

IN THE HIGH COURT OF SWAZILAND

REX

Vs

MPENDULO MATSENJWA

Criminal Case No. 164/2007

Coram
For the Crown
For the Defence

S.B. MAPHALALA - J MR.
S. FAKUDZE MR. B.
SIMELANE

JUDGMENT 6th
December 2007

[1] The accused person one Mpendulo Matsenjwa of KaNdzangu area in the District of Lubombo is indicted for the murder of one of his kinsman in that upon or about the 21st January 2006 and at or near KaNdzangu area in the District of Lubombo, the accused did unlawfully and intentionally kill Shonaphi Dlamini.

[2] The accused person is represented by *Mr. B Simelane* and the Crown is represented by *Mr. S. Fakudze* and has tendered a plea of not guilty for murder but guilty in respect of the lesser offence of culpable homicide. The trial proceeded on this basis where the parties filed formal admissions by the accused in terms of Section 272 (1) of the Criminal Procedure and Evidence Act (as amended) of 1938. The said Section of the Act provides that **"in any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and such admission shall be sufficient evidence of such fact"**. In sub-section 2 thereof it provides that **"an admission made by the accused or his representative in his presence at a preparatory examination, which the Magistrate presiding thereat noted on the record, may be proved at the subsequent trial of such accused by the production, by any person, of the documents purporting to constitute such record"**. As a result thereof the summary of evidence by the Crown was entered *in toto* as reflected hereinafter:

[3] The first witness for the Crown is listed as one Dr. R.M. Reddy of Police Headquarters who is the pathologist who conducted a post-mortem examination on the body of the deceased and also prepared a report thereto.

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November 2007, where he explained in great detail his findings and I shall refer to his evidence later on as I progress with the judgment.

[4] The second witness for the Crown is one PW2 Nunu Hilda Masuku of Mpolonjeni area next to Mpolonjeni stores. Her evidence is that of an identification witness on the body of the deceased who is her grandmother. PW3 is one Ivin Ngwanyangwanya Dlamini also of KaNdzangu area next to **Emphakatsini**. Her evidence is that during the morning of the 22nd January 2006 whilst walking along the path she noticed a person lying motionless next to the path. He came closer to this person and concluded that this person was dead and that the body was that of the deceased. Without touching this person, he proceeded to report his findings at the **Umphakatsi** where he found one Frank Mcitheni Shongwe to whom he made the report.

[5] According to the summary of evidence the fourth witness listed is one PW4 Frank Mcitheni Shongwe who got a report from PW3. This witness upon getting this report proceeded to the scene whereupon he found the body of the deceased with multiple injuries all over her body then subsequently called the police. The next witness listed is one PW5 Thomas Matsenjwa who is accused's uncle. His testimony is that in the morning of the 5th February 2006, whilst at his homestead PW6 requested him to accompany him to his homestead after telling him about what he knows about deceased death. Indeed, he proceeded to PW6's home where they found the accused person. The accused related to this witness how he killed the deceased. The accused also told him that save for his brothers, PW6 and PW9, he has also told two other people about what he did. The accused also related the circumstances that led him to tell these two people. In the

company of other community members, this witness took the accused to the police station where he was detained. The sixth witness for the Crown is one PW6 Prince Ntokozo Matsenjwa also of KaNdzangu area at Joseph Matsenjwa's homestead. This witness is accused's elder brother. He collaborated the evidence of PW5. He caused the accused to relate to a number of people of how he killed the deceased. His evidence is corroborated by PW9 to some extent.

[6] PW7 was Nkosingiphile Dlamini also of KaNdzangu area near KaNdzangu Primary School. She testified that in the evening of the 21st January 2006, he together with PW8 came across the accused who was running. Upon seeing them, the accused told them that he had killed the deceased with an axe. The accused requested the duo to go with him to the spot where deceased was lying as to help him remove the axe he used in killing her which was now stuck on the deceased's head. Indeed, they obliged but this witness got cold feet when he saw the deceased lying dead with the axe lodged in her head.

[7] The eighth witness for the Crown was one PW8 Sephetho Ndwandwa also of KaNdzangu area at Wilson Nxumalo's homestead next to the sport field. He assisted the accused in removing the axe lodged on deceased's head after being requested by the accused. He deposed therein that the accused warned them not to tell anyone about what they saw. This witness took the axe home and hid it as requested by the accused. However, he handed over the axe to some members of the community (PW9 and PW10) on the 6th February 2006. When handing over the axe, his mother Norah Langwekazi Ndwandwe was present. PW9 Remember Bizzah Senzo

Matsenjwa who is accused elder brother was also called. He collaborated PW5 and PW6 to some extent. He also deposed as to how the accused was eventually handed over to the police.

[8] PW10 Ernest Ferreira who is also a member of KaNdzangu community. He is also a community policeman. He testified that on the day in question, in the company of PW5, PW6, PW9 and PW11 accused came to his homestead. The accused told them where the axe he used in killing the deceased was. The accused then led them all to PW8's homestead where the axe was recovered. The group then took the axe and the accused to the Siteki Police Station. PW11 George Nicholas Shiba was amongst those who handed the accused over to the police. He collaborated the evidence of PW5, PW6, PW9 and PW10.

[9] From the police PW12 1694 Sergeant Simoen M. Dlamini of Siteki Police Station testified that on the 22nd January 2006, he received a report regarding this matter. In the company of other fellow officers he proceeded to the scene of crime where upon arrival they attended to it. He described to the court the state in which he found the body of the deceased.

[10] PW13 3554 Constable N. Dlamini of Siteki Police Station is one of the investigators in this matter. He incarcerated the accused when he was brought to the police station by community police.

