



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal case No: 26/2013

In the matter between:

**MADEYI PARIS DLUDLU**

**VS**

**REX**

Neutral citation: *Madeyi Paris Dlundlu v. Rex (26/2013) [2014] SZSC48 (03 December 2014)*

**Coram:** **A.M. EBRAHIM JA**  
**M.C.B. MAPHALALA JA**  
**E.A. OTA JA**

**HEARD** : **04 NOVEMBER 2014**  
**DELIVERED** : **03 DECEMBER 2014**

**Summary**

*Criminal Appeal – Sentence – on the first count appellant convicted of murder with extenuating circumstances and sentenced to fifteen years imprisonment – on the second count of assault with intent to cause grievous bodily harm, appellant sentenced to two years imprisonment without an option of a fine – both sentences were ordered to run concurrently and further backdated to the date of arrest on the 11<sup>th</sup> November 2009 – appeal only against sentence – held that the imposition of sentence lies within the discretion of the trial court – held further that an appellate court will not interfere with the exercise of that discretion in the absence of a misdirection or irregularity resulting in*

*a failure of justice – held that the sentence imposed by the court a quo lies within the range of sentences for such offences in this jurisdiction – appeal accordingly dismissed and the sentences confirmed.*

---

**JUDGMENT**

---

**M.C.B. MAPHALALA JA**

[1] The appellant was convicted in the court *a quo* on the 1<sup>st</sup> June 2012 of the crime of murder with extenuating circumstances. He was also convicted of a second count of assault with intent to cause grievous bodily harm. On the 25<sup>th</sup> June 2012, the appellant was sentenced to fifteen years imprisonment in respect of the count of murder and two years imprisonment in respect of the second count of assault with intent to cause grievous bodily harm. The sentences were ordered to run concurrently and further backdated to the date of his arrest on the 11<sup>th</sup> November 2009.

[2] The appellant seeks a reduction of five years from his fifteen year sentence imposed by the trial court. He accepts his conviction for both offences and contends that the sentence of fifteen years is “harsh and severe to the extent that it induces a sense of shock and trauma”.

[3] The facts of the matter are generally not in dispute. The appellant was married to the deceased, and, they had four minor children. The appellant was working in South Africa as a truck driver, and, the deceased was residing at their matrimonial home at Mambatfweni area in the Manzini region together with the minor children.

[4] On the 8<sup>th</sup> November 2009, PW1 Nontobeko Ngwenya was at the appellant's homestead together with the deceased. They were sharing the same bed, and, the minor children were sleeping on a mat in the same bedroom. The appellant arrived home at about 0100 hours on the 9<sup>th</sup> November 2009 and knocked at the door. The deceased did not open the door immediately. The appellant then proceeded to knock on the window. The evidence of PW1 has not been disputed by the defence that the deceased could not open the door timeously as she was attending to a child who had defecated on the bed. This evidence is also corroborated by PW7 Constable Mfanzile Dlamini who observed human waste on the bed where the deceased and PW1 were sleeping.

[5] When the deceased eventually opened the door, the appellant assaulted her with fists repeatedly and further hit her head against the floor and the wall. The house was lit with a candle and PW1 was able to witness the incident.

The minor children woke up from their sleep when the appellant was assaulting the deceased.

[6] Subsequently, the appellant pulled the deceased out of the house and continued to assault her with fists. The deceased tried to run away but the appellant ran after her, and, she fell on the ground. Notwithstanding the fall, the appellant continued hitting her repeatedly with fists as she lay on the ground. It is not in dispute that the appellant was wearing “safety boots”, and, that he landed a heavy kick on the deceased’s head with the “safety boots”. This led to the fracturing of the deceased’s skull. The boots had iron in-built on the front of the shoes, and, they are usually worn by people who drive big and long trucks. The appellant was a truck driver of a twenty-two metre long truck; hence, he wore these safety boots. During the assault Gcina Dlodlu and Teenager Mbongiseni Dlodlu arrived at the scene and tried to restrain the appellant from assaulting the deceased.

[7] When the appellant entered the house, he did not say anything to the deceased but proceeded to assault her. The contention by the appellant that when the door was opened, Bheki Vilakati, who was having sexual relations with his wife, bolted out and ran away is not supported by the evidence. PW1 further denied this allegation as unfounded. It is also not in

dispute that there was no altercation between the appellant and the deceased about a man who had run away from the house upon his arrival.

