IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 27/2014

In the matter between:

NHLANHLA MDAKA MOTSA Appellant

And

REX Respondent

Neutral Citation: Nhlanhla Mdaka Motsa v Rex *(27/2014)* [2016] *SZSC 28 (30 June 2016)*

Coram: **R. CLOETE AJA, C. MAPHANGA AJA and M. LANGWENYA AJA**

Heard: **13 MAY 2016**

Delivered: **30 JUNE 2016**

Summary: *Criminal Procedure – Culpable Homicide as a result of passion killing – Range of sentence in passion killing cases – Personal circumstances of the accused not taken into account – misdirection – Sentence of eight years imprisonment; two years suspended and ten months backdated too harsh – Sentence reduced to six years imprisonment; three years suspended taking into account ten months spent in custody pending the disposal of the case by the Court a quo.*

JUDGMENT

M. LANGWENYA AJA

[1] The Appellant was charged with the murder of Bheki Mahlonga Sihlongonyane on 23 June 2002 at or near Bulunga, Manzini. On the basis of a statement of agreed facts, the appellant was convicted in the High Court of Culpable Homicide and sentenced to 8 years imprisonment, 2 years of

which were conditionally suspended for 3 years. Additionally ten months of the sentence was deducted to reflect the period the appellant spent in custody before he was released on bail in May 2003. He now appeals to this Court against the severity of his sentence.

[2] The statement of agreed facts shows that on 22 June 2002 Busisiwe Matsebula who is the wife of the appellant visited the deceased-Bheki Mahlonga Sihlongonyane at his home. The deceased and Busisiwe Matsebula subsequently left the home of the deceased and went to a bush where they had sexual intercourse. They were caught in the act by the appellant. The appellant was carrying a bush knife. The appellant confronted and assaulted the deceased and his wife Busisiwe with the bush knife that he was carrying. The appellant hit Busisiwe Matsebula on the left arm and the deceased was hit more severely on the head.

[3] The appellant subsequently left the duo at the scene of the crime and went to raise an alarm. He informed David Ndiya Gamedze that he had killed his wife and the deceased because he found them having sexual intercourse in

the bush. In the company of David Ndiya Gamedze, the appellant went to the scene of the crime but did not find the deceased and his wife.

[4] The body of the deceased was found in a bush on 6 July 2002. Next to the body of the deceased there was a bush knife and a knife that, according to the statement of agreed facts, the appellant had used in the commission of the offence.

[5] The appellant was arrested on 13 July 2002 and was released on bail in May 2003. He was arraigned in the High Court on 18 June 2014, twelve years after the offence was allegedly committed. The appellant admitted that the death of the deceased was as a result of his unlawful and negligent conduct attributable to finding his wife having sexual intercourse with the deceased.

[6] The Pathologist determined the cause of death to be as a result of multiple injuries. The autopsy report showed that the deceased had sustained, *inter alia*, a chop wound of 9x1cms over the left parietal eminence of the head; a

chop wound of 5x1cms on the front of the forehead in the middle portion and a cut wound of 2cms in the palm of the right hand.

[7] After he had assaulted the deceased, the appellant raised an alarm and returned to the scene in the company of David Ndiya Gamedze.

[8] In sentencing the appellant, the learned trial Judge correctly pointed out that culpable homicide, involving as it does the taking of another's life, is a serious crime. He also correctly stated that courts have an obligation to discourage the resort to violence and use of lethal weapons to kill other people. He also stated that the offence of culpable homicide is prevalent in Swaziland.

[9] I am, however, of the view that there are varying degrees of severity in respect of counts of culpable homicide. The negligence complained of may either be slight or it can be more serious or even gross and bordering on recklessness. Consequently, the punishment in each case should therefore vary depending on the nature of the negligence involved and such deterrent

effect as it may be thought to have, may also require to be ameliorated according to the particular circumstances-See **Mathenga Solomon Masuku v Rex Criminal Appeal No. 3/2007.**

[10] The record shows that the appellant was traumatised by the incident; that throughout the hearing he demonstrated his remorse and contrition; that at the time he was sentenced he was sixty years old; that he has seven children, two of whom are attending school; and that he is a first offender. These personal circumstances of the appellant were acknowledged but not taken into account as the learned trial Judge stated that "I fully agree that the accused has shown remorse by pleading guilty." By not taking into account the appellant's personal circumstances, the learned Judge misdirected himself.

