

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Criminal Appeal Case No. 3/07

In the matter between

MATHENGA SOLOMON MASUKU

Appellant

and

REX

Respondent

Coram

BROWDE AJP

TEBBUTT JA

BANDA JA

For Appellant  
For the Crown

Mr. Bhembe Mr.  
S. Fakudze



JUDGMENT

TEBBUTT JA

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

[2] 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 accidentally stabbed the deceased once on the chest."*

- [3] The postmortem report reflects that the deceased died from a stab wound to the chest.
- [4] After he had stabbed her, the Appellant arranged for the deceased to be conveyed to hospital. The Appellant and the deceased, it is agreed, were on good terms and were friends. It is also recorded in the statement of facts that 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 vary, depending on the nature of the negligence involved and such deterrent effect as it may be thought to have, may also require to be ameliorated according to the particular circumstances.

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

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

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

[10] 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.

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

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

Having remorse for one's actions - and the acceptance by the Court of that remorse - does not, however, embrace or involve having to provide compensation for the victim's relatives. In requiring proof of this, the learned Judge 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 at what he had done. One can understand that completely.

[15] The sentence of 12 years imprisonment, albeit partially 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  
JUDGE OF APPEAL

Delivered in open court at Mbabane on 9 May 2007