

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 33/21

In Matter between:

THE KING

And

MESHACK MMELI BHEKIMPI MHLANGA

Neutral citation: *The king v Meshack Mmeli Bhekimpi Mhlanga (33/21) SZHC 290 [2021] (20 December 2022)*

CORUM: Z. Magagula J

Dates heard: 06.12.22

Date delivered: 20. 12. 22

Summary: *Criminal Law-Accused charged with Murder-accused pleads not guilty to the charge, but guilty to culpable homicide-Plea accepted*

and statement of agreed facts prepared- Accused found guilty of culpable homicide.

Criminal law- Appropriate sentence for culpable homicide- deterrent sentence considered – Accused a member of Community Policing Forum called to assist search for house breaking suspects- Accused discharges fire arm in direction of other community members thinking they were suspects- Deceased shot in the back of head dies- Accused acting exemplary after the shooting.

JUDGMENT

- [1] The accused, Meshack Mmeli Mhlanga was arraigned before me on an indictment of murder, it being alleged in the indictment that on or about the 25th of January 2021, at or near Maphalaleni area in the Hhohho Region, the said accused did unlawfully and intentionally kill one Menzi Khumbulani Sibanyoni and thus committed the crime of murder.
- [2] When the charge was put to the accused, he pleaded not guilty to murder, but guilty to culpable homicide. The plea was confirmed by accused's Counsel **Ms. S. Mhlanga** and accepted by the Crown, represented by **Ms. N. Ngubeni** who then indicated that a statement of agreed facts had been prepared. The statement was signed by Ms. Ngubeni and the accused personally.
- [3] The statement was read into the record by the Crown. It was formally admitted into evidence and marked **Exhibit "A"** the statement of agreed facts read.

It is agreed between the Crown and the defence that on the 23rd January 2021, there was an attempted break-in at Joy General Dealer reported by PW2, Mbongiseni Mavimbela Gubevu Mavimbela. The deceased responded to the call with others, including Siyabonga Sibanyoni and Nkululeko Sibanyoni.

Upon arrival they started searching for the suspected house-breaking culprits all around the shop and could not find them. They proceeded towards the goods shed for a search using their phone torches. The deceased was leading the search and that is when Nkululeko called the accused who was still not there and he proceeded to Joy General Dealer.

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Whilst he was still at still at Joy General Dealer, he noticed some cellphone light at or near the goods shed. He then proceeded there assuming that the cellphone light were those of the culprits, upon arrival he fired a shot towards the goods shed in an attempt to disperse the intruders. That is when the deceased was shot to death at the back of his head and neck by one of the bullets.

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It is further agreed between the parties that the deceased's body was taken to the Mbabane Government Hospital where Dr. Komma Reddy opined that the cause of death was due to the following injuries:

- (i) Fire-arm injuries to back side of the head and neck.
- (ii) An entrance wound of 6x6 mm with inverted margins, present in the middle portion, on the back side of the neck.
- (iii) Multiple entrance wounds (4) of 5x5 mm, with inverted margins present on the side of the head.
- (iv) Multiple entrance wounds (3) of 1x1 cm, 6x6 mm and 5x5 mm with inverted margins, present on the left side of the top of the head, over the parietal eminence.

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It is agreed further that the following items will be handed in to form part of the of the Crown's evidence.

- (i) The statement of agreed facts
- (ii) The post mortem report
- (iii) Photo album
- (iv) Ballistic report
- (v) 12 gauge caliber fired cartridge

The accused further admits to the following:

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- (i) *He acted negligently in the circumstances*
- (ii) *There was Novus actus interveniens between the death of the deceased and his actions.*
- (iii) *The deceased died due to injuries inflicted by the accused.*

The Crown handed in the Post-mortem report prepared by Dr. Komma Reddy and it was admitted into evidence and marked **Exhibit "B"**. The observations of the doctor have already been stated in the statement of agreed facts, suffice to confirm that the cause of death was stated as;

"Due to fire-arm injuries to back side of the head and neck"

Pictures which were compiled into an album showing various scenes including of the location of injuries on the deceased were also admitted into evidence and marked **Exhibit "C"**. A ballistic report prepared by Police Forensic laboratory (ballistic section) was handed into court and marked **Exhibit "D"**. This report confirmed that the firearm to wit a 12 gauge calibre Baikal shot gun with serial number SWAR 96056625 was examined on the 24th March 2021 and found to be serviceable, or capable of discharging a bullet. The Crown also handed in the fire-arm itself which was marked **Exhibit "1"** and a spent cartridge which was marked **Exhibit "2"**. All these exhibits were handed in by consent and there was therefore no need to call the Doctor who conducted the post-mortem examination nor the investigating officer.

- [4] I am satisfied that the statement of agreed facts taken with the accused person's own plea, the Crown has proved the beyond reasonable doubt the offence of culpable homicide and accordingly the accused is found guilty of culpable homicide.

