

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

7/10

CRIM.APPEAL CASE NO:

In the matter between:

LOMCWASHO THEMBI HLOPHE

APPELLANT

AND

REX

RESPONDENT

CORAM: RAMODIBEDI, CJ

DR. TWUM, JA

FARLAM, JA

FOR THE APPELLANT

IN PERSON

FOR THE RESPONDENT

MR. P. DLAMINI

Summary

Culpable homicide - plea in mitigation - sentencing benchmark of 9 years - review according to particular circumstances of each case - substantial similarity of sentences - power of appellate court to interfere with sentence - commencement of sentence - judicial discretion - section 16 (9) of the Constitution.

JUDGMENT

DR. S. TWUM J.A.

[1] This is an appeal from the judgment of **R.A. Banda, C.J.**, sitting in the High Court, Mbabane, on the 9th May 2008. It is against sentence only.

[2] The basic facts are that the Appellant was convicted by the High Court for the culpable homicide of one Phoso Maseko, her boyfriend, and sentenced to ten (10) years imprisonment. The Court refused to back-date the sentence. The Appellant was not represented in the court *a quo* and she appeared in person during the hearing of the appeal before this Court. This obviously redounded adversely on the quality of her presentation as will soon appear.

[3] The record shows that even though the Appellant and the deceased were not married, they had lived together for quite some time, as "husband and wife". In the evening of the fateful day, she said the deceased accused her of deliberately setting fire to his house. A quarrel ensued. They were the only people in the house. The Appellant said that the deceased, who had been drinking, attacked her with a plank. She said she was able to seize it from him. She said that thereafter the deceased produced a knife and tried to stab her with it. She said she managed to dispossess him of the knife and stabbed him with it. She claimed that she stabbed him only once, but later she admitted on the promptings of the trial Judge that there were two stab wounds. She said it was late evening but she walked to the community police and reported herself there. She was later charged with the culpable homicide of the deceased.

[4] The Crown's case against her was based substantially on the statement of agreed facts settled between her and Crown Counsel. This was admitted in evidence, of course, without any objection.

"Statement of Agreed Facts:

It is agreed that:

1. The accused and the deceased were live in lovers.
1. On the 17th October 2007 the accused and the deceased had a quarrel. The deceased was accusing the accused of deliberately setting his house on fire;
1. The deceased produced a knife with intent to stab the accused. The accused dispossessed the deceased of the knife;
1. Accused stabbed the deceased on the chest twice and she went to report the matter to the community police;
1. Accused accepts that deceased died as a result of her unlawful actions and that there is no intervening cause of death;
1. Accused accepts the contents of the post mortem report which may be handed in by consent;
2. It is further agreed that the knife used in the commission of the offence be handed in as an exhibit;
1. Accused has been in custody since 17th October 2007."

At the trial she gave a brief viva voce evidence which added a few missing links to the facts stated in the Statement of Agreed Facts.

[5] Crown Counsel conceded that at the time there was no eye witness to the offence. He added that but for the accused's statement to the police, there would have been no evidence even to

establish the identity of the deceased's assailant. Crown Counsel further confirmed that it was the appellant who reported the matter to the police.

[6] Upon the arraignment of the appellant she pleaded guilty and on her own plea the court found her guilty of culpable homicide and convicted her accordingly.

[7] Before passing sentence on her, the court asked her if she had anything to say in mitigation of sentence. The appellant pleaded with the court to be lenient with her and not pass a harsh sentence. She said she did not have any intention to commit the offence. When the court asked her to explain what she meant by saying that she had no intention of committing the offence, she said she acted in self-defence since it was the deceased who was initially in possession of the knife. The court further pointed out to her that what she did could not be self-defence since after she had dispossessed the deceased of the knife, he posed no danger to her. The appellant explained further that they were inside the house and struggling for the knife. She was fearful that he could have seized upon another object to harm her and she had nowhere to run to since they were in the house and she could not get out. She added that when she went to report the matter to the community police she had no idea that the deceased had died. In further mitigation, she informed the court that she had 3 children aged 14, 10 and 7 years, respectively.

[8] In passing sentence on her, the learned Judge said the offence committed by the appellant was a very serious one. He said he had noted what she had said in mitigation. However, the only matter the learned trial Judge actually recorded he had taken into consideration was that fact that the accused had 3 young children. Almost immediately the learned Judge nullified the effect of this mitigating

factor by saying that the accused ought to regard herself as very fortunate for the Crown to have accepted her plea of guilty to culpable homicide. He said in his view, the offence was more in the nature of murder.

