IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 116/09

In the matter between:

THE KING

VS

NOMSA NTOMBENC ANE MAHLABA

CORAM: **SEY, J**

FOR THE CROWN **MR. NXUMALO**

FOR THE ACCUSED **MR. MAGONGO**

J U D G M E N T

15th June 2011

SEYJ.

[1] The accused is charged with the crime of Culpable Homicide in that upon or about 23 June, 2009 and at or near kaLanga area in the Lubombo Region, the said accused unlawfully assaulted Simanga Gamedze and inflicted upon him certain injuries which caused the death of the deceased on the 28th June, 2009 and the said accused did negligently kill the said deceased and commit the crime of Culpable Homicide.

[2] The accused person pleaded not guilty to the indictment. In support of its case, the Crown led the evidence of five (5) witnesses and at the close of the Crown's case, the accused gave evidence under oath in her defence. She did not call any witnesses.

[3] Briefly put, what emerges from the evidence adduced before this Court is that the accused and the deceased were a married couple who lived together in their homestead at Kalanga area in the Lubombo Region. The

accused is 47 years old whilst the post-mortem report reflects the age of the deceased as 49 years old.

[4] It is alleged by the Crown that on or about 23rd June, 2009, the couple had some altercations during which the accused pierced the deceased with a stick and that the injuries which were inflicted by the accused caused the death of the deceased on the 28th June, 2009. The defence does not deny that the accused pierced the deceased with the stick about three times. However, the defence strongly contends that it was not the stick that caused the injuries which killed the deceased and evidence was led alleging that the deceased was injured when he fell on a sledge in the yard.

[5] A confession statement dated the 30 day of June, 2009 and made by the accused to a Judicial Officer stationed at Simunye was tendered by consent and admitted in evidence as Exhibit B. In the said statement the accused stated that she had pierced the deceased with a stick three times on his chest and twice on the sides of his stomach. She also stated that she had no intention whatsoever to kill her husband and that she had only acted in self defence.

[6] I shall now proceed to consider all the salient points of the evidence adduced before this Court. PW1 was Dr. R. M. Reddy who testified that the cause of death was "due to complications consequent to abdominal injury." The postmortem report which was admitted in evidence as Exhibit A shows that the following antemortem injuries were seen:-

> "1. Sutured wound over front of abdomen midline 13.4 cms length vertically present. On dissection repair of jejunum area of small intestine congested with adhesions present.
>
> 2. Sutured wound 3cms length with drain kept in situ present in right iliac fosa.
>
> 3. Contused area in middle of chest front 10.2 cms area on reflection skin present.
>
> 4. Two traditional healer cuts present in left iliac region 1 x 0.2 cm, 1.1 x 0.2cm skin deep present."

[7] Dr. Reddy explained that injury No.l was the most serious one among the four injuries seen. He said this injury was caused by a sharp object and there was a rupture of the intestines which later developed complications. PW1 also said that injury No.2 was made by the surgeon at the hospital to drain the fluid out. He stated further that the sutured wound extended from the top of the abdomen to the bottom which meant that the doctor had opened up the deceased to repair the ruptured portion of the intestines.

[8] PW5 Dr. Tefert B. Tecle was the doctor who had repaired the ruptured portion of the deceased's intestines as aforesaid. He testified that on the 24th of June, 2009 he was on duty at Good Shepherd Hospital when one Andreas Gamedze was brought in by 12 noon. He said the patient was in a critical condition and when he examined his abdomen he could tell that he had been perforated inside. He said he opened the patient up and found that the two sides of his abdomen had been perforated by a blunt object. PW5 went on to state that if the deceased had gone to the hospital earlier he would definitely have survived. He said his findings were that there was septic complication

due to the fact that the abdomen had been burned by the acid and it was full of pus and fluid. He said the deceased died on the 28 of June at 5:30 p.m. He tendered his report which was admitted in evidence by consent and marked as Exhibit C.

[9] PW2 was Gcinaphi Gamedze a sister to the deceased. She testified that on being informed by the accused that her brother was ill, she went to deceased's homestead to see him. She said the deceased told her, in the presence of the accused and PW3, that the accused had pierced him with a sharp object on the abdomen during an argument between both of them. The witness further told the court that she had seen traditional healer cuts present on the deceased. She also told the court that the deceased was taken to hospital in a critical condition and he died thereafter on the 28th June, 2009.

