THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO. 9/2007

In the matter between:

MTHABA THABANI XABA	**APPELLANT**
Vs	
REX	**RESPONDENT**
CORAM	**BANDA CJ** **STEYN JA** **ZIETSMAN JA**

FOR THE APPELLANT
FOR THE RESPONDENT

HEARD ON 31-10-2007
DELIVERED ON THE 12 TH NOVEMBER 2007

JUDGMENT

SUMMARY

After pleading guilty the appellant was convicted of culpable homicide – Sentence imposed – 12 years imprisonment – 2 suspended – Sentence determined on basis of incomplete Statement of Agreed Facts – Imperative the full facts should be placed before court to enable it to determine the degree of an accused's degree of moral guilt – Failure to do so can lead to miscarriage of justice – Court *a quo* failing to take significant mitigating circumstances into account - Court also having regard to factors not proved evidentially or by admission – This constituting misdirection – Sentence set aside.

STEYN JA

1. The appellant was convicted of culpable homicide. He was sentenced to 12 years imprisonment, 2 years of which were conditionally suspended. He appeals only against the sentence imposed upon him on the ground that it "induces a sense of shock".

2. His plea of guilty was premised upon the acceptance by the parties and by the Court of a so-called "Statement of Agreed Facts. (The Statement). It reads as follows:

"The accused stand (sic) before court charged with the murder of John Gasa Mphoteli Ndwandwe in the evening of the 11th *July 2004. It is common cause that both the deceased and the accused had been drinking liquor at a sheeben owned by one Phenious Ngwenya, it is common cause further that whilst at the sheeben there was a quarrel over the accused radio which got lost while in the custody of the deceased for repairs. It is common cause further that the accused and deceased whilst walking to their respectful (sic) homes along the path way had forth (sic) which resulted in the accused hitting the deceased with an iron rod which resulted in deceased sustaining multiple injuries which resulted in his death. The accused confessed to PW4, PW5 and PW7 that he has badly assaulted the deceased, this was on the same day of the assault 11th July 2004. The deceased was found by PW1 on the 14th July 2004, after hearing about the news of deceased, accused went to stay with his sister in Tonga in the Republic of South Africa. He was later arrested on or about the 28th October 2004, he freely and voluntarily*

recorded a statement before PW9 Magistrate Musa Nxumalo. He has been in custody ever since". (The "forth" should according to Crown Counsel read "fight").

The only other evidence placed before the Court was the Report on Post-mortem Examination the findings to which I will refer below.

3. The trial court in sentencing the appellant says that it had taken the personal circumstances of the appellant into account. The Court then proceeded to itemise all the aggravating features. These were:

3.1 ***That the appellant "had badly assaulted the deceased … and (he) did nothing to assist (him)".***

3.2 ***She says: [3] "You left him lying in the field for a number of days until he was discovered by certain people in the fields. The deceased may not have died instantly and he lay out there suffering until he died. According to the medical report, the cause of death was due to multiple injuries. It further states that the chest bone plus 5 left side ribs and 2 right side ribs were fractured. You must have used tremendous force an***

must have struck the deceased several times. His right cheek was also swollen due to bruising. He was much older than you. He was 48 years old to your 27 years. This death also is alcoholic (sic) related".

3.3 ***The Court then adds the following: "Once you heard he had been found you ran away to South Africa where you stayed until you were arrested on the 28th October 2006.***

3.4 ***Society has an expectation from me to do the right thing and that is to sentence you appropriately". The sentence of 12 years imprisonment was then imposed (2 years suspended).***

4. It is immediately apparent that the trial Judge did not to have regard to the major mitigating circumstances. The statement terse, and indeed unsatisfactory as it is, does confirm that there was provocation, that there was a fight, that he confessed to the crime, expressed remorse, that he immediately reported the fact that he had assaulted the deceased "badly". His counsel also said - and this was accepted by the Crown - that the deceased had lied to the appellant that the radio

which the appellant had handed to the deceased for repairs had been lost or stolen, when it had been appropriated by him for his own use.

5. The failure of the Court to have regard to these factors taints the reasoning of the trial Judge when motivating the severe sentence she imposed. Certainly a sentence of 12 years can only be reserved for the most serious cases of culpable homicide or cases falling just short of murder where extenuating circumstances were found to be present. This is certainly not such a case.

6. Very serious however is the failure of the Crown and the Court to have ensured that the factual premise on which the appellant's guilt had to be determined was properly investigated and recorded. We only know there was "a fight". Who was the aggressor? Was the deceased armed? How did appellant get hold of an iron rod? (His contention that the fight took place near a fence and that he grasped the iron rod whilst rolling on the ground in the fight with the deceased was an averment fairly conceded by the Crown as reasonably possibly true). It is of critical importance that the sentencing of an accused person should be premised on a thorough investigation of all the

relevant facts surrounding the commission of the offence. The personal circumstances of an accused person obviously need to be taken into account. However the degree of his moral guilt is also dependent on the gravity of the offence as well as the mitigating and the aggravating features of the offence. If the court process does not elucidate these factors, the court sentencing an offender may fail to do justice to an accused, or ***per contra*** fail to ensure the protection of the public.

