



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 142/03

In the matter between

REX

And

JOHANNES LOMGCABULA MHLONGO

ACCUSED

Neutral citation: *Rex v Johannes Lomgcabula Mhlongo (142/03)* [2014]
SZHC35 (7 March 2014)

Coram: M. S. SIMELANE J

Heard: 4 March 2014

Delivered: 7 March 2014

Summary: Criminal procedure: plea of guilty to the offence of Culpable Homicide - statement of agreed facts establishing the offence of Culpable Homicide - The Accused was convicted on his own plea of guilty and sentenced to five (5) years imprisonment, 2 years of which is suspended for a period of 2 years.

Judgment

SIMELANE J

[1] The Accused person was arraigned before me on 4 March 2014 charged with the offence of Culpable Homicide. When the charge was put to him, fully interpreted in Siswati, he indicated that he understood the charge and pleaded guilty. The plea was confirmed by learned defence Counsel Mr. K. Vilakati. At that stage Mr. S. Dlamini, learned Crown Counsel told the Court that the parties had prepared a statement of agreed facts which they wished to tender in Court as evidence. This was confirmed by the learned defence Counsel.

[2] The statement of agreed facts was read and explained to the Accused in Siswati. He accepted it as true and correct. Thereafter, the statement of agreed facts was admitted in evidence as exhibit A. The statement of agreed facts states as follows:-

“It is agreed as follows between the Crown and the Accused:-

- 1. On the 14th of July 2003 at about 8.00pm the deceased witnessed a break-in at Accused's shop. The deceased went to PW1 Obert Malevane Dlamini to report the incident. The deceased and PW1 went to Accused's shop and they saw two people moving from the shop to the nearby trees. The deceased in the company of PW2 Sihle Myeni went to the Accused's home to report the incident. They reported the incident to Accused and his three sons and brother who are PW3 Fana Thokozani Mhlongo, PW4 Stephen Mathendele Mhlongo (brother) PW5 Mlungu Mhlongo and PW6 S'dumo Mhlongo.**

- 2. The deceased, PW2, Accused and Accused's three sons and the brother got into Accused's motor vehicle and went to the shop and when they were about to reach the shop the two people disappeared. The deceased then jumped off the motor vehicle while it was moving and ran to the other side of the shop. The others alighted when the car stopped. The Accused also alighted with his gun. They then saw a person alighting from the side of the shop and Accused shot the person and he fell down. They got close and found that the person who was shot was the deceased. PW1 also arrived on the scene after hearing the gun shot and found the deceased dead.**

3. **The Accused then requested one Nikere Mbhamali a police officer who is a neighbour to accompany him to Lavumisa police station where he reported the shooting.**
4. **The Accused admits that the deceased died due to his unlawful and negligent conduct and there was no other intervening cause other than the action of the Accused.**
5. **The Accused person was arrested on the 14th July 2003 and released on bail on the 16th August 2003.**
6. **The statement of agreed facts, the post-mortem examination report and the fire-arm are hereby handed in as evidence.**
7. **The Accused is very remorseful as he killed a person who was assisting him during the break-in at his shop.”**

[3] The parties also by consent tendered a copy of the postmortem report on the basis that the original report got lost and could not be traced as this is a relatively old matter. The postmortem report was admitted by the Court as Exhibit B. In the postmortem report Dr. R.M. Reddy stated that the following antemortem injuries were seen:

“Irregular large 5.7 cms area entry wound over right arm upper third with small lacerations 0.5 cms to 0.4 cms diameter track in. Track involved through armpit muscles, humerus, blood vessels, nerves, chest muscles 4-5 ribs, intercostal structures, pleura, lung effusion blood in soft tissues; pleural cavity contained about 900 ml blood: small pellets embedded in tissues lung lateral to medial direction.”

