IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case No: 14/2022

In the appeal between:

SABELO ANDY MDAKA	FIRST APPLICANT
SIBUSISO GIDEON MABUZA	SECOND APPLICANT
And	
THE KING	RESPONDENT

Neutral citation: *Sabelo Andy Mdaka vs The King (14/2022) [2022] SZHC 49 (2022)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE S. B. MAPHALALA, JA
JUSTICE S.J.K. MATSEBULA, JA

Heard : 09th August, 2022

Delivered : 20th October, 2022

SUMMARY

Criminal Appeal – application for condonation for the late filing of a Notice of Appeal;

Held that there are two legal requirements for the granting of an application for condonation, a reasonable explanation for the delay as well as prospects of success on the merits of the appeal;

On appeal against conviction for murder with extenuating circumstances appellants contend that the Crown failed to prove the commission of the offence beyond reasonable doubt – on appeal against sentence of life imprisonment imposed by the Court *a quo* appellants contend that the sentence is harsh and induces a sense of shock;

Held that the Crown has proved the commission of the offence beyond reasonable doubt and that the appeal against the conviction for murder with extenuating circumstances cannot succeed;

Held further that the Trial Court having found the existence of extenuating circumstances, it misdirected itself by imposing a custodial sentence of life imprisonment of thirty years;

Held further that in this jurisdiction the range of sentences in respect of a conviction of murder with extenuating circumstances was a custodial sentence between fifteen and twenty years imprisonment depending on the facts and circumstances of each case;

Accordingly, the appeal on conviction with extenuating circumstances is dismissed. The appeal on sentence succeeds, and the appellants are sentenced to a custodial sentence of twenty years imprisonment.

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] The appellants were arraigned before the Court *a quo* on a charge of murder, and, they pleaded not guilty. The Crown alleged that upon or about the 8th September, 2017 at Vusweni area in the Hhohho region,

the said appellants acting together and in furtherance of a common purpose unlawfully and intentionally killed Muzi Nkuna. They were subsequently convicted of murder with extenuating circumstances. On the 15th November, 2021 each of the appellants was sentenced to a custodial sentence of life imprisonment of thirty years.

[2] The appellants lodged a Notice of Appeal on the 8th July 2022, about eight months pursuant to their conviction and sentence. They appealed on both conviction and sentence. Four grounds of appeal were advanced in the Notice of Appeal. Firstly, that the Court *a quo* erred both in fact and in law by finding the appellants guilty of the offence of murder in the absence of evidence beyond reasonable doubt that they committed the offence. Secondly, that the Court *a quo* erred both in fact and in law by relying on the evidence of PW9 Mdingo Elphas Mamba in convicting the appellants. Thirdly, that the Court *a quo* erred both in fact and in law by admitting the statement made to a Judicial Officer by the first appellant when there was evidence that it was not made freely and voluntarily as required by law. Fourthly, that the Court *a quo* erred both in fact and in law by sentencing the

appellants to life imprisonment of thirty years on the basis that the sentences are harsh and induce a sense of shock.

[3] The Rules of this Court expressly provide that the Notice of Appeal should be filed within four weeks of the date of the judgment appealed against provided that if there is a written judgment such period shall run from the date of delivery of such written judgment.[1] The Rules provide:

> "8. (1) **The Notice of Appeal shall be filed within four weeks of the date of the judgment appealed against:**
>
> **Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:**
>
> **And provided further that if the appellant is in gaol, he may deliver his Notice of Appeal and a**

[1] Rule 8

copy thereof within the prescribed time to the officer in-charge of the gaol, who shall thereupon endorse it and the copy with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent.

(2) The Registrar shall not file any Notice of Appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained."

[4] It is common cause that the judgment was delivered on the 15th November, 2021 and the Notice of Appeal was not filed with the Registrar within four weeks of the judgment as required by Rule 8. Similarly, the appellants did not deliver the Notice of Appeal to the officer in-charge of the Correctional Facility where they were currently held in custody for onward transmission to the Registrar as required by the Rules of Court. It is apparent from the evidence that

the appellants did not file the Notice of Appeal timeously within the time prescribed by the Rules of Court.

