



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE No. 370/09

In the matter between:

**THE KING
VS**

**MBEKEZELI WISEMAN DLAMINI
THULANI NTSHANGASE
GIOVANNIE PAPA**

Neutral citation; Rex v Mbekezeli Wiseman Dlamini & 2 Others
(370/2009) [2012] SZHC 45 (17th April 2012)

CORAM: SEY J.

Heard: 13 April 2012

Delivered: 17 April 2012

JUDGMENT

SEY J.

[1] By an Amended Indictment dated at Mbabane on the 5th day of

March 2012, Accused No. 1 and 2 are jointly charged in **Count One** with the crime of **Murder** in that upon or about the 10th of October 2007 and at or near Ngwane Park, Manzini in the district of Manzini, the said accused individually, and/or each or all of them acting jointly and in furtherance of a common purpose, did unlawfully and intentionally kill one **JOSEPH VUSI MKHWANAZI**.

[2] Upon being arraigned before this Court on the 13th day of April, 2012, Accused No. 1 **MBEKEZELI WISEMAN DLAMINI** [to whom I would here after refer to as the accused] pleaded guilty to the lesser charge of **Culpable Homicide**. Thereafter, defence counsel, Mr. Mabila, confirmed the guilty plea and prosecuting counsel, Mr. Maseko, accepted the said guilty plea.

[3] The Crown thereafter intimated to the Court that they had come to an agreement with the accused and that they had filed a Statement of Agreed Facts which was duly signed by both counsel. The Crown then read out the said Statement of Agreed Facts as well as the post mortem report which was handed into Court by consent and marked as Exhibit A . In addition and by consent, the statement made to a Judicial Officer on 11/10/07 was also admitted as Exhibit B, The statement made to the police and dated 11/10/07 was admitted as Exhibit C, the bail application was admitted and marked as Exhibit D

and the firearm was marked as Exhibit E.

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

4.1 "It was on 10.10.07 at around 1400 hours on a Wednesday. It was Thulani Ntshangase's birthday. In preparation for the birthday they went to check on the deceased who was their friend at Tums General Suppliers Matsapha. They went there together with Thulani Ntshangase, and Sibusiso Maseko.

Upon arrival at Matsapha Tums they found that the deceased had no money since they wanted him to buy them a few drinks. When he informed them that he had no money they left, but before they left the deceased called a bottle store at Ngwane Park Siphilile Bottle Store where he told the bar lady at the bottle store to give them drinks on credit and that he (deceased) was going to pay for these after work.

They then proceeded to Coates Valley where they left Thulani Ntshangase at his house. The accused then proceeded with Sibusiso to the bottle store at Ngwane Park to get the cellar cask red wine, and they then went back to Coates Valley at Thulani Ntshangase's house.

They proceeded to drink the cellar cask and watched movies, until after 1700 hours when one Sabelo Dlamini joined them. The deceased then called to inform them to pick him from town, next to Kowloon Restaurant.

However before they could leave, one Sabelo Shongwe a friend arrived. He was also driving his own car.

Sibusiso Maseko then joined Sabelo Shongwe in his car, a Honda white in colour; Accused was left in the other car with Thulani Ntshangase and Sabelo Dlamini.

Before leaving the premises, (Thulani's place Coates Valley), Accused was told to fetch a gun from Thulani's house. Thulani told him that the gun was under his bed. He went straight to fetch the gun and came back immediately. This was a revolver, and went back to the car. The gun remained in his possession. The two motor vehicles followed each other towards town to fetch the deceased at Kowloon. Accused was occupying the front seat as a passenger. At the robots next to Estel House the other motor vehicle remained, whilst they proceeded to Ngwane Park with the deceased, they were now four (4) in all inside the car. They went to Ngwane Park to purchase more drinks (alcohol). Siphilile bottle store was already closed. Then they moved towards Ngwane park High School whereupon they met Giovannie Papa and the motor vehicle stopped as they planned to greet each other. As friends they were hugging next to the road.

When the hugging was still going on, the gun was still in Accused's possession, he had tucked the revolver in his jeans and stomach. Prior to the occurrence of the unfortunate event, Thulani Ntshangase was driving the Volvo Sedan. Accused was seated on the front passenger seat, with the deceased and one Sabelo Dlamini seated at the back of the motor vehicle.

