement before a judicial officer in which he admitted killing the deceased and narrated the details leading to her death as outlined above in this judgment.

[14] The trial judge in the court *a quo* found that the defence of provocation was not available to the Appellant because he had not acted in the heat of passion when he found the deceased having sex with another person, as the offence took place the following day. The trial judge concluded;

> *"In the absence of proof that the accused was provoked as alleged or that the Homicide Act was applicable in*

the circumstances of this case, the alleged provocation cannot even constitute extenuating circumstances. The accused is accordingly convicted of murder without extenuating circumstances"

[15] In allowing the Appellant to challenge this finding the court had regard to the decision in ***Sam Dupont v Rex Criminal Appeal No.4/08*** where this court referred to Rule 7 of the Rules of the Court of Appeal which provides that the Appellant shall not without the leave of the Court of Appeal, argue or be heard in support of any ground of appeal not stated in his Notice of Appeal, but the Court of Appeal in deciding the appeal, shall not be confined to the grounds so stated. The court then observed,

"Bearing in mind, however, that the Appellant was unrepresented, this court adopted a flexible approach and allowed him to argue his case against conviction as well as in the interest of justice".
The crown correctly in my view, did not raise any objection to this approach. It must be stressed however that this case should not be treated as a licence for flagrant disregard of the Rules of this court"

[16] Section 295 of the Criminal Procedure and Evidence Act 67/1938 as amended by P47/1959 provides,

"(1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

(2) 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".

[17] The legislature did not define what amounts to extenuating circumstances and, therefore, the courts have had to determine what extenuating circumstances are generally, or in particular cases. This court has on several occasions defined what amounts to extenuating circumstances. Some of the most recent decisions are ***Ntokozo Adams v Rex Criminal Case No. 16/10 [2010] SZSC 10*** and ***Mandla Bhekithemba Matsebula v R Criminal Appeal Case No. 02/2013 [2013] SZSC 72.***

[18] ***In Adams v Rex (Supra)*** Dr Twun JA, adopted the definition of extenuating circumstances which had been stated in ***R v Biyana 1938 EDL 310*** and approved in ***Frendakubi Olhers 1948 SA (3) 810***, as follows:

"In our view an extenuating circumstance in this connection is a fact associated with the crime which serves in the minds of reasonable men to diminish morally albeit not legally the defence of the prisoner's guilt. The mentally of the accused may furnish such a fact. A mind (which) though not diseased so as to

provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical that it would be in the case of a mind of normal condition. Such delusion, erroneous belief or defect would appear to us to be a fact which may, in proper cases, be held to provide an extenuating circumstance. When we take a case like this where there is a profound belief in witchcraft, and that the victim practiced it to grave harm, and we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as persons labouring under a delusion which, though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstances"

[19] In ***Adams v R (Supra)*** Dr. Twum JA went further and defined the facts which the court has to take into account when determining whether extenuating circumstances exist. He stated;

"In determining the existence or non-extenuating circumstances, the court has to consider:

(a) Whether there are any facts which might be relevant to extenuation such as doing abuse, immaturity intoxication, provocation belief or muti or witchcraft.

(b) Whether such facts in their cumulative effect probably had a bearing or the accused's state of mind in doing what he did.

(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances. The general rule is that it is for the accused to lead evidence which would show extenuating circumstances in the crime of murder even though it is also true that the conduct is not limited to circumstances appearing from the evidence led by or on behalf of the defence. On the contrary, the court must also have regard to all the relevant evidence including even the evidence led on behalf the prosecution. The time for gauging the existence of the extenuating circumstances is of course the time of the commission of the crime. This means that there must have been a real possibility that the accused at the time of committing the crime was in fact in a state of mind which lessened his moral blameworthiness.

In sum, the court probes the mental side of the accused to determine extenuating circumstances. Finally, it is well settled that this court will not interfere with a trial court's finding of absence of extenuating circumstances unless such finding of absence of extenuating circumstances unless such finding is vitiated by misdirection irregularity or in one to which no reasonable court could have come".

