



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 334/07

In the matter between:

REX

and

SAMKELISO DLAMINI

1ST ACCUSED

SIFISO MASHADO

2ND ACCUSED

DION MUNROE

3RD ACCUSED

Neutral Citation : Rex vs Samkeliso Dlamini; Sifiso Mashado; Dion Munroe
(334/07) [2017] SZHC 208 (05 DECEMBER 2017)

Coram : MABUZA – PJ

Heard : 27/3/2017; 5/8/2017

Delivered : 05 DECEMBER 2017

SUMMARY

Criminal Law – Accused charged with the crime of murder – Intention to kill not proved – Accused convicted of culpable homicide.

JUDGMENT

MABUZA -PJ

- [1] The Accused were charged with the crime of murder in that upon or about the 11th August, 2007 and at or near Siteki area in the Region of Lubombo, the said Accused persons acting jointly and in furtherance of a common purpose did unlawfully assault Thulane Mkhize and inflict injuries from which the said Thulane Mkhize died on the 29th August 2007 at Mbabane Government Hospital and did thereby commit the crime of murder.
- [2] On the date of due commencement of trial on the 08/11/16 the Court was informed that the 1st Accused had since passed away. I ordered that his death certificate be filed. It was filed on the 15/12/2016 and the charge against him was withdrawn. The trial properly began on the 27/03/2017. When the charge was put to Accused 2 and 3 they pleaded not guilty. Their pleas were confirmed by their counsel Mr. Phakathi.

[3] Dr. Komma Reddy (PW1) testified that he conducted the post mortem and that the cause of death was due to injuries to the head. The deceased was identified to him by the deceased's brother Mfanasibili Mkhize. The post mortem was conducted on the 4th September 2007, the deceased having been assaulted on the 11th August 2007 at Siteki and subsequently died on the 29th August 2007 at the Mbabane Government Hospital.

[4] The following ante mortem injuries were present:

- “1. A healing contusion of 2 x 1 cms, present on the middle portion of the right side of the neck.
2. A healing abrasion of 6 x 1 cms, present across the lower 1/3 portion of the right upper arm.
3. A healing contusion of 5 x 2 cms, oblique in direction, present on the front and middle portion of the right forearm.
4. A healing contusion of 3 x 2 cms, present on the lateral side of the right thigh in its upper 1/3 portion”.

[5] PW1 further testified that with regard to the skull the base of the occipital bone was fractured and that there was a lot of blood inside the head. He stated that both right and left lungs were diseased and pus was present on cut sections. He stated that the deceased had been unconscious for sixteen days prior to his death hence some of the superficial wounds began healing. He says that the head injuries were consistent with being beaten with a hard stick or iron rod or a stone.

[6] Sifiso Tsabedze (PW2) testified that the deceased was his friend. That on the 11th August 2007 he went to visit the deceased at work and together they proceeded to Siteki Hotel. The deceased was carrying a jug of traditional brew made from grapefruit. Upon arrival at the hotel they left the now empty jug outside with a vendor and entered the hotel where they enjoyed beers. At about 11.00 p.m. they decided to leave as the hotel was about to close.

[7] When they got to the vendor, they found that the jug was no longer there and that Accused 3 had taken it from her. He followed Accused 3 and asked for the jug but Accused 3 refused with it and instead went and joined his friends who together with Accused 3 assaulted PW2 with beer bottles and kicks. He

says that he raised an alarm and the deceased came to his rescue but the accused persons assaulted the deceased until he fell.

[8] PW2 identified Accused 2 and 3 in the accused dock. He says that a third friend (Accused 1) is missing. He says that after the deceased had fallen the accused persons continued kicking him and bashed his head on the concrete pavement.

[9] He says that he had also fallen during the assault on him. He arose and noticed that Accused 1 was now carrying an iron rod and before he (PW2) could get to the deceased Accused 2 and 3 began chasing him. He outran them and when he returned later to check on the deceased who could not get up, the accused chased him again and he went home.

[10] The following morning he went to the deceased's home where he reported that the deceased and himself were assaulted by Accused 3 and his friends the previous night. The deceased was not at home.

[11] After making this report, he then went to the Siteki police station to lay a charge of assault and the police advised him that the deceased was in hospital.

He says that he knew Accused 1 from Siteki but did not know Accused 2 and 3. He was seeing them for the first time on the night of the assault.

[12] He was cross-examined. It was put to him that it was actually himself and his friends that attacked the Accused persons and that evidence will be led in this regard. And that Accused 3 was stabbed in the process. He denied this.