[5] The appellants were legally represented during the trial proceedings in the Court *a quo* by Attorney Sifiso Jele. It is the same Attorney who is legally representing the appellants before this Court. The appellants' Attorney was aware that he would not comply with the prescribed time for filing the Notice of Appeal; however, he failed to invoke the rules of this Court and apply for an extension of time within which to file the Notice of Appeal. The appropriate rule provides the following:[2]

> **"16. (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these rules:**
>
> **Provided that the Judge President or such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision.**

[2] Rule 16

(2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which *prima facie* show good cause for leave to be granted."

[6] The appellants lodged the application for condonation for the late filing of the Notice of Appeal on the 08th July 2022, and the application was served upon the respondent on the same day. Mystery surrounds the stamp of the Registrar of the Supreme Court which appears on the front page of the condonation application as well as on the signature of the Assistant Registrar of the Supreme Court bearing the date of the 30th May, 2022. During the hearing of the application for condonation, the Court specifically invited the Learned Counsel for the appellants to address this anomaly but the explanation proffered was not satisfactory; however, both Learned Counsel for the Crown and the Learned Counsel for the appellants confirmed that the

application for condonation was served upon the respondent's attorneys on the 08th July, 2022. It is therefore apparent that the application was not lodged on the 30th May 2022 but on the 08th July 2022 when the application was served upon the respondent. It is evident that either there was a fraudulent act committed or a mistake on the date of the Registrar's stamp. Similarly, the Assistant Registrar of this Court who was present in Court could not explain this anomaly.

[7] The application for condonation was opposed by the respondent, and, a Notice to oppose was filed on the 12th July, 2022. The respondent subsequently filed an answering affidavit on the 13th July, 2022.

[8] In the application for condonation the appellants sought leave to file their Notice of Appeal outside the limits provided by the Rules of this Court. They further sought an order condoning the late filing of the Notice of Appeal. The founding affidavit was deposed by the appellants' attorney and not the appellants themselves.

[9] The facts deposed in the founding affidavit are not within the Attorney's personal knowledge and belief true and correct. The appellants' attorney dealt with COVID-19 preventative measures at the Correctional Services which prevented the appellants from filing the Notice of Appeal timeously. It was his contention that with the advent of the COVID-19 pandemic incoming inmates such as the appellants had to undergo a certain period of isolation before they could interact with other inmates. His further contention was that the new inmates were not privy to the privileges enjoyed by other inmates including making telephone calls to relatives and their Attorneys. He also argued that the appellants' relatives took a long time to visit them in the Correctional Facility in order to assist them in buying phone cards to make calls. He also argued that he was not able to receive instructions timeously from the appellants in order to file the Notice of Appeal because of the COVID preventative measures employed at the Correctional Facility.

[10] The respondent has filed an opposing affidavit disputing the reasons given by the appellants' attorney for their failure to file the Notice of Appeal timeously. It is apparent from the record of proceedings that

the appellants' bail was revoked by the Court *a quo* at the close of their defence case and not on the day of conviction of the appellants as alleged by the Learned Counsel for the appellants. Consequently, the fourteen day isolation period lapsed before the conviction of the appellants and subsequent sentencing on the 15th November, 2022.

[11] The appellants' attorney further contend in his founding affidavit for condonation that the appellants' relatives took a long time to visit them; however, it is not apparent from the founding affidavit when the appellants' relatives finally paid a visit to the appellants at the Correctional Facility.

[12] It is common cause that convicted inmates are allowed by Correctional Authorities to draft their own notices of appeals with the assistance of the Officer in-charge or the Social Welfare Office within the Correctional Services. The Notice of Appeals which are drafted by the inmates are stamped by the Correctional Services and handed over to the Registrar of the High Court for filing. Attorneys who are subsequently employed by the inmates are at liberty to file amended

Notices of Appeal or supplementary grounds of appeal with leave of Court.

[13] During the Criminal Trial the appellants were legally represented by the same Defence Counsel who is appearing before this Court on appeal. It was open to the Defence Counsel to get proper instructions from the appellants considering that the fourteen day isolation period lapsed before their conviction and sentence. It was also open to the Defence Counsel to lodge an application in terms of Rule 16 for the extension of time within which to fie the Notice of Appeal if the defence Counsel was of the considered view that they would not comply with the time limits.

