IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CRIMINAL TRIAL NO. 235/07**

In the matter between:

REX

VS

1. **SAMSON MADLOPHA**
2. **MANGALISO MATSENJWA**

CORAM " MBC MAPHALALA, J

FOR CROWN MR. N. MATHUNJWA

FOR DEFENCE MR. B. MDLULI

JUDGMENT 16th
DECEMBER 2009

[1] The accused were charged with murder it being alleged that upon or about 10th February 2007 and at or near Siteki area in the district of Lubombo the accused persons each or both of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill Oscar Langalibalele Groening.

[2] When the accused were arraigned, they both pleaded guilty to the lesser charge of culpable homicide, and the Crown accepted their plea. Accordingly, the trial proceeded on the charge of culpable homicide.

[3] The Crown applied to hand in the Statement of Agreed Facts in Court as part of its evidence, and the application was granted. The Crown proceeded to read the Statement in open Court. It is worth mentioning that the Statement was submitted with the consent of both Counsel for the Crown and the defence.

[4] The Statement of Agreed Facts reads as follows:

> **Samson Madlopha and Mangaliso Matsenjwa, (hereinafter referred to as accused No. 1 and No. 2 respectively) stand charged with the offence of murder. They have both individually pleaded guilty to the lesser charge of Culpable Homicide which plea the Crown accepts.**

On the 10th of February 2007 at Siteki Town Centre, in the Lubombo region, at around 1700 hours, accused No. 2 went to Bogart bar, Siteki, and imbibed in alcoholic beverages for about four (4) hours. During the drinking spree accused No. 2 picked up a fight with the deceased over accusations that accused No. 2 had taken the deceased's girlfriend at the bar.

At around 8.30 pm the deceased person decided to leave Borgart bar for home. Accused No. 1 and No. 2 decided to follow him about 15 minutes later. They caught up with the deceased next to the Siteki Swaziland Electricity Company (S.E.C.) deport, which ironically was the deceased's place of employment.

When the deceased person realized that one of the two people was accused No. 2, he (deceased) took out his waist belt and attempted to beat accused No. 2 accusing him of lacking discipline. Accused No. 2 shoved the deceased person away. Deceased person advanced towards accused No. 2. Accused No. 2 picked up a nearby stick and repeatedly struck the deceased person with it on his (deceased) upper body and head and the deceased fell on the ground. The deceased rose up and grabbed accused No. 2 by his clothes. Accused No. 1 then retrieved a knife from his pocket and proceeded to stab the deceased once on the back of his right lower chest.

The deceased raised an alarm. Two security guards stationed at the nearby Swazi Bank, Siteki branch, namely Mbuso Xaba (PW1) and Thulani Zaba Phakathi (PW2) approached the scene of the fight in an endeavour to assist the person raising an alarm. They (PW1) and (PW2) unsuccessfully tried to apprehend the deceased persons' assailants. They then alerted Policemen (PW9) and (PW10) who were driving a police van nearby the place where the deceased was assaulted. Both officers joined the chase of the assailants and (PW9) apprehended accused No. 2 whom he knew, who again escaped successfully. The policemen then conveyed the deceased person to Good Shepherd hospital where he was certified

dead on arrival.

Both accused No. 1 and No. 2 were arrested on the 11th February 2007 and have been in custody since that day.

On the 13th February at Siteki mortuary, Dr. R.M. Reddy (PW11), police pathologist, conducted a post mortem examination on the deceased's body. He opined that the cause of death was due to "Haemorrhage as a result of Penetrating Injury to Large Blood Vessel of Thoracic Cavity".

By severely assaulting and stabbing the deceased with a stick and knife, accused No. 1 and No. 2 unlawfully and negligently caused the deceased's death. There was no legal justification for accused No. 1 and No. 2's illegal conduct especially because at the time of the stabbing the threat posed by the deceased had been subdued.

Accused No. 1 and No. 2 admit that the deceased died as a result of their unlawful and negligent act and there was no *norms actus interveniens*

The following will be produced as evidence:

-**Confession by accused No. 1**

-**Confession by accused No. 2**

-**Post mortem report**

- **Stick**

[5] In the **Criminal Appeal of Zwelithini Dlamini v. The King Criminal Appeal No. 5 of 2008, Zietman J.A. at page 4** had this to say:

> "When a case has to be decided on a Statement of Agreed Facts, it is necessary that sufficient particulars of the event be included in the statement not only to prove the guilt of the accused, but also to

> enable the Court to determine what will be an appropriate sentence for the committed crime. This is particularly important where more than one accused is involved and where the guilt of one or more of the accused is determined on the basis of Common Purpose. In order to determine an appropriate sentence for each of the accused, the actual role played by each of them in the commission of the offence can be important and should be clearly stated".

