



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 14/2014

In the matter between:

CELANI SCACA NKAMBULE

Appellant

vs

REX

Respondent

Neutral citation: *Celani Scaca Nkambule vs Rex (14/2014)*
[2014] [SZSC 16] (30 May 2014)

Coram: A.M. Ebrahim JA
Dr. S. Twum JA
Dr. B.J. Odoki JA

Heard: 13 May 2014

Delivered: 30 May 2014

Summary: *Criminal procedure - sentence - appellant convicted of two counts of murder without extenuating circumstances - sentenced to 30 years imprisonment on each count - sentences ordered to*

run consecutively - appellant sentenced to 60 years imprisonment - appeal allowed sentences of 60 years imprisonment set aside and substituted with a sentence of 25 years imprisonment on each count - ordered that sentences to run concurrently rather than consecutively.

JUDGMENT

EBRAHIM JA:

- [1] The appellant was convicted of two counts of murder without extenuating circumstances. He was sentenced to thirty years imprisonment on each count. The sentences were ordered to run consecutively. The appellant appeals only against the sentence imposed on him. Counsel representing the Crown has conceded that the sentence warrants interference as it does not accord with the sentences previously approved by this court.
- [2] On the first count the appellant was convicted of murdering one Xolile Lulane on the 23rd September 2010 and on the second count he was convicted of murdering one Nomsa Sihlongonyane.

- [3] The deceased on the first count was the mother of the appellant's minor child although the parties were not married but lived together as man and wife. The deceased on the second count was related to the appellant as she was the wife of his uncle.
- [4] At his trial the appellant tendered pleas of guilt, on both counts, but not to murder but to culpable homicide. His pleas were not accepted.
- [5] The facts which led to the demise of the deceased can best be gleaned from a statement made by the appellant to the police, in order to explain his conduct.
- [6] He admitted that the deceased Xolile Lulane was staying with him at his parental home as husband and wife, even though they were not married. There is a minor child born of their relationship.
- [7] He admitted to have previously assaulted her sometime in May 2010, because she had a penchant of giving away property belonging to him to other people.

[8] Following the assault the deceased in respect of the second count Nomsa Sihlongonyane had advised Xolile to end her relationship with him but she did not heed her advice.

[9] On the 23rd September 2013 when the appellant proceeded to his home, returning from his place of employment, he discovered that Xolile had distributed his food to her parental home. This led to an argument between them and she ran from the scene to the homestead of the second deceased.

[10] The appellant followed her and stabbed her numerous times with a knife and Xolile died at the scene. During the confrontation which took place between Xolile and the appellant the second deceased was also stabbed as she attempted to intervene. She did not die at the scene but died later the same day in hospital after she had been conveyed there for treatment.

[11] The deceased Xolile was eighteen years old when she fell victim to the attack on her by the appellant.

[12] The post mortem revealed the following injuries to her body:

- “(a) A stab wound of 2x1cm, with sharp margins, present on the middle portion of the front and right side of the chest, which is 21cm, from the midline and 29cm from the umbilicus.**
- (b) A stab wound of 2x1cm, with sharp margins on the middle portion of the top of the left shoulder.**
- (c) A stab wound of 2x1cm with sharp margins, muscle deep, present on the middle portion of the front side of the left upper arm in the lower $\frac{1}{4}$ portion.**
- (d) A stab wound 1x1cm, with sharp margins, muscle deep, present on the middle and front side of the right upper arm.**
- (e) A stab wound of 1x1cm, muscle deep, present on the middle portion of the top of the left shoulder.**
- (f) A stab wound of 2x1cm, muscle deep present on the lateral and back side of the left upper arm in the middle portion.**
- (g) A stab wound of 2x1cm, present in the midline, on the back, in the upper $\frac{1}{4}$ portion of which is 127cm from the heel of the right foot.**
- (h) A stab wound of 1x $\frac{1}{2}$ cm present on the middle portion of the right side of the back, which is 4cm from the midline and 108cm from the heel of the right foot.**
- (i) A stab wound of 1x1cm, present on the middle portion of the midline and 97cm from the heel of the right foot.**
- (j) A stab wound of 2x1cm, bone deep, present on the middle portion of the left shoulder, which is 8cm, from the midline and 11cm from the heel of the left foot.**
- (k) A stab wound of 2x1cm, present below the middle portion of the left side of the back, 7cm below the injury No.10 (i.e. j above), 8cm from the midline and 111cm, from the heel of the left foot.**

- (l) In the right lung there was a stab wound of 2cm length present in the middle lobe and stab wound of 1cm length, present in the lower lobe.
- (m) In the left lung there was a stab wound of 1cm length present in the lower lobe.
- (n) In the heart and pericardial sac there was a stab wound of 1cm length, present on the back side of left ventricle of the heart.”

