



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No.05/2012

In the matter between:

NHLANHLA DLUDLU

Appellant

vs

REX

Respondent

Neutral citation: *Nhlanhla Dlodlu vs Rex (05/2012) [2014]
[SZSC 18] (30 May 2014)*

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

Heard: 02 May 2014

Delivered: 30 May 2014

Summary: *Criminal procedure - sentence - appellant convicted of murder and sentenced to twenty eight years*

imprisonment - appeal against sentence - appropriate sentences for murder in Swaziland reiterated. Sentences should fall within range as outlined therein except for good reason. The sentence of twenty eight years imprisonment set aside and substituted with a sentence of twenty years imprisonment.

JUDGMENT

EBRAHIM JA:

- [1] The appellant was convicted of murder without extenuating circumstances; he was sentenced to twenty eight years imprisonment. He appeals against the severity of sentence imposed on him.
- [2] The deceased was the mother of the appellant. Sihle Dlamini testified in the court **a quo** that the appellant is his cousin. He deposed that on the 7th March 2009 he and other members of his family were at their parental home.
- [3] The deceased and her driver were visiting from Pretoria and were partaking of liquor at the homestead.

[4] Presently, after refreshing themselves they left but the deceased, whilst on her journey, soon received a phone call from her daughter who advised her that an argument had developed between her and the appellant. She met her daughter in Mbabane and proceeded with her to the Mbabane Police Station where she requested that the police accompany her to where the appellant was at his homestead.

[5] On arrival, the appellant complained to her that he was not being appreciated for the contribution he was making in looking after the homestead. The deceased attempted to pacify him and reminded him that as he was unemployed it was she who was supporting him and taking care of all his needs. The appellant was not receptive to this assertion and left the room but later returned.

[6] It then became apparent that the dispute between the deceased's daughter and the appellant centred around the disappearance of a cell phone belonging to his sister Nompulelo Dlodlu. The deceased questioned the appellant on why he had sold his sister's cellphone. The appellant did not respond to this question and continued to state that that he was being undermined and abused.

- [7] The police details present during the course of these discussions suggested to the deceased that they take the appellant to the police station and calm him down. The deceased intervened, and advised them that she had forgiven him and stated that it was not necessary for them to do so. The police details encouraged the deceased and the appellant to hug each other and “make peace.” This they did, but it was apparent that the appellant still appeared to be unhappy.
- [8] The deceased decided not to leave for Pretoria that evening due to the lateness of the hour and also because the border post for entry into South Africa would by that stage be closed.
- [9] Later that night after everyone had retired to bed the appellant entered the room where Sihle Dlamini and one Thokozani Bhembe were sleeping, and was heard to say “let me commit murder once and for all.” Sihle Dlamini followed him, after he heard a noise emanating from the room in which the deceased was sleeping only to discover that the appellant had struck the deceased with an axe and was about to strike her a further blow with it. He took the axe away from him.

[10] In all the appellant delivered three blows with this axe to the body of the deceased.

[11] The post mortem on the deceased revealed the following:

“Blood stains over scalp, face, trunk, left upper limb and right hand;

The following ante mortem injuries seen:

(1) cut wound right forehead to behind the ear 12.2x4.1cm brain deep.

(2) cut wounds over scalp parietal, occipital region 7.2x2.1cm, 4.1x2cm, 6.1x2.2cm, 9x1.7cm, 3.3x1.2cm, 5.2x1.7cm brain deep. Fractured skull comminuted, torn dura, lacerations of brain, portion of brain drain out present.

(3) cut wound over lower region neck right shoulder 9.2x1.8cm muscle deep.

(4) cut wounds over right hand 3x1cm 1x1cm muscle deep.”

[12] The deceased appears to have died instantly following the attack on her by the appellant.

[13] Against the background of this evidence the appellant was found guilty of murder.

[14] I have no difficulty with the conviction returned by the learned trial judge but it is with the sentence imposed by him that I take issue.

