IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 18/2019**

In the matter between

SIBUSISO KUKUZA DLAMINI **Appellant**

And

THE KING **Respondent**

Neutral Citation: *Sibusiso Kukuza Dlamini v. The King* (18/2019) [2021] *SZSC* (3rd June, 2021).

Coram: **M.C.B. MAPHALALA CJ, J.P ANNANDALE JA, AND M.J. MANZINI AJA.**

Date Heard: **2nd March, 2021**

Date Delivered: **3rd June, 2021**

SUMMARY: *Appeal against murder conviction and sentence – whether High Court misdirected itself in convicting*

Appellant for murder – dolus eventualis – requirements discussed – whether High Court misdirected itself in finding that no extenuating circumstances existed – held that High Court ought to have found extenuating circumstances – sentence set aside and re-considered in light of extenuating circumstances.

JUDGMENT

M.J. MANZINI AJA

[1] Before us is an appeal against a Judgment of the High Court in terms of which Appellant was found guilty of murder without extenuating circumstances, contempt of court, forgery, and uttering a forged document well knowing that it was forged. Appellant pleaded guilty to all charges except murder, and the trial proceeded only on the murder charge. Appellant was sentenced to twenty five (25) years for murder; three (3) months for contempt of court; nine (9) months for forgery; and nine (9) months for uttering a forged document. The appeal is directed at the conviction for murder and corresponding sentence.

[2] Appellant is an adult male from Mbhuleni area, where the incident leading to the death of Lunga Hleta (the deceased) occurred on the 25th December, 2005. Appellant was arrested and later released on bail. Almost nine years later he was served with an indictment for culpable homicide, but the trial did not commence. Four years later he was served with an amended indictment for murder, contempt of court, forgery, and uttering a forged document well knowing that it was forged. The murder trial commenced on the 7th May, 2018, thirteen years after the deceased met his death. The inordinate delay can hardly be said to be in line with the age old adage that justice delayed is justice denied, particularly for the relatives of the deceased. We are not aware of the reasons for the long delay, but it is not acceptable.

[3] Evidence led by the Crown at the trial was brief. The first witness, the pathologist who prepared a post-mortem report testified on the nature of the injuries sustained by the deceased, and the cause of death. The second witness, (Hlengiwe Dlamini) testified how the deceased had come to Appellant's spaza shop, which she had been asked to look after by Appellant, and without their permission took a packet of cigarettes and some money. Furthermore, that when Appellant returned he was informed about

the incident, whereupon he went in search for the deceased. Appellant is said to have come back with the deceased, and upon confirmation that he was the culprit, the deceased was assaulted by Appellant. The third witness, Sabelo Dlamini testified that when Appellant returned with the deceased he kept on assaulting him all over the body with an iron rod (round bar) of about two (2) centimetres thick. He testified that the deceased was assaulted by Appellant until the deceased lay down facing upwards. He testified that the police were eventually called and when they came to pick up the deceased, the iron rod was still on the ground.

[4] Appellant also testified, and gave his own version of the incident. According to Appellant the deceased sustained the fatal injuries by knocking or hitting himself on a door frame, and when he fell onto a stack of unused concrete bricks.

[5] The Court *a quo* analysed the nature of the injuries sustained by the deceased and concluded that they were consistent with the evidence of an iron rod being used to assault the deceased. Mlangeni J held that Appellant must have appreciated that the injuries he inflicted upon the deceased could lead to his death but he nonetheless inflicted them, to the extent that the deceased lay on the ground, motionless, facing upward.

[6] The Court *a quo* rejected Appellant's version that he had only slapped the deceased with an open hand, and that the deceased had hit his head against the door frame of the spaza shop in his attempt to flee from the Appellant. The Court also rejected Appellant's testimony that the deceased ran away whilst holding his head, and thereafter fell onto concrete bricks lying next to the spaza shop.