[11] To acknowledge but fail to give due weight to the personal circumstances of the accused for purposes of sentencing is contrary to the formula outlined in the *triad* as explained by **Friedman J in S v Banda and Others 1991 (2) SA 352 (B) at 355 A-C**

The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.

[12] When sentencing, a Court must also, it is trite, consider the purposes of punishment-deterrence, retribution, prevention and rehabilitation: See **Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SA 243 (SCA) para 13.**

[13] Further, that to these aims must be added the quality of mercy, though not mere sympathy for the offender.

[14] The trial Court correctly classified the culpable homicide in this case as the crime of passion. The crime of passion defence allows a person who has killed a lover or partner of his/her lover to argue that rage caused by a sexual or emotional rival generated the crime. The crime of passion defence, or more aptly, the partial defence of provocation reduces murder to culpable homicide.

[15] Our law recognizes a heat of passion defence in culpable homicide cases, providing that killings may be treated less harshly if the killer was in a heat of passion that would have left a reasonable person distraught and unable to exercise appropriate judgment. In such cases, a man who finds his wife engaged in sexual intercourse with another man is a textbook example of heat of passion cases.

[16] There is however some academic criticism that the crime of passion defence is based on a narrow macho conception of protecting one's sexual property; that, in the era of human rights protection, 'the heat of passion' defence has reached its sell by date. Absent a change of the law in this respect, the courts

are bound to apply the law as stated in Section 2 and 3 of the **Homicide Act 44 of 1959.**

[17] The Courts in both Swaziland and Botswana have passed sentences ranging from two years up to eight years in culpable homicide cases where the heat of passion was the defence. The following cases are instructive:

In Botswana and in the case of **S v Momoti 1974 (2) BLR 92, CA** where the accused killed a man he found with his wife in their bedroom suggesting sexual intimacy, the accused was convicted of culpable homicide and sentenced to three years imprisonment, part of which was suspended.

[18] In the case of **S v Moseki 1986 BLR 206** which was a case of a love triangle, the accused, after remonstrating with his girlfriend against associating with the other man, and being told by the girlfriend that she could do anything she wanted to do, stabbed her to death. He was found guilty of manslaughter and sentenced to seven years imprisonment.

[19] The case of **State v Scotch 2008 (2) BLR 490** was another passion killing case where the verdict was manslaughter. The learned Judge commented that on a scale of gravity it was a bad case which came close to murder, although it did not cross that threshold. The accused was sentenced to eight years imprisonment.

[20] In Swaziland there is the case of **R v Cedumona Enock Mamba HC 181/2008** where the accused killed a man he found having sexual intercourse with his wife in bed. He was acquitted and discharged.

[21] In the case of **R v Zakhele Mbhamali HC 192/2006,** the Court observed that this was a crime of passion where the accused was led to act as he did by the actions of his live-in lover who had a secret love affair on the side. The accused was found guilty of culpable homicide and sentenced to seven years, two years of which was suspended for a period of three years.

[22] The case of **R v Enock Sinaki Shongwe HC 410/2007** is another passion killing case where the offender was sentenced to six years imprisonment two years of which was suspended.

[23] There is also the case of **R v Banny Meshack Masangane HC 134/2008** another case of passion killing where the accused killed a man he suspected to be having sexual relations with his wife. He was sentenced to two years imprisonment.

[24] As can be seen from the cases cited above, there is paucity of decisions of crimes of passion in the Superior Courts of Swaziland.