SENTENCE

- [6] In mitigation of sentence it was submitted on behalf of the accused that he was a first offender. He had displayed an extra-ordinary act of remorse in that he had personally called the police after the shooting, he had stayed with the body the whole night while waiting for the arrival of the police.

When the police could not get to the area where the deceased was on account of the fact that the road was muddy, the accused had loaded the deceased into his own motor vehicle and met the police half-way. He surrendered himself to the police and he co-operated with them throughout their investigations including making a confession.

- [7] It was further submitted that the accused is related to the deceased in that he was the son of his cousin. He was deeply saddened by the death of the deceased who is effectively a family member. It was submitted that the accused was a member of the local community policing forum commonly known as "community police"
- [8] In considering what the appropriate sentence is, the court has to strike a delicate balance between the personal circumstances of the accused, the interest of society as well as the crime itself. **Rumpff J.A in S v Zinn 1969 (2) S.A 537 (A)** said of the duty of a Judge in passing sentence.

*"As regards the duties of a Judge in imposing punishment, we have been referred **inter alia** to voet, vol.1 page 57, where in a note, it is said, 'it is true, as Cicero says in his work on duties, BK1 chapter 25, 'that anger should be especially kept down in punishing, because he who comes to punishment with a wrath, will never hold that middle course which lies between too much and the too little'. It is also true that it would be desirable that those who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity".*

- [9] Also quoted with approval by **Hlophe J** (as he then was) in **Rex V Lucky Albert Mabila (unreported) High Court case no. 359/02**

It has been said over and over that in imposing sentence the court must consider the triad; consisting of the criminal, the crime and the interests of society. These three competing factors ought to be weighed or considered equally, none is to be considered more than the other.

- [10] In the case of **Rex v Fikile Zodwa Mabila (381/19) SZHC 231 [2019] (October 2022)** I had occasion to quote **S.B Maphalala J** (as he then was) in **Rex v Zweli Maziya High court case no. 87/2005** when he said;

"The ends of punishment are 4 in number and in respect of the purpose to be served by it, punishment may be distinguished as;

- (i) Deterrent
- (ii) Preventive
- (iii) Reformatory or
- (iv) Retributive

Of these, the first in the essential and all important one is deterrent. The others merely ancillary"

[11] In the present case the accused has been found guilty of a very serious offence. The loss of human life under any circumstances can never be down played. However, I have to consider, as I have been urged by Ms. Mhlanga to consider that this type of culpable homicide was not on the lower scale of the offence of culpable homicide. The accused is a member of the community policing forum. He was called from his home to join the search for the intruders. Certainly he did not join a "posse of bounty hunters". According to the statement of agreed facts, the accused was called specifically from home and I believe this was because he had a fire-arm. If the purpose of punishment is deterrent, then the accused ought to get a fitting punishment, but the questions are; deterrent from what? From executing his duties as a member of the community policing forum? From responding when neighbors raise the alarm or from carrying his fire-arm when an alarm is raised? These are questions that are quite material in this matter.

[12] The accused was of course negligent in discharging his fire-arm without, ascertaining who was on the other end, and for that he does deserve a sanction. Certainty justice must be done, but mercy, not a sledge-hammer is its concomitant – **S v Harrison 1970 (3) S.A. 684 at 686 (H)**

[13] In this jurisdiction, sentence for culpable homicide range from zero to ten years with each sentence being placed within a range that takes into account the seriousness or otherwise. See **Hlophe J in Rex V Mpendulo Bonny Ginindza (167/2017) [2020] SZHC 77 (29 April 2020)**

In **Musa Kenneth Nzima v Rex Criminal appeal no. 21/07** the then court of appeal stated the position as follows;

"There are obviously varying degrees of culpable homicide offences. This court has recognized this and in confirming a sentence of 10 years in what it described as on extra-


ordinarily serious case of culpable homicide said that the sentence was proper for an offence "at the most serious of the scale of such crime... A sentence of 9 years seems to me to be also warranted in culpable homicide convictions only at the most serious end of such crimes. It is certainly not to be imposed in every such conviction.

The present appeal is one such case. Apart from the misdirection 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"

[14] This matter is clearly different from a bar brawl, or a misunderstanding the leads to a gun fight. I am convinced also that considering the facts of the matter and the circumstances of the accused, no useful purpose would be served by imposing a custodial sentence without the option of a fine. I am mindful that no amount of money would return the deceased to life, but mercy is the "spice which seasons justice" Holmes **J.A in S v Rabbie 1975 (4) SA 855 at 862.**

[15] I am convinced that the appropriate sentence in this matter is as following:

1. The accused is hereby sentenced to a fine of E 6 000-00, alternatively Six years imprisonment.
2. Half of the sentence is suspended for a period of 3 years on condition that the accused is not convicted of an offence in which the use of a fire-arm is an element.

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Z. Magagula
Judge of the High Court

Appearance:	Ms N. Ngubeni	for the Crown
	Ms S. Mhlanga	for the defence