[7] The grounds of appeal are set out in the Amended Notice of Appeal in the following terms:

"*1. The court a quo erred both in fact and in law by failing to find and holding that the Crown has succeeded in establishing dolus eventualis.*

1.1 The court erred in fact and in law to find that Appellant had no intention to kill the deceased and/ or by finding that the Appellant had indirect intention to kill the deceased. From the evidence before Court, it is apparent that the Appellant acted negligently hence the initial charge the Appellant was indicted for was that of culpable homicide.

1.2 The court a quo erred both in fact and in law by failing to hold and find that the Appellant was acting in defence of his property when he assaulted the deceased as the evidence clearly establishes that the deceased had stolen money and cigarettes from Appellant's shop.

2. The Court a quo erred both in fact and in law by failing to find and hold that there were extenuating circumstances in the matter, despite the Crown having conceded to same.

3. The court a quo erred both in fact and in law by failing to properly consider the triad before arriving at a proper sentence to be meted out.

3.1 The court a quo overlooked the personal circumstances of the Appellant and over-emphasized the other aspects of the triad, being the prevalence of the offence and the interests of society. From the reading of the sentence by the court a quo, it is apparent that His Lordship approached the sentencing with anger, thereby resulting in an overly harsh sentence.

3.2 The remarks by His Lordship that Appellant was not remorseful simply by denying that he assaulted the deceased with an iron

rod when there was overwhelming evidence against clearly demonstrate that His Lordship approached the sentencing with anger.

4. The sentence imposed by the court a quo is harsh and induces a sense of shock."

<u>*Dolus eventualis*</u>

[8] Appellant's main argument is that the evidence of the Crown failed to establish beyond a reasonable doubt that he had the requisite intention, in the form of *dolus eventualis*, to kill the deceased, and for this reason, he should have been convicted of culpable homicide in line with the initial indictment.

[9] Counsel for the Appellant developed her submissions based on the trite principle enunciated in decided cases that intention to kill may be deduced from the type of weapon used in inflicting injury; the part of the body where the injury is sustained; the severity of the injury inflicted; and the degree of force employed in inflicting the injury. She argued that in the instant case there was no compelling evidence to establish the type of weapon that was used to inflict injury to the deceased. She contended that although the witness testified that an iron rod was used to assault the deceased, the Crown

failed to produce it as an exhibit. Furthermore, that no evidence was tendered to corroborate the use of an iron rod.

[10] On the other hand, the Crown submitted that Appellant was correctly convicted of murder. The Crown argued that the evidence of Sabelo Dlamini, the eye witness, was not disputed through cross examination. The Crown further argued that since the evidence of the eye witness was not disputed there was no need for corroboration. The Crown also submitted that even though the iron rod was not produced as an exhibit in Court, the investigating officer had testified that he had searched for it but in vain. The investigating officer testified that through investigations he had established that an iron rod was used to assault the deceased.

[11] The test for *dolus eventualis* is well settled. According to **Mazibuko v Rex 1982-86 SLR 377 (CA) at 380 –**

> *"A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not"*.

[12] The above test has been applied in numerous Judgments of this Court, which need not even be mentioned herein. In paragraphs [19], [20] and [21] of the Judgment, the Court a quo clearly demonstrated that it was alive to, and applied the correct test for *dolus eventualis*. In paragraph [22] the Court a quo said –

> *"It is my view that the accused appreciated that the injuries could lead to death but nonetheless proceeded to inflict them, to the extent that the deceased lay on the ground, motionless, facing upward"*.

[13] In my view, Appellant's contention that the Crown failed to establish *dolus eventualis* cannot be sustained. This is mainly due to the defence's failure to cross-examine and challenge Sabelo Dlamini on his testimony that Appellant assaulted the deceased with an iron rod. No attempt whatsoever was made by the defence to challenge this aspect of his evidence. It is a trite principle that if a party to any proceedings intends to lead evidence to contradict that of an opponent, he or she should first cross examine the witness upon the facts which he or she intends to prove in contradiction, so as to give the witness an opportunity for explanation. Thus, the Court *a quo* was entitled to accept as correct the evidence of Sabelo Dlamini.

