



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 381/2020

HELD AT MBABANE

In the matter between:

THE KING

And

SIFISO BONGINKOSI ZULU

CELUCOLO DLAMINI

Neutral Citation: *The King vs Sifiso Bonginkosi Zulu and Another* (381/2020)

[2022] SZHC 90 (21/06/2022)

Coram: **J.M. MAVUSO J.**

Heard: **18 November, 2021.**

Delivered: **21 June, 2022.**

SUMMARY:

Criminal law – Accused persons charged with acting jointly and in furtherance of common purpose,, with Oupa Manyisa, on the first count, in committing the offence of murder and in the second count, with committing, assault with intent to cause grievous bodily harm – The Crown in conjunction with the accused, submitted to Court a statement of agreed facts – They pleaded not guilty to murder but guilty to culpable homicide on the first count – On the second count they pleaded guilty to Assault with Intent to Cause Grievous Bodily Harm – Accused found guilty on their own pleas and accordingly, convicted – Before handing down of sentence, which had not taken place in casu, accused’s plea of guilty to culpable homicide – on the first Count, found to be equivocal – Plea of not guilty entered by the Court – Matter to go for trial.

JUDGMENT

J.M. MAVUSO-J

[1] At the commencement of trial, three accused persons were arraigned before this Court, in the above matter. Sifiso Oupa Manyisa, appeared as the first accused, whilst Sifiso Bonginkosi Zulu and Celucolo Dlamini appeared as the second and third accused, respectively.

- [2] Before the accused were asked to plead, the Crown applied for a separation of trial. The purpose of the application was to have the first accused's trial conducted separately from that of the second and third accused. The reason for separating the trials was that the first accused intended pleading, not guilty, whilst the second and third accused intended pleading guilty, to the lesser offence of culpable homicide.
- [3] There being no objection to the application for the separation of trials and more importantly there being no prejudice to the other accused persons, occasioned by allowing the separation of trial, the Court duly granted the Crown's application.
- [4] Once the separation of trial was allowed to take place, accused two (2) Sifiso Bonginkosi Zulu, became accused number one (1) whilst Celucolo Dlamini became accused number two (2) from having been accused number three (3) before the application.
- [5] After the trials were separated, an amended indictment was submitted by the Crown, reflecting the changes necessitated by the separation.

- [6] (i) In terms of the amended indictment, in Count 1, the accused were now charged as follows:

“Accused 1 and Accused 2 are guilty of the crime of murder

In that upon or about the 1st April 2009 and at or near Lugodvweni in the Shiselweni Region, the said accused persons acting jointly and in furtherance of a common purpose with one Sifiso Oupa Manyisa, did unlawfully and intentionally kill one Siyabonga Mdluli and did thereby commit the crime of murder.”

- (ii) In count two (2), the second (2) accused, who is facing this charge alone, was charged as follows:

“Accused number two (2) is guilty of the crime of Assault with intent to Cause Grievous Bodily Harm.

In that upon or about the 1st April 2019 and at or near Lugodvweni area, accused person acting jointly and in furtherance of a common purpose (sic) together with one Sifiso Oupa Manyisa who has now been separated, did unlawfully and intentionally assault one Derrick Mdluli and thus did commit the said crime.”

- [7] (i) On count 1, both accused persons pleaded not guilty to the charge of murder and instead, pleaded guilty to the lesser offence of Culpable Homicide.
- (ii) On count 2, the second accused pleaded guilty to the crime of Assault with Intent to Cause Grievous Bodily Harm.
- (iii) After the charges were read to the accused, they were asked if they understood same. Their answer was in the affirmative. They were then asked how they intended to plead, to each Count with both featuring in Count one, both accused pleaded not guilty to murder, but guilty to culpable homicide. Accused number two (2) pleaded guilty to Count 2. Once the accused pleaded, their attorney, stood up to confirm their pleas. Both pleas were accepted by the Crown which thereafter proceeded to submit a Statement of Agreed Facts, duly signed by the parties.
- [8] (i) The statement was read into the Court record and confirmed by the accused's legal representative, as being truly reflective of the events which unfolded on the 1st April 2019, pertaining to this matter.

- (ii) Contents of the Statement of Agreed Facts, are hereunder, set out in full:

“Sifiso Bonginkosi Zulu and Celucolo Dlamini (hereinafter referred to as the accused persons) stand charged with the following offences:

Count 1

Accused 1 and Accused 2 are guilty of the crime of MURDER.

