



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 174/10

In the matter between

REX

Crown

and

PHIWAYINKHOSI NHLANHLA GININDZA

Accused

Neutral citation: *Rex v Phiwayinkhosi Nhlanhla Ginindza* (174/10)
[2012] SZHC 143 (04 JULY 2012)

Coram: Mamba J

Heard: 28 June 2012

Delivered: 04 July 2012

- [1] Criminal law – murder and culpable homicide defined.
- [2] Criminal law – murder or culpable homicide – where an accused whilst appreciating or realizing that his actions might cause the death of another and acts recklessly or wantonly and in fact causes the death of another, he is guilty of murder on the basis of indirect intention (*dolus indirectus*).

- [1] The accused, has been charged with the murder of Siketi Emmelinah Tfwala, it being alleged that on or about 7th March, 2010 he intentionally and unlawfully killed her at Mawelawela area in the Shiselweni Region.

- [2] The facts in this case are largely common ground. This is borne out by the fact that whilst accused pleaded not guilty to murder but guilty to Culpable Homicide, he did not challenge any of the evidence by the crown as contained in the summary of the evidence. This evidence was thus all admitted by consent. Also not in issue is the admissibility of a statement made by the accused before a magistrate where he essentially admitted having assaulted the deceased and inflicting on her the injuries from which she subsequently died.

- [3] The essence of the accused's defence as stated by him when he gave evidence under oath and also as submitted in argument by his counsel is that, the proven or established facts do not establish a case of MURDER but do establish a case of Culpable Homicide. He thus agrees that he unlawfully and negligently caused the death of the deceased – because that is what Culpable Homicide means or is – but denies that he had the

requisite intent to commit the crime of MURDER. This intent, of course, may come in one of two forms, namely: direct and indirect intention. In *MAPHIKELELA DLAMINI v R* 1979-1981 SLR 195 at 198D-H Maisels P Propounded the law as follows:

‘The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R* 1970 – 1976 *SLR* 25. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah’s* case the law was stated as follows, at 30A: “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”.

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah’s* case to which I have referred the then President of this court, Mr Justice Schreiner said: “It has been suggested that a finding that a person must have foreseen or

appreciated a risk is not the same as a finding that the person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have". In this statement of the law Caney JA on the same page concurred. Milne JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: "I should like first of all to associate myself very strongly with the learned President's view that when it is correctly held that a person 'must' have appreciated that his act involved a risk to another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk". I thought it right to mention these matters because for many years to my knowledge *Annah's* case has been followed in Swaziland and although I share the regret expressed by Mr Justice Schreiner in *Annah's* case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p29 of *Annah's* case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my

concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah's* case to which I have referred.'

Isaacs JA concurred and also added: 'My agreement is not to be considered as being an agreement with a departure from *Annah's* case'

See also *VINCENT MAZIBUKO v R*, 1982 – 1986 (2) SLR 377; where the headnote reads:

'A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not.'

[4] The established or proven facts in this case are as follows:

4.1 On 6th March, 2010 several people including the Accused and the deceased attended a wedding celebration at a certain unnamed homestead at Mawelawela area in the Shiselweni region. As usual, on these occasions; food, traditional beer and other refreshments were served aplenty to those present. These celebrations or festivities went on until after eleven of the clock at night.

4.2 The accused left for his house which was also in the same area late at night and he apparently left the deceased at this homestead still partaking in the festivities. After leaving this homestead, the deceased got lost whilst trying to find her way home. At about midnight she came at the home of the accused and announced her presence or introduced herself in the siSwati way of kukhulekela. She knocked at the door to accused's house and when the accused woke up and went out to see who had knocked on his door he found the deceased standing outside. She was evidently drunk. In his statement made before a magistrate, the accused stated that he asked the deceased where she was from at that time of the night, but she did not answer him. He then ordered her to leave the homestead. He then picked up a "thin log' (lutfungo) and I hit her with it all over her body" until the stick broke into pieces. He thereafter used a bigger one. This beating caused her to leave the homestead but the accused continued beating her as she walked away. She went up to some higher ground and there she declared that she was no longer going any further and the accused would rather kill her instead. He stopped beating her and started walking back to his home.

