

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No. 160/2006

REX

Vs

CHRISTOPHER MUZI MABELESA

Coram: S.B. MAPHALALA - J

For the Crown: MR. P. MDLULI

For the Accused: MR. B. MAPHALALA

REASONS FOR SENTENCE

14th August 2008

[1] This is a very tragic and sad case of culpable homicide where the accused killed his younger brother in a hunting expedition.

[2] On the night of the 15th September 2006 at approximately 2300 hours, accused and deceased set off to the mountain of Ntondozi to hunt for game. Accused was armed with a 12 bone shot gun and several live rounds of ammunition. At the mountains accused shot at an animal which did not die instantly and as his younger brother rushed to finish off the animal accused simultaneously taking a second shot, hit his brother on the back. The deceased died instantly from the shot.

[3] As a result of the above facts the accused was indicted for the crime of murder in that upon or about the 15th September 2006, and at or near Ekukhulumeni area in the Manzini Region, the accused did unlawfully and intentionally kill one Bongumusa Stanley Mabelesa. In a pre-trial conference held earlier on the accused tendered a plea of not guilty to murder and guilty to the lesser crime of culpable homicide.

[4] On the 5th August 2007 when the accused appeared before me he confirmed his plea as afore-mentioned. This plea was also accepted by the Crown and confirmed by his Counsel Mr. Maphalala. A Statement of Agreed Facts was thereafter read into the record to form part of the prosecution case. I must mention that the agreed facts are what is outlined by this court at paragraph [2] of this judgment. The court then returned a verdict of guilt in respect of the lesser crime of culpable homicide.

[5] Mr. Maphalala for the accused then filed very useful Heads of Arguments and provided the court with relevant decided cases on the subject. I must put it on record that the professional standards exhibited by Counsel was of the highest notch and is appreciated by this court. Furthermore, Mr. Mdluli for the Crown also exhibited a very high sense of justice by leaving the question of sentence to the court.

[6] As a prelude to his submissions in mitigation of sentence Mr. Maphalala cited the legal

authority of JRL Milton, South African Criminal Law and Procedure Vol. 11 at page 399 where the following is stated:

- (1) The penalty is discretionary and 'culpable homicide is a most hospitable crime' embracing circumstances in which the proper sentence may range from imprisonment to a small fine or less.
- (2) Generally 'in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender'. But this proposition, which was enunciated by Davis AJA in R v Swanepol in the course of interpreting R v Mahametsa, and which has since been applied in many other cases, does not embody 'rules of law which are binding on all courts and in proper cases they can be departed from'.
- (3) But even where a 'high degree of negligence' has been proved the court is not obliged to impose a sentence of imprisonment. It may consider that the offender's record and circumstances make imprisonment inappropriate.
- (4) While it is true that 'no greater moral blameworthiness arises from the fact that the negligent act caused death' it is not wrong for the court, bearing in mind the deterrent and retributive purposes of punishment, to emphasize 'the sanctity of human life' and impose a more severe punishment than if death had not resulted.
- (5) Subjective factors which are not relevant to the determination of whether the accused acted negligently may be taken into account in determining his moral blameworthiness for purposes of sentence.

[7] The court was further referred to the cases of S vs Isaacs 2002 (1) S.A. 176 at 178, S vs Silimela 1999 (2) SACR at page 7, S vs Sakabula 1975 (3) S.A. 784 (c) at 786H, S v Kulati 1975 (1) S.A. 557 (EC) at 559 A - 560H, Grantoy Thwala vs R 1979 -81 S.L.R 77 at 78C, John

vs R 1970 - 6 S.L.R at 83 - 84, R vs Thwala 1982 - 86 S.L.R. 401 at 401 - 404.

[8] Counsel for the accused submitted the following facts in mitigation of sentence:

1. Accused is employed by the Swaziland Water Services Corporation and holds a responsible position in the capacity of a supervisor in the Water Treatment Department;
2. Accused is married with two minor children aged 9 years and 4 years respectively;
3. Accused is a sole breadwinner looking after his wife, his two children, his mother, two nieces as well as the child of the deceased; and
4. Accused personally handed himself over to the police and further reported the death of his brother to the police.

[9] The court was further referred to Section 313 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 to the proposition that the law allows the suspension of a sentence on a conviction of culpable homicide. Further the court was referred to Section 314 of the said Act to the proposition that the law allows an accused person convicted of culpable homicide to be sentenced to payment of a fine including payment of instalments.

[10] Having considered the tragic facts of this matter against the principles of law enunciated in

the decided cases cited at paragraph [7] of this judgment, I have come to the view that a custodial sentence would be unduly harsh on the accused. The accused has killed his own brother accidentally and I am sure this fact will always be with him for the rest of his days. The small child of the deceased who is under his care will always be a painful reminder that his father died in the hands of "babelomkhulu". By all standards this will always be punishment to the accused whether he is in custody or out of custody.

[11] I also come to the view that no amount of fine will usage the painful memories. In the circumstances of the case I have come to the considered view that a wholly suspended sentence would meet the special circumstances of this case.

[12] In the result, for the afore-going reasons the accused is sentenced to 7 (seven) years imprisonment and the whole sentence is suspended for a period of three years on condition

S.B. MAPHALALA

PRINCIPAL JUDGE

that the accused is not convicted of an offence in which violence is an element committed during the period of suspension.