[8] As the deceased lay on the ground motionless, the appellant did not appear to be bothered at all. It was PW1 with the assistance of the appellant's friend who took the deceased and placed her on the bed inside the house. It was apparent to the appellant that the deceased had died from the injuries sustained; however, he did not report the matter to the police. In the morning the appellant left his homestead and went to his place of work in South Africa. He surrendered himself to the police upon his return from South Africa on the 11<sup>th</sup> November, 2009.

[9] PW2 Bheki Vilakati was woken by the appellant's brother Teenager Dludlu at about 3 am on the 8<sup>th</sup> November 2009. He was told that the appellant was calling him to come at this homestead, and, no reasons were given why he was being called. He declined to go to the appellant, and, the appellant immediately arrived at PW2's homestead in the company of another man that he did not know. PW2 was taken by force to the appellant's homestead where he was assaulted by the two men and sustained serious injuries. The medical report of PW2 was admitted in evidence by consent and marked Exhibit B. The report shows that PW2 sustained multiple injuries and abrasions on the face, the left eye, lower neck as well as the left

side of the chest. Upon his arrival at the homestead of the appellant, PW2 saw the body of the deceased lying motionless on the ground, and, the appellant had told PW2 that he would assault him in the same manner as he had done to the deceased on the basis that he has sexual relations with the deceased. The appellant did not advance any evidence to substantiate this allegation.

[10] The Pathologist Dr. Komma Reddy examined the body of the deceased, and, his report on Post-Mortem examination was admitted in evidence and marked Exhibit A. According to the report, the cause of death was due to multiple injuries caused by a massive blunt force like stamping or kicking. Such a finding is consistent with the undisputed evidence of PW1 that the appellant hit the deceased consistently with fists and further hit her head against a wall and floor; and, that in addition he had kicked her on the head and fractured her skull. As a result she lay motionless on the ground. Amongst the ante-mortem injuries is that the right temple bone of the skull was fractured, and, there was extra – dural and intra – cerebral haemorrhage in the brain, the spleen was ruptured, and the pancreas congested; the liver, gallbladder and billiary passages were ruptured.

[11] From the evidence, it is apparent that the appellant was properly convicted in respect of both offences. The trial judge did not misdirect herself. The

evidence of PW1 that the deceased was assaulted by the appellant until he lay motionless on the ground has not been disputed by the defence. PW2 found the deceased lying motionless on the ground as did PW4 Sabelo Ngwenya. The appellant admitted to PW2 having assaulted the deceased and he further threatened to assault him in the same way as he had done to the deceased. The extent of the injuries was further corroborated by PW3 Dr. Komma Reddy.

[12] The Crown was able to prove the commission of both offences beyond reasonable doubt. The defence of provocation pleaded by the appellant is not supported by the defence. As stated in the preceding paragraphs, the delay in opening the door was in the circumstances justified as the deceased was still attending to the child. Furthermore, there is no evidence that PW2 was sexually involved with the deceased on the day in question or any other day. Similarly, there is no evidence that PW2 was sleeping in the appellant's house when he arrived or that he bolted out of the house upon the appellant's arrival at his homestead.

[13] When the appellant assaulted the deceased several times with fists, hitting her head against the wall and floor, and, further kicking her head with safety boots, he foresaw the possibility of his conduct resulting in the death of the deceased but he persisted with the assault reckless whether death

ensued or not. The learned trial judge was correct in his finding that the appellant had *mens rea* in the form of *dolus eventualis* as fully analysed by Justice Tebbut JA in *Thandi Tiki Sihlongonyane v. Rex* Criminal Appeal No. 40/ 1997.

[14] Tebbut JA in *Thandi Tiki Sihlongonyane v. Rex* (supra) at page 5 of the judgment stated the law as follows:

**“In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it. . . . The issue in *dolus eventualis* is whether the accused himself or herself foresaw the consequences of his or her act. . .”**

[15] His Lordship Justice Tebbutt JA at page 4 of his judgment summarised the essential requirements of *dolus eventualis* as follows:

**“They are:**

- 1. Subjective foresight of the possibility, however remote, of the accused’s unlawful conduct causing death to another;**
- 2. Persistence in such conduct, despite such foresight;**



3. **The conscious taking of the risk of resultant death, not caring whether it ensues or not;**
4. **The absence of actual intent to kill.”**

[16] The trial judge was correct in her finding that extenuating circumstances existed in respect of the count of murder. The absence of premeditation does constitute an extenuating circumstance. His Lordship Chief Justice *Ramodibedi CJ* in *Bhekithemba Mapholoba Mamba v. Rex* Criminal Appeal No. 17/2010 at para 13 held correctly that a finding of *dolus eventualis* may in a proper case constitute an extenuating circumstance.