[9] After warning himself of the need to consider the gravity of the offence and the interest of society, the Judge sentenced the appellant to 10 years imprisonment on 9th May 2008.

[10] On 28th July 2009 the accused filed an appeal against her sentence, to this Court. In what may be considered as the Notice of Appeal, the appellant put 6 matters before this Court for consideration. She obviously did not have the services of a lawyer in formulating these matters. Seriously, they are not grounds of appeal but it is clear what reliefs she wanted from this Court. The first matter she raised was a request to this Court to grant her an option of “a fine and reduce the sentence.” I take that to mean that she thought her sentence was unduly long and ought to be reduced.

[11] In her oral submission before this Court she repeated that she had 3 children aged 14, 10 and 7 years respectively, and that there was nobody to care for them since her mother who would have done that had died. She said at the moment they were probably with her brother. She said she was a first offender, aged 37 years and that she thought what she did was genuinely in self-defence. It was not pre-meditated, she said, since generally, she and the deceased had had a good relationship. She added that she deeply regretted what had happened and blamed herself for that mistake that befell her. She concluded by saying that she would be a good person in her community if she was given a lesser sentence.

[12] Crown Counsel submitted in the Respondent’s Head of Argument that there was no misdirection or irregularity in the court *a quo’s* exercise of its discretion on sentence. He quoted an excerpt

from the case of **Twala v Rex (1970-76) SLR 363** at page 364 in support of that submission. He added rather confidently that there were no grounds upon which this Court could be invited or persuaded to interfere with the sentence passed on the appellant. He submitted further that a sentence of ten (10) years' imprisonment for a serious crime like culpable homicide was extremely lenient. He said the court *a quo* in reaching its sentence, properly took into account relevant factors on the personal circumstances of the appellant, the circumstances of the crime and the expectations of society.

[13] It is fair to point out that in the excerpt from the case of **Twala v Rex** (supra), the court held that where the sentence was "disturbingly inappropriate" the appellate court could interfere. For the reasons stated below, my view is that the appellant's sentence was "disturbingly inappropriate"

[14] In this Kingdom, a number of judgments have been delivered by this Court giving guidance to trial courts on the exercise of their discretion when passing sentence in culpable homicide cases. I pause to consider 3 of such cases. **Bongani Dumsani Amos Dlamini v Rex** (Criminal Appeal No. 12 (2005)). In this case, the appellant was charged with the murder of Zwakele Sibandze on 2nd March 2002 before the High Court. However, on 7th February 2005 the Crown and the defence agreed on a Statement of Agreed Facts. On the basis of that statement the appellant pleaded guilty to and was convicted of culpable homicide. The applicant was a first offender of advanced age. He was sentenced to 10 years imprisonment by the High Court. The sentence was backdated to 2nd March 2002. The salient facts which appear from the Statement of Agreed Facts are:

1. On or about 2nd March 2002, the accused unlawfully stabbed the deceased with a knife on the head and inflicted serious injury upon him which caused his death a week later.

1. The reason for the attack on the deceased by the accused was that the accused had borrowed the deceased's shoes which he was refusing to return to him. This misunderstanding degenerated into a fight. They were separated by PW1 and the accused went away.
2. The accused subsequently returned and without any provocation whatsoever, stabbed the deceased on the head and ran away. The knife got stuck on the deceased's head. It could not be pulled out.

1. The deceased could not be treated in a local hospital and had to be taken to a hospital in Pretoria (S.A.) but died on 9th March 2002 as a result of the injury he sustained.

[15] In sentencing the appellant, the trial court considered that even though he was convicted of culpable homicide, the circumstances attending the commission of the offence called for a very severe sentence. He regarded the case as clearly distinguishable from the ordinary case of culpable homicide. In particular, the accused had attacked the deceased when peace had been restored, without any provocation "with his full might" with the result that the injury inflicted could not be treated in a local hospital and the deceased had to be transferred to a hospital in Pretoria (South Africa). On appeal, this Court took the view that this was an extraordinarily serious case of culpable homicide, almost crossing the threshold of culpable homicide into murder. The sentence of 10 years was confirmed.

[16] **Musa Kenneth Nzima v Rex** Criminal Appeal No. 21/07 was another case of culpable homicide. A drunken fracas ended in the stabbing by the appellant of a 19 year-old man in the abdomen. He died later in hospital from the wound. The appellant was charged in

the High Court with murder. He pleaded guilty to culpable homicide which was accepted by the Crown. He was sentenced to 9 years' imprisonment. In his appeal to this Court solely against his sentence, he complained that the sentence was unduly severe as to induce a sense of shock.

