IN THE SUPREME COURTOF SWAZILAND

Criminal Appeal Case No. 10/2015

In the matter between:

NJABULISO MAMBA **Appellant**

And

REX **Respondent**

Neutral Citation: *Njabuliso Mamba vs Rex (10/2015)* [2015] SZSC 31 (09 December 2015)

Coram: S. B. Maphalala AJA
M. D. Mamba AJA
N. J. Hlophe AJA

Date Heard: 19 November 2015

Date Handed Down: 09 December 2015

Summary

Criminal Appeal – Appeal against sentence only – Legal position as relates to sentencing discussed – Sentence is a matter for the discretion of the trial court –Appellate court can interfere with sentence only in those instances where there is a misdirection or an irregularity result in a failure of justice or where sentence is so harsh or severe that it induces a sense of shock – When sentence induces a sense of shock – This happens where there is a striking disparity between the sentence imposed and that which the appellate court would impose.

Appellant, a young man of 17 years with friends had just come out of a place where there had been held a night long festival or event called the Simunye Annual Fun Fair – One of Appellant's friends provokes the deceased – A fist fight ensues between the two groups – Appellant and his group over-powered and run away – Deceased gives chase and catches up with Appellant who stabs him three times from which he dies – Upon conviction for the murder of the deceased, appellant sentenced to 18 years imprisonment.

Appellant appeals against sentence – Contends sentence is too harsh and too severe to bear – Asks for reduction of same by 9 (nine) years – Whether a case made for this court to interfere with the court *a quo's* discretion on sentence – Striking disparity does exist between the sentence made and that which the Appellate court would itself impose – Initial sentence set aside and replaced with one fixed at 12 years imprisonment.

JUDGMENT

HLOPHE AJA

[1] The Appellant who represented himself before this court, has brought an appeal in which he contends that the sentence imposed on him by the court *a quo* is too harsh and too severe for him to bear.

[2] It is not in dispute that the Appellant was convicted of the murder of one Brian Carvalihio who died on the 24th October 2010, after having been stabbed three times by the Appellant whilst at Lusoti Village at Simunye in the Lubombo Region.

[3] A brief summary of the facts of the matter is that the Appellant and his friends together with the deceased and his friends attended a certain annual function held at Simunye called the Simunye Fun Fair. In the early hours of the 24th October 2014, there ensued a quarrel between the Appellant‘s faction and that of the deceased. This misunderstanding led to an exchange of blows. After the intervention of one Simanga Maziya, who testified before the court *a quo* as PW2, the accused and the boys he was with ran away. The deceased and his companions gave chase and

upon catching up with them, the Appellant who was armed with a knife, stabbed the deceased three times from which he died.

[4] The Appellant was subsequently arrested and charged with the murder of the deceased following that his attempt to escape could not succeed. After trial he was convicted and sentenced to eighteen (18) years imprisonment. It is against this sentence that the Appellant noted the current appeal to this court contending that the sentence imposed on him was "too harsh and severe" for him to bear. He prayed that this court interferes with the said sentence by reducing it by 9 years, so that he does not serve the full 18 years imposed by the court *a quo*.

[5] In his Heads of Argument the Appellant submitted that whereas he took full responsibility for the death of the deceased, it had to be considered that the commission of the offence had not been premeditated at all. He submitted that he tried to run away from the deceased but that he chased after him and eventually caught up with him. It was this catching up with him that caused him to panic and stab the deceased in fear that he was himself in danger. He acknowledged possessing the knife so that he could deal with the persistent intimidation he had been made to suffer. He further acknowledged that he further carried it because of bad influence arising from peer pressure, which required him to express

himself or to do things in a particular way including being protective of each other with his gang members.

[6] The Appellant also contends that he was sentenced without much attention being paid to the fact that his mental faculties were interfered with by the alcoholic drinks they had taken the whole day. This he contended further called for the court *a quo* to be lenient with him. He claims that the court a quo also did not take into account that he was still very young at the time he committed the offence. In this regard he is obviously or apparently pleading youthfulness and immaturity. He claims to be very remorseful about his conduct.

