IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case No: 05/2022

In the appeal between:

LINDOKUHLE MAXWELL SIBANDZE APPELLANT

And

THE KING RESPONDENT

Neutral citation: *Lindokuhle Maxwell Sibandze vs The King (05/2022) [2022] SZHC 36 (2022)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE M. J. DLAMINI, JA
JUSTICE J. P. ANNANDALE, JA

Heard : 01st August, 2022

Delivered : 22nd September, 2022

SUMMARY

Criminal appeal – Bail pending hearing of criminal appeal – appellant convicted of Culpable Homicide and sentenced to seven years imprisonment two years suspended for three years – appellant filed Notice of Appeal against sentence– appellant simultaneously filed application for bail pending appeal to the Trial Court, and, the application is dismissed for lack of reasonable prospects of success on appeal – subsequently appellant lodged an appeal against the judgment refusing bail to this Court on the basis that reasonable prospects of success on appeal exists;

Held that in applications for bail pending appeal the appellant has the onus to show the existence of reasonable prospects of success on appeal by showing that the Trial Court misdirected itself and that another Court may decide the matter differently, and, that in the present case the appellant has failed to discharge that onus;

Held further that the imposition of sentence lies within the discretion of the Trial Court, and, that the Appellate Court will only interfere with such a sentence if there has been a material misdirection resulting in a

miscarriage of justice; and, that the appellant bears the onus to show that the sentence is excessive and induces a sense of shock. In doing so the appellant should show that there is a striking disparity between the sentence imposed by the Trial Court and the sentence which would have been imposed by the Appellate Court;

Held further that the Trial Court exercised its discretion judiciously and imposed an appropriate sentence;

Held further that there are varying degrees of culpable homicide cases, and, that a benchmark of nine years is appropriate at the most serious end of the scale for such crimes, and, that the sentence imposed by the Trial Court was appropriate;

Accordingly, the application for bail pending appeal is dismissed.

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] The appellant was arraigned in the Court *a quo* and indicted on a charge of murder. He pleaded not guilty to murder but pleaded guilty to a lesser crime of Culpable Homicide which was accepted by the Crown. The defence counsel confirmed the plea of Culpable Homicide.

[2] During the criminal trial in the Court *a quo,* the defence and prosecution handed to Court by agreement a Statement of Agreed Facts which was read into the record. The Crown also handed to Court by consent the Post-mortem report as part of their evidence together with the photo album of the deceased, the knife that was used in the commission of the offence as well as the Statement of Agreed Facts.

[3] The facts of the matter are common cause as reflected in the Statement of Agreed Facts, which was admitted in evidence. The appellant and the deceased were drinking liquor together with other people, and, the deceased subsequently engaged in an argument with one of the persons, and, the appellant intervened in the conflict. An

altercation ensued between the deceased and the appellant resulting in a physical fight.

[4] The evidence further shows that the appellant lost the fight and fled the scene; the deceased chased after him. During the fight the appellant stumbled upon a knife which he used in stabbing the deceased on the chest causing a gaping wound. The deceased bled profusely, fell down and he was certified dead upon arrival at Nhlangano Government Hospital.

[5] During the criminal trial in the Court *a quo* the appellant admitted the unlawfulness of his act that he inflicted the fatal injuries sustained by the deceased. The appellant further admitted that there was no *novus actus interveniens* between his unlawful conduct and the death of the deceased.

[6] The Court *a quo* convicted the appellant of Culpable Homicide on the 11th November, 2021 after considering the appellant's plea of guilty, the Statement of Agreed Facts which constitutes evidence of the Crown, the post-mortem report, the photo-album of the deceased, the

knife as an exhibit as well as submissions and closing arguments by the prosecution and defence counsel. It is common cause that the Court *a quo* considered the triad before sentencing the appellant to seven years imprisonment two years conditionally suspended for three years.