- [4] The parties also handed in by consent a shotgun which is black and brown in colour with serial number 21237 inscribed on the wooden handle. It was submitted as the weapon used by the Accused in the commission of the offence. The shotgun was admitted as Exhibit I.
- [5] Having considered the statement of agreed facts together with the other exhibits tendered, it is clear to me that the Crown has proved beyond reasonable doubt the offence of Culpable Homicide. I say this because the Accused himself has admitted to having fired the gun. On his own admission he acted both unlawfully and negligently in doing so. It is established that the deceased died as a result of injuries sustained from the gun wounds due to the shooting.
- [6] I agree fully that there was no intention by the Accused to kill the deceased. When the Accused was shooting the deceased he did not know that he was shooting the deceased as he (deceased) had alighted from the vehicle whilst it was still moving. He just assumed it was one of the robbers who attacked his shop. What is however clear from the totality of the evidence is the unlawful negligent causing of the

death of a fellow human being which clearly founds the offence of Culpable Homicide. This is because case law has distinguished the offences of Murder and Culpable Homicide in the following words:-

“Murder is the unlawful killing of a human being with intent to kill. Where this intent is absent, the offence is Culpable Homicide... A definition of Culpable Homicide is the unlawful negligent causing of the death of a fellow being.” See R V Thulani Doctor Mthembu Criminal Trial No. 120/06, R V Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09, R V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11.

[7] For the above stated reasons, the Accused is hereby convicted on his own plea of guilty to the offence of Culpable Homicide.

SENTENCE

[8] The learned Crown Counsel informed the Court that the Accused is a first offender.

[9] In mitigation of sentence the defence Counsel submitted the following factors.

- (1) The Accused person is seventy five years old. At the time of the commission of the offence he was sixty-four years old.
- (2) The Accused person is married to three (3) wives.

- (3) He has over twenty (20) children. Although most of the children are grown ups some of them still rely on the Accused for livelihood. Five of the children are still schooling.
- (4) He is a cotton farmer. He gets about ten (10) bales per season which quantifies to about E10 000.00 per season.
- (5) He has livestock in the form of cattle.
- (6) The shop in question is now run by one of his sons.
- (7) He is diabetic; as a result of this disease his sight has been affected.
- (8) His legs and feet are swelling and that is why he walks with difficulty.
- (9) The Accused is very sorry for what happened. He was remorseful after the commission of the offence and it is why he reported himself to the police.
- (10) Even after his release, may the Court note that he has not committed any offence.
- (11) He has been presented as a first offender.
- (12) Sending such an old man to jail will not serve any purpose.
- (13) May the Court consider an appropriate sentence.

[10] In passing sentence on the Accused, I have considered the triad consisting of the offence, the offender, and the interest of the society as mandated by law. This principle of our law is the import of the dictum of **Holmes JA** in the case of **S V Rabie 1975 (4) SA 855 A**, 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.”

[11] Also, there is the case of **S V Harrison 1970 (3) SA 684 (A) at 686**, where **Addleson J** stated as follow:-

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

[12] The foregoing principle has been repeatedly applied in our Courts. The authorities are legion. See for example **Mandla Vilakati V Rex Criminal Appeal No. 18/07 per Ramodibedi JA** (as he then was). I have thus considered the Accused person’s personal circumstances.

[13] I agree that these factors should mitigate your sentence especially your present age of 75 years and your failing health. I also agree that you have shown remorse by pleading guilty and you facilitated your own handing over to the police. I cannot however lose sight of the fact that in the course of the shooting precious life was lost, which life is irreplaceable.

[14] I also note that the offence you committed is a very serious and prevalent one in Swaziland. The incidents of unlawful killing of other people with lethal weapons is on the increase and the Courts have a duty to discourage it.

[15] Having carefully considered the triad, I find that a fitting sentence will be as follows:-

“Five (5) years imprisonment without the option of a fine, two (2) years of which is suspended for a period of two (2) years on condition that the Accused does not commit, within the period of suspension, any offence of which violence is an element.”

[16] The thirty-three (33) days of the sentence shall be deducted to reflect the period of Accused’s arrest and incarceration which is 14th July 2003 to 16th August 2003 as reflected in the statement of agreed facts.

[17] Rights of Appeal explained to the Accused.

**M. S. SIMELANE J.
JUDGE OF THE HIGH COURT**

For the Crown: Mr. S. Dlamini

For the Accused: Mr. K. Vilakati