IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 03/2014

In the appeal between:

MCINISELI JOMO SIMELANE **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Mciniseli Jomo Simelane vs Rex (03/2014) [2013] SZSC05 (30 May 2014)*

CORAM: **M.M. RAMODIBEDI, CJ**
DR. S. TWUM, JA
M.C.B. MAPHALALA, JA

Heard 02 May 2014

Delivered 30 May 2014

Summary

Criminal Appeal – murder, attempted murder, rape, arson as well as assault with intent to cause grievous bodily harm – the appellant and second accused were convicted by the court *a quo* on the basis of the doctrine of common purpose in respect of murder, attempted murder as well as arson – the appellant was further convicted of rape as well as assault with intent to cause grievous bodily harm – the appellant was sentenced to death in respect of the murder,

twenty years imprisonment in respect of rape, ten years imprisonment in respect of attempted murder, five years imprisonment in respect of arson and two years imprisonment in respect of assault with intent to cause grievous bodily harm – second accused was sentenced to twenty years imprisonment in respect of murder allegedly in view of extenuating circumstances found, ten years imprisonment in respect of attempted murder and five years in respect of arson – sentences imposed on the appellant and second accused were ordered to run concurrently from the date of arrest – held that courts should not impose disparate sentences for substantially and similarly circumstanced accused persons but should strive for a measure of uniformity whenever this can be reasonably possible – held further that the Court *a quo* made two irreconcilable findings of *mens rea* in the form of *dolus directus* and *dolus eventualis* which resulted in the glaring disparity of the sentences imposed on the appellant and second accused in respect of the count of murder and which resulted in a misdirection – held that this court is in the circumstances justified to interfere with the findings on extenuating circumstances as well as sentencing in respect of the appellant – accordingly, the appeal succeeds and the death penalty commuted to twenty years imprisonment.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant was convicted in the court *a quo* of Murder, Attempted Murder, Rape, Arson as well as Assault with Intent to Cause Grievous Bodily Harm. He was sentenced to death with regard to the conviction of murder, ten years imprisonment for Attempted Murder, twenty years imprisonment for Rape, five years imprisonment for Arson as well as two years imprisonment for Assault with Intent to Cause Grievous Bodily Harm. The sentences were ordered to run concurrently from the date of the appellant's arrest. The appeal is against sentence on the death penalty, and, the appellant contends that the sentence is

harsh and severe on the basis that the death of the child was not premeditated. In his grounds of appeal, he argues that he intended to kill the child's father who was not on the premises that night. The appellant was convicted together with the second accused for Murder, Attempted Murder and Arson on the basis of common purpose.

[2] In a statement of Agreed Facts presented by consent before the court *a quo,* the second accused's husband Mndobandoba Masuku was killed on the 4th March 2009; he was hacked with sharp objects and his body was burned inside his own car. The second accused's child aged two years, Ntando Masuku, who was in the same motor vehicle was also hacked and suffered permanent injuries to his left hand which is still non-functional. Veli Mamba, the husband of Tanele Samkeliso Sacolo, the complainant in counts two and three, has been charged with the death of Mndobandoba Masuku, and, the matter is still pending trial before this court.

[3] Upon his release on bail, the second accused learnt that the said Veli Mamba was boasting that he would never be convicted of the death of Mndobandoba Masuku. The second accused was hurt by this revelation and sought to revenge her husband's death. Subsequently, she hired the appellant who was the first accused in the court *a quo,* to kill Veli Mamba and further burn his cars. The appellant and second accused bought petrol, and, the appellant proceeded to the homestead of Veli Mamba in furtherance of the common purpose; the second

accused directed the appellant to the homestead of Veli Mamba but she remained behind at a nearby homestead. The appellant later returned, handed to the second accused a bushknife which was to have been used in killing Veli Mamba and further reported that he had accomplished the assignment.

[4] It is apparent from the evidence adduced in the court *a quo* that on the 22nd July 2009, the appellant attacked the homestead of the said Veli Mamba at night armed with a bushknife. He found his wife Tanele Sacolo together with the children. The appellant instructed the complainant to put down the child which she was carrying, and, he ordered the complainant in the fifth count, Gcina Mamba, to have sexual intercourse with Tanele Sacolo, and he refused because she was his mother; the appellant then assaulted him with the blade of the bushknife. The appellant proceeded to rape Tanele Sacolo in full view of the children. Thereafter, he hacked her with the bushknife inflicting severe injuries upon her; however, she was able to flee from the appellant leaving behind the seven months old baby, Cololwakhe Mamba, crying on the floor.

