IN THE SUPREME COURT OF SWAZILAND

Criminal Appeal Case No. 6/2014

In the matter between:

THEMBEKILE DLAMINI **Appellant**

And

REX **Respondent**

Neutral Citation: *Thembekile Dlamini vs Rex (6/2015)* [2015] SZSC 30 (09 December 2015)

Coram: Dr. B. J. Odoki JA
J. P. Annandale AJA
N. J. Hlophe AJA

Heard: 20 November 2015

Delivered : 09 December 2015

Summary

Criminal Appeal – Appeal against sentence only – Position of the law with regards an appeal against sentence – Sentence a matter for the discretion of the trial court – Appellate court interferes with sentence only where there is a misdirection or irregularity resulting in a failure of justice or where the sentence is so harsh or severe that it induces a sense of shock – When sentence induces a sense of shock – This is where there is a striking disparity between the sentence imposed and that which the appellate court would have imposed.

Appellant also asking for review and reduction of her sentence by means of subsequent letter to Notice of Appeal – Propriety of review of High Court Order by Supreme Court considered – Position settled that Supreme Court has no jurisdiction to review High Court decisions or orders – Decisions or orders to be reviewed are generally those of inferior Courts which the High Court is not – Supreme Court only entitled to review its own decisions.

Appellant convicted on two counts of murder, two of attempted murder and one of arson and sentenced to an effective 70 years imprisonment – Offences arise from an incident where Appellant used petrol to burn a house with some occupants asleep inside it – Two of the occupants dying on the spot and burnt to ashes while the other two sustained serious injuries.

Structure burnt by Appellant completely destroyed – Appellant eventually charged, convicted and subsequently sentenced to an effective 70 years imprisonment – Appeal noted against sentence only it being argued it far exceeds the range of sentences put in place by the Supreme Court in previous matters – Principles behind the range of sentences discussed – Whilst range of sentences significance as a guide, it is neither rigid nor inflexible as it can be altered either upwards or downwards in appropriate matters – Court orders that all the sentences run concurrently with that imposed for count 1 by the court *a quo* which has the result that the Appellant serves 30 years in prison.

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JUDGMENT

HLOPHE AJA

[1] The Appellant noted an appeal against a sentence imposed on her by the High Court (Maphalala PJ) which was handed down on the 10th December 2015, subjecting her to an effective 70 years imprisonment following her having been convicted on five counts comprising two of murder, two of attempted murder and one of arson.

[2] In view of the appeal being only against the sentence imposed by the court *a quo*, it follows that the facts as found by the court *a quo* are now common cause and are as set out herein below.

[3] For reasons whose basis were never established in court other than that it was her belief, the Appellant was convinced that one Boy Tsabedze, who happens to be the father of the two children who died as a result of Appellant's actions and who was the head or owner of the homestead where the incident resulting in the charges she ended up being convicted of occurred, was responsible for the miserable life she lived. The relationship between the Appellant and the said Boy Tsabedze was shown by the evidence to be extremely bad.

[4] It is not in dispute that the Appellant was evicted from a place she had considered to be her home as a result of which she had to be accommodated in a tent donated to her by the Swaziland Red Cross Society. This tent, it is common cause, was pitched next to the home of one Boy Tsabedze. It is not disputed that the life led by the Appellant was very miserable resulting from her initial eviction from the place she had regarded as her home with the result that she had to stay in the tent referred to above. Her situation seemed to have been worsened by an

incident when she was attacked at her tent, with some of her belongings being destroyed or damaged.

[5] Without any evidence having been adduced she apparently believed that the said Boy Tsabedze was responsible for both her eviction from her initial homestead as well as for the attack on her tent, where some of her belongings were damaged. This belief only exacerbated the animosity between the two.