[14] The condonation application further dealt with prospects of success on appeal. The appellants' Counsel argued that another Judicial Officer presented with the same evidence could have reached a different conclusion and would not have convicted the appellants. It was his contention that the appellants were convicted on circumstantial evidence, and, that the inference drawn by the Court *a quo* could not be the only reasonable inference in the circumstances. He further

argued that the appellants were convicted on the statements made by the appellants. He argued that the said statements were not made freely and voluntarily as required by law. According to the appellants' Counsel the first appellant was physically assaulted by the police prior to making the statement.

[15] The appellants' Counsel further contended that the sentence meted out by the Trial Court was excessive and induced a sense of shock. It was his contention that the custodial sentence of thirty years meted by the Trial Court was unconstitutional on the basis that it exceeded the benchmark sentence in murder cases of twenty-five years; however, the appeal is not based on the alleged unconstitutional sentence but on common law grounds.

[16] It is the contention of the Learned Counsel for the appellants that the appellants were convicted on the evidence of PW9 Sabelo Elphas Mamba. He argued that this Crown witness was an accomplice witness; however, this assertion is not borne by the evidence. In the answering affidavit the respondent disputed the assertion made by the

deponent that the appellants had prospects of success on appeal which entitled them to be granted the condonation application.

[17] It is apparent from the evidence that the appellants made certain admissions to PW6. The evidence which transpired during the trial proceedings was that the appellants called PW9 to the mountain during the night of the commission of the offence and later confided to him that they had killed the deceased. This piece of evidence was never challenged during the trial in the Court *a quo*. Similarly, there was the evidence of pointing out of exhibits during the trial which linked the appellants to the commission of the offence; and, the evidence of pointing out of the exhibits was never challenged during the trial.

[18] Notwithstanding the assertion by the appellants that they were together during the day of commission of the offence, their evidence was contradictory and not corroborative. In the trial within a trial the second appellant gave evidence that he was assaulted by the police, that he was grabbed with wrists and handcuffs prior to making the statement with the Judicial Officer; and that accordingly his confession was not admissible. On the contrary the first appellant never gave

evidence in his defence during the trial within a trial; hence, his confession was admissible because the evidence of the Crown was left uncontroverted.

[19] There is no legal basis why the appellants contend that the sentence is unconstitutional because the twenty-five years mentioned in the Constitution is the minimum sentence that could be imposed for a life sentence. The Constitution provides that a sentence of life imprisonment shall not be less than twenty-five years.[3] However, the appellants have succeeded in proving that the sentence imposed by the Court *a quo* is severe in light of the existence of extenuating circumstances.

[20] In its judgment the Court *a quo* emphasised that aggravating circumstances existed. The appellants were involved in the cultivation of dagga, which is currently a criminal offence in this country. The unlawful killing of the deceased emanated from the unlawful cultivation of the dagga. The appellants unlawfully killed the deceased and removed his dead body from the scene of crime. The deceased

[3] Section 15(3) of the Constitution of 2005

was subsequently removed from the scene of crime by the appellants and placed a distance away from the scene of crime; a big bag of dagga was placed next to the deceased. I will deal with the severity of the sentence in the succeeding paragraphs and the reasons why the Court *a quo* misdirected itself on the sentence imposed.

[21] In the preceding paragraphs of this judgment, I have alluded to the fact that the appellants did not apply for the extension of time to file the Notice of Appeal as required by Rule 16. It is well-settled in this jurisdiction that as soon as the litigant or his attorney becomes aware that compliance with the Rules will not be possible he should invoke Rule 16 of the Rules of this Court and lodge an application for the extension of time.

[22] Similarly, it is well-settled in this jurisdiction that whenever a litigant or his attorney realises that he has not complied with the Rules of this Court, he should invoke Rule 17 and apply for condonation without delay with the view to remedy his default. The object of condonation is to assess the degree of delay in filing the requisite legal documents, the adequacy of the reasons given for the delay, the prospects of

success on the merits of the appeal as well as the interests of the respondent in the finality of the matter.

[23] In Floyed Mlotshwa and Another v Chairperson of the Elections and Boundaries Commission[4] I had occasion to deal with an application for condonation for the late filing of heads of argument as well as the list of authorities. In dealing with the applicable legal requirements of condonation, I had this to say:

> **"12. . . . . It is trite law that there are two main legal requirements for the granting of an application for condonation. Firstly, the applicant must present a reasonable explanation for the delay in complying with the Rules of Court. Secondly, he must satisfy the Court that he has prospects of success on the merits."**

[24] The appellants have failed to give a reasonable explanation for the delay in filing the Notice of Appeal timeously. As stated in the preceding paragraphs, the appellants' bail was revoked on the closing

[4] Civil Case No. 96/2018 at paragraph 12

of the defence case. Thereafter, the matter was postponed to allow for the filing of heads of argument and the list of authorities. The fourteen day period for COVID-19 isolation in prison lapsed before the conviction and sentencing of the appellants; hence, the appellants' attorney could have lodged the Notice of Appeal timeously.

