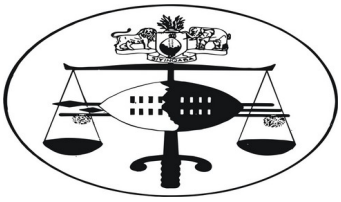

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case No: 23/2017

In the appeal between:

BONGANI BAVUKILE DLAMINI APPELLANT

And

REX RESPONDENT

Neutral citation: *Bongani Bavukile Dlamini vs Rex (23/2017) [2020] SZHC 03 (2020)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**

JUSTICE R. J. CLOETE, JA

JUSTICE J. P. ANNANDALE, JA

Heard : 03rd March, 2020

Delivered : 21st April, 2020

SUMMARY

Criminal appeal – appellant charged and convicted by the *court a quo* of murder without extenuating circumstances – *court a quo* sentenced appellant to twenty-three (23) years imprisonment after considering the triad – appellant lodged appeal against both conviction and sentence to this Court – the ground of appeal against conviction being that the Crown failed to establish *mens rea* in the form of intention beyond reasonable doubt – the basis for the appeal on sentence being that the *court a quo* did not consider intoxication and youthfulness of the appellant as extenuating circumstances;

On appeal this Court held that the Crown had established *mens rea* in the form of *dolus eventualis* beyond reasonable doubt when regard is to the nature of the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted;

Held further that the sentence imposed by the *court a quo* was not severe in view of the brutality of the death of the deceased and the multiple stab wounds inflicted upon the deceased;

Held further after due notice to the appellant and submissions by Defence Counsel that the Court exercising its discretion in terms of section 5 of the Court of Appeal Act was increasing sentence by two years in light of the existing aggravating circumstances in the death of the deceased;

Held further that giving notice to increase sentence during the appeal hearing was sufficient on the basis that the appellant was legally represented by Defence Counsel and who was given the opportunity to address the Court on the possible increase of the sentence in accordance with section 5 of the Court of Appeal Act;

Accordingly, the appeal on both conviction and sentence is dismissed and the sentence imposed by the *court a quo* is set aside and substituted with a sentence of twenty-five years imprisonment.

JUDGMENT

M. C. B. MAPHALALA CJ:

[1] The appellant was charged and convicted of murder without extenuating circumstances by the *court a quo*. He was sentenced to twenty-three (23) years imprisonment.

[2] The appellant lodged a Notice of Appeal against the judgment of the *court a quo* challenging both conviction and sentence. The basis for the appeal against conviction is that the Crown had failed to establish the commission of the offence of murder beyond reasonable doubt.

[3] During the trial proceedings the appellant had conceded that the deceased died as a result of the stab wounds which he had inflicted upon the deceased; hence, the *actus reus* is not disputed. He pleaded self-defence contending that the deceased was attempting to sodomize him in the bedroom. The *court a quo* did not misdirect itself in rejecting this defence on the basis that the appellant had failed dismally to establish the requisites of self-defence.

[4] Her Ladyship Justice Ota JA sitting with Justice Ramodibedi CJ and Justice M. C. B. Maphalala JA, as he then was, delivered a unanimous judgment in Malungisa Antonia Bataria v. Rex[1]:

> **"25. A starting point in demonstrating why I reach the conclusion above, is to acknowledge that the defence of self-defence has constitutional hegemony in section 15(4) of the Constitution Act 2005. That legislation postulates that a person shall not be regarded as having been deprived of life unlawfully and in contravention of the said section, if that person dies in consequence of force applied to such an extent as is reasonably justified in the circumstances, for the defence of any person from violence or for the defence of property.**
>
> **26. An accused who raises this defence must elicit evidence to establish it. What must be**

[1] Supreme Court of ESwatini Criminal Appeal Case No. 6/2014 at para 25 and 26

established is now judicially settled as the following:-

(a) that he was unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of the attacker.

(b) the means he used in defending himself were not excessive in relation to the danger.

(c) the means he used in defending himself were the only or least dangerous means whereby he could have avoided danger."

