IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.167/2017

In the matter between

REX

VS

MPENDULO BONNY GININDZA

Neutral Citation: *Rex* Vs *Mpendulo Bonny Ginindza (167/2017) [2020] SZHC 77 (29th April 2020)*

Coram: Hlophe J.

For the Crown: Mr M. D. Nxumalo

For the Defence: Mr B. Xaba

Dates Heard: 23/04/20; 24/03/20; 25/03/20; 01/04/20;

Date Judgement Delivered: 29th April 2020

Summary

Criminal Law – Accused charged with Murder – Accused allegedly bullied and assaulted by the deceased whose knife drops resulting in accused picking it and stabbing deceased once on the shoulder – Whether accused intended to kill the deceased – Accused's initial plea of not guilty to murder on account of alleged self – defence changed to that of guilty to culpable homicide after all witnesses had been led but just before submissions and the subsequent handing down of Judgement – Partial Defence of Provocation relied upon for the plea of guilty to culpable homicide tendered and accepted by the prosecution, albeit late in the day – Whether besides mere acceptance of plea of guilty to culpable homicide by the crown, such defence established from the facts given the stage at which the plea concerned was tendered and the legal implications that attach thereto – Court convinced culpable homicide independently established by the evidence - Accused convicted of Culpable Homicide.

JUDGMENT

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[1] The accused was arrested on the 10th May 2017 and charged with the crime of murder after it was alleged that he, on the 9th May 2017 at or near Nyakeni area in the Manzini District, unlawfully and intentionally killed one Banele Makhanya.

[2] According to the evidence led in Court, the accused was 19 years old at the time the offence was committed while the deceased was 23 years old. The

accused is currently 23 years old considering the time lapse before his trial commenced.

[3] When the matter was mentioned in court for trial, the accused pleaded not guilty to the charge of murder, which necessitated that the crown leads evidence to prove its case. The crown led a total of three witnesses. Otherwise the photographs taken from the scene by the scenes of crime expert were entered into the record by consent which meant that the photo album prepared by the said expert had to be accepted by the court without contestation from the defence. The Court went on to mark the said album as Exhibit B. The same thing applied to the confession by the accused as it was also entered by consent. It was marked Exhibit C.

[4] The witnesses led by the crown were PW1 Dr Komma Reddy, who introduced himself as a Police Pathologist and went on to clarify that he had conducted a post mortem on the corpse of the deceased. His report which he had compiled afterwards indicated that the deceased had been stabbed once on the lower shoulder, on the part immediately after the left arm separated from the body. The Report was marked Exhibit A. The Pathologist's

evidence tendered in court and as supported by the post-mortem report confirmed what the photographs contained in the album prepared by the Scenes of Crime expert, Exhibit B, suggested, particularly that the deceased had been stabbed once on the shoulder. Otherwise the Pathologist's finding was that the deceased died of a stab wound to the left shoulder, which had resulted in the severing or cutting off, of blood vessels, the axillary artery and the axillary vein, causing the deceased to over-bleed to his death.

[5] The evidence by the crown, established that the accused and the deceased were, together with several other boys who included PW2, Lenhle Thwala, driving a herd of cattle from a local dip tank when the misunderstanding that led to the death of the deceased arose. According to the said PW2, they were walking along the way when some of the cattle they were driving strayed from the route they were following. The accused who happened to be the eldest boy from the same homestead as PW2, that is the homestead from where the straying cattle came, instructed the junior boys to redirect the straying cattle back on to the intended path, an instruction that was acted upon.

[6] For whatever reason this did not sit well with the deceased who started accusing the accused, his junior in terms of age, of not being entitled to issue such an instruction and of carrying himself out as a boss when he was himself a boy. The accused's response in refuting the accusation prompted the deceased to retort by saying he had always wanted to get or deal with the accused. He (the deceased) allegedly slapped him (the accused) with an open hand whilst he missed him with a second one which the accused allegedly managed to block with his hands. The deceased is said to have then pulled out a knife, opened it, and charged at the accused with same. The knife is said to have, for some reason, dropped off the deceased's hand and fallen on to a nearby low-lying rock.

