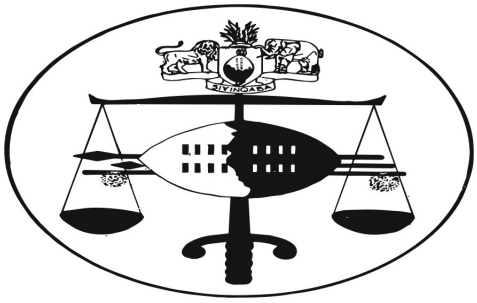

IN THE SUPREME COURT OF SWAZILAND

CRIMINAL APPEAL NO.30/2010

CITATION: [2010] SZSC 14

HELD AT MBABANE

In the matter between:

SIFISO MALAZA	**FIRST APPELLANT**
DANIEL KHUMALO	**SECOND APPELLANT**
PETER DLAMINI	**THIRD APPELLANT**

AND

REX **RESPONDENT**

CORAM : RAMODIBEDI, CJ

EBRAHIM, JA

MOORE, JA

HEARD : 8 NOVEMBER 2010

DELIVERED : 30 NOVEMBER 2010

SUMMARY

Criminal law – murder – accused pleading guilty to culpable homicide – Crown accepting plea – Statement of agreed facts – Whether disclosing the offence of culpable homicide – Appeal against both conviction and sentence dismissed.

JUDGMENT

RAMODIBEDI, CJ

[1] The three appellants in this matter jointly faced an indictment in the High Court of Swaziland on a charge of murder. It was alleged that upon or about 30 May 2008, and at or near Down-Town Bar area in the Hhohho Region the appellants, acting jointly in furtherance of a common purpose, did unlawfully and with intent to kill, assault one Phumelela Masuku ("the deceased") and inflict upon him certain injuries which caused his death on 4 June 2008.

[2] Upon their arraignment the appellants, all of whom were duly represented, pleaded guilty to culpable homicide. The Crown accepted the plea. Thereafter, a "Statement of Agreed Facts", jointly signed by the Crown's representative as well as the appellants' representative, was handed in by consent. I shall return to the statement in question shortly.

[3] Against the abovementioned background the High Court (M.C.B. Maphalala J) duly convicted the appellants of culpable homicide on their own plea. After hearing submissions in mitigation of sentence the learned Judge *a quo* sentenced the appellants to seven (7) years imprisonment each. Five (5) years of the sentence were suspended for five years on condition the appellants were not convicted of an offence involving violence during the period of suspension. As can be seen, the appellants were sentenced to an effective sentence of two (2) years imprisonment each.

[4] In their grounds of appeal the appellants seek to challenge both conviction and sentence. With regard to the former, they rely on three grounds, namely:-

(1) That the court *a quo* erred in convicting them purely on the Statement of Agreed Facts without verifying from them whether they agreed with the statement in question.

(2) That the court *a quo* erred in holding that the Statement of Agreed Facts contained "sufficient particulars" to disclose the offence of culpable homicide.

(3) That the court *a quo* erred in holding that the appellants had a common purpose to cause the death of the deceased without considering the individual acts of each appellant.

[5] Insofar as sentence is concerned, the appellants have launched a two-pronged attack against the court *a quo*'s judgment, namely:-

(1) That the court *a quo* erred in holding that the Statement of Agreed Facts contained sufficient particulars to enable it to determine an appropriate sentence.

(2) That the court *a quo* erred in sentencing the appellants to a custodial sentence without considering the delay in bringing the appellants to trial.

[6] As indicated above the facts pertaining to this matter are contained in the Statement of Agreed Facts dated 28 June 2010. The statement reads as follows:-

"The accused persons are charged with Murder. They plead guilty to the offence of Culpable Homicide. The Crown accepts the plea.

1. *It is agreed that on the 30th May, 2008, the accused and the deceased who are all from the same area and knew each other, met at the Yemfo bar in Mbabane town and they drank alcohol together.*

2. It is further agreed that in the evening of that day, they then proceeded to Msunduza location

in Mbabane and continued with their drinking spree at Singapore bar. They again left the said bar and moved to kaZeeman bar where they again continued with their drinking whilst there, accused No.1 produced his cell phone to look at the time and deceased noticed it and requested to have a look at it. Accused No.1 gave it to him since they knew each other.

3. *When Accused No.1 requested to have his cell phone back, deceased refused and he had hidden it. They went out of the bar and Accused 1 continued to request deceased to bring back his cell phone but deceased refused. There came one Goman who also requested deceased to give the cell phone back to Accused 1, but deceased quarreled with him and fought him with a fist on the mouth. Accused 1 tried to separate them but deceased was uncontrollable.*

4. *Accused No.2 also came to the scene, he also requested deceased to give Accused 1 his cell phone, but deceased refused. They then fought*

deceased until he fell down. They searched him and found that he had hidden it under his underwear. They asked him that they proceed to the Mbabane Police station, he refused, but they ended up at the Police Station where they handed him to the Police. The Police took deceased to the Mbabane Government hospital and the accused persons were released.

5. *On the following day, the accused learned that the deceased had passed away at the hospital. Then on the 9th of June, 2008, they got a message that the Police were looking for them. On the 12th June, 2008, they handed themselves to the Mbabane Police where they were arrested.*

6. *The accused persons admit that deceased died as a result of the injuries unlawfully and negligently inflicted upon him by them and that there was no intervening cause. That the post-mortem report be handed to the court by consent.*

Dated at MBABANE this 28th day of June 2010

(signed) *(signed)*

_____ _____

FOR THE CROWN *FOR: ACCUSED."*

[7] According to the post-mortem report, the cause of death was due to multiple injuries.

