



IN THE IDGH COURT OF ESWATINI

JUDGEMENT

HELD ATMBABANE

CRIT. CASE NO. 493/11

In the matter between:

REX

Applicant

And

PLEASURE MPHUMELELO SIBANYONI Respondent

Neutral Citation: *Rex v Pleasure Mphumelelo Sibanyoni (493/110) SZHC 101[2019} (10th June 2019)*

Coram: MAPHANGA J

Date Heard: 3rd June, 2019

Date Delivered: 10th June, 2019.

Summary : The accused convicted of culpable homicide - the principles on sentencing (the triad) considered and applied-accused accordingly sentenced to 7 years imprisonment, 3 of which suspended over a period of 4 years on condition he is not convicted of any offence of which violence is an element.

SENTENCE

- [1] The accused originally faced a charge of murder. He has been found guilty of the lesser offence of culpable homicide. On the 3rd of June 2019, this court heard submissions on sentence. I now hand down judgment on sentence following the conviction.
- [2] In sentencing the accused this court will follow the tried and tested principles that have been adopted and applied by this court in the inexorable quest to mete out a just and appropriate sanction on the offender. These principles and the attendant considerations have been neatly encapsulated by Moore JA's judgment in *Chicca Manyana Iddi and Two Others v Rex* Crim. Appeals Case. No. 03/2010; 09/2010 and 10/2010 where the learned judge adumbrated the key issues as follows:

"A sentence must consider:

- 1. The penalties and other forms of treatment prescribed by the legislature*
- 2. The circumstances of the case*
- 3. The circumstances of the offender, and*
- 4. The interests of society at large.*

Under the above broad headings, the court must also consider such factors inter alia as:

- 1. The evidence in mitigation*
- 2. The effect of the offence upon the victim and the community*
- 3. Whether the offender has made reparation or has compensated the victim*
- 4. The effect which the sentence may have upon continuing relationship*

*between the offender and the victim
e.g. domestic violence*

*5. The prevalence of the offence at the
time of its commission*

*6. Its potential for inflicting harm upon
the innocent and the vulnerable*

*7. Its potential for undermining the
integrity of the society and its public
morals"*

[3] Now the relevance and applicability of the above broad principles and considerations will in application vary from case to case as will the relative emphasis of the applicable factors. I accordingly propose to apply the prime principles and relevant factors as appropriate to the circumstances of the instant case.¹

[4] Uppermost in sentencing policy is the general rule that the sentencing court's task entails tailoring such sentence in each case as will as far as possible strike a modicum of balance in the tension between the seriousness of the offence and the need to pass a sentence that fits the crime, the interests of society as well as the individual interests of the accused in his personal sphere and circumstances.

[5] At the hearing the accused attorney, Mr. S Jele, elected not to follow the convention of leading evidence in mitigation of sentence but instead took the approach of making oral submissions from the bar, no doubt based both on instructions from the accused as well as the uncontroverted factual record as pertains to the circumstances under consideration. To that end it has been established that the accused is a first offender whose record has not been besmirched by criminal conduct in the past. At the time of the commission of the offence he was 24 years of age. He

¹ See also the Judgment of Masuku in the unreported case of R v Mabuza ((302/09)) [2010] SZHC 86 (07 June 2010) where the Court cited with approval Justice Moore's remarks"

has abided by his bail conditions and at all times attended without fail at his trial. It was submitted that immediately after the commission of the offence his actions have demonstrably been those of a person who was in genuine remorse in that from that moment he co-operated fully with the police and volunteered a statement that was eventually recorded before a Magistrate.

[6] Mr. Jele further urged to consider that the accused has, since the events leading to his arrest, suffered immensely both emotionally and in his welfare in that he has had flashbacks to the events of the evening of a post-traumatic kind and also that he lost his employment at the bar where he used to work. He has a minor child of two years for whom he is now responsible to support as well as the unemployed mother of the child who was described as his fiancée', He has since found employment with a cellphone service and vending establishment in Mbabane. His attorney sought to emphasise that the accused has led a life of a responsible law-abiding citizen deserving of a second-chance at reintegration into society. Finally I was urged further to consider that the accused has shown contrition.

[7] I must consider that in the run of the mill the circumstances stand out in contrast to the commonplace violent crimes that often arise in public places of entertainment and drinking in that it involved an infraction between a patron and an employee of the pub. I must also take into account that surely alcohol was a factor in the incident although not attributed to the accused, as there is no evidence that he himself had been drinking or even that he imbibed at all in alcoholic beverages as a lifestyle. Indeed he presented himself to the police and

admitted his causal actions as pertains the physical elements of the offence.

