



IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 92/98

HELD AT MBABANE

IN THE MATTER BETWEEN:

REX

VS

- 1. MBHEKISENI MNTSHALI**
- 2. ABEL DLEM MNGOMEZULU**

CORAM:

MATSEBULA J

FOR THE CROWN:

MS. LANGWENYA

FOR THE ACCUSED (NO.1):

MR. Z. MAGAGULA

FOR ACCUSED NO.2:

MR. MNISI

JUDGEMENT

JUDGEMENT ON SEPARATION OF TRIALS

Accused stand charged with a serious crime of murder. The allegation is that they on the 16th February 1998 at or near Stillo in the Lubombo District acting in common purpose, unlawfully and intentionally killed Mfungelwa Mabuyakhulu.

The Court has been informed that Mr. Magagula is appearing on behalf of accused no.1 on instructions by accused no.1 and a Mr. Mnisi should be appearing on behalf of accused no.2 also on instructions. The Court is not happy with the attitude of attorneys who get instructions, come for pre-trial conferences and at the commencement of the trial disappear on the basis that they have not been properly instructed or paid. That is unethical, the attorney should come back to Court and withdraw formally because he has placed his name on the record as appearing for an accused person. If an accused person is incapable of paying, the attorney must come here and inform the Court so that other arrangements could be made especially in cases where an accused person is charged with murder. He cannot just decide to stay away and put the Court in great inconvenience as it is in now. I will instruct the counsel for the Crown to phone him and let him come here otherwise he is going to be committed for contempt of court because we cannot allow this type of behaviour. This is what the President of the Law Society was saying the other day, these are some of the rotten potatoes in the legal practice. I will order that he be brought here to explain and we apologise on behalf of the Court for the inconvenience caused to accused no.2

For the present proceedings, the position is, accused no.1 pleads guilty to culpable homicide and accused no.2 pleads not guilty. In such events the correct procedure is to have a separation of trials because we cannot proceed where an accused pleads guilty to a lesser crime and another accused pleads not guilty. In the result, the case against accused no.2 will stand down. It does not mean he has been acquitted but he will wait until Mr. Mnisi comes to give an explanation and if need be he will be referred back to the Registrar so that a prodeo counsel could be arranged.

The law provides that, in the event that an accused is incapable of paying, the Registrar must provide a counsel for the accused to represent him. The case against accused no.2 will stand down and we will proceed against accused no.1 who is pleading guilty to culpable homicide.

JUDGEMENT ON ACCUSED NO.1

You were charged with the crime of murder and when the charge was put to you you pleaded guilty to culpable homicide. The Crown represented by Ms. Langwenya has indicated the willingness to accept the plea to culpable homicide instead of murder. She has now stated the

facts agreed upon between her and Mr. Magagula who is representing the accused. The facts are as follows:

It is said that on the 16th February 1998 at Stillo in the region of Lubombo, he the accused and another killed Mfungelwa Mabuyakhulu. It is said that Mabuyakhulu died accidentally and they had no intention of killing him hence the plea of guilty to culpable homicide.

Ms. Langwenya has also told the Court that the contents of the post-mortem examination conducted on Mfungelwa Mabuyakhulu are not challenged by the defence. The report made by PW7 Mandla Dlamini of Stillo Mbutfo Swaziland Defence Force by the accused and another person that they had accidentally killed Mabuyakhulu is admissible. There is no indication that by saying they had accidentally killed this person that that this is a confession because in that event if it would have been regarded as a confession then it would have been inadmissible on the basis that the member of the Defence Force did not follow the procedures laid down for people making confessions. To say you have killed a person accidentally is not a confession at all.

In the light of the fact that the Crown has accepted the facts agreed to between the Crown and the defence, the Court is satisfied that the accused is guilty of the crime of culpable homicide and find him guilty accordingly.

JUDGEMENT ON SENTENCE

You have been convicted of a crime of culpable homicide which as I point out is just as serious as any other crimes. Mr. Magagula on your behalf has stated that you pleaded guilty and therefore has shown that you are sorry and remorseful about what happened. There are numerous decided cases that we should take into account, the fact that an accused person pleads guilty and treat that in his favour. I hope that is the case with you.

Mr. Magagula also drew the Court's attention to the fact that you have 11 minor children; that your wife is unemployed; that 7 of these minor children are still going to school and that you are

a cotton farmer. That, if you are sent to prison on a custodial sentence you will suffer prejudice because the crop needs your personal monitory and obviously if the cotton crop fails, the children and your wife will be affected.

Mr. Magagula also drew the Court's attention to the fact that you committed this offence in the call of your duty as a community policeman. The Court agrees with Mr. Magagula that this is not one of the cases where people use brutal force to assault others, in the process, perhaps accidentally kill them and then come here and plead for leniency. He also drew the Court's attention to the fact that you unlike the people in the police force have not yet had the advantage of being trained on how to apprehend a culprit or a suspect without using force that exceeds the ordinary limit.

The work that you do is commendable. You are assisting the police force and the community to clamp down on crimes, but sometimes in the endeavour to control the incidence of crime the community police become more enthusiastic in their approach and exceed the amount of force necessary to effect an arrest and in such cases the Court looks at the intention with which the act is done. The intention of the community police is always to maintain law and order but the Court should also send a clear message to people who accept being appointed as community police that they should not exceed the minimum force that can be used in overpowering and effecting an arrest of a suspect. I would encourage community police to liaise with the Royal Swaziland Police Force when they are faced with cases that have been reported to them so that they do not exceed the limit of using force and find themselves in the situation the accused has.

It has been admitted that some of the stolen items that had been reported were in fact found in possession of the deceased and the deceased has not stolen these items from the accused but from a third party and the accused was merely coming to the assistance of the third party in order to recover the stolen property.

Taking all these factors into account the Court will pass the following sentence on the accused.

The accused will be sentenced to a fine of E1,000.00 or in default of payment to undergo an imprisonment for one year. He is further sentenced to an imprisonment for three years

which is suspended for a period of three years on condition that the accused is not, during that period of suspension, convicted of any crime of which violence is an element and committed during the period of suspension.

The accused must understand that if within the period of three years he again makes himself guilty of any crime involving violence then he will be imprisoned for these three years.

J.M. MATSEBULA

JUDGE