[8] As can be seen from the Statement of Agreed Facts, the appellants' own legal representative duly signed the statement. Crucially, as pointed out earlier, this statement was handed in by consent. It follows, in my view, that the appellants' first complaint that the court should have verified with them on whether they agreed with the facts is devoid of merit in the circumstances. The record shows that their legal representative duly "confirmed" the facts as correct. There can be no prejudice in the circumstances.

[9] The appellants' second complaint that the Statement of Agreed Facts did not contain sufficient particulars to disclose the offence of culpable homicide is equally

without merit. In particular, this complaint overlooks paragraph 6 of the statement in question, namely:-

> *"6. The accused persons admit that deceased died as a result of the injuries unlawfully and negligently inflicted upon him by them and that there was no intervening cause."*

I have underlined the words "unlawfully" and "negligently" to underscore the fact that they conform to the definition of culpable homicide. In this regard I am in respectful agreement with Holmes JA in **S v Burger 1975 (4) S.A. 877 (A)** at 878, namely:-

> *"As to the law, in general:*
>
> (i) *Culpable homicide is the unlawful, negligent causing of the death of a human being…"*

[10] In my view, the contents of paragraph 6 of the Statement of Agreed Facts constitute an admission of relevant facts giving rise to culpable homicide. In this regard s272(1) of the Criminal Law and Procedure Act 67/1938 ("the Act") provides as follows:-

> *"272. (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact."*

See in this regard such cases as **Mduduzi Mkhwanazi v Rex, Criminal Appeal No.3/2006**; **Chicco Fanyanya Iddi, Appeal Case No.03/10**; **Jose Gabriel Machva v Rex, Appeal Case No.09/10**; **Raymond David Malakara v Rex, Appeal Case No.10/10** (per my Brother Moore).

[10] It is also of fundamental importance to have regard to s238(1)(a) of the Act. The section provides as follows:-

> *"238. (1) If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is charged, and the prosecutor*

has accepted such plea, the court may, if it is –

(a) the High Court or a principal magistrate's court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence."

[11] Similarly, the appellants' third complaint that the court *a quo* erred in holding that the appellants acted in furtherance of a common purpose overlooks several references to the words "accused persons," "they" and "them" in the statement, particularly paragraphs 3-6. Those words obviously indicate that the appellants were acting together in furtherance of a common purpose. Furthermore, the appellants pleaded guilty, on legal advice, to a specific charge of acting in furtherance of a common purpose. The complaint in question is thus without any substance in the circumstances.

[12] In this Court Mr. Bhembe for the appellants, while conceding that the facts disclosed a commission of an offence against the second and third appellants, argued

forcefully that the first appellant, Sifiso Malaza, should have been acquitted simply because he was not specifically referred to by name in the Statement of Agreed Facts. I reject this argument entirely for the same reasons outlined above. In several passages, the statement in question refers to "the accused persons" without exception. As alluded to earlier, the first appellant pleaded guilty to culpable homicide on legal advice. Moreover, the statement makes it plain that all the accused persons including the first appellant acted in furtherance of a common purpose.

[13] Faced with these difficulties, the appellants tried to advance a new complaint that they were not properly arraigned. This complaint, however, does not form part of their grounds of appeal at all. Seeing that they were legally represented, I should be disinclined to accept the correctness of their belated complaint in the circumstances. Although the record of proceedings leaves a lot to be desired, there cannot be the slightest doubt that the charge was put to the appellants. Thus, for example, the second appellant is recorded as having said the following:-

"ACSD 2: I understand the charge and plead guilty My Lord."

In my view that is an indication that the charge was indeed put to the appellants after all. In fairness to Mr. Bhembe, he did not pursue this ground of appeal, and properly so in my view.

[14] It follows from the foregoing considerations that no fault can be found with the conviction of the appellants in these circumstances.

[15] There remains the appellants' complaint against sentence. With regard to the complaint that the Statement of Agreed Facts did not contain sufficient particulars to enable the court *a quo* to determine an appropriate sentence, the appellants rely on the following remarks made by this Court in **Mthaba Thabani Xaba v Rex, Appeal Case No.9/2007**:-

"6. …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."*

[16] It will be seen, however, that Xaba's case is clearly distinguishable from the instant case. As this Court observed in that case, the trial Judge did not have regard to "major mitigating circumstances". Furthermore, unlike the present matter, Xaba had been sentenced to 12 years imprisonment for culpable homicide, thus prompting this Court to comment as follows in paragraph 5 of its judgment:-

"5. …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."

[17] *In casu,* it cannot seriously be maintained that the court *a quo* failed to take into account all the relevant factors in sentencing the appellant. The very fact that the court imposed an effective sentence of only two years imprisonment on each appellant for culpable homicide is sufficient proof that the court considered all the relevant factors in the appellants' favour.

[18] Finally, the appellants' complaint that they were wrongly sentenced to a custodial sentence without considering the delay in bringing them to trial can quickly be disposed of as it is unmeritorious. In any event this complaint was not pursued in argument in this Court. It is true that the appellants were taken into custody on 12 June 2008. Their trial commenced on 28 June 2010, a delay of two years. Crucially, however, the record shows that the appellants were granted bail on 20 June 2008. It means, therefore, that they were not in custody during the two years' delay in bringing them to trial. As such they are, in my view, not entitled to any credit in their sentence in respect of that period.

[19] In all the circumstances of the case, therefore, the appeal is dismissed. Both convictions and sentences recorded against the appellants are confirmed.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree : _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree : _____

S.A. MOORE

JUSTICE OF APPEAL

FOR APPELLANT : MR. S. BHEMBE

FOR RESPONDENT : MR. A. MAKHANYA