IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 12/2020**

In the matter between

ALEX SIPHO SIMELANE **APPELLANT**

AND

REX **RESPONDENT**

Neutral Citation: *ALEX SIPHO SIMELANE v REX (12/2020) [2022] SZSC 60 (29 NOVEMBER 2022)*

Coram : **N.J. HLOPHE JA**
MAMBA JA
A.M. LUKHELE AJA

Heard : **04 OCTOBER, 2022**

Delivered : **29 NOVEMBER, 2022**

[1] *Criminal Law – Appropriate verdict, murder or culpable homicide. Appellant chasing after deceased and catching him. Victim overpowered and felled to the ground. Victim repeatedly and viciously assaulted by the appellant with a baton, inter-alia, on the head and chest whilst lying helplessly on the ground. Injuries fatal.*

[2] *Criminal Law – verdict – murder or culpable homicide – no direct intent to commit murder. Where, however, appellant adjudged to have foreseen that his action may bring about the death of his victim but nonetheless continued to beat him and victim died. Appellant guilty of murder and not just culpable homicide.*

[3] *Criminal Law and Procedure – Sentence – unless sentence prescribed by statute, such is within the discretion of the trial Court. However, where contrary to the trial Court, the Appeal Court finds the existence of extenuating circumstances, Appeal Court at liberty to interfere with the sentence imposed by the trial Court.*

MAMBA JA:

[1] The appellant, Alex Sipho Simelane, appeared before the High Court on a charge of murder. The Crown alleged that he had on 21 April 2013 murdered Phillip Gamedze. It was alleged further that the crime had been committed at or near Maseyisini area in the region of Shiselweni. On being arraigned, the appellant pleaded not guilty to the charge. After hearing evidence, he was, however, found guilty as charged. The trial Court also found that there were no extenuating circumstances in this case. The appellant was consequently sentenced to a term of imprisonment for 18 years. The Court also ruled that 'the period of imprisonment is to take into account any period that the accused has spent in custody in relation to this offence'.

[2] The appellant has appealed against both his conviction and sentence. His grounds of appeal are in the following terms:

'1. The Court *a quo* erred both in fact and in law by convicting the appellant of murder instead of culpable homicide' in view of the fact that the appellant and the deceased were engaged in a fight and the deceased died as a result of the injuries he sustained in the course of that fight.

1.1 The Court a quo erred by failing to take into account that the weapon used by the accused in the assault of the deceased, who had assaulted the appellant first was not a deadly weapon, thus the appellant could [not] have had the intention to kill the deceased.'

1.2 The Court ought to have ruled that there were extenuating circumstances inasmuch as there was no premeditation for the commission of the crime.

1.3 On the issue of sentence, the appellant states that the sentence meted out to him is too harsh and induces a sense of shock.

[3] The essential or salient facts in this appeal are largely common cause or not in dispute and they are as follows:

3.1 Both the appellant and the deceased were residents of Maseyisini area. The deceased had an orchard in the area. This grove was apparently, away from the home of the deceased. Alligator or avocado pears were some of the fruits that were in the orchard. Certain individuals used to help themselves on the alligator pears without the knowledge or approval of the deceased.

3.2 At about 5P.M. on 21 April 2013, the deceased requested Siphelele Gamedze, his son, to accompany him to the orchard in order for them to see to it that there were no thieves or trespassers there. The deceased left home first and his son followed shortly thereafter. On arrival at the orchard, Siphelele found the deceased chasing after the appellant who was carrying avocados. He joined the chase and the appellant was cornered at a certain spot just outside the grove where he had parked his Toyota lite Ace mini truck. After a brief exchange of words between Siphelele and the appellant, the former started beating

the latter with a stick. That was after the appellant had been ordered to put down the avocados he was carrying. The appellant fought back and hit the deceased with fists all over his body. In the process, Siphelele smashed or shuttered the windscreen of the appellant's mini truck. It was at this stage that the appellant held Siphelele by his clothes and started calling out for his friends to come to the scene. Two of the said friends approached the scene and this caused both Siphelele and the deceased to run away, with the appellant and his friends in hot pursuit. The appellant said that the Gamedzes must be killed. At this stage he was armed with a baton he had retrieved from his motor vehicle. The appellant and his friends pelted the Gamedzes with stones. Siphelele outran his pursuers but the deceased was not that lucky. The appellant caught up with the deceased and started assaulting him with the baton. At this stage the deceased was not fighting back at the appellant and was bent forward and facing down. The two companions of the appellant did not take part in the assault. Siphelele observed this whilst he was about 100 metres from the scene. Siphelele ran home to report the incidence to his mother. The assault by appellant on

the deceased was so severe that Siphelele told his mother that he did not think his father would survive. Indeed he did not.

