IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 02/2021**

In the matter between

HASSAN KASASA **APPELLANT**

AND

THE KING **RESPONDENT**

Neutral Citation: *HASSAN KASASA v THE KING (02/2021) [2023] SZSC 10 (03 APRIL, 2023)*

Coram : S.P. DLAMINI, J. P. ANNANDALE et M. D. MAMBA JJA.

Heard : 06 JUNE, 2022

Delivered : 03 APRIL, 2023

MAMBA JA:

[1] *Criminal law- Conviction for Murder – Appeal on sentence only. Sentence matter within the discretion of the trial Court.*

[2] *Criminal law and Procedure – Appellant first offender guilty of murdering three year old child by strangulation. Sentenced to 50 years imprisonment – sentencing patterns within jurisdiction taken into account. Sentence of 50 years imprisonment oppressive, harsh and startlingly inappropriate. Sentence markedly disproportionate to that which Appeal Court would have imposed. Sentence reduced to 30 years of imprisonment.*

[1] This judgment ought to have been handed down long before today. I was not one of the original judges empanelled to hear the appeal. When I subsequently became a member of the panel, unbeknown to me I replaced the scribe and became the scribe. This was only brought to my attention by the Registrar on 09 March, 2023. That is the cause for the delay and I very much regret it.

[2] The Appellant, Hassan Kasasa, was arrested at Sidwashini, on the outskirts of Mbabane City on 14 January 2013 and was subsequently charged with three crimes. On the first Count, it was alleged that he had on 14 January 2013 murdered one Masisi Asimbonge Makhalima. This crime, the Crown alleged, was committed at or near Nginamadvolo area in the Hhohho region. On the second Count, the Crown alleged that the Appellant had committed the crime of Theft in

that on or about the 13th day of January 2013 and at or near Nginamadvolo area, the Appellant stole a motley of items worth E4,298.00 belonging to Sibusiso Masilela. The third Count alleged a contravention of Section 14 (c) of the Immigration Act 17 of 1982 (as amended). The substance of the charge was that he, being a foreigner to Eswatini, he had been found at Sidwashini area without the requisite documents allowing him to enter and remain in Eswatini.

[3] The trial commenced on 17 June 2020. The Appellant was duly represented by Counsel. On being arraigned, he pleaded not guilty to the first Count and pleaded guilty to the rest of the other Counts.

[4] At the end of the trial, he was found guilty on the first two Counts and was acquitted on the third Count. The trial Court came to the conclusion that, inspite of his plea, the Appellant ought to be acquitted and discharged on the third Count inasmush as the indictment did not disclose an offence. The indictment on this Count was quashed as disclosing no offence.

[5] On the first Count (murder), he was sentenced to a term of imprisonment for fifty (50) years, whilst he was ordered to serve a custodial sentence of one year on the second Count (Theft). These sentences were ordered to run concurrently and were backdated to the 13th day of January 2013, that being the date on which he was arrested and taken into detention. (I, however, note that the Appellant was arrested on 14 January, 2013. Again, both the Appellant in his evidence in chief and D/Constable T. Mabuza (PW7) testified that the relevant events occurred in January 2014. (See page 89 lines 15 and 16 and page 74 line 1 of record, respectively). They were clearly in error in this regard. The application by the Director of Public Prosecutions (DPP) in terms of Section 88 (Bis) (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) to summarily try the Appellant at the High Court is dated 24 June 2013 and bears the Registrar's date stamp of the next day. So plainly, the crimes were committed in January 2013 and not 2014.

[6] Following his conviction and sentence, the Appellant noted an appeal against the sentence of fifty (50) years of imprisonment imposed in

respect of the first Count. In his ground of appeal, the Appellant states that

> 'The sentence of fifty years imprisonment without the option of a fine is so severe that no reasonable Court would have imposed it.'

That is the only ground of appeal in this appeal. Although there is reference to a failure to impose a fine, I do not think that the Appellant challenges such failure to impose a fine as an irregularity. The statement or ground of appeal merely seeks to capture the actual sentence that was imposed by the trial Court and that is the essence of how the appeal was understood and argued before us.

