IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 22/2010
CITATION: [2010] SZSC 16

In the matter between:

BHEKI MASUKU **1st APPELLANT**
GCINA MASUKU **2nd APPELLANT**

AND

THE KING **RESPONDENT**

CORAM RAMODIBEDI CJ
MOORE JA
FARLAM J.A

FOR THE APPELLANT MR. L GAMA
FOR THE RESPONDENT MS. Q. ZWANE

Culpable Homicide – mitigating factors – youth of the accused – age when crime committed.

JUDGMENT

Farlam J.A.:

[1] The appellants in this matter, who are brothers, were charged in the High Court with murder. Their pleas of guilty to culpable homicide having been accepted by the Crown, they were convicted by M.C.B. Maphalala J, who sentenced each of them to nine years imprisonment, two years of which were suspended for three years on condition that he was not convicted of an offence wherein violence was involved during the period of suspension. The learned Judge ordered that the sentence imposed on each of them was, as he put it, ‘ with effect from 1 March 2010’ (i.e. the date the appellants were convicted and sentenced).

[2] No evidence was led at the trial. A statement of agreed facts signed on behalf of the Crown and the appellants was placed before the court and provided the factual basis on

which the appellants were sentenced. It contained the following:

'1. The accused persons are guilty of CULPABLE HOMICIDE. In that upon and about the 24th March, 2006 and at or near Madonsa area in the District of Manzini, the accused persons acting jointly and in the furtherance of a common purpose did unlawfully and negligently kill one LOPES MONDLANE and did thereby commit the crime of CULPABLE HOMICIDE.

2. The following events and facts are agreed upon:

2.1 On the 24th March 2006, the Accused number 1 [the first appellant] who was heavily drunk left Madonsa bar towards home. Along the way home he met up with the deceased, who mocked the accused for being heavily

drunk. An argument ensured and the two started fighting.

2.2 In the course of the fight the deceased was able to over- power the 1st Accused and sat on top of the accused… strangling him.

Accused number 2 [the second appellant], who was in a church service nearby, was called by people who were watching the fight, to come and stop the fight. When Accused number 2 arrived he found the deceased on top of accused number 1 and strangling him. Accused number 2 kicked the deceased on the head and the deceased fell off Accused number 1.

2.3 Accused number 1 got up and he together with Accused number 2 assaulted the deceased with fists on the face, head and kicked him all over the body for a while.

2.4 The deceased lay on the ground and when Accused 1 and 2 realised that deceased was helpless and unconscious they left him on the ground.

3. The accused persons admit that they acted jointly and in the furtherance of a common purpose by unlawfully and negligently killing the deceased.

4. The Accused further admit that there was no intervening cause between their unlawful action of assaulting the deceased and the death of the deceased.'

[3] It appeared from the post-mortem report, which was handed in by consent, that the deceased was about 47 years old. After counsel for the Crown had said that he had no record of previous convictions in respect of the appellants, their attorney, *Mr Gama,* who also appeared before this court, informed the court that the first and second appellants were born on the 7th October 1985 and 28th September 1990 respectively. It was thus clear that when the fatal attack on the deceased took place the first appellant was 20 years old and the second appellant was 15 years. Mr *Gama* also said that the first appellant had been employed shortly before the trial began as a gardener and that the second appellant was unemployed. Both were unmarried. The second appellant had a one year old child.

[4] The oral judgment on sentence delivered by the trial judge contained the following:

'In imposing sentence I will consider the mitigating factors as well as your personal circumstances. I will also consider the interest of society. It is common cause that when the offence was committed, you were still very young and that would in a way operate in your favour. But at the same time the court will not forget that a life was lost and it is the duty of the court to ensure that the sentence that is passed becomes a deterrent to other accused persons. According to the statement of agreed facts, accused number 1 was provoked which led to the fight and when accused number 2 entered the picture, he did not intervene, he assaulted the deceased and the deceased fell down and both accused number 1 and 2 together started assaulting the deceased on the head and face and kicked him all over the body. There was no need to do this particularly because the deceased had fallen down.

I will sentence you to imprisonment without an option of a fine. Considering the time that you committed the offence, I also will have part of the sentence suspended. I consider this to be a very serious case of culpable homicide.'

[5] The trial judge subsequently furnished a written judgement, in which he quoted the agreed statement of facts in full. He then gave a short summary of the facts in the statement which concluded with the following: 'When they realised what they had done, they left the deceased on the ground to die.' The judge proceeded to explain why he had been satisfied that the statement established beyond reasonable doubt that the appellants committed the crime of culpable homicide. He cited ***R v John Ndlovu 1970-1976 SLR 389 (HC)*** and ***Shiba v R 1977 – 1978 SLR 165 (CA***) in support of his finding that the appellants exceeded the bounds of self defence in attacking the deceased in the way they did.

[6] Turning to the question of sentence, the judge referred to the fact that the appellants' attorney had submitted that the appellants should be given suspended sentences and that he had relied in this regard on the facts that they were young when the offence was committed, they were first offenders who had pleaded guilty and the first appellant was drunk when he committed the offence and could not appreciate the wrongfulness of his actions.

[7] The judge also referred to a further submission advanced by the appellants' attorney to the effect that it had taken four years for the appellants to be to be brought to trial and that, as the attorney had put it, 'keeping suspects in suspense is a form of punishment.' The judge rejected this submission on the ground that it overlooked the fact that the

appellants ‘were out of custody and going about their business.’