[5] The appellant subsequently sprinkled petrol on the bed and set the house on fire. Gcina Mamba, a boy aged fifteen years old and Nqobile Zwane, a girl aged nine years old managed to escape leaving the baby behind. The baby was burnt to death by the fire. The post-mortem report states that the cause of death was "due to burns". The report further describes the external appearance as follows:

> "**Body is completely burnt beyond recognition, with missing portions of limbs, skull bone exposing brain matter, cooked ribs, soft tissues of scalp, face, neck, trunk, limbs due to burns. Trunk organs are exposed and all organs cooked. Stomach empty, no identifiable odour present, ¾ genetalia burnt, third degree burns all over body present with soot particles in trachea, bronchi favouring ante mortem sunis. Facilities are lacking for x-raying the body and follow universal procedures."**

[6] Tanele Sacolo was able to identify the appellant at an Identification Parade held at Nhlangano Correctional Institution as the assailant. The appellant was standing with other men of more or less similar body built and complexion; all the men were wearing the same soccer kit.

[7] The appellant pleaded guilty to arson; however, he pleaded not guilty to the other offences. He denied any intention to kill the deceased and contended that he wanted to avenge the death of Mndobandoba Masuku who was allegedly killed by Veli Mamba. Having gone through the record, I am satisfied that the appellant and the second accused were properly convicted of murder by the court *a quo*. Furthermore, the appellant does not challenge his conviction but only the death penalty.

[8] The court *a quo* imposed the death penalty against the appellant upon its finding that there were no extenuating circumstances as required by section 295 of the Criminal Procedure and Evidence Act No. 67/1938 which provides as follows:

"295. (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 the 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."

[9] This court has on numerous cases quoted with approval the South African leading case of *S. v. Letsolo* 1970 (3) SA 476 (A) at 476 G-H where *Holmes JA* defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. The trial court has to consider three factors: firstly, whether there are any facts which might be relevant to extenuation such as drug abuse, immaturity, intoxication or provocation; the list is not exhaustive. Secondly, whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such facts were sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did; and, in deciding this factor, the trial court exercises a moral judgment.

See the cases of *Bhekumusa Mapholoba Mamba v. Rex* Criminal Appeal No. 17/2010 and *William Mceli Shongwe v. Rex* Criminal Appeal No. 24/2011.

[10] It is trite law that an appeal court will generally not interfere with the finding of the trial court as to the existence or otherwise of extenuating circumstances in the absence of any misdirection or irregularity unless that finding is one which no reasonable court could have reached.

See the case of *S. v. Mcbride* 40/88(1988) ZA SCA 40 (30 March 1988) and *William Mceli Shongwe v. Rex* (supra) at para 53.

[11] The court *a quo* made two irreconcilable findings of *mens rea* in the form of *dolus directus* on the one hand and *dolus eventualis* on the other hand. This constitutes a misdirection; and, this court is legally obliged to interfere with the findings by the court *a quo* that there were no extenuating circumstances in the conviction of the appellant.

[12] At page 51 of the Record, at para 59, the Trial Judge had this to say:

> **"59. .... From the facts of the matter referred to above, I have no hesitation to find that the intention exhibited by the first accused was *dolus directus*. Otherwise there would be no sound explanation on why he took the petrol to the house of his victims, why he sprinkled petrol on the bed, why he did not pick up the baby from the floor after he had hacked its mother and chased her away. It shall be remembered that I have**

rejected his version that the fire was caused by an accident. It shall further be recalled that he had already pronounced to PW1 that he was going to kill the baby after killing her. This then establishes a case of *dolus directus* – direct intention to kill the child and not the accident he refers to."

[13] However, at page 51 of the Record at para [60], His Lordship made a contradictory finding when he said:

"[60] In any event it is obvious that the accused cannot escape being guilty of murder even on *dolus eventualis* – legal intention – when considering that he had set out to kill a human being. It therefore should not matter much if he killed a different person from the one he had set out to kill in the first place, as long as the death of the deceased was foreseeable as a possibility."

So far so good. Had the Learned Judge *a quo* stopped there, no fault could have been ascribed to him. But he continued and took a completely different direction when he said the following:

"**I have no hesitation when he entered the complainant's house with petrol and went on to sprinkle it on the bed, he foresaw the possibility of any of the occupants dying but he was reckless whether or not it did arise."**

[14] His Lordship in the court *a quo* when convicting the second accused of murder at para 75 -78 of the record stated that she had admitted hiring the appellant to kill Veli Mamba in the Statement of Agreed Facts. His Lordship further

contended that the second accused together with the appellant purchased petrol which was intended to be used in the burning of the house and its occupants to death. He concluded that the second accused acted jointly with the appellant in the furtherance of a common purpose in planning to kill a human being, and, that it did not matter whether a different person other than the one intended to be killed was killed if the death of such a person was a reasonable possibility. According to the learned judge, the second accused foresaw the possibility of the death of any of the occupants of the house but was reckless whether or not it occurred.