[7] The knife was picked up by the accused who stabbed the deceased once on the part of the shoulder referred to above and then ran away. The deceased who had tried to give chase on the running accused collapsed after a while. Upon noticing the effect of the stab wound on the deceased, the accused allegedly returned to where the deceased was lying and there tried to block the blood gushing out of the stab wound through the use of the deceased's own T – Shirt. At that time the accused had allegedly instructed Lenhle

Thwala and the other boys from his homestead who were there, to go to a nearby Mqhobokazi homestead and there try to secure a motor vehicle to ferry the deceased to hospital. The vehicle could however not be found at that time because it had apparently gone out.

[8] In fact the bullying of the accused and the younger boys from his homestead by the deceased had started earlier than the incident that resulted in the stabbing of the deceased. The younger boys accompanying the accused, who included PW2, Lenhle Thwala, had earlier purchased some ice blocks and scones from a vendor who operated next to the dip tank. Given that the weather was cool on the said day and the ice blocks were very freezing on their hands, the boys had decided to pull the long sleeves of their jerseys into their said hands so as to use them to cushion the effect of the cold emanating from the ice blocks.

[9] The deceased is said to have ordered the boys against that and threatened to deal with them if they persisted in that against his order. He went on to express disgust contending they should not have bought the ice blocks rather than hold them in that manner. This had prompted the

boys to run away from where he was and continued their journey without him.

[10] The confession made by the accused after his arrest, before Magistrate M. Dlamini at the Manzini Magistrate Court, reiterated mainly what had been testified to by PW2. In summary it confirmed that whilst the deceased and the accused, together with some young boys from the same homestead as the accused, were walking from the dip tank, the deceased bullied them firstly by objecting to their using their jerseys to cushion the cold effect of the ice blocks they had purchased from some vendors next to the dip tank. The boys had to run away and walked a distance from them to avoid him.

[11] It also recounted that as they were about to reach their homestead, one of the beasts from the accused's homestead strayed from the proper route, prompting the accused to send some of the boy to restrain or redirect the cow back on to the proper route. The deceased did not take kindly to the accused issuing instructions to the junior boys instead of the accused going there himself. It was allegedly upon the accused trying to explain that the young boy was a relative from the same homestead as his, who also had no

problem with his being sent to restrain the straying beast, that the deceased is said to have attacked accused after allegedly insulting him. The accused allegedly moved backwards until he was allegedly blocked by a stone. The deceased allegedly slapped the accused with an open hand on the face. Thereafter the deceased allegedly pulled out a knife from his pocket. As he tried to open it, it fell off the deceased's hands. The accused allegedly picked it up quickly, stabbed the deceased, allegedly once, on the upper chest and then ran straight home where he found his uncle Monday Thwala and a brother of his and informed them about what had happened.

[12] The investigating officer, PW3, 6852 Detective Constable Vusi Harrem Thwala, told the court how he had been detailed to attend to the case of murder said to have occurred at Nyakeni area in the company of the Scenes of Crime Officer who took photos at the scene. He testified further how he and his colleagues had conducted investigations, including how the accused had surrendered himself the next morning at the Manzini Police Station after having been taken there by his uncles. This officer also testified on how the accused had pointed out the exhibit used to stab the deceased after he was cautioned by the Police in terms of the Judges' Rules.

[13] The case put by Defence Counsel to the crown witnesses particularly PW2, was that he had picked the knife when it fell and stabbed the deceased once because he feared that anything short of that was going to give the deceased, who was older and violent by nature, an opportunity to kill him if he had got the knife first.

[14] It had further been put to the crown witnesses that the deceased was a known bully who was dangerous and had at one point he had butchered one Bhekie Sigudla with a bush knife and evaded arrest by the Police. It was argued he had been stabbed in order to be incapacitated.

[15] It was also put to the said crown witnesses that the deceased was a bully who had in a way brought about his own misfortune. It had also been put to the witnesses that the stabbing of the deceased came about after he had been chased by the deceased when he tried to run away from him and was only caught after he had fallen down. This latter case put to the crown witnesses was vehemently denied just as it was denied that he was stabbed in order to incapacitate his assailant.

[16] The accused decided to give his evidence under oath. He by and large repeated what he said in his confession whose contents have somehow been summarized above. He only added in his evidence the contention that the deceased had been stabbed after he had chased him as he ran away. He otherwise maintained that he stabbed him in order to prevent the deceased from killing him if he had picked up the knife first, because the deceased was a dangerous person who was older than him.

