

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL CASE NO.441/07**

**In the matter between:**

**THE KING**

**AND**

**MPIYAKHE ALBERT SHONGWE**

**Mr. Attorney N.M. Maseko for the Applicant  
Mr. Attorney S. Dlamini for the Defendant**

**Date of hearing: 29 June,  
2009 Date of Judgment: 29  
June, 2009**

***EX TEMPORE JUDGMENT***

**MASUKU J.**

[1] The accused in this matter stands before me on an indictment of culpable homicide. The particulars of the indictment are that upon or about 14 December, 2007 and at or near Mahlshaneni area in the Shiselweni

District, the said accused person did unlawfully and negligently kill one Madlajana Thwala and thereby committed the crime of culpable homicide.

[2] When the indictment was read to the accused person he pleaded guilty thereto and his plea of guilty was subsequently confirmed by his Counsel Mr. Dlamini. I thereafter put certain questions to the accused in order to satisfy myself that he agreed with the constituent ingredients of the offence in question namely culpable homicide and the accused confirmed all the elements including that the deceased was dead and that he died as a result of injuries inflicted by him and *e.t.c.*

[3] Thereafter the statement of agreed facts was read into the record and interpreted to the accused, and the accused confirmed the same as being a true and accurate reflection of the events which led to the deceased's death on 14 December, 2007.

[4] There are also some exhibits that were handed in by consent including the postmortem report, the confession of statement and the album of photographs, these being documentary exhibits. And there were real exhibits

constituting a knob-stick exhibit (1) and a nokia 1100 cellular phone exhibit (2).

[5] In view of the accused's plea of guilty which was confirmed by his attorney and the answers returned by the accused to the inquiries made by the Court regarding the constituent elements of the crime of culpable homicide; his acceptance of the agreed statement of facts, and the exhibits that were tendered in evidence both documentary and real, I am well satisfied that the accused's plea is unequivocal. In the circumstances, I hereby return a verdict of guilty and I find you guilty of the offence of culpable homicide in line with your plea.

### **JUDGMENT ON SENTENCE**

[6] I have, upon his own guilty plea, convicted the accused person of the offence of culpable homicide. The task of the Court, at this juncture, is to impose what is, in the circumstances of this case a condign sentence, which is of course, no easy feat. No wonder that it has been correctly stated that "sentencing is a lonely and onerous task", per Hogarth "Sentencing as a Human Process," (1971) U. Toronto, page 65.

[7] In *S v Ndlovu* 1982 (3) SA 51 (ZH), Gubbay J. (as he then was), said the following at 52:

"But in each case, what has to be looked to is the moral blameworthiness of the miscreant and proper balance maintained between the inherent seriousness of the crime, the circumstances in which he committed it and his own personal situation."

That is what I intend to do in the instant case, but this will be done in line with the admonition given by Corbett J.A. in *S v Rabie* 1975 (4) SA 855 (A) at 866 A - C.

[8] There, the learned Judge of Appeal said:

"A judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive for severity; nor on the other hand surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach the task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as one tenet in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[9] In order to apply the guidelines stipulated above, it is necessary to first consider your personal circumstances and the setting in which this grievous offence occurred. I have been told that you are 61 years old, married with six children, who have all attained the age of majority. You are a subsistence farmer, having spent your productive years in the mines of the Republic of South Africa.

[10] I will consider that you are first offender, who has previously had no brush with the law. It has also been contended on your behalf that you evidenced remorse by

pleading guilty, which is further buttressed by the fact that you submitted yourself to the police after having committed the offence. A plea of guilty does not per se serve to indicate remorse in every case. See *S v Muller* [2006] ZA GPHC at paragraph 72. Furthermore, it is clear from the agreed statement of facts that the deceased was in his aggressive element, having assaulted you and accusing your cattle of having eaten his crop. His behaviour, as described in the statement of agreed facts was clearly annoying.

[11] It is also accepted that on the day in question, you, as was the deceased, had been imbibing alcohol, which may have served to impair your judgment and subsequently, your actions. Creeping into this medley of circumstances, was the temptation on your part to steal the deceased mobile telephone. I acknowledge that you have not been charged for that offence. Another weighty factor is that you are not a young person anymore; not long from attaining the biblical life expectancy age of three score and ten.

[12] That said, reality must be brought home that you have been convicted of a serious offence which has resulted in the loss of a life. Whilst it may be true that the deceased was in a sense the author of his own misfortune by being aggressive and petulant, your reaction to his provocative conduct does not appear, objectively viewed, to have been commensurate. The merciless and severe beating to which you subjected the deceased, as reflected in the autopsy report, was clearly excessive in the circumstances and renders this a case on the upper scale of culpable

homicide, in terms of seriousness. The autopsy report records lacerations on the scalp, fractures on the skull, abrasions on the temporal regions, a fracture in the right forearm, to mention but a few.

[13] Although admittedly disempowered somewhat in your reasoning faculties by the potency and probably the quantity of your drink of choice, at your age, one would have expected more maturity and sound judgment even in the face of provocation. This was not to be. You necessarily have to be condemned, in the twilight of your life, to a certain measure of a custodial sentence, to underscore the seriousness of this offence, perchance other like-minded persons who may wish to emulate your bad example may be deterred.

[14] In all the circumstances, it is my considered opinion that the following sentence would meet the justice of the case:-


14.1. You are hereby sentenced to seven (7) years imprisonment.

14.2. Three (3) years of such sentence be and are hereby suspended for a period of three (3) years on condition that you are not, during the period of suspension, found guilty of an offence in which violence to the person of another is an element, resulting in a custodial sentence being imposed without the option of a fine.

14.3. The custodial sentence is to take into account the pre-trial period spent by the accused person in custody i.e. 5 days between 14 December, 2007 and 19 December, 2007, when the accused was admitted to bail.

**Directorate of Public Prosecutions for the  
Crown. Messrs. Mabila Attorneys for the**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
29<sup>TH</sup> DAY OF JUNE 2009.**

  
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**T.S. MASUKU  
JUDGE**