[17] However, I respectfully disagree with the finding by the trial judge that the allegation by the appellant that PW2 bolted out of his house when he arrived or that he was sexually involved with his wife constitute an extenuating circumstance. There is no evidence that PW2 was sleeping in the appellant's house when the appellant arrived and that he subsequently escaped. The evidence of Nontobeko Ngwenya was not disputed that only the deceased, the four children as well as herself were sleeping in the house when the appellant arrived. Similarly, the evidence of PW2 was not disputed that he was asleep when he was woken up by Teenager Dlundlu at about 0300 hours and told him that the accused wanted him to come to his homestead.

[18] Her Ladyship at para 5 of the judgement dealt with the existence of extenuating circumstances as follows:

**“[5] In the present case, Mr. Du Pont has urged the court to take into consideration the fact that the accused would not have travelled from the Republic of South Africa to his homestead for the purpose of assaulting the deceased and that the absence of premeditation may constitute extenuating circumstances. It is also my considered opinion that the erroneous belief or delusion, about a man having bolted out of his house, under which the accused laboured would appear to provide extenuating circumstances. . . .”**

[19] With due respect to the learned trial judge, the appellant in his evidence in-chief did not say that he believed erroneously that a man had bolted out of his house or that he believed erroneously that PW2 was sexually involved with his wife. The appellant told the Court that he saw PW2 running out of his house because he was sexually involved with his wife; and, that this was the reason for the delay in opening the door by the deceased. It is the appellant’s evidence that he assaulted PW2 after he had seen him bolting out of his house.

[20] However, the trial judge was correct that *mens rea* in the form of *dolus eventualis* constitutes an extenuating circumstance and precludes the court from imposing a death penalty. This court is alive to the provisions of

section 15 (2) of the Constitution which makes the death penalty not mandatory where no extenuating circumstances have been found. The next inquiry is whether the sentence imposed by the trial court is severe to the extent that it induces a sense of shock as the appellant contends.

[21] In the appeal of *Elvis Mandlenkhosi Dlamini v Rex* Criminal Appeal No. 30/2011 at para 29, I dealt with the principles of law governing appeals on sentence. I had this to say:

**“[29] It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an appellate Court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as the yardstick for the determination of appeals brought before this Court. See the following cases where this principle has been applied:**

- *Musa Bhondi Nkambule v. Rex* Criminal Appeal No. 6/2009

- *Nkosinathi Bright Thomo v. Rex Criminal Appeal No.12/2012*
- *Mbuso Likhwa Dlamini v. Rex Criminal Appeal No. 18/2011*
- *Sifiso Zwane v. Rex Criminal Appeal No. 5/2005*
- *Benjamin Mhlanga v. Rex Criminal Appeal No. 12/2007*
- *Vusi Muzi Lukhele v. Rex Criminal Appeal No. 23/2004.* ”

[22] In the appeal of *Elvis Mandlenkhosi Dlamini v. Rex* (supra) at para 36-37, I had occasion to deal with the range of sentences in this jurisdiction relating to the offence of murder with extenuating circumstances:

“[36] This court has been consistent with sentences imposed on convictions of murder with extenuating circumstances; they range from fifteen to twenty years depending on the circumstances of each case. In the case of *Mapholoba Mamba v. Rex Criminal Appeal No. 17/2010*, the Supreme Court reduced a sentence of twenty-five years to eighteen years. In the case of *Ntokozo Adams v. Rex Criminal Appeal No. 16/2010*, the Supreme Court reduced a sentence from thirty years to twenty years imprisonment. In *Khotso Musa Dlamini v. Rex Criminal Appeal No. 28/2010*, the Supreme Court confirmed a sentence of eighteen years imposed by the court *a quo*. In *Mandla Tfwala v. Rex Criminal Appeal No. 36/2011*, a sentence of fifteen years was confirmed. In *Sihlongonyane v. Rex Criminal Appeal No. 15/ 2010*, a sentence of twenty years was reduced to fifteen years.