[15] The following authorities assist in this regard:

Ntonkozo Adams (2010) SZSC 10; Samkeliso Madati Tsela [2011] SZSC 13 and Mandla Bekithemba Matsebula [2013] SZSC 72.

[16] In particular, I highlight the passages in paragraphs [37] to [41] in the judgment of **Moore JA** in the **Matsebula** case (**supra**) in which he also referred to the **Adams** and **Tsela** judgments.

“THE SENTENCE FOR MURDER

[37] In Adams supra, the circumstances of the killing were particularly gruesome. The accused in that case had killed his heavily pregnant victim by stabbing her several times with a spear. This unfortunate lady received some 13 stabwounds from which both she and the unborn she was carrying perished. The trial judge having found that there were no extenuating circumstances sentenced the accused to 30 years imprisonment without the option of a fine for the offence of murder without extenuating circumstances. This court, having found that there were indeed extenuating circumstances in that case, reduced the sentence to 20 years imprisonment for murder with

extenuating circumstances. This court reached that conclusion even though it found that this was a particularly serious crime which it described in this way at paragraph [35]

‘There is no doubt whatsoever that this was a particularly heinous crime. The details of the murder chronicled at pages 16-21 make chilling reading. The multiple stab wounds unleashed upon a woman who was 9½ months pregnant were gruesome and horrendous in the extreme. There was a wound on the cheek, there were wounds on both sides of the chest, the middle portion of the abdomen, the right side of the abdomen, two stab wounds in the lungs, a stab wound in the left of the heart, on the back, leg, the loin region and arms. They were directed at vital and vulnerable organs of that poor and helpless pregnant woman.’

Addressing his mind to the appropriate sentence in the circumstances of that case, Dr. Twum wrote at paragraph [36]:

‘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.’

In Mbhamali v Rex [2013] SZSC 8 this court upheld a sentence of 20 years imprisonment imposed by Hlophe J who was the trial judge in the instant appeal. The facts and circumstances in Mbhamali made that case a far more gruesome and heinous case of murder than the case before us. In Mbhamali, case this court found that:

[6] The circumstances of the offence could hardly have been worse. Here was a hale and hearty young man in the prime of his life: at the age of induction to disciplined forces, or of fitness for manual labour, launching a brutal attack against an unarmed woman who could hardly be expected to defend herself, let alone mount a counter attack or do the appellant any physical harm. He chose for his weapon of offence one of the most feared and lethal objects commonly available in Swaziland - the awful bush knife.

[7] The report on post mortem examination described the cause of death on page 1 in cryptic terms: "Due to multiple injures." But pages 2 and 5, listing the five ante-mortem injuries which were observed upon the body of the deceased, tell a grim tale of the savage and merciless attack which the appellant mounted upon the hapless deceased. The list makes sad reading. I set it out, not to excite maudlin curiosity, but rather to illustrate that, taken together with all of the other grievous elements of this case, it affords ample justification for Hlophe J imposing a sentence of measured severity.

[8] The injuries listed in the report are:

- 1. Cut wound over left side scalp to the right eye obliquely present bone deep 16x2.2cm. It involved skull with brain intracranial haemorrhage.**
- 2. Cut wounds over left ear to face 13x2cm, 12x2cm bone deep involved muscles vessels obliquely placed.**
- 3. Cut wound below left ear to mouth 18x2.3cm bone deep involved muscles, lips, nerves, teeth and tongue.**

4. **Cut wound extending from left side front of neck upper region to right obliquely place 10x3.2cm involved muscles, blood vessels, nerves, trachea, esophagus, vertebral body surface.**
5. **Abrasion over buttocks 3.1cm, 2x1.7cm.**

[9] In his sworn expert testimony, Dr. R.M. Reddy, an experienced police pathologist, described the effects of the injuries he listed in his report. Each of the four wounds inflicted with the bush knife was fatal in itself. Cumulatively, they were even more so. The abrasion, which the doctor characterised as aggressive, evidenced the final indignity suffered by the deceased as her buttocks crashed to the rocky ground upon which she lay inert as the appellant, vicious but cowardly, fled the scene.