The facts of this case were that in the afternoon of 15th March 2003, two rival groups of young men had been drinking and most of them were drunk. As it often happens in such gatherings, an altercation erupted between the two rival groups but eventually peace was restored without any incident. However, shortly after midnight on that day (i.e. 16th March 2003) the appellant and one other were proceeding home when they came across the deceased and another. The altercation of the previous afternoon was soon revived. The appellant and the deceased started to fight. When the deceased realised that he was having the worst of the exchanges, he called for help from his companion who went to his aid by striking the appellant on his back with what was described as a "wire aerial". At this point the appellant drew out a knife from his pocket and stabbed the deceased once in his abdomen. The appellant fled. The next day the appellant handed himself over to the police. He was kept in custody for about one month before he was released on bail. The deceased died later in hospital from his wound.

[17] At his trial in the High Court, the appellant said he was drunk, so also was the deceased. He said he was very sorry for the tragedy because the deceased was a relative of his as well as his neighbour. In considering an appropriate sentence to pass on the accused, the trial Judge weighed both the mitigating and aggravating factors. He took into consideration the fact that the accused was a relatively young man of 30 years and a first offender. He was drunk when he committed the crime and he had been hit on the back by the deceased's companion with a "wire aerial". On aggravation, the trial

Judge said that there was no knife on the deceased and further, that the appellant showed no remorse as he claimed that he was not to blame for the death of the deceased. The learned Judge also said that there were three stab wounds all inflicted on the deceased's abdominal region.

During the hearing of his appeal, **Tebbutt J.A.** writing the judgment of the Court held that the learned Judge erred in the facts he considered to aggravate the offence. In particular, the Judge erred when he took the view that there were 3 stab wounds in the abdominal region of the deceased. He had misread the post-mortem report. Two of the wounds were not made by the accused. He also erred when he held that the appellant showed no remorse. The record showed that he did. This Court held that by relying on these erroneous statements as constituting aggravating factors the learned Judge misdirected himself.

[18] Giving judgment this Court once again bemoaned the unbridled use of knives in drunken disputes and brawls, particularly between rival groups of young men. It reiterated the view that the only way in which the courts can attempt to curb this tendency was by imposing sentences of sufficient severity to deter this practice. That notwithstanding, **Tebbutt J.A.**, said the courts ought in appropriate cases to temper the severity of the sentences they would otherwise impose, in order to take account of human frailties. In sum, each case must be decided on its own merits and therefore a benchmark of a certain number of years imprisonment as an indication of the court's aim to ensure severity in sentencing in cases where knives are used and lives are in consequence lost, without individualising the facts of the case and the personal circumstances of the offender, is not an appropriate approach to sentencing. He quoted the well-known dictum of **Holmes J.A.** in the

South African case of **S. v. Rabie** (1975) (4) S.A. 885 (A) to buttress his point:

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.” He also quoted with approval the caveat of **Corbett J.A.** in the same case when he cautioned that a judicial officer should not approach a punishment in a spirit of anger, “nor should he strive for severity; nor, on the one 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.” He said that

it would appear that a benchmark of 9 years imprisonment seemed to have been applied. He expressed some disquiet that in all those 9 cases “scant weight seems to have been given to the individual circumstances of either the facts or the offender, quite apart from the question of whether 9 years is a condign period of imprisonment for offenders convicted of culpable homicide.”

[19] There are obviously varying degrees of culpable homicide offences. As noted above, in the case of **Bongani Dumsani Amos Dlamini v Rex** 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. It is certainly not one to be imposed in every such conviction.

In the Botswana case of **NTESANG v. THE STATE** (2007) 1 BLR 387 (C.A.) at 390, **Lord Coulsfield (J.A.)** writing the judgment of the Court said:

“One of the fundamental principles of justice in sentencing is that the court should strive to impose the right sentence for the particular circumstances of the case. On the one hand, it has always been recognised that it is salutary for the courts to aim at a measure of uniformity in sentencing, whenever this can reasonably be done. There is, inevitably a degree of tension between these principles and it is the duty of the court to try to reach a just sentence by giving each the weight which seems proper in the particular case.”

It is instructive to note that Lord Coulsfield J.A. sat with Grosskopf J.A. and Ramodibedi J.A. (now Chief Justice of Swaziland).

