

IN THE HIGH COURT OF ESWATINI

JUDGEMENT

CRIMINAL CASE NO.256/18

In the matter between:

REX

VS

- 1. MDUDUZI SIFISO MASUKU**
- 2. SONNYBOY MDLEDLE MASINA**

Neutral Citation: *Rex Vs Mduduzi Sifiso Masuku & another*
SZHC (21st April, 2023)

Coram: DV KHUMALO A.J.

Heard: 18th April, 2023

Delivered: 21st April, 2023

Summary: *1. Criminal Law – Both Accused charged with murder.*

2. Criminal Procedure – Both pleaded not guilty to murder but guilty to culpable homicide – 1st Accused accordingly convicted and sentenced to eight (8) years imprisonment for culpable homicide – of which three (3) years are suspended conditionally, while 2nd Accused found not guilty of culpable homicide notwithstanding his plea of guilty because the evidence in the statement of agreed facts could not link him with commission of the offence.

JUDGMENT ON SENTENCE

- [1] The accused persons appeared before this court arraigned on a charge of murder, being alleged that upon or about the 20th July, 2018 and at or near Logoba area in the Manzini Region the said accused persons acting in furtherance of common purpose did unlawfully and with intent to kill, assault Phinda Phiwo Mdluli with an unknown object all over the body – who later died while undergoing treatment.

- [2] When the charge was read to the accused, they both pleaded not guilty to murder but guilty to a lesser charge of Culpable Homicide. The pleas were confirmed by their attorney and accepted by the prosecution. A statement of agreed facts was handed in by consent between the prosecution and the defence. Further handed in, were the post-mortem report and the photo album showing the deceased's body and injuries sustained.
- [3] According to the statement of agreed facts, the accused persons were in a game room at Logoba when an argument broke out between the 2nd Accused and another individual who was playing snooker game. The argument had been triggered by the 2nd Accused's refusal to play with that individual. It would appear the misunderstanding developed into a physical confrontation. As a result of the conflict between the two, the deceased stood up to assist the 2nd Accused. On the other hand the first Accused joined the conflict as he thought that the 2nd Accused was being assaulted by the deceased and the other individual. The 1st Accused hit the deceased with an open hand on the face which prompted the latter to go out for a while.

[4] When returning to the room he was carrying a screw driver which he used to stab the 1st Accused on the head. The 2nd Accused together with another male person referred to as Nathi disarmed the deceased of the screw driver and he later fell down. The 1st Accused allegedly collected a stone and assaulted the deceased several times and was later rescued by other people. The deceased was conveyed to hospital for treatment where he eventually succumbed to death. This is according to the averments made in the statement of agreed facts which reads as follows in its detailed form:

“That the accused persons are facing one (1) count of MURDER and has pleaded guilty to Culpable Homicide.

- 1. That the Crown has accepted the plea of guilty to Culpable Homicide.*
- 2. That it was in the evening of the 20th July, 2018 and at Logoba, kaMkholo Game Room, in Manzini when an argument broke out between the 2nd Accused and an unknown Snooker player following the 2nd Accused’s refusal to play with the unknown Snooker Player. Following the argument between the two, the deceased stood up to assist the 2nd Accused. On the other hand, the 1st Accused also joined in the argument as he thought that the 2nd Accused was being assaulted by the deceased and the Snooker Player. On his intervention, the 1st Accused clapped the deceased with an open hand on the face.*

3. *On being clapped in the face with the open hand, the deceased went out and came back some 20 minutes later carrying a screw-driver which he used to stab the 1st Accused on the head. Following the stabbing incident, the 2nd Accused together with one, Nathi disarmed the deceased the screw-driver and in the process the deceased fell down. Believing that the deceased wanted to kill him and acting on the spare of the moment, the 1st Accused came with a stone and assaulted the deceased several times. Following successful attempts to separate the deceased and the accused persons by other on-lookers, the accused persons left the deceased. He died on the 23rd July, 2018 whilst undergoing treatment at the Raleigh Fiktin memorial Hospital.*
4. *The 2nd Accused admits that both the deceased and the 1st Accused thought they were helping him as they believed that the Snooker Player was assaulting him.*
5. *The Accused admits that the deceased died due to their unlawful and negligent conduct and that there is no intervening cause of death;*
6. *The 2nd Accused, in the company of his mother, handed himself over to the Matsapha Police Station. Equally, the 1st Accused cooperated with the police in their investigation.*
7. *Following their arrest, the Accused persons were admitted to bail and has been out of custody since then;*
8. *The Accused persons are remorseful for their conduct. To demonstrate their remorse, the 2nd Accused handed himself over to the police when called upon to do so by the police and equally the 1st*

Accused cooperated with the police during the investigation of the offence.