[14] In the circumstances of this case, I also hold the view that it is immaterial that the iron rod was not produced as an exhibit. According to the *post mortem* report and the evidence of the pathologist, the deceased sustained a seven comma three (7.3) centimeter injury to his skull. This fatal injury caused bleeding in his brain due to ruptured blood vessels, and was caused by blunt force. The evidence of the pathologist was not challenged. He was not cross examined on the probable cause of the fatal injury, and neither was it suggested to him that what caused death was the injury sustained when the deceased hit his head against a door frame or falling hard on concrete blocks, as the case may be. The report of the pathologist on this score, if it were to be consistent with Appellant's version, would have been particularly helpful to the defence case. But this was not to be.

[15] The failure of the defence to put its version to the key Crown witnesses was fatal, as counsel correctly conceded.

[16] In the result, I hold that the Crown discharged its onus of proving *mens rea* in the form of *dolus eventualis.*

Extenuating circumstances

[17] I now turn to deal with the Court *a quo's* finding that there were no extenuating circumstances. The Learned Judge *a quo* concluded that there were no extenuating circumstances and said:

> "*… mainly because at the time the accused inflicted the numerous fatal wounds upon the deceased he had already recovered the cigarettes and the money that the deceased had helped himself to. It is also an established fact that the accused, who could have reported a case of theft to the police, took the law into his own hands and hurt the deceased very badly. The fact that the deceased was his neighbour and much younger than him is such that other means of dealing with the mischief should have come naturally to the mind of the accused person. If he did not want to lay criminal charges, he could have taken up the matter with the deceased's family next door."*

[18] Appellant contends that the Learned Judge *a quo* misdirected himself in concluding that there were no extenuating circumstances. Appellant relies on the uncontroverted evidence that the deceased had stolen cigarettes and money from the Appellant's spaza shop, and that Appellant was an

uneducated man who went as far as standard four (primary school). Appellant also relied upon the fact that he was found guilty of murder on the basis of *dolus eventualis*.

[19] The Crown supports Appellant's contention that extenuating circumstances ought to have been found to exist. The Crown submitted in the Court *a quo* that the deceased's conduct influenced the Appellant to assault him. The Learned Judge *a quo* was, however, not persuaded by the concession of the Crown.

[20] This Court must decide whether the Learned Judge *a quo* misdirected himself in concluding that there were no extenuating circumstances. The approach to be adopted was succinctly stated by Williamson J.A in **S v. Manyathi 1967(1) SA 435(A.D) at 439** as follows:

> "*To entitle this Court on appeal to interfere with the decision that there were no extenuating circumstances, it must be satisfied that the Court a quo misdirected itself or committed some other irregularity in relation to that question or that no court could reasonably, on the facts, have come to the same conclusion; see for example S v Babanda 1964(1) SA26 (26 (A.D) at p. 27 E-F. To properly decide whether on*

accused's mental state at the time he committed a crime was such that his conduct was less blameworthy than it might normally be obviously requires a consideration of the cumulative effect of all the relevant circumstances. A failure by a Court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances in a case such as the present would amount to the Court misdirecting itself on the question in issue."

[See too: **William Mceli Shongwe v Rex Criminal Appeal No. 24/2011 and Mciniseli Jomo Simelane v Rex (03/2014) [2014] SZSC 05 (30 May 2014].**

[21] Although Section 295 of the Criminal Procedure and Evidence Act enjoins a Court which has convicted an accused person of murder to state whether in its opinion there are any extenuating circumstances, they are not defined. It is trite law that the determination of the presence or absence of extenuating circumstances involves a three-fold enquiry. First, whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation. Second, whether such facts or circumstances,

in their cumulative effect, probably did influence the accused's state of mind in doing what he did. Lastly, whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding the last issue, the trial Court exercises a moral judgment.