In that upon or about the 1st April, 2019 at or near Lugodvweni area in the Shiselweni Region, the said accused persons acting jointly and in furtherance of a common purpose with one Sifiso Oupa Manyisa did unlawfully and intentionally kill one SIYABONGA MDLULI and did thereby commit the crime of murder.

Count 2

The 2nd Accused is guilty of the crime OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM.

In that upon or about the 1st April, 2019 and at or near Lugodvweni area in the Shiselweni Region, the said accused persons acting jointly and in furtherance of a common purpose with one Sifiso Oupa Manyisa did unlawfully and intentionally assault one DERRICK MADODA MDLULI by hitting him with a stick once on the right eye with intent to cause Grievous Bodily Harm.

2.

On arraignment, accused 1 and accused 2 plead (sic) not guilty to the crime of Murder in respect of Count 1 but plead (sic) guilty to a lesser offence of Culpable Homicide. In respect of Count 2, the 2nd accused persons pleads guilty to the crime of Assault with Intent to Cause Grievous Bodily Harm which the Crown hereby accepts.

3.

It is therefore agreed between the Crown and the accused persons that the following events took place before, during and after the commission of the offence. The accused persons specifically admit the (sic) herein under mentioned relevant facts in Terms of Section 272 of the Criminal Procedure and Evidence Act, No. 67/1938.

4.

On the 1st April, 2019 between 1500 hours and 1600 hours Celucolo Dlamini (A2) was confronted by one Derrick Madoda Mdluli accusing A2 of a squabble over a love triangle involving one Gabsile Khumalo.

5.

It is agreed that Derrick Madoda Mdluli asked his younger brother (the deceased) to accompany him to Elugodvweni area eMaplazini to collect his belongings from his girlfriend's house situated at KaKhumalo. Along the way they met with one Bona who remained behind with Derrick Mdluli whilst the deceased proceeded to the house of Gabsile Khumalo to get his brother's belongings. When the deceased came back he reported that he did not find Gabsile as she was said to be in Piet Retief.

5.1

It was then that Derrick got information from Bona that Gabsile was having an affair with Celucolo (Accused 2). Derrick then approached Celucolo who was at a distance from where they were standing and asked him why they were abusing him with his wife; translated to say (Yemneftu kwentiwa yini kutsi ningigcilate

nemkakho). Accused 2 did not answer but decided to go, leaving behind the cattle he was looking after.

6.

Celucolo reported the incident of the confrontation and abandonment of the cattle to Sifiso Oupa Manyisa and Sifiso Bonginkosi Zulu (A1) and it was later on the same evening A1 and A2 armed with lethal weapons went to look for the stray cattle. Sifiso Oupa Manyisa had refused to join A1 and A2 to go and look for the cattle. They did not find the cattle. On their way back they met with Sifiso Oupa Manyisa who was carrying a slasher and further suggested that they should continue looking for the cattle.

7.

During the search of the cattle, the accused persons met both the deceased and Derrick Madoda Mdluli from whom they enquired about (sic) the lost cattle and earlier confrontation between A2 and them. Celucolo (Accused 2) asked from Derrick and his younger brother saying “Uphi Rubber” referring to Derrick and he (Derrick threw away the 2 litre Marula bottle and responded by saying “kwente njani”. It was then that accused 1 assaulted Derrick with a stick on the forehead. Rubber fled, A1, and A2 chased after him

whilst Sifiso Oupa Manyisa remained behind assaulting the deceased with the slasher on the forehead. The deceased fled and Manyisa chased him whilst assaulting him with the slasher on the back of his head.

7.1

Accused 1 (Sifiso Zulu) went back to Manyisa and the deceased. Upon arrival (sic) accused 1 assaulted the deceased three (3) times on his back with a stick. The deceased tried to run away but was trapped by the wire and fell on his back. Whilst the deceased was lying down, Manyisa continued to assault deceased with the slasher on the chest. Accused 1 then admonished Manyisa to stop assaulting the deceased. They then left him lying on the ground and went home to sleep together with Celucolo.

8.

The following day, accused 1 and 2 went to the mountain to look for cattle so that they could drive them to the dipping tank and Manyisa remained at home. Upon searching for the cattle, Manyisa joined them and informed them that he got information that the person they assaulted the previous night has died. Manyisa suggested that they should escape, accused 1 suggested they go to Piet Retief but

accused 2 suggested that they should go to Mpolonjeni at Siteki. They then proceeded to Mpolonjeni at Ncamsile Dlamini's homestead who is accused 1's sister.