[17] It was otherwise put to him that as soon as the deceased was unarmed (the knife having dropped off from his hands), he should have taken the knife, threw it away or ran away with it. It was put to him further that there was no justification for the accused to have stabbed the deceased once the latter had lost possession of the knife as that had amounted to revenge.

[18] On the evidence, it cannot be denied that the accused was the aggressor against the deceased on the day in question. It could not be denied as well that he did not only bullied the deceased and his siblings by words, but had gone on to slap the accused on the face with an open hand which generally

amounted to extreme provocation. He had also attempted to stab the accused with the knife he had pulled out of his pocket, only for him to lose his grip on it, as it fell on to the ground, giving the accused person a chance to pick it up and stab the deceased once on the shoulder and run away.

[19] I cannot accept that the deceased had caught up with the accused when he chased him after he had been stabbed. I also cannot accept they had at any point grappled over the knife leading to the deceased getting stabbed. This finding is also strengthened by the fact that the accused, as shall be seen herein below, later abandoned this contention when he altered his plea to that of guilty to culpable homicide with the rider that the version to be adopted by the court was that tendered by the crown witnesses, particularly PW2. I also cannot accept that the deceased was going to stab and kill or harm the accused if the latter had run away instead of picking up the knife and stabbing the deceased before fleeing. I would be speculating if I were to so find. I am of the view the accused's contention in that regard does not reveal an imminent threat he was averting by stabbing the deceased instead of fleeing if he would have had the time of calculating what would or would not happen before stabbing the deceased.

[20] The accused had initially wanted to establish self defence. Self defence is unsuited in my view on account of the fact that the force applied by the accused was in my view not one that was reasonably necessary in the circumstances to protect himself from an unlawful actual or threatened attack. See in this regard **R V John Ndlovu 1970 - 76 SLR 389**. I am of the view the force applied was not reasonably necessary in the circumstances when considering that the knife had already fallen off the deceased's hands. Further still, after taking possession of it, the accused could have either thrown it away or ran away with it.

[21] I am also not convinced that the force used was in the circumstances commensurate to the danger apprehended, yet self defence requires the two to be commensurate. See again **R V John Ndlovu 1970 – 76 SLR 389**. I am of the view excessive force was used in this matter which again is contrary to self defence, on which the accused had initially sought to rely. I have had to go to this extent in the matter particularly in assessing the evidence vis-à-vis self defence, as an abundance of caution given that the accused had, just before submissions could be made, abandoned such a

defence and instead tendered a plea of guilty to culpable homicide. It was in fact necessary for me to deal exhaustively with self defence in view of the fact that all the evidence had already been led when the change of plea was made. This reality had in my view necessitated that the evidence placed before court be not ignored.

[22] The changing of a plea of not guilty by an accused person during trial merits a brief comment. According to **Gardener And Lansdown's South African Criminal Law And Procedure, Volume 1, General Principles And Procedure Juta And Company 1957;**

> *"An accused who has pleaded not guilty may be permitted at any time during the trial to withdraw that plea and tender a plea of guilty if the court is of opinion that the adoption of such a course is consistent with justice; but this will not enable the court, or in the case of a jury trial, the jury if it has been sworn, to abstain from pronouncing a verdict. In R.v.Hancock (1931), 145 L.T.168 (23 C.A.R. 16 C.C.A.),the prisoner in the course of a jury trial admitted his guilt and the judge treated this as a withdrawal of the plea of not guilty and passed sentence*

forthwith without taking the jury' to have its verdict. The Court of Criminal Appeal held that the proper course was taken the verdict of the jury, pronounced the proceedings a nullity, and ordered that the conviction be set aside and that a retrial takes place."

[23] The normal procedure in this jurisdiction is that the plea to the lesser charge of culpable homicide by a person charged with murder happens before the leading of evidence. As a result, the leading of evidence is normally obviated with the evidence having now to be substituted by a statement of agreed facts.

[25] It is in keeping with what was said in the foregoing excerpt that besides the accused having sought to change his plea, I have still found myself obliged to consider the evidence and pronounce my judgement in this matter.