[7] Pursuant to conviction and sentence for Culpable Homicide the appellant lodged a Notice of Appeal on the 17th November, 2021 against sentence. The appellant advanced three grounds of appeal. First, that the Court *a quo* erred both by failing to take into consideration the judgment of Rex v Mpendulo Bonny Ginindza which had similar facts where the accused was given an option of a fine upon conviction of Culpable Homicide. This case was quoted as precedent in mitigation of sentence. Secondly, that the Court *a quo* erred by failing to give reasons why the appellant was not given an option of a fine in circumstances where the deceased was the aggressor and pursued the appellant when he tried to run away from the scene. Thirdly, that the sentence imposed by the Court *a quo* is harsh and induces a sense of shock when one has regards to the

circumstances of the case. It is common cause that the appeal on sentence is still pending before this Court.

[8] On the 18th November, 2021 the appellant lodged an application before the Trial Court for bail pending appeal on the basis that he had reasonable prospects of success on appeal. His contention on appeal was that another Court would find differently from the Trial Court and hold that the sentence imposed by the Trial Court was harsh and induces a sense of shock. He quoted the case of Rex v Mpendulo Bonny Ginindza Criminal case No. 167/2017, a High Court case, as authority for the proposition that a sentence of imprisonment with an option of a fine is appropriate on convictions of Culpable Homicide. He criticised the Trial Court for failing to give reasons why he was not afforded a sentence with an option of a fine. He criticized the Trial Court for failing to consider the evidence that after he had lost the physical fight he fled the scene but the deceased pursued him. He further argued that the Trial Court should have considered that he stabbed the deceased in self-defence, and, that he had no intention of killing the deceased. It is not in dispute that self-defence was not invoked by the appellant during the trial.

[9] The Court *a quo* heard the application for bail pending appeal and subsequently dismissed the application on the 21st December, 2021 on the basis that the appellant had no reasonable prospects of success on appeal. The Court *a quo* further distinguished and showed material factual differences between the High Court Case of Rex v Mpendulo Bonny Ginindza and the present case. On the 27th January, 2022 the appellant lodged a Notice of Appeal against the refusal by the Court *a quo* to grant bail pending appeal.

[10] The grounds of appeal were that the Court *a quo* misdirected itself by finding that the appellant had no reasonable prospects of success on appeal when the respondent had not filed an answering affidavit disputing the averments made in the founding affidavit. In particular the appellant's contention was that the Crown had not disputed that the Court *a quo* had not considered the case of Rex v Mpendulo Bonny Ginindza or the averment that another Court may find that the sentence imposed by the Court *a quo* induces a sense of shock. He argued that the Court *a quo* had failed to give reasons why the Court *a quo* did not afford him an option of a fine in the circumstances of the case. The appellant's other ground of appeal was that the Court erred by finding

that in as much as there were strong mitigating and extenuating circumstances in the appellant's case, he did not qualify for an option of a fine notwithstanding that another Court could find differently.

[11] Subsequently and on the 8th March, 2022 the appellant lodged an urgent application before this Court seeking an order admitting him to bail pending appeal allegedly in terms of section 149(1) of the Constitution. In the present application he contends that he has reasonable prospects of success on appeal. The basis of this application is similar to the application for bail pending appeal that was lodged in the Court *a quo.* In this application as in the previous application in the Court *a quo* he contends that he has reasonable prospects of success on appeal. The respondent has filed an answering affidavit opposing the application.

[12] During the hearing of this application both the Defence and the Crown had filed Heads of Argument and a Bundle of Authorities as required by the Rules of Court. The appellant's contention was that he has reasonable prospects of success on appeal on the basis that another Court may find differently from what was held by the Trial Court. He

referred the Court to the judgment of Rex v Mpendulo Bonny Ginindza where the accused was convicted of Culpable Homicide and sentenced to payment of a fine; he urged the Court to follow that precedent in the present matter. The appellant argued that the sentence imposed by the Trial Court was harsh and severe to the extent that it induces a sense of shock. The appellant further argued that since the respondent had not filed an Answering Affidavit in the Court *a quo* disputing the averments made in the appellant's founding affidavit, the Court should have granted the application for bail pending appeal.

[13] The appellant further argued that strong mitigating and extenuating circumstances existed in the appellant's case to show that he qualified to have been given bail pending appeal. In addition he argued that he was not a flight risk since he was a Liswati by birth and rooted in the country; and, that prior to his conviction, he had been admitted to bail and he did not violate his bail conditions.