7. There is an additional consideration which has to be dealt with. It is clear that the learned Judge ***a quo*** regarded the fact that the appellant fled from Swaziland to South Africa and that he only returned when he was arrested for his offence as aggravating factors. There was no evidence to support the latter finding. If the court intended to use these factors as aggravating features, it should have put them to the appellant and should have given him an opportunity to deal with these considerations. See in this regard **S V H 1977 (2) S.A. 954 (A)** at p. **960 [G – H]. Op. cit**. the South African Court of Appeal says:

> "Ordinarily facts having a bearing on the question of sentence, either in

> mitigation or in aggravation thereof ought to be placed before the Court either by way of recorded admissions or evidence on oath. In the case where a court intends to rely on its personal knowledge of facts having a bearing on sentence, those facts should in fairness to the defence be communicated to an accused so as to enable him, if so advised, either to contravert them or to address the Court thereon". This was not done ***in casu***. Had it been raised the appellant may well have given the same version to the Court ***a quo*** as he did to us; namely, that he returned voluntarily to Swaziland and gave himself up to the police. The veracity of this statement could not be determined before us, but it could have been readily resolved in the trial court.

8. The trial Court has therefore clearly erred in its motivation for imposing what is a very severe sentence for the negligent acts which culminated in the death of the deceased. In several cases serving before this Court for similar offences the learned Judge *a quo* has imposed "exemplary" sentences. Her reason for doing so appears to be motivated by both considerations of retribution and deterrence. As outlined earlier – and in her commendable zeal to give effect to these two considerations - she has clearly disregarded the mitigating

circumstances referred to above. At the same time she has taken aggravating factors into account not supported by the evidential material before the Court. It is therefore important for us to stress that the sentencing process requires a dispassionate assessment of all the factors, both aggravating and mitigating associated with the crime. "Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances". See **S V KHUMALO 1973 (3) S.A. 697 (A) at p. 698 [A – B].** See also **S V SPARKS 1972 (3) S.A. 396 (A)** and **R V BERGER 1936 A.D. 334** at p. **341**.

9. The *locus classicus* in regard to a court's approach to sentencing is the judgment of Holmes JA in **S v RABIE 1975 (4) S.A. 855** at pp. **861 – 862 op. cit at 862 [C – D].** The court, after recording the ***triad*** of the purposes of punishment cautions courts charged with the onerous duty of assessing punishment as follows: **"It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness".**

10. Corbett JA in a concurring judgment in **RABIE op cit** at p. **565 – 566** cites a passage from Seneca on **mercy**, including the declaration that: **"Severity I keep concealed mercy ever ready".** The learned Judge of Appeal then concludes at p. 866 [A – B] as follows:

> ***"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case".***

11. It is clear from the above that the Court ***a quo's*** approach to the

sentencing process “tilted” the “weighing in the scales by incompleteness”. She also overemphasized the retributive and deterrent aspects of punishment and failed to take into account significant, indeed weighty mitigating factors associated both with the offence and the offender. We are therefore obliged to reconsider the sentence imposed upon the appellant.

12. In summary I would say the following:

12.1 The Crown, who had all the resources of the State at its disposal, failed to place coherent and comprehensive evidence before the trial court. Such facts as it did canvass had therefore, in fairness to the appellant to be interpreted benevolently;

12.2 On such facts that were presented, there were clearly circumstances which mitigated the appellant’s unlawful conduct. These include provocation, a physical struggle between the deceased and the appellant. We don’t know who the aggressor was but the failure of the practitioners and the Court to explore the issues makes the task of the

court immeasurably difficult;

12.3 The appellant was clearly remorseful, gave himself up, made a confession to a Magistrate, pleaded guilty and as a first offender should not be over severely punished;

12.4 Giving due weight to the fact that this was a severe assault – at least 3 blows would have had to be inflicted to cause the injuries sustained by the deceased as reflected in the post-mortem report – a significantly lesser sentence than the effective sentence of 10 years imprisonment should be imposed;

12.5 An appropriate sentence which takes into consideration all three the factors of the well known ***triad,*** i.e the offence, the offender and the interest of society at large, would be six (6) years imprisonment, backdated to 28th October 2004.

J.H. STEYN

Judge of Appeal

I agree

R. A. BANDA

Chief Justice

I agree

N. W. ZIETSMAN

Judge of Appeal