9. This statement of agreed facts and the post-mortem report are hand exhibits in this matter."

[5] The court has however noted that much as A2 pleaded guilty to culpable homicide, there was no evidence linking him with commission of the offence. The statement of agreed facts submitted by consent between the crown and the defence shows that the only role played by A2 during the incident was disarming the deceased of the screw driver when he was stabbing A1. There was no criminal element in that act. It was later A1 who fetched a stone and hit the deceased several times – which culminated to his death.

[6] No role was played by A2 in that regard. It is therefore apparent that his plea of guilty was misinformed. In the context of a case involving a statement of agreed facts, the plea of guilty must find support in the averments made in the statement – showing that the accused indeed committed the offence. In the instant case there is not even slightest evidence

connecting A2 with commission of the offence – such that there is no correlation between the plea of guilty and the statement of agreed facts. The plea of guilty was therefore erroneously tendered and as such cannot yield a verdict of guilty. It therefore follows that A1 is found guilty of culpable homicide while A2 is found not guilty – acquitted and discharged in respect of both the murder and culpable homicide.

- [7] When passing sentence the court takes into account that the accused person is a first-time offender. He pleaded guilty to the offence and demonstrated that he is remorseful. He also cooperated with the police during the investigation of the case and further complied with his bail conditions. This court also takes into account that before commission of the offence, the deceased had stabbed the accused with a screw driver which triggered anger on the part of the accused. When ultimately hitting the deceased several times with a stone, he was acting in revenge. In this way it can be said that he had been provoked. He has three (3) children to maintain, plus his parents who are said to be disabled.

[8] The court has also not overlooked the seriousness of the offence and its prevalence in the society. The accused person used a dangerous weapon in a form of a stone to kill the deceased. He struck him all over the body including the head – an area that is dangerous in the body - where death was reasonably foreseeable. This court has also taken to account that it was the accused who triggered the whole incident leading to the deceased's death by hitting him with an open hand on the face. It should also be pointed out that the accused acted excessively when he relentlessly hit the deceased with the stone all over the body – and not caring whether or not he died.

[9] It is trite law that the discretion to determine appropriate sentence rests with the trial court. **See Sam Dupont vs. Rex – Criminal case No. 4/2008 at paragraph 13.** The court also ought to take into account all the competing interests in the case and to strike a balance therein. In this regard the nature and seriousness of the offence must be considered. Interests of the offender and the society must also be factored in. A balance

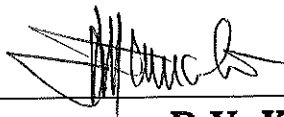
must then be struck between all those interests. **See Sibusiso Mchunu vs. Rex – Criminal Appeal case No. 4/2014 at page 7.** The sentence passed by the court must be fair and just. In as much as it should be deterrent, it must embrace a measure of mercy, reform and rehabilitation for the offender. See **Ntokozo Dlamini vs. The King – Criminal Appeal Case No. 10/2001.** Also see **Rex vs wandile Majaha Magagula – Criminal Case No. 363/2016 at paragraph 101.**

- [10] The law also requires that the court must establish whether or not extenuating factors exist in a case before passing sentence. See **Daniel Dlamini vs Rex – Appeal Case No. 11/1998 at pages 2-3.** Extenuating circumstances in law are those factors bearing on the commission of the crime, which reduce the accused's moral blameworthiness or degree of guilt. See **S. vs. Masina 1990 (4) SA 710 (AD) 714 A.** In the instant case the deceased provoked the accused by stabbing him with a screw driver on the head as already alluded to above. Provocation constitutes an extenuating factor in our law. See **S. Letsolo 1970 (3) SA 476 (AD).** See also **The King vs. Nichodemus**

Mfanyana Mndzebele – Criminal Case No. 512/2021 at

Paragraph 35. The provocative act by the deceased in this case has the effect of diminishing the mental blameworthiness of the accused as it tends to show that his act of killing the deceased had not been premeditated.

[11] In light of all the foregoing, I find it fair and just to sentence the accused to eight (8) years imprisonment without an option of a fine - of which three (3) years are suspended for three (3) years on condition the accused is not convicted for Murder, Attempted Murder, Culpable Homicide or assault with intent to cause grievous bodily harm within the period of suspension. A total of eighteen (18) days, being the period spent by the accused in custody before liberation on bail shall be deducted from his sentence.



D.V. KHUMALO
ACTING JUDGE OF THE HIGH COURT

For the Crown: Mngomezulu F.

For the Defence: Dlamini P.