[10] Coshile Gamedze testified as PW3 and she corroborated the evidence of PW2 on all material aspects. She also told the Court that the accused had told the doctor that the deceased had been assaulted by thugs at a drinking spree

and that the doctor had recorded this information in Exhibit C. She further told the court that she was present when the accused gave the police officer the stick she had used to assault the deceased. Under-cross examination, this witness said that on the day the deceased was injured, both the accused and the deceased were drinking at her homestead and that they were both drunk before they went home.

[11] PW4 was 1694 D/Constable Simeon Similane. He was the investigating officer and it was his evidence that, upon a caution in terms of the Judges' Rules, the accused had produced a long stick with a sharp edge and whitish in colour. He said the accused had told him in the presence of PW3 that the said stick was what she had used to injure the deceased. PW4 then seized the stick which he subsequently tendered in Court as part of his evidence and it was marked as Exhibit 1. The Crown thereafter closed its case.

[12] Defence counsel thereafter made an application under **Section 174 of the Criminal Procedure and Evidence Act 67/1938** to the effect that the

accused had no case to answer. Counsel was however, over ruled, and the accused was called upon to enter into her defence.

[13] The accused testified under oath and she reiterated all what she had stated in Exhibit B. She admitted that she had pierced the deceased about three or four times but she contended that the deceased had not died as a result of those injuries she had inflicted on him . The accused maintained that the deceased was drunk and that he had fallen on a sledge when he chased after her and that was how he got injured. The accused also told the Court that it took her two days to get the deceased to the hospital because they were not used to using hospitals. She said during that period she had performed traditional cuts on the deceased because they were used to traditional practices and that was what the deceased had asked her to do and she had also administered enema to the deceased.

[14] It is noteworthy that there was no eyewitness to the said incident in which the accused was embroiled with the deceased. The defence does not

deny that the accused had pierced the deceased with Exhibit 1. The bone of contention, however, is that it was not the stick that caused the injury which killed the deceased.

[15] It is submitted by the Crown that the issue of the sledge should be discountenanced by the Court as just an afterthought by the accused for the following reasons:-

1. It was not denied by the accused that she was present when the deceased told both PW2 and PW3 that he was injured by the accused.

2. Had the deceased been injured by a sledge, the accused could have easily related that to PW2 and PW3 when she had informed them about the sickness of the deceased.

3. If the issue of the sledge was a reality, the accused would have easily told the doctor at the hospital (i.e. PW5) that the deceased was injured by a sledge instead of telling the doctor that the

deceased was injured by thugs during a drinking spree as is reflected in the doctor's medical report.

4. That the defence had failed to deny the allegation that the accused had told the doctor that the deceased was injured by thugs as it failed to put such denial to the doctor.

5. Further, that if the issue of the sledge was real, the accused would have easily shown PW4 the sledge when he had gone to arrest the accused at her homestead. The accused only pointed out the stick and not the sledge. PW4 heard about the sledge when they reached the charge office and after the accused had recorded the statement before the Judicial officer.

6. On this basis again the Crown submitted that the issue of the sledge is just an afterthought as the defence failed to put its case to PW4 to the effect that the accused had showed him the sledge during the time she had pointed out the stick. This only came out under cross-examination of the accused.

[16] Let me pause at this stage to say something on the subject of counsel's duty to put the defence case to prosecution witnesses. In **S v P 1974 (1) SA (Rhodesia, A.D.) Macdonald JP** said at page 582:

> "It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial So important is the duty to put the defence case that, practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from the court."

[17] In **Rex v Dominic Mngomezulu and others Criminal Case No. 94/1900, Hannah CJ** made the following pronouncement at page 17 therein of the said judgment:

> "..... failure by counsel to cross-examine on important aspects of a prosecution witness's testimony may place the defence at risk of adverse comments being made and adverse

> inference being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story."

[18] It is essential that the defence puts its case to all Crown witnesses and failure to do so may be taken as an afterthought during the defence case. When the accused gave evidence, it became apparent that she was taking issue with prosecution evidence which had not been challenged. For instance, PW3 had told the Court that the sticks that were used for the sledge were about three in number and that they were as high as her chest and this

was not denied by the defence. However, when the accused testified she described the sledge as follows: "it was made of wood and in front the pieces of wood were longer and at the back they were shorter and at the top they became Y-shaped to hang the ploughing stuff." Crown counsel has submitted that this introduction by the accused of two more short sticks was an afterthought as this was not put to PW3. I agree.