[13] When it was put to him that there were inconsistencies between his evidence in Court and the statement that he had recorded with the police, he said that the Court should use the evidence that he had given to it. Further on in re-examination he revealed that he was not the author of his statement but a police officer reduced his verbal statement into English. There was no interpreter present.

[14] 1946 Assistant Superintendent Mduduzi Dlamini (PW3) testified that Detective Constable Nhlanhla Dlamini (now deceased) (3554) was one of the investigating officers in this matter. That on the 12th August 2012, PW3

received a docket in this matter and handed it over to 3554 to investigate. PW3 was the supervising officer. He testified that in this matter together with 3554 they proceeded to Good Shepherd Hospital to interview the deceased. They found that he was severely assaulted and could not talk and failed to record a statement from him. Because of the severity of the injuries the deceased had to be transferred to Mbabane Government Hospital.

[15] He stated that three accused were arrested and initially charged with assault to do grievous bodily harm until the deceased died and the charge was changed to murder. He testified that none of the accused laid any charges of assault against PW2. He further testified that Accused 1 was deceased. He identified Accused 2 and 3 by pointing them out in the accused's dock,

[16] Of importance from cross-examination of PW3 was that according to the recorded statement of officer 3554 there was an iron rod that he was given and what had happened to it. PW3 responded that he did not find it among the exhibits. The Crown closed its case. The defence opened its case by calling the Accused to their defence.

- [17] Sifiso Terence Mashaba (DW1), Accused 2 (under oath) testified that on the 12th August 2007, himself, Accused 1 and some other friends were standing outside the Siteki Hotel. It was after midnight towards 1.00 a.m. They were drinking alcohol and waiting for Accused 3 who was still inside.
- [18] While they were waiting Accused 3 came out running chased by PW2 and three of his friends who were assaulting Accused 3. DW1 and his friends tried to stop the assault but failed. They too joined the fight.
- [19] DW1 stated that he struck PW2 with a beer bottle and PW2 ran away thereafter together with Accused 3 they chased after PW2 and on their return found that Accused 1 had been taken into police custody, and the deceased was no longer there. His evidence is that during the skirmish he concentrated on PW2. He had nothing to do with the assault on the deceased.
- [20] DW1 also stated that he heard PW2 say in his evidence in chief that Accused 3 and himself chased after PW2 while the deceased remained behind with the deceased. DW1 could not give any reason why PW2 had implicated him.

[21] Dion Munro (DW2), Accused 3 next gave evidence (under oath) and testified that on the 11th August 2007 he was at the Siteki Hotel drinking alcohol. As it was closing time he went to the toilet. He was carrying a jug. He met some people who were unknown to him who demanded the jar and he refused to hand it over and they blocked his way and assaulted him under his right arm. He dropped the jar and ran away into the toilet and left by another door. He says that the deceased was among those people. When he got outside he found his co-accused and the deceased said that Accused 3 was disrespectful. The deceased took off his top and a fight ensued. Accused 3 says that he did not take part in the fight. He says that it was the deceased and his friends who were armed. They had a slasher, bush knife and chisel. He says that together with DW1 he went after PW2 and chased him until Central High School but PW2 outran them. When they returned to the hotel they found that the deceased and Accused 1 had been taken by the police. They left for their respective homes.

[22] The following morning Accused 3 went to Accused 1's home to inform the father that Accused 1 had been arrested. While there, the police arrived and arrested him.

[23] In cross-examination he was asked to give a reason why PW2 had implicated him. His response was that PW2 was one of the people who had assaulted him. He also stated that he knew PW2 by sight. He denied that he and the co-accused assaulted the deceased and stated that it was Accused 1 who had assaulted the deceased and was found with a shoe full of blood. After his evidence the defence closed its case.

[24] The evidence of PW2 is more credible than that of the accused. PW2 described the assault on him and the deceased in detail. He says that the Accused first assaulted him when he asked for the jug. They assaulted him with beer bottles and kicked him. He raised an alarm and the deceased came to his rescue. But the accused also assaulted the deceased until he fell down and they continued kicking him and bashed his head against the concrete pavement.

[25] He says that he had also fallen during the assault and as he got up he noticed that Accused 1 was carrying an iron rod used for re-inforcements. Before he could get to help the deceased, Accused 2 and 3 started chasing him.

[26] The post mortem report filed by PW1 states that the deceased died “due to injuries to the head.” In the tabulation of the ante mortem injuries the closest injury to the head is the injury on the middle portion of the right side of the neck.

[27] In his oral testimony PW1 stated that with regard to the skull, the base of the occipital bone was fractured and there was a lot of blood inside the head.

[28] The occipital bone is the trapezoidal-shaped bone found at the lower back area of the cranium. The occipital is cupped like a saucer in order to house the back part of the brain.