[5] Justice Ota JA in the Malungisa Antonia Bataria[2] case further quoted with approval the judgment of Justice Twum JA sitting in the

[2] (supra) at para 27

Botswana Court of Appeal in Mmolotsi v. The State[3] where his Lordship had this to say with regard to self-defence:

> **"Under the law of this country when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should be no more than reasonably necessary in the circumstances. The law also means that if the killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would-be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self-defence."**

[3] [2007] 2 B.L.R. 708 (CA) para 44

[6] There is no evidence that the appellant was unlawfully attacked by the deceased; hence, there is no basis in law for the appellant to invoke self-defence. If there was indeed an unlawful attack by the deceased, the appellant would have shouted for help from his friend PW9 Khulani Dylan Dlamini who was sitting in the next room. The contention by the appellant that he had not shouted because there was loud noise from the music system is both misconceived, mischievous and misleading. PW2 Nompumelelo Primrose Nkambule who was a neighbour to the deceased heard vividly when the deceased was shouting and screaming asking the appellant why he was stabbing him.

[7] Justice Mlangeni J in his judgment in the *court a quo* summarises the evidence of PW2 in this regard[4]:

> **"9. The evidence of PW2, Nompumelelo Primrose Nkambule, gives a clear and independent account of the commotion culminating in his injury and eventual death. In the night of the 5th September,**

[4] Para 9 and 10 of the judgment

2014 she was awoken by very loud noise which reverberated on the entire building structure. This noise was a combination of music from a music system, some banging against a wall and a loud scream from someone in pain saying “ungigwazelani”**, why are you stabbing me? Some of the noise was like furniture being forcibly moved around in the deceased’s residence. The noise was so scary that she ran to hide underneath the kitchen sink in her residence and called the emergency number 999 using her cellular phone. She also contacted other teachers on residence and alerted them that things were bad, they better remain within their residences.**

10. Whilst she was communicating with colleagues and at the height of apprehension “the deceased knocked at my door asking for assistance. I told him I was assisting him but did not open the door.” In the meantime a colleague, Obert Sikhulu

Dlamini who is PW1, was already with the deceased outside and the witness Nompumelelo Nkambule then opened her door. The deceased had blood all over the body, suggesting that he had multiple injuries. At that stage he was weak and had struggled to move from his residential unit to the door of witness Nompumelelo Nkambule who was the immediate next door neighbour. When Nompumelelo first saw the deceased he was sitting down. He said he was feeling cold, and the witness provided a blanket to cover the deceased. Frantic efforts were made to take him to hospital, which was eventually achieved through the use of the deceased's motor vehicle. A few hours later, news came that the deceased had died even before he got any medical assistance at Mankayane hospital."

[8] It is common cause that the appellant was armed with a dangerous knife and the deceased was not armed with any weapon. The

appellant does not offer any explanation why he was armed with such a dangerous weapon in the midst of friends. Furthermore, the scenario described by PW2 is very scary being the very loud noise which reverberated on the entire building; the noise being a combination of music from a music system, some banging against a wall, a loud scream from the deceased asking the appellant why he was stabbing him as well as noise like the forceful removal of furniture within the deceased's residence. The scenario described by PW2 shows that the deceased was on the receiving end from the appellant's unlawful attack.

[9] It is apparent from the evidence that after the appellant had stabbed the deceased twenty times and banged him against the wall, he emerged from the bedroom stained in blood. When PW9 asked him what had happened, the appellant did not answer. After brutally stabbing the deceased, the appellant left the scene, with his friend PW9 Khulani Dylan Dlamini and he did not assist the deceased to go to the hospital.

[10] The extent of the injuries suffered by the deceased was substantial and it defeats any notion of self-defence allegedly invoked by the appellant. Judge Mlangeni J in the *court a quo* describes the extent of the injuries as follows:[5]

> **"11. It is common cause that the deceased died as a result of stab wounds inflicted upon him by the accused person using an okapi knife. He sustained no less than twenty stab wounds. This is supported by the evidence of Dr R. M. Reddy, the Police Pathologist, whose evidence was not challenged. He was paraded as PW8 and handed in his post-mortem report by consent and it was marked as exhibit** "D"**. Probably because of the multiplicity of the stab wounds and for the sake of brevity the doctor identified them in clusters 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10. Some of these clusters each related to several stab wounds. To**

[5] Para 11 and 12 of the judgment *a quo*

illustrate this I quote cluster 1 in full herein below:-

'1. Cut wound over scalp right parietal region 2.5 cm x 0.5 cm, occipital region occipital centre 2 cm x 0.7 cm, left side deep region 2.1 cm x 0.5 cm scalp present'.