[25] The explanation given by the Learned Counsel for the appellants that their relatives took a long time to visit them at the Correctional Facility so that they could buy them phone cards to call their attorney does not amount to a reasonable explanation. The Officer in-charge as well as the Department of Social Welfare at the Correctional Services do assist inmates in transmitting messages to their attorneys and their relatives as well as in the drafting of Notices of Appeal for onward transmission to the Registrar of the High Court. Furthermore, the appellants were legally represented during the trial proceedings as well as in the present appeal by the same attorney. It was incumbent upon the defence attorney to file an application timeously for an extension of time in terms of Rule 16 in addition to the application of condonation in terms of Rule 17.

[26] The degree of non-compliance with the rules in this appeal is extensive. The judgment on sentence was delivered on the 15th November, 2021 and the Notice of Appeal was lodged with the Registrar on the 08th July, 2022. The rules of this court require that the Notice of Appeal should be filed within four weeks of the judgment; however, in this appeal, the Notice of Appeal was lodged eight months after the judgment contrary to the Rules. Furthermore, the application for condonation for leave to file the Notice of Appeal out of time was lodged on the 08th July, 2022 together with the Notice of Appeal.

[27] It is apparent from the preceding paragraphs of this judgment that the appellants have failed dismally to give a reasonable explanation for the delay in lodging the Notice of Appeal timeously. Generally, in considering an application for condonation the court exercises a discretion, and, this discretion has to be exercised judicially upon a consideration of all the facts in order to achieve a result that is just. It is settled law in this jurisdiction that without a reasonable explanation for the delay, the prospects of success are immaterial, and without the prospects of success on the merits, no matter how good the

explanation for the delay may be, an application for condonation should be refused. Both legal requirements for condonation should be satisfied if the application for condonation is to be granted. A court will not exercise its power of condonation if it comes to the conclusion that on the merits there are no reasonable prospects of success however convincing the explanation for the delay.

[28] However, I am convinced that in this appeal, it was the Learned Counsel for the appellants who was reckless and inefficient. Not only did he represent the appellants during the criminal trial, but he is representing the appellants on appeal before this Court. It was incumbent upon him to file the notice of appeal timeously after the judgment had been delivered. Alternatively, he could have invoked Rule 16 and applied for an extension of time upon realising that he would not comply with the limits of lodging the notice of appeal within four weeks of the judgment. The fact that he deposed to the founding affidavit constitutes evidence that he was covering his inefficiency. In the interests of justice, I would grant the condonation application on the basis that the appellants were not at fault by failing

to file the notice of appeal timeously or invoking Rule 16 in respect of an application for the extension of time.

[29] The appellants contend that they were convicted on the basis of circumstantial evidence and that the inference drawn by the Court *a quo* could not be the only reasonable inference. On the contrary the appellants were convicted on the basis of the totality of the Crown's evidence.

[30] The Court *a quo* did not misdirect itself in drawing the inference. It is trite law that the inference sought to be drawn must be consistent with all the proved facts, and, the proved facts should be such that they exclude every reasonable inference from the facts saved the one sought to be drawn. The evidence of PW9 Elphas Mamba was not disputed that the appellants confided with him that they had shot and killed the deceased. This evidence corroborates the evidence of the Pathologist that the cause of death was a gunshot injury which penetrated the right lung, piercing the heart and vertebra. The Pathologist removed two pellets from the deceased. The report of the

Pathologist was handed to Court by consent and marked **Exhibit "A".** PW1 the Pathologist was not cross-examined by the defence Counsel.

[31] PW9 testified that when he met the appellants at the mountain, the first appellant was carrying the firearm which was used in the commission of the offence. The evidence of the ballistic expert as well as that of the Scenes of Crime Officer were handed to Court by consent and they were never disputed by the defence. The ballistic expert was able to identify the modified gun which was used in the commission of the offence.