[7] The legal principles involved in sentencing are well known in this jurisdiction and these were restated by this Court in *Johannes Mfanukhona Dlamini & Another v Rex (18/2018) [2023] SZSC 5 (23 February, 2023)* in the following terms:

> '[36] It has been repeatedly stated that the issue of sentences is a matter pre-eminently within the discretion of the sentencing Court. The legislature may also want to have a say on such

issues, and thus the stipulation in the statute of the sentences that ought to be imposed by the Court on certain offences. In deciding what would be an appropriate sentence in each case, the Court must always bear in mind the competing interests of society, the accused and the offence for which the accused has been convicted. Needless to say that, the Court ought to take into account the whole circumstances pertaining to the offence. At the end of the day, the Court has to do a balancing act. None of the three pillars of the triad must be over-emphasized or down played in the exercise.

. . .

[39] I must also observe that another important element or factor to take into consideration in the sentencing equation, is the sentencing patterns within this jurisdiction in respect of similar crimes.

. . .

[41] In *S v Malgas 2001 (1) SACR 469 (SCA), paragraph 12,* the Court stated:

'A Court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because if prefers it. To do so would be to usurp the sentencing discretion of the trial Court. Where material misdirection by the trial Court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a Court of first instance and the sentence imposed by the trial Court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as "shocking", or "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate Court is not

at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial Court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

That is the standard or practice employed or used in this jurisdiction as well.'

[8] The essential facts in this case are as follows:

8.1 The Appellant was born in Tanzania. His parents deserted him whilst he was still young. He was raised up by his grandfather. He left his home country and settled in the Republic of South Africa before coming into Eswatini illegally. He had no stable job in South Africa and was involved in the informal selling of cellular mobile telephones. In Eswatini he was involved in illegal dealing in dagga. At the time of the commission of the offence, he was thirty-four (34) years old.

8.2 The Appellant was in love with Zinhle Dlamini, the mother of the deceased. At the time of her death, Masisi was three (3)

years old. Zinhle introduced the Appellant to her family and the Appellant would often spend the night with Zinhle at her home whenever he was in Eswatini. Masisi was not the Appellant's biological child.

8.3 On 13 January, 2013, the Appellant came to Zinhle's home in the company of three (3) other men driving in a motor vehicle and asked for the whereabouts of Zinhle. On being informed that Zinhle was at work, he left the homestead but later returned in the afternoon alone and on foot. After pleading with Zinhle's family to allow him to sleep there in the absence of his girlfriend, he was allowed to spend the night there. After having his breakfast early on 14 January, 2014 he requested Zinhle's mother, Zodwa Dlamini to permit him to go with Masisi to town as he wanted to buy airtime for his mobile telephone. Zodwa granted him permission to travel with Masisi to town. After sometime, the Appellant returned to the homestead without Masisi. On being questioned by Zodwa on the whereabouts of Masisi, the Appellant lied to Zodwa and told her that Masisi had been taken by her mother after a tussle over her with a certain

man who claimed to be her father. In the process, the Appellant claimed that he had been hurt. Indeed, Zodwa noticed that the Appellant's trousers were dirty with red soil. After that brief conversation with Zodwa, the Appellant hurriedly left the homestead, taking his belongings with him.

8.4 After a report was made to Zinhle that Masisi was missing and the strange behaviour by the Appellant, the matter was reported to the police. The Appellant was subsequently arrested in a bus that was headed for Mbabane.

8.5 On being questioned by the police on the whereabouts of Masisi, the Appellant is reported to have asked for permission to speak to Zinhle's parents. He was granted this permission to speak to them in the presence of some members of the community police. It was during this brief meeting that the Appellant confessed to having killed Masisi. He begged for forgiveness from Zinhle's parents. Later he led them and the police to where the body of the deceased was.

8.6 On examination of Masisi's body, the pathologist concluded that the cause of death was strangulation. There was also

evidence to show that the deceased had soiled herself at the time she was being killed. The Appellant did not tell anyone why he killed Masisi.

8.7 The Appellant had been taking intoxicating liquor the whole day and night of 13 January, 2013 and was inebriated and distressed, he said.

These then are the relevant facts in this appeal that the Court had to consider amongst many other things in determining the appropriate sentence to impose on the Appellant. The trial Court was very much alive to these issues.

[9] As already stated above, the conviction of the Appellant is not in issue in this appeal nor is the admissibility of the evidence of pointing out referred to herein. I mention the said evidence because on the face of it, what was tendered as evidence of a pointing out was in essence a confession, whose admissibility stood on very shaky ground. However, nothing turns on this aspect of the matter in this appeal.