[22] As is apparent from its Judgment, the Court *a quo* did not consider, as a possible extenuating circumstance, the fact the Appellant was found guilty of murder on the basis of *dolus eventu*alis, yet this was a relevant consideration. In numerous decisions it has been held that the fact that an accused person's mental intent in committing murder was one amounting to *dolus eventualis* may in an appropriate case constitute an extenuating circumstance. It should be accepted that there are gradations of foreseeability and that if death is foreseen as no more than a remote possibility, this fact may be relied upon in deciding whether extenuating circumstances are present. This is not to say that *dolus eventualis* must necessarily be viewed separately as an extenuating circumstances. A trial Court must consider *dolus eventualis* in the context of all the relevant surrounding circumstances. In my view, the Court *a quo's* failure to apply its mind to *dolus eventualis* as a possible extenuating circumstance constitutes a

misdirection which entitles this Court to interfere and consider the issue afresh.

[23] Having considered the facts attendant to this matter I consider the following factors to cumulatively constitute extenuating circumstances –

(i) Appellant's lack of education and unsophisticated background. Appellant studied up to standard 4 and ran a spaza shop as a means of living;

(ii) The deceased's conduct triggered the fateful chain of events. By helping himself to Appellant's merchandise and stealing money he would have angered any reasonably minded person;

(iii) Appellant's conviction is based on *dolus eventualis*

[24] I am of the opinion that the only reasonable conclusion is that extenuating circumstances were present. The finding of the Court *a quo* that there were no extenuating circumstances should consequently be set aside and a verdict of murder with extenuating circumstances substituted.

[25] The consequences of such a finding is that the sentence imposed by the Court *a quo* must be considered afresh. All the facts relevant to the question

of sentence on the murder conviction appear from the record. In considering an appropriate sentence the following factors are relevant:

25.1 The seriousness of the crime. Murder is a serious crime. As correctly pointed out by the Learned Judge *a quo* it is the responsibility of our Courts to protect society from those who have little or no regard for the lives of others. Our Courts must play an active role in deterring would-be offenders from committing serious crimes such as murder by imposing sufficiently deterrent custodial sentences.

25.2 The personal circumstances of the Appellant. Appellant made a living by running a spaza shop, and has a family that was dependent upon him for support. Appellant is a relatively unsophisticated male who only studied up to standard 4.

25.3 The Appellant was convicted of attempted murder in another case whilst out on bail in respect of the murder charge. Appellant by so doing did not show respect for the law and the life of other citizens.

25.4 Sentencing patterns in this jurisdiction. In **Elvis Mandlenkhosi Dlamini v Rex Criminal Appeal No. 30/2011** His Lordship M.C.B Maphalala JA (as he then was) stated that the sentencing range

imposed upon murder with extenuating circumstances ranges from fifteen to twenty years depending upon the circumstances of each case. In **Tony Zola Mamba v Rex (02/2017) [2018] SZSC 12 (9th May 2018)** a conviction of murder with extenuating circumstances and a sentence of twenty (20) years was confirmed on appeal.

25.5 In **Siboniso Casper Masuku v Rex (35/2014) SZSC 16 [2017]** this Court imposed a sentence of twenty five (25) years for murder without extenuating circumstances.

25.6 Thus, twenty five (25) years imprisonment for murder with extenuating circumstances seems to be on the high end.

25.7 Taking into account all of the above my view is that an appropriate sentence would be twenty three (23) years imprisonment.

[26] In the result the Court hereby issues the following Order:

1. The Appellant's conviction for murder without extenuating circumstances is set aside and substituted with the following:

"The Accused is guilty of murder with extenuating circumstances".

2. ***The sentence imposed upon the Appellant for murder is set aside and substituted with the following sentence:***

"Twenty three (23) years imprisonment".

3. ***The Judgment of the Court a quo is upheld in all other respects.***

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M.J. MANZINI
ACTING JUSTICE OF APPEAL

I agree

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M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

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J.P. ANNANDALE
JUSTICE OF APPEAL

For Appellant: MS. N. NDLANGAMANDLA

For Crown: MR. A. MAKHANYA