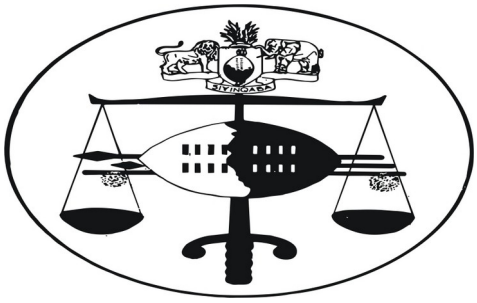

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL APPEAL NO. 18/07

In the matter between

MANDLA VILAKATI ***APPELLANT***

and

REX **RESPONDENT**

CORAM BROWDE JA
TEBBUTT JA
RAMODIBEDI JA

HEARD : 1 NOVEMBER, 2007
DELIVERED : 14 NOVEMBER 2007

JUDGMENT

SUMMARY

Murder charge – Appellant convicted of culpable homicide and sentenced to 12 years imprisonment – Sentence – Principles thereof

discussed – Section
5 (3) of the Court of Appeal Act 74/1954.

RAMODIBEDI JA

[1] The appellant was tried in the High Court on a charge of murder. It was alleged that on or about 5 September 2004 and at or near Mathangeni area in the Manzini region the appellant did unlawfully and intentionally kill one Nkosikhona Hlatshwako ("the deceased").

[2] The trial court convicted the appellant of culpable homicide on his own plea. It then sentenced him to 12 years imprisonment, four of which were suspended. He appeals against sentence only.

[3] The relevant facts of the case may be gleaned from the statement of agreed facts which was jointly handed in by the Crown and the defence. According to this statement, the appellant and deceased were "good friends". They were both

workmates at Welcome Textiles Matsapha. On the night of September 2004, they proceeded to "an all night gig" at Manzini Trade Fair where they imbibed alcoholic beverages.

[4] On the morning of 5 September 2004, the appellant was involved in a "verbal showdown" with the deceased's mother. In the process, the accused insulted the deceased's mother. Thereupon another "verbal showdown" ensued between the appellant and the deceased. They were, however, separated and the appellant left the deceased's homestead only to return about 10 minutes later. The two men once again argued over the appellant's insult to deceased's mother. It was at this point that the appellant fatally stabbed the deceased in the chest with a knife only once.

[5] Crucially, the statement of agreed facts contains the following important paragraph which is reproduced verbatim:-

> "At *the time accused person, due to intoxication, stabbed the deceased he did not foresee that death would ensue and did not reconcile himself with the act [and] had no intention to kill but was negligent. And did reconciled (sic) himself with the consequences but still went ahead".*

[6] In sentencing the appellant, the learned Judge *a quo* said this:-

> *"You can count yourself lucky Mr. Vilakati, that you are now to be sentenced not for murder but for culpable homicide".*

With respect, these remarks are unfortunate. There can be no doubt in my mind that they serve to indicate that the learned trial Judge wrongly treated the appellant's offence as murder after all. The sentence of 12 years imprisonment says it all, as this is the type of sentence one may find in a case of murder with extenuating circumstances and not culpable homicide.

[7] It is in my judgment, of fundamental importance for the proper administration of justice that courts must draw a distinction between murder and culpable homicide in the sentences that they impose. A blurring of the two crimes with regard to sentence as the present case shows is not only unjustified but may also bring our criminal justice system into disrepute.

[8] Although in his reasons for sentence the learned trial Judge records that he considered the mitigating factors urged on the appellant's behalf, it is clear, as it seems to me, that he gave insufficient consideration to such factors and thus misdirected himself. Two examples shall suffice:-

(1) Concerning appellant's remorse the learned trial Judge said this:-

> "W*hen considering sentence I do agree with your attorney that at least to <u>some extent</u> you have shown remorse by pleading guilty and that you have*

facilitated you[r] own handing over to the hands of the police to take the matter further." (Emphasis added.)

The fact of the matter, however, is that the appellant genuinely showed remorse and not just to "some extent" as the learned Judge held. It will be recalled for that matter that the appellant had duly handed himself to the police.

(2) The learned trial Judge merely records that the appellant was "drinking". He makes no reference to the fact that the appellant was in fact intoxicated as fully set out in paragraph [5] above.

[9] It follows from the aforegoing that, although sentence is a matter which lies within the discretion of the trial court, this is a fit case where this Court is at large to interfere. It should further be noted that this Court has additional powers under section 5 (3) of the Court of Appeal Act 74/1954 to interfere in a

matter such as this. The section reads as follows:-

> *"On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."*

[10] Giving full weight to these considerations, it follows that the appeal must succeed to the extent that the sentence of the court *a quo* is set aside and replaced with the following:-

(1) "Eight (8) years imprisonment. Three (3) years are suspended for three years on condition that the appellant is not found guilty of an offence involving an assault committed during t*he period of suspension.*

(2) *The sentence is backdated to 30 April 2005 being the date when the appellant was first taken into custody."*

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

J. BROWDE
JUSTICE OF APPEAL

I agree

P.H. TEBBUTT
JUSTICE OF APPEAL

For Appellant : In person

For Respondent : Mr. T. Masina