3.3 Norah Hlantekile Gamedze, the wife of deceased told the Court that after the report of the assault on her husband was made by Siphelele, she rushed to the scene. There she found the deceased lying down. He was covered in blood and so was the ground around him, he was unable to speak. She noted a cut on his head and tongue. She denied any knowledge of any provocation by the deceased to the appellant.

3.4 The matter was reported to the Nhlangano Police Station. The body of the deceased was removed from the scene by the police. This was after photographs were taken concerning the scene and the corpse. Subsequently, a post-mortem examination was done by the Police Pathologist Dr R. M. Reddy on 24 April 2013. The Dr. noted or observed at least eight ante-mortem injuries on the body of the deceased. He concluded that the cause of death was due to multiple injuries. These injuries were:

'1. Laceration over left scalp 2.5cm x 2cm with abrasion 4cm, Laceration forehead, 2.5cm x 1cm, right forehead 5 x 1cm skin deep on reflection scalp contusion 6.2cm area with depressed fracture vault 5.2cm x 2.7 cm left side, diffuse intracranial haemorrhage over brain mixed about 130ml present.

2. Laceration over occipital region 2cm x 2cm bone deep.

3. Laceration upper lip 3cm x 1cm lip deep with abrasion 3cm x 1.2 cm fracture jaws loosened teeth.

4. Laceration over right ear 3cm x 1cm ear deep.

5. Laceration over chin right 3cm x 1cm muscle deep.

6. Abrasion front chest right 1.2cm x 1cm x 1.1cm, 1cm effusion blood in soft tissues of chest with fracture sternum ribs 7 torn intercostal structures blood in pleural cavity about 700 ml.

7. Abrasion over front of left shoulder 4cm, 1cm

Abrasion front of right leg 2cm x 1cm.

The Pathologist testified that the fatal injuries were those listed under 1, 2 and 6 above which were on the head and chest. Injuries 4, 5 and 7 were not fatal. The Dr. stated that these injuries were caused by a blunt object or weapon. Crucially in this connection, there was no denial by the appellant that these injuries were inflicted by him on the deceased.

3.5 The evidence of Siphelele Gamedze was substantially and materially corroborated by Wiseman Mdumiseni Manana (PW4). PW4 stated that he, together with Ncamiso, chased after and pelted Siphelele with stones whilst the appellant was busy assaulting the deceased. Mdumiseni testified that the appellant assaulted the deceased repeatedly with a baton whilst the latter was lying on the ground and bleeding. When this occurred, the appellant was sitting on top of the deceased. Mdumiseni and Ncamiso failed to persuade the appellant to stop the assault on the deceased. This resulted in them physically pulling him away from the deceased.

3.6 Mdumiseni confirmed that the appellant did pick some avocados from the relevant orchard.

3.7 Police officer 4601 Constable Richard Bongani Dlamini testified that at about 5:30 P.M. on the date in question, he received a report of an assault and malicious damage to property. The report was made by the appellant. He left the Nhlangano Police Station and proceeded to the named site at Maseyisini and there he found the appellant together with Wiseman Manana and Ncamiso Simelane. Whilst still taking their statements his attention was drawn by one Ernie Ngwenya a community police to a man who was lying helplessly at a spot not far from the nearby sports ground. Constable Dlamini aborted the interview with the appellant and rushed to the place indicated by Ernie. There he found the body of the deceased covered in blood and surrounded by a lot of people, including the wife of the deceased, Norah Gamedze. The body of the deceased was taken to the Nhlangano Health Centre where he was declared dead after examination. Meanwhile the appellant and his two companions were arrested and taken into detention.

3.8 On the 22nd day of April, 2013 the accused, according to the scenes of crime officer 4131 Assistant Inspector Enoch Zeni Tsabedze, led them to a motor vehicle at his parental home where he wanted to point out to the police '- - - the exhibit he had used to assault Phillip Gamedze', and indeed he did so after due caution by the police. (I hereby note that the admissibility of this pointing out as amplified in the quoted words uttered by the accused is doubtful. This is, however, not in issue in these proceedings).

3.9 On the bakkie or light delivery motor vehicle the accused pointed out a broken baton with red and white stripes. Pictures were taken of this pointing out and the broken baton removed by the police. Police testified further that, from there "the accused then requested to take us to the place where he had assaulted the deceased. - - - He took us down to the playground where he said he had left the deceased. - - - when we got to the place we did not find him but what we found was blood. - - - I took photographs of the scene my Lord.' (Pages 49 – 50 of the Record of Proceedings).