[26] I otherwise agree that from the evidence and circumstances of the matter, the evidence establishes culpable homicide. It cannot be disputed that the deceased has been shown to have been the aggressor and to have provoked the accused, by slapping him with an open hand and also attempting to stab him with a knife.

[27] The position of our law with regards provocation is that same is taken to be a partial defence. This means that where established, it has the effect of reducing the offence of murder to that of culpable homicide.

[28] In the recent Judgement of **Rex vs Sanele Sithandwa Dludlu (392/2014) [2020] SZHC 58** I extracted from **Gardener and Lansdown's book, The South African Criminal Law and Procedure, Volume 1, General Principles and Procedure, Juta and Company page 101**, an excerpt confirming that on a charge of murder, intention may be negatived by evidence that the accused was subjected to provocation by his victim. The only requirement there is that the act of provocation should have had the ability to upset the balance of mind of a reasonable person and deprive him for that time, the power of self control or of the ability to realise the probable

consequences of his act. Further, such an act should indeed have had the effect of influencing in that manner the mind of the accused. It is also stated that the reaction to the act of provocation must be a natural one and it must not be disproportionate to the act of provocation.

[29] Considering the fact that the accused after getting slapped by the deceased , picked from the floor a knife meant to be used on him by the deceased and stabbed the latter once on the shoulder, convinces me that the deceased was stabbed as a natural reaction to what he had done to the accused – that is his having been slapped with an open hand whilst he was also charged at with an opened knife.

[30] In my view the act of the accused cannot be said to be disproportionate to the act of provocation by the deceased. I have no doubt it had the ability to upset the balance of mind of a reasonable person – so as to deprive him for that moment of the power of self - control. I am therefore convinced that the accused was provoked and that that should avail him as a partial defence.

[31] Whereas it could be argued that the accused was cornered when he eventually stabbed the deceased once and ran away and that such qualified him for self defence, the reality is that he was the only one who talked of himself as having been cornered which was not confirmed by the crown witness present at the time. Secondly, I have a problem with the proportionality of his act to the nature of the threat facing him at the time. As at the time of stabbing, the knife had fallen on to the floor from the deceased's hand which means that the "thereat" was no longer potent. The accused could have either run away with the knife or thrown it away.

[32] Even if the common law requirements of provocation were not met, I am sure that the Homicide Act of 1959, would avail the accused as a partial defence given that according to Section 2 of the said Act, provocation where established, had the effect of reducing a crime of murder to that of culpable homicide. This would be where the requirements of provocation spelt out in Section 3 were met. The relevant Sections of the Homicide Act of 1959 provide as follows:-

Killing on provocation

"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 the death in the hit 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.

<u>Provocation defined</u>

(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."

[33] I am of the view that the circumstances of the matter indicate that the stabbing of the deceased was a result of the unjustified slapping and attacking of the accused by the deceased, which would have had the effect of depriving a reasonable person of the power of self - control as envisaged in the Homicide Act of 1959.

[34] Given that the accused had himself changed his plea to that of guilty to culpable homicide before judgement, I can do no more than return a verdict of guilty to culpable homicide on his part. I accordingly find the accused guilty of culpable homicide for the killing of the deceased.

SENTENCE

[35] As concerns the appropriate sentence the parties' Counsel made representations on what I should take into account. Whereas I was asked on behalf of the accused to pass what I considered a lenient sentence, I was reminded by counsel for the crown not to loose sight of the fact that the accused had been convicted of an offence considered serious in so far as life was lost.

[36] An elaborate argument was made about the deceased in a way having been an author of his own misfortune given that he provoked the accused to the extent of slapping him with an open hand and charged at him with an opened knife when the deceased had actually not been provoked in any way.

[37] I agree that I have to be guided by the principle of a triad on the sentence I have to impose, so that I can avoid giving one of the competing interests prominence to the prejudice of the other interests. These interests are those of the accused, those of Society and the crime itself.

[38] I have considered that the accused was a minor at the time of the commission of the offence and that he is still a very young person who has a future ahead of him and that he deserves a chance to contribute positively thereto after he shall have squared his accounts with society. I also note that the accused is not only a young person but is also a first offender. I consider as well that he exhibited remorse in terms of changing his plea.

[39] Were it not for the fact that a life was lost herein, it seems to me that this could have qualified to be a matter for a caution and discharge.