12. In this cluster there are three different stab wounds, while in cluster 2 there is only one, being 'contusion, abrasion left eye outer aspect 2.5 cm x 0.4 cm.' The clusters were apparently determined by location, so that stab wounds around one area were described together in one paragraph. It is on the basis of counting the individual wounds that I have come to the conclusion that the deceased sustained twenty stab wounds. It is dreadful to imagine the pain that the deceased experienced before his demise. The doctor described this

macabre incident as "very rare". Of the twenty injuries, clusters 4 and 9 were fatal. Cluster 4 was on the neck while cluster 9 was on the chest, lung deep, involving "muscle intercoastal structures, pleura, lung upper lobe, and angle sharp back to front pleural cavity contained about 900 ml present."

[11] It is common cause that the deceased died from multiple injuries inflicted upon him by the appellant. The report on post-mortem examination shows the brutality of the injuries sustained by the deceased before his death. Dr R. M. Reddy, the Police Pathologist describes the injuries sustained:[6]

"The following ante mortem injuries seen:-

1. Cut wound over scalp right parietal region 2.5 cm x 0.5 cm occipital region centre 2 cm x 0.7 cm scalp deep present.

---

[6] Pages 2, 5 and 9 of the Post-mortem report compiled by Dr. R. M. Reddy, the Pathologist and conducted on the body of the deceased

2. **Contusion abrasion left eye outer aspect 2.5 cm x 0.4 cm.**

3. **Cut wound over chin left 1.5 cm x 1 cm muscle deep.**

4. **Punctured wound front of neck middle away from midline neck deep present 2.1 cm x 0.7 cm. It involves muscles blood vessels, thyroid cartilages effusion blood in soft tissues present edges clean cut angle sharp. Front to back downwards.**

5. **Cut wound over neck lower region, outer aspect 1.7 cm x 1 cm, 1 cm x 0.5 cm, back of neck 1.8 cm x 0.7 cm muscle deep present.**

6. Cut wound over top of left shoulder medial to it present 1.5 cm x 0. 5 cm, 3 cm x 1 cm, front 1.7 cm x 0.6 cm muscle deep.

7. Cut wound over left arm outer aspect back 2.1 cm x 1 cm, 1.9 cm x 1 cm, arm 2. 7 cm x 1.3 cm muscle deep.

8. Cut wound over back of right shoulder 1.7 cm x 0.8 cm muscle deep.

9. Punctured wound over back left chest upper region obliquely placed 2.3 cm x 1 cm lung deep. It involves muscles intercoastal structures, pleura, lung upper lobe (1.1 cm x 7 cm) edges clean cut. Angle sharp back to front pleural cavity contained about 900 ml present.

10. Cut wound over right arm 2.1 cm x 0.7 cm, front of shoulder 1.9 cm x 0.7 cm, below clavicle

1.3 cm x 0.7 cm muscle deep."

[12] The appellant's version that he was under attack from the deceased, and, that he was defending himself by warding off unwarranted sexual attacks from the deceased cannot stand in the light of the totality of the evidence. As observed in the preceding paragraphs the appellant did not shout for help from his friend who was in the next room. There was no threat of physical harm to his person. According to his own evidence he was free after the alleged first sexual advance and he could have left the bedroom. I am convinced that the explanation given by the appellant is false in light of the evidence before this Court; there is no reasonable possibility of his explanation being true.

[13] Watermeyer AJA in R V Difford[7] re-iterated the long standing principle that the accused does not bear the onus to convince the Court of the truth of any explanation he gives. His Lordship had this to say:

> **"The legal position is then summed up thus by the Learned Judge: 'It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any**

[7] 1937 AD 370 at 373

possibility of his explanation being true, then he is entitled to his acquittal . . . ”

[14] Having dealt with the element of *actus reus* or the unlawfulness of the conduct of the appellant, I now turn to deal with the second element of criminal liability being *mens rea.* It is common cause that the Crown set out to prove the existence of *dolus eventualis* as opposed to *dolus directus;* and, the Crown was able to prove the existence of *dolus eventualis*. When the appellant brutally stabbed the deceased repeatedly with the knife and inflicting twenty multiple injuries, he foresaw the possibility of his unlawful conduct causing the death of the deceased but he persisted in such conduct despite such foresight.

[15] His Lordship Tebbutt JA in Thandi Tiki Sihlongonyane v. Rex[8] summarised the essential requirements of *dolus eventualis* as follows:

“They are:

1. Subjective foresight of the possibility, however remote, of the accused’s unlawful conduct causing death to another;

[8] Criminal Appeal No. 40/1997 at page 4 of the judgment

2. Persistence in such conduct, despite such foresight;

3. The conscious taking of the risk of resultant death, not caring whether it ensues or not;

4. The absence of actual intent to kill."

[16] His Lordship Tebbutt JA continued and said the following:[9]

"In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually

[9] Thandi Tiki Sihlongonyane v. Rex (supra) at page 5

foresaw it . . . . The issue in *dolus eventualis* is whether the accused himself or herself foresaw the consequences of his or her act . . . .”