[19] The defence has also argued that the evidence of PW2 and PW3 as to what the deceased had told them about his injury has not been proven to be a dying declaration and therefore should not be admissible. Counsel referred to **Hoffman & Zeffertt, the South African Law of Evidence, 4th Edition Lexus and Nexus Butterworths 2001** on the issue of dying declaration. Defence counsel also cited the case of **R v Abdul 1905 TS 119 at 122-123** and he submitted that since the deceased had died two days later he was not in apprehension of death and as such that piece of evidence does not qualify as a dying declaration.

[20] I must state that it is inexorably apparent that the Crown has adduced sufficient evidence which shows that the utterances by the deceased to PW2 and PW3 qualify as a dying declaration. It is in evidence mat after the deceased had told them that he was injured by the accused, he never talked again until he died. This piece of evidence is corroborated by the evidence of the doctor who testified that when the deceased was brought to the hospital on an emergency basis he was in a critical condition and he later became unconscious.

[21] It is also pertinent to note that defence counsel raised the issue of novus actus interveniens. He submitted that, based on the evidence led of PW5, the only inescapable conclusion is that the injury to the deceased would not have killed him if he had been taken to the hospital promptly and that the deceased died as a result of serious infection. Counsel referred the Court to the **Principles Of Criminal Law, 2nd Edition by Jonthan Burchell and John Milton** at page 123 where the term novus actus interveniens is expressed to be an abnormal or intervening act or event which will serve to break the

chain of causation. Defence counsel also cited the case of **S** v **Mbambo 1965 (2) SA 843 A (Paragraph 22)** and he submitted that it must be proved that the injury inflicted by the accused was mortal or one likely to cause death.

[22] On a proper analysis of the evidence adduced, I must state that I feel disinclined to agree with the aforesaid submissions made by defence counsel as I find no intervening factor in the circumstances of this present case.

[23] I accept as a fact that the delay was caused by the accused as she tried to conceal her unlawful act and this is shown by her actions of performing traditional healing and administering enema to the deceased. I find that the actions of the accused as aforementioned might have caused the serious infection and septic complication referred to by PW5. The latter had told the Court that because the deceased was in sepsis his health was down going and that when this happens the patient goes into a state of shock which is irreversible. I accept this piece of unchallenged evidence. Also on this point, I accept the evidence of PW1 that one of the antemortem injuries seen was

"two traditional healer cuts present in left iliac region 1 x 0.2 cm, 1.1 x 0.2cm skin deep." I am therefore satisfied that the injuries which were inflicted by the accused on the deceased caused the death of the deceased on the 28th June, 2009.1 so hold.

[24] It is worthy of note that on a careful perusal of Exhibit B, which is the statement of the accused, I find her narration of the events which took place at the Gamedze's homestead on that fateful day in June, 2009 quite telling. For ease of clarity I shall reproduce it in extensor hereunder as follows:

> ***" On Tuesday 21st June, 2009 around 22:00 hours my husband Andreas Gamedze (the deceased) arrived at our homestead at KaLanga. When he arrived we were already asleep and I had not locked the door. He kicked the door open and entered the house. When inside the house he started to insult me using various words and saying I was sleeping with other men. I never responded to his insults and he proceeded to pull away the blankets from me and threw them at the door. I noticed that he was carrying a stick at the time. I woke up and attempted to get back the blankets and as I bent down he assaulted me with the stick and he missed me about four times. I finally got the***

blankets from the floor and threw them on my bed. I proceeded to get a stick next to his bed and I decided to stand next to the door. As I picked this stick he left the house and stood outside the door still insulting me. Out of anger, I used the stick I had picked next to his bed to stab him three times on his chest and twice on the sides of his stomach... "

[25] To my mind, the story tallies with PW3's evidence that the accused and the deceased were at her homestead earlier where they had been drinking and that both of mem had been arguing and mat the accused had left the deceased at her place and gone home. I believe the quarrel continued after the deceased arrived home and that led to the piercing as detailed above which resulted in the injuries that were inflicted by the accused on the deceased.

[26] The law relating to the offence of culpable homicide is as set out under **Section 2 (l)(a) & (b) of the Homicide Act, No. 44/1959** wherein the offence is defined as follows:

"2. (1) A person who -

> (a) unlawfully kills another under circumstances which but for this section would constitute murder; and
> (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;
>
> shall only be guilty of culpable homicide."