[32] There is evidence of pointing out. After their arrest the appellants led the police to Mbasheni Mountain where they showed the police dagga fields and ashes of the clothes which were worn by the deceased. The first appellant subsequently led the police to his parental homestead where he showed the police an empty cartridge of a 12 bore shotgun which was yellow in colour. The shotgun was taken as an exhibit. The first appellant also led the police to his house where he pointed out a black sweater, black pair of tekkies and a yellow T-shirt which clothes he was wearing during the commission of the offence. The

second appellant led the police to his house where he pointed out a yellow overall, green push-in shoes with a label Adidas and one T-shirt which clothes he was wearing during the commission of the offence.

[33] It is important to mention that the police cautioned the appellants before the pointing out as required by law. The appellants gave two firearms to the police being two air-guns one of which had been modified and converted to a 12 bore shotgun. It is also important to mention that the appellants had surrendered themselves to the police after the commission of the offence.

[34] The scene of crime was at Vusweni Mountain and the body of the deceased was moved to the Mbasheni Mountain. There were bloodstains on the ground where the body of the deceased was found. The distance between the two mountains was estimated to be about two kilometres. On the next day after the death of the deceased, PW2 stumbled upon the body of the deceased lying in pool of blood and dumped on the path leading to the bus rank; she was in the company

of another person. They reported the incident to the Community Police.

[35] The Court *a quo* held a trial within a trial with regard to the statements made by the appellants to Magistrate Siphosini Dlamini who was PW3 in respect of the second appellant and another statement made to Magistrate Mbatha by the first appellant. The Court *a quo* found that the first appellant had recorded the statement freely and voluntarily without any undue influence and the statement was admitted in evidence and marked **Exhibit "E".** However, the Court *a quo* found that the statement made by the second appellant was not made freely and voluntarily on the basis that the second appellant was assaulted by the police prior to making the statement.

[36] The appellants were charged with murder and the doctrine of common purpose was invoked. The Crown's evidence does establish beyond reasonable doubt that the appellants were acting jointly and in furtherance of a common purpose when the deceased was shot and killed. The appellants actively associated themselves in the commission of the offence. It is well-settled in this jurisdiction that

the doctrine of common purpose applies where people agree to commit a criminal offence or where they actively associate themselves in a joint unlawful enterprise. Not only did the appellants agree to guard the dagga fields in the mountain using a modified pellet firearm but they actively associated themselves in the commission of the offence.

[37] It is implicit in the doctrine of common purpose that each of the persons involved in the commission of the offence becomes responsible for the specific criminal conduct committed by one of them which falls within their common design. The liability for the criminal conduct arises from the common purpose to commit the offence. It suffices for the prosecution to establish that the accused agreed to commit a particular criminal offence or actively associated themselves with the commission of the offence with the requisite *mens rea*; hence, the conduct of the accused who contributed causally to the consequence offence is legally imputed to the other accused.

[38] It is common cause that the appellants were planting dagga. During the night when the deceased was shot to death they were guarding

their dagga plants from possible thieves. During the night at about 2300 hours they saw another person cutting the dagga trees; however, they could not ascertain the identity of the person. The first appellant was in possession of the firearm, and, he shot at the person. They heard the person who had been shot crying, and, when they came closer, they identified him as the deceased who was a neighbour to the first appellant.

[39] The ballistic report was admitted by consent and marked **Exhibit "B".** The report was prepared by 3345 Detective Inspector Vincent Mbingo who is attached to the ballistic section of the Forensic Laboratory. He examined and tested the modified pellet gun and found that it was capable of firing ammunition. He examined the exhibit fired cartridge and compared the individual and class characteristics markings transferred to them by firearm components during the firing process and found that the fired cartridge case was fired from the modified pellet gun used by the appellants from the commission of the offence.

[40] The scenes of crime report was admitted in evidence by consent, and, it was prepared by 4625 Detective Constable Nimrod Motsa and it

was marked **Exhibit "C".** He attended the scene where the body was found, and, he observed that the deceased was lying next to a green bag with dagga inside. There was blood from his mouth and nose. On his back there were multiple pellet wounds. He concluded that the deceased was killed with a shotgun. There were many blood drops at the scene which suggested that the deceased was not killed at the scene where the body was found. He also took pictures from the original scene where the offence had been committed.