[17] His Lordship Justice Cohen ACJ in Beadle v. Rex[10] dealt with *mens rea* in the form of *dolus eventualis* and proffered the following definition:

“Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not. The requirements according to the learned authors are: (i) subjective foresight of (ii) possibility and (iii) recklessness . . . . The subjective test . . . takes account only of the state of mind of the accused, the issue being whether the accused himself foresaw the consequences of his act . . . . If the accused in fact foresaw the possibility of the consequences in question and was reckless as to

[10] 1979 – 1981 SLR (CA) 35 at 37

whether or not they did result, he intended them in the legal sense."

[18] Troughton ACJ in Rex v. Jabulani Philemon Mngomezulu[11] had this to say with regard to *mens rea* in the form of *dolus eventualis:*

> **"The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased."**

[19] His Lordship Dendy Young JA in Maphikelela Dlamini v Rex[12] described legal intention as follows:

> **"As I understand the law in Swaziland, the South African concept of *dolus eventualis* has been stated in this way: if the assailant realises that the attack might cause death and he makes it not caring whether death occurs or not, that constitutes *mens rea* or intention to kill. And the way this**

[11] 1970 – 1976 SLR 6 HC at 7

[12] 1979 – 1981 SLR 195 (CA) at 197

test has been applied is whether the assailant must have realised the danger to life."

[20] Justice M. C. B. Maphalala JA, as he then was in William Mceli Shongwe v. Rex[13] had this to say with regard to *mens rea* in the form of intention:

> **"46. In determining *mens rea* in the form of intention, the Court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased."**

[13] Criminal Appeal Case No. 24/2011 at para 46. See also Mandla Mendlula Criminal Appeal Case No. 12/2013 at para 28. Ntokozo Adams v. Rex Criminal Appeal Case No. 16/2010 and Xolani Zinhle Nyandzeni v. Rex Criminal Appeal Case No. 29/2008; Rex v. Nkosinathi Nel Criminal Case No. 225/2008

[21] In the present matter the *court a quo* found that no extenuating circumstances existed in accordance with the Criminal Procedure and Evidence Act.[14] Section 295 of the Act provides the following:

> **"295. (1) If a Court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:**
>
> **Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.**
>
> **(2) In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class of the**

[14] No. 67 of 1938 as amended, section 295

community to which the convicted person belongs."

[22] Holmes JA in S v. Letsolo[15] defined extenuating circumstances as follows:

> **"Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to consider:-**
>
> **(a) Whether there are any facts which might be relevant to extenuation such as immaturity, intoxication or provocation (the list is not exhaustive);**

[15] 1970 (3) SA 476 AD at 476

(b) Whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;

(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.

Such an opinion having been expressed, the trial Judge has a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence."

[23] The judgment of Holmes JA in S v. Letsolo[16] was approved and followed by this Court in Bhekumusa Mapholoba Mamba v. Rex[17] where His Lordship Justice Ramodibedi CJ laid down the test for determining the existence of extenuating circumstances, and, he had this to say:[18]

> **"12. The correct test insofar as extenuating circumstances are concerned is not whether or not the provocation is commensurate with the resultant violence. The real question is whether the provocation had a bearing on the appellant's state of mind, subjectively speaking, in doing what he did and whether such provocation reduced his moral blameworthiness as opposed to his culpability. This involves a moral judgment. Viewed in this way, I have come to the inescapable conclusion that**

[16] (Supra) at footnote 15 above

[17] Criminal Appeal Case No. 17/2010 at Para

[18] At Para 12 in Bhekumusa Mapholoba Mamba (supra)

the trial Court adopted a wrong approach and thus misdirected itself in finding that provocation did not constitute an extenuating circumstance in the matter."

