



IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Criminal Case No: 410/07

In the matter between

REX

Versus

ENOCK SINAKI SHONGWE

ACCUSED

Neutral citation: *Rex v Enock Sinaki Shongwe (410/07)* [2014]SZHC 398
(5 December 2014)

Coram: M. S. SIMELANE J

Heard: 20 October 2014

Delivered: 5 December 2014

Summary: Criminal Procedure – Murder – Culpable Homicide – Statement of agreed facts – Accused found guilty and convicted of Culpable Homicide – Sentenced to Eight (8) years imprisonment.

Judgment

SIMELANE J

- [1] The Accused was indicted with the crime of Murder. The Crown alleges that on or about 19 February 2006 and at or near Mashobeni area in the Shiselweni Region, the said Accused did intentionally and unlawfully kill one Sonnyboy Dlamini and did commit the crime of Murder. When the charge was put to the Accused in siSwati he pleaded not guilty to the Murder charge but guilty to a lesser charge of Culpable Homicide. The Crown insisted on a Murder charge.
- [2] It is apposite for me at this juncture to have regard to the key evidence led *in casu* for a proper determination of the case.
- [3] PW1 was Dr Komma Reddy who examined the dead body of the deceased. He formerly handed to Court the post mortem report as evidence and it was marked Exhibit A. The autopsy report demonstrates that the deceased died due to multiple injuries. The

doctor further stated in his report that on examination the following antemortem injuries were observed:-

- “1. Chop wounds of 4 x 1cms and 4 x 1½ cms present on the top of the head and the margins are sharp.**
- 2. A chop wound of 4 x 1cm present in the right temple region of the head and the margins are sharp.**
- 3. Lacerated wounds of 5 x 1 cms, 4 x 1 cm and 3 x 1cms, present on the right side of the top of the head.**
- 4. Cut wounds of 2 x 1cm and 3 x 2 cms, with sharp margins present in the left temple region of the head.**
- 5. The first digits of the index and middle finger of the left hand are cut and absent.”**

[4] The defence Counsel in cross-examination asked from the doctor if the fingers were freshly cut or not. The doctor’s response was in the affirmative.

[5] PW2 was Nombuso Shongwe who told the Court that she stayed with the Accused and her mother at Mashobeni area in the year 2006. It was her evidence that on 19 February 2006 she was at home sitting outside the house with her father who is the Accused and her younger siblings when they saw the deceased passing by their homestead. It was her evidence that the deceased was carrying a knife. She told the Court that the Accused then approached him and the two eventually

fought each other. She further told the Court that she and her mother grabbed the Accused, dragged him to the house and locked him inside. It was further her evidence that the Accused managed to come out of the house through a window after a while and proceeded to the deceased who was still lying on the ground as a result of the previous beating and the Accused assaulted him with a knobstick. The Accused thereafter went to the deceased homestead to report that he had assaulted the deceased. The deceased's brother came to pick him up and took him away as he was still lying on the scene of crime next to Accused's homestead. PW2 showed the Court the knobstick that was used by the Accused in beating the deceased.

[6] PW3 was Samson Mkhonta a senior community member of Mashobeni area. He told the Court that on the day in issue he was called by the police to the scene of crime when the Accused pointed out a knobstick which was used in the commission of the offence. This witness told the Court that there was an illicit sexual relationship between the deceased and the Accused person's wife. He further told the Court that the said affair was well known in the community as it was once reported to the traditional authorities of the area and the deceased was even fined after he sent some people to apologize to the Accused. It was further his evidence that the deceased was once caught with the Accused person's wife in a forest. He further testified that on another incident the deceased was caught in the Accused's house with the Accused's wife, he was attacked by the community but managed to run away. When PW3 was cross-examined it became very clear that the illicit sexual relationship between the deceased and

Accused's wife was well known in the whole community and that it was the immediate cause of the fight that led to the death of the deceased.

[7] It is apposite for me to state that after PW3's evidence the Crown conceded to a lesser offence of Culpable Homicide in light of the evidence adduced before Court.

[8] Thereafter, the following exhibits were handed to Court by consent as part of the Crown's evidence. The exhibits are a watch, a white shirt and a grey and black hat. The exhibits were collectively marked Exhibit C.

[9] The Crown thereafter closed its case and the defence offered no evidence in defence.

[10] Having carefully considered the evidence adduced before Court and the postmortem report tendered, it is clear to me that the Crown has proved beyond reasonable doubt the offence of Culpable Homicide. This, I say because the Accused has admitted that he had a fight with the deceased and that he assaulted the deceased with a knobstick on the head. This finds corroboration in the doctor's report as per the antemortem injuries observed by the doctor which are mostly on the head.

[11] It is evident that the Accused had no intention to kill the deceased. He killed him because of the illicit affair with his wife, a well known

affair in the community. The Accused was clearly provoked into killing the deceased whom he caught in an illicit affair with his wife. This state of affairs brings the offence homicide as encapsulated in Section 2 an 3 of the Homicide Act 44/1959 which states as follows:-

“2. (1) A person who-

- (a) unlawfully kills another under circumstances which but for this section would constitute murder, and**
- (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;**

Shall only be guilty of culpable homicide.

(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

3.(1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.

- (2) **In this section “an ordinary person” means an ordinary person of the class of the community to which the accused person belongs.**
- (3) **If such act or insult is done or offered by one person to another or, in the presence of another, to a person who is under the immediate care of such other or to whom the latter stands in any relation referred to in subsection (1), the former is said to give the latter provocation for an assault.**
- (4) **A lawful act shall not be provocation to any person for an assault.**
- (5) **An act done by a person in consequence of incitement gives by another in order to induce him to do such act and thereby to furnish an excuse for committing an assault shall not be provocation to such other for an assault.**
- (6) **An arrest which is unlawful is not necessarily provocation for an assault but it may be evidence of provocation to a person who knows of the illegality.”**

[13] Furthermore it is incontrovertible that the Accused negligently caused the death of the deceased which clearly founds the offence of Culpable Homicide. 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 Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09, R V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11.”

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

[15] In mitigation of sentence the Accused stated that he is a first offender and this was confirmed by the Crown. He also told the Court that he is a married man with four (4) children. He has been working at the mines in Ermelo and currently works in a forest at *Gcogca* area as a night watchman. He further told the Court that he is the sole breadwinner in his family. It was further his submission that he is remorseful and the offence was committed in the heat of the moment by finding the deceased with his wife. He was very co-operative with the police when they effected an arrest on his person. It was further stated that he spent one (1) month in custody before his release on bail.

[16] I do note that the Accused committed a very serious offence which is so prevalent in this country. I find that even though the Accused was provoked on the day in issue by finding his wife with the deceased and that the illicit sexual relationship between the deceased and Accused wife was well known in the community, the Accused did not have a right to take away the deceased person's life.

[17] Having considered the *triad* consisting of the offence, the offender and the interests of society, the Accused is sentenced to Six (6) years imprisonment Two (2) years of which are suspended for a period of Two (2) years on the condition that he is not convicted of a similar offence during the period of the suspension.

[18] Rights to Appeal explained to the Accused.

M. S. SIMELANE J
JUDGE OF THE HIGH COURT

For the crown : **Mr. A. Matsenjwa**
For the Accused : **Ms. N. Mazibuko**