IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Criminal Appeal Case No.23/2015

In the matter between:

GEORGE MATHONSI 1ST Appellant

VELAPHI VUSI DLAMINI 2nd Appellant

And

THE KING Respondent

Neutral citation: *George Daniel Mathonsi & Velaphi Vusi Dlamini vs. Rex (23& 24/2015) [2016] SZSC 25 (30 June 2016)*

CORAM **M.C.B. MAPHALALA, CJ**

S.P. DLAMINI, JA

M. LANGWENYA, AJA

Head: 23rd May 2016

Delivered: 30th June 2016

Summary: *Criminal law – Rape and Murder charges Appeal on Sentence alone (reduction of sentence) - Youthfulness, severity and harshness of sentences as grounds of appeal- No misdirection on sentence by trial court – sentence within the Range of sentences imposed by this Court- Appeal dismissed.*

JUDGMENT

S. P. DLAMINI, JA

[1] The first appellant and second appellant were charged with and convicted of very serious offences including murder, rape and robbery at the High Court.

[2] The appellants accept the convictions and appeal against the sentences only. First appellant prays that his sentence be reduced from twenty (20) years to fifteen (15) years and second appellant prays that his sentence be reduced from fifteen (15) years to nine (9) years.

[3] The appeal of the second appellant was effectively abandoned at the hearing of the matter as no submissions were made with regard to the appeal. On the papers as they stand, this appeal cannot be upheld.

[4] The relevant testimony of the first appellant is as follows;

(i) He had slept in a makeshift house in the mountain around the Nkoyoyo area and left his clothes. When he returned he saw a person that he believed was the owner of the make-shift house. He did not enter the house but later returned and managed to fetch his clothes without being noticed. After hiding his clothes in the rocks he decided to check a gun he had hidden in the area. He went past a homestead and saw two men. One of the men approached him and pretended to pull out a gun. He pulled out his own gun and the men fled. One of the men was the deceased. He chased after them. The deceased went into the make shift house. First appellant waited outside. The deceased jumped through the window and ran, First appellant ran after him. The deceased fell into a ditch. First appellant also fell in the ditch but away from the deceased. First appellant claimed that he tried to balance himself and the gun accidentally went off a bullet was released which hit the deceased on the hip. A scuffle ensued and First appellant was able to overpower the deceased and left the scene. This testimony is found in the confession by first appellant that was ruled as admissible by the court *a quo*.

(ii) Contrary to the claim by first appellant that the gun accidentally went off and the bullet hit the deceased, the court *a quo* found on the evidence of the Crown witnesses that the accused intentionally killed the deceased.

(iii) Further the evidence in chief was conclusive that during the commission of the crime first appellant used an AK 47 rifle and fired it at least two times as two spent cartridges and one splintered bullet were

found at the scene of the crime. The police were able to establish that the cartridges and splintered bullet were fired from the AK 47 found in possession of first and second appellants.

[5] The following points are raised by the first appellant in the heads of argument as proof of misdirection of the court *a quo* on sentence.

(5.1) Firstly, that the court *a quo* failed to "find the existence of extenuating circumstances in the matter even after it was agreed by the Crown and the defence that there exists extenuating circumstances that reduce (sic) the first appellant's moral blame worthiness" (see paragraph 5.1 of appellants heads of argument.

(5.2) Secondly, it was contended on behalf of first appellant that on account of "youthfulness, immaturity and no evidence of pre-meditation to kill reduces (sic) the moral blameworthiness of the first appellants.'' (See paragraph 5.2 of the first appellants blends of argument)

(5.3) Thirdly, that the sentence of the first appellant amounts to a violation of his constitutional rights as enshrined in Section 14 (1) of the Constitution Act 2005 which provides;

" 14 (1) The fundamental Human Rights and Freedoms of the individual entrenched in this chapter are hereby declared and guaranteed namely,

(e) protection from inhuman and degrading treatment.'

(5.4) Finally, that the court did not take into account the fact that Appellants were first offenders as well as personal circumstances as set out at page 113- 114 of the court record.

[6] On the other hand, respondent submitted that there was no misdirection or irregularity on the part of the court *a quo* and that there are no grounds upon which this court may interfere with the judgment of the court a quo on the sentencing of the appellants. Further, the respondent contended that the sentence of first Appellant of twenty (20) years for murder and the sentence of second Appellant of fifteen (15) years for rape are extremely lenient and that the court *a quo* extended to them mercy. Finally, respondent submitted that the deceased was murdered for no apparent reason and that the sentence of twenty (20) years imprisonment is within the sentencing range in our jurisdiction.

[7] After hearing counsel for appellants and considering the relevant authorities, the appeal of the first appellant is not upheld as it is fully shown below.