[6] Sometime during the day of the 4th July 2008, the Appellant was overheard as she talked to one Lencane Maziya while Boy Tsabedze walked past them saying that she was going to burn down Boy Tsabedze's homestead. On a separate occasion she had, upon discovering that her place had been under attack with certain items damaged, and as her tent was being fixed, she was heard by PW2 among others swearing that she was going to buy petrol and burn the people responsible for making her life miserable without mentioning them by name. Indeed on the 4th July 2008, the date on which the incident resulting in her being charged with the offences referred to herein, she sent one Sicelo Ndlovu, with whom she stayed, to ask him to buy her a litre of petrol, which he did. She herself also went to purchase petrol from a nearby filling station that late afternoon or early evening and was given lifts by certain motor

vehicle drivers who themselves were able to identify her as she went to and from the filling station and they testified to this in court.

[7] Notwithstanding that some people at her home or tent, including the said Sicelo Ndlovu, were still busy fixing the tent at which she stayed, the Appellant later disappeared from there that evening only to return very late that night and she was seen by among others Sicelo Ndlovu as she came running. As she did so there was an alarm being raised in the neighbourhood at Boy Tsabedze's homestead where she was accused of having burnt a house or hut thereat. She was said by the witness in court to have reacted by saying that she was "going to finish them", as she took off the takkies or shoes she had been wearing and burnt, causing them to explode into a big flame of fire indicating that they were for some reason highly flammable.

[8] From the fire at the homestead of Boy Tsabedze two children who were inside the burnt hut were burnt to death while the two other occupants escaped with serious burns or burn wounds for which they had to be treated and examined in hospital. The burnt hut was destroyed. The Appellant was subsequently charged, tried and convicted on two counts of murder, two of attempted murder and one of arson. She was sentenced to thirty years on each of the murder counts and 10 years on each of the

attempted murder counts as well as the one for arson. The two attempted murder and arson counts were ordered to run concurrently between the three of them, and jointly to be served consecutively with each one of the murder counts. The sentence was thus an effective 70 years imprisonment, which she was required to serve.

[9] The Appellant noted an appeal to this court in which she clearly challenged the sentence imposed on her, not the conviction. This judgment relates to the said appeal. In her said Notice of Appeal the Appellant contends as follows:

> "1. The sentence melted (sic) (apparently meant to say meted) out by the court *a quo* is so harsh as to induce a sense of shock.
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> 2. The court *a quo* erred in law in directing that the sentences run consecutively and that the Appellant should effectively serve a 70 year sentence in as much as the offences culminated from one set of facts.
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> 3. The court *a quo* erred in law in overlooking that the offences committed were a result of a single act of the Appellant".

[10] The Appellant's Notice of Appeal referred to above was prepared by her attorneys M. S. Dlamini Legal. This Notice of Appeal was prepared on

the 12th February 2014 and filed to court on the 20th February 2014. Notwithstanding that the appeal had already been noted as stated and was pending before the Supreme Court of appeal, the Appellant wrote a letter to the Registrar of the High Court asking that her matter be reviewed together with her sentence. The reasons she put forth for her said request was that she was an old sickly person and that staying at the Correctional Institution affected her a lot and that she needed to take care of her three children as they were homeless yet she had no relatives to take care of them as she was in prison.

[11] I can only comment by saying that it is unclear what the purpose of this document (letter) is. As it purports to be a review application, the position of our law is now settled that a judgment of the High Court cannot be reviewed by the Supreme Court which only has Appellate jurisdiction over it. See in this regard Section 146 and 147 of the Constitution as well as the case of ***Kenneth Ngcamphalala vs The Principal Judge of the High Court and 9 Others Civil Appeal Case No. 24/2012,*** where this court constituted of five Justices was unaninomous after considering Sections 146, 147 and 148 of the Constitution of this Kingdom together with Sections 14, 15 and 16 of The Court of Appeal Act of 1954, as well as related judgments from the United Kingdom, the

Republic of South Africa and Lesotho, that a judgment of the High Court is not reviewable by the Supreme Court.

