IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane Criminal Appeal Case No. 33/2014

In the matter between:

MFANAWENKHOSI NDLOVU **Appellant**

AND

REX **Respondent**

Neutral citation: *Mfanawenkhosi Ndlovu vs Rex (33/2014) [2016] SZSC 41(30 June 2016)*

Coram: **MAPHANGA AJA, J. MAGAGULA AJA AND MANZINI AJA**

Heard: 23 May 2016

Delivered: 30 June 2016

Summary – *Criminal law – conviction for murder – appeal against sentence – trial court failing to take into account sentencing trends for murder convictions and youthfulness – sentence reduced to 14 years.*

JUDGMENT

MANZINI AJA

[1] The appellant was indicted for murder before the High Court, and was subsequently convicted and sentenced to imprisonment for a period of eighteen (18) years without the option of a fine by Simelane J.

[2] The brief facts of this case are that on or about the 1st January 2009, and at or near Ekutsimleni area, the Appellant unlawfully and intentionally killed the deceased (Sabatha Dlamini) by stabbing him once on the chest. The incident occurred during an end of year party to which the Appellant had been invited. The Appellant came to the party armed with a knife, because he had been allegedly threatened by some person (not the deceased). On the day in question he had been drinking alcohol. During the course of the party there was an altercation between the Appellant and the deceased, resulting in the Appellant stabbing the deceased in the chest. The deceased died from the stab wound.

[3] Initially, the Appellant's erstwhile attorneys had filed an appeal against both conviction and sentence. The Appellant then had a change of mind

and the appeal is now against sentence only. This was confirmed by his current attorney, Mr. S. Hlophe.

[4] Mr. Hlophe, with the leave of this Court, filed an Amended Notice of Appeal, in terms of which the appeal is on the following grounds:

1. The Court a quo misdirected itself in law in failing to take into account the sentencing trend in murder cases in this jurisdiction;
2. The Court a quo erred in law and in fact in failing to take into account the facts and circumstances of the case in coming to an appropriate sentence;
3. The Court a quo misdirected itself in approaching the sentencing of the Appellant in a spirit of anger;
4. The sentence imposed by the Court a quo is severe and harsh in the circumstances of the present case.

[5] At the outset it was acknowledged by Counsel for the Appellant that the generally applicable principle is that the imposition of an appropriate sentence is a matter which lies within the discretion of a trial court (High Court) and that this Court will only interfere on limited grounds. This is trite, and there is a plethora of authority on this point. See **Samkeliso Madati Tsela v Rex (2010) [2011] SZSC 13 (31 May 2012); Mandla Bhekithemba Matsebula v Rex (02/2013) [2013] SZSC 72 (29**

November 2013); Elvis Mandlenkhosi Dlamini (30/2011) [2013] SZSC Mbabane J. Tsabedze, Sandile W. Dlamini v Rex (29/2011) [2011] SZSC 12 (31 May 2012); Musa Khotso Dlamini v Rex (28/2010) [2010] SZSC 11 (30 November 2010); Sibusiso Goodie Sihlongonyane v Rex (14/2010) [2011] SZSC 45 (30 November 2011).

[6] Thus, Counsel was constrained to persuade us that this was a proper case warranting intervention by this court. His submissions were not necessarily in the order of the Amended Notice of Appeal.

[7] At first, it was argued that the court *a quo* failed to take into account the facts and circumstances of the Appellant, specifically youthfulness, in its consideration and assessment of mitigating factors, yet youthfulness was considered as an extenuating circumstance. Counsel argued that youthfulness does not appear on the list of mitigating factors taken into account by the court *a quo*, which are listed in paragraph [7] of the judgment. Indeed, youthfulness does not appear on the list.

[8] Second, it was argued that the Court *a quo* failed to take into account sentencing trends for murder convictions in our jurisdiction by comparing decided cases. Mr. Hlophe cited a number of cases involving murder convictions and sentences imposed therein. These will be dealt with later

in the judgment. Mr. Hlophe urged the Court to reduce the sentence to 12 (twelve) years.

[9] Third, it was argued that in sentencing the Appellant the court *a quo* acted in a spirit of anger.

[10] The Crown, on the other hand, argued that the Appellant was appropriately sentenced. Ms. B. Fakudze submitted that, as regards to youthfulness, it was sufficient that the court *a quo* had considered it as an extenuating circumstance. She further argued that youthfulness is not a mitigating factor, once it has been considered as an extenuating circumstance. It was also contended that the court *a quo* had sentenced the Appellant within the sentencing range, and that, therefore, there was no misdirection or irregularity.

ANALYSIS OF ARGUMENTS AND APPLICABLE LAW

[11] At paragraph [9] of his judgment Simelane J stated the following:

> **"In the circumstances I am of the considered view that a sentence of eighteen (18) years imprisonment without an option of a fine is appropriate in this matter and it is so ordered."**

[12] There is no reference at all to the sentencing trends for murder convictions in this jurisdiction.

