

**HIGH COURT OF SWAZILAND  
HELD AT MBABANE**

**CRIMINAL TRIAL NO. 386/08**

In the matter between:

**REX**

**VS**

- 1. MANGALISO HEZEKIEL XABA**
- 2. BONGANI NDUKUZEMPHI MBHAMALI**
- 3. MPHALALENI RAYMOND SIMELANE**
- 4. MANDLA SAMUEL KUNENE**
- 5. SICELo NHLENGETFWA**
- 6. MZWANDILE RAYMOND SIMELANE**
- 7. DUMSANE MSHAYISA**

**FOR THE CROWN**

**MR. S. DLAMINI**

**FOR THE ACCUSED PERSONS**

**IN PERSON**

**J U D G M E N T**

**SEY J.**

[1] The indictment dated the 12<sup>th</sup> day of May 2009 states that the accused persons are charged with the crime of Murder in that upon or about the 11 November 2008 and at or near Sibovu area in the Shiselweni region, the said

accused persons, each or all of them, acting in furtherance of a common purpose, did unlawfully and intentionally kill one Sonnyboy Mhlongo and did thereby commit the crime of Murder.

[2] When the accused persons were arraigned before this Court they were reminded of their rights to be represented by counsel but they all opted to defend themselves.

[3] The accused persons have pleaded not guilty to Murder but guilty to Culpable Homicide and the Crown accepts their plea.

[4] The Crown thereafter intimated to the Court that they had come to an agreement with the accused persons and that they had filed a Statement of Agreed Facts which was duly signed by counsel for the Crown and all the seven accused persons.

[5] The Crown then read out the said Statement of Agreed Facts as well as the post-mortem report and both documents were handed into Court by consent.

[6] The Court thereafter enquired from each of the accused persons whether they understood the contents of the two documents and whether they had any objection to them being admitted into Court as evidence.

[7] Each of the accused persons said that they were fully aware of the contents of the documents and that they had no objection to them being admitted into Court as evidence. In the circumstances the said documents were duly admitted into Court as evidence and marked as Exhibits A and B respectively.

[8] The Statement of Agreed Facts is to the effect that on the 11 day of November, 2008 accused No. 1 and accused No. 2 went to deceased's homestead as community police members. They were in the company of accused No. 3, 4 and 6 whom they had asked to accompany them to the deceased's homestead. Accused No. 1 was carrying a knob stick, accused No. 2 was carrying a stick and accused Nos 3, 4 and 6 were not carrying any thing. The deceased was also carrying his own stick.

[9] The Accused persons had gone to the deceased's homestead to carry out an investigation about the disappearance of 4 bags of cement at Sibovu Nazarene Primary School.

[10] When they got to Sibovu Primary School they asked the deceased to tell them about how he had stolen the bags of cement. The deceased got angry and tried to fight them with his stick but they dispossessed him of it. The deceased then ran away and the accused persons gave chase and they were joined by accused No. 5 and 7. They caught the deceased person and started to assault him with open hands.

[11] The Accused persons then got small sticks from the veld which they used to assault the deceased when he denied knowledge about the theft of the cement. The accused persons assaulted the deceased on his back from the buttocks towards the limbs.

[12] While they were assaulting him a certain man called Mr Madlopha came by and told them to stop assaulting the deceased. The deceased asked for water and they took him to the river to drink. While they were next to the Gazini river one Zulu Zeph Mshayisa and Dumisani Maswati Dube joined them and they asked what was happening. After the matter had been

explained to them they also asked the deceased about the theft but he further denied.

[13] The deceased was then taken to Sibovu Primary School by the accused persons in the presence of Zulu Zeph Mshayisa and Dumisani Maswati Dube. At the school the head teacher Mrs Khumalo came with one boy called Zakhele Mhlongo who narrated how he and the deceased and another man had stolen the cement.