- 4.3 The deceased followed and caught up with the accused and when he realised this, he assaulted her once more with a bigger stick, causing her to fall on the ground. She then insulted him by calling him by his mother's genitals. He then picked up a stone and hit her with it on the head and she fell down again. He left her there and went to his house.
- 4.4 That night, the accused returned to the scene, ie, where he had left the deceased. He was armed with some matches. He then set her cloths alight before returning to his house once again. In the morning she was found dead. She had died due to the multiple injuries inflicted on her by the accused.
- 4.5 The doctor in his post-mortem report lists about three "cut wound like" injuries he observed on the body of the deceased, one of which was a contusion on the scalp frontal region with subdural haemorrhage over the brain. Another such wound was located on her chin and her jaw, (probably the lower one) was fractured and her teeth loosened. There were also superficial burns on the lower parts of her body.

[5] The two sticks or 'logs' referred to hereinabove were exhibited in court and I had the chance to view them; their profiles. The one referred to in the accused's confession as a "thin log" (lutfungo) was made up of about seven broken pieces about 3 millimetres in diameter. These were collectively handed in as exhibit 3. It was a relatively small piece of stick, a twig or switch that could not in any sense of the word be called or referred to as a log. On the other hand, the other one was a big stick about a metre long and three centimetres wide. It had been cut into two pieces by the investigating team; I was told, "for forensic examination." (What this entailed, was not disclosed to the court). This stick was handed in as exhibit 4. Again, whilst this admittedly is a big stick, it can hardly be referred to as a log in my view. The stone used by the accused in assaulting the deceased was admitted as exhibit 5 and it was estimated to be double the size of a tennis ball.

[6] There are slight variations in the evidence of the accused made on oath in court from the statement he made to a magistrate. In evidence in court he said he was alerted to the presence of the

deceased near his door by the barking of his dogs. He then peeped through one of his windows and saw a figure standing next to his door. When he went out to see who it was, he could not tell because he was too drunk. When he asked the person what he wanted, he received no reply and this prompted him to pick up a stick from outside the house and as he did so, the unidentified person advanced towards him. He then lashed out at the figure with the stick several times causing it (figure) to move away with him in hot pursuit. He stopped following and hitting that person and as he walked back towards his house, the person followed him. The accused then hit him with a stone, felled him and then repeatedly assaulted him with the stick. He then returned to this house where he pondered on the identity of the night intruder. He then returned to the scene with a box of matches to examine who the person was. He lit a match and examined the body and then dropped the burning match stick on the ground and left for his house. Later whilst in his house he noticed some light from outside. He went out and found that the deceased's body had caught fire. The accused then got water and put out the fire.

[7] I should also mention here that the crown also established beyond any reasonable doubt that several people heard the deceased, on the night in question, shouting for help and stating “that the accused is killing her.” Whilst it may not be proper to admit this statement as a dying declaration since there is no evidence that the deceased made such a statement at a time when she was convinced she was about to die, I think this statement is nonetheless admissible as part of the *res gestae*. It was a contemporaneous statement that accompanied the admitted assault on her. In any event, nothing much turns on this piece of evidence. The admitted facts establish an unlawful killing. What remains for the court to ascertain or determine is whether this unlawful killing was intentional or negligent – MURDER or Culpable Homicide. I examine this issue below.

[8] The evidence is that the accused who was drunk hit the deceased several times with two sticks and once with a stone. The deceased sustained multiple injuries from which injuries she died. These

wounds were located on her upper body, although there were burn wounds on her lower part too.

- [9] The accused has admitted that he repeatedly assaulted the deceased. On one occasion, he hit her with the metre-long stick and caused her to fall onto the ground. The second time she fell on the ground was after he hit her with a stone. On Both occasions whilst she had fallen to the ground, he continued assaulting her. I do accept though that the deceased was drunk at the time and the accused said at one stage she stumbled and fell because of her drunkenness. I also accept that the accused was drunk at the relevant period. He was, however, sober enough to know and appreciate what he was doing and what was going on around him. He was able to relate to the magistrate and this court how the events leading to the death of the deceased unfolded on that fateful night. He was also able, upon his arrest, to point out the weapons or items he had used in assaulting the deceased.

[10] The wounds that caused the death of the deceased were severe. They were fatal, the pathologist said. They were all inflicted on her by the accused. I have no doubt that when the accused assaulted the deceased in the manner he did and using the weapons described above, although he may not have actually or directly desired to kill her; he must have realised and did realise or appreciate that his actions might cause the death of the deceased and he did not care whether or not such death came about. He therefore clearly had the required intent to bring about her death, in the form of indirect intention or *dolus indirectus*. He is accordingly found guilty of murder as charged.

MAMBA J

For Crown:

Mr. S. Dlamini

For Accused:

Mr. M. Dlamini