[7] The crown on the other hand opposed the appeal and disputed that there is any aspect of the sentence in which the court *a quo* can be faulted and be said not to have paid attention to before imposing the sentence it did on Appellant.

[8] It was submitted that a sentence is a matter that falls within the discretion of the trial court. It was argued that the appeal court would only interfere therewith where there is a material misdirection by the court *a quo* which results in a miscarriage or failure of justice. This it was argued has as a principle been enforced or upheld by numerous judgments of this court.

The sentence imposed on the Appellant, it was argued fell within the sentencing range of this court as can be seen in previous judgments of this court in which it was allegedly enunciated and had become an established rule that sentences in murder cases with extenuating circumstances ranged between 12 and 20 years. The case of ***Samkeliso Madati Tsela v Rex, Criminal Appeal Case No. 20/2010 or [2012] SCSZ13*** was cited as authority for this proposition. In that particular case the Supreme Court set out a table where the range of sentences was set out for culpable homicide and murder.

[9] Mr. Nxumalo further submitted in his Heads of Argument that it was in the public interest in the case of serious or prevalent offences that the courts impose severe sentences which have the effect of sending a proper message that such offences will not be tolerated and thereby attain the necessary deterrence. In the aforementioned Judgment there was quoted an excerpt from the Judgment of the Botswana Court of Appeal in ***Mosiiwa v The State (2006) 1 BLR 214 p. 219*** as quoted in the Supreme Court of Appeal Judgment in ***Elvis Mandlennkosi Dlamini v Rex Criminal Appeal Case no. 30/2011*** in the following words:-

> **"It is in the public interest, particularly in the case of serious or prevalent offences that the sentence's message be crystal clear so that full deterrent sentences may be realized, and that the**

public may be satisfied that the court has taken adequate measures within the law to protect them of serious offences".

[10] It is however important to notice that in the true spirit of justice which should cut like a double-edged sword the learned Judge was quick to point out that the sentences do not only have to be deterrent and indicate that certain offences are not to be tolerated when he said the following in the same excerpt towards the end of it:-

"By the same token, a sentence should not be out of all proportion to the offence, or to be manifestly excessive, or to break the offender or to produce in the minds of the public the feeling that he has been unfairly and harshly treated."

[11] To underscore the significance of each sentence having to reflect this which has often been referred to as a delicate balance, I can do no better than quote the oft quoted words of **Holmes JA** in ***S v Rabbie 1975 (4) SA 855 (AD) at page 6*** when he expressed himself as follows:-

"A Judicial Officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between the crime, and the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive

after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contributes to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case".

[12] I agree with the submissions by Crown Counsel that sentencing is a matter reserved for the discretion of the trial court and that this court will not interfere with same except in those instances where there has been a material misdirection resulting in a miscarriage of justice as well as where same is so harsh that it induces a sense of shock, which is determined in law by assessing the disparity between the imposed sentence and that which this court would itself have imposed. This principle was expressed in the following words in ***Elvis Mandlenkosi Dlamini vs Rex (Supra) at page 16 paragraph 29.***

"It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an Appellant court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage 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".

[13] The foregoing words of his Lordship MCB Maphalala J (as he then was) were echoing what had been said in numerous other judgments including ***S v De Jager and Another 1965 (2) SA 616 (A)*** at 629 where this principle was expressed in the following graphic words:-

> ***"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 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"***

[14] Considering the judgment of the court *a quo* it is clear that it considered numerous similar matters dealing with murder with extenuating circumstances which had imposed a similar sentence. In other words, it generally speaking, cannot be faulted on either a misdirection or an irregularity. It however would be a different case on whether the sentence was so severe as to induce a sense of shock of one considered the peculiar circumstances of the Appellant including how the offence

itself occurred. This can therefore emphasize the significance of the fact that, in law, each matter is required to turn on its own peculiar facts and circumstances.

[15] The thrust of the Appellant's appeal as I understood it was not that the court *a quo* committed a misdirection or an irregularity when one considers the notice of appeal and the Heads of Argument filed. It becomes clear that the cause for complaint was that the sentence was, in the words used in the ***De Jager Judgment (Supra)***, so severe that no reasonable court could have imposed it. As indicated in the extracted excerpt from the ***De Jager case (Supra)*** this was interpreted to mean that the sentence was so severe that it induces a sense of shock.