[6] I am convinced that in the present case, the Statement of Agreed Facts has given the Court sufficient facts and particulars to enable the Court to determine what will be the appropriate sentence for the crime committed by the accused; the statement further reveals the role played by each of the accused in the commission of the offence.

[7] In the Zwelithini Dlamini appeal *(supra),* the judge noted with concern that the Statement of Agreed Facts did not give sufficient particulars to enable the court to prove the guilt of the accused and further assist the Court in determining the appropriate sentence for each of the accused persons. It is against this background that the sentence imposed on the Appellant by the Court *a quo* of eight years imprisonment backdated to the day of arrest was confirmed but with the rider that three (3) years of the eight years are suspended for three (3) years on condition that the appellant is not found guilty of murder, or culpable homicide involving an act of violence against another person, or assault with intent to do grievous bodily harm committed during the period of suspension.

[8] In that case as in this case, the two accused had originally been indicted for murder on the basis of the doctrine of Common Purpose but they pleaded guilty to the lesser charge of culpable homicide. They were both convicted of eight years, and the appellant who was accused No. 1 appealed against his sentence,

and the Court noted that very little had been said in the Statement of Agreed Facts on the role played by the appellant in the Commission of the offence; hence, the Court reduced the sentence of the appellant holding at page 6 that:

> "Any uncertainty or doubt about the exact role played by the appellant must be decided in his favour".

[9] In the present case, the Court asked both accused personally if they had read the Statement of Agreed Facts, understood its contents and whether they agreed that it should be admitted in Court as evidence; both accused persons responded separately and individually in the affirmative.

[10] Similarly, both accused agreed that they have read the Post Mortem Report, understood its contents and that they have no objection that it should be admitted as part of the evidence of the Crown.

[11] The Crown further enquired from both accused whether they have any objection to the admission of the confessions as part of the evidence of the Crown, and if they made the confessions freely and voluntarily without any undue influence. Initially the first accused said he was forced to make the confession by the police; however, within seconds, he turned around and said he made the confession freely and voluntarily and that the police never exerted any undue influence upon him.

[12] Both Counsels were invited by the Court to address it on the contradiction by the first accused; they both agreed that the confession should be excluded and rendered inadmissible. The Court then ruled the confession inadmissible.

[13] I should mention that the exclusion of the confession of the

first accused does not assist him in any way because the matter is proceeding on the basis of his plea of guilty to culpable homicide and not on the basis of his confession.

[14] On the other hand, accused No. 2 told the Court that he made the confession freely and voluntarily without any undue influence, and, that he had no objection to the admission of his confession as part of the evidence of the Crown.

[15] It is common cause that the accused persons were charged jointly and in furtherance of a Common Purpose.

[16] **Jonathan Burchell in the South African Criminal Law and Procedure Volume 1, Third Edition** defines the doctrine of common purpose at page 307 as follows:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime.
>
> If the participants are charged with having committed a 'consequence crime', it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which casually contributed to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their number with the requisite faulty element *[mens red).* If this is established, then the conduct of the participant who actually causes the consequent is imputed or attributed to the other participants.
>
> Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequences, provided that it is established that one of the group brought about this result."

[17] In the case of **S. v. Safatsa and Others 1988 (1) S.A. 868 (A) at p.898 A and B, Botha J.A.** had this to say:

> "In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of the participant in causing the death of the deceased is imputed, as a matter of law, to the other participants.... it is well established that a common purpose need not be derived from an antecedent agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design."

[18] At **p. 899 E and F, Botha J.A.** stated as follows:

> "Association in a common illegal purpose constitutes the participation - the *actus reus.* It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all....
>
> Moreover, it is not necessary to show that there was a casual link between the conduct of each party to the common purpose and the unlawful consequence……."

[19] In the case of **S. v. Mgedezi and Others 1989 (1) S.A. 687 (A)** at **P.705-706 Botha J.A.:**

> "In the absence of proof of a prior agreement, accused No. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12 can be held liable for those events, on the basis of the decision in **S. v. Safatsa and Others 1988 (1) SA 868 (A),** only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the

perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea;* so, in respect of the killing of the deceased, he must, have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[20] The principles enunciated in the above case were approved and applied by the High Court in the case of **Rex v. Dlamini Sandile and Others 1987 - 1995 (3) SLR 305** at **pages 307-8.**

[21] In applying the above principles to the present case, I am satisfied that the accused persons acted in common purpose when they committed the offence. Both were present on the scene, and both of them participated in the physical attack of the deceased; the second accused repeatedly and consistently assaulted the deceased with a stick, and the first accused stabbed the deceased with a knife which he was carrying.

