IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 19/82

In the matter between:

JOSEPH DIKA HLOPHE APPELLANT

vs
CORM: YOUNG P

ISAACS J A

AARON J A

JUDGMENT

YOUNG J P

In this case there is a difference of opinion in this Court as to the proper order on the Appeal. The Appellant was charged with the crime of murder, a little girl of five months. It was alleged that he assaulted the child with stick causing the fracture of the skull and the consequent death of the child. In the High Court the Appellant was represented by Counsel. His Counsel tendered a plea of guilty to Culpable Homicide on the charge and this was accepted by the Crown.

The following material was thereafter placed before the trial Court - the summary of evidence and a document headed confession statement which formed part of that summary. The confession statement had been made to a judicial officer. In a short judgment the learned trial judge said this "You pleaded guilty to Culpable Homicide and the Crown Counsel has accepted your plea. I think he is right in accepting the plea because it is not clear that you intended

killing your child. You were fighting with the mother and accidentally you killed the child, that is according to your statement. I accordingly convict you of Culpable Homicide".

From this it will be observed that the trial judge relied upon the confession statement of the Appellant. The Appellant was sentenced to three years imprisonment. He appeal to this Court against conviction and sentence. It emerges from the summary of evidence that the child died as a result of intercranial haemohhrage following fractures of the skull. The circumstances are that on the 6th of January, 1982 Appellant returned home at 1.00p.m. and asked his wife (the mother of the child) for food. The wife gave him left over to eat. Appellant refused to accept the food and insisted that fresh porridge should be cooked for him. The wife refused and a quarrel developed. Appellant took a knobstick and with it struck at the wife. She was carrying the deceased baby at the time. The blow landed on the baby's head thus causing the fracture from which the child died. In his confession statement Appellant said this "I picked up a stick nearby to hit her for saying so. While I was striking the "front" blow she used a child to ward off the blow. The child was struck by the blow aimed at my wife. I then went to my grandfather to report the incident.

I explained that I had accidentally truck the child."

Appellant rushed the child to hospital but on the way it died. It will be seen from what I have read out that Appellant did not admit negligence, i.e. forciability of danger towards the child, when he

struck the blow at the mother. He specifically said that the blow to the child was an accident. It is plain therefore par adventure in my opinion that an essential element of the crime of Culpable Homicide, namely negligence towards the child, was being

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denied. In my view a plea of guilty of Culpable Homicide should neither have been tendered by Counsel nor accepted by the Court for if it turned out at the trial of this issue that ablow to the child was accidentally inflicted in the sense that Appellant could not reasonably have foreseen the blow landing on the child. The Appellant was in law entitled to his acquital. It is a fundamental principle that criminal liability does not attach to an act or a consequence of an act unless it was attended by mensrea or fault, in a sense of dolus - in a case where intent is involved in a crime or culpa, i.e. negligence in relation to the actual result (the death of the child) achieved; i.e. punishment without mensrea or fault, see J. v Mtshiza 1970 (3) S. A. L. A. 747 at 752 A. We are concerned here with Culpa (negligence). As I say the test of negligence is forseability; in other words could the Appellant have foreseen the danger to the child, when he struck at the mother ; the fact that injury to the child was done whilst carrying out an illegal assault upon the mother does not per se make the injury to the child unlawful, see the case of S. v Bernadus 1965(3) S.A. 287 A. What is reasonably foreseeable depends on all the circumstances of the case. The test is objective, not subjective. The case of 8. v Raisa 1979(4) S.A. 541 0, is very much on all fours with the case before this Court now. The Accused in that case stated that he wanted to injure the mother of a child but in trying to stab the mother "she warded off the blow by putting the child in front," and he child was stabbed in the head. The Accused pleaded guilty in that case and was convicted. However, the conviction was set aside on review and the case remitted to the Magistrate with the

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instruction that a plea of not guilty be entered and thereafter the case to take its ordinary course. I wish just to acknowledge the assistance I have derived from the reasoning in Raisa's case. Counsel for the Crown placed much reliance on the case of Annan Lokudzinga Matsenjwa, 1970-76 SD. Law Reports 25, a case in this Court. There a mother was carrying baby on her back. A quarrel arose with another woman who produced a knife and "stabbed round and over" the left shoulder of the mother, having the baby. The blade penetrated the head of the child which died. The Appellant was convicted of the murder of the child. The presence of the child on the mother's back was known to the Appellant. The Appellant and I note from page 26 "did not suggest that the blow fell in a different place from the one intended by the Accused by reason of any movement made at that moment by the mother. This Court by a majority upheld the conviction for murder on the ground of dolis and by a minority on the gound of Culpa but of course in that case substituting a verdict of Culpable Homicide. It would be apparent in my view that Matsenjwa's case, far from supporting the submission by the Crown in the present case, is entirely consistent with the ratio in Raisa's case. It is true that Raisa's and Matsenjwa's cases involved dolus or intent whereas this case involves culpa. But in my view the principle is exactly the same. Just as intention had to be shown in those two cases so foreseeability had to be proved in the present case. It is true that in Matsenjwa's case the Court itself drew the inference of fault whereas in Raisa's case the matter was sent for trial but for good readon. In Matsenjwa's case there had been a trial, all

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the issues had been canvassed at the trial. The issues of fault on a plea of not guilty. In Matsenjwa's case no defence of accident was raised or merged on the evidence, and apparently this Court felt entitled to draw the inference it did draw on the record. In Raisa's case there had been no trial of the issues because there had been a plea of Culpable Homicide which had been

accepted by the state. Likewise in my view in this case the issue of negligence had not been tried, and the issue cannot be determined on the material before Court. I would, therefore, without hesitation uphold the appeal on the ground that the Appellant has not had a trial on the issue which was clearly raised on the documents before the Court, and the Appellant cannot be loaded with the fault of his Counsel nor with a fault on the part of the trial Court, in not realising that the question of negligence was vital to a conviction for Culpable Homicide However, the Crown was misled by a plea of guilty and it seems to me, therefore, that if the appeal is allowed then an order in terms of Rule 34 of the Court of Appeal Rules should be made, i.e. directing that the case be remitted to the Magistrate with a direction that a plea of not guilty be entered and the trial, then take its course. I would accordingly take allow the appeal and make the order I have indicated but I understand the majority of the Court takes a different view so that their view will prevail in the result of the appeal. It is not necessary for me, therefore, to take the matter further but if the appeal were to be allowed I would have suggested to the crown that having regard to the course of events - for which no blame can be attached to the appellant because he is in the hands of counsel

and the Court - that the matter be dropped altogether and no further prosecution against him initiated. But, as I say if the appeal is not going to be allowed, that issue of course does not arise.

SIGNED

D. YOUNG

PRESIDENT OF THE COURT OF APPEAL