Since the accused was under the influence of alcohol (the red wine) he cannot remember exactly when he drew the gun and how he had shot at the deceased. He only heard his friends shouting the

“EESH” and when he looked around he saw the deceased lying on the ground. He noticed that the deceased was bleeding from his head.

Thulani Ntshangase proceeded to grab/take away the gun from him. Jovan papa took him to his car. He was drunk and there was total confusion.

Police tried to talk to him but since he was too drunk, there was nothing they could get from him and he was arrested at Manzini Police station around 2300 hours on 10.10. 2007.

At around 1100 hours he made a statement at Manzini Police Station to a female Police officer. Police officers were not harsh to him during the conversation/investigation. Police further notified him that if he needed to make a confession, he had to go to the magistrate and he voluntarily agreed to do so.

Accused had no intention whatsoever to kill the deceased who was his friend; he had no problems with him, even on this day. At times they would go together to enjoy themselves (drink in Pubs). Whatever happened was an accident he is very sorry, it was unfortunate that he killed his friend. He did not kill his friend intentionally.”

- [5] What the crimes of murder and culpable homicide have in common is a fatal outcome for a human being in that a life is lost. Nonetheless, the crime of murder cannot be said to have been committed unless the act or omission which caused death was intentionally committed or omitted and death was the desired

result, or, if not the desired result, at least actually foreseen as a possible result the risk of occurrence of which the accused recklessly undertook and acquiesced in. In short, *dolus* in one or other of its manifestations, namely, *directus or eventualis*, is the kind of *mens rea* which must have existed.

- [6] The crime of culpable homicide, on the other hand postulates an absence of *dolus* and the presence of *culpa*. It has thus been possible to define without qualification the crime of culpable homicide as the unlawful negligent causing of the death of a human being. See **Snyman, Criminal Law, 4th ed. at 425; Burchell and Milton, Principles of Criminal Law, 2nd ed. at 474; Milton, South African Criminal Law and Procedure Vol. 11, 3rd ed. at 364.** See also **P.M.A. Hunt: South African Criminal Law and Procedure Volume II at page 373.**

In the case of **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.....”

- [7] In this present case, in view of the evidence before this Court as well

as the guilty plea advanced, I accordingly convict the accused of the said offence of culpable homicide upon his own guilty plea.

[8] I shall now turn to consider the appropriate sentence befitting the crime committed by the accused. When the evidence discloses a clear case of murder the task of the Court to impose a sentence is generally an easy one. But this task surely becomes a daunting one when the accused commits culpable homicide without premeditation or pre-planning. In arriving at its sentence the Court strives to satisfy what is usually referred to as the triad, namely, the interests of society, the personal circumstances of the accused as well as the seriousness of the offence itself. Mr. Mabila has urged the Court to try to strike a balance when dealing with the three competing factors and not to put the interests of the society at the expense of the accused.

[9] It cannot be gainsaid that this was a very unfortunate incident indeed and that the accused has shown great remorse. When he was called upon to plead the words he uttered were "I never killed intentionally. It was a mistake." In mitigation, defence counsel submitted that the accused acknowledged his unlawful deed and that he admitted from the very first day that he was responsible for the death of his friend and further that his family went to pay their

respects to the family of the deceased before the burial. Mr. Mabila also submitted that the Court should not be oblivious to the accused person's state of sobriety and that the accused was dead drunk on that day which had an effect on the functioning of his mental faculty. Suffice it to say that I have taken this into account and I have further considered, as part of the common cause, the fact that the accused and the deceased had been friends in excess of seven years and that they used to party together and they did all other things together as friends would. I also accept counsel's submission that, by killing someone that close, the accused is already being punished as this would forever remain on his mind. It also needs to be mentioned that I have taken into consideration the fact that the accused is a first offender, aged 32 and married with three children and that he is still young.