[14] Then the police who had been called from Nhlangano arrived and they took the deceased to the hospital. The police also took the names of all those who were at the scene and they ordered that the accused persons should converge below Isaac Kunene's homestead the next morning.

[15] The next morning, the accused persons converged below Isaac Kunene's homestead and they were taken by the Police to Nhlangno Police station. They were later on the 12 and 13 of November, 2008 taken to the Nhlangano Magistrate's Court where they made statements before judicial officers.

[16] The Accused persons admit that the deceased died as a result of their unlawful and negligent conduct of assaulting the deceased with sticks.

[17] The accused persons accept the contents of the post mortem report which state that the deceased died due to multiple injuries.

[18] The photos of the deceased taken by scenes of crime officers and the sticks used to assault the deceased were by consent thereby handed in to Court as exhibits in this matter.

[19] In respect of the post-mortem report, section 221 of the Criminal Procedure and Evidence Act provides, inter alia, that:

"In any criminal proceedings in which any facts are ascertained by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; such facts may be proved by a written report signed and dated by such medical practitioner and that report shall be prima facie evidence of the matters stated therein....."

[20] The said post-mortem report gives a detailed description of the multiple injuries which were inflicted on the deceased from the back of his trunk to his lower limbs, including his buttocks. The report also states that "subdural haemorrhage over the brain" was present.

[21] The Court has accepted the said post-mortem report of Dr. Reddy as prima facie evidence of the cause of death of the deceased.

[22] In the light of the evidence adduced by the Crown and the guilty pleas tendered by all seven accused persons, the said accused persons are hereby found guilty and convicted of the offence of Culpable Homicide as charged.

[23] Prosecuting Crown counsel Mr Stanley Dlamini has intimated to the Court that he has no record of previous convictions in respect of all the accused persons.

[24] In mitigation each of the accused persons submitted that what had happened was an accident and that it was not intentional. They pleaded with the Court to be lenient with them.

### **Sentence**

[25] I have attentively listened to the various mitigating factors put forward by all the accused persons. However, I must state that what each and every one of the accused persons did to the deceased was not only inhuman and degrading but also contrary to the provisions of the Constitution of Swaziland, 2005. Section 18 (1) of the said Constitution thereof provides that

"the dignity of every person is inviolable." Sub-section (2) states further that "a person shall not be subjected to torture or to inhuman or degrading treatment or punishment."

After a careful consideration of the Statement of Agreed Facts, I find that what all seven of you did to the deceased amounted to torture which is contrary to the provisions of the Constitution as aforesaid. Furthermore, as members of the community police you are supposed to be exemplary and you are definitely not expected to violate the very laws which you have been tasked with maintaining. Your position as members of the community police does not give you a licence to act unlawfully and in a reprehensible manner.

In the result, in arriving at my sentence, I am of the firm opinion that this is a clear case which demonstrates the oft-quoted dictum of **Holmes** JA that "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." See **S v. Rabie 1975 (4) S.A. 855 (A)**.

I therefore hereby sentence each of the accused persons as follows:

**Accused No. 1** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 2** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 3** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 4** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 5** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 6** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

**Accused No. 7** is hereby sentenced to 7 years imprisonment, three of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

[26] It is in evidence that the accused persons were arrested on the 18<sup>m</sup> December, 2008. Accused No. 1 was released on bail on 17<sup>m</sup> February, 2009, accused No. 2 was released on bail on 23<sup>rd</sup> April, 2009, accused No. 3 was released on bail on 15 January, 2009, accused No. 4, 5 and 6 were released on

bail on 7 January 2009 and accused No. 7 was released on bail on 12 May, 2009. The periods between the dates when they were taken into lawful pre-trial incarceration and the date when they were sentenced should be deducted from the sentence of 7 years as aforesaid.

DELIVERED IN OPEN COURT AT MBABANE THIS 24<sup>th</sup> day of March,  
2011

*M.M. SEY(MRS)*  
JUDGE OF THE HIGH COURT