[10] The doctor's evidence, bolstered by graphic photographs, reinforces the prosecution contention that the killing of the deceased was the result of the appellant's deliberate intention to end her life. As Dr. Reddy noted, the blows were aimed and landed upon vital areas: the neck - severing it - upon the scalp, and upon the face between those points. They were all bone deep, which indicates that they were inflicted with much force.'

[39] In this case, the trial judge found that there were evidential factors which suggested that the deceased in the murder case had been raped as well. Be that as it may, the prosecution failed to

prove the charge of rape which was accordingly dismissed. Indeed, the circumstances surrounding the murder seem to indicate that it arose out of an attempted rape gone tragically wrong. A belt and log were found at the scene. Neither item was a weapon per se. Both items evidence on the spur of the moment improvisation rather than studied premeditation. A gun or a knife would have pointed strongly to premeditation. The report on post mortem examination recorded the performing doctor's opinion that death was due to strangulation and drowning. The ante-mortem injuries were:

- (i) Right side of the face swollen.**
- (ii) A lacerated wound of 6x1cms, present on the chin.**
- (iii) A contusion of 5x $\frac{1}{2}$ cm, present on the right side of the mouth.**
- (iv) Contusions of 3x3cms, 2x1cms and 1x1cm present on the under surface of the lower jaw.**
- (v) A ligature mark of 16x3cms, present around the middle portion of the front side of the neck.**

None of these above injuries was said to be the cause of death. They are a far cry from the multiplicity of individually fatal wounds inflicted in the Mbhamali case. The Swaziland equivalent of the person on the Clapham Omnibus would be at a complete loss to understand how the same judge could impose a sentence of 25 years in the instant case, and one of 20 years in Mbhamali when that murder was far more horrific and gruesome than the one before us.

[40] It follows from the foregoing comparison that the sentence of 25 years imposed by the trial judge violates the principle of uniformity of sentencing and must be set aside on this ground as well.

The Appropriate Sentence

[41] Based upon the principles articulated in the foregoing paragraphs, and upon the comparison with other sentences sanctioned by this court, and upon the range of sentences for murder established by Tsela, this court is satisfied that, in all the circumstances of the instant case, a sentence of 20 years for murder with extenuating circumstances would be appropriate. The sentence for rape is fitting and remains undisturbed."

[17] Regard is also had to the schedule prepared by the learned judge **Moore JA** in the **Tsela** case which explicitly outlines the sentencing patterns in murder case extending from 2002 up until 2011 in this jurisdiction.

[18] I also respectfully draw attention to the judgment in respect of a case heard during the course of this session **Nkosinathi Richard Davie Nel vs Rex (36/2012 [2014] SZSC (30 May 2014))** at paragraphs [21] where I respectfully associated myself with what **Moore JA** has stated in the **Simanga**

Mabaso v Rex (24/13) [2014] SZSC 10 (May 2014): (also heard during the course of their session)

“[25] The appropriate sentence for murder has been authoritatively laid down in Tsela v Rex [2012] SZSC 13 which can be accessed 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 saved for the most serious cases coming before the courts...”

[19] I have seen fit to be repetitive in drawing attention to these observations in this judgment in the hope that these will not escape the notice of the judicial officers seized with relevant cases on the issue of sentence pertaining to the murder cases.

[20] Against the background of this learning it is my view that a more appropriate sentence on the facts of this case is one of twenty years imprisonment.

[21] Accordingly the appeal is allowed and it is ordered.

(i) The sentence of the trial court of 28 years imprisonment for murder is set aside and is substituted with a sentence of 20 years imprisonment, the fifteen months spent in custody is to be taken into account in computing the period of imprisonment.

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 : **S. Magagula**