



IN THE HIGH

COURT OF ESWATINI

JUDGMENT

Case No. 422/2013

In the matter between:

REX

And

DUMA BONGINKHOSI MONDLANE

Neutral citation: *Rex v Duma Bonginkhosi Mondlane (422/2013) [2020] SZHC 106 (4 June 2020)*

Coram : **T. L. Dlamini J**

Heard : 25 March 2020 1 April 2020 21 April 2020

Delivered : 4 June 2020

Summary: *Criminal law and procedure – Accused person charged with Murder but pleaded guilty to Culpable Homicide – Crown accepted the plea – Statement of agreed facts prepared and submitted to court*

Held: *That the accused is guilty of Culpable Homicide based on his own plea – Sentenced to six years imprisonment and three years suspended for a period of 3*

years on condition the accused is not convicted of an offence where violence is an element.

JUDGMENT

- [1] The accused person, **Duma Bonginkhosi Mondlane**, appeared before me arraigned on a charge of Murder. The indictment states that on 25 October 2013, at Phumlamcashi in the Lubombo region, he unlawfully and intentionally killed **Nkosingiphile Mabulala Gamedze** by stabbing him with a knife. When the charge was put to him, he denied that he killed him intentionally but stated that it was by mistake. He therefore pleaded not guilty to Murder but guilty to Culpable Homicide.
- [2] The defence attorney confirmed the plea and the crown accepted it. Acceptance of the plea is sanctioned by **s.155 of the Criminal Procedure and Evidence Act of 1938** as amended (hereinafter called “the Act”). Subsection (2)(a) provides that an accused person “*may plead either that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons;*”.
- [3] Following the acceptance of the plea, a statement of agreed facts was prepared and handed-in by consent of the parties. The statement, which the court marked as ANNEXURE “1”, was read into the record and the following facts are common cause.

- [4] The accused is a cripple and uses a crutch for support. He was at a shebeen enjoying alcoholic drinks with Melusi Hlandze, Nkola Tsabedze, Mbha Lungile Dlamini and Nkosingiphile Mabulala Gamedze (the deceased). As they were drinking, the deceased stood up and lifted the accused by the leg high. This caused the accused to fall off the chair he was sitting on and the alcoholic drink he was carrying spilled on the clothes he was wearing, viz., a white t-shirt and trouser. He was also hurt on the mouth and bled.
- [5] One Moses Shanduza Dlamini and the other people who were there tried to intervene and further told the deceased to buy the beer of the accused which he spilled. At that time the accused was literally crying. The accused then took out a knife and stabbed the deceased once on the right breast. After the stabbing, the deceased then left the shebeen and appeared to be proceeding to the compound where he stayed. He however diverted to a nearby house where he collapsed at the door and died.
- [6] The accused admits, according to the statement of agreed facts, that the deceased died as a result of the injuries inflicted by the stabbing and that the post-mortem examination report correctly reflects the cause of death and the nature and extent of the injuries sustained by the deceased. He also admits that the stabbing was the immediate cause of the death of the deceased and that there was no *novus actus interveniens*. The post-mortem examination report was handed-in by consent of the parties as part of the evidence. It was marked as EXHIBIT "A". This report, among other injuries sustained, shows that the deceased had a penetrating wound on the front right chest and a 2.9 by 1.4 cm injury penetrating the lung.

[7] The statement of agreed facts outlined above constitutes a formal admission in terms of s.272 of the Act. The section provides as quoted below:

“272. (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact.”

[8] After the statement was read into the record, the accused confirmed that it correctly reflects the facts of what took place and that it is a statement of the facts he agreed to with the crown.

[9] The agreed facts therefore take the place of evidence. Section 238 of the Act provides that if the accused pleads guilty to a charge on the indictment or to another charge that he might be found guilty of, and the prosecutor accepts the plea, the court may sentence him without hearing evidence. It is on the basis of this provision that no witnesses were called to give evidence. On the strength of section 238 of the Act, the accused is found guilty of Culpable Homicide on the basis of his own plea.

SENTENCE

[10] In mitigation, the court was urged by the defence to consider that the accused was not the aggressor. It was submitted that the deceased provoked him by physically and brutally manhandling him in a manner that made him to fall and sustain an injury on the mouth and bled as a result. He had his clothes wet by an alcoholic drink that spilled on him because of the physical and brutal manhandling that he was subjected to by the deceased. The use of the knife, it was submitted, was triggered by the provocation which the accused was subjected to.

[11] It was further submitted that the accused was relatively young at the time and has two young children. One of them is attending school and is in Grade 6. He makes a living by being a member of a sugar cane farming scheme that enables him to receive financial income. The court was implored to be lenient and suspend half of the sentence.

[12] The crown, on the other hand, submitted that the court should not lose sight of the fact that a life was lost, and that the deceased has a family as well. The court was therefore urged to pass a sentence that would deter other would be offenders. In similar cases, the crown submitted that the court passed sentences ranging between five (5) and ten (10) years. As authority, the court was referred to a judgment of this court in the case of **Rex v Sabelo Dlamini (406/2014) SZHC 163 [2018] (12 July 2018)** where my sister **Langwenya J** imposed a custodial sentence of 10 years after opining that the courts handed down sentences from nine to ten years for culpable homicide (**see: paragraph [18]**). The crown prosecutor urged the court to consider all the circumstances of the case and hand down a fitting and proper sentence.

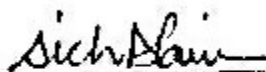
[13] In considering a proper sentence, I have taken into account what in legal parlance is called the *triad*. There is no record of any previous conviction that was submitted to this court in respect of the accused person. I therefore take him as a first offender. I have also taken into consideration that he is a father of two minor children. I further take into consideration that the deceased was the aggressor, and in my finding, the accused was provoked by him and he acted out of the provocation. This finding, in law, is a mitigating factor.

[14] On the other hand, I am not turning a blind eye to the fact that a life was lost. Society looks up to the courts for protection against offenders. I am alive to

the fact that the sentence I'm expected to impose will neither satisfy those who are close to the deceased nor those who are close to the accused either. This is so because in the eyes of the former it will appear to be too lenient while it will be seen as too severe in the eyes of the latter. This doesn't however absolve the court from striving the best it can to achieve an appropriate balance between the competing expectations.

[15] On appeal, the Supreme Court dealt with two cases whose facts were closely similar in terms of how the victims were killed. These are the cases of **Mthaba Thabani Xaba v Rex (9/2007) [2007] SZSC 4 (12 November 2007)** and **Mathenga Solomon Masuku v Rex, Criminal Appeal 3/2007 (unreported), whose judgment was delivered on 9 May 2007**. In both cases the accused persons were sentenced to 12 years by the trial court. On appeal, the sentences on both cases were reduced to six (6) years.

[16] In my view and finding, a proper sentence, which I hereby impose, is six (6) years imprisonment, of which three (3) years are suspended for three years on condition the accused is not convicted during the period of suspension of any offence where violence is an element. The sentence is backdated to take into account any period which the accused has spent in custody in respect of this offence.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For the Crown : Mr B. Ngwenya
For the Respondents : Mr X. Mthethwa

