



IN THE HIGH COURT OF ESWATINI

JUDGMENT ON SENTENCE

HELD AT MBABANE

CASE NO. 49/17

In the matter between:

REX

Versus

JULIUS MJULUKO DLAMINI

Neutral citation: *Rex v Julius Mjuluko Dlamini (49/17) [2020] SZHC 139 [2020]*
(23 July 2020).

Coram: M. LANGWENYA J

Heard: 6 April 2020; 23 April 2020; 20 July 2020; 21 July 2020

Delivered: 23 July 2020

Summary: Criminal law-Criminal Procedure-accused charged with murder and pleads guilty to culpable homicide-accused charged with attempted murder and attempted rape-accused pleads guilty to all the charges and the Crown, with the consent of the defence prepared a statement of agreed facts-Section 155 of the Criminal Procedure and Evidence Act 1938 invoked-statement of agreed facts tendered in Court-accused convicted on the basis of his own plea and on content of

statement of agreed facts-Evidence in mitigation of sentence evaluated in light of the 'triad' principle.

JUDGMENT

- [1] The accused was charged with a total of four counts being murder, rape, two counts of attempted murder and one count of attempted rape.
- [2] On the first count, the accused was charged with the offence of murder, it being alleged by the Crown that on or about 23 March 2015 and at near Mhlane area in the Manzini district, the said accused did unlawfully and intentionally kill Futhi Mndzebele.
- [3] On the second count, the accused was charged with the offence of rape, it being alleged that on or about 23 March 2015 and at or near eMhlane area in the Manzini district, the said accused intentionally and unlawfully had sexual intercourse with Futhi Mndzebele without her consent and did thereby commit the crime of rape. The Court was initially informed that the Crown is unable to access the forensic report to prove commission of the offence of rape because border gates between eSwatini and the Republic of South Africa are closed as a result of the covid-19 scourge. On 20 July 2020 Ms L. Hlophe for the Crown applied that the count of rape be proceeded with before another Judge. She stated that it was the recommendation of the DPP that the charge of rape be heard by a different judge and that this court proceeds with the charge of murder, two counts of attempted murder and one count of attempted

rape. Mr X. Mtetwa does not object to the Crown's application. The application was granted.

- [4] In the alternative, the accused was charged with necrophilia-a charge that was during the hearing of the matter- abandoned by the Crown.
- [5] On the third count, the accused is charged with the crime of attempted murder. In that on or about 10 April 2015 and at or near Sindzandlala in the Shiselweni district, the said accused person did unlawfully and with intent to kill assaulted Phuthumile Mabuza by strangling and attempting to stab her with a knife and did thereby commit the crime of attempted murder.
- [6] On the last count the accused is charged with the offence of attempted rape. In that on or about 10 April 2015 and at or near Sindzandlala are in the Shiselweni district, the said accused person did intentionally attempt to have unlawful sexual intercourse with Phuthumile Mabuza without her consent and did thereby commit the crime of attempted rape.
- [7] When the charges were put to the accused he pleaded not guilty to murder but guilty to culpable homicide. On the third and fourth counts of attempted murder and attempted rape respectively, the accused pleaded guilty to both counts. The plea of the accused was confirmed by Mr X. Mtetwa.
- [8] When the accused was arraigned and pleaded guilty to the charges set out above, the Crown accepted the plea. In this vein, section 155 of the Criminal Procedure and Evidence Act applies and states as follows:

'That the accused may plead 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.'

- [9] Accordingly, the Court accepted the accused's plea and proceeded on a charge of culpable homicide in the first count, attempted murder and attempted rape.
- [10] The Crown submitted a statement of agreed facts signed by the accused and counsel for the Crown. The post mortem report was also handed in by the Crown. The statement of agreed facts was marked exhibit 'A' and the autopsy report was marked exhibit 'B' while the photo album of the scenes of crime was marked exhibit 'C'. The knife, rope and spade were marked exhibit 1, 2 and 3 respectively.
- [11] All the above documents and exhibits were handed in Court by the Crown with the consent of the Defence. The Court duly admitted same as evidence.
- [12] The statement of agreed facts was read out in Court by the Crown and its contents were confirmed by defence Counsel.
- [13] The Court enquired from the accused personally if he was conversant with the contents of the statement of agreed facts and whether he had any objections to it being admitted into Court as evidence. The accused said he was aware of the contents in the statement of agreed facts and also pointed out that he had no objection to it being admitted into Court as evidence.
- [14] The common cause factors are that on or about 23 March 2015 the deceased-Futhi Mndzebele was found dead lying on the bed and bleeding through the nose, ears and mouth. The gruesome discovery was made by Zandile Mngometulu who was in the company of Samu Motsa and Thandazile. The accused lived in the same house but in a different bedroom as the deceased and was away when the gruesome find was made. The accused arrived at the scene before the police got to the scene.

