

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 313/08

In the matter between:

REX

v

JOSEPH MACOBHO SHIBA

CORAM

Q.M. MABUZA

FOR THE CROWN

MR. T. VILAKATI OF
THE DIRECTORATE OF PUBLIC
PROSECUTIONS

FOR THE ACCUSED MR. S. BHEMBE

JUDGMENT
11/02/2010

[1] The accused herein was indicted with the crime of murder it being alleged that on or about the 10th April 2008 at or near Mpolonjeni area in the Lubombo Region the accused unlawfully and intentionally killed Jibho Lucky Dlamini and did thereby commit the crime of murder.

[2] When the charge was put to him he pleaded not guilty. His attorney confirmed the plea as per instructions.

[3] The Crown led the evidence of seven witnesses. At the close of the Crown case the defence tendered a plea of guilty to culpable homicide as the Crown had failed to prove intention on the part of the accused. The Crown wisely accepted the plea as in the Court's opinion it had not proved the intention. The Court thereafter convicted the accused of the crime of culpable homicide.

[4] The facts of the case were disclosed by PW1. PW1, Celucolo Celani Dlamini testified that on the 10th April 2008 the day on which the deceased met his death he and the deceased were enjoying some drinks. They started drinking at 4.00 p.m. They first drank at Ka Shoba Tavern and then in the evening proceeded to a Ka Shiba homestead at Mpolonjeni. They went into the hut where alcoholic brew was being served and purchased some brew.

[5] While they were drinking the wife to the accused, Phumzile Dlamini who was also in the hut asked to speak to the deceased Jibho Lucky Dlamini. He complied and left the hut and went outside. He was gone for sometime and PW1 left the hut and went outside to tell him that they should leave as it was late. The

deceased was talking to the accused's wife. The deceased replied that he was coming; PW1 returned to the hut. Later, PW1 went outside and talked to the deceased prevailing upon him to leave. The deceased instead instructed PW1 to buy some more brew and to find a container in which to pour the brew while he finished talking with the accused's wife. PW1 did as instructed.

[6] PW1 testified that the accused was also in the drinking hut. He sent his daughter to call her mother, his wife. While the child had gone to call accused's wife, accused left the hut and went home. Accused's wife and the deceased entered the hut; but left soon thereafter the deceased accompanying the accused's wife to accused's home. After sometime after they had left, PW1 also left and caught up with them before they reached accused's home. PW1 asked the deceased where he was going to as it was late and they had to go home. The deceased answered that the accused wanted tobacco and sent both him and the accused's wife to purchase it. Along the way when they were about to enter the main road the accused assaulted his wife with a knob stick. When PW1 tried to intervene the accused instructed him to get out of the way as he would get injured and PW1 did so. Meanwhile the accused continued to beat up his wife and when PW1 tried to intervene the second time the accused pushed him away and he fell. The deceased tried to help PW1 up but all that he saw was blood oozing from the deceased. PW1 did not know what had happened.

[7] After the deceased was injured, the accused's wife shouted to the accused that he had injured the deceased. When PW1 tried to go near to the deceased the latter said he should keep away from him because the accused had already killed him. PW1 did so.

[8] The accused was arrested on the night of the 10th April 2008 and charged with the murder of the deceased. The knife which was used in the commission of the offence was handed over by the accused to the police. It was handed in as exhibit 1. The post-mortem report was handed in by consent as exhibit A. The photographs of the deceased were handed in as exhibit BI- 4.

[9] The Crown was unable to prove intention. From the evidence adduced by the Crown it is clear that there was provocation of the accused by the deceased in making advances to the accused wife. The deceased was clearly the author of his own misfortune. Clearly the accused cannot be found guilty of murder; but of culpable homicide.

[10] After the accused tendered the plea of culpable homicide at the close of the Crown case; the Crown having accepted same; the accused was acquitted of murder and found guilty of culpable homicide.

[11] I invited Mr. Bhembe to address me in mitigation on behalf of the accused.

[12] Mr. Bhembe asked the court to show mercy because the accused was a first offender and in all his fifty five years he had never fallen foul of the law. That showed that the accused was a law abiding citizen. The accused was remorseful as the deceased was his neighbour and his death would haunt him forever.

[13] The accused had already suffered a set back because his home had been burnt to the ground after the incident of the death of the deceased. The accused has four minor children; three of them were unable to go to school since his incarceration. The accused earned a living by building houses before his arrest. His health is ailing. He was arrested on the 10th April 2008; and has been in custody since then.

[14] Whilst I appreciate the accused's circumstances I must balance them with other aspects of the case. The accused took someone's life. His relatives lost a family member who cannot ever return to them. Everybody has a right to life and no one has a right to take that right away. I must also take into account the interests of society. Society expects the courts to punish people who break the law and commit such offences. Society also expect the courts to mete out sentences that will serve as a

deterrent to other would be offenders.

[15] It is true that the accused was provoked by the fact that the deceased was dallying with his wife but that was no excuse to take the law into his own hands by taking the deceased's life. In Siswati culture there are built in mechanisms as what a husband does to a wayward wife; without the necessity of taking someone's life. She is taken to her relatives to be warned.

[16] I sentence the accused to ten years imprisonment without the option of a fine; three years of which are suspended for one year on condition the accused is not convicted of any offence of which assault is an element.

The sentence is backdated to the 10th April 2008. The right of appeal explained to the accused.

Q.M. MABUZA-J