[24] His Lordship Schreiner JA in Rex v. Fundakubi and Others[19] also dealt decisively with the principles relating to extenuating circumstances, and, he had this to say:-

> **"It would, of course, not be possible to raise as a question of law the issue whether extenuating circumstances were or were not present in a particular case; for that lies wholly within the province of the trier of fact at the trial. But where the trial Judge has ruled as a matter of law that certain material must be excluded from consideration by the Jury or the Court in arriving at its opinion as to whether extenuating circumstances are present, this is clearly a question of law on which the decision of this Court may properly be sought . . . .**

[19] 1948 (3) SA 810 (AD) at pp 816 - 818

Turning now to the respective functions of the trial Judge and of the Jury (or the Court consisting of a Judge and Assessors), the subsection, which was added in 1935, makes no provision that the Judge is to do anything more than to require the Jury (or Court) to state whether in their opinion there are extenuating circumstances and, if the answer is in the affirmative, to require them to specify those circumstances. Then, if extenuating circumstances have been found by the Jury (or Court) the Judge is given a discretion under section 338(1) to impose a sentence other than the death sentence. No provision is made for the Judge's summing up to the Jury (or Court) on the subject of extenuating circumstances, or for his excluding from their consideration any kind of circumstance on the ground that it does not in law amount to an extenuating circumstance as the expression is used in the Act. The Judge, by reason of his discretion, after ascertaining the reasons of the Jury (or Court) to impose or not to impose the death sentence where extenuating circumstances have been found, is enabled to

give effect to any view that he may hold as to the propriety of regarding as extenuating the particular kind of circumstances found to be present; but strictly, he has no power to . . . exclude, in advance, consideration of the circumstance in question by the trier of fact . . . .

Before leaving the more narrowly procedural aspect, it should be pointed out that, although the sub-section does not refer to a summing up on the subject of extenuating circumstances, it is within the inherent power of the Judge to point out to the Jury (or Court) what features of the case appear to him to be relevant to the question upon which they are to express their opinion, and, in a proper case, to assist them by giving his own views as to the weight to be attached to these features. But it remains the function of the Jury (or Court) to reach its own conclusion not only as to the existence of particular circumstances but also as to their characterisation as extenuating . . . .

. . . . But it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or

too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blamethiness in committing it, can be ruled from consideration."

[25] Corbett JA in S v. McBride[20] dealt with the principle of extenuating circumstances, and, he had this to say:

"Before considering these arguments it is appropriate to restate the principles by which this Court is guided when asked on appeal, in a case of murder, to reverse a finding by the trial Court that there were no extenuating circumstances. These are that the decision, as to the existence or otherwise of extenuating circumstances is, in the first instance, essentially one for the trial Court; and, in the absence of any misdirection or irregularity this Court will not interfere on appeal with the trial Court's finding as to the non-existence of extenuating circumstances unless that finding is one to which no reasonable Court could have come. This Court cannot substitute its view on the question

[20] 1988 (4) SA 10 (A) at pp 18 - 19

of extenuating circumstances merely because it disagrees with the view of the trial Court. Nor, in the absence of good grounds for interference with the finding of the trial Court, does this Court express any view as to whether the trial Court could or should have found extenuating circumstances. These principles are so well established and have been stated and re-stated so often by this Court that I do not deem it necessary to quote supportive authority."

[26] Schreiner JA in R v. Fundakubi and Others[21] quoted with approval the judgment of Lansdown JP in R v Biyani 1938 EDL 310 as to what constitutes extenuating circumstances:

"In our view an extenuating circumstance in this connection is a fact associated with the crime which serves in the minds of reasonable men to diminish morally albeit not legally, the degree of the prisoner's guilt. The mentality of the accused may furnish such a fact. A mind (which) though not

[21] (supra) at 815. This judgment was further quoted with approval by Corbett JA in S v. McBride (supra) at 19

diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in a case of a mind of normal condition. Such delusion, erroneous belief or defect would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance . . . . When we find a case like this, where there is a profound belief in witchcraft, and that the victim practised it to grave harm, and when we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as persons labouring under a delusion which, though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and this provide an extenuating circumstance."

[27] It is well-settled that the burden of proving on a balance of probabilities the existence of extenuating circumstances associated

with the commission of the offence of murder rests on the accused[22] upon his conviction in accordance with section 295 of the Criminal Procedure and Evidence Act.[23] Accordingly, a criminal trial involves two phases which are clearly distinguishable from each other. First, it is the juridical guilt of the accused which is concerned with the question of whether the criminal offence of murder has been committed. The onus in respect of this phase rests upon the Crown to prove the commission of the offence beyond reasonable doubt. Secondly, the circumstances which affect the moral guilt of the accused which is concerned with the question of whether extenuating circumstances exist in the commission of the criminal offence. The onus in respect of this phase lies with the accused to prove on a balance of probabilities that there were extenuating circumstances associated with the commission of the criminal offence of murder.