[13] The second deceased was aged twenty years old when she succumbed to the stab wounds inflicted on her by the appellant. The post mortem relating to this deceased reflects the following:

- “1. A stab wound of 4x2cms, with sharp margins, present on the middle portion of the front and left side of the chest, which is 19cms from the midline and 50cms, from the umbilicus.
- 2. A stab wound of 1½x1cm, with sharp margins, present on the middle portion of the right side of the back in the upper third portion, which is 8cms from the midline and 127cms from the heel of the right foot.
- 3. A stab wound of 1½x1cm, with sharp margins, present on the middle portion of the right side of the back, which is 10cms.”

[14] Against the background of these facts the learned judge **a quo** was entirely justified in convicting the appellant of murder on both counts.

[15] Crown counsel, however has conceded that the effective sentence of sixty years imposed on the appellant was inappropriate. In my view this concession was properly made.

[16] It is useful to revisit what **Moore JA** stated in the case of **Mandla Bhekithemba Matsebula vs Rex (02/2013) [2013] SZSC (24 November 2013** at paragraphs 20 to 26 of that judgment under the heading of CUMULATIVE SENTENCES where he stated:

“CUMULATIVE SENTENCES

[20] Judicial officers are frequently required to design appropriate sentences following convictions for several offences at the same trial. The basic and underlying principle is that an appropriate sentence must be tailor made for each individual offence. But multiple sentences cannot be combined in a manner which renders the cumulative total sentence disturbingly inappropriate and unjust.

[21] In Ndwandwe v Rex [2012] SZSC 39, the appellant complained against cumulative sentence of 32 years which was essentially a compound of individual sentences of 5, 12, and 15 years imprisonment which Hlophe J had ordered to run consecutively. This court reduced that gross sentence to one of 24½ years because, “the cumulative sentence of 32 years imposed a quo was indeed startlingly inappropriate.” See paragraph [36] on Swazili.

[22] In construing this court's judgment, Ota J cited some of the leading judgments on the captioned topic in which succeeding generations of judges, both in this kingdom and beyond, have laid down the law and explained its underlying rationale with such clarity, that it is a matter of considerable concern that judicial officers still seem to experience continuing difficulty in avoiding the pitfall of excessive sentences.

[23] It is unclear whether these difficulties arise out of a laudable revulsion from the unspeakable crimes for which the convicts before them stand condemned, or from a misguided and impermissible determination to exorcise those crimes by the imposition of draconian penalties beyond the scope of the discretion which every sentencing officer undoubtedly possesses, but which discretion is circumscribed by laws prescribing maximum penalties, by the sentencing conventions extant within this jurisdiction, and by the elastic ranges indicated by the judgments of this court.

[24] It is for these reasons that whereas sentences of life imprisonment, plus the confiscation of property, plus a fine of US\$ 100,000:00 were imposed upon the convicted kidnapper and rapist Mr. Castro following a plea bargain in Cleveland, Ohio in the USA, such penalties would be wholly inappropriate here in Swaziland. Judicial officers must therefore lower their sentencing sights to the prevailing norms, practices and precedents of this Kingdom. The sentencing discretion which they undoubtedly enjoy is not limitless or unfettered. It can only be validly exercised within its proper bounds: free from any misdirection of law or fact.

[25] Section 300 of the Criminal Procedure and Evidence Act is captioned “Cumulative or Concurrent Sentences”. It reads:

(1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(2) If such punishment consists of imprisonment the court shall direct whether each sentence shall be served consecutively with the remaining sentence.

The wording of subsection (2) is mandatory in as much as the court is required to direct whether each sentence shall be served consecutively with any remaining portions of part served sentences. It must be noted that the court is not mandated to direct that a new sentence must run consecutively to sentences the accused is currently serving, but which have not yet been served in full. Subsection (2) confers a discretion upon a sentencing court. That court may, or may not, depending upon the circumstances of each particular case, order that a fresh sentence, or some part of it, be served consecutively with any pre-existing sentence or part thereof. The factor which courts have consistently considered in deciding whether to order consecutive sentences or not, is whether or not such an order would result in the accused being burdened with an overall term which is

startlingly inappropriate, or manifestly excessive, or harsh, oppressive or inhuman.

[26] The cases in which this process has been employed are legion and do not bear repetition. The court a quo unfortunately misdirected himself as evidenced by paragraph [26] of its judgment in these terms:

‘I must clarify that the extent of both sentences was influenced more as well by the fact that they both could not realistically be made to run concurrently nor even be treated as one for purposes of sentence when considering their serious nature for the latter principle and the fact that they had not been committed as part of the same transaction for the former principle, as they happened months apart.’

The above passage suffers from the misconception that a court is powerless to order concurrent sentences for several offences unless they are ‘committed as part of the same transaction.’ The judge therefore felt himself inhibited from passing concurrent sentences because the two offences before him “happened months apart.” This misdirection vitiates the sentences imposed by the trial judge and places upon this court the duty of substituting appropriate sentences for those awarded by the trial court.”