[40] I however still have to condemn the act of stabbing the deceased in those circumstances given that no one should be allowed to do so in circumstances like those of the present case. In fact offences of death resulting from the negligent use of knives are on the rise which necessitates that I impose a sentence that should send an appropriate message to other would be offenders.

[41] Society looks up to the courts to pass sentences that uphold order in society including making its members distinguish conduct that is allowed from that which is disapproved.

[42] The sentencing trend of our Courts is that sentences for culpable homicide range from zero (0) to ten (10) years, with each sentence being placed at a point within the range that takes into account or that reflects its seriousness or otherwise. In putting across this practice, the Court of Appeal had the following to say in **Musa Kenneth Nzima V Rex Criminal Appeal Case No. 21/07:-**

"There are obviously varying degrees of culpability in culpable homicide offences. This Court has recognized this and in confirming a sentence of 10 years imprisonment in what it described as an extraordinarily serious case of culpable homicide said that the sentence was proper for an offence "at the most serious end of the scale of such a crime." (See Bongani Dumsani Amos Dlamini Vs Rex CA Case No. 12/2005). A sentence of 9 years seems to me also to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction.

The present appeal is one such case. Apart from the misdirections to which I earlier referred, it seems to me that insufficient weight was given to the individual facts of the case and to the personal circumstances of the Appellant."

[43] In that case whose facts are very close to this one, the accused had negligently killed the deceased after stabbing him once in the abdomen with a knife. The only difference is that he had not suffered the same provocation

as suffered by the accused in this one. The sentence of 9 years imposed by the court a quo was set aside and substituted with a lesser one of 6 years.

[44] I perhaps need to emphasise what was said in **S V Rabie 1975 (4) SA.855 (A) at page 862 (G)** as a guide I have had to give serious consideration to:-

> "*Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.*"

[45] Again in **S V Harrison 1970(3) SA 684 (A) at 686 A**, the following was said quoting from **S V Rabie Supra at 861 H – 862 A**:-

> "*Justice must be done, but mercy, not a sledgehammer, is its concomitant.*"

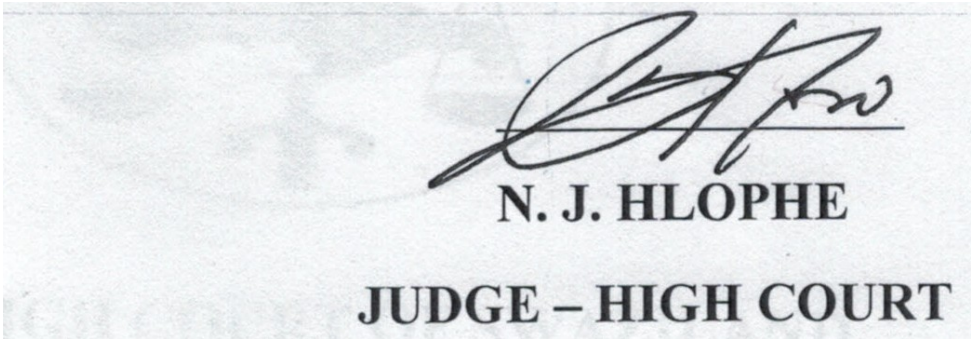
[46] The offence in this matter seems to me to be on the lowest end of the scale given what the evidence revealed. It for this reason seems to me to be

inappropriate that in circumstances like these, the accused can be given a custodial sentence without the option of a fine in a matter where a fine is not outlawed as a sentence. Even though life cannot be bought with money, I am of the view that there are instances where an alternative sentence to a custodial one should be seriously considered and perhaps even be imposed. A fine is not prohibited as a sentence for culpable homicide except that it should, I agree, be in very limited and appropriate matters. I am of the view the circumstances in this matter would justify such a sentence.

[47] Having said what I have above, I am convinced that the following will be an appropriate sentence in this matter, which I go on to impose: -

1. The accused person be and is hereby sentenced to a fine of E5000.00 or 5 years imprisonment for the negligent killing of the deceased.

2. Half of this sentence shall be suspended for a period of three years on condition that the accuse is not convicted of an offence in which the use of a knife is an element.



N. J. HLOPHE

JUDGE – HIGH COURT