[28] It is trite law that the determination of the existence of extenuating circumstances involves a three-fold enquiry.[24] Firstly, whether there

---

[22] Per Corbett JA in S v. McBride (supra) at 20

[23] Act No. 67 of 1938 as amended

[24] S v. McBride (supra) at 20

existed at the time of commission of the offence circumstances which could have influenced the accused's state of mind; Secondly, whether such circumstances, in their cumulative effect influenced the accused's state of mind to commit the criminal offence; Thirdly, whether this influence was capable of reducing the moral blameworthiness of the accused in committing the offence.

[29] The *court a quo* sitting as the trial Court found that there were no extenuating circumstances at the time of commission of the criminal offence which could have influenced the appellant's state of mind which could constitute extenuation. It is well-settled that the determination of the existence of extenuating circumstances rests with the trial Court; in the absence of any misdirection or irregularity, the appellate Court will not interfere with the finding of the trial Court.[25] I have not been able to find any misdirection or irregularity as to the finding of the trial Judge that no extenuation circumstances existed at the time of commission of the offence. The appellant who bears the burden of proving on a balance of probabilities the existence of extenuating circumstances has not discharged the onus.

[25] Rex v. Fundakubi and Others (supra) at 816; S v. McBride (supra) at 18 – 19

[30] The appellant is appealing against both conviction and sentence. The appellant has set out various grounds of appeal in respect of conviction contending that the Crown has failed to prove the commission of the offence beyond reasonable doubt; however, in respect of sentence, he has set out one ground of appeal that the *court a quo* should have found that extenuating circumstances existed because of his voluntary intoxication and youthfulness. The appellant doesn't contend that the sentence is harsh and severe or that it induces a sense of shock. The appellant merely contends that the Court erred both in fact and in law by not finding and holding that extenuating circumstances existed in the matter by virtue of his intoxication and youthfulness.

[31] I agree with the observation made by the trial Judge that the appellant in his evidence in-chief and under cross-examination did not invoke intoxication as the cause of his unlawful conduct. During the criminal trial the appellant invoked self-defence that he was attacked by the deceased and acted in self-defence. Furthermore, the extent of the appellant's voluntary intoxication is not very clear from the evidence. According to the evidence of PW4 when the deceased and his two

companions arrived at the School, they were chatting and assisting each other in offloading shopping items from the motor vehicle. Accordingly, PW4 concluded that they were not intoxicated; and, his evidence was not disputed under cross-examination.

[32] It is well-settled in this jurisdiction that sentencing is the primary prerogative of the trial court; it is the trial court that determines the severity of the sentence in accordance with the 'triad principle of sentencing'. In arriving at the appropriate sentence in accordance with the triad principle Judges consider the gravity of the offence, the circumstances of the offender as well as the public interest. Rumpff J in S v. Zinn[26] stated the triad principle as follows:

> **"It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society."**

[33] However, it is trite law that an appellate court will not interfere with the sentence imposed by a trial court if there is irregularity or

[26] 1969 (2) SA 537 AD at 540

misdirection or if the sentence is disturbingly inappropriate or where there is a statutory or mandatory minimum sentencing.

[34] Hefer JA in S v Stigling and Another[27] dealt with the existence of a disparity in sentences between co-accused who participated in the commission of the same offence. His Lordship restated the law as follows:

> **"The crucial question in an appeal against the imposition of the discretionary death sentence is whether the trial judge could reasonably have imposed the sentence which he did. If the answer to this is in the affirmative, that is the end of the matter. This question also forms the basis of the so-called striking disparity test. In this respect the test is applied when the Appellate Division, relying on what appears from the record of the case, can form a definite opinion as regards the sentence which it would have imposed in the first instance and where there is a striking disparity between such sentence and that which the trial**

[27] 1989 (3) SA 720 AD at 720

judge imposed. It would, however, be unrealistic not to acknowledge the fact that a specific period of imprisonment in a particular case cannot be determined according to any exact, objectively applicable standard, and that there would frequently be an area of uncertainty wherein opinions regarding the suitable period of imprisonment may validly differ, in such a case, even if the Appellate Division was of the opinion that it would have imposed a considerably lighter sentence, it would nonetheless not interfere as the required conviction that the trial Judge could not have reasonably have imposed the sentence which he did, was lacking."