[12] At paragraph 9 – 11, this court in that case put the position as follows:-

> **"9. It is plain from the foregoing sections that the jurisdiction of the Supreme Court is wholly statutory. It is appellate only. In the words of Lord Diplock in the case of in re Racal Communications Ltd [1981] AC 374 (HL) at 381, 384, the Supreme Court has no jurisdiction itself to entertain any original application for judicial review. In terms of s 148 of the Constitution, the only review power which the Supreme Court enjoys is the power to review its own decisions. It is of fundamental importance to recognize that this section deals with two different concepts, namely, "supervisory" and "review" jurisdiction. In relevant parts, it reads as follows:-**
>
> > **"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.**
> >
> > **(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions**

as may be prescribed by an Act of Parliament or rules of court."

10. Mr. S.C. Dlamini who appeared for the applicant in this Court submitted that the review jurisdiction entitling this Court to deal with the matter is contained in s 148 (1) of the Constitution. This submission is misconceived. It is instructive to stress that section 148 deals with two different concepts. Subsection (1) deals with "supervisory" jurisdiction of the Supreme Court. As the word itself denotes, "supervisory" in its ordinary meaning simply refers to "overseeing" and not "reviewing." Subsection (2) on the other hand deals with "review" jurisdiction of the Supreme Court over its own decisions. Indeed, one has merely to look at the heading of s 148 to see that it refers to two different concepts. The heading is "Supervisory and review jurisdiction." I have underlined the word "and" to emphasise that it is disjunctive and not conjunctive as Mr. S.C. Dlamini would like the Court to believe. It follows that supervisory jurisdiction in s 148 (1) is not the same thing as review jurisdiction in s 148 (2).

11. It is of fundamental importance to stress that the scheme of s 148 confining review jurisdiction of the Supreme Court to its own decisions only, as opposed to High Court decisions, is consistent with the common law position. At common law judicial review, in the words of Lord Diplock in the case of in re Racal

Communications (supra), is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes made by High Court judges can only be corrected by means of an appeal and not review. See, for example *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2)* SA 385 (SCA) at para [35]. The Lesotho Appeal Court also took a similar view in *Molise v Lehohla NO and Others 1995 – 1999 LAC 442* at 444 – 445. This is so because the High Court is not an inferior tribunal. On the contrary, it is a Superior Court of record. In this regard section 139 (1) (a) (i) and (ii) of our Constitution provides in relevant parts as follows:-

> **"139. (1) The Judiciary consists of -**
>
> **(a) the Superior Court of Judicature comprising -**
>
> **(i) The Supreme Court, and**
>
> **(ii) The High Court (Emphasis added)."**

[13] If the letter in question was meant to be an appeal, then its grounds did not make sense as they were not attributing any wrong doing to the court *a quo* entitling her to an appeal. It sounded oblivious to the fact that her being kept in custody was a result of the court *a quo* having found her guilty of committing serious offences in law for which she had to be punished through imprisonment. After the matter was allocated a hearing

date, the attorneys of record filed their Heads of Argument and made reference only to the Notice of Appeal without any being made to the letter in question. This could only confirm that the said letter had no legal effect and that no reliance whatsoever was attached to it by the Appellant and her counsel.

[12] The matter was therefore proceeded with on the basis of the Notice of Appeal and as neither mention nor reference was made to the letter, it was for purposes of this appeal taken to be surplasage without there being any intention on the part of the appellant to place any reliance on it.

[13] In her Heads of argument, the Appellant argued that this court was given power by Section 5 (3) of the Court of Appeal Act to quash a sentence it did not agree with and replace it with the one it deemed appropriate. It was argued further that according to Section 21 (b) of the Constitution, there was protection extended to an accused person from a harsh penalty.

[14] The Appellant argued further that whereas public interest required that deterrent sentences are passed, it had to be noted that a sentence should not be manifestly excessive so as to break the offender nor should it be so as to produce in the minds of the public a feeling that the accused has been unfairly or harshly dealt with.