[16] A sentence induces a sense of shock if "there is a striking disparity between the sentence passed and that which the court of appeal would have passed", according to the excerpt in the ***De Jager case (Supra).*** Regarding the matter at hand, when considering the youthfulness of the Appellant who it is common cause was seventeen (17) years at the time of the commission of the offence and was apparently immature. There is a striking disparity between the sentence imposed and that I would impose. He was obviously immature when considering the manner the offence was committed. The court *a quo* does not seem to have paid

sufficient attention to the fact that when he stabbed the deceased, it is the latter who had become an aggressor as he chased after the Appellant, and caught up with him apparently with a view to himself assault the Appellant. I am convinced that the sentence imposed by the court *a quo* is so harsh as to induce a sense of shock because of the disparity I have alluded to, too severe and that it induces a sense of shock. This should therefore call for interference with the said sentence.

[17] I note that the Crown has referred the court to several judgments of this court where sentences around the one imposed by the court *a quo* herein were maintained and or not interfered with including what the sentencing trend of the courts is on matters like the present but I am convinced that those cases are distinguishable from the present one. I agree with the view expressed by Crown Counsel that the range fixed or suggested by this court in previous matters is not cast in stone but is more a guideline aimed at ensuring that there is uniformity of sentences. This does not suggest that the sentencing discretion of the courts is now being circumscribed. It was with this realization in mind when the Supreme Court, after setting out the range of sentences in ***Samkeliso Madati Tsela v Rex Criminal Appeal Case No. 20/2010 or [2010] SCSZ 13*** went on to say the following:-

"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 the peculiar circumstances of the particular case and provided also that the sentence provides clear and cogent reasons upon the face of the record for the sentence for which he or she imposes".

[18] Owing to the peculiar circumstances of this matter, I am convinced that it would be important for this court to consider that as a young man who was a first offender the accused, does deserve another chance in life after he would have reformed following the corrective emphasis of the Correctional Institutions. The sentence initially imposed on him does not in my view seem to afford him this opportunity and can be said to be inducing a sense of shock therefore.

[19] Dealing with the sentencing of a young person in ***Mabuza and Others v S (174/2001) [2007] ZACA 110***, the Supreme Court of Appeal of South Africa, put the position as follows at paragraph 22:

"Youthfulness almost always affects the moral culpability of juvenile accused. This is because young people often do not

possess the maturity of adults and are therefore not in a position to assess the consequences of their actions. They are also susceptible to peer pressure and to adult influence and are susceptible when proper parental guidance is lacking. There are, however, degrees of maturity, the younger the juvenile, the less mature he or she is likely to be. Judicial policy has thus appreciated that juvenile delinquency does not inevitably lead to adult criminality and is often a phase of adult development. The degree of maturity must always be carefully investigated in assessing a juvenile's moral culpability for the purpose of sentencing".

[20] I find the foregoing words to be apposite in this matter and I am convinced it is an angle to which much attention does not seem to have been paid to by the court *a quo* at the time it imposed the sentence it did. I am of the view the said sentence does merit interference with by reducing same to that which this court considers appropriate.

[21] Having said what I have herein above it seems to me that an appropriate sentence herein would be 12 years imprisonment. This sentence I hope does achieve the deterrence needed while at the same time giving the Appellant a chance in life after he would have served it.

[22] Consequently, I am persuaded to set aside the entire sentence passed by the court *a quo* and substitute it with the following one:-

1. The accused be and is hereby sentenced to 12 years imprisonment.

2. The sentence is to take into account the seventeen months spent by the accused in custody prior to the hearing and finalization of his matter.

3. This sentence shall take effect from the date of the Appellant's arrest and shall be subject to order 2 above.

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N. J. HLOPHE
ACTING JUSTICE OF APPEAL

I Agree

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S. B. MAPHALALA

ACTING JUSTICE OF APPEAL

I also Agree

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M. D. MAMBA
ACTING JUSTICE OF APPEAL

For the Appellant: In Person

For the Crown: Mr. M. Nxumalo