[41] The Court *a quo* found that he appellants called PW9 during the night and asked him to come to the mountain where they planted their dagga. PW9 was also planting dagga in the mountain together with the appellants. PW9 obliged and went to the mountain in the middle of the night. The appellants who were carrying the modified pellet gun confided with PW9 that they had killed the deceased. Again on the next morning PW9 saw the appellants coming down from the mountains. In terms of the confession of the first appellant, the appellants went home to fetch a plastic to cover the body of the deceased which they subsequently dumped about two kilometres away from the scene of crime in an open veld.

[42] In their defence the appellants pleaded different and contradictory versions with the purpose of absolving themselves from the commission of the offence. However, they did not put their version to the Crown witnesses. Their evidence amounted to an afterthought and was inadmissible. In the case of Nkosinathi Sibandze v Rex[5]. I had occasion to deal with the principle that the defence case should be put to the prosecution witnesses.

> **"15. It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief.**
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> . . . .
>
> **16. The importance of putting the defence case to the prosecution witnesses is to enable the Court to see and hear the reaction of the witnesses to the defence advanced by the accused. The Crown witnesses**

[5] Criminal Appeal Case No. 31/2014 at paragraphs 15 and 16

should be cross-examined on the specific defence and respond fully to all questions put forward by the defence counsel. This assists the Court in weighing up the evidence presented and reach its decision. Failure to put the defence to prosecution witnesses is fatal to the defence case. Such evidence is considered an afterthought, and, it is inadmissible."

[43] The appellants were convicted on the basis of *dolus eventualis* for the unlawful killing of the deceased. It is common cause that on the 08th September, 2022 the appellants were camping at Vusweni Mountain overnight guarding their dagga fields from thieves who were stealing their dagga. They were armed with a firearm which they had modified into a shotgun. When they saw the deceased cutting their dagga trees, they shot at the deceased killing him instantly. Even though they could not identify the person who was cutting their dagga trees, they were aware that they were shooting at a human being.

[44] It is well-settled in this jurisdiction that the test for *dolus eventualis* is the subjective foresight of the possibility of death, persistence in such

conduct notwithstanding such foresight and the conscious taking of the risk resultant death not caring whether or not it ensues. A person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another human being may cause death and nevertheless inflicts that injury, reckless whether or not death will ensue. For purposes of *dolus eventualis* it suffices that the accused foresees the possibility of his act resulting in death, yet he persists in the act reckless whether or not death ensues.

[45] The appellants have contended that the evidence of PW9 should be excluded as not credible on the basis that he was an accomplice witness. It is apparent from the evidence that PW9 was not an accomplice witness. An accomplice witness is generally introduced as such by the prosecution in order to enable the court to proceed in terms of section 234 of the Criminal Procedure and Evidence Act[6] as amended. PW9 was a credible witness who was able to answer all questions posed to him as well as explaining his responses adequately during cross-examination by the defence counsel.

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[6] No. 67 of 1938 as amended

[46] PW9 admitted that he cultivated dagga together with the appellants in the mountain; however, he was not present during the commission of the offence. There was no evidence linking PW9 to the commission of the offence. It is apparent from the evidence that PW9 was called by the appellants at night to come to the mountain where they were cultivating dagga and he obliged. Upon his arrival in the mountain the appellants confided to him that they had killed the deceased.

[47] The appellants allege that the sentence meted by the trial court is harsh and severe to the extent that it induces a sense of shock. The principles governing sentencing in this jurisdiction are well-known. In the case of Elvis Mandlenkosi Dlamini v Rex[7] I had occasion to state these principles as follows:

> **"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 sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant**

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

to satisfy the appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed; this 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."

[48] The Court *a quo* convicted the appellants of murder with extenuating circumstances primarily because this was a case of *dolus eventualis* which constitutes extenuating circumstances. The existence of extenuating circumstances has a great bearing on the imposition of sentence. A death penalty as well as a sentence of life imprisonment

is not competent once the trial court establishes the existence of extenuating circumstances.

[49] The Constitution provides that the sentence of life imprisonment shall not be less than twenty-five years.[8] This legislative provision is setting the minimum sentence where the accused is sentenced to life imprisonment after establishing aggravating factors. The death penalty as well as the life sentence presupposes that the unlawful killing of the human being is accompanied by *mens rea* in the form of *dolus directus* as opposed to *dolus eventualis*.