[11] The last witness for the Crown was the Scenes of Crime

made. He preserved the scene and then took photographs which were handed into court to form part of his evidence. The photographs were entered collectively as exhibit "A1 to A13".

[12] The axe which was used by the accused in committing this crime was entered by consent as "exhibit 1".

[13] The Crown then closed its case and the accused also closed his case without leading any evidence in his defence.

[14] The Crown contended that there is no doubt who killed the deceased, that it is the accused before court. The accused person made formal admissions in terms of Section 272 of the Criminal Procedure and Evidence Act. The accused admits that on the 21st January 2006, he unlawfully killed the deceased. He further admitted that he recorded a statement to a judicial officer. That he made this statement freely and voluntarily. This statement was entered by consent to form part of the evidence. The accused asked this court to consider the summary of evidence. Based on the formal evidence and the supporting evidence of Dr. Reddy the accused should be found guilty of the crime of murder.

[15] Counsel appearing for the accused filed very comprehensive Heads of Arguments for which I am grateful to Counsel for his high degree of industry and professionalism. The crux issue before the court is outlined that the point of departure between the defence and the prosecution is whether accused is guilty of the crime of murder as the Crown alleges or culpable homicide as the defence submits. In this regard it is contended for

the accused that murder is the unlawful killing of a human being with intent. Culpable homicide is the unlawful killing of a human being either negligently or intentionally where there is a partial excuse. In this regard the court was referred to the Court of Appeal decision of *Thandi Tiki Sihlongonyane - Criminal Appeal No. 40 of 1977* and that of *Lokudzinga Matsenjwa 1970 - 6 S.L.R. 25* and the South African case of *S vs Alexander 1982 (4) S.A. 710 (T)*.

[16] It is contended for the accused that the present case falls on the second part of the culpable homicide definition where it may be decided that there appears to be an intention but there is partial excuse. Counsel for the accused contended that the provision of Section 2 of the Homicide Act apply to the facts of the present case. The said section provides the following:

"(1) A person who-

- (1) Unlawfully kills another under circumstances which but for this section would constitute murder; and
- (2) Does the act which causes the death in the heat of passion caused by sudden provocation as defined in section and before there is time for his passion to cool shall be guilty of culpable homicide".

[17] According to *Mr. Simelane* provocation under this Act is defined as including any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of ordinary person to deprive him of the power of self-control and to induce him to assault the person by whom such act is done or offered. Ordinary person is defined as an ordinary person of the class of the community to which the accused belongs. That there is no doubt that the act has made what appears *ex facie*

murder to be culpable homicide. No doubt exists that the assault that accused carried out on deceased was severe but regarding what they be murder to be culpable homicide is the very intention of Parliament when making such act. *Mr. Simelane* has submitted that the question for determination is whether what was said by deceased was enough to induce the loss of self-control? This unlike the South African position requires the court to wear the shoes of a rural person living in the rural area and believing that a person of his sister's age would not die naturally but is bewitched and then deceased confessing her part in the death of his sister, a sister he had buried two months previously. The position of the act requires that the court should take into account the custom practices and beliefs of the rural communities and that inevitably brings in the element of believing that people are capable of bewitching and killing others.

[18] Counsel for the accused further contended that our position differs from the Southern African position in that the test is that of a reasonable man. This position is well exposed in *R vs Hercules 1954 (3) S.A. 826*, *R vs Detseba 1958 (1) S.A. 762*, *Rex vs Tanganyika 1958 (3) S.A. 7* and the case of *Majaheni Ngwenya vs R 1970 -6S.L.R. 126 (CA)*.

[19] Counsel for the accused further cited the High Court case in the matter of *Majaheni Ngwenya vs R 1970 - 76 S.L.R. 126 (CA)* before the Court of Appeal (as it then was) where the court reached a conclusion that the crime of culpable homicide had been committed on similar facts. Appellant's father had died and the herd boys were falling sick. A day after appellant's father had died, appellant visited deceased and invited him to his place so that he could see what he had done. Along the way appellant assaulted the

deceased. Deceased had admitted bewitching appellant's father and the herd boys. After finding appellant guilty of culpable homicide the Court of Appeal sentenced him to 5 years imprisonment.

[20] According to *Mr. Simelane* in the statement to the Magistrate accused stated that he got angry and he failed to control himself then hit deceased. There is nothing to gainsay what he has asserted and the court should accept that as the reason accused assaulted deceased. That the confession by the deceased to him was enough to advise any person in his position to act in the manner, he did; that he acted in the heat of passion in assaulting the deceased and did not cool off; and that therefore he is guilty of culpable homicide in terms of the Homicide Act of 1959.

[21] The above is the evidence before court and the legal submissions by Counsel in this case. The Crown contends that accused ought to be found guilty of the crime of murder and the defence on the other hand has taken the position that the court ought to find the accused guilty of the lesser offence of culpable homicide in view of the operation of Section 2 of the Homicide Act of 1959. The said Section provides that a person who unlawfully kills another under circumstances which but for this section would constitute murder, and does the act which causes the death in the heat of passion caused sudden provocation as defined in the section and before there is time for his passion to cool shall be guilty of culpable homicide.

[22] After considering the arguments of the parties and assessing the evidence brought forth I have come to the considered view that the position adopted by the defence is the correct one on the circumstances of this case. I

agree *in toto* that the provisions of Section 2 of the Homicide Act operate on the facts of present case. On the facts of the case accused committed this act which caused the death of deceased in the heat of passion caused by sudden provocation by the deceased and there was no time for his passion to cool off and thus he can only be found guilty of the lesser crime of culpable homicide under the cited Section of the Criminal Procedure and

A handwritten signature in black ink, consisting of a large, stylized initial 'S' or 'M' with a horizontal line extending to the right.