- [15] The deceased was assaulted on the head with a spade by the accused. The deceased died of the injuries inflicted on her by the accused.
- [16] When the police arrived at the scene, they forcefully opened the door of the house in which the deceased slept. The police secured the scene and carried out their investigations. They photographed the scene and later conveyed the body of the deceased to RFM hospital where she was certified dead. The body of the deceased was subsequently taken to the mortuary.
- [17] Dr Komma Reddy, a police pathologist determined the cause of death to be due to injuries to the head. The post mortem report states also that the frontal, parietal, occipital and left temporal bones were fractured. The brain was also disrupted and there was extra-dural and intra-cerebral haemorrhage present.
- [18] Section 221(1)(a) of the Criminal Procedure and Evidence Act, 1938 provides as follows:

‘In any criminal proceedings in which any facts are ascertained-

- (a) By a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the result of any forensic test or his opinion as to the cause of death of such person;
Such facts may be proved by a written report signed and dated by such medical... practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated therein..’**

- [19] Based on the above provision, I have accepted the autopsy report without the doctor handing it in Court because both Counsel for the Crown and the Defence consented to it being so admitted. Accordingly, the Court accepts the autopsy report as *prima facie* evidence of the cause of death of the deceased. The autopsy report was marked exhibit ‘B.’

[20] The accused person admits that Futhi Mndzebele is dead; that the death of the deceased was unlawfully and negligently caused by the accused on 23 March 2015. The accused admits also that he struck the deceased with a spade on the head, an act that resulted in her death. This fact is confirmed by the police pathologist. It is admitted further, by the accused that his conduct of striking the deceased with a spade on the head was the immediate cause of her death and that there was no *novus actus interveniens*. It is admitted by the accused that his act of striking the deceased with a spade in the manner that he did was dangerous and that a reasonable person in the circumstances of the accused ought to have known that the assault he meted on the deceased might possibly result in her death. He was negligent.

[21] I am satisfied that the Crown has proved the commission of the offence of culpable homicide beyond reasonable doubt. This I say based on the evidence before Court as reflected in the post mortem report; statement of agreed facts and the plea of guilty tendered by the accused. The accused is accordingly found guilty of culpable homicide of Futhi Mndzebele.

[22] Regarding counts three (attempted murder) and four (attempted rape), there is the evidence of the complainant Phuthumile Mabuza. On 10 April 2015, the complainant in counts three and four was at home. When she walked out of her house she was attacked by the accused who struck her next to the ear twisted her neck and then dragged her into the bedroom. The accused shut the mouth of Phuthumile Mabuza using his hand as he dragged her to the bedroom.

[23] In the bedroom, the accused forced the complainant to lie on the bed. The accused strangled the complainant and forcefully separated her legs while

pressing his knee on her chest. The accused tried to have forceful sexual intercourse with the complainant but the latter fought back. The accused pulled a knife and attempted to stab the complainant. The complainant held the knife and the knife struck the bed. The complainant kicked the accused and he fell. The complainant fled and raised an alarm. Sibongile Daphne Tsabedze responded to the alarm raised by the complainant. The accused fled towards the corn field and jumped over the fence. The matter was reported to the police.

- [24] The accused admits that he unlawfully and with intent to kill, strangled the complainant and further tried to stab Phuthumile Mabuza with a knife. The accused admits also that he unlawfully and intentionally attempted to have sexual intercourse with Phuthumile Mabuza.
- [25] Whereas the commission of the two counts of attempted murder and attempted rape are closely linked in time and place, the two offences required two separate intentions despite them arising from one incident.
- [26] On 12 April 2015, the accused was arrested by the police and has been in custody since. The accused is remorseful for his actions.
- [27] The post mortem report, the photographs of the scene of crime, a spade, a knife and a rope was produced as part of the exhibits in this matter.
- [28] I am satisfied that the Crown has proved the commission of the offence of attempted murder and attempted rape in counts three and four respectively. This is based on the evidence as reflected in the statement of agreed facts as well as the accused's plea of guilty to both count 3 and count 4. The accused is found guilty of attempted murder. The accused is found guilty of attempted rape. ✓

[29] The Crown submitted that the accused does not have previous convictions. In mitigation of sentence, it was submitted on behalf of the accused that:

[30] He is remorseful

[31] He is twenty-two years old. He was seventeen years old at the time of the commission of the offence.

