



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 251/08

In the matter between:

REX

v

MBONGISENI DOUGLAS FAKUDZE

CORAM

FOR THE CROWN

: Q.M. MABUZA -J
:
: MISS Q. ZWANE OF THE
: DIRECTORATE OF PUBLIC
: PROSECUTIONS
:
: MR. B.J. SIMELANE OF BEN
: J. SIMELANE & ASSOCIATES

FOR THE ACCUSED

JUDGMENT
02/03/2010

[1] The accused herein was originally indicted for the offence of murder; it being alleged that on or about the 24th June 2008 at or near Ngwenyaboya area in the

Lubombo region he unlawfully and intentionally killed Notsile Fakudze.

- [2] At the hearing of the matter he pleaded guilty to the lesser crime of culpable homicide. The Crown accepted the plea. A statement of agreed facts was then read into the record and filed as Exhibit A. The post-mortem report was filed by consent as Exhibit B.
- [3] The statement of facts revealed that the deceased was the biological daughter of the Accused. She was two years old when she met her demise. On the day she died, her natural mother Gugu Busisiwe Khanya and the Accused were getting ready to go to bed at around 9.00 p.m. The deceased requested her mother to take her outside as she wanted to relieve herself. When they came back inside the house the deceased defecated on herself.
- [4] The Accused woke up the deceased who was sleeping on a mat and began beating her with a doll asking her why she was relieving herself inside the house. He stopped beating her up with the doll and beat her with fists and open hands, knocked her down onto the floor, and immersed her in water which choked her in an attempt to wash away her blood and faeces.

- [5] The deceased was bleeding from her nose and mouth. The deceased's mother attempted to stop the accused from beating the deceased but she failed. The accused eventually threw the child on top of Gugu her mother and the child died instantly in her arms. The Accused thereafter instructed the deceased's mother not to divulge that he had assaulted the child but should say that she died from a seizure of fits.
- [6] The Accused now concedes that the death of the deceased was caused by his negligent act of excessive chastisement of the deceased. He further admits that there was no intervening cause (***novus interveniens***) between his unlawful action of excessively chastising the deceased and the death of the deceased.
- [7] The post-mortem report revealed that the deceased died due to an injury to the head. The following ante-mortem injuries were found on the top of her head by the pathologist: contusions of 5 x 3 cms, 3 x 2 cms and 3 x 1 cms plus a lacerated wound of 1 x ½ cms on the middle portion of the inner side of the upper lip.
- [8] The pathologist did not give evidence in order to enlighten the Court with regard to what weapon

actually caused the injuries on the deceased's head. Neither was the mother to the deceased called to give evidence. She too would have enlightened the Court in regard to many unanswered questions lingering in the Court's mind. In fact the Court was not given a satisfactory answer as to why there were no witnesses to give evidence. True justice is never properly done when it is hurriedly dispensed with.

[9] In passing sentence in this case I am passing through a dark tunnel with my eyes blindfolded and my hands tied behind my back. There are insufficient facts to assist the Court do justice.

[10] Mr. Simelane in mitigation has submitted that at the time the Accused committed the offence he was 20 years old. He had three children; the deceased being the second born child. The Accused was at the time employed by US Distillers where he held an important position in the water treatment section. He earned E1,500.00 per month.

[11] Mr. Simelane submitted that the Accused over reacted because the deceased did not do what was required of her. The evidence in the statement of agreed facts is not very clear. For instance the agreed facts state that

the child was taken outside to relieve herself. When she came back inside she continued to defecate on herself. The statement goes on to state that the Accused woke up the deceased who was sleeping on a mat and began beating her... asking her why she was relieving herself inside the house. It seems to me that the deceased had a runny tummy; what would enrage a parent about this to the point of overreacting. Can a child of two talk?

[12] Mr. Simelane submitted that the Accused was remorseful even though he tried to cover up what he had done by persuading the deceased's mother to lie for him and to say that the deceased had died from seizure of fits. I am not certain as to how remorseful he is because he did not give any oral evidence in mitigation to enable the Court to form its own impression as to how truly repentant he is. What I believe is that he will have to live with his conscience for the rest of his life that he caused his own daughter's death. I agree with Mr. Simelane that even the community that he will return to after he has served his sentence will forever look upon him as a murderer.

[13] In passing sentence I have to take into account the interests of society. Society is appalled when children

are severely beaten; more so when they are brutally killed or tortured before they are killed. Children are helpless and cannot fight back. This one was too small to run away; even if she had tried to run away it was dark outside. She looked up to her father to protect her. Her mother was there; she also failed to protect her. In fact the mother should have been co-charged with the accused for negligently allowing the deceased to be beaten to death while she stood by and looked on.

[14] Mr. Simelane has correctly cautioned that the sentence I mete out must be tempered with mercy. That I should be a judge first and a mother last.

[15] I am persuaded by the fact that the deceased's death will haunt the Accused forever because she was his daughter. However, on the other side of the scale she was young, had a whole future ahead of her, she suffered pain before she died.

[16] The Accused is a first offender.

[17] The Accused is sentenced to 10 years imprisonment without an option of a fine. The sentence is backdated to 24/06/2008.

Rights of appeal and review explained.

Q.M. MABUZA-J