9.

It is agreed that the accused persons later surrendered themselves to Siteki Police who then handed them over to Gege Police on the 3rd April 2019. On the 4th April 2019, the accused persons led the Police to their place of abode at Lugodvweni area where upon arrival accused 2 freely and voluntarily pointed out a stick which was placed in front of the main house. Accused 3 freely and voluntarily pointed out a white round neck T-shirt and 2 slashers, one with wings both sides and the other sharpened on both sides with wooden handles. These items were retrieved from an abandoned pit latrine. Accused 2 again freely and voluntarily led the Police to a sitting room of the main house where he pointed out a bush knife with a rubber handle which was placed against the wall. All this was done in the presence of Msweli Malinga and Dzeliwe Hlashwako who were independent witnesses.

9.1

The above mentioned items were photographed by 5380 D/Constable Gama, scenes of crime officer during the pointing out, who then developed a photo album. Another photo album was compiled and developed by 7445 D/Constable Simelane, scenes of crime officer at the crime scene.

10.

It is further agreed that a Post-mortem examination was conducted by Doctor R.M. Reddy, a police pathologist at Mbabane Government Mortuary on the 10th April 2019 who then compiled a report. According to the report the deceased body was brought by 7445 of Gege Police Station. The doctor opined that the cause of death was due to MULTIPLE INJURIES (INVOLVED SKULL BRAIN).

11.

It is further more agreed that after Madoda Derrick Mdluli was injured he ran to the homestead of Nomsa Mabuza and informed her that he had been attacked by three (3) men whom amongst them was Celucolo Dlamini (Accused 2).

12.

Police were called who promptly arrived and conveyed him to Nhlangano Health Centre where he was attended to by Doctor

Grace Ahumura who then compiled a report (REP 88) where he opined that complainant had laceration on the right supra orbital region.

13.

It is also agreed that the following will be handed in by consent to form part of the Crown's evidence.

- i) The Statement of Agreed Facts;*
- ii) Post Mortem report (PM 133/2019);*
- iii) Medical Report REP 88;*
- iv) Photo Albums;*
- v) A Stick;*
- vi) Two (2) wooden slashers;*
- vii) Bush knife;*
- viii) Round neck white T-shirt.*

14.

Accused 1 and Accused 2 specifically admit the following:

- i) They inflicted fatal and multiple injuries on the deceased which eventually caused his death.*
- ii) Their conduct was unlawful and negligent;*

- iii) *There was no legal justification for their actions;*
- iv) *There was no Novus Actus Intervenis between their unlawful action and the death of the deceased;*
- v) *The deceased ultimately died due to the injuries inflicted by the accused persons.*
- vi) *Accused are both remorseful of their conduct.”*

[9] The parties, by consent, handed into Court, the report on the post-mortem examination. Same was marked exhibit 9. According to the report, the cause of death was “*Due to multiple injuries*” (Involving injuries to the skull Brain). The injuries are described as follows:

“(2) CUT WOUND OVER LEFT FRONTO-PARIETAL REGION SCALP 14CMX1.3CM BRAIN DEEP. IT INVOLVED SCALP, SKULL, DURA, BRAIN. FRACTURE EXTENDED TOWARDS ANTERIO CRANIAL FOSA BASE OF SKULL.

(3) CUT WOUND OVER RIGHT SCALP PARIETAL REGION 10CMX2CM BRAIN DEEP, IT INVOLVED SCALP, SKULL, DURA, BRAIN.

- (4) **CUT WOUND RIGHT TO CHIN 3CMX1CM, LEFT TO CHIN 3CMX1CM MUSCLE DEEP.**
- (5) **LINEAR SCRATCHES BELOW, LEFT TO NIPPLE 5CMX0.2, 4.1CMX0.2CM, 3CMX0.1CM, 2CMX0.1CM, 1.2CMX0.2CM, 1CMX0.2CM.**
- (6) **SCRATCH OVER RIGHT NEXT OUTER 3CMX0.1CM.**
- (7) **SCRATCH RIGHT SHOULDER TO BACK 12CMX0.2CM, BACK LUMBAR REGION 8CMX0.2CM AND SHOULDER TO BACK 12CMX0.2CM, BACK LUMBAR REGION 8CMX0.2CM AND SHOULDER, ARM 5.5CMX0.2CM, 2CMX0.1CM. FRONT OF CHEST 19CMX0.2CM, 16.5CMX0.2CM.**
- (8) **SCRATCH LEFT THIGH FRONT 2CMX0.1CM, 1.9CMX0.1CM.”**

[10] 5380 Detective Constable Thulane Israel Gama is a Police Officer based at the Shiselweni Regional Head Quarters. He is the Investigating Officer in this matter. He is a Scenes of Crime Officer, photographer and a Draughtsman.