3.10 Again, I have quoted the above passage to illustrate the rather lackadaisical manner in which very doubtful evidence was led by the Crown and not objected to buy the defence. First, the appellant informed the police that he had used the broken baton to assault the deceased. An assault is an unlawful act and such a confession being made to a police officer – a person in authority – was clearly inadmissible unless confirmed in writing before a judicial officer. Secondly, unlike in South Africa, a tangible object or corporeal must be discovered as a result of a pointing in our law. The spot that was pointed out and covered in blood was already known to the police as this is the very spot where the body of the deceased was found on 21 April 2013. Therefore, there was really no discovery made on 22 April 2013 as a result of the purported pointing out. See *July Mhlongo & Another v Rex and Rex v Magungwane Shongwe & 2 Others 1982-1986 (2) SLR 427 at 432C*. I, however, point out that the admissibility of these pieces of evidence is not in issue in these proceedings nor was it in the Court *a quo*. For the proper and fair trial of cases and administration of justice, Counsel are put on alert on these

matters, for they may just determine or even dictate the eventual outcome of a trial.

3.11 Police officer (PW6) handed in a photo album containing various pictures he had taken in the course of his investigation. These included the avocado orchard, scene of crime, blood stained broken baton, injuries sustained by the deceased and pictures taken at the post-mortem examination room or operating threatre. The photo album was handed in as exhibit C.

3.12 It is also perhaps significant to note that the blood stains picked up from the trousers worn by the appellant on 21 April 2013 matched the DNA of the deceased; meaning that the blood stains on the appellant's trousers were those from the deceased. The comparison was of course done after the Police Pathologist had obtained some blood samples from the body of the deceased for analysis.

3.13 In cross examination the defence informed PW6 that the appellant '- - - was threatened by a number of police officers at the police station to go and show them the wooden stick and also show them the scene of crime.' PW6 denied knowledge of this. This allegation by the defence put the admissibility of the evidence of pointing out in issue. There was, however, no trial-within-a-trial conducted to determine such admissibility of the evidence. The evidence of PW6 was materially corroborated by PW7, 5315 Detective Assistant inspector Gcinile Mbuli.

3.14 A statement - a confession in fact – made by the appellant before a judicial officer on 23rd April 2013 was handed in by consent. In that statement, the appellant essentially admitted that the dispute between him and his companions on the one side and the Gamedzes on the other side had its origin in the theft of avocados belonging to the deceased. In that statement he stated *inter alia,* that:

'I asked Ncamiso and Wiseman to chase the son but he outpaced them, I also gave chase and caught up with Mr. Gamedze by the river and I fought with him using a stick, I managed to grab his

stick and assaulted him with it and also with fists. When Ncamiso and Wiseman returned, they found me still assaulting Mr. Gamedze and they asked me to forgive him. I then stopped assaulting him and left him lying on the ground. When we got to the car, we called the police to report the damage to our car.' (Page 81 of record).

3.15 The car referred to in the above quotation is obviously the Toyota lite Ace or mini lorry the appellant was using on that date. Again, the appellant seems to contradict the evidence of PW4, Mdumiseni Manana that when they pleaded with the appellant to stop assaulting the deceased he failed to heed their call until they had to physically restrain him by removing him from the deceased. In this regard I would prefer and accept the version given by Mdumiseni over that given by the appellant. Mdumiseni gave his evidence in a straight forward manner. In fact he was not cross examined on this aspect of his evidence. Legal experience has shown and the Courts have learnt this very well that a confession is after all a self-serving piece of evidence and the Court has to deal with it with that in mind whenever

appropriate. For this reason, I hold that it is not true that the appellant voluntarily heeded Mdumiseni's call for him to stop the assault on the deceased. He had in fact to be physically restrained and removed from the deceased who was lying helpless on the ground. That is the evidence that was led by the crown against the appellant.

3.16 The appellant testified that on the day in question, he was in the company of Wiseman Manana and Ncamiso Simelane and were driving in his Toyota lite Ace towards a river in Maseyisini. Next to a forest, some boys emerged from the forest and ran away. His companions, Wiseman and Ncamiso, chased after them whilst the appellant continued driving. He said when he was about to reach the public garden other boys emerged from the garden and also ran away. He stopped the motor vehicle to scare them away. The boys ran away and in the process dropped the avocados they were carrying. The appellant testified that he stopped his vehicle and proceeded to pick up the avocados left behind by these boys. As he walked back to his motor vehicle, he was confronted by the deceased and Siphelele who asked him what he was carrying.