[8] However compelling the accused's case for mitigation I must however contrast this with the important singular consideration that he has been convicted of a very serious offence whose consequences to the victims family cannot be reversed nor tempered on account of the fact that the deceased's life has been permanently extinguished. The damage this has wrought to his next of kin, his immediate family and his community is irreparable - no penitence can return him to life. All too often sacred human life is taken to the extent that the rate of homicide has as a matter of fact become prevalent and on the rise. This Court has taken judicial notice of this notorious and regrettable trend. There is thus a need to factor the indignation and very present threat such violent crimes pose to the security and integrity of society. The welfare and interest of Society are of paramount importance as is the seriousness of the crime. A fitting sentence has to account for some level of punishment and retribution as well as deterrent effect.

[9] There is further another consideration linked to the circumstances of the offence. It is the nature of the weapon used and the agency of such dangerous weapons in many homicides in this country. It is common cause that the accused had been bearing and brought in his person a knife of a lethal nature well recognized and one which has, in innumerable murder and culpable homicides as well as aggravated assault crimes, been a critical factor in the severity of the trauma on the victims. The accused is a mature person who knows all too well that such weapons are prohibited in public places because of the serious social risk to human life and safety but carried one

heedless and without regard to the ever-present risk of impulse to resort to use of such knives in violent incidents.

- [10] Of this I can only re-iterate the caveat that this court has all too often raised in cases involving violent crimes as pertains to the brandishing and carrying of knives to public places. In the *R v Mabuza* case, **Masuku J** adverts to this phenomenon as follows:

'I must decry the ever-increasing incidents of people in this country, particularly young men, who carry knives needlessly on their persons. This becomes more serious when they visit places of amusement where alcohol is on offer. The urge to use knives at the slightest provocation and for the flimsiest of reasons becomes irrepressible. The law enforcement officers must step up their resolve in curbing this menace by holding to account those found possessing dangerous weapons of which knives are a part so that people may know that it is an offence to be found carrying a dangerous weapon on your person in circumstances where there is no Justification'

- [11] I need only mention further that mindful of the above concerns, it cannot be ignored that the accused in the instant case was in a position of responsibility over the maintenance of the rules of the Markos Bar patrons all who entered that facility that included ensuring that no dangerous weapons are not brought into the premises where he worked. Of this he was aware and

the irony is that when the brawl with the deceased occurred he had just been attending to clearing the bar area of bottles which routinely removed as a precaution against potentiality of such being used as dangerous weapons as a matter of practice at the Markos Bar.

[12] At the urging of the defence counsel, Mr. Jele we are to pay regard to the need to blend the punitive element of the sentence with some modicum of mercy and instead of a custodial sentence make use of the rehabilitative and reformist opportunity to sentencing. He strongly urged that regard to the circumstances of this case a custodial sentence would not be appropriate favouring instead a suspended sentence combined with supervised community service. In a countervailing argument Crown Counsel, Mr. Matsenjwa submitted that on the contrary the Court could not ignore that the gravity of the offence and the aggravating circumstances we have referred to above, as well as the interests of society outweigh the personal circumstances and mitigating factors.

[13] In considering your sentence I must first note that the offence with which you have been convicted is indeed a grave one involving the loss of a life. The right to life of every citizen is enshrined and protected by our Constitution. It is a precious right that is at a premium deserving the fullest protection of the law. The courts have to meaningfully promote and protect its security against the scourge of violence and crime. That includes protection of society from the recurrence and risk of violence.

[14] Rightfully in sentencing you I must pay regard to the fact that you are a young and first offender and thus

even where a commensurate and serious sentence is deserved I must deliver it with a measure of leniency.

However having said that a custodial sentence appears to me a fitting measure in cases involving the taking of life. Such severe sentences ensure that this court is consistent in sending a message to society at large especially in those offences involving the use of lethal weapons that the courts recognize society's indignation at the wanton taking by a person of another life. I hope that the sentence you are about to receive although can be no atonement for the life you have taken will ensure that you reflect on your offence and the grief caused in its wake.

[15] In light of these factors and circumstances of this case, it is my considered decision that the following would be a fitting sentence for the offence you have committed:

SENTENCE

You are accordingly sentenced to 7 years imprisonment a portion of which three are suspended for a period of 4 years on condition that you are not convicted for a crime in which the use of violence to another is an element.

DELIVERED IN OPEN COURT ON THIS 10TH DAY OF JUNE 2019.



MAPHANGA J

JUDGE OF THE HIGH COURT.

Appearances:

For the Prosecution: Mr. A Matsenjwa
Directorate of *Public* Prosecutions

For the Defence: Mr. S Jele
Mbuso E. Simelane and Associates