[35] Contrary to the contentions made by the appellant in his grounds of appeal that the *court a quo* did not consider his personal circumstances when meting out the sentence, the Court did consider that he was nineteen years of age when he committed the offence and that he was a first offender with two minor children.[28]

[28] Para 4 and 5 of the judgment on sentence in the *court a quo*

[36] I agree with the *court a quo* that the personal circumstances of the appellant were overshadowed by the aggravating circumstances of the brutality and cruelty of the killing of the deceased. The *court a quo* was further correct in finding that the brutality in the killing of the deceased constitutes aggravating circumstances.

[37] The Learned Judge in the *court a quo* when passing the custodial sentence of twenty-three years imprisonment had this to say:

> **"4. . . . . It is an irony of immense proportion that such a person would die in such a senseless and brutal manner. The extent of grief was such that some members of the family required counselling, for this is no ordinary case of murder. Referring to the multiplicity of injuries upon the body of the deceased, the police pathologist described the situation as "very rare" (para 12 main judgement). As soon as the assailant was through with his grissly deed he hastily left the scene of crime, together with his companion, leaving**

the deceased alone in circumstances where there was objectively no realistic hope of survival. These factors lead me to the conclusion that indeed there are aggravating circumstances in the matter."

"5. Against the gravity of the offence and the loss to the family and society I must consider the personal circumstances of the offender. The offender is a twenty-three year old and has two minor children. The sad reality though is that the minor children cannot be a factor in the equation, because the unavoidable consequence of his crime is that he shall spend a great deal of time away from them. This would be so even if he had been gainfully employed and was supporting them before he was convicted.

6. The convict is a first offender but this is significantly overshadowed by the gruesome offence that he

has been convicted of. At the time he committed the offence he was a nineteen year old school leaver, but his brutality defies his age and appearance. It is well-settled that youthfulness is a relevant consideration in sentencing, but in the case of Mbhamali v R (1987 – 1995 SLR 58-64), where the offender was also nineteen years at the time of committing murder, the Court of Appeal cautioned that:-

‘ . . . . Young people in their late teens should not think that they are at liberty to prowl around armed with deadly weapons and to do what was done in this case, namely, to fire a series of shots from a pistol at unarmed men who had announced themselves as policemen’.

7. . . . . I take judicial notice of the alarming escalation in fatal violence in this country, and the carrying of dangerous weapons such as knives in circumstances where there is no apparent danger or need, must be discouraged in the strongest possible way. If the offender did not have a knife in his possession it is likely that the conflict would not have ended in the manner that it did.

8. The defence was reluctant to offer guidance on sentence, preferring to leave it all to the discretion of the Court. This, perhaps, is understandable in view of the extra-ordinary circumstances of the matter. I hold that an appropriate sentence is a period of twenty-three years in prison. The sentence is backdated to the date of conviction, the 1st August, 2017. The calculation is to take into account a period of four (4) days

that he spent in custody prior to being granted bail."

[38] Justice M. C. B. Maphalala JA, as he then was, in Elvis Mandlenkhosi Dlamini v. Rex[29] had this to say with regard to sentencing:

"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

[29] Criminal Appeal Case No. 30/2011 at para 29

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".

[39] Justice M. C. B. Maphalala JA, as he then was, in William Mceli Shongwe v Rex[30] had this to say with regard to sentencing:

"54. It is a trite principle of our law that the imposition of sentence is primarily a matter which lies within the discretion of the trial Court; and in exercising that discretion, the Court is enjoined to have regard to the triad, consisting of the seriousness of the offence, the personal circumstances of the offender as well as the interests of society. An appellate court will generally not interfere with the exercise of that judicial discretion by

[30] (Supra) at Para 20

the trial Court in the absence of a misdirection resulting in a miscarriage of justice."

[40] Justice Ramodibedi CJ in Xolani Zinhle Nyandzeni v. Rex[31] delivering a unanimous judgment of this Court reduced a sentence of thirty years imprisonment for the brutal murder of his deceased brother to twenty-five years imprisonment. The Court had found that no extenuating circumstances existed during the commission of the criminal offence. Similarly, in Gerald Mvemve Valthof v Rex[32] this Court reduced a sentence of forty years for the brutal murder of his two minor children and attempted murder of their mother, a live-in girlfriend to twenty-five years imprisonment. Again, the Court found that no extenuating circumstances existed during the commission of the offence.

