



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 240/09

In the matter between

REX

Versus

SIBUSISO VUSI DLAMINI

1ST ACCUSED

NASH NKOSINATHI MAGAGULA

2ND ACCUSED

BONGANI MANDISA DLAMINI

3RD ACCUSED

Neutral citation: *Rex v Sibusiso Vusi Dlamini and 2 Others (240/09) 2014*
[SZHC] 151 (17 July 2014)

Coram: M. S. SIMELANE J

Heard: 9 JULY 2014

Delivered: 17 JULY 2014

Summary: Criminal procedure – Culpable Homicide – statement of agreed facts – Accused found guilty and convicted on a charge of Culpable Homicide.

SIMELANE J

[1] All three (3) Accused persons were arraigned simultaneously before me on 9 July 2014 charged with the offence of Culpable Homicide. It was alleged by the Crown that on or about 5 of August 2008 at or near Somnjalose area in the Hhohho region, the said Accused persons unlawfully assaulted Zwelithini June Dlamini and inflicted upon him certain injuries which caused the death of the said Zwelithini June Dlamini on the same day and the said Accused persons did thereby negligently kill the said Zweilithini June Dlamini and commit the crime of Culpable Homicide.

[2] When the charge was put to the Accused persons fully interpreted in Siswati, they indicated that they understood the charge and pleaded guilty to the offence of Culpable Homicide. The plea was confirmed by their defence counsel Mr S. Dlamini and the Crown accepted the plea. The Crown

represented by Miss Q. Zwane thereafter intimated to the court that they had come to an agreement with the Accused and that they had prepared a statement of agreed facts which was duly signed by both counsel.

- [3] The Crown then read into the record the statement of agreed facts which was handed into court by consent. The statement was formally admitted in evidence as an exhibit and was marked exhibit A. The statement of agreed facts is to the effect that:

“The Accused persons have pleaded guilty to the charge of CULPABLE HOMICIDE. The under mentioned facts are agreed upon by the Crown and the accused persons mentioned above.”

- [4] The deceased, one Zwelithini June Dlamini was suspected by the Accused persons to have stolen various items from people and items from his brother’s house, Accused 1 and from one Jabulani SonnyBoy Manana (PW3) in the summary of evidence. The deceased was known amongst his family and community to be in the habit of stealing.

- [5] On the fateful day of 5 August 2008 at around 1900 hours the deceased was searched for by the Accused persons, PW3, Bhekisisa Motsa, Sifiso Mabila and other community members who included Ntokozo Shongwe, Lungelo Shongwe in order to question him about the missing items suspected to be stolen by him.

- [6]] Accused 1 (the deceased brother) led the group in search for the deceased and he was found sleeping at one Khanyisile's house. He was asked to go outside of the house and then questioned about the stolen items namely; Television set, Handi-gas and five cell phones stolen from Accused 1 house and PW3's cell phone stolen from the hot springs. Instead of responding to the allegations the deceased began assaulting them and ran away. The deceased was sought after and when he fell down the group managed to catch up on him.
- [7] At this juncture the Accused persons took sticks and started beating the deceased and demanded the items. They were joined by Ntokozo Shongwe, Lungelo Shongwe, Wakhe Motsa (community police) Sifiso Simphiwe Magongo, Sifiso Mabila and Mzwandile Mtsetfwa momentarily in the assault. The deceased responded and said he gave the stolen items to one of his friends. The deceased was driven in Accused 1's car to the friend's place, but was not located. The deceased was then driven to the police station where they reported the matter. The deceased succumbed to death due to the injuries inflicted on him by the Accused persons.
- [8] On the 6 of August 2008 a post-mortem examination was conducted on the body of the deceased and the Pathologist Doctor R.M. Reddy opined that the deceased's cause of death was due to multiple injuries.

[9] The Accused persons admit the following:

- “1. That one Zwelithini June Dlamini is dead;
2. That they each or all of them acting jointly in the furtherance of a common purpose did unlawfully and negligently caused the death of the deceased person by repeatedly assaulting him with sticks all over his body;
3. That there was no *novus actus inteveniens* between the infliction of the injuries to the time of death of the deceased;
4. That the infliction of the injuries noted by the pathologist in the post-mortem examination report caused the death of the deceased as opined by the pathologist;
5. The post-mortem examination report will be produced as evidence.”