[20] A benchmark of a number of years imprisonment in culpable homicide convictions may be justified in respect of substantially and similarly circumstanced accused persons. There is no gainsaying the fact that no two cases are factually the same. Hence, similarity of sentences without a careful consideration of the peculiar circumstances of the offence may conduce to a serious miscarriage of justice. Judicial officers may do well to adjust an apparent benchmark down to reflect the circumstances of the offence, the offender and the expectations of society.

[21] After a very careful and anxious consideration of the case in hand and guided by the authorities I have reviewed above, I am persuaded that the sentence of 10 years imprisonment passed on the appellant is “disturbingly inappropriate” and ought to be reduced. At the time of her conviction, the appellant was about 36 years of age. She has three minor children and even though the deceased was her boy friend they lived together. Her evidence was

that the quarrel that led to the tragedy was sparked off by the deceased accusing her of deliberately setting fire to his house. Without any consideration for the accused or her children he pummelled her. This case epitomises one more pathetic and sordid saga of domestic violence being unleashed on a hapless woman by her supposed lover, inebriated by liquor. Often, this results in an unnecessary loss of life as happened in this case. Obviously, the death of any human being from unnatural causes is a very serious matter, for death is too finite. It evokes a justifiable feeling of society's anguish and disapprobation.

[22] It is clear from the learned Judge's evaluation of the appellant's defence during her trial that he showed considerable scepticism about it. First he said, in my opinion, quite unfairly that she should count herself lucky that the Crown accepted her plea of guilty of culpable homicide. In his view, the crime savoured more of murder than culpable homicide. On the facts, the trial Judge was wrong in that view. Crown Counsel had magnanimously conceded that but the accused person's admissions in the statement of agreed facts, the Crown would have been hard put establishing the identity of the assailant of the deceased. She had no counsel but she co-operated with the court and made a clean breast of what had actually happened. She herself walked to the community police and reported to them the stabbing. Viewed with some charitable disposition, one could understand her apprehensions when she was confronted with the murderous intentions of a drunken person. She may have acted on the spur of the moment in sheer panic. It is in that context that she regarded what she did as self-defence. Again, her lack of help from counsel may have accounted for her admission, on the promptings of the trial Judge, that there were two stab wounds on the deceased. The post mortem report stated an "abrasion over left frontal region and penetrating wound over front of chest right upper region". The Oxford Dictionary defines abrasion as "a long narrow

superficial wound in the skin". There is no evidence how the deceased came to suffer that injury. So even though it was on the deceased body the trial judge had no evidence to hold it against the appellant. In any event, negligence is sufficient for the fault element in culpable homicide.

[23] For the above reasons, particularly in light of the authorities I have reviewed above, I am firmly of the opinion that the sentence passed on the appellant by the trial judge was disturbingly inappropriate. I will set aside the term of 10 years and substitute a period of 6 years.

[24] **"COMMENCEMENT OF SENTENCES"**

After the *court a quo* had imposed the sentence of 10 years imprisonment on the accused the following dialogue between Crown Counsel and the learned trial judge appears at page 11 of the record:

CC: "Is it back-dated?"

Judge: "No"

CC: "As the court pleases."

Before the promulgation of the Constitution on 26th July 2005, the matter of back-dating of sentences was regulated by section 318 of the Criminal Procedure and Evidence Act No. 67/1938 as amended (see P. 49/1964). It reads:

"Subject to sections 300 (2) and 313, a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced unless the court, on the same day on which the sentence is passed, expressly orders

that it shall take effect from some day prior to date on which it is pronounced.”

[25] In the case of **ROBERT MAGONGO v. REX** (Appeal Case No. 33/00) the Court discussed the obligations of a trial court in regard to the back-dating of sentences when an accused person has been kept in custody awaiting trial. Three scenarios emerged. The trial court could order that the sentence passed be back-dated or it could specifically order that the sentence be not back-dated or it could simply not mention it at all. This Court said it had become customary in this jurisdiction to backdate custodial sentences to the date of the accused person’s arrest. In another case, **MANDLA N. MATSEBULA v. REX** (Appeal Case No. 6/02) the Court made similar remarks and confirmed that over the years this jurisdiction had developed a consistent practice that, where appropriate, sentences are backdated to the date of the arrest of an accused. It explained that the practice developed, no doubt, because of the lengthy delays to which criminal trials are so often and so regrettably subject. The practice was to avoid the perhaps unanticipated prejudice of pre-conviction incarceration per incuriam not being taken into account by the sentencing Judge. Obviously, by back-dating sentences, a court ensures that an accused is not unfairly penalised because of the lengthy periods of pre-trial incarceration. It must be noted that section 318 of the Criminal Procedure and Evidence Act, referred to above, specifically empowers a court to direct that the sentence of imprisonment it imposes on an accused should take effect from the day it is passed.