[41] During the hearing of the present appeal, the appellant's Counsel was given an opportunity to address the Court on the possibility of increasing sentence. He merely reiterated the personal circumstances

[31] Criminal Appeal Case No. 29/2010

[32] Criminal Appeal Case No. 5/2010

of the appellant, his youthfulness and intoxication which were previously considered by the trial Court when imposing sentence. The notice given to the appellant in this regard was sufficient since he was legally represented by Counsel. The appellant's Counsel did not ask for more time to make further submissions at a later date. Where an appellant is not legally represented the Court exercising its discretion could consider giving the appellant an extended notice to prepare for submissions.

[42] The Court of Appeal Act[33] deals with appeals on sentence, and it provides the following:-

> **"5.3 On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution thereof as it thinks ought to have**

[33] No. 74 of 1954, Section 5 (3)

been passed, and in any other case shall dismiss the appeal."

[43] However, in this jurisdiction an accused person charged with a capital offence is entitled to Pro Deo Counsel if he cannot afford Counsel of his choice. The Constitution provides the following:[34]

"21. (2) (c) A person who is charged with a criminal offence shall be entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life."

[44] Justice Ploos Van Amstel AJA in Daniel Coenraad De Beer v The State[35] delivered a unanimous judgment of the South African Supreme Court relating to the power of the Supreme Court to increase sentence on appeal. His Lordship had this to say:

[34] Section 21(2) (c)

[35] Criminal Appeal Case No. 1210/2016 (1210/2016) ZASCA 183

"5. In S v Boggards 2013 (1) SACRI (CC) Khampepe J acknowledges that a Court of Appeal is empowered to set aside a sentence and impose a more severe one. She said that at Common law there was no formal requirement for an Appeal Court to give an accused person notice when that Court was considering an increased sentence on appeal. The Constitutional Court (CC) held that it was necessary to develop the common law so as to require notice to an appellant where an increase in the sentence is being contemplated by the Court of its own accord. Kampempe J said the following at para 72:

'It is worth emphasising that requiring the Appellate Court to give the accused person notice that it is considering an increase in sentence or imposing a higher sentence upon conviction for a substituted offence, does not fetter that Court's discretion

to increase the sentence or to impose a substituted conviction with a higher sentence. The Court may clearly do so in terms of s 22 (b) of the Supreme Court Act and 322 of CPA. Elevating the notice practice to a requirement merely sets out the correct procedure according to which the Court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the Appellate Court's exercise of its discretion.

After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the Appellate Court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires'.

. . . .

9. There are provisions of the Criminal Procedure Act 51 of 1977 (the CPA) which are relevant in the present context. Section 309 (3) provides that in an appeal from a lower Court the High Court, in addition to the powers referred to in s 304 (2), shall have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence. Section 322 which appears in the chapter dealing with appeals in cases of criminal proceedings in Superior Courts, provides in subsection (1) (b) that in the case of an appeal against a conviction or of any question of law reserved, the Court of Appeal may give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial.

. . . .

11. This is consistent with the notion that sentence is always a matter for the Court. That is why the State and an accused person cannot bind a Court by agreeing what the sentence should be. When an appeal is lodged against a conviction, and it appears to the appeal court that the sentence imposed by the lower court is manifestly inappropriate, it cannot be deprived of its jurisdiction to ensure that justice is done by the failure of the State to cross-appeal. In such a case the appeal court is entitled to notify the appellant that it may consider an increase in the sentence if the conviction is upheld. The question of sentence then becomes part of the subject-matter of the appeal. It is true that this may discourage an appellant from pursuing his appeal against the conviction but this is no reason why a sentence which is manifestly inappropriate should be allowed to stand. The victims of crime have a legitimate

interest in expecting appropriate sentences to be imposed."

[45] In view of the existence of aggravating circumstances in the brutality of the death of the deceased with twenty multiple stab wounds, I have come to the conclusion that the *court a quo* did not misdirect itself in respect of both conviction and sentence. However, I am inclined to increase the sentence slightly in view of the aggravating circumstances by two years.

[46] Accordingly, I make the following order:

(a) The appeal on conviction and sentence is dismissed.

(b) The sentence of twenty-three years imprisonment imposed upon the appellant by the *court a quo* is set aside and substituted with a sentence of twenty-five years imprisonment.

(c) The sentence is backdated to the date of conviction being the 1st August, 2017. The calculation is to

take into account a period of four (4) days that the appellant spent in custody prior to being granted bail.

For Appellant : Attorney Bonginkosi Xaba

For Respondent : Crown Counsel Bhekiwe Ngwenya