[37] In *Ndaba Khumalo v. Rex Criminal Appeal No. 22/2012*, a sentence of eighteen years was confirmed. In *Zwelithini*

***Tsabedze v Rex* Criminal Appeal No. 32/2012, a sentence of twenty-eight years was reduced to eighteen years. In *Sibusiso Goodie Sihlongonyane* Criminal Appeal No. 14/2010, a sentence of twenty-seven years was reduced to fifteen years. In *Thembinkosi Marapewu Simelane and Another* Criminal Appeal No. 15/2010, a sentence of twenty-five years was reduced to twenty years. In *Mbuso Likhwa Dlamini v. Rex* Criminal Appeal No. 18/2011, a sentence of fifteen years was confirmed. In *Sibusiso Shadrack Shongwe v. Rex* Criminal Appeal No. 27/2011, a sentence of twenty-two years was reduced to fifteen years.”**

- [23] The appellant has failed to advance any submissions and/or legal arguments showing that the trial court committed a material misdirection resulting in a miscarriage of justice. Furthermore, the appellant has failed to advance any legal argument showing that the sentence imposed by the trial court is grossly harsh or excessive or that it induces a sense of shock as to warrant interference by this Court in the interests of justice. Admittedly, a court of appeal will also interfere with a sentence imposed by the trial court where there is a striking disparity between the sentence which was in fact imposed by the trial court and the sentence which the appeal court would itself have passed; however, this principle of the law is not applicable in the present matter.

[24] The Appellant has implored the court to reduce his fifteen year sentence by five years on the basis that the offence was not premeditated. However, the trial court did not make a finding of *mens rea* in the form of *dolus directus* but *dolus eventualis*. The appellant admitted that his conduct when assaulting the deceased was reckless; however, he argued that he did not foresee that his conduct would result in the death of the deceased. This contention is not supported by the evidence. The assault was not provoked, and, the appellant assaulted the deceased with fists several times, hit her head against the wall as well as against the floor; when she tried to run away, he pursued her, and, she fell to the ground. Notwithstanding her fall, he kicked her hard with safety boots on the head fracturing her skull. Clearly, he foresaw the death of the deceased but continued with the assault reckless whether or not death ensued.

[25] When imposing sentence, the court *a quo* considered the triad, that is the personal circumstances of the appellant, the interest of society as well as the gravity and extent of the injuries sustained by the deceased. Furthermore, the trial court ordered that the two sentences in respect of murder and assault with intent to cause grievous bodily harm should run concurrently and backdated to the date of his arrest on the 11<sup>th</sup> November 2009.

[26] At paragraphs 6 and 7 of the judgment, her Ladyship had this to say:

**“[6] Madeyi Paris Dlodlu, in arriving at the appropriate sentence, I have taken into account all your mitigating circumstances which factors usually influence discretionary sentences. I have also considered all the mitigating factors advanced on behalf of the accused. I have, in particular, considered the fact that the accused is a first offender with five minor children, and, that he is the bread winner of the family, and, that the death of the deceased, who was the mother of his children, will haunt him forever.**

**[7] However, I must also not lose sight of two other applicable factors, namely, the gravity of the crimes of which you have been convicted and the interests of society. It is also proper for me to bear in mind the chief objectives of criminal punishment, namely, retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. It cannot be gainsaid that the callousness and cold-bloodedness of your wife’s murder is particularly striking. Having said so though, I should not, as *Maisels P.* accepted in *Letsholo v The State* [1984] BLR 274, CA, permit righteous anger to becloud my judgment. Moreover, as was said in *S v Harrison* 1970 (3) SA 684 (A) at 686 A, quoted in *S v Rabie* supra at 861H – 862 A: “Justice must be done, but mercy, not a sledgehammer, is its concomitant.”**

[27] In the circumstances, the trial judge did not misdirect herself in imposing the sentence of fifteen years. Accordingly, the appeal on sentence is dismissed.

---

M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree:

---

A.M. EBRAHIM  
JUSTICE OF APPEAL

I agree:

---

E.A. OTA  
JUSTICE OF APPEAL

FOR RESPONDENT: Senior Crown Counsel Macebo Nxumalo

FOR APPELLANT: Appellant in person

**DELIVERED IN OPEN COURT ON 3 DECEMBER 2014**