[13] The importance of the principle of uniformity in sentencing has been dealt with by this court in a number of its decisions. For instance in the case of **Mandla Bhekithemba Matsebula v Rex** (supra) Moore JA at paragraph [40] stated the following:

> **"It follows from the foregoing comparison that the sentence of 25 years imposed by the trial judge violates the principle of uniformity of sentencing and must be set aside on this ground as well."**
>
> (emphasis added)

[14] The **Matsebula** case clearly emphasises that a trial court is enjoined to consider the principle of uniformity of sentencing in considering an appropriate sentence.

[15] In the case of **Samkeliso Madati Tsela v Rex** (supra) at paragraph [21] Ebrahim JA stated the following:

> **"[21] The principles of uniformity of sentences did not escape the trial judge. He undoubtedly had that precept in mind when he wrote at paragraph [10] ….**

[22] Hlophe J was <u>careful not to buck the prevailing sentencing norms</u> established by recent awards upheld by this court. He pitched the sentence imposed by the appellant at 12 years imprisonment upon the court of murder which, as the table below clearly illustrates, is well within the boundaries of appropriate sentences approved of by this court."

(emphasis added).

[16] The **<u>Tsela</u>** case undoubtedly confirms that an appeal court acts well within its powers if it ascertains whether a trial court was alive to the principle of uniformity of sentences.

[17] However, as was pointed out by Agim JA in the case of **<u>Mandla Tfwala v Rex (36/2011) [2012] SZSC 15 (31 May 2012)</u>**

"Reliance on the range of previous sentences for the same offence must be subject to the peculiar facts of each case especially the personal circumstances of the accused and the circumstances of the commission of the offence".

[18] Further, in **<u>Bhekizwe Motsa v Rex (Criminal Appeal No. 246/2008)</u>** this court cautioned that –

"the practice of being guided by the range of sentences previously imposed by courts for the same offences does not impair in any way the discretionary power of sentencing vested on a court by statute. So that a court can in justifiably compelling circumstances impose outside the range of custodial sentences for that offence".

[19] It is with reference to these principles in mind that the judgment of Simelane J must be considered. It is silent on sentencing trends in this jurisdiction. The fact that he made no reference at all to the principles adumbrated above empowers this court to interfere with his judgment on sentence. I now turn to deal with the sentencing trends in this jurisdiction.

[20] In a number of cases this Court has considered 15 (fifteen) years imprisonment to be the midpoint of sentences for murder convictions.

[20.1] In the case of **Sihlongonyane v Rex (Criminal Appeal 15/2010)** a sentence of 20 years was reduced to 15 years.

[20.2] In the case of **Sibusiso Goodie Sihlongonyane v The King** (supra) this Court reduced a sentence of 27 years imprisonment for murder with extenuating circumstances to 15 years.

[20.3] In the case of **Sibusiso Shadrack Shongwe v Rex** (supra) this Court reduced a sentence of 22 years imprisonment for murder with extenuating circumstances was reduced to 15 years.

[20.4] In the case of **Mbabane J. Tsabedze and Another v Rex** (supra) this court reduced a sentence of 15 years imprisonment to 11 years for a murder involving several stab wounds.

[20.5] In the case of **Elvis Mandlenkhosi Dlamini v Rex** (supra) this Court upheld a sentence of 15 years imprisonment. The court considered the relatively young age of the appellant in upholding the sentence. The appellant had brutally and fatally assaulted the deceased with an iron rod.

[20.6] In the case of **Mandla Tfwala v Rex** (supra) this court upheld a sentence of 15 years imprisonment. The court considered the relatively young age of the appellant in upholding the sentence. The appellant had shot the deceased at a blank range (10 metres) three times in quick succession.

[21] On the issue of youthfulness I have considered that the Appellant was 25 (twenty five) years old at the time of the commission of the offence. In the case of **Njabulo Mamba v Rex (10/2015) [2015] SZSC 31 (09 December 2015)** this Court, per Hlophe AJA, in reducing an 18 year sentence to 12 years, in respect of an appellant who was 17 years old at the time of the commission of the offence, at paragraph [15] stated the following:

> **"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."**

[22] In *casu*, the Appellant was a relatively young man (not a juvenile) as in the case referred to above, and this should count in his favour. In the circumstances, taking into account the sentencing trends in this jurisdiction, the youthfulness of the Appellant, and the interests of society, I am convinced that a sentence of 14 years imprisonment would have been appropriate.

[23] The appeal against sentence is allowed and the Court makes the following order:

ORDER

It is the Order of this Court that:

(i) The appeal against sentence be and is hereby upheld.

(ii) The sentence of the trial court of 18 years imprisonment for murder with extenuating circumstances is hereby set aside.

(iii) The Appellant is sentenced to 14 years imprisonment for the offence of murder with extenuating circumstances.

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M.J. MANZINI
ACTING JUSTICE OF APPEAL

I agree.

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C. MAPHANGA
ACTING JUSTICE OF APPEAL

I agree.

J. MAGAGULA
ACTING JUSTICE OF APPEAL

For the Appellant: Mr. S. Hlophe

For the Respondent: Ms. B. Fakudze
(appearing with Ms. N. Masuku)