[14] The respondent is opposing the application for bail pending appeal on the basis that the appellant has no reasonable prospect of success on appeal and that another Court may not find differently from what was

found by the Trial Court. The respondent's Learned Counsel referred the Court to the judgment of the Court *a quo* where he considered and analysed the judgment of Bonny Ginindza which was relied upon by the appellant as authority for the proposition that in culpable homicide cases a sentence of a fine is appropriate in the lower scale of the range of sentences for such cases. The appellant argued that the present case called for the payment of a fine. The Court *a quo* had compared the Bonny Ginindza case and the present case and concluded that the two cases are distinguishable; and, that as much as the two cases bear slight similarities, their differences are several, material and striking. Having regard to the facts of the two cases, the conclusion reached by the Court *a quo* is correct and cannot be faulted.

[15] In the Bonny Ginindza's case the accused was nineteen years of age at the time of commission of the offence. The deceased was armed with a knife and had demonstrated his intention to stab the accused. The accused stabbed the deceased on the shoulder an area that may not be classified as fragile; the accused had tried to save the life of the deceased by administering first aid to him. The incident did not commence with a physical fight, and, the deceased had attacked the

accused despite that the accused was not fighting back, and, the accused was in high degree of imminent danger from his assailant.

[16] In the present appeal, the appellant was twenty-four years of age at the time of commission of the offence. The deceased was not armed with a weapon and had not demonstrated any intention to stab the appellant; the appellant stabbed the deceased on the chest which is a critical part of the body where the heart is located. The appellant never made an attempt to save the life of the deceased. The incident commenced with a physical fight between the deceased and the appellant, and, the appellant was not in equal degree of imminent danger as the accused was in the Bonny Ginindza's case. Accordingly, it is not true that the Court *a quo* failed to consider the case of Bonny Ginindza during sentencing as alleged by the appellant.

[17] The legal issue for decision in this appeal is whether the appellant has discharged the onus of proving the existence of reasonable prospects of success on appeal. It is trite law that in an application for bail pending appeal the appellant should discharge the onus of proving the existence of reasonable prospects of success on appeal. In doing so the appellant

must show that the Trial Court misdirected itself, and, that another Court may decide the case differently. Where the appeal is on sentence the appellant must show that the sentence imposed by the Trial Court is harsh and severe to the extent that it induces a sense of shock. Similarly, the appellant must show that a patent disparity exists between the sentence imposed by the Trial Court and the sentence that would have been imposed by the appellate court had it been sitting as a Trial Court.

[18] Learned Counsel for the appellant argued during the hearing of this appeal that the appellant was not a flight risk on the basis that he was a Liswati citizen born and bred in the country with no foreign citizenship or passport; and, that prior to conviction, he had been admitted to bail and had complied with his bail conditions. On the other hand the Learned Counsel for the respondent had argued that an appellant seeking bail pending appeal is inherently a flight risk on the basis that he has already been convicted and sentenced. It is now generally accepted that an appellant seeking bail pending appeal has to show that he has reasonable prospects of success on appeal. There is a presumption that the fact of conviction and sentence renders the

appellant a flight risk unless he can establish reasonable prospects of success on appeal. ***See Leo Ndvuna Dlamini.***[1]

[19] Generally, a Notice of Appeal against orders refusing bail should include an application for bail pending appeal in order to safeguard and protect the rights of the applicant and ensure that the application is heard speedily. The essential requirement in determining the application is the existence of reasonable prospects of success on the appeal. In the absence of reasonable prospects of success on appeal, the Court will not release the accused on bail pending appeal. On the contrary where the reasonable prospects of appeal are high the Court may release the accused on bail unless there are compelling and overriding circumstances why the accused should not be released in the interests of justice.

