IN THE SUPREME COURTOF SWAZILAND

CriminalAppeal Case No. 36/2014

In the matter between:

MFANASIBILI CHARLES DLAMINI **Applicant**

And

REX **Respondent**

Neutral Citation: *Mfanasibili Charles Dlamini vs Rex (36/2014)* [2016] SZSC 76 (30thJune 2016)

Coram: C. MAPHANGA, AJA

Z. W. MAGAGULA, AJA

M. LANGWENYA, AJA

Date Heard: 20th MAY 2016

Date Handed Down: 30thJUNE 2016

JUDGMENT

MAGAGULA AJA.

[1] The Appellant was convicted of murder and sentenced to eighteen years imprisonment without the option of a fine. He has now appealed to this court against both conviction and sentence.

[2] The brief facts of the matter are that the Appellant, the deceased and his girlfriend were in a group of people returning from a local bar in Malkerns at about midnight. The group apparently separated as people reached their destinations at a location called Mangozeni in Malkerns. Later on an alarm was raised which was heard by amongst others PW1, Celumusa Sidumo Zwane. PW1 ran to where he heard the alarm and found the deceased on the ground and the Appellant assaulting him with a knob stick. According to PW1 Appellant continued assaulting deceased despite pleas from him (witness) to stop. PW1 then ran to the Malkerns Police Station which was just across the road from where the assault was taking place.

The police arrived and took deceased to hospital who later succumbed to his death.

[3] In cross-examination of this witness, Appellant's counsel suggested to him that it is deceased who started the fight, that the knob stick was actually used by deceased to assault Appellant before Appellant managed to take it from him and hit deceased. Of course this witness was not present when the fight between Appellant and deceased started.

[4] Another witness, Thembinkosi Goodwill Masuku, PW2 told the Court *a quo* that he heard a female voice raising an alarm. He ran in the direction of the sound and found the Appellant assaulting deceased who was on the ground. He tried to stop the assault but was kicked away by Appellant. The police soon arrived and took deceased to hospital. This witness told the court that he knew both Appellant and deceased very well. He met Appellant on the street the following day and his inquiry on why he, Appellant, assaulted the deceased was met with an

arrogant answer that he (Appellant) would be happy if deceased were dead. At that stage it was not known that deceased had died of his injuries in hospital. In cross-examination, the suggestion that Appellant was acting in self defence was put to this witness who professed no knowledge of the events prior to his arrival at the scene.

[5] The deceased was finally rescued by the third crown witness, Idah Madzandza Masilela. She told the court that upon hearing an alarm being raised, she proceeded to the scene and found Appellant assaulting deceased with a knob stick. This witness knows the Appellant very well such that when she arrived at the scene she called out his name told him to stop assaulting the deceased, he stopped apologized to her.

[6] There is also the evidence of Nothando Gab'sile Vilakati PW6. She was deceased's girlfriend she was among the group making their way from the bar at about midnight on the day. It was dark, and someone grabbed and closed her mouth. This unknown person threatened to kill her if

she raised the alarm as he dragged into a dark alley-way whoever had grabbed her then let go and ran away. Later she heard a voice say I will beat you until you die. On getting closer to the source of the threat she saw that the person being assaulted was her boyfriend, the deceased; he was on the ground and his assailant was using a stick-like object.

[7] In his evidence, Appellant told the Court *a quo* that he was on his way to his cousin's place where he was to spend the night. He heard the cry of a female voice. He ignored the noise and proceeded on his way when a man came running towards him. The man pulled something from his pants which he thought might be a fire-arm he started running away, but the man caught up with him and started assaulting him with a knob stick. Appellant was able to get the better of his assailant, he disposed him of the knob stick, but in the scuffle he was stabbed with a sharp object on the hand by the attacker. He then saw the woman whose voice he heard crying run away to raise the alarm. He beat his assailant with the knob stick just to

over-come him. He then ran away and spent the night not at his cousin's place but with another family in the same location. Appellant said he was treated for his injuries at the Mdzimba Army Barracks where he was employed as a soldier. He was given a sick note, but none was produced in court as evidence. It was also appellants evidence that he had taken some alcoholic beverages on the night.