[29] PW1 further testified that the head injuries on the deceased were consistent with being beaten with a hard stick or iron rod or head being banged on a hard surface.

[30] The evidence of PW2 is corroborated by PW1 who says that the cause of death was due to injuries on the head which were consistent with a hard object like a stone or iron rod. PW2 said he saw the Accused persons bash

the deceased's head on the concrete pavement. He also saw Accused 1 carrying an iron rod but did not see it being used.

[31] Accused 2 and 3 have ineffectually tried to shift the blame on Accused 1 because he is dead. This trick would have worked if they had given more details of how Accused 1 was the sole perpetrator. As the evidence stands there is not much that the court can attribute to the absent Accused 1 because the case against all three is stronger than the case against Accused 1.

[32] Has the requisite intention been proved? It seems not. The evidence is that several drunk young men were engaged in fight outside the Siteki Hotel over the possession of an empty jug. The fight was instantaneous, on the spur of the moment and not premeditated. It was a free for all. There was no time to consider the consequences of their action on either side. Unfortunately the deceased was the major victim of the fight. It could have been any of the young men that were embroiled in the fight.

[33] It is my finding, therefore, that there was no intention to kill the deceased and that the Crown has not proved such intention.

[34] The Crown has, however, proved that the deceased was unlawfully killed. The charge is that the accused persons acted jointly and in furtherance of a common purpose in assaulting the deceased. All three accused are in my view responsible for unlawfully causing the death of the deceased even if they did not intend to kill him

[35] In view of the foregoing, I find both the accused guilty of the lesser crime of culpable homicide and they are hereby convicted accordingly.

SENTENCE

[36] The Crown informed the Court the accused persons had no record of previous convictions.

[37] In mitigation Counsel for the accused stated that:

re: Accused 2

Accused 2 was now 31 years old. He was 21 years old when the crime was committed. He has a two year old child who resides with Accused 2's mother. They both depend on him financially. Before he was arrested he had piece jobs. He was arrested on the 11th August 2007 and was released on bail on the 8th December 2008 (16 months credit). He was re-arrested during March 2017 (credit 8 months, 5 days).

re: Accused 3

[38] Accused 3 was now 36 years old. He was 26 years old when the crime was committed. He has a three month old child whose mother is unemployed. They both depend on him financially. He too used to do piece jobs before he was arrested. He was arrested during August 2007 and released on the 18th October 2007 (credit 3 months).

[39] That both Accused were very young during August 2007 when the offence was committed. That the assault on the deceased occurred after a drunken brawl of the people that were involved in the brawl including the murder victim and PW1.

[40] The accused were asking for mercy.

[41] I shall take the Accused personal circumstances into account in sentencing them.

[42] However, I also have to take into account the crime itself as well as the interests of society.

[43] The assault inflicted on the deceased was uncalled for. All he wanted was his jug. There was no need to kill him.

[44] Society expects the Courts to punish offenders in order to prevent would be offenders from breaking the law and committing similar crimes. Excessive drinking is rife in our society and thereafter crimes are committed with impunity. In this instance it was a drunken brawl and there was no premeditation. The assault occurred on the spur of the moment and spiralled out of control.

[45] I shall take into account the fact that the crime occurred in August 2007 and the case took a long time to come for trial. It is now ten years later and all

the while the accused were waiting for their trial. The first accused died while they were waiting, they did not flee Swaziland.

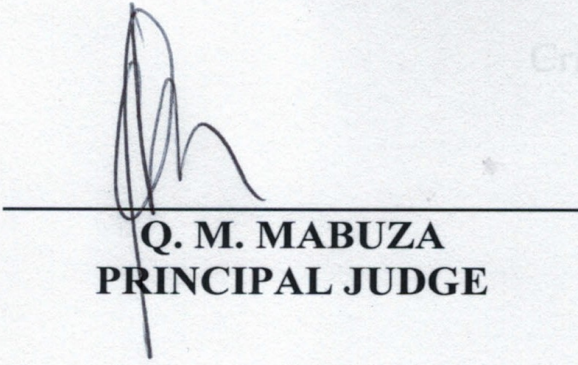
[46] I sentence both accused to six years imprisonment without an option of a fine two years of which are suspended for one year on condition that they are not convicted of a crime of which assault is an element.

[47] Twenty six (26) months and five (5) days are to be deducted from the sentence of Accused 2.

[48] Three months are to be deducted from the sentence of Accused 3.

TMBABANE

Crim. Case No: 2



Q. M. MABUZA
PRINCIPAL JUDGE

For the Crown : Mr. P. Dlamini

For the Accused : Mr. B. Phakathi