[22] It is common cause that when the deceased left the bar where the three of them were drinking separately both accused persons decided to follow the deceased fifteen minutes later. They caught up with the deceased along the way and attacked him.

[23] It is common cause as well that at the time of the attack on the deceased, the accused had not provoked the accused; and most importantly the deceased was not armed. In addition, there was no danger posed by the deceased to the accused persons.

[24] It is not in dispute that the deceased died from the injuries inflicted by the accused persons acting in Common Purpose. When they physically assaulted the deceased, they foresaw the real possibility that he would be killed, but nevertheless

participated in the attack recklessly notwithstanding their awareness of that risk and not caring whether or not the deceased was in fact killed.

[25] In the circumstances, the accused are convicted of the offence of culpable homicide in accordance with their plea of guilty to that offence.

[26] I now turn to consider the appropriate sentence to be imposed upon the accused. In doing so, I have to take into account the personal circumstances of the accused, the interests of society as well as the seriousness of the offence.

[27] It has been submitted in mitigation on behalf of the accused persons that: First, the accused are still young and because of their youth, they were bound to make mistakes; Secondly, that they pleaded guilty to the charge and saved the Court's time; Thirdly, that by pleading guilty, they showed remorse; Fourthly, that the loss of human life is punishment in itself; Fifthly, that the accused should be given another chance in life to allow for their rehabilitation; Lastly, that the accused had imbibed in alcohol because of poverty.

[28] On the other hand, the Crown submitted in aggravation of sentence that: Firstly, that it is not true that the accused imbibed in alcohol because they are poor but they did so as a form of social pleasure; Secondly, that the Court should consider the seriousness of the offence particularly because a human life was lost; Thirdly, that the physical assault on the deceased was excessive in the circumstances and that this should render this case on the upper scale of culpable homicide; Fourthly, that society should be protected from people such as the accused particularly because there is a rise in the number of people carrying dangerous weapons in places of social pleasure; Fifthly,

that society expects courts to issue stiffer sentences in such cases as a deterrence to others; Sixthly, that a plea of guilty doesn't serve as a form of remorse since various circumstance may induce the making of such a plea; Seventhly, that the accused were not remorseful otherwise they should have assisted the deceased to be hospitalized after the assault instead of running away from the scene as well as from the police.

[29] In the case of **S. v. Rabie 1975 (4) S.A. 855 (A)** at **862 G, Holmes J.A.** stated:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

[30] The above case was quoted with approval by the Supreme Court of Swaziland in the case of **Musa Kenneth Nzima v. Rex Criminal Appeal No. 21 of 2007 at page 6.**

[31] In the Nzima case, the Court recognized at page 8 of the judgment that there are varying degrees of culpable homicide offences and that a sentence of ten years was appropriate "at the most serious end of the scale of such a crime."

[32] Clearly, each case must be decided on its own facts and the personal circumstances of the offender rather than adhere to a bench mark of a certain number of years of imprisonment.

[33] In the present case, I will consider the youthfulness of the accused persons in their favour. At the time of commission of the offence, the second accused was eighteen years of age and the first accused was twenty five years of age; it is possible that as young people, they made an error of judgment.

[34] However, there is nothing in their conduct which shows that

they are remorseful. After committing the offence, they left the deceased helpless where he had fallen to die; they made no attempt to assist him.

[35] Furthermore, they ran away from the police and resisted arrest.

[36] The physical assault on the deceased was excessive, unprovoked and was inflicted upon a defenceless man who was unarmed. The second accused assaulted the deceased repeatedly with the stick on his head and upper body until he fell to the ground. When he rose up, the first accused without danger to himself and unprovoked stabbed the deceased to death.

[37] It is on this basis that I consider the offence committed by the accused to be **"at the most serious end of the scale of the offence of culpable homicide."**

[38] To that end, I agree with Tebbutt J.A. in the Nzima case that a sentence of ten (10) years is appropriate in serious cases of culpable homicide.

[39] In the circumstances, I sentence the accused persons to a term of imprisonment of ten (10) years backdated to the date of their arrest on the 11th February 2007.

M.B.C. MAPHALALA
JUDGE OF THE HIGH COURT
OF SWAZILAND