[25] When the matter was argued by both Counsels for the appellant and respondent, we were referred to authorities where the court sentenced offenders for culpable homicide. Most of the cases cited did not concern passion killing. They concern mostly of quarrels after alcohol in-take, resulting in the killing of another person. Most of those authorities could not therefore be said to be relevant to the present case.

[26] The scale of cases referred to shows that sentencing in culpable homicide as a result of passion killing in Swaziland ranges from two years to seven years and in Botswana it ranges from three years to eight years. In the present case, it was at night and in the bush when the appellant caught the deceased having sexual intercourse with appellant's wife. The statement of agreed facts does not show that the appellant had time to think through the consequences of his actions when he found his wife in an amorous situation with another man. There is also no evidence that the appellant carried the weapons for the purpose of committing the crime. The appellant, it would appear happened to use the weapons when confronted with the gruesome find.

[27] From the sample of cases cited above, it is clear that eight years was handed down for the gross forms of passion killing. The statement of agreed facts does not reflect that the appellant was reckless when he committed this offence. From the sample of cases tried in Swaziland, the range of sentence in passion killing is from two years to seven years. This, however should be more of a guide without taking away the discretion of trial courts to impose sentences warranted by peculiar facts of each case.

[28] It is trite law that the issue of sentencing is one which vests a discretion in the trial court. An appeal court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one, or where the discretion has not been judiciously exercised. The circumstances in which a court of appeal will interfere with the sentence imposed by the trial court are where the trial court has misdirected itself on the facts or the law (**S v Rabie 1975 (4) SA 855 (A))**, or where the sentence that is imposed is one which is manifestly inappropriate, induces a sense of shock (**S v Snyders 1982 (2) SA 694 (A))**; or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed (**S v WT 1975 (3) SA 214**; **S v Hlaphezulu & Others 1965 (4) SA 439 (A); S v Van Wyk 1992 (1) SACR 147; Vusi Muzi Lukhele v Rex Criminal Appeal 23/ 2004; Benjamin Mhlanga v Rex Criminal Appeal 12/2007; Sifiso Zwane v Rex Criminal Appeal 5/2005; Mbuso Likhwa Dlamini v Rex Criminal Appeal 18/2011)**; or where there is an *over-emphasis of the gravity of the particular crime and an under-emphasis of the accused's personal circumstances* **(S v Maseko 1982 (1) 99 (AD); S v Collett 1990 (1) CR at 465)**

[29] The trial court, it would appear to me acknowledged the personal circumstances of the appellant in its judgment but did not give them due weight. The trial court appeared to place emphasis on the ubiquity of such offences and the need to curb them by meting appropriate sentences and in the process emphasised the gravity of the crime and under-emphasised the appellant's personal circumstances (**S v Maseko 1982 (1) SA 99 (AD))**. For this reason this Court is at large to re-consider the sentence afresh.

[30] The sentence of eight years imprisonment, albeit partially suspended, was in the circumstances in my view, therefore too harsh and requires this Court to interfere with it for that reason.

[31] The matter served before the High Court twelve years after the crime was committed. From the record it is unclear why there was such a delay. It is often said that justice delayed is justice denied (might I add, derailed). While this may be an overstatement in some contexts, it does underline the need for reasonable expedition. The unexplained delay is to be deprecated.

[32] In my view the sentence of six years imprisonment, three years conditionally suspended would be an adequate one.

In the result the appeal succeeds to this extent.

[34] The conviction for culpable homicide is confirmed. The sentence of the Court *a quo* is set aside and there is substituted for it the following sentence:

Six years imprisonment, three years of which are suspended for three years on condition that the appellant is not convicted during the period of suspension of an offence of which violence against another person is an element. The effective sentence will take into account the period of ten months that the appellant spent in custody from 13 July, 2002 until May, 2003 when he was released on bail.

M. LANGWENYA AJA

I agree _____

R. CLOETE AJA

I agree _____

C. MAPHANGA AJA

For the Appellant: Mr. W. Maseko

For the Respondent: Ms. N. Masuku