[15] Turning to extenuating circumstances, the court *a quo* held that the appellant was a hired assassin who stood to gain financially from the proposed killing of Veli Mamba. The court rejected the contention by the defence that he was actuated by pity for the second accused to kill Veli Mamba due to their close biological relationship. The court mentioned that the appellant had failed to prove the biological relationship between himself and the second accused.

[16] At page 63 of the record at para 11 and 12, the trial court found that the death of the child was premeditated on the basis that the appellant had ordered Tanele Sacolo to place the child on the floor before sprinkling petrol on the bed and setting the house on fire, and, that he did not bother to take the child outside the burning house. To that extent the trial court contended that the appellant had *mens rea* in the form of *dolus directus* and not *dolus eventualis*. It is against

this background that the trial court reasoned that there were no extenuating circumstances to the murder conviction of the appellant.

[17] On the other hand the trial court found that extenuating circumstances existed in respect of the second accused. At page 64 of the record, para 13 and 14, His Lordship had this to say:

> **"13. On the part of the second accused, however, it seems that her position was somewhat different. Firstly, she had not sent the first accused to kill anyone else than Veli Mamba. It is just that she however, foresaw the death of someone else as a possibility if not a probability and was reckless whether or not it happened. A very important factor as concerns the existence or otherwise of extenuating circumstances on her part being her intention which was in the form of *dolus eventualis*. Furthermore, as concerns Veli Mamba, who was never killed, but his consideration as a factor is important when considering that it is not in dispute that she believed perhaps even wrongly, that he was responsible for the death of her husband who was himself killed in a gruesome manner.**
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> **14. I am therefore convinced that as concerns the second accused person, there is a cumulation of factors which establish the existence of extenuating circumstances. ..."**

[18] His Lordship having established extenuating circumstances in respect of the second accused, he sentenced her to twenty years imprisonment. However, he sentenced the appellant to a death penalty. His Lordship did not exercise his discretion in terms of section 15 (2) of the Constitution 001/2005 in favour of

the appellant "because of the elaborate extent to which he went about planning the murder concerned taken together with the brutality, callousness and the gruesome manner with which the murder of the innocent child was committed and that it [was] all in the name of financial gain".

[19] The court *a quo* established from the evidence that the appellant and the second accused when killing the deceased, acted jointly and in the furtherance of a common purpose. To that extent, the court should have made one finding of *mens rea* either in the form of *dolus directus* or *dolus eventualis* in respect of both the appellant and the second accused. Such an approach would have assisted the court in arriving at a uniform decision on the existence or otherwise of extenuating circumstances between the appellant and the second accused. In the circumstances the appellant should be given the benefit of the doubt on the basis of the irreconcilable findings of *mens rea* by the court *a quo*.

[20] *Centlivres JA* in *Rex v. Khoza* 1949 (4) SA 555 (A) at pp 557 -558 correctly sets out the position of the law in respect of the criminal liability of accused persons arising from the doctrine of common purpose:

> **"It is trite law that a person who gives a mandate to someone else to murder a third party is guilty of murder if the third party is killed as a result of the instruction he gave.... It is also clear that where a person commits an act intending to murder one person and kills another, he is guilty of murdering that other person.... there is, however, a dearth of authority on the criminal liability of a person who gives another person a**

mandate to kill a third person where, as a result of carrying out the instructions given, a person other than the third person is killed. On principle it seems to me that if the mandate is performed in every particular, the mandator would be guilty of murder even although the person killed was not the person he intended should be killed."

[21] *Ramodibedi CJ* in the case of *Bhekumusa Mapholoba Mamba v. Rex* Criminal Appeal No. 17/2010 at para 13 and 15 held that a finding of *dolus eventualis* as opposed to *dolus directus* may in a proper case constitute an extenuating circumstance. He further held that it is well-settled that the absence of premeditation, depending on the circumstances of each case, may constitute an extenuating circumstance. Accordingly, I find that the appellant, as did the second accused, is guilty of murder with extenuating circumstances on the basis of *mens rea* in the form of *dolus eventualis*.

[22] Section 296 of the Criminal Procedure and Evidence Act provides that the death penalty shall be imposed upon an offender convicted of murder without extenuating circumstances. Notwithstanding this statutory provision, section 15 (2) of the Constitution provides that the death penalty shall not be mandatory; in essence the Constitution gives the court a discretion whether or not to impose a death penalty in cases where extenuating circumstances do not exist. The failure by the trial court to impose similar penalties to the appellant and second accused further suffices to give the appellant the benefit of doubt against the imposition of the death penalty.

