IN THE HIGH COURT OF ESWATINI

JUDGMENT ON SENTENCE

CASE NO. 446/15

HELD AT MBANE

In the matter between:

TIKHALI MANGO **FIRST ACCUSED**

MBONGENI SIBUSISO BUTHELEZI **SECOND ACCUSED**

MADIBHANE HABBAKUKI SIMELANE **THIRD ACCUSED**

Neutral citation: *Tikhali Mango, Mbongeni Sibusiso Buthelezi and Madibhane Habbakuki Simelane [446/15] [2019] SZHC 240 (5 December, 2019)*

Coram: **M LANGWENYA J**

Heard: **28 March 2018; 9 April 2018; 3 July 2018; 4 July 2018; 11 July 2018; 18 March 2019; 21 March 2019; 25 June 2019; 23 September 2019; 3 October 2019; 10 October 2019; 18 October 2019; 18 November 2019; 3 December 2019 and 5 December 2019**

Delivered: **5 December 2019**

Summary: *Criminal Procedure- Concept of extenuating circumstances defined-value or moral judgment-what constitute extenuating factors-belief in muti and witchcraft- level of participation of accused in commission of crime- unsophistication of accused- import of section 295(2) of the Criminal Procedure and Evidence Act 1938- extenuating circumstances found to exist- first and second accused sentenced to twenty-four (24) years and twenty-two (22) years respectively.*

JUDGMENT ON EXTENUATING CIRCUMSTANCES AND ON SENTENCE

[1] The accused persons were found guilty of the murder of Magidi Mlambo.

[2] When the matter was called to determine the existence or non-existence of extenuating circumstances, both accused persons did not lead evidence in extenuation. Counsel for both accused made submissions on their behalf.

[3] The concept of extenuating circumstances is defined as that which morally, although not legally, reduces an accused person's blameworthiness or the degree of his guilt[1].

[4] The Court must now consider all the relevant facts and circumstances-both mitigating and aggravating in order to make a value or moral judgment about the existence or otherwise of extenuating factors.

[5] It is trite law that the enquiry as to the presence or absence of extenuating circumstances is the responsibility of the Court and its officers[2]. The conduct of the enquiry should not be so much as ticking of the boxes as it should be one done with due diligence as well as an enquiring mind.

[6] The aim of the inquiry is to probe into whether or not any factor is present that can be considered to extenuate an accused person's guilt after his conviction.

[7] On behalf of the first accused it was submitted that he is an uneducated man and is sixty one years old from the remote rural Mambane area. Prior to his arrest, he earned a living as a traditional healer and believed that human body parts act as portions for luck. It was contended that in deciding whether

[1] *Daniel Mbudlane Dlamini* Court of Appeal Case No. 11/1998; *Kaleletswe & 2 Others v The State* Criminal Appeal 26/1994 (Botswana); *S v Letsolo* 1970 (3) SA 476(A); *R v Fundakubi & Others* 1948 (3) SA 810 at 818
[2] See *Daniel Mbudlane Dlamini* (above)

or not extenuating factors exist, the Court must consider the standards of behaviour of an ordinary person of the class of the community to which the convicted persons belong[3]. Mr Nzima for the second accused associated himself with this submission and added that the second accused went as far as Grade 3 at school; and that although he is much younger than the first accused, he is also a traditional healer who believes in *muti* and in witchcraft.

[8] It was submitted on behalf of both accused persons that the community of Mambane being in a remote rural area likely holds such beliefs about *muti* and the use of human body parts as a tonic for luck. I must state that there is evidence on record- and specifically from the accomplice witness- that the first accused recommended that body parts of a human being are used to attract luck especially in business endeavours.

[9] Both accused persons co-operated with the police when the investigation into the murder of the deceased was carried out through pointing out certain exhibits including some of the remains of the deceased.

[10] It is also an extenuating factor on behalf of the second accused that he did not actually hack the deceased with the axe. It is an aggravating factor against the first accused that the murder of the deceased was pre-meditated on his part. He used an axe to hack the deceased on the neck to death. The

[3] See Section 295(2) of the Criminal Procedure and Evidence Act 1938.

first accused sold and profited from the body parts of the deceased. Not so with the second accused. It is a mitigating factor that the second accused did not initiate this offence but seems to have been dragged into it-his degree of participation is therefore less than that of the first accused.

[11] That said, there is no denying the fact that the nature of the offence is savage and appalling.

[12] My value or moral judgment is that for the reasons outlined above extenuating circumstances are present.

[13] In mitigation, the Court was entreated to consider that the first accused is sixty one years old. He is a first offender. He has fifteen children, six of whom are minors and still attending school. The youngest child of the first accused is six years old. It was submitted that when the first accused was arrested, his youngest child was two years old and the first accused has not been able to cultivate a relationship with his youngest child as he has been incarcerated since.

