



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGEMENT**

Criminal Appeal Case No. 35/2014

In the matter between:

**SABELO NTSOLO NDLANGAMANDLA**

**APPELLANT**

**And**

**Rex**

**RESPONDENT**

**Neutral Citation:**

*Sabelo Ntsolo Ndlangamandla v Rex (35/2014)*  
*[2015]*

*SZSC 02 (29 July 2015)*

**Coram:**

DR. B.J. ODOKI JA; Q.M. MABUZA AJA;

S. NKOSI AJA

**Heard:**

01 JULY 2015

**Delivered:**

29 JULY 2015

## **Summary**

*Appeal against sentence – Appellant convicted of culpable homicide – Appellant sentenced to sixteen years imprisonment of which four years were suspended – Appeal against sentence on the ground that it is harsh and severe and should be reduced. No misdirection on sentence by trial court – Appeal dismissed.*

## **JUDGMENT**

**DR. B.J. ODOKI, JA**

- [1] The appellant was charged with murder but was convicted of culpable homicide and sentenced to sixteen years imprisonment without option of a fine. Four of the years were suspended for a period of three years on condition that the appellant is not convicted of any offence which has an element of violence which is directed against the person of another, which is committed during the period of suspension.
- [2] The facts of the case were that the appellant pick pocketed the deceased cell phone inside a bar. A security officer who was called as Pw2 intervened after realizing a commotion between the deceased and the appellant. The security officer found the appellant's hand inside the deceased's pocket and the deceased asked why the appellant had taken his cell phone. The deceased then hit the appellant with a fist, leading to the appellant removing his hand from inside the deceased's pocket.
- [3] The appellant ran outside after he had prevented Pw2 from blocking his way by waving a knife. The deceased went outside calling upon the appellant to bring back his cell phone.

The appellant who was at the gate then appeared from the shadows and stabbed the deceased.

[4] The trial court accepted the prosecution evidence and rejected the appellant's plea of self defense and convicted him of culpable homicide.

[5] In his notice of appeal dated 11 October 2012, the appellant states that he appeals for leniency against the harshness and severity of his sentence of twelve (12) years imprisonment without the option of a fine. He states that he was a first offender and it was not his intention to commit the offence. He requests court for the reduction of his sentence.

[6] Another document was submitted by the appellant at the hearing of the appeal headed: **Questions of Law Tendered in dispute as to whether the appellant had a free and fair trial and competent verdict in this case or not.** It was received in the Registry of this court on 29 June 2015. It appears that the appellant wanted to use it as his Heads of Argument.

[7] A perusal of the document shows that the appellant was challenging his conviction as well as sentence, whereas in this court he confirmed that he was appealing against the sentence only. Regarding sentence, the appellant stated that the sentence imposed by the trial judge induced a sense of shock based on the fact that the trial judge acknowledged that the appellant did not aim for more commonly known vital areas of the body such as the heart, lungs or head. He also argues that the trial judge did not take into account the personal circumstances of the appellant.

- [8] Counsel for the Crown, Ms. Elsie Matsebula, opposed the appeal and supported the sentence imposed by the trial court. She acknowledged that the sentence imposed by the trial court was beyond the benchmark sentence in culpable homicide cases which is ten years. She relied on the case of *Musa Kenneth Nzima vs. Rex Criminal Appeal No. 21/07(unreported)* to support her pinion.
- [9] However, counsel submitted that the normal range of sentences is not cast in stone but may be departed from in deserving cases. She relied on the case of *Samkeliso Madala Tsela v Rex Criminal Appeal No. 20/2010(unreported)*. She submitted that in the present case the trial court articulated the reason for imposing the sentence.
- [10] Counsel further argued that in the case of *Mandla Vilakati v Rex Criminal Appeal No. 18/07*, this court interfered with the sentence imposed by the trial court which was above the range of sentences in culpable cases. She concluded that in that case the trial court had misdirected itself on the two issues of intoxication and remorse, and therefore the case was distinguishable from the present case.
- [11] In the instant case, counsel submitted the appellant has not shown any remorse and attempted to evade justice by denying that he was the accused before the court and running away after committing the offence.
- [12] Counsel also pointed out that the appellant had previous convictions which he denied and continued claiming that he was a first offender until the previous convictions were proved. She submitted that the appellant had previous convictions involving violence including robbery and theft.