[50] The trial court correctly considered the triad consisting of the crime, the offender as well as the interests of society. The Court considered that the appellants were first offenders, that they co-operated with the police investigation, that they are married with wives and minor children to support and that they were in gainful employment.

[51] The first appellant was thirty-eight years of age at the time of their conviction and the second appellant was thirty-seven years old. The

[8] Section 15(3)

first appellant was married with two minor children, and, his wife was unemployed; the family depended solely upon his support for survival and sustenance. On the other hand the second appellant was married with four minor children, and his wife was the sole breadwinner. Both appellants were illiterate and they had never attended school; they were both employed as labourers at Ngonini Estates with a monthly salary of E1, 500.00 (One Thousand Five Hundred Emalangeni). They supplemented their income with the planting of dagga. The appellants were subsequently arrested by the police and convicted of murder with extenuating circumstances. Accordingly they could not continue with the cultivation of dagga.

[53] The Trial Court further accepted that the conviction of the appellants was based on circumstantial evidence, and, the Court concluded that this constitutes another extenuating circumstance. The Court further found that the theft of the dagga by the deceased constituted an extenuating circumstance as well.

[52] The Trial Court further found that the appellants religiously attended their trial every time they were so directed. The Court *a quo* further held that society viewed the appellants as killers and that this was a punishment on its own. The Court also accepted the evidence of PW9 that the death of the deceased was accidental notwithstanding that the appellants took a gun and headed to the dagga fields in the mountains to guard their dagga plantation against the people who were stealing their dagga at night.

[54] Having found that extenuating circumstances were present, it was not open to the Trial Court to impose a sentence of life imprisonment. In the case of Elvis Mandlenkhosi Dlamini v Rex[9], I delivered a unanimous judgement and had this to say with regard to sentences imposed on convictions of murder with extenuating circumstances:

> **"36. This Court has been consistent with sentences imposed on convictions of murder with extenuating circumstances; they range from fifteen to twenty years depending on the circumstances of each case.**

[9] Supra at paragraphs 36 and 37

In the case of Mapholoba v Rex Criminal Appeal Case No. 17/2010, the Supreme Court reduced a sentence of twenty-five years to eighteen years. In the case of Ntokozo Adams v Rex Criminal Appeal Case No 16/2010, the Supreme Court reduced a sentence from thirty years to twenty years imprisonment. In Khotso Musa Dlamini v Rex Criminal Appeal Case No 28/2010, the Supreme Court confirmed a sentence of eighteen years imposed by the Court *a quo*. In Mandla Tfwala v Rex Criminal Appeal Case No. 36/2011 a sentence of fifteen years was confirmed. In Sihlongonyane v Rex Criminal Appeal Case No. 15/2010 a sentence of twenty years was reduced to fifteen years.

37. In Ndaba Khumalo v Rex Criminal Appeal Case No. 22/2012 a sentence of eighteen years was confirmed. In Zwelithini Tsabedze v Rex Criminal Appeal Case No. 32/2012 a sentence of twenty-eight years was reduced to eighteen years. In Sibusiso Goodie

Sihlongonyane Criminal Appeal Case No. 14/2010 a sentence of twenty-seven years was reduced to fifteen years. In Thembinkosi Marapewu Simelane and Another Criminal Appeal Case No. 15/2010 a sentence of twenty-five years was reduced to twenty years. In Mbuso Likhwa Dlamini v Rex Criminal Appeal Case No. 18/2011 a sentence of fifteen years was confirmed. In Sibusiso Shadrack Shongwe v Rex Criminal Appeal Case No. 27/2011 a sentence of twenty-two years was reduced to fifteen years.

38. In the circumstances the trial judge did not misdirect himself in imposing the sentence of fifteen years. Accordingly, the appeal on sentence is dismissed."

[55] Accordingly the court makes the following order:

(a) The appeal against the conviction of the appellants for murder with extenuating circumstances is hereby dismissed.

(b) The appeal against sentence succeeds and the sentence imposed by the Court *a quo* is set aside.

(c) The appellants are each sentenced to a custodial sentence of twenty years imprisonment without the option of a fine.

For Appellant s : Attorney S. M. Jele

For Respondents : Crown Counsel, Mxolisi Dlamini

JUSTICE M. C. B. MAPHALALA
CHIEF JUSTICE

I agree

JUSTICE S. B. MAPHALALA, JA

I agree

JUSTICE S. J. K. MATSEBULA, JA