



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No.36/2013

In the matter between:

NKOSINATHI RICHARD DAVIE NEL

Appellant

VS

REX

Respondent

Neutral citation: *Nkosinathi Richard Davie Nel vs Rex (36/2013)*
[2014] [SZSC] 17 (30 May 2014)

Coram: A.M. Ebrahim JA
S.A. Moore JA
Dr. S. Twum JA

Heard: 12 May 2014

Delivered: 30 May 2014

Summary: *Criminal procedure - sentence - appellant convicted of murder without extenuating circumstances and attempted murder - sentenced to 25 years imprisonment for murder and 9 years imprisonment for attempted murder - sentences ordered to run*

*concurrently - Crown counsel conceded that the sentence imposed by the court **a quo** does not fall within the accepted range of sentences for such offences in this jurisdiction - appeal allowed effective sentence reduced to 18 years imprisonment.*

JUDGMENT

EBRAHIM JA:

- [1] The appellant was convicted on count one of murder without extenuating circumstances and sentenced to 25 years imprisonment. He was also convicted on count 2 with attempted murder and sentenced to 9 years imprisonment with labour. The sentences were ordered to run concurrently.
- [2] He appealed against the severity of the sentence. Crown counsel conceded that the sentence imposed fell outside the accepted range of sentences for sentences for such offences in this jurisdiction.
- [3] The facts in this matter are that the complainant in respect of count 2 Stanley Nel resided with the appellant in the Timbutini area, in a homestead with the appellant.

- [4] On the 30 January 2008 after he retired to bed and whilst asleep he was awakened as a result of feeling a sharp pain in his back. He screamed, and saw that the appellant was present and carrying a spear. The appellant stabbed him for the second time, this time, in the vicinity of his abdomen. Nel fled from the room and proceeded to the deceased's home where she was sleeping.
- [5] The deceased opened her door and Nel asked her to rush him to hospital. His cousin Mahlalela emerged from his homestead to assist and helped Nel to board a vehicle described as a (bakkie) and they then drove towards a gate in order to leave their compound. The deceased was also seated in the bakkie, in the front passenger's seat.
- [6] The gate was locked, the keys were in the deceased's room. Mahlalela proceeded to her home to fetch the keys only to be confronted by the appellant who stabbed him as well (no serious injury was suffered by Mahlalela). He fled and the appellant turned his attention to the deceased and Nel.

[7] The deceased alighted from the vehicle and approached the appellant and questioned him about his conduct. He pushed her towards the vehicle and she fell and was stabbed several times by the appellant with a spear.

[8] Mahlalela by this stage returned to the scene and managed to grab hold of the spear from the appellant and threw it a distance away from where the fracas had occurred. He then, with Nel placed the deceased into the front seat of the bakkie but by this stage the appellant had retrieved the spear and attempted to smash the windows of the bakkie, intending to attack the deceased yet again.

[9] Mahlalela, however, managed to drive the bakkie towards the locked gate and caused it to collapse, and drove through the entrance and took deceased to hospital where she died the next day.

[10] The post mortem report on the deceased revealed that she had suffered the following injuries:

“1. A stab wound of 3.5x1.5cms, with sharp margins, present on the front and right side of the chest, 3cms from midline and 20cms from the umbilicus.

2. **A stab wound of 1x½cms, with sharp margins, present on the right side of the abdomen, which is 2cms from the midline and 10cms from the umbilicus.**
3. **A stab wound of 3.5x½cms, present on the right and middle portion of the back, which is 2.5cms from the midline and 107cms, from the heel of the right foot.**
4. **A stab wound of 3x1cms, with sharp margins, present on the front side of the left elbow.”**

The pathologist, Dr. Reddy concluded that she had died due to having received multiple stab wounds.

[12] Nel also received medical attention and fortunately survived the attack. The medical report pertaining to him reflected the following:

“Abdominal penetrating wound (xxxx outside) penetrating wound on left lumbas region, stab wound one, left posterior’s chest.”

[13] Against the background of this evidence the learned judge correctly convicted the appellant of murder in relation to the murder of the deceased. He also properly convicted the appellant for the attempted murder of Nel. No charge appears to have been levelled against the appellant for his attack on Mahlalela.

[14] The appellant has not appealed against his convictions in this court but against the sentences imposed on him on the premise that the effective sentence of 25 years imprisonment is unduly harsh.

[15] It is apparent from the judgment of the learned judge **a quo** that he did take into account that at the time the appellant committed the offence he was fifteen years old, and that he admitted the stabbing of the deceased and Nel and that he exhibited remorse.

[16] The learned judge noted that the appellant had used a dangerous weapon, a spear to inflict the injuries on the deceased which resulted in her death and that he used the same weapon to inflict the injuries seen on the witness Nel. The learned judge also took into account that by the time the appellant came to trial and was sentenced on 13th September 2012 he was 19 years old and that he had been in custody since the date of his arrest which was 30th January 2008.

[17] In this court Crown counsel has made the following concessions as regards to the sentence imposed on the appellant:

“AD SENTENCE

Respondent concedes that the appellant has youthfulness on his side as an extenuating factor which the Honourable Judge a quo ought to have taken into account.

1.1 In Mandla Bhekithemba Matsebula v Rex, Criminal Appeal (02/2013) [2013] SZSC 72 at 32-33 this Honourable Court made it clear that youthfulness is an extenuating circumstance. Respondent further concedes that the sentence of twenty five (25) years imprisonment is not within the range of sentences which this Honourable Court has confirmed and imposed in murder cases.

1.2 In Mandla Mlondlozi Methula v Rex, Criminal Appeal (12/2013) [2013] SZSC 60 at 19 this Honourable Court stated that the range of sentences of murder in our jurisdiction is between fourteen (14) and twenty (20) years imprisonment.

1.3 It is Respondent’s humble submission that this Honourable Court is at large to impose a sentence of twenty (20) years imprisonment as this sentence is within the range of sentences for murder.”

[18] The cases of **R v Adams [2010] SZSC 10** and **Samkeliso Madati Tsela v Rex [2011] SZSC 13** are of assistance in determining on whether the concessions made by the Crown counsel are justified. In the **Adams** case **Dr. Twum J.A.** narrated how the victim was brutally murdered and in paragraph [35] of his judgment stated:

“The multiple stab wounds unleashed on a woman who was eight and one half months pregnant were gruesome and horrendous in the extreme. The foetus she was carrying also died.’ Twum JA opined that ‘in this case, the offence called for a very severe sentence’. This Court imposed a sentence of 20 years imprisonment.”

[19] Regard is also to what **Moore JA** said in the case of **Mandla Bhekithemba Matsebula v Rex SZSC 72** at paragraphs 20 to 26 of that judgment in which he held the same views as expressed in the **Tsela** and **Adams** cases.

[20] I am satisfied that the concession made by Crown counsel is therefore well founded.

[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.

A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE :

S.A. MOORE
JUSTICE OF APPEAL

I AGREE :

DR. S. TWUM
JUSTICE OF APPEAL

FOR THE APPELLANT : **In person**

FOR THE CROWN : **B. Magagula**