[8] The law in our jurisdiction when it comes to the issue of sentencing, at least at the level of the Superior Courts, is fairly settled .There are several judgments of this Court dealing with how to approach the matter:

In the case of **James Mthembu v Rex Criminal Appeal No 23/ 11.** The Learned **RAMODIBEDI CJ**, as he then was, states the following at paragraph 11 in the judgment;

"[11] **Reverting now to sentence, it is trite in this jurisdiction that the imposition of sentence in a case such as the present one is a matter**

which lies pre- eminently within the discretion of the trial court. An appellant court will ordinarily not interfere unless there is a material misdirection resulting in a miscarriage of justice. Authorities for this proposition are legion. It shall suffice simply to refer to such cases a <u>Musa Bhondi Nkambule v Rex, criminal Appeal No.6/09; Mzila Dlamini and Another v Rex</u> (supra); <u>Msombuluko Mphila v Rex Criminal Case No. 33/12.</u>

Also in the case of **ELVIS MANDLENKHOSI DLAMINI VS Rex Appeal No 30/2011 at paragraph 29 M.C.B Maphalala JA,** as he then was and now the Chief Justice, stated the following;

"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 interest 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 includes 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 cases of 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.**

[9] As it appears in the preceding paragraphs, the Learned Counsel for the appellants made submissions on behalf of the first appellant in order to persuade this Court to reduce the sentence for the murder conviction. Counsel argued that the youthfulness of the accused and the circumstances of the murder should be considered, namely, that there was no pre–meditation on the part of the first appellant. Furthermore, it was submitted on behalf of the first appellant that a rehabilitative approach to sentencing should be adopted by the Court by reducing his sentence so that he is released sooner and has a chance to re-join society as a reformed person. Additionally, it was submitted on behalf of the first appellant that the sentence is not in line with Section 14(1) of the Constitution 2005.

[10] The court *a quo*, in the view of this Court, considered all the relevant factors and had the benefit to assess the evidence including demeanor of the appellants.

[11] The court *a quo*, after evaluating the evidence regarding extenuating circumstances and as reflected at pages 112 to 114 stated the following paragraph;

"(8). **In passing sentence I shall take the above submission into account. However, I have to take into account the fact that Mr. Tsela, the deceased in Count 1 was killed for no reason at all. I was told that he was still young. He left a wife behind and she was still traumatized when she recalled the events of that day. She too is still young and had to become a widow prematurely.**

[9**]. The unlawful possession and the unlawful use of firearms is rampart and this has to come to an end. Society expects the courts to impose deterrent sentences in circumstances of accused persons who flaunt firearms and cause havoc in the lives of innocent victims.''**

When applying the legal framework postulated in the cases of **James Mthembu V Rex, Elvis Mandlenkosi Dlamini** and the other authorities referred to in this matter concerning appeals on sentencing, this Court found no misdirection at all on the part of the Learned trial Judge. Therefore, there is no justification for this Court to interfere with the court a quo's proper exercise of a discretion in sentencing. Furthermore, the learned trial judge was perfectly entitled to take into consideration the seriousness of the offender, the interests of offender, and the interests of society. This is supported by James Mthembu case at page 8.

[12] This Court agrees with the submission of the Learned Counsel for respondent that the sentence of twenty (20) years imprisonment for murder is within the sentencing range in our jurisdiction and reliance for this was correct found on the case of **Moses Siphila Ndwandwe V Rex Criminal Appeal no 20 /2013, James Mthembu V Rex Criminal case 23/2011,** Khehla **Nkambule V Rex Criminal Appeal case 42/2015**. In all these authorities the sentences on convictions of murder and or Robbery were within the range

of twenty 20 to twenty six years without an option of a fine. It is the view of this Court, that these cases are not dissimilar to the present case in terms of the facts and circumstances.

[13] Therefore, this court will be loathe to interfere with the judgment of the court *a quo* on sentence. In the exercise of its discretionary powers, the court *a quo*, to the benefit of the appellants ordered that the sentences be backdated to the date when the Appellants were taken into custody and to run concurrently.

[14] The Court is of the view that Section 14 (1) of the Constitution 2005 is not applicable in the issue before this Court. Perhaps, if the Court was dealing with the issue of corporal punishment as part of the sentence it could be argued that Section 14(1) is the legitimate factor to consider.

[15] In view of the aforegoing, therefore, the judgment of the court *a quo* on sentencing the appellants, twenty (20) years imprisonment in respect of the first appellant and fifteen (15) years imprisonment in respect of the second appellant are hereby confirmed. This court agrees with the submission of the Learned Counsel for respondent that the sentence of twenty (20) years imprisonment for murder is within the sentencing range in our jurisdiction and reliance for this was correctly found on the case of **Moses Siphila Ndwandwe V Rex Criminal Appeal no 20 /2013, James Mthembu V Rex Criminal case 23/2011, Khehla Nkambule V Rex Criminal Appeal case 42/2015.** In all these authorities the sentences on convictions of murder and or robbery were within the range of twenty 20 to twenty six 26

years without an option of a fine. It is the view of this Court, that these cases are not dissimilar to the present case in terms of the facts and circumstances.

ORDER

In the premise, the Court makes the following order;

(i) The appeals of first and second appellants on sentence are hereby dismissed;

(ii) The sentences imposed on first and second appellants by the court *a quo* are hereby confirmed.

_____

S.P. DLAMINI

JUSTICE OF APPEAL

_____

M.C.B. MAPHALALA

CHIEF JUSTICE

_____

M. LANGWENYA

ACT. JUSTICE OF APPEAL

FOR THE APPELLANTS: **Mr. L. Howe**

FOR THE RESPONDENT: **Mr. P. Dlamini**