[8] After rejecting Appellant's version that he assaulted the deceased in self defence, the Court *a quo* found him guilty of murder with extenuating circumstances. Appellant has challenged the verdict and in his grounds of appeal he maintained that the trial court erred: in finding him guilty of murder when he did not have the intention to kill the deceased; by rejecting his evidence of self defence; and by relying on the evidence of PW6, the deceased's girlfriend; and in finding that there was no emergency, lastly Appellant complained that the sentence imposed by the trial court was harsh and induces a sense of shock. In the alternative appellant argues that he ought to have been found guilty of culpable homicide because he

reasonably could not foresee the possibility of his actions causing the death of the deceased.

[9] The defence of self defence has now been enshrined in Section 15 (4) (a) of the Constitution of Swaziland Act No. 1/2005. The said provision essentially provides that a person shall not be regarded as having been deprived of life in contravention thereof if the death is as a result of the use of force to such an extent as is reasonably justified and proportionate in the circumstances for the defence of any person from violence. The concept of self defence has fallen for consideration in this and other jurisdictions.

[10] Beck J. A. in ***Sipatji Motsa vs Rex (2000-2005) SLR 79 at 84*** quoting Watermeyer J.A. in R v Molifi 1940 AD202 at 204

> ***"Homicide in self defence is only … under certain strictly limited conditions – the means of defence must be commensurate with the danger and dangerous means of defence must not be adopted when the***

threatened injury can be avoided some other reasonable way".

This was further crystalized by Ramodibedi CJ in ***Siphamandla Henson Dlamini vs Rex Supreme Court of Appel Case No. 23/2013*** (Unreported) who after analyzing the authorities said:

> ***"The underlying principles from these authorities is that self-defence is only available if three requirements are met, namely, if it appears as a reasonable possibility on the evidence that:-***
>
> ***(1) "the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;***
>
> ***(2) the means he used in defending himself were not excessive in relation to the danger; and***
>
> ***(3) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger".***
>
> See ***Thulani Peter Dlaminni vs R Criminal Appeal No. 7/2004.***

[11] In the Botswana Court of Appeal Case of ***Magula vs The State [2006], BLR 209*** Tebbutt J. P stated the principle as follows:

> ***"The courts have repeatedly emphasized that in considering whether an accused has acted in self defence, the court should not take what has been described as 'the Arm-chair approach' to the facts. It is all very well sitting in the cool, calm atmosphere of the Court to opine that the accused should have taken this step when faced with an unlawful attack upon him. The trier of fact must, however try to place himself in the position of the accused in the circumstances that existed at the time…It must also be remembered that it is not necessary that the accused person should have feared for his life. He can act in self defence if he had a reasonable apprehension that the aggressor intended to inflict grievous harm on him".***

[12] I now to consider whether the Appellant in this matter was facing an attack which made it necessary that he defend himself. The Appellant's evidence is that he was attacked by the deceased for no apparent reason. It is only his belief that deceased wanted to rob him. Granted that the

only available evidence as to how the conflict began is that of the Appellant, and I may accept this version without necessarily holding so; did he use proportionate force? This question is answered by the evidence of the crown witness who all said they found the deceased on the ground being assaulted with a knob stick. PW1 tried to intervene and was threatened by the Appellant who continued the assault on deceased.

[13] The injuries suffered by the deceased are, in my view consistent with repeated blows and this is not the kind of injuries that would be expected to be inflicted by a person whose sole purpose is to ward-off an attack against him.

[14] According to the report of the pathologist, which was handed into the record by consent of the parties the deceased suffered:

(1) Sutured wound over the right eye brow 2.1cm parietal region 3 cm length, left forehead 3cm with contused abrasion over chest 7.6cm area. On reflection of scalp contusion 9cm from to parietal region with depressed fracture 5.2x4.4 cm area linear fracture middle cranial

fosa, diffuse subdural haemorrhage over brain about 140ml.

(2) Abrasion over right shoulder 5x2.1cm back of truck middle 1x1.1cm.

(3) Abrasion over left hand 2.7cm area.

[15] None of the witnesses saw a fight, none of the witnesses can place the knob stick in the possession of the deceased. For these reasons I am disinclined to believe the version given by the Appellant. The Appellant must have foreseen the possibility of death arising from his actions but was reckless whether it ensued or not. This is borne out by his continued assault on the deceased when he was lying down and not a threat to him. I am further not able to come to a conclusion that there was a sudden emergency confronting the Appellant. The Appellant does meet the condition for the reasons herein above the appeal against conviction in dismissed.