[27] According to **P.M.A. Hunt: South African Criminal Law and Procedure volume II at page 373,** the definition of culpable homicide means "the unlawful killing of a human being either (a) negligently, or (b) intentionally in circumstances of partial excuse." [28] In **S v Burger 1975 (4) S.A. 877 (A)** at **878, Holmes JA** had this to say about the definition of culpable homicide: "As to the law, in general:

> Culpable homicide is the unlawful, negligent causing of the death of a human being....."

[29] In the case of **Annan Lokudzinga Mathenjwa v. R 1970 - 76 SLR 25,** the appellant, a Swazi woman, had been convicted of the murder of a

seventeen month old baby, and extenuating circumstances having been found, was sentenced to life imprisonment. She appealed against the conviction on various grounds. Two of the Justices of the Court of Appeal opined thus:

> "If the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not he ought to have realised the risk, since he killed unlawfully." (per Schreiner P, Caney JA concurring)

[30] Judging from all the evidence adduced in this present case, I find that the only inference that may be drawn in the circumstances is that the injury which caused the death of the deceased was negligently caused by the accused and therefore the Homicide Act 1959 as outlined above applies.

[31] In the premises, I am satisfied that the Crown has proved its case beyond reasonable doubt that indeed the accused committed the offence charged. I have also come to the considered conclusion that the Crown has satisfied the

degree of proof required in criminal law as enunciated by Lord Denning in ***Miller v Minister of Pensions 1947 ALL ER*** at ***372*** where the learned Judge stated as follows:

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it's possible but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

[32] In the result, I hereby find the accused guilty of the offence of Culpable Homicide and I accordingly convict her as charged.

[33] In mitigation, defence counsel submitted that it is in evidence that life in the Gamedze home was not rosy and on that fateful night the deceased was

the aggressor. The accused is a first offender who had no previous brushes with the law. She now has to fend for six children single-handedly and that the youngest of the six was only 8 years old. She has shown remorse for the offence she committed and whilst on bail she did not commit any offence or breach her bail conditions. Counsel urged the Court to impose a wholly suspended sentence on the accused.

[34] In his submissions to the Court, Crown counsel argued against the plea for a suspended sentence which he said would not send a strong message to the community that the accused has been punished. Counsel urged the Court to consider the interests of the society and the seriousness of the offence the accused has committed. He also submitted that the accused could easily get another husband whilst she had made her children fatherless forever.

[35] In arriving at my sentence, I have endeavoured to balance the triad requirements namely, the seriousness of the offence committed, the interests of society and the personal circumstances of accused. I must state that this is a tragic case brought about by the accused and the deceased having been

under the influence of liquor. I have taken into account all the mitigating factors put forward by defence counsel as well as the fact that, after the accused had inflicted injuries on the deceased, she showed remorse, she went to great lengths to administer traditional cuts on the deceased as well as to give him an enema before taking him to the hospital.

[36] Thus, having regard to the sad circumstances of the case, the age of the accused, her remorse, the fact that she is a first offender and also the fact that she has six children, all of whom depend on her, I feel that any sentence imposed on her should be suspended.

[37] In **Thandi Tiki Sihlongonyane v Rex Appeal case No. 40**/97 the appellant had stabbed her sister twice with a kitchen knife in the course of a drunken brawl during which the two sisters started by using vulgar and abusive language towards one another and ended in a physical fight in which the deceased was the initial aggressor. She was found guilty of murder with

extenuating circumstances and sentenced to 7 years imprisonment by **Matsebula J** in the High Court.

[38] She appealed to the Court of Appeal of Swaziland against the sentence of 7 years imprisonment. It is note worthy that prior to the date of her appeal the appellant had been in prison for a period of 20 months. **Tebutt JA** held that in his view an appropriate sentence would be "60 months imprisonment of which 40 months is suspended for 3 years."

[39] In this present case, I am of the firm opinion that the conscience of the accused person would be the best form of incarceration she could ever experience in life. After all, she has not only made herself a widow but she has rendered her children fatherless. Moreover, she would have to face her inlaws and her community in shame for the rest of her life. I therefore feel that suspending any period of imprisonment this Court is minded to impose would serve as a reformative purpose as far as this accused is concerned.

[40] Therefore, it is my considered view that an appropriate sentence would accordingly be the following:

> 5 years imprisonment all of which is wholly suspended for 3 years on condition that the accused is not convicted of any offence committed during the period of suspension of which violence is an element and for which she is sentenced to imprisonment without the option of a fine. It is so ordered.

M. M. SEY(MRS)

JUDGE OF THE HIGH COURT