[10] The post mortem report which was compiled by Doctor R.M Reddy the police pathologist was admitted in evidence as exhibit B. The opinion of the Doctor is that the cause of death was due to **“multiple injuries”**. The following ante mortem injuries were observed by the Doctor:

“Blood stains over scalp.

The following atermortem injuries seen:-

- 1. Laceration over scalp left 3 x 2 cms, 4 x 1 cms, parital, occipital region 3.2 cms, 1.7 cms area subdural heamorrhage over brain about 60 ml.**
- 2. contused abrasion over right shoulder top 5 x 2.7 cms area with laceration 1 x 0.7 cms muscle deep.**
- 3. contused abrasion over back of trunk intermingled 42 x30 cms area varying in size 5 cms , 2.5 cms , 5.1 cms , 23 x 1 cms ,18 x 1.1 cms effusion blood in soft tissues and contusion intercostals structures left middle three spaces.**
- 4. contused abrasions over left lower limb 12.1 cms , 11 x 4.7 cms, 14 cms , 3 x 1.2 cms area intermingled effusion blood in soft tissues.**
- 5. abrasion over left foot dorsum 5 x 1.2cms.**
- 6. contused abrasions over right lower limb 14.7 cms , 13.1 cms area intermingled effusion blood in soft tissues.**
- 7. contusion of left testicles 3 x 2.7 cms area present.”**

[11] In light of the evidence adduced before this Court as well as the guilty plea advanced by the Accused the Court comes to the ineluctable conclusion that the Crown has proved beyond reasonable doubt the commission of the offence of Culpable Homicide. It is clear to me that the Accused persons did not intend to kill the deceased. The death was as a result of the Accused persons' negligence and carelessness. I accordingly convict the Accused on their own plea of guilty to the offence of Culpable Homicide.

[12] I shall now turn to consider the appropriate sentence befitting the crime committed by the Accused persons. I am mindful that I have to consider the triad when sentencing the Accused persons. The triad is, the interest of society, the personal circumstances of the accused as well as the seriousness of the offence itself.

[13] See **Mfanasibili Gule v The King criminal case 02/2011, paragraph 17. The King v Xolani Dlamini Case No. 42/ 2011 paragraph 26 and 27.**

[14] More to the foregoing is that the sentence is expected to blend in a measure of mercy according to the circumstances. In the case of **S.V Harrison 1970 (3) SA 684 (A) at 686, Holmes JA** demonstrated this trite principle of the law as follows:

“Justice must be done, but mercy, not a sledge-hammer is its concomitant”.

[15] In honour of the above trite principle of the law, I have considered the following mitigating factors as adduced by the Accused persons. Accused 1 stated as follows under oath in mitigation;

1. He is a first offender which factor was confirmed by the Crown.
2. He is 39 years old.
3. He is married with nine (9) children, who are all school going.
4. The offence was committed in his line of duty as a community police.
5. He was expelled from his community pursuant to the commission of the offence.
6. He is remorseful.

[16] Accused 2 stated as follows under oath in mitigation of sentence:

1. He is thirty seven (37) years old.
2. He is a first offender.
3. He has one child who is school going and aged 5 years.
4. He earns a living through installing satellite dishes for televisions.
5. He is remorseful.

[17] Accused 3 stated as follows under oath in mitigation of sentence:

1. He is twenty six (26) years old.
2. He is remorseful.

[18] Having carefully considered all the factors ante, it is expedient for me to point out that the offence committed by the Accused persons is a very serious one. It is thus in my view inexorably apparent that the interest of the society especially in view of the prevalence of this sort of offence in the Kingdom demands that a fitting sentence be imposed. I am of the considered view that I should in the circumstances impose a sentence that will help as a deterrence to would be offenders.

[19] In conclusion, having carefully considered the triad, I am of the firm conviction that a sentence of Eight (8) years imprisonment, Two (2) years of which is suspended for a period of Three (3) years on condition that the Accused is not convicted of an offence involving violence is befitting of the offence committed. It is so ordered.

[20] Rights of Appeal explained to the Accused.

M.S. SIMELANE
JUDGE OF THE HIGH COURT

For the Crown : **Miss Q. Zwane**
For the Accused Persons : **Mr S. Dlamini**