[23] Admittedly, it is a trite principle of our law that the imposition of sentence is primarily a matter which lies within the discretion of the trial court. An appellate Court will generally not interfere with the exercise of that judicial discretion by the trial court in the absence of a misdirection or irregularity resulting in a failure of justice. See *Makwakwa v. Rex* Criminal Appeal No. 2/2006, *Kenneth Nzima v. Rex* Criminal Appeal No. 21/2007, and *Sam Du Pont v. Rex* Criminal Appeal No. 4/2008.

[24] What is of great concern in this appeal is the disparity of the sentences imposed on the appellant and second accused by the trial court notwithstanding that they are substantially and similarly circumstanced. Courts should strive to achieve a measure of uniformity in sentences whenever this can reasonably be done. *Ramodibedi CJ* in the case of *Vusumuzi Lucky Sigudla v. Rex* Criminal Appeal No. 01/2011 at para 23 quoted with approval an appeal case decided by the Court of Appeal of Botswana in *Sekoto v. The State* 2007 (1) BLR 393 (CA) at 395 – 396 in which His Lordship had this to say:

> **"23. .... "It is a matter of regret that we have to comment on the apparent lack of uniformity of sentences in this jurisdiction. The practice of imposing disparate sentences for substantially and similarly circumstanced accused persons is cause for concern. If allowed to continue, it could soon bring the whole criminal justice system in this country into disrepute.... Indeed this is a salutary principle which is followed in many jurisdictions. I should not, however, be understood to convey that it is permissible to ignore peculiar circumstances of each individual case. It will indeed readily be recognized after all that no two**

cases can ever be exactly the same. Substantial similarity is all that one can hope to look for."

[25] *Justice Stanley Moore JA* in the case of *Mbabane Tsabedze and Another v. Rex* Criminal Appeal No. 29/2011 at para 13 quoted with approval his earlier judgment in the case of *Keith Ndou v. The State* (2008) SWCA 60, a judgment of the Botswana Court of Appeal:

"32. There is no doubt that sentencers should strive in so far as is possible to achieve a measure of uniformity in sentencing. This principle was expressed by Lord *Coulsfield JA* in *Dimpho Rapula Ntesang v The State* Criminal Appeal No. CLCLB-036-06 at page 6 of the computer generated version in this way:

'…it has always been recognized that it is salutary for the courts to aim at a measure of uniformity in sentencing, *whenever this can reasonably be done."*

[26] Justice Moore JA went further and quoted with approval page 673 of the South African Law and Procedure Vol. 16th edition under the rubric "Uniformity of Penalty", which provides the following:

"...where there are two or more accused concerned in equal degrees in an offence, discrimination between them in the matter of quantum and quality of penalty should in general be avoided. But, as very clearly enunciated in the judgment of the English Court of Criminal Appeal in R. v. Ball (C.C.A. 19.11.1951), the circumstances of the respective cases may justify and require discrimination: a penalty suited to the one case may be quite unsuited to the other or others."

[27] The disparity between the death sentence imposed on the appellant and the sentence of twenty years imposed on the second accused in circumstances where they were equally culpable for the murder of which they were jointly convicted does constitute a misdirection or irregularity resulting in a failure of justice. The disparity is so glaring when considering the facts of the case and in particular that they had acted jointly and in the furtherance of a common purpose. The court is justified to interfere with the death penalty to the benefit of the appellant.

[28] In the case of *Elvis Mandlenkhosi Dlamini v. Rex* Criminal Appeal No. 30/2011 at para 29, I had occasion to say the following:

> **"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:**
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> - ***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. "**

[29] In the case of *Mandlenkhosi Dlamini v. Rex* (supra) at para 36, I had this to say:

> **"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.**
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> **37. In *Ndaba Khumalo v. Rex* Criminal Appeal No. 22/2012, a sentence of eighteen years imprisonment 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."**

[30] In the result the appeal is upheld and the following Orders are made:

(1) The death sentence imposed upon the appellant is set aside and is substituted with the following sentence:

"twenty (20) years imprisonment."

(2) This sentence will run concurrently with the other sentences imposed by the trial court in respect of Attempted Murder, Rape, Arson and Assault with Intent to Cause Grievous Bodily Harm. The sentences will take effect from the date of the appellant's arrest on the 28th July 2009.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR. S. TWUM
JUSTICE OF APPEAL

For Appellant Attorney S.C. Simelane

For Respondent Attorney Mr. S.N. Dlamini

DELIVERED IN OPEN COURT ON 30 MAY 2014