[20] A distinction should always be drawn between an application for bail pending trial which is governed by sections 95 and 96 of the Criminal Procedure and Evidence Act[2] and an application for bail pending

[1] Criminal Appeal Case No. 12/2013

[2] No. 67 of 1938 as amended

appeal. In both applications the Court has a discretion to determine bail, and, the discretion has to be exercised judiciously. However, the principles governing the granting of bail in respect of the two types of applications are different. In applications for bail pending trial the emphasis is that the Court may release the accused at anytime of the proceedings unless the Court finds that it is in the interests of justice that the accused should be detained in custody. Relevant considerations in this regard include such factors as that the accused is not a flight risk and that he will not abscond trial as well as not interfering with Crown witnesses.

[21] His Lordship Nganunu CJ, sitting in the Court of Appeal of Botswana in Salvado v The State[3] held that in bail applications pending appeal, the applicant should prove the existence of exceptional circumstances in order to be granted bail. His Lordship had this to say:

> **"The presumption of innocence on the side of the accused falls by the wayside when he is convicted at his trial. It becomes a fact that the law considers him a criminal until**

[3] (2001) 2BLR 411 at 413

perhaps he succeeds to upset the conviction in any appeal he may make. With the disappearance of innocence, also disappears the tilt of the Courts towards the liberty of that person in any bail application. The law expects the convict to serve any term of imprisonment decreed by the Court. To me this constitutes the fundamental divide between the approach of our courts in pre-trial bail applications and those after a conviction and sentence of imprisonment. In my view, the principle followed by our courts in post-conviction bail application is that the applicant must show the existence of some exceptional circumstances in order to be granted bail, otherwise, he is expected to serve his sentence instead of being on the streets as a free man". *See the judgment of this Court in Rex v Mfanukhona Dalmini Criminal Appeal Case No. 18/2018.*

[22] The judgment in Salvado v State was followed and applied by this Court in the case of Leo Ndvuna Dlamini v Rex[4] as well as Rex v

[4] Criminal Appeal Case No. 12/2013

Mfanukhona Dlamini[5] and, it now forms part of our law. His Lordship Justice Hannah J in the case of State v Sephiri and Kgoroba[6] explained the factors which to him constitutes exceptional circumstances warranting the granting of bail pending appeal. His Lordship had this to say:

> **"The approach of the Court of Appeal in England when dealing with application for bail pending appeal is now clearly set out in R v Walton. In that case the Court held that exceptional circumstances are the test and the two questions to be considered in determining whether exceptional circumstances exist are (1) whether it appears *prima facie* that the appeal is likely to be successful or (2) whether there is a risk that the sentence will have been served by the time the appeal is heard".**

[23] Notwithstanding the decisions aforesaid, it is now settled in this jurisdiction that in applications for bail pending appeal, the applicant

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[5] Criminal Appeal Case No. 18/2018

[6] 1982 IBLR 211

is only required to prove the existence of reasonable prospects of success on appeal. There is no need to establish exceptional circumstances.

[24] I now turn to deal with the sentence imposed by the Trial Court on the appellant. His Lordship Justice M C B Maphalala JA, as he then was in the case of Elvis Mandlenkhosi Dlamini v Rex[7] had this to say with regards to sentencing:

> **"It is trite law that the imposition of sentence lies with 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**

[7] Criminal Appeal Case No. 30/2011 paragraph 29

the sentence which the Court of Appeal would itself 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".

[25] The appellant has argued that the sentence imposed by the Trial Court is very harsh and severe to the extent that it induces a sense of shock. It is common cause that the appellant was sentenced to seven years imprisonment without an option of a fine of which two years were suspended for a period of three years on condition that the appellant is not found guilty of Culpable Homicide, attempted murder or assault with intent to cause grievous bodily harm committed within the period of suspension of sentence. The thirteen days spent in custody before liberation on bail would be deducted from the sentence. Effectively the appellant will serve a sentence of five years imprisonment less the period of time spent in custody prior to the granting of bail pending trial.

[26] In his application for bail pending appeal the appellant contends that the Trial Court misdirected itself by imposing a sentence of imprisonment without an option of a fine. He contends further that an appropriate sentence is an option of a fine in light of the existence of extenuating factors in the form of intoxication and youthfulness on his part. However, it is apparent from a reading of the judgment of the Court *a quo* that the extenuating circumstances were considered by the Court *a quo* before imposing the custodial sentence.