[17] I also draw attention to what **Moore JA** stated in the same judgment under the heading of **PROPORTIONALITY** in paragraphs 27 of that judgment:

“[27] In Tison v Arizona - 481 U.S. 137 (1987) Justice Brennan of the United States Supreme Court decided that it was necessary for a sentencing court to determine whether a given punishment was disproportionate to the severity of a given crime. The principle of proportionality also required the court to determine, in cases where the accused is convicted upon several counts in a given indictment, whether the totality of the punishment meted out is proportionate to the severity of the crimes committed. At pages 481 U.S. 179 -180 that doyen of the progressive wing of the Court wrote:

‘In Solani v Helsin 463 U.S. 277, 463 U.S. 292 (1983, the court summarized the essence of the inquiry:

In the sum, a court’s proportionality analysis under the Eighth Amendment to the United States Constitution should be guided by objective criteria including -

- (i) the gravity of the offence and the harshness of the penalty;**
- (ii) the sentences imposed on the other criminals in the same jurisdiction;**
- (iii) the sentences imposed for commission of the same crime in other jurisdictions.’**

To the list I would respectfully add: the sentences imposed for offences of comparable or enhanced gravity, and the differing sentences imposed by a particular judge. As the material under the heading THE SENTENCE FOR MURDER will illustrate, the

sentences imposed in this case of 25 years for murder, and more so of the cumulated sentence of 35 years' imprisonment, cannot be said to have passed the proportionality test."

[18] I have also had regard to the case of **R v Adams [2010] SZSC 10** where **Dr. Twum JA** expressed the view that "**prima facie**, a young man, as the appellant was, is presumed to be immature." He went on to say at paragraph [36] of that judgment:

"I agree that 30 years imprisonment is unduly long and could expose this particular offender to hardened criminals...I will reduce the sentence of 30 years imposed on the appellant to 20 years from the date of his conviction and sentence to take account of human frailties."

The appellant in this case was 21 years old when he committed this offence and 25 years old on the date he was sentenced.

[19] Regard is also had to the case of **Samukeliso Madati Tsela v Rex (2010) [2011] SZSC 13 (31 May 2012)**. In that case guidance was provided on what are "Appropriate sentences for murder in Swaziland and the appropriate range identified." It

was stated that sentences should fall within range outlined therein except for good reason. See: **R v Adams [2010] SZSC 10 (02/2013); R v Mandla Bhekithemba Matsebula [2013] SZSC 72 (02/2013).**

[20] I respectfully repeat the words of **Moore JA** which I made reference to in my judgment in the case of **Nkosinathi Richard Davie Nel vs Rex (36/2012) [2012] SZSC (30 May 2014):**

“[21] I also have regard to what Moore JA stated in the case of Simanga Mabaso v Rex (24/13) [2014] SZSC 10 (May 2014) which was heard during the current session:

‘[25] The appropriate sentence for murder has been authoritatively laid down in Tsela v Rex [2012] SZSC13 which can be assessed at swazilii.org. A sentence of twenty five years imprisonment lies at the upper end of an elastic scale. Such a sentence must inevitably be reserved for the most serious cases coming before the courts...’

[22] In my view, regard being had to the authorities cited in paragraphs 18, 19 and 21 of this judgment, and the fact that the appellant was only 15 years old at the time of the commission of this offence that a total effective sentence of 18 years imprisonment would be appropriate on the facts of this case.

[23] I would accordingly order that the sentence imposed by the learned judge a quo be set aside and be substituted with the following sentence:

**'Count 1 : 18 years imprisonment
Count 2 : 9 years imprisonment**

The sentences to run concurrently with effect from 30th January 2008, that being the date the appellant was taken into custody."

[21] It is my view that the facts relating to this case reflect two extremely serious cases of murder. The appellant committed to two very brutal murders and inflicted gruesome injuries on his victims. His conduct was very determined and deliberate which led to the death of two young persons who lost their lives at a very early stage in their life. It is for these reasons that I believe the ratcheting upwards of the sentence would be appropriate on the facts of this case and the sentences to be imposed should be greater than the sentences which this court considered as being appropriate in the **Tsela case** (supra). See also for example **Xolani Zinhle Nyandzeni v Rex 29/2010 [2012] SZSC (3) (31 May 2012)** where the appellant, in that case, received a sentence of 25 years imprisonment.

[22] Based upon the principles articulated above I am satisfied that in all the circumstances of this case a sentence of 25 years for murder would be appropriate in respect of each count with the sentences to run concurrently. The appellant will therefore serve a net period of 25 years imprisonment backdated to 23rd September, 2010.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE :

DR. S. TWUM
JUSTICE OF APPEAL

I AGREE :

DR. B.J. ODOKI
JUSTICE OF APPEAL

FOR THE APPELLANT : **In person**

FOR THE CROWN

: A. Makhanya