

IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.29/96

In the matter between:

REX

VS

GILBERT MKHATSHWA NXUMALO

TEYISI POLYCARP SIMELANE

CORAM : MATSEBULA J

FOR CROWN : MR. D. WACHIRA

FOR DEFENCE : MR. NKAMBULE

JUDGMENT

27/01/97

The accused were initially charged with the crime of murder and when the charge was put to them they pleaded guilty and added a statement which was interpreted they are pleading guilty to culpable homicide.

The counsel for the Crown also informed the court that they had indicated to Mr. Nkambule, their counsel that they had pleaded guilty to culpable homicide and that the Crown counsel would accept the plea of culpable homicide.

The court has no discretion to interfere with the Crown when it accepts the plea extended by accused persons. This was clearly held in a number of cases and the one that easily comes to mind is STATE VS BERNARD 1985(4) SA431 in which it

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was held that the court misdirected itself by insisting that notwithstanding the plea pleaded by the accused and accepted by the Crown as culpable homicide. The court felt that a proper verdict was murder. On appeal the Court of Appeal held that that was irregular.

Therefore the court accepts the plea of culpable homicide as accepted by the Crown regarding this and on the facts stated by the Crown and supported firmly by Mr. Nkambule on the count. The court is satisfied that they are guilty of the crime of culpable homicide.

JUDGMENT OF SENTENCE

The court has repeatedly said the passing of sentence by any residing officer is the most difficult task in any trial because the court is faced with what we refer to as a 'triad'. That is the interest of the society the interest of accused and the prevalence of the crime. If the court considers the interest of the accused and exclude those of the society and the prevalence of the crime then the members of the society are likely to take the law into their hands and start punishing people without bringing them

to the courts of law.

The two have been convicted of culpable homicide and the court has been given the facts leading to the death of the deceased. As it had been correctly pointed by Mr. Nkambule

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a life was lost over trivial objects and over an amount of plus minus E200.

It is this factor which will weigh heavily on both accused as far as the sentence is concerned.

What society generally recognises is the sanctity accorded by the different communities to life and they also recognise the process by which life is brought about. Where therefore any person by his negligent act disposes of life the court has to send clear message so that society is satisfied that it is protected by the courts of law. These were facts which were decided in the case of FREEDMAN VS SMUTS 1996(1) 1154.

The court takes into account the facts as given by the Crown and supported by Mr Nkambule. The court will do the best it can to accommodate these interests.

The court, however also takes into account the contents of exhibit 'A' that is the post-mortem report.

According to exhibit 'A' there was subdural haemorrhage all over the brain surface and that on the left eye conjunctivae there was also haemorrhage. There was a lacerated wound over the chin 2.1 x 6.0cm deep and there were contusions over the front and back of chest varying in size approximately 1 to 3.1cm x 0.5cm.

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In view of the contents of the post mortem report the court does not accept accused no.2's version to his counsel of what happened. There is certainly more harm he caused the deceased which led to his death.

The court also takes into account that all this trouble was brought about by the deceased himself. The accused had taken a proper procedure by going to the Police Station where an agreement was reached. He agreed to pay accused no.1 the amount of money which accused no.1 had paid him for purchasing a starter-motor. As soon as they left the Police Station he threatened that he was not going to pay. This led to the two accused taking him to accused no.2's house. Because of this factor, the court takes into account in accused's favour that the deceased was the cause that led to his own death.

Taking all these into account the court passes the following sentence:

Accused no.1 is sentenced to an imprisonment for three years which is wholly suspended for a period of three years on condition that he is not during the period of suspension convicted of any crime of which violence is an element.

Accused no. 2 stands in a different light as I have already indicated and the court is going to sentence him differently.

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He is sentenced to three years' imprisonment which will be backdated to 24th February 1996.

J. M. Matsebula

Judge