IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 45/11

In the matter between:

SANDILE MBONGENI MTSETFWA **Appellant**

And

REX **Respondent**

Neutral citation: *Sandile Mbongeni Mtsetfwa vs Rex (45/11) [2015] [SZSC 18] (29 July 2015)*

Coram: **S.B MAPHALALA AJA, M.D. MAMBA AJA and S. NKOSI AJA**

Heard: 14 July 2015

Delivered: 29 July 2015

Summary: **Criminal Procedure – appeal against sentence - Appellant sentenced 12 years imprisonment for of Culpable Homicide – Appellant contends that sentence too severe and harsh. This court finds that the court *a quo* balanced the triad being the interest of the accused, the crime and the society - dismisses the appeal on sentence.**

JUDGMENT

MAPHALALA AJA

[1] The Appellant was at High Court **(Per Masuku J.)** charged with murder where the Crown contends therein that Appellant had killed unlawfully and intentionally one Cebsile Dlamini who was his lover and with whom he intermittently lived with.

[2] The Appellant pleaded not guilty to the charge of Murder but guilty to the offence of Culpable Homicide; however, the Crown rejected the said plea.

[3] The Crown then paraded a number of witnesses and a Statement of Agree Facts was entered by consent of the parties that the evidence of PW1 and PW2 was not in dispute and therefore these witnesses were not necessary during the trial of the matter.

[4] It was also common cause between the parties that there was no dispute that Cebsile Dlamini died as a result of injuries inflicted by the accused. The Postmortem Report was handed by Counsel of the parties in which indicated that the deceased bleed heavily as a result of penetrating injuries to the lungs.

It was also not in dispute that the Appellant made a confession before Magistrate Xoliswa Hlatshwayo at the Mbabane Magistrate Court.

[5] The Appellant gave evidence under oath.

[6] The Appellant was then found guilty on the crime of Culpable Homicide.

[7] The Appellant after being convicted then wrote a letter of appeal to the Registrar on the 20 October, 2011 stating the following at paragraph 2 of that letter:

> **I was brought before the High Court of Swaziland where I was prosecuted and convicted by Justice Thomas Masuku to twelve (12) years imprisonment. My Lord I would like to state that I pleaded guilty to the charges and I feel that the sentence he imposed was too harsh and it induce a sense of shock and more reason will be sent in due course hence I appeal against the sentence.**

[8] The appeal appeared before this court on the 14 July, 2015 where the Appellant filed brief Heads of Arguments and the Crown represented by Crown Counsel Mr. H. Magongo also filed Heads of Arguments in opposition.

[9] The point of the appeal is only the sentence that the Appellant feels twelve (12) years imprisonment imposed by the court *a quo* was too harsh and that it induces a sense of shock.

[10] It is trite law in this jurisdiction that the imposition of sentences lies within the discretion of the trial court. It is the duty of the trial court to impose a balance sentence taking into account the three competing and to some extent divergent interest of the offender, the interests of the offender, the offence and the society. See **Sibusiso Gcina Mchunu vs Rex Criminal Appeal No. 14/2014; Vusi Madzalule Masilela vs Rex Criminal Appeal No. 04/2008.**

[11] Section 5 (3) of the Court of Appeal Act no. 74 of 1954 provide as follows:-

> **S 5(3) "On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal".**

[12] I am in agreement with the Crown's argument that this section doe not give the Supreme Court unfettered powers to erode the discretion of the trial court to impose what it finds is the appropriate sentence . **(See Thwala v R 1970-76 SLR 363 at 364 A)**

[13] This court , as an appellate court, can only interfere with the sentence passed by the trial court only if it finds that in the exercise of its discretion there is a misdirection or irregularity or as it is sometimes stated when the court finds that there is a striking disparity between the sentence which was in fact passes by the trial court and the sentence which was in fact passed by the trail court and the sentence which the court of appeal would have passed. See **Siboniso Sandile Mabuza vs The King Criminal Appeal No. 1/2007.**

[14] In the totality of the facts of this case and the submissions by the Appellant and the Crown after I have read the record of proceedings in the court below I am not able to find any misdirection or irregularity. The Learned Judge **Thomas Masuku J.** in a comprehensive judgment on sentence at pages 63 to 67 cited decided cases. In paragraph [85] thereof had this to say.

> **[85] In the light of the issues mentioned earlier, including the provocation, youthfulness; the pressure brought to bear upon you before the commission of the offence and the fact that you are a first offender, rehabilitation should be given due weight as well. In the circumstances, I am of the view that a sentence that fits you, the seriousness of the crime and the interests of the society is the following:-**
>
> **You are hereby sentenced to twelve (12) years imprisonment, which sentence be and is hereby back-dated to 7 July, 2009, being the date of your incarceration.**

[15] In the result, for the aforegoing reason I decline to interfere with the sentence imposed by the court *a quo* that it is harsh and excessive.

[16] The Appeal is accordingly dismissed.

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S.B MAPHALALA AJA

I AGREE

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M.D. MAMBA AJA

I AGREE

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S. NKOSI AJA

FOR THE APPELLANT	:	In Person
FOR THE RESPONDENT	:	Mr. H. Magongo (DPP's Chambers)