- [13] It was counsel's submission that this is a peculiar case which deserved the sentence imposed; as the trial court took account all the circumstances of the case before imposing the sentence.
- [14] It is well settled that sentencing is a matter which is predominantly within the discretion of the trial court and an appellate court will not interfere with the sentence unless there is a material misdirection resulting into a miscarriage of justice. See *Sam DuPont v Rex, Criminal Appeal No. 4/08, Jonah Tembe v. Rex, Criminal Appeal No. 18/2008, Mbekizwe Motsa v. Rex, Criminal Appeal No. 37/2010 and Mfundiswa Tembe v. Rex, Criminal Appeal No. 4/13[2013]SZSC 32 and Zwelithini Njovane Khumalo v. Rex Criminal Appeal No. 5/14 [2014] SZSC 14.*
- [15] It is equally trite law that when imposing sentence, the trial court must consider the triad, namely the circumstances of the offence, and the offender, and the interest of the society.
- [16] It is also necessary for the trial court to take into account the range of sentences that have been approved by this court. A table of such ranges was provided in the case of *Samkeliso Madati Tsela v. Rex, Criminal Appeal No. 20/10 [2011] SZCS 13.*
- [17] The Supreme Court in the *Tsela case supra* observed that the cold figures in the table do not provide any insight into the many considerations which this court took into account in upholding or varying awards of the court below and called for a more refined and well facilitated research into the matter.
- [18] However, the court in the *Tsela case (supra)* acknowledged that the table would serve as a useful purpose since it did indicate the range within which the sentences emanating

from this court fell within the period under review and which provide a useful guide for sentences in the courts below.

[19] As counsel for the Crown submitted, in the *Tsela case(supra)* this court acknowledged the residual discretion that remains within the competence of the sentencing court to enable and adjust the appropriate sentence either below or above the range where the peculiar circumstances of the case justify doing so. The court observed,

*“It should, however, be borne in mind that a residual discretion remains within the competence of every sentencing officer which enables him to adjust an appropriate penalty either below or above the extremities of the range, provided always that such a course is justified by the peculiar circumstances of each case, and provided also that the sentence provides clear and cogent reasons upon the face of the record for the sentence which he or she imposes”*

[20] In sentencing the appellant, the trial judge addressed himself to the need to take into account all the relevant factors citing the following observation of

*Holmes JA in S.V. Rabie 1975 (4)SA 855 (A) at 262:“Punishment should be for the criminal as well as the crime, be fair to the society, and be blended with a measure of mercy, according to the circumstances”*

[21] The trial judge emphasized the sanctity of life and duty of all to preserve it not to destroy it. He stated that this was a borderline case of murder which the appellant escaped by the thickness of the skin of his teeth because of the failure to discharge the onerous burden of proof beyond reasonable doubt. He also noted that the appellant stabbed his victim in the shoulder and he bled to death, but he did not stab the deceased in the vital area like the heart, lungs or the head.

- [22] However, the trial judge took into account the fact that the appellant was both the initial and final aggressor, and that the appellant looked for trouble with the deceased and enticed him to follow him out of a bar, waylaying him outside.
- [23] Having considered the circumstances of the offence, the trial judge considered the circumstances of the appellant. He took into account the fact that the appellant was disadvantaged by economic hardship. He never held a job and remained virtually unemployed. He completed form four schooling in 2008, two years before committing this offense. He remained single with no dependants.
- [24] On the other hand the trial judge observed that the appellant was not a man with clean hands. He had accumulated three convictions for robbery, two for theft, one of assault and two for contempt of court.
- [25] The trial judge also took into account numerous precedents in this jurisdiction where culpable homicide convictions had attracted a wide scale of terms of imprisonment relevant to the manner in which death was caused.
- [26] The appellant argued that the sentence upon him was harsh and induced a sense of shock. On the other hand Counsel for the Crown maintained that although the sentence was beyond the normal range of sentences in cases of culpable homicide, the sentence in this case was justified given the peculiar circumstances of this case.
- [27] One of those peculiar circumstances in this case was the number of previous convictions which were recorded against the appellant. This was an aggravating factor. The appellant did not realize the seriousness of these previous convictions and continued claiming that he was a first offender. He also showed no remorse.

[28] The trial court suspended the period of imprisonment for four years so that the effective term of imprisonment was twelve years. The period of suspension should help the appellant to keep straight and avoid being sent back to prison after serving his current term of imprisonment.

[29] The trial judge directed himself correctly on the law and principles relating to sentencing. He took into account all the relevant factors. There was no serious misdirection in law amounting to a miscarriage of justice.

[30] Consequently I find that the sentence imposed upon the appellant was justified and it is confirmed.

[31] In the result, this appeal is dismissed.

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**DR. B.J. ODOKI**  
JUSTICE OF APPEAL

I Agree

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**Q.M. MABUZA**  
ACTING JUSTICE OF APPEAL

I Agree

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**S. NKOSI**  
ACTING JUSTICE OF APPEAL

**For the Appellant:** In person

**For the Respondent:** Ms. Elsie Matsebula