'- - - I told them that I was carrying avocados which I had found. While I was trying to answer, they drew closer to me and they started fighting me and I could not answer my Lord. In the midst of that [Siphelele] asked his father "do you see who that is, it is the dog that assaulted you in the forest, so we should assault him and leave him in the forest." While I was focusing on [Siphelele] Mr. Gamedze assaulted me on the head with a stick.'

The appellant stated that when Siphelele joined the deceased in the assault, he tried to run away and at the same time call out for Wiseman and Ncamiso, who immediately came to the scene. When Siphelele saw these two, he told his father that they must run away, which they did and in the process Siphelele smashed the front windscreen of his motor vehicle.

3.17 The appellant got a baton from his vehicle and gave chase to the Gamedzes. He said he was "so saddened at the time." (Page 92 line 19). He caught up with them and they pelted one another with stones "- - - until Mr. Gamedze was left with only myself. We fought with Mr. Gamedze until I overpowered him and he fell down. Out of anger I continued to assault him, he finally bowed down and at that time - - - Wiseman came and suggested that we leave Mr. Gamedze, we then returned to the motor

vehicle." Though he telephoned the police about the damage to his motor vehicle '- - - and also report about Mr. Gamedze's incident which thing I did not know would result in a mess.'

3.18 From the above summary of the testimony by the appellant, he again sought to convince the Court that he obeyed his companion's plea to stop assaulting the deceased who was lying helpless on the ground. This assertion by him was properly or rightfully rejected by the trial Court. Again, the appellant wanted the Court to believe that he, out of his own initiative, reported the plight of the deceased to the police. He only reported an assault and the damage to his motor vehicle. The police first got to know about Gamedze's plight from Ernie, the community police member. This is also confirmed by him in his confession statement. (See page 81 line 8-12). It is common cause that the orchard in question was privately owned by the deceased. It was not a public garden as stated by the appellant.

3.19 The appellant denied that he and his companions had gone to the orchard to help themselves on the avocados of the deceased. He insisted that his aim was to go and wash his motor vehicle at the river nearby. The appellant stated that he did not notice or make count of the injuries he inflicted on the deceased because he was overcome by anger "- - - and that is why I even had the courage to call the police to the scene." The appellant called the police to view his damaged mini truck. It was the community police who drew the attention of the police to the plight of the deceased next to the playground. In any event, the incident had been witnessed by about three persons who were to the knowledge of the appellant at the time, potential witnesses.

3.20 At the close of the defence case and after submissions by both Counsel were made, the appellant was found guilty as charged. The trial Court further found that there were no extenuating circumstances in this case. A sentence of 18 years of imprisonment was meted out to the appellant.

[4] Counsel for the appellant strenuously argued that in view of the accepted facts that there was an exchange of blows or simply a fight between the appellant and the Gamedzes, the trial Court ought to have found that the appellant acted negligently in causing the death of the deceased and therefore the proper verdict would have been one of culpable homicide and not murder. Reliance and emphasis was also placed or made on the nature of the weapon used. It is regrettable that the baton used was only referred to as that used by Zulu men as their daily accoutrement. Its profile – size, length and thickness were not described. Whilst I agree that the nature of the weapon used in the commission would invariably be a factor in the determination of the appropriate verdict to be returned, this is largely dependent on many other factors. One factor alone may not be decisive. For instance, a light stick used repeatedly to assault a person on a delicate part of the body may cause death and a clear case of murder be made out in the circumstances of the case. Another example may be the use of one's bare hands to kill the victim by constriction or strangulation.

[5] In the case at hand, even accepting for the moment that there were exchange of blows from the warring parties, the crucial point in this case is that the appellant chased after the deceased, caught up with him, assaulted him, overpowered him and caused him to fall to the ground. Once he had him on the ground, he sat on him and repeatedly struck him with the baton on the face, head and chest and other parts of the body. It is these blows or injuries that caused the death of the deceased. At the relevant time the deceased was not a young, strong man. He was 72 years old.

[6] From the above, I am of the considered view that the trial Court was perfectly correct that the appellant was guilty of the crime of murder. The Court concluded that whilst it may be correct that there was no evidence that the appellant had a direct or even premeditated intention to kill the deceased, he clearly must have realised or foreseen that assaulting the deceased in that manner might bring about his death but he resigned himself to that eventuality and went ahead and hit him in the way he did and caused his death. He was on this premise guilty of murder on the basis of indirect intention. To hold that he was only guilty of culpable homicide would be to find that he failed to foresee

that which a reasonable person would have foreseen; namely that his action would cause the death of the deceased.