[10] In its judgment on sentence, the trial Court had this to say:

'[71] . . . This was no doubt, a cold blooded murder on the ground that the child was of tender years, looking up to the accused as a father figure. She died in the very hands which were supposed to protect her. She met her death in a gruesome and chilling manner as she was strangulated to death as per the pathologist's report. The crown witnesses testified that the child [soiled herself in the process].

[72] . . .That was a 3 year old who could neither influence nor control her mother's actions. It appears that Zinhle had to suffer the long lasting agony of the death of her only child for falling in love with the accused and offering him a place to sleep whenever he was in the country for his illegal trade. Worse still, she did not have to be the only one suffering. Her parents too had to [bear] the [brunt] as they lost their granddaughter for being courteous to the accused by acceding to his request to spend the night at their homestead. No intelligible motive is found in the case at hand. The murder . . . was callous and heinous.'

I cannot fault these remarks by the trial Court. There is no tangible evidence why the Appellant murdered the deceased. The Court *a quo* also found that, from the demeanour of the Appellant, he was not remorseful of what he had done. There were no signs of contrition and he often wore a smile as he testified in Court.

[11] I have referred to earlier in the judgment to the sentencing patterns or trends in this jurisdiction on similar cases. This is not to suggest or postulate the theory that judges must operate as robots or automatons in the imposition of sentence. Each case must always be decided and determined based on its own particular facts and circumstances. Again, the plea to adhere to certain definitive sentencing trends, is to try to achieve a certain measure of uniformity in sentencing within a particular jurisdiction. In turn, this would prevent judge shopping - whereby litigants would prefer that their cases be adjudicated upon by a certain judge or judges at the exclusion of other judicial officers. The discretion of the judicial officer remains sacrosanct or intact and cannot be overridden by such sentencing patterns or trends.

[12] Having said all of the above, one notes that death is indeed an irreversible phenomenon. No amount or nature of punishment may undo it. Thus the hurt consequent thereupon is also immeasurable. In *Fanukhona (supra)* the Court referred to the fact that a sentence of life imprisonment in this jurisdiction is at least a period of twenty-five (25) years of imprisonment, and this is for violent and heinous crimes such as the present. See also Section 15 (3) of the Constitution. However, the sentence of fifty (50) years of imprisonment imposed on the Appellant is, in my respective judgment too harsh or oppressive. It is disturbingly disproportionate to that which this Court would have imposed had it been the trial Court. In short, it is so markedly different or there is so much disparity between them that it can properly be said to induce a sense of shock or is startlingly inappropriate. In *Bongani Bavukile Dlamini v Rex (23/2017) [2020] SZSC 03 (21 April, 2020)* where the accused had stabbed the deceased about 20 times with a knife, a sentence of 23 years was increased on appeal to 25 years of imprisonment. The Court described the murder as brutal.

[13] There is another disturbing feature in this case. Section 295 (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) provides that

'(1) If a Court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.'

Having convicted the Appellant of murder, the Court was enjoined to conduct an enquiry on the existence or otherwise of extenuating circumstances and record its findings thereon. A finding either way on this issue would have had an impact on the sentence meted out. This was regrettably not done inspite of the fact that the defence had filed written submissions on the issue. (See page 211 to page 212 of the Record).

[14] The Appellant is a first offender and whilst he exercised his right to plead not guilty to the charge of murder, he did, upon his arrest offer some level of cooperation to the police and the next of kin of the

deceased by revealing to them where Masisi's body was. Admittedly, the crime had been completed but such an act did, in no small measure, curtail the anxiety on all the concerned parties.

[15] For all of the above reasons, I would uphold the appeal by the Appellant and make the following order:

(a) The sentence of 50 years of imprisonment imposed on the Appellant for the murder of Masisi Asimbonge Makhalima is hereby set aside and is substituted with the following one:

> 'The accused is sentenced to a term of imprisonment for 30 years. This sentence shall be deem to have commenced on the 14th day of January, 2013; that being the date on which the accused was arrested and taken into custody.'

MAMBA
JUSTICE OF APPEAL

I AGREE

S. P. DLAMINI
JUSTICE OF APPEAL

I ALSO AGREE

J. P. ANNANDALE
JUSTICE OF APPEAL

FOR THE APPELLANT: MR. S. B. MOTSA

FOR THE RESPONDENT: MR. N. NGUBENI (With M. Nxumalo & N. Mhlanga).