IN THE SUPREME COURT OF SWAZILAND

Criminal Appeal Case No. 39/2012

In the matter between:

MUZI SANDILE NTSHANGASE **Appellant**

vs

REX **Respondent**

Neutral citation: *Muzi Sandile Ntshangase v Rex (39/2012) [2015] SZSC 21(9 December 2015)*

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

Heard: 25 November 2015

Delivered: 09 December 2015

[1] *Criminal Law – Appeal - conviction for murder with extenuating circumstances – appellant who was 22 years old at time of commission of offence sentenced to 18 years of imprisonment for the brutal killing of his erstwhile girlfriend and mother of his child.*

[2] *Criminal Law – Appellant convicted of murder with extenuating circumstances and sentenced to 18 years imprisonment. Appeal on sentence only. General approach by the court on issue of sentence restated as within the discretion of the trial court. No material misdirection by sentencing court shown. Appeal dismissed.*

JUDGMENT

MAMBA AJA

[1] The appellant was convicted by the High Court of the crime of murder on 10 October 2012 and on 01 November 2012 was sentenced to a period of 18 years of imprisonment. He has now appealed against that sentence only.

[2] At the time of the commission of the offence the appellant was 22 years of age. The deceased was his girlfriend with whom they had a child. The court *a quo* held that there were extenuating circumstances in connection with the commission of the crime.

[3] Briefly, the facts of the matter that led to the conviction of the appellant are as follows:

3.1 The appellant and the deceased were once involved in an intimate relationship from which a child was born out of wedlock. The court *a quo* described this relationship in the following terms:

> 'This relationship of theirs was, however, not a peaceful and stable one as it was always attended by turbulents or quarrels

> which would often result in the relationship breaking up, if anything, temporarily. …These two used to stay together as husband and wife for some time and would later break up after which the deceased would go back to her parental home.'

3.2 It is common cause that on the day of the commission of the offence, i.e, 31 October 2011, the appellant and the deceased were not staying together. The appellant came across the deceased at Siphofaneni whilst in the company of another woman. Both the appellant and the deceased had taken some alcoholic drinks at the time. They had, however, been drinking separately.

3.3 The appellant called the deceased to come to him as he wished to speak to her. The deceased refused; reminding the appellant that they had separated. This angered the appellant who then accused the deceased of cheating on him or being unfaithful. He then attacked her with a knife in full view of onlookers. The appellant caused the deceased to fall on the ground. He stabbed her many times in the neck-region whilst she was on the ground. The stabbing was so vicious that people nearby were forced to run away by the sheer intensity and ferocity of the attack on the deceased.

3.4 The injuries sustained by the deceased, which ultimately caused her death were amply enumerated by the court *a quo* as follows:

‘[23] The postmortem report indicated nine serious stab and chop wounds inflicted on the deceased. The most ghastly of these injuries were the 9x4cm and 7x3cm chop wound on the middle portion of the right side of the top of the head, 10x2cm and 6x3cm chop wound on the front and middle portion of the upper quarter part of the neck, a 17x4cm and a 7x2cm chop wound present on the middle portion of the backside of the neck as well as a 10x2cm chop wound in the front and middle portion of the chest. There were also serious stab wounds such as the 4x3cm stab wound located on the middle portion of the front and left side of the chest, a stab wound of 21/2x 1cm wound present on the right shoulder, a stab wound of 3x1cm on the right axilla as well as a 5x3 cm stab wound on the middle portion of the border of the right buttock. The doctor also found that the right temporal bone, right parietal bone and occipital bone were fractured. There was also extradural, subdural and intra-cerebral haemorahage. Otherwise the doctor found the cause of death to have been due to multiple stab and chop wounds found or inflicted on the deceased’s body.’

[4] In holding that there were extenuating circumstances in connection with the commission of the crime, the trial court held that the appellant's drunkenness, immaturity, anger and jealousy, taken together, constituted extenuating circumstances. In considering sentence, the court took into account the following factors in favour of the appellant; namely; that he was a first offender, the factors already mentioned in considering the existence or otherwise of extenuating circumstances, the relative youthfulness of the appellant, the fact that the crime was not premeditated and that he was likely to be rehabilitated in prison and return to society as a useful person.