[7] For the above reasons, this ground of appeal fails and the verdict by the trial Court is upheld.

[8] Dealing with the issue of extenuating circumstances, the Court in *R v Gama, Sipho and Another (2000-2005) (1) SLR 321 at 322* the Court stated as follows

> '- - -the Court is obliged to make an assessment of the moral blameworthiness instead of the legal blameworthiness as was the position when considering their guilt. An extenuating circumstance is one which morally, though not legally reduces an accused person's blameworthiness or the degree of his guilt - - -.
>
> The Court is enjoined to reach a conclusion after considering all the relevant facts and circumstances, both mitigating and aggravating, in order to make such a judgment - - - there is no onus on the accused to prove that extenuating circumstances do exist, just as there is no onus on the prosecution to prove its

absence. It is the duty of the Court, with a diligent and with an anxiously enquiring mind to probe into whether or not any factor is present that can be considered to extenuate an accused person's guilt when making its value or moral judgment.'

See *Daniel Dlamini v Rex App case 11/1998* where Leon JA stated that

'The accepted general definition of an extenuating circumstance is one which morally, although not legally, reduces an accused person's blameworthiness or the degree of his guilt - - - in reaching a conclusion as to whether or not extenuating circumstances are present, the Court makes a value or moral judgment after considering all the relevant facts and circumstances both mitigating and aggravating in order to make such judgment.'

Vide also *R v Paulos Rinesto Jambau & Another (HC) case 34/1997, R v Bongani Mkhwanazi & 3 Others CR.125/98.* The Crown, properly in my view, conceded that there are extenuating circumstances in this case. First there was a fight between the two groups. The Gamedzes accused the appellant of stealing their avocados. Secondly, it was the son of the deceased that started the fight by hitting the appellant with a stick. Again, it was the said son who smashed and shuttered the windscreen of the motor vehicle

belonging to the appellant. The crime was not pre-meditated. The appellant has been convicted based on indirect intention. All these factors taken cumulatively constitute extenuating circumstances in my view.

[9] The appellant has also challenged the sentence meted out by the trial Court. He submits that it induces a sense of shock. I am unable to agree. The sentence is in my view, within the sentencing range for such a crime in this jurisdiction. However, I am mindful of the fact that this Court has, contrary to the trial Court, found that there are extenuating circumstances. For that reason alone, this Court is at large to interfere with the sentence imposed by the trial Court which was pre-eminently endowed with the discretion to pass the appropriate sentence. (See *Thandaza Nkosiyabekwa Silolo v Rex (30/2015) [2016] SSC 32 (30 June 2016)* and the cases therein cited, *George Daniel Mathonsi and Velaphi Vusie Dlamini v Rex (23 &24/2015) [2016] SZSC 25 (30 June 2016)* and *Lomcwasho Thembi Hlophe v Rex CR 7/2010.*

[10] Whilst I am of the firm view that a sentence of 18 years of imprisonment is generally speaking within the range for a conviction for murder with or without extenuating circumstances, I find it appropriate to interfere with the sentence imposed by the trial Court. In doing so I am also of the firm view that had the trial judge found that there were extenuating circumstances present in the matter, he would have imposed a lesser sentence than that which he did. Consequently, I am of the considered view that the justice of the case dictates that a sentence of 16 years of imprisonment be and is hereby imposed on the appellant.

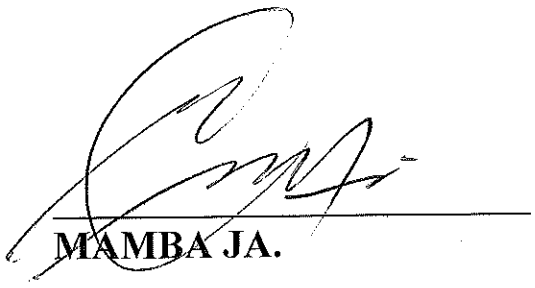
[11] For the foregoing reasons, I would make the following order:

(a) The appeal on the conviction of the appellant is dismissed. However, the Court finds that extenuating circumstances do exist.

(b) The sentence imposed on the appellant is hereby set aside and substituted with the following:

> The appellant is sentenced to a term of imprisonment for 16 years. In terms of section 16 (9) of the Constitution any pre-sentencing period spent by the appellant in custody in

respect of this case should be deducted from the sentence imposed herein.



MAMBA JA.

I AGREE

N. J. HLOPHE JA.

I ALSO AGREE

A. M. LUKHELE AJA.

FOR THE APPELLANT: **MS. N. NDLANGAMANDLA**

FOR THE RESPONDENT: **MS. B. NGWENYA**