

THE HIGH COURT SWAZILAND

REX

Vs

SENZO ZWANE

Criminal Case No. 68/2005

Coram: S.B. MAPHALALA-J

For the Crown: MISS N. LUKHELE

For the Defence: IN PERSON

JUDGMENT

(23rd August 2005)

[1] The accused person who is conducting his own defence stands indicted for the crime of culpable homicide, where it is alleged by the Crown that upon or about the 14th December 2003, and at or near Ngwane Park area, in the Manzini region, the said accused did unlawfully stab Vusi Mdluli with a knife and inflict upon him certain injuries which caused the death of the said Vusi Mdluli on 21st December 2003.

[2] The accused tendered a plea of guilty in respect of the indictment. The Crown as represented by Miss Lukhele called two witnesses to prove the commission of the offence as required by the law. The first witness was Bongani Mdluli who was present when this crime was committed. The second witness was the medical

doctor, Dr Komma Reddy who is the pathologist who conducted a post-mortem examination on the deceased's body. He read and handed into the court a report where he stated in paragraph 10 thereof that the cause of death was "due to complications of injury to neck". In paragraph 20 he detailed the injuries on the deceased. It is clear therefrom that deceased suffered a number of antemortem injuries on his body.

[3] The evidence of PW1 Bongani Mdluli, being the single witness is that the deceased was his uncle and that at about 7.00pm on the 14th December 2003, he was with the deceased and others at Ngwane Park visiting. Accused person came up to them and asked the deceased if he was the one who said accused had stolen his (deceased) chicken. A quarrel then ensued between the accused and the deceased. Accused person had a knife and a fight broke out. Accused's friends came and they chased the deceased. One of the boys who were with the accused stabbed the deceased two times. All along PW1 tried to intervene to calm the situation. The deceased ran for about 50 metres where the accused followed him with the other boys. The accused then stabbed the deceased on the neck and on the back of his head. He testified that the accused was also injured in his hand during the fracas. Thereafter he made means to call the police who later arrived and the deceased was taken to hospital. The accused who had also gone to hospital for his injuries was arrested there by the police.

[4] The accused cross-examined this witness briefly where it was put to PW1 whether he saw the accused stab the deceased. The witness answered that the accused was the one who stabbed the deceased and also the Manyisa boy.

[5] The accused gave evidence under oath where in the main admitted that he did stab the deceased but that he did not stab the deceased on the neck but at the back. It was the other boy who has disappeared who stabbed the deceased on the neck. It would appear from his evidence that his defence is that the stab wounds he inflicted on the deceased were not the proximate cause of death since he only stabbed the deceased in the back. The pathologist had found that the cause of death was due to complications of injury to neck. This appear to be the

crux of the accused's defence although he had pleaded guilty to the offence and the Crown was only obliged to lead evidence, aliunde.

[6] In arguments before me Miss Lukhele submitted that the Crown in this case relies on the evidence of a single witness in terms of Section 236 of the Criminal Procedure and Evidence Act No. 68 of 1938 (as amended). She submitted that the evidence of PW1 was competent and credible satisfying the requirements of the said Section, (see R vs Mokoena 1932 OPD 79; Nhlapho vs R 1953 (1) PH H 11 (AD); R vs Bellingham 1955 (2) S.A. 566 (AD); R vs J 1966 (1) S.A. (88 SR AD) and also Swift's Law of Criminal Procedure, 2nd Edition at paragraph 256 at page 475 and the cases cited thereat).

[7] In the present case the accused person has pleaded guilty to the indictment for the crime of culpable homicide and the Crown has led evidence to prove the commission of the offence in terms of the Act. The only issue which is contentious is that PW1 has deposed that it was the accused who stabbed the deceased on the neck whilst accused's version is that it was the other boy who has disappeared who stabbed the deceased on the neck. It is trite law applying to the cautionary rule that where there are conflicting stories, one told by the complainant [or other Crown witness] and the others told by the accused, before the onus placed on the state can be discharged the court must be satisfied that the story of the party on whom the onus rests is true and the other false, (see R vs Segole 1947 (2) S.A. 641 (T); R vs Malan, 1947 (1) PH H 38 (AD) and RvMhlabiso 1956 (3) S.A. 379 (E) 383).

[8] In the present case it appears to me that the evidence of the Crown in this respect is more credible than the evidence of the accused. PW1 was adamant in his evidence in-chief that it was the accused who stabbed the deceased on the neck and back of the head. This witness did not know when giving evidence that the cause of death was the stab wound on the neck. He gave evidence on the events as they unfolded that fateful night. The accused did not cross-examine him on this point contenting himself on an argument that he did not know that

he was supposed to cross-examine him on this point. I must say, the accused cannot have his cake and eat it, he cross-examined this very witness on some other issues on what transpired that night. I do not accept the accused's version.

[9] In the result, for the afore-going reasons I find the accused guilty of the crime of culpable homicide as charged.

SENTENCE

[1] The accused person has been convicted of the lesser offence of culpable homicide as it has been shown in the judgment of this court dated 23rd instant. What remains for the court is to mete out an appropriate sentence in the circumstances of the case.

[2] Holmes JA in the case of *S v Rabie* 1975 (4) S.A. 855 (A) at 862 G referred with approval in *S vs Zinn* 1969 (2) S.A. 537 (A) at 541 and said the following:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."

[3] The above is the legal approach I ought to adopt in casu.

[4] The accused conducted his own defence and he advanced a number of factors in mitigation of sentence. Firstly, he asked the court to be lenient as he is a first offender. He apologized before the court. Secondly, that at

the time of the commission of the offence he was employed as a builder; and he is not married. Thirdly, that he takes care of his sickly mother. Fourthly, that he was arrested on the 14th December 2003, and was released on the 17th July 2005. Fifthly, that he is 21 years old and was 18 years old when he committed this offence.

[5] I have considered all these facts against the gravity of the crime committed. The accused person committed a serious offence and the circumstances in which this offence was committed do not put the accused in a favourable light at all. The accused continued to attack the deceased even after he was down. He attacked the deceased with other boys one of them the court has been told also stabbed the deceased. It appears to me that this was a free for all where the deceased was being attacked at all sides. This was despite PW1's intervention when he tried on a number of occasions to calm the situation.

[6] In the result, the accused is sentenced to 7 years imprisonment, two years of which is suspended for a period of 3 years on condition that the accused is not convicted of an offence in which violence is an element committed during the period of suspension.

S.B. MAPHALALA

JUDGE