[27] The appellant further contends that the mitigating factors advanced should have influenced the Court *a quo* to impose a sentence which carries an option of a fine. In paragraphs 7 and 8 of the judgment on sentence the Trial Court considered that the appellant was a first offender and that he had pleaded guilty to the charge of Culpable Homicide, he had one child to maintain, that he co-operated with the police investigations, observed his bail conditions, and, that he was twenty-four years of age at the time of commission of the offence and that he was intoxicated.

[28] It is also apparent that in paragraph 9 of the judgment the Court *a quo* considered the triad, being the nature of the offence, the interests of the accused as well as the interests of society. The Trial Court further balanced those interests before imposing sentence as required by the principles enunciated in the case of S V Zinn[8].

[29] Notwithstanding the existence of extenuating and mitigating circumstances, the Court *a quo* was correct by not overlooking the seriousness of the offence and its prevalence in society. The appellant used a lethal weapon in the form of a knife to stab the deceased who was evidently not armed with any weapon. The stab wound was inflicted on the chest which is a fragile and sensitive part of the body. It is apparent that the conduct of the appellant in using a lethal weapon in the circumstances when the deceased was unarmed was not commensurate with the perceived danger; it was an unnecessary overreaction. Such reckless conduct which results in the loss of human life should be discouraged by our Courts.

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[8] 1969 (2) SA 537 (A) at 540

[30] The words of Justice Moore JA in the Botswana Court of Appeal in the case of Mosiiwa v The State[9] remains true. His Lordship had this to say:

> **"It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should by crystal so that the full effect of deterrent sentences may be realized and that the public may be satisfied that the Court has taken adequate measures within the law to protect them of serious offences. By the same token, a sentence should not be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated".**

[31] Similarly, in S v Rabie[10] Justice Holmes JA[11] stated that 'punishment should fit the criminal as well as the crime, be fair to society and be

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[9] (2006) 1 BLR 214 at 219

[10] 1975(4) SA 855 (AD)

[11] At P 862

blended with a measure of mercy according to the circumstances'. Justice Corbett JA[12] sitting together with Justices Holmes JA and Kotze AJA the same case issued a unanimous judgment had this to say with regard to sentencing:

> **" . . . . A Judicial Officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case".**

[12] At P 866

[32] The appellant contends that insufficient weight was given to the individual facts and his personal circumstances otherwise he would have been given an option of a fine as reflected in the case of Mpendulo Bonny Ginindza. However, it is generally accepted that no two cases are factually the same. It is therefore imperative that the Court should consider carefully the peculiar circumstances of the offence as well as the personal circumstances of the accused. From the distance it would seem that the circumstances of this case and the Bonny Ginindza are similar but upon a careful and critical analysis the peculiar differences emerge. Accordingly, uniformity in sentencing should only be considered when the factual similarity has been positively established in order to avoid a serious miscarriage of justice.

[33] His Lordship Justice Tebbutt JA in the case of Musa Kenneth Nzima v Rex[13] recognized that there are varying degrees of culpability in culpable homicide offences and that a benchmark of nine years imprisonment seems to have been applied in this jurisdiction; however, His Lordship emphasised that such a sentence is justified

[13] Criminal Appeal Case No. 21/2007

and proper for an offence at the most serious end of the scale of such a crime. It is my considered view that a sentence of seven years imprisonment without an option of a fine with two years thereof suspended is appropriate in the circumstances of this particular case. The Trial Court did not misdirect itself when imposing the custodial sentence without an option of a fine.

[34] This Court finds that there are no reasonable prospects of success on appeal against sentence which could warrant the release of the appellant on bail pending appeal.

[35] Accordingly the application for bail pending appeal is dismissed.

For Appellant : Attorney Noncedo Ndlangamandla

For Respondent : Crown Counsel, S Phakathi

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JUSTICE M. C. B. MAPHALALA

CHIEF JUSTICE

I agree

JUSTICE M. J. DLAMINI, JA

I agree

JUSTICE J. P. ANNANDALE, JA