[15] It was argued that courts should strive for uniformity in sentencing wherever that was possible and that disparity in sentences had to be avoided as it can only bring the whole justice system into disrepute. This sentence, it was argued, deviated from the guidelines put forth in ***Elvis Mandlenkosi Dlamini v Rex Criminal Appeal Case No. 30/2011,*** namely that the sentences in a case of murder with extenuating circumstances should range between 15 and 25 years. There was in this regard cited a string of cases said to be confirming this principle such as ***Mapholoba Mamba vs Rex, Criminal Appeal Case No. 17/2010, Ntokozo Adams vs Rex Criminal Appeal Case No. 16/2010; Khotso Musa Dlamini v Rex Criminal Appeal Case No. 28/2010*** and ***Mandla Thwala vs Rex Criminal Appeal Case No. 36/2011.*** The theme running through all these cases is that they were all kept within the 15 – 25 years sentence range such that those that had initially been sentenced to over 25 years by the High Court were reduced to either 25 years or other lower years of sentences within the suggested range referred to above.

[16] It was argued further that the court *a quo* had not paid attention to the general principle that sentences imposed for offences arising from the same transaction ought to run concurrently as opposed to running consecutively. It was contended that as it happened in some previous judgments, that the sentences imposed in this matter should be substituted

with that of twenty years for each one of the two murder counts and that all the others (attempted murder and arson counts) ordered to run concurrently with the said twenty years. The suggested result would then be that all the sentences are served concurrently by the Appellant resulting effectively in twenty years imprisonment.

[17] The Appellant closed her argument by contending that the sentence imposed on the Appellant was harsh and severe and that this necessitated that it be reduced and that all the sentences be made to run concurrently with the reduced sentence for one count of murder.

[18] As indicated above, the relief sought on appeal was opposed by the Crown. According to Mr. Stanley Dlamini who appeared on its behalf, the sentence was argued to be, when taken in the peculiar circumstances of the matter, appropriate.

[19] Even though the Supreme Court in ***Samkeliso Madati Tsela v Rex, Criminal Appeal Case No. 20/2010 [2012] ZCSZ 13*** sought to set out the range of sentences in cases of murder, it never said that under no circumstances should a higher or lower sentence be imposed. The Court only put in place a guideline in the range that it put forward. That the Supreme Court in the said case was giving a guideline it was argued, can

be seen from the following excerpt taken from the same ***Samkeliso Madati Tsela v Rex judgment (Supra)***:-

> **"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 extremes of the range, provided always that such a course is justified by peculiar circumstances of the particular case and provided also that the sentences provide clear and cogent reasons upon the face of the record for the sentence for which he or she imposes".**

[20] In keeping with this excerpt it was argued that the court *a quo* did give reasons why it was necessary for it to impose the sentence it did. In other words, the court had allegedly given reasons for the sentence it had imposed and that such sentence was supported by the circumstances of the matter. In short, it was argued that the court *a quo* had found this to be an extreme case of murder and that the Appellant was driven by the hatred she harboured towards the family or the person of Boy Tsabedze. Besides, it was further argued, this case had to be treated differently from all the cases of murder with extenuating circumstances when considering that it had elements of premeditation.

[21] It was further argued that even though there was the general rule that offences arising from the same transaction ought to run concurrently such a rule was not cast in stone and was not absolute. It was also argued, that whether or not sentences should run concurrently, should be dependent on whether the said sentence is startlingly inappropriate or manifestly excessive or harsh, oppressive or inhuman.

[22] It was for instance clarified in ***Madati Tsela v Rex Criminal Appeal Case No. 20/2010 [2012] SCSZ13***, that "…a judge retains a residual discretion for good and sufficient reasons, to order consecutive sentences in appropriate cases".

[23] On the basis of the foregoing, it was argued that the court *a quo* was entitled in the circumstances of the matter to impose the sentence it did and that the said sentence was justified in the peculiar circumstances of this case and that it was also appropriate when taking into account that the reasons for its imposition were given ex-facie the judgment.