[32] He was arrested on 12 April 2015 and has been in custody since.

[33] **Sentence**

The accused was found guilty of the offence of culpable homicide, attempted murder and attempted rape.

[34] In imposing sentence I must have regard to the accused person's personal circumstances, the seriousness of the offence and the general interest of society. In determining an appropriate sentence, the court should also be mindful of the foundational principle of sentencing that 'punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy¹. In addition, the court must also consider the main purpose of punishment, which is deterrence, preventative, reformatory and retributive².

[35] The accused has been found guilty of offences that are serious in as much as they are attended by violence. The accused has been found guilty of culpable homicide- an offence in which a human life was lost. From the statement of agreed facts it is apparent that the accused inflicted the fatal injuries on the

¹ Per Holmes JA in *S v Rabie* 1975 (4) SA 855(A) at 862G-H.

² See *R v Swanepoel* 1945 AD 444 at 445.

head of the deceased with a spade. It does not appear that the deceased was armed when she was hacked on the head with a spade by the accused. The life of the accused was therefore not in danger when he committed the crime of culpable homicide.

[36] The accused person paid little or no regard to the personal space and dignity of the complainant when he committed the offence of attempted murder and attempted rape. The accused invaded the home of the complainant struck her next to the ear, attempted to stab her with a knife, twisted her neck and dragged her to the bedroom. The accused visited violence on the person of the complainant in the count of attempted murder and attempted rape. In the process, the accused violated the physical integrity of the complainant.

[37] Such conduct therefore warrants recognition in the determination of an appropriate sentence to reflect the natural indignation that society would feel at the conduct exhibited by the accused when he committed the offences he has been found guilty of.

[38] The accused is a first offender. At the time of the commission of the offences he was seventeen years old. In terms of the Children Protection and Welfare Act, 2012, the accused was a child when the offences were committed³. The accused is now twenty-two years old. It is trite that youthfulness is a factor to be considered in favour of the accused for purposes of sentencing.

[39] The accused was arrested on 12 April 2015 and has remained in custody to date. Effectively, the accused has spent five years and three months in custody while awaiting trial. This is a weighty mitigating factor. It is trite that the

³ A child means-(a) a person under the age of eighteen years; (b) in relation to criminal proceedings, a child is a person who has attained the age of criminal responsibility as referred to under section 83. See Section 2- Interpretation.

period spent in pre-trial incarceration must be taken into account when the accused is being sentenced. The court was also informed that the accused is remorseful.

[40] It is also not lost to me that the accused has pleaded guilty to the offences charged and in the process redeemed the court's time. Mercy is called for in view of these personal circumstances of the accused.

[41] That said, the interest of society demands that the accused serves a term of imprisonment for the offences he has been found guilty of. All would-be offenders who are inclined to engage in acts of culpable homicide, attempted murder and attempted rape must know that the courts will not look kindly upon such conduct. To tamper the harshness of the sentences with mercy, I will make the sentences of all three counts to run concurrently. I will also suspend a portion of it as a disincentive for the accused not to engage in such conduct in the future.

[42] I therefore sentence the accused as follows:

[43] Count one which is the crime of culpable homicide: the accused is sentenced to ten (10) years imprisonment-three years of which are hereby suspended for a period of three (3) years, on condition that he is not, during the period of suspension, found guilty of a crime in which violence to the person of another is an element. The sentence will take into account the period of five years and three months the accused spent in pre-trial incarceration.

[44] Count three-attempted murder the accused is sentenced to, he is sentenced to five years imprisonment. The period of five years and three months spent in pre-trial incarceration will be taken into account in computing the period of imprisonment.

[45] Count four-attempted rape, the accused is sentenced to he is sentenced to three years imprisonment. The period of five years and three months spent in pre-trial incarceration will be taken into account in computing the period of imprisonment.

[46] The sentences in count one, count three and count four shall run concurrently.



M. LANGWENYA
JUDGE OF THE HIGH COURT

For the Crown: **Ms L. Hlophe**

For the Defence: **Mr X. Mtetwa**