[16] I now turn to the question of the sentence. Having found the Appellant guilty of murder with extenuating circumstances, the Trial Court sentenced the Appellant to

eighteen years without the option of a fine. The Appellant argues that this sentence in harsh and induces a sense of shock. It was submitted on behalf of the Appellant that he had shown remorse, that he was 26 years old at the time of the commission of the offence, that he was a first offender, that the offence was not pre-planned but Appellant acted against what he believed to be imminent danger to his person.

[17] He has six dependents; he is not well educated, having only achieved a Form 3 level of education, he lost his father when he was 5 years old and his mother when he was 17 years; when the matter was argued before this court Ms. Dlamini who appeared for the Appellant also submitted, and this was conceded by Mr. Makhanya who appeared for the crown, that there is no evidence that the appellant was aggressor and this should weigh in favour of the Appellant.

[18] In its judgment the Court *a quo* after enumerating the mitigating factors as in above, save the fact that it was not

established in evidence that Appellant was the initial aggressor then had this to say at paragraph 9:

> ***"[9] In my view the interests of the society outweighs the mitigating factors. This is so because the incidents of unwarranted killing of innocent persons with lethal weapons, especially among the youth of this kingdom is fast becoming a nightmare and the court has the constitutional duty to discourage this. There must be instilled in this nation the sacredness of life as guaranteed in the Constitutional Act".***

[19] In the Case of ***Elvis Mandlenkosi Dlamini v Rex Criminal Appeal No. 30/2011*** Maphalala J. A. (as he then was) had this to say about sentence:

"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 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 principle has been followed and applied consistently by this court over many years and it serves as a yard stick for the determination of appeals brought before this court".

[20] I respectfully agree with the principle as enunciated by the court hereinabove. The court also has to consider the interests of society, the personal circumstances of the Appellant and the crime, the so called triad. See ***S v Zinn 1969 (2) 537 (AD) at 540.*** Holmes JA ***in S vs Rabie 1975 (4) SA 855 at 862*** put it in a different way:

> ***"Punishment should be for the criminal as well as the crime, be fair to the society, and be blended with a measure of mercy, according to the circumstances".***

[21] In the circumstances of this particular case I do not believe that there was a misdirection per se by the trial court. However, it is not lost to me that the trial court may have overlooked the fact that in the totality of the evidence there remains a lacuna that has not been filled. The evidence of the Appellant is that he was attacked first

and he was merely acting in self defence. This lacuna may be in significant to persuade the court that the defence of self-defence was established, but it is enough to warrant an interference with the sentence by any direct evidence other than that even if it is correct, the force applied was disproportionate to that required.

What the trial judge says in paragraph [9] of his judgment though is not lost to this court.

> ***"This is because the incidents of unwarranted killings of innocent persons…"***
>
> ***"The court has a constitutional duty to discourage this. There must be instilled in this nation the sacredness of life as guaranteed by the Constitutional Act".***

[22] It would seem to me that the trial Judge approached the sentence in a manner not consistent with the authorities. Holmes J. in ***S vs Rabie*** (Supra) expressed the following:

> ***"A Judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve the delicate balance between the crime, and the criminal and the interest of***

society which his task and the objects of punishment demand of him".

[23] In the circumstances, this court finds that it may be fortified in interfering with the sentence imposed by trial court. I am justified in this belief by the Supreme Court in ***Samukeliso Madati Tsela v Rex Criminal Appeal Case No. 20/2010*** quoted with appeal by Hlophe AJA in ***Njabuliso Mamba v Rex Criminal Appeal Case No.10/2015.***

> ***"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 extreme of the range, provided always that such a course is justified by the peculiar circumstances of the case and provided also that the sentence provides clear and cogent reasons upon the face of the record for the sentence which he or she imposes".***

[24] With the above in mind, it seems to me that a sentence of 13 years is appropriate. The court then makes the following order:

(1) The sentence of the court a quo is hereby altered to 13 years

(2) The sentence is to take into account a period of 3 months Appellant was in custody before being admitted to bail.

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Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree

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C. MAPHANGA
ACTING JUSTICE OF APPEAL

I also Agree

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M. LANGWENYA
ACTING JUSTICE OF APPEAL

For the Appellants: Ms. Dlamini

For the Crown: A. Makhanya