[24] It is a settled position of our law that a sentence is a matter reserved for the discretion of the trial court. This discretion can only be interfered with where there is a misdirection or irregularity or where it is so severe that no reasonable court would have imposed it. It is obvious that a

misdirection will occur where the sentence concerned was against law or where improper considerations were taken into account before it was passed. A sentence is so severe so as to be unreasonable where it induces a sense of shock. A sentence induces a sense of shock if there is a striking disparity between the sentence passed and that which the Appellate court would itself have passed. The South African Appellate Division put the legal position on this point in the following words in ***S v De Jager and Another 1965 (2) SA 616 (A) at 629***:-

> ***"It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by an irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock; that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed"***

[25] This principle has repeatedly been cited in numerous judgments of this Court even if not quite on the same wording but the effect and meaning of what has to be said is the same. In ***Sibusiso Makoshi-Kosh Dlamini vs Rex Criminal Appeal Case No. 36/2010 at paragraph 11*** the position was put as follows by this Court:-

> **"This Court has repeatedly stressed that the imposition of sentence is a matter which lies within the discretion of the trial court. An Appellate court will ordinarily not interfere with a sentence imposed by the trial court in the absence of a misdirection resulting in a miscarriage of justice.**

This principle is now so well established in this jurisdiction that it is hardly necessary to cite any authority".

[26] In ***Moses Gija Dlamini v Rex Criminal Appeal Case No. 4/2007***, Banda CJ with Steyn JA and Zietzman JA concurring put the position as follows regarding the same principle:-

"The sentence of any court is always a matter in the discretion of the sentencing court. An Appellate court will only interfere with the sentence if there was a misdirection or if the sentence was wrong in principle or that it was shockingly harsh and is a sentence which induces a sense of shock".

[27] There are numerous other judgments of this court on this point such as for instance; ***Elvis Mandlenkosi Dlamini vs Rex Criminal Appeal Case No. 30/2011; Msombuluko Mphila v Rex Criminal Appeal Case No. 33/2012*** and ***Mandlenkosi Daniel Ndwandwe v Rex Appeal Case No. 39/2011.***

[28] The question to ask is whether in reality it can be said that the sentence imposed in this matter is one that can be said to induce a sense of shock as opposed to whether there was an irregularity or a misdirection resulting in a miscarriage of justice. The Appellant, after referring to several judgments of this Court which have put the range of sentences in

cases of murder with extenuating circumstances between 15 and 25 years, submitted that on this point alone, the sentence by the court a quo was excessive and should in fact be altered. It was proposed that the sentence in the two murder counts be reduced to twenty years in each count, which are to run concurrently with the other sentences. These are ten years each for two attempted murder and one arson count. These three have already been ordered to be served concurrently. The result would then be that the Appellant effectively serves only twenty years imprisonment.

[29] I cannot agree with the Appellant's counsel's submission in this regard. Firstly I do not agree that when setting out the range of sentences, this Court meant that it will never be proper to venture out of the range. If it was so I have no hesitation to say that the interests of justice may not be served. An appropriate sentence must be determined by the circumstances of each case, hence the need to ensure that whilst the courts are guided on how to approach sentencing for among other purposes, certainty and uniformity, sight should never be lost of the fact that at both ends of the scale, there would be cases that call for sentences that go beyond or below the suggested boundary without being inhuman. An example that comes to mind is the case of a terrorist who detonates a bomb in a supermarket full of people. In terms of the range does it mean that if extenuating circumstances are found or for whatever reason a death

penalty does not apply in that case, his sentence would have to be confined to the said range notwithstanding the peculiar circumstances? In other words should his sentence not exceed 25 years because the range suggested by this Court in an earlier matter cannot be exceed? I think not. I am of the view that whilst the range is indeed welcome and appreciated, it can never be said that all cases should be kept within that suggested range no matter what the circumstances.

[30] Secondly, I agree with Mr. Stanley Dlamini for the Crown that in the formulation of the sentencing range in matters of murder with extenuating circumstances, the learned Judge in the ***Samkeliso Madati Tsela v Rex matter (Supra)*** did spell out as quoted above that there would be those matters whereupon in exercise of its discretion, it would be appropriate for the court to impose a sentence that falls outside the extremes of the range. I agree that this should be the case and further that where the court so ventures as to impose a sentence that goes beyond that, sound reasons or exceptional circumstances have to be expressed on the face of the Judgment.