[5] The learned judge further took into account the general interest of society, the administration of justice, the seriousness of the offence and the interests of the appellant himself. Also taken into consideration by the trial court was the fact that the appellant had in court tendered a plea of guilty to culpable homicide and had not completely denied his criminal liability herein. The appellant had also shown remorse and cooperated with the police in the course of their investigations of this offence. The learned judge *a quo* concluded his judgment by saying that:

> '[23] Notwithstanding the foregoing it should be borne in mind that the accused committed and has been found guilty of a

very serious offence which was committed in cold blood and in full public view with people all around him. The offence committed in this manner resulted in the loss of the life of a young person who had a future ahead of her. It has often been sad that life is sacrosanct and that no one has the right to take it away, let alone in the manner done by the accused and the time he took away that of the deceased.

…

[25] As concerns the interests of society, there is no doubt that society expects to see offenders in the like of the accused, who would commit offences like the one herein with callousness, going against all that society stands for, being dealt with severely so that a proper message is sent out to other would be offenders.

[26] Whilst there may be several offences committed with women being killed, this one is in my view a stand-alone when one considers the barbaric manner with which it was committed; particularly the slaughter of a human being to the extent of wanting to have her head decapitated in public. Our society is not used to this, hence the need to pass a sentence that nips it from the bud as it were.

[27] Having said all I have I am alive to the warnings that courts have repeatedly made that sentencing should not be imposed in anger but that it should be blended with mercy. See in this regard **R v Zinn 1969 (2) SA 537 (a)** and **S v Rabie 1975 (4) SA 855 (a).**'

[6] I am unable to find any fault or misdirection in the way the trial court approached the issue of sentence. The appellant was himself unable to point to any such misdirection.

[7] The imposition of sentence is, as it has been repeatedly stated in this jurisdiction, a matter that is predominantly within the discretion of the trial court. In *Elvis Mandlenkhosi Dlamini v Rex (30/11) [2013] SZSC 06 (31 May 2013),* this court stated this issue as follows:

'[29] It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an appellate Court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the

interests 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. This principle has been followed and applied consistently by this Court over many years and it serves as the yardstick for the determination of appeals brought before this Court. See the following cases where this principle has been applied:

- *Musa Bhondi Nkambule v Rex* Criminal Appeal No. 6/2009
- *Nkosinathi Bright Thomo v Rex* Criminal Appeal No.12/2012
- *Mbuso Likhwa Dlamini v Rex* Criminal Appeal No. 18/2011
- *Sifiso Zwane v Rex* Criminal Appeal No. 5/2005
- *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007
- *Vusi Muzi Lukhele v Rex* Criminal Appeal No. 23/2004

[30] The Trial Court was alive to the caution made by *Ramodibedi JA,* as he then was, in the Court of Appeal of Botswana in *Bogosinyana v. The State* (2006) 1 BLR 206 (CA) at page 6 where the learned judge of Appeal had this to say:

"It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safeguarding the interests of society. It is thus a delicate balance which should be undertaken with utmost care. In this regard it is important to remember the age-old caution not to approach punishment in a spirit of anger. The justification for such a caution, as one seems to have read, lies in the fact that he who comes to punishment in wrath will never hold the middle course which lies between too much and too little."

[31] Similarly, *Moore JA* in the Botswana Court of Appeal in the case of *Mosiiwa v The State* (2006) 1 B.L.R. 214 at p.219 made the following caution which the judge in the Court *a quo* seems to have heeded:

"It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystal so that the full effect of 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. 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."

[32] In *S.v. Rabie* 1975 (4) S.A. 855 (AD) at p. 866 *Holmes JA* had this to say:

"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, the criminal and the interests 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 pressures of society which contribute 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."**

[8] For the foregoing reasons, there is no merit in this appeal and it is hereby 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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J.P. ANNANDALE AJA

For the Appellant:	In Person
For the Respondent:	Ms E. Matsebula