Amongst his duties, was the collection of exhibits from the crime scenes and the packaging of same for the purposes of conducting forensic investigations. When the pointing out of the weapons, used in the commission of the murder, this Officer was present. He compiled an album of the exhibits which were recovered.

[11] An independent observer was invited, to keep a watching brief of the pointing out and in particular, when the accused persons pointed out the weapons from where they were hidden.

[12] With a Statement of Agreed Facts having been filed by the parties. The provisions of the Criminal Procedure and Evidence Act No. 67 of 1938 become applicable. Section 272 (1) of the said Act provides as follows:

“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 evidence of such fact.”

[13] (i) After finding the accused persons guilty as per their pleas, in mitigation,

their defence Counsel Mr. Manica on behalf of the 2nd accused, with regards to Count one, submitted as follows:

“it does not arise in the amended indictment that 2nd accused participated in the assault of the deceased in whatever manner.”

- (ii) The Court’s interpretation of the above statement, is that it seeks to exonerate the 2nd accused from criminal liability. If the statement be true, it raises the possibility of an acquittal of the 2nd accused. In view of the foregoing, the Court has to enter a plea of not guilty. The submission by defence Counsel, certainly, renders the accused’s plea, equivocal.

[14] Our Criminal Law and Procedure Act 67 of 1938 is shallow, when it comes to regulating circumstances which may arise during the proceedings raising doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it appears to the Court that the accused does not admit an allegation in the charge or the accused has incorrectly admitted such or that he has a valid defence to the charge.

Section 155 (3) of the Criminal Law and Procedure Act 67 of 1938 states

as follows:

“Two or more pleas may be pleaded together except that the plea of guilty cannot be pleaded with any other plea to the charge.”

Effectively, a plea of guilty cannot in terms of our law, stand with a plea of not guilty. A party must either plead guilty or plead not guilty.

In the case at hand, no application has been made on behalf of the 2nd accused persons to have his plea of guilty, substituted with a, plea of not guilty.

[15] In South Africa, Section 113 of the Criminal Procedure Act 56 of 1955 (as amended) is instructive of when a plea of guilty may be corrected. Section 113 (1) of the Act provides thus:

“(i) If the Court at any stage of the proceedings under Section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or

appears to the Court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the Court is of the opinion for any other reason that the accused's plea of guilty should not stand, the Court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution. Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the Court records a plea of not guilty, shall stand as proof in any Court of such allegation.”

[16] The legal system of the Republic of Malawi, is modelled on the British Common Law. In Malawi, Criminal law is regulated by a Penal Code. The legal system of Malawi, has faced similar legal challenges as our own particularly, and relating to, pleading in criminal cases. Even though the Malawian legal system is based on the British Common Law, it certainly offers invaluable guidance in how to deal with a plea, of guilty and of when same can be altered by a Court and a plea of not guilty entered.

In the case of **Cliff Njovu vs The Republic, High Court of Malawi Criminal Appeal Case No. 7 of 2000**, Mwaungulu, J hearing an appeal from a Magistrate Court where the accused had been sentenced to two and a half years imprisonment with hard labour, dealing with one of the grounds of appeal, namely that:

“the guilty plea on which the Court below convicted the appellant was equivocal.”

Observed that:

“The trial Court can only obtain an unequivocal plea. The trial Court must proceed to trial if the plea is equivocal”, the Learned Judge instructed.

[17] For the above dictum, the Learned Judge relied on the English case of; **P. Foster (Haulage) Ltd v Roberts [1988] 2 ALL ER. 754 – 755** where the Learned O’Connor J, states as follows:

“In my Judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court’s jurisdiction to permit a defendant (accused) sic to change an unequivocal plea of guilty at a (sic) later

stage. A court cannot accept an equivocal plea of guilty; it.....must either obtain an unequivocal plea or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged.”