[10] Defence counsel has urged the Court to blend the sentence of this accused person with an unusual degree of mercy. He submitted that what distinguishes this matter from other culpable homicide cases is that in those cases people carry weapons in a bid to protect themselves but that in this case, the accused had not left home with the firearm and, moreover, that there is nothing on record which envisages that the accused had intended to use it at any time and that it is common cause that he was never the owner of the said

firearm. Counsel referred the Court to the following authorities, namely, **Sandile Mkhabela vs. Rex, Appeal Case No. 15/2000; Sidumo Sipho Mngomezulu vs. Rex, Appeal Case No. 39/2000; Mlungisi Mhlanga vs. Rex, Appeal Case No. 10/06** and he urged the Court not to impose a custodial sentence on the accused but to issue a suspended sentence together with a fine.

[11] For his part, the DPP urged the Court to pass a sentence which would send a strong message to other would be offenders that firearms should not form part of the company of friends because firearms cause fatality. He further submitted that the sentence should dictate that there would absolutely be no need for one to carry a weapon even in terms of enjoyment.

[12] Invariably, the decision of the Court, in such cases, often hinges on discretion after a careful consideration of sentences imposed in other cases of culpable homicide. In **Nkosinathi Bright Thomo v Rex Criminal Appeal No. 12/2010, Ebrahim J.A.** in his judgment referred to cases in which the Supreme Court had confirmed sentences of 10 years imprisonment for convictions of culpable homicide. His Lordship stated as follows:

“In the case of **MUSA KENNETH NZIMA V REX, criminal**

appeal 21 of 2007, a sentence of ten years imprisonment was confirmed. In the case of **VUSI MADZALULE MASILELA, criminal appeal 14 of 2008**, a sentence of ten years imprisonment was confirmed for a conviction of culpable homicide. In the case of **LUCKY SICELO NDLANGAMANDLA AND TWO OTHERS, criminal appeal 8 of 2008**, a sentence of ten years imprisonment was approved of by this Court as was a sentence of nine years imprisonment imposed for a conviction of culpable homicide in the case of **REX V PETROS MNGISI MASUKU, criminal appeal 11 of 2008**. In each of these cases the accused had caused the death of the deceased persons by inflicting stab wounds to them.”

[13] In **Lomcwasho Thembi Hlophe v The King, Criminal Appeal 7/2010, Dr S. Twum J.A.** pronounced that:

“There are obviously varying degrees of culpable homicide offences. As noted above, in the case of **Bongani Dumisani Amos Dlamini v Rex [Criminal Appeal No.12/2005]** this Court endorsed a sentence of 10 years imprisonment in what the trial Judge described as an extraordinarily serious case of culpable homicide ‘at the most serious end of the scale of such a crime.’

I respectfully agree entirely with **Tebbutt J.A.** when he opined that a sentence of 10 years seems to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes.”

[14] Judging from the circumstances presented in the Statement of Agreed Facts in this instant case, coupled with the mitigating factors advanced on behalf of the accused, I am of the considered view that the cumulative effect are of such a nature that the offence committed by the accused herein cannot be categorised as being “at the most serious end of the scale of such crimes.” However, In arriving at a proper sentence, I feel it is imperative that I do not lose sight of the principle that the sanctity of human life should be sacrosanct. The protection of right to life is one of the fundamental rights and freedoms of the individual enshrined in the Constitution of the Kingdom of Swaziland Act, 2005.

[15] I am equally mindful of the dictum in the judgment of the **Supreme Court of Swaziland** in the case of **Gerald Mvemve Valthof And The King Criminal Appeal Case No: 5/10** in which their Lordships stated that “the criminal jurisprudence of this Kingdom, like in some other nations, requires that the Courts ought in appropriate cases to temper the severity of sentences they would

otherwise impose to take account of human frailties.” In the same judgment, their Lordships went further to refer to what they termed the oft - quoted dictum of **Holmes JA** in the case of **S v. Rabie 1975 (4) S.A. 855 (A)** where he stated as follows:

“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.”

[16] In my judgment, I am reasonably sure that the accused did not intend to kill the deceased and as such the degree of the moral guilt of the accused is clearly considerably reduced. In the circumstances, the accused is hereby sentenced to 3 years imprisonment two of which is hereby suspended for a period of 2 years on condition that he is not convicted of a crime of which violence to the person is an element committed during the period of suspension for which an unsuspended period of imprisonment is imposed. It is hereby so ordered.

FOR THE CROWN

FOR ACCUSED NO. 1

MR. N. MASEKO

MR. M. MABILA

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE.....
DAY OF APRIL 2012.**

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

COURT