



IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Criminal Appeal Case No. 3/07

In the matter between

MATHENCA SOLOMON MASUKU

Appellant

and

REY

Respondent

Comes

BROWDE AJP

TEBBUTT JA

BANDA JA

For Appellant

Mr. Bhembe Mr. S.

For the Crown

Fakudze

JUDGMENT

TEBBUTT JA

The Appellant was convicted in the High Court Culpable Homicide and sentenced to 12 years imprisonment, 3 years of which were conditional suspended for three years. He now appeals to this Court against the severity of his sentence.

The statement of agreed facts shows that on 11 October 2005 the Appellant and Phindile Mhlanga, (the deceased) were, with others, drinking traditional brew from a common container. The owner of the homestead where the drinking session was taking place, decided it was time for the group to leave. The deceased then suggested that the group should go to her nearby homestead to continue with the drinking. The Appellant objected to this suggestion stating that on previous occasions the deceased tended to be violent when there were drinking sessions at her place. The agreed statement of facts goes on thus:

"4.2 Notwithstanding the Accused's objection, deceased picked up the container in readiness to proceed to his homestead. The Accused who had been all along whilst drinking was carrying a small pocket knife, using it to sharpen wooden sticks, stood up and fended-off the deceased with the hand in

*which he held the knife with which he accident
stabbed the deceased once on the chest."*

- [3] The postmortem report reflects that the deceased < from a stab wound to the chest.
- [4] After he had stabbed her, the Appellant arranged for 1 deceased to be conveyed to hospital. The Appellant a the deceased, it is agreed, were on good terms and we friends. It is also recorded in the statement of facts thj the Appellant "is remorseful of his actions".
- [5] The learned Judge in sentencing the Appellant, has made several misdirections. She correctly pointed out that culpable homicide, involving, as it does, the taking of another's life, is a serious crime, lying second behind murder in the hierarchy of crimes against the person. She also correctly stated that society required of the courts that they pass sentences commensurate with the seriousness of the crime and that they should have a deterrent effect as well. There are, however, varying degrees of severity in respect of counts of culpable homicide which is, of course, the unlawful negligent killing of another person. The negligence resulting in such death can be slight or it can be more serious and can even be gross, bordering on recklessness. The

punishment in each case should therefore also depending on the nature of the negligence involved such deterrent effect as it may be thought to have, also require to be ameliorated according to the partic circumstances.

[6] In the present case the Appellant, it was agreed by Crown, had caused the death of the deceas "accidentally". The degree of negligence was therefore, most, slight. In convicting the Appellant of culpab homicide the trial Court accepted that the Appellant ha acted negligently and in accepting the agreed facts therefore also accepted that he had caused the death o; the deceased "accidentally".

[7] However, the learned Judge then said that she had been told that "despite being drunk the Appellant had aimed straight for the deceased's heart."

[8] There is no evidence to that effect; it also does not appear in the agreed statement of facts. The learned Judge does not say who "told" her those facts and it was a clear misdirection on her part to refer to what she had been "told" by some undisclosed person, without any evidential basis for it. She went on to say that "everyone knows

that the heart is a very vulnerable organ" and cont thus:

"I believe that somewhere in your subconscious knew that by going directly for the heart she wi be fatally wounded."

This in my view, is almost tantamount to a finding of, intention to kill and is entirely unfounded. It moreover, complete speculation, with again no evidential basis for it whatsoever. It is a clear and most materia misdirection.

The learned Judge further misdirected herself in another respect. She said she was not "given an explanation as to why you carry such a dangerous weapon when you go drinking". There is no evidence that the knife used was "such a dangerous weapon". It is referred to in the statement of facts as "a small pocket knife" which the Appellant was using to sharpen sticks. The carrying by male persons of small pocket knives is not uncommon in any society.

There is yet another misdirection, in my view. It is this. The learned Judge said -

"I am told by your lawyer that you are remorse have no doubt that you are but I was not told you did for the deceased's family in order to j your remorse"

Having remorse for one's actions - and the acceptance the Court of that remorse - does not, however, embra or involve having to provide compensation for the victin relatives. In requiring proof of this, the learned Jud£ also misdirected herself.

[12] In approaching the question of what the amount of the sentence should be the learned trial Judge was obviously influenced and guided by the factors I have mentioned, factors which are unwarranted and have as their foundation the misdirections I have set out above.

[13] In the light of those misdirections this Court is at large to consider the sentence afresh.

[14] The Appellant was, at the time of his trial, 45 years of age and a first offender. The Crown accepted that he had caused the deceased's death by accident. He and she were good friends and were planning to go into a business venture together. He would have had no reason to wish her dead; far from it. Indeed, when he saw what

had happened he immediately arranged for her to be transported to hospital. He said he was remorseful what he had done. One can understand that completely.

[15] The sentence of 12 years imprisonment, albeit partly suspended, was in the circumstances in my view therefore far too harsh. Indeed Mr. Fakudze, who appeared for the Crown agreed both that the learned Judge had misdirected herself and that the sentence should be reduced. He did not attempt to support it.

[16] In my view a sentence of six years imprisonment, three years conditionally suspended would be an adequate one.

[17] In the result the appeal succeeds to this extent.

[18] The conviction for culpable homicide is confirmed. The sentence of the Court *a quo* is set aside and there is substituted for it the following sentence.

"Six (6) years imprisonment, 3 years of which are suspended for three years on condition that the Appellant is not convicted during the period of suspension of an offence of which violence against another person is an element. The sentence is backdated to 11 October 2005".

P.H. TEBBUTT JUDGE OF
APPEAL



I agree

J. BROWDE

ACTING JUDGE PRESIDENT



I agree

R. BANDA

Delivered in open court at Mbabane on.9.day of

2007