[8] In his argument on appeal Mr *Gama* contended that the sentences imposed on the appellants were unduly harsh in the circumstances. He submitted that the judge did not seem to have taken into account the manner in which the offence was committed. He pointed out that the judge did not mention that the second appellant was called by members of the community to intervene and that when he arrived on the scene he found the deceased on top of the first appellant, strangling him.

[9] Mr *Gama* also submitted that the judge had wrongly found that the appellants left the deceased on the ground to die, a fact not supported by the statement of facts.

[10] It was further contended that the ***court a quo*** did not take into account the fact that although the deceased was much older than the appellants and had earlier overpowered the first appellant the appellants had not resorted to the use of weapons against him.

[11] Mr *Gama* also argued that the ***court a quo*** appeared not to have taken into account the ages of the appellants when the crime was committed, especially that of the second appellant who was fifteen years old at that time. In this regard he referred to ***Mahlambi v R 1977 – 1978 SLR 98***

(HC), in which Nathan CJ held that '(w)hen in sentencing an accused's age is taken into account it should be his age at the time of the commission of the offence and not at the time when sentence was passed.'

[12] It is clear from the fact that the trial court failed to distinguish between the two appellants that it did not have regard to the second appellant's age when the crime was committed, as it was obliged to do because the principle laid down in ***Mahlambi's*** case obviously applies. A youth of fifteen years should ***prima facie*** be regarded as immature (cf. ***S v Ngoma 1984 (3) SA 666 (A)*** at ***674 F*** and ***Monaleli v R LAC (2005-2005) 24 (Les C of A) at 27H.)***

[13] Although, as was pointed out by Rumpff C.J. in ***S v Lehnberg 1975 (4) SA 553 (AD)*** at **561** there are degrees of maturity in the case of teenagers, nevertheless children of that age are immature and lacking in experience of life (see also ***S v Van Rooi 1976 (21 SA 580 (AD).*** *C*hildren of that age are also more likely to act on the spur of the moment without premeditation.

[14] Of course this does not mean that a child of fifteen who commits a crime and is tried some years later, when he is twenty (as is the case here), has to receive the sentence appropriate for a fifteen year old; see in this regard ***Oodira v S Criminal Appeal 035 of 2005) [2006] BWCA 27,*** a judgement of the Botswana Court of Appeal. But it does mean that in passing sentence on such an offender the trial court must

have regard to mitigating factors flowing from the Accused's age at the time the offence was committed.

[15] The factors listed in paragraph 13 all appear to have been present in this case. When the second appellant came on the scene he found a situation where his brother was in mortal danger as he was being strangled by the deceased. While it is true that once the danger was averted it was not necessary for him to attack the deceased further (which is why he was guilty of culpable homicide) the fact remains that the acceptance of his plea to the charge of culpable homicide means that it must be accepted that he did not intend to kill the deceased. Once his elder brother, the first appellant, got up he assisted him in assaulting the deceased. There were accordingly substantial mitigating factors present.

[16] As far as the first appellant is concerned, he was, as I have said, 20 years old at that time. He was 'heavily drunk'. He was mocked by the deceased for his condition and the ensuing argument culminated in a fight which led to his being overpowered by the deceased, who was more than twice his age and who set on him and proceeded to strangle him. When his younger brother, the second appellant, rescued him, he proceeded with his brother's help to assault the deceased. His heavily intoxicated state, the fact that he acted under quite considerable provocation and his age all constitute mitigating factors, which were not given adequate weight by the ***court a quo.***

[17] The mitigating factors applicable to the appellants are of such a nature that it is not correct, in my opinion, to describe this case, as the ***court a quo*** did, as 'a very serious case of culpable homicide'.

[18] In recent years this court has on a number of occasions considered the appropriateness of sentences imposed in culpable homicide cases following upon assaults. We are grateful to Ms *Zwane*, who appeared for the Crown in this case, for furnishing us with copies of a number of these. The most recent was ***Lomcwasho Thembi Hlophe v the King, Criminal Appeal 7/2010***, a case decided on 27th May this year.

[18] In Para 19 of the judgement, which was delivered by ***Dr S. Twum J.A.,*** the following was said:

> 'There are obviously varying degrees of culpable homicide offences. As noted above, in the case of **Bongani Dumisani Amos Dlamini v Rex [Criminal Appeal No.12/2005]** this Court endorsed a sentence

of 10 years imprisonment in what the trial Judge described as an extraordinarily serious case of culpable homicide “at the most serious end of the scale of such a crime.” I respectfully agree entirely with **Tebbutt J.A.** when he opined that a sentence of 10 years seems to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes’.

[19] This case is not one which can be regarded as being ‘at the most serious end of the scale’. The cumulative effect of the mitigating factors I have summarised above as well as the aspects on which the ***court a quo*** failed to take them into account or give adequate weight thereto are such as to justify the setting aside of the sentences imposed at the trial and their replacement by the sentences set out below.

[20] The appeal is accordingly allowed, The sentences imposed by the ***court a quo*** are set aside and the following sentences are substituted therefor:

> ‘ 1. Accused 1 is sentenced to six years imprisonment, three of which are suspended for three years on condition that he is not convicted of a crime of which violence to the person is an element committed during the period of suspension for which an unsuspended period of imprisonment is imposed.
>
> ‘ 2. Accused 2 is sentenced to three years imprisonment, all of which is suspended for three years on condition that he is not convicted of a crime of which violence to the person is an element committed during the period of suspension for which an unsuspended period of imprisonment is imposed.
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> ‘3. The sentences on both accused are backdated to 1 March 2010.’

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I.G. Farlam

Justice of Appeal

I agree

M. M. Ramodibedi
Chief Justice

I agree

S.A. Moore
Justice of Appeal

Delivered in open court on this 30th day of November 2010.