



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT ON SENTENCE**

**Criminal Case No: 485/2010**

**In the matter between**

**REX**

**Versus**

**BONGANI ANGEL CAPPER LUKHELE**

**ACCUSED**

**Neutral citation:**            *Rex v Bongani Angel Capper Lukhele (485/2010)*  
[2014] SZHC 339 (30 September 2014)

**Coram:**                        **OTA J**

**Heard:**                         **30 September 2014**

**Delivered:**                   **30 September 2014**

**Summary: Criminal procedure – sentencing; extenuating circumstances; Accused guilty of Murder with extenuating circumstances – sentence of 12 years imposed.**

## **JUDGMENT**

### **OTA J**

#### **[1] EXTENUATING CIRCUMSTANCES**

On 26 September 2014, I found the Accused guilty of the Murder of one Menelisi Dlamini, and convicted him accordingly.

[2] The task at hand is the appropriate sentence to impose. The law requires me, before the imposition of sentence, to first enquire from the testimony and submissions before Court whether there are extenuating circumstances which could reduce the Accused’s blameworthiness, and save him from the death sentence. The duty to find extenuating circumstances lies squarely with the Court. It is pertinent, that I also state here, that even in the absence of extenuating circumstances the Court still has the discretion to dispense with the death sentence if it deems it meet to do so. This discretion is statutorily derived from Section 15 (2) of the Constitution Act 2005, which postulates that **“the death penalty shall not be mandatory.”**

[3] Now, having carefully considered the totality of the evidence led and submissions by Counsel, I find the following extenuating circumstances.

- [4] Firstly, the Accused's drunken state at the time of the offence. Even though I have already found that this factor cannot exonerate the Accused from conviction for Murder, I however see it as a major contributor to his commission of the offence. The evidence tendered by Crown witnesses and the Accused shows that the Accused had consumed some quantity of alcohol at the material time of this offence. He commenced his drinking spree with PW2, Bongani Hadzebe, the previous day in a different bar, which drinking he carried over to the shebeen where the incident occurred on the next day. It is obvious to me that this factor aided his commission of the offence. I thus find intoxication to be an extenuating circumstance.
- [5] Furthermore, is that the offence was committed by the Accused in the cause of a fight with the deceased. The Accused did not deliberately set out to kill the deceased. I have found that he had indirect intention to kill i.e *dolus eventualis*. This is based on the fact that when he used a spear head to stab the deceased in a delicate and sensitive part of his anatomy, the chest, he ought to have foreseen the possibility of his action resulting in the death of the deceased, but he was reckless whether death occurred or not. The indirect intention to kill is an extenuating circumstance.
- [6] Then there is the fact that the Accused schooled only up to form 2. He is an unsophisticated person of low educational background. His general conduct at the shebeen shows this lack of sophistication. As **Dr Twum JA**, observed when dealing with extenuating circumstances, in the Botswana Court of Appeal Case of **Fly v The State (CCCLB – 009 – 08) (2010) BWCA, at para 3.**

**“Low education, coupled with a rustic background may do!**

[7] I thus find the Accused's low educational background to be an extenuating circumstance.

[8] In the face of the foregoing extenuating circumstances, I will impose a sentence other than that of death.

[9] **SENTENCE**

In mitigation of sentence, learned Defence Counsel Mr Motsa urged the following factors:

1. The Accused is a first offender.
2. He has two (2) school going children who are dependent on him.
3. He is 29 years old thus relatively young.
4. He cooperated fully with the police.
5. The guilt conscience occasioned by the crime will haunt him for the rest of his life.
6. He spent 36 months in prison prior to his release on bail.

[10] For his part, learned Crown Counsel Mr S. Dlamini, urged no aggravating factors, save to confirm that the Accused is a first offender.

[11] Bongani Angel Lukhele, there is no doubt that your immaturity by reason of your relative youthful age of 29 years contributed to this offence and should operate to mitigate your sentence. This immaturity is clear from the fact that you were unable to conduct yourself properly, which led to the deceased's demise. It is also my view that this relative youthful age and the fact that you are a first offender and not a reprobate, coupled with your obvious remorse demonstrated by your co-operation with the police, show

that you can still be reformed and should compel a sentence other than that of life imprisonment.

[12] I also take cognisance of the fact that the offence was committed in the course of a fight between you and the deceased. This should serve to mitigate your sentence.

[13] The fact that you have children who are dependent on you is an old, tired and over sung litany, by almost all convicts and in my view, carries little or no weight as a mitigating factor. This is because you should have thought of the welfare of your two children before you committed this offence.

[14] Similarly, the fact that you spent 36 months incarcerated prior to your release on bail, is of no moment. This is due to the fact that you are constitutionally entitled to a discount of this period of incarceration from the sentence imposed.

[15] Bongani Angel Lukhele, on the other side of the scale are the aggravating factors in this case, paramount of which is that in the course of your irresponsible drinking and unprovoked, you picked on the deceased and harassed him into engaging in a fight. After eliciting the fight and in its due course, you stabbed the deceased in the chest with a dangerous and lethal weapon such as the spear-head leading to his premature demise. There is no moral justification for your action. The deceased was not armed. He did not provoke you in anyway. He was just in the bar to drink just like every other person. He did not deserve to be sent to an early grave as he did.

[16] More to the above, is that we are faced with an increasing trend of the senseless killing of innocent citizens, perpetrated especially by the youths.

It appears to me that the sacredness of life has lost its salt in the kingdom. This is clearly unacceptable. The Constitution Act guarantees the right to life. This must be respected and it is the duty of the Courts to ensure this respect, by imposing fitting sentences for this sort of offence. This will serve as a deterrent to others.

[17] Having weighed the triad as above, I find a sentence of 12 years condign for the offence you committed. This sentence is backdated by 36 months to cover the period you spent incarcerated prior to your bail.

[18] It is so ordered.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
THE-----DAY-----2014**

**OTA J.  
JUDGE OF THE HIGH COURT**

**For the Crown: S. Dlamini**

**For the Accused: S. B. Motsa**