[31] It is unclear why the highest mark of the range was fixed at 25 years so as to "suggest" that no sentence should be above that extreme. It seems to me that this was not fixed because of what the Constitution says about

life sentence in this jurisdiction. If this was so influenced, it could be a mistake to fix the maximum at 25 years because the Constitution does not in reality fix 25 years as the equivalent of a life term or sentence but in fact it says that a life term shall not be less than 25 years as a minimum with the maximum being left open ended. In fact the constitution puts the position as follows in Section 15 (3) of the Constitution.

"A sentence of life imprisonment shall not be less than twenty five years".

[32] While not necessarily saying that the sentence in question was not appropriate, I must make myself clear that I do not agree that same should not go beyond 25 years in appropriate circumstances. I agree however that such should naturally be so in exceptional cases; which is to say our courts can impose a sentence beyond 25 years in warranting circumstances. I am afraid that putting a ceiling of 25 years on sentences would have the potential of rendering the courts to not be responsive in certain circumstances, requiring of it to respond appropriately by imposing sentences that go beyond the suggested limit, with the result that the courts end up losing respect from the public they serve.

[33] The Appellant committed and was convicted of very serious offences. The murders of the deceased were premeditated when one considers the evidence, because the Appellant is shown as having said, with the owner

of the homestead within hearing distance, that she was going to burn down his homestead earlier on that day. She also declared in the presence of the people working at her home or tent after her property was vandalized, that she was going to burn the people responsible for that with petrol. She indeed went on to purchase the petrol and went out of her way to burn the people she knew very well as neighbours were inside the house through the use of petrol. As it turned out two people – the children – died while the other two adults were lucky to have survived with burns.

[34] She did not even show remorse because after effecting the burning of the house with an alarm raised she had alleged that she was finishing "about them". Although she may have believed that the owner of that homestead was responsible for her misery, it can however never be a justification for her to have done what she did. The court needs to send a clear message that such a barbaric act shall not be tolerated given that life is sacrosanct and no one is entitled to take it away whatever the provocation or circumstances.

[35] These are, in my view, the type of circumstances to justify that the sentence in this matter should exceed the 25 years put as the upper end of the range of sentences suggested or put in place by the Supreme Court in the matter referred to above.

[36] The question is; is there any striking disparity between the sentence given by the court *a quo* from that which this Court as the Appeal Court would have imposed? I am convinced there is such disparity between the sentences in question. The one this Court would impose necessitates that all of the sentences be served concurrently with the first one of the murder counts, such that the Appellant would have to serve an effective thirty years imprisonment as a sentence.

[37] For the foregoing reasons I have come to the conclusion that the sentence imposed by the court *a quo* be and is hereby set aside and is substituted with the following one:-

1. The accused be and is hereby sentenced as follows:-

    1.1 On Count 1, Murder, she is sentenced to 30 years imprisonment.

1.2 On Count 2, Murder she is sentenced to 30 years imprisonment.

1.3 On Count 3, Attempted Murder, she is sentenced to 10 years imprisonment.

1.4 On Count 4, Attempted Murder, she is sentenced to 10 years imprisonment.

1.5 On Count 5, Arson, she is sentenced to 10 years imprisonment.

2. Counts 2, 3, 4 and 5 are all to be served concurrently with the sentence imposed in count 1. The result is that the Appellant is to serve 30 years imprisonment in all.

3. This sentence is backdated to take effect from the 5th July 2008.

N. J. HLOPHE
ACTING JUSTICE OF APPEAL

I Agree

DR. B. J. ODOKI

JUSTICE OF APPEAL

I also Agree

J. P. ANNANDALE
ACTING JUSTICE OF APPEAL

For the Appellant: Miss N. Mabila
Mr. M. S. Dlamini

For the Crown: Mr. S. Dlamini