[26] With the passing of the Constitution the whole issue of the commencement of sentences must be reconsidered. Section 16 (9) of the Constitution provides:

“Where a person is convicted and sentenced to a term of imprisonment for an offence, any period that person has spent in lawful custody in respect of that offence before the completion of the trial of that person shall (my emphasis) be taken into account in imposing the term of imprisonment.”

It must be emphasised that section 16 (9) comes under Chapter III of the Constitution which deals with the “Protection and Promotion of Fundamental Rights and Freedoms.” In my opinion, by putting section 16 (9) in Chapter III, the framers of the Constitution meant to give it added value. Indeed they ordained by section 14 (2) of the Constitution that “it shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government....”

[27] Today, the commencement of sentences has taken a new urgency. It is no longer a matter of practice. The sentencing court is enjoined by the Constitution to take into account the accused person’s pre-trial incarceration. It is still true that sentencing is generally, a matter governed by the discretion of the court. But in my opinion Section 16 (9) of the Constitution has effected a paradigm shift in the trial court’s discretion in sentencing.

[28] Under the Constitution, it is no longer permissible for a trial court not to take pre-trial incarceration into account when imposing a custodial sentence on an accused person. The accused person becomes entitled *ex debito justitiae* to be given credit for the pre-trial incarceration. The only question is, how does the court do that? The section does not use the word “back-date”. There is a presumption that where a new piece of legislation is enacted in place of an old one the law-giver must have known of the existing law. It is legitimate therefore to say that the framers of the Constitution knew how pre-trial incarceration was dealt with before

26th July 2005. The present section 16 (9) is obviously remedial and must be given a liberal interpretation which achieves the aim of trial courts taking into account pre-trial incarceration of accused persons. Pre-trial incarceration, though a matter of legal necessity, must be regarded as an aberration in the criminal justice systems. Modern notions of justice are such that fundamental rights and freedoms of a person should not be frittered away. In my view it will not be an adequate response to section 16 (9) for a trial judge to impose a sentence without specifically showing on the record how he upheld that imperative in section 16 (9). The most visible way of doing this, is to order that the period of pre-trial incarceration be deducted from the sentence imposed on the accused. In practice, evidence is not readily available to a trial court when an accused person will be released from jail on account of his having completed serving his sentence.

[29] Under the old law, a sentence is to take effect from the day on which it is pronounced unless the court expressly orders that it shall take effect from some day prior to that on which it was pronounced. Now it is my opinion that the trial court must order the deduction of the pre-trial incarceration from the sentence imposed, or he may award a figure and say that but for the fact that he had taken into consideration the accused person's pre-trial incarceration, he/she would have been given a higher term of imprisonment. This second option smacks of disingenuity and is for that reason, unsatisfactory. As **Lord Hewart C.J.** said in **Rex v. Sussex Justices ex-parte McCarthy** (1924) 1 KB 250 at 259, "it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done." Where the trial court gives no indication that he applied his mind to section 16 (9), it leaves room for the real possibility that he acted per incuriam.

[30] In *casu*, the trial Judge declined the invitation by Crown Counsel to consider ordering the back-dating of the appellant's pre-trial incarceration, by a simple "No". There is a no indication that he actually took that pre-trial incarceration into account as is required of him under section 16 (9). It is clear that the trial Judge approached the appellant's punishment in a spirit of anger. This is an error.

[31] I have already set aside the appellant's sentence of 10 years imprisonment and substituted a sentence of six (6) years. This sentence of six (6) years' imprisonment should be back-dated to 17th October 2007 when she was taken into lawful custody pending her trial. The plea for the payment of a fine is not appropriate in the circumstances of this case and it is refused.

The appeal is, to the extent of the changes made in the sentence, allowed. The prison authorities are to note these changes and act accordingly.

Delivered in open court on 27th May 2010.

DR. SETH TWUM

JUSTICE OF APPEAL

I agree: M.M. RAMODIBEDI

CHIEF JUSTICE

I agree: I.G. FARLAM

JUSTICE OF APPEAL