[14] The first accused is married. Two of his wives are deceased and he has one surviving spouse. His children from the deceased wives are dependent on him for support and maintenance.

[15] It was submitted on behalf of both accused persons that they were remorseful.

[16] On behalf of the second accused it was submitted in mitigation that the second accused is a first offender. He is married and has one minor child who is aged five years old. His wife is unemployed and is dependent on second accused for support and maintenance. There is evidence that the second accused's home was burnt down soon after he was arrested. He told the Court in his evidence in chief that his wife and child had to relocate to his parental home at Phonjwana.

[17] In order to arrive at an appropriate sentence, I am required by law to consider the broad judge-made guiding principles known as the *triad.* [4] In *S v Zinn,* the Appellate Division held that in imposing a sentence 'what has to be considered is the *triad* consisting of the crime, the offender and the interests of society.' These factors must be considered equally and one should not be heavily relied upon over the other[5].

[18] Regarding the crime, the punishment imposed must not be disproportionate to the offence[6].

[4] *S v Zinn* 1969 (2) SA 537A
[5] *S v Holder* 1979 (2) SA 70A
[6] *Dodo v S* 2001 (3) SA 381 (CC) at paragraph 37.

[19] In as far as the offender is concerned, the Court should consider the personal circumstances of the offender and ensure that the sentence fits the offender.

[20] In as far as the society is concerned, a sentence that is imposed should not so much serve the community's wishes as it should the public interest[7]. The interests of society are not served by too harsh a sentence, but equally so, they are not properly served by one that is too lenient. Differently put, the public interest requires that punishment imposed should serve as a deterrent to other would-be offenders; serve as a preventative measure to crime as well as serve to rehabilitate offenders[8].

[21] Both accused persons did not verbalize any remorse and neither have I, during the trial and at this post-conviction stage observed them to be remorseful. Their attorneys however submitted that the accused were remorseful. I am of the view that both accused persons are more regretful than they are remorseful. But then, there is a difference between regret and remorse as ably stated by Ponnan JA in the case of *S v Matyityi* in the following manner:

> **'There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. The genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is the surrounding actions of the accused, rather than what he says in more**

[7] *S v Makwanyane* 1995 (2) SACR 1 (CC).
[8] *S v Rabie* 1975 (4) SA 855(A) at 866 A-C.

Court, that one should rather look. In order for remorse to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his or her confidence. Until and unless that happens, the genuiness of the contrition alleged to exist cannot be determined.'

[22] According to the post-mortem report, the cause of deceased's death was due to injury to the third and fourth neck bones. Now we know how that injury was sustained by the deceased. The first accused hacked him with an axe and the second accused assisted the first accused in the dismembering of deceased's body. There is no gainsaying this was a gruesome crime to a defence-less man whose only crime was to hearken to first accused's bidding he should go help him dig muti in the forest. Such betrayal of trust knows no bounds.

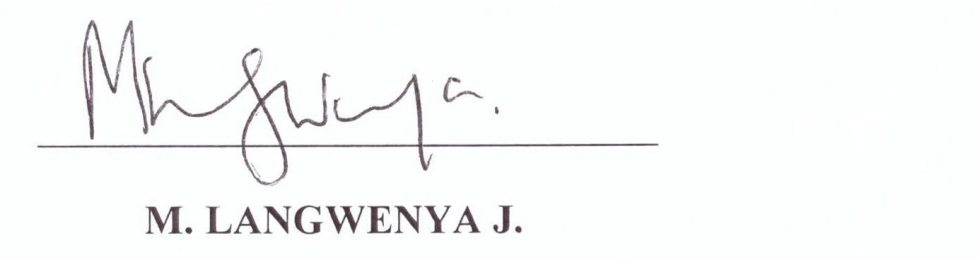
[23] I consider on behalf of both accused persons that they cooperated with the police and that they are both unsophisticated and first offenders.

[24] It is true that the deceased's family are poorer for losing him and that no matter what, he can never be brought to life again. One can only hope that the accused persons will, while in prison reflect on their conduct and change their ways for the better.

[25] First accused, for the lead role you played in the commission of the offence, you are accordingly sentenced to a term of imprisonment of twenty-four (24)

years. This sentence will take into account the period you have spent in lawful pre-trial incarceration.

[26] Second accused, for the accessory role you played in the commission of the offence, you are accordingly sentenced to a term of imprisonment of twenty-two (22) years. This sentence will take into account the period you have spent in lawful pre-trial incarceration.



M. LANGWENYA J.

For the Crown: Mr P. Dlamini (Director of Public Prosecutions)

For the first accused: Ms N. Ndlangamandla

For the second accused: Mr O. Nzima