[20] This definition was applied in the case of ***Mandala B. Matsebula v R (Supra)*** where this court gave a list of possible factors that appellate courts of Swaziland and surrounding countries have held to be extenuating circumstances. The factors the courts have held to amount to extenuating circumstances include belief in witchcraft, mental delusion, intoxication, immaturity, provocation, breakdown in love relationship, lack of education, among others.

[21] In the present case, the Appellant and the deceased had been living together for about five years. They had two children. The relationship between the Appellant and the deceased had broken down. The deceased had denied the Appellant sex for a long time on the pretext that she was not well. The deceased had left the Appellant's house. The Appellant was dreaming of the deceased having sex with another man. Eventually he found the deceased having sex with another man before he hacked her to death.

[22] It is clear that the Appellant was provoked by the actions of the deceased. He suffered mental anguish and delusion until he eventually took her life. It seems to have been some kind of passion killing. The Appellant was an illiterate and rural person. He readily admitted killing the deceased and cooperates with the police in the police in their investigations. He readily admitted the killing of his wife. These facts reduced his moral blame worthiness.

[23] In my view, the above facts cumulatively constituted extenuating circumstances. Therefore the trial judge in the court *a quo* misdirected himself in finding the Appellant guilty of murder without extenuating circumstances.

[24] As regards the sentence imposed by the trial court, the Appellant submits that the sentence of twenty five years is harsh and severe and should be reduces by ten years, in order to promote his rehabilitation, restoration and reintegration. He contends that he was unsophisticated and illiterate when he committed the offence and hence he failed to see foresee the destructive consequences of his actions in assaulting the mother of his children with an axe. He takes full responsibility for the murder. He pleads that he is a first offender and had two minor children to look after.

[25] The learned Counsel for the Respondent, while submitting that the trial judge took into account the aggravating circumstances in sentencing the Appellant to twenty five years, conceded that the sentence was beyond the range of sentences handed down in similar cases. He was agreeable to the reduction of sentence to twenty years.

[26] It is well settled that sentencing is a matter primarily within the discretion of the trial court, and an appellate court will not generally interfere with the sentence unless there is a material misdirection resulting into a miscarriage of justice.

See ***Sam DuPont v Rex, Criminal Appeal No. 4/08, Jonah Tembe v Rex, Criminal Appeal No. 18/2008, Mbekizwe Motsa v Rex, Criminal Appeal No. 37/2010 and Mfundiswa Tembe v Rex, Criminal Appeal No. 4/13 [2013] SZSC32.***

[27] In sentencing the Appellant, the trial judge in the court *a quo* stated that the brutal and gruesome nature of the offence committed by the Appellant was beyond any imagination, and it was incumbent upon the court to issue a sentence that is proportionate to the offence committed in terms of deterrency and that society expected the court to impose appropriate deterrent sentences which would not only reduce but curb the killing of defenseless women.

[28] The trial judge was justified in describing the Appellant's murder of the deceased as gruesome and to recognise the need to impose deterrent sentences to curb the killing of defenseless women. However, given the extenuating circumstances in this case already outlined in this judgment, and the mitigating circumstances in favour of the Appellant, and the range of sentences of between fourteen and twenty years imposed or confirmed by this court in similar cases, as documented in the case of ***Mandla Mendlula v Rex (Supra),*** I am of the view that the trial judge in the court *a quo* misdirected himself on the appropriate sentence in this case, when he imposed a sentence of twenty five years imprisonment against the Appellant.

[29] The Appellant prayed for a reduction of his sentence by ten years. However, I agree with the learned Counsel for the Respondent that a sentence of twenty years would be appropriate in this case.

[30] Accordingly, this appeal is allowed. The sentence of twenty five years imprisonment is set aside and substituted with a sentence of twenty years, backdated to the date of the arrest on 6th March 2010 as directed by the trial judge in the court *a quo*.

DR. B. J. ODOKI
JUSTICE OF APPEAL

I Agree

M. M. RAMODIBEDI
CHIEF JUSTICE

I Agree

S. A. MOORE
JUSTICE OF APPEAL

For the Appellant: In Person

For the Respondent: Miss Ncamsile Masuku