In the same matter the Learned Judge went on to state that:

“Even if the plea is unequivocal, a guilty plea, entails a continuing duty on the Court, before sentence, to ensure the defendant really intends to plead guilty.”

The Court went on to state, as follows:

“The Court must alter a guilty plea where the facts raise doubt on the defendant’s guilt and the Court has not passed sentence. After sentence the Court is functus officio.”

[18] In the present case, a Statement of Agreed Facts was prepared and handed into Court by the parties. They were represented by defence counsel throughout the proceedings.

[19] With the assistance of their attorney the 1st and 2nd accused, specifically admitted and stated as follows, in their Statement of Agreed Facts:

- (i) They inflicted fatal and multiple injuries on the deceased which eventually caused his death;
- (ii) Their conduct was unlawful and negligent;
- (iii) There was no legal justification for their actions;
- (iv) There was no *Novus Actus Interferions* between their unlawful action and the death of the deceased;
- (v) The deceased ultimately died due to injuries inflicted by the accused persons;
- (vi) Accused are both remorseful of their conduct.

[20] The accused persons, were found guilty as per their own plea. In mitigation, accused's Counsel, submitting on behalf of the 1st accused stated as follows:

“In so far as the 1st Count is concerned his participation was that of assaulting deceased at the back three (3) times. It must be noted

that accused number one, admonished Oupa Manyisa to stop assaulting the deceased any further.....” and deceased continued to do so.

With respect to the second accused, in mitigation his attorney submitted as follows:

“it does not arise in the amended indictment that the second accused participated in the assault of the deceased in whatever manner.”

Whilst the accused persons’ plea in Count one was unequivocal at the inception of the trial. The above statement not only raises doubt on whether or not the accused person intended to plead guilty, to Count 1, but the statements made in mitigation, bring about a qualification which, if true, may show that they are not guilty of the offence charged.

[21] Taking into account what, O’Connor J said in **P. Foster (Haulage) Ltd** cited with approval by D.F. Mwaungulu J in the **Cliff Njovu case supra**, that, the Court has a continuing duty before sentence to ensure that an accused person, really intends to plead guilty and that this should be established from the facts of the case. I have no doubt that on the facts of this case the statement made by Defence Counsel in mitigation, in respect of both

accused persons brings about doubt on whether the accused intended to plead guilty to the charge, in this case.

[22] From the defence Counsel's submission it is clear that, he sought to exonerate the accused persons from criminal liability. The effect of the foregoing, on the backdrop, of the plea of guilty, is that it rendered their plea on the first count equivocal.

[23] Now the question to ask, is whether an admission made in terms of section 272 (1) of the Criminal Procedure and Evidence Act No.67 of 1938 can stand on the face of an equivocal plea. I think so. In a trial yet to be heard, all admissions made in the statement of agreed facts and all denials made, can legally remain as such. O'Connor J in **P. Foster (Haulage) Ltd** *supra* stated as follows:

“A Court cannot accept an equivocal plea of guilty; it.....must either obtain an unequivocal plea or enter a plea of not guilty.”

[24] In this case the Court noted the equivocalness of the accused person's plea during mitigation just before a sentence was handed down.

[25] It seems to me that the accused persons, in pleading not guilty to murder but guilty to culpable homicide, in this case, were being crafty, if not misguided, when considering the stage of the proceedings, at which they sought to exonerate themselves, from criminal liability. The decision the Court has taken in this matter, is aimed at ensuring that the accused person's plea to Count one is unequivocal, whilst ensuring that the Crown is not out-foxed in any way, in its plea bargaining.

[27] As indicated above, the Court has not handed down sentence in this matter. It is as such, well within its powers to make the following Orders, hereunder:-

- (i) The plea of guilty is heretofore, altered to a plea of not guilty on the first count.
- (ii) The matter is referred to trial on the first count.
- (iii) All admissions made in the course of the hearing of the above matter, (with respect to the first count) shall remain as admissions and so all denials shall remain denials.
- (iv) On the second count accused's sentence will be handed down upon finalisation of proceedings in count one.

Dated at Mbabane this..... day of June 2022

J.M. MAVUSO J
HIGH COURT OF ESWATINI

For the Crown: NOMPUMELELO NGUBENI

For the Accused: MANIKA ATTORNEYS