IN THE SUPREME COURT OF SWAZILAND

Criminal Appeal Case No. 28/2012

In the matter between:

NHLASE ANTHONY NXUMALO **Appellant**

vs

REX **Respondent**

Neutral citation: *Nhlase Anthony Nxumalo v Rex (28/2012) [2015] SZSC 16 (9 December 2015)*

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

Heard: 24 November 2015

Delivered: 09 December 2015

[1] Criminal Law and Procedure – Appellant convicted of murder with extenuating circumstance and sentenced to 20 years imprisonment. Appeal on sentence only – issue of sentence matter for the discretion of the trial court.

[2] Procedure and Practice – Criminal law – Appeal on sentence – sentence predominantly a matter for the discretion of trial court. Appeal court can only interfere therewith where such discretion not exercised properly or at all or where there is a material misdirection by the sentencing court resulting in a failure of justice or where the sentence is so markedly different from that which appeal court would have imposed.

JUDGMENT

MAMBA AJA

[1] The appellant was convicted in the High Court of the crime of murder. In convicting the appellant, the court a quo held that there were extenuating circumstances in connection with the commission of the offence. He was thus sentenced to a period of 20 years of imprisonment. He has now appealed against the sentence. His sole ground of appeal is that the sentence is too harsh and induces a sense of shock.

[2] The facts upon which the appellant was convicted were, I think, common cause and they are as follows:

2.1 On or about 12 January, 2010 and at or near Ondiyaneni area in the District of Shiselweni, the appellant assaulted two young children who were relatives of the deceased. The appellant was himself a nephew of the deceased. This incident prompted the deceased to go out looking for the appellant.

2.2 On 13 January 2010, the deceased found the appellant at a sports-field in the company of other boys and he called him to come to him which he did. The deceased was armed with a stick and had

his dogs with him. After telling the appellant that he had been looking for him for a while, the deceased hit the appellant with the stick on his forehead, felling him to the ground. The dogs belonging to the deceased bit the appellant as he lay on the ground.

2.3 The appellant managed to pick himself up. Once he got onto his feet he produced a knife from his pocket and stabbed the deceased two times and also stabbed his dogs. This caused the deceased to leave the sports field but promising to return later. He was bleeding from the two stab wounds.

2.4 After walking for a short distance, the deceased became weak from the stab wounds, and he fell down. The appellant chased away the dogs belonging to the deceased and he thereafter hit the hapless deceased with a stick several times until the stick broke. Thereafter, the appellant retrieved his knife from where he had hidden it under a marula tree and indiscrimately stabbed the deceased about 7 times as he lay on the ground.

2.5 The appellant then left the deceased there and proceeded on his way home. But before reaching his home, he licked the deceased’s blood off his knife, broke the knife into two parts and threw it into a cattle dipping tank there.

2.6 The deceased died on the spot as a result of or due to these multiple injuries inflicted on him by the appellant.

[3] In sentencing the appellant, the trial court stated as follows:

> '[42] I have considered the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. I agree with the Crown that the personal circumstances of the accused in the present case do not outweigh the seriousness of the offence as well as the interests of society. The killing of the deceased was gruesome, vicious and totally reckless. This Court owes a duty to society to prevent a recurrence of such a similar offence by imposing appropriate deterrent sentences.'

[4] This Court has stated on many or countless occasions that the imposition of sentence is predominantly a matter which lies within the discretion of the trial court. As an Appeal Court, this court may only interfere with the exercise of such discretion on very limited or narrow grounds; such as; where the trial court has misdirected itself in such a material way that a miscarriage of justice has been caused; or, where the sentence imposed by the trial court is manifestly excessive so as to justify interference so markedly different from that which this court would have imposed, ie, that this court would not have imposed it. Vide *Mancoba Lebongang*

Mokoena v Rex (10/13) [2013] [SZSC 55] (29 November 2013) and the cases therein cited.

[5] In *Vusi Madzalule Masilela v R, Crim 14/2008*, judgment delivered on 19 November 2008, this court stated as follows:

‘[5] It is now well-established in this jurisdiction, as indeed it is so in the Commnonwealth jurisdictions, that sentence is a matter which pre-eminently lies within the discretion of the trial court. It is the primary duty of the trial court to impose a balanced sentence, taking into account the triad consisting of the offence, the offender and the interests of society. See for example **S v Rabie 1975 (4) SA 855 (A),** quoted with approval by this Court in **Musa Kenneth Nzima v Rex, Criminal Appeal No. 21/07.**

[6] As a matter of fundamental principle, an appellate court will ordinarily not lightly interfere with the exercise of a judicial discretion by the trial court in the absence of a misdirection resulting in a miscarriage of justice. See for example such cases as **Sam Dupont v Rex, Crim Appeal No. 4/08; Fani Msibi v Rex, Criminal Appeal No. 7/08.**’

[6] In the present appeal, the assessment or analysis of the issues by the court *a quo* in the excerpt I have referred to in paragraph 3 hereinabove, cannot

be faulted. The actions by the appellant in assaulting the deceased as he haplessly lay on the ground were vicious, barbaric, sadistic, brutal, unjustified and totally unmitigated and unacceptable. At the end of the vicious assault, the appellant proceeded to lick the blood of the deceased off his knife. Again, such barbaric and cannibalistic behaviour by him was totally unwarranted.

[7] From the above facts, I am unable to find any misdirection by the trial judge in the imposition of the sentence herein. The sentence of 20 years of imprisonment does not, in the circumstances of this case induce a sense of shock in me. I would therefore dismiss this appeal.

[8] In the result, the appeal is dismissed.

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M.D. MAMBA AJA

I agree.

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S.B. MAPHALALA AJA

I also agree.

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M.J. MANZINI AJA

For the Appellant: Mr. Manana

For the respondent: Ms. E. Matsebula