

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 13/07

In the matter between:

REX

VS

- 1. BHEKI MASUKU**
- 2. GCINA MASUKU**

CORAM

MBC MAPHALALA, J

FOR CROWN

MS. Q. ZWANE

FOR DEFENCE

Mr. LEO GAMA

JUDGMENT
1st MARCH 2010

[1] The accused were charged with the crime of Murder it being alleged that upon or about the 24th March 2006 and at or near Madonsa Area in the Manzini Region, the accused persons acting

jointly and in furtherance of a Common Purpose unlawfully and intentionally killed Lopes Mondlane.

[2] Both accused pleaded guilty to Culpable Homicide, and the Crown accepted their plea.

[3] The Crown applied to hand into Court by consent a Statement of Agreed Facts signed by both the Crown and Defence Counsel. The Statement was read out in Court and translated from English to Siswati.

[4] The Statement reads as follows:

"1. It is agreed as follows: The accused persons are guilty of the Crime 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, accused No.1 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 ensued and the two started fighting.

2.2. In the course of the fight the deceased was able to overpower the 1st accused and sat on top of accused and strangled him. Accused No.2 arrived who was in a church service nearby was called by people who were watching the fight, to come and stop the fight. When accused No. 2 arrived he found the deceased on top of accused No. 1 and strangling him. Accused No. 2

kicked the deceased on the head and the deceased fell off accused No. 1.

2.3. Accused No. 1 got up and he together with accused No. 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 No. 1 and 2 realized 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.

5. It is agreed that the report of the Post-Mortem examination be submitted as part of the Crown's case before this Honourable Court.

6. The Crown accepts the plea of guilty of accused No. 1 and No. 2 respectively on the charge of Culpable Homicide.

[5] The Crown further applied to hand in Court, by consent the Post-Mortem Report; it confirms that the deceased died due to Head Injuries caused by the repeated and continued physical assault to the deceased's head.

[6] The Statement of Agreed Facts does establish beyond reasonable doubt that the accused committed the offence of Culpable Homicide.

[7] It is Common Cause that the Second Accused found the First Accused and the deceased fighting, and he kicked the deceased on the head and he fell to the ground. Both accused started assaulting the deceased with fists on the face, head and also kicked him all over the body for a while continuously and repeatedly until he was helpless and unconscious. When they realized what they had done, they left the deceased on the scene to die.

[8] Self-defence is not available to the accused because the force used was excessive and not commensurate with the attack. Moreover, even when the deceased had fallen to the ground, they continued to assault the deceased with fists and kicks all over the body repeatedly for a while until he was helpless and unconscious. A reasonable man in their position would not have continued assaulting the deceased repeatedly even though he had fallen to the ground.

[9] In the case of **R. v. John Ndlovu 1970-76 SLR 389** at **390**, **Nathan C.J.** stated

"In the case of **S. v Ntuli 1975 (1) S.A. 429 (A)** which was followed by the recent case of **S. v. Motleleni 1976 (1) SA 403 (A)** it was said that a person may apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack. The test whether the accused acts reasonably in defence is objective. But the force used must be commensurate with the danger apprehended; and if excessive force is used the plea of self-defence will not be upheld."

[10] In the **Appeal of Shiba v. Rex 1977-1978 SLR 165 (CA)** at **167 B** and **C His Lordship Smit J.A.** stated:

"The law with regard to self-defence requires that a person should rather flee than kill his assailant where he can save himself by flight, but that no one is expected to take flight to avoid an attack, where flight would not afford him a safe way of escape. A person is not bound to expose himself to the risk of a stab in the back when by wounding or killing his opponent he can secure his own safety. Furthermore, in considering the question of self-defence the Court must endeavour to imagine itself in the position in which the accused was (**R.v. K 1956 (3) SA 353 (A)**). The Court must be careful to avoid the role of the armchair critic, wise after the event, weighing the matter in the

secluded security of the Court room (**Ntanjana v. Vorster** and the **Minister of Justice 1950 (4) SA 398 (C) at 406 A).**"

[11] At **page 168 B, C, D and E, Smit J.A. Further** stated:

"It is well established in our law that a person is justified in killing in self-defence, not only when he fears his life is in danger, but also when he apprehends grievous bodily harm... The danger may in truth not have been great, but the jury must consider whether a reasonable man, in the circumstances in which the accused was placed, would have thought that he was in great danger. A weapon less dangerous than the one used may have been at hand which would have sufficed to ward off the threatened assault but the jury must not expect too nice a discrimination or too careful a choice of weapons from a man called upon in a sudden emergency to act promptly and without opportunity for reflection.

The test whether the appellant exceeded the bounds of self-defence is an objective one. But this very objectivity demands ... that the Court considers all the surrounding factors operating in the appellant's mind at the time she acted, and avoid the role of the armchair critic Men faced in moments of crisis with a choice of alternatives are not to be

judged as if they had both time and opportunity to weigh the pros and cons The self-defender is entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril."

[12] Applying the objective test to the facts of the present case, it is evident that a reasonable man in the position of the accused would not have acted the way they did.

[13] In the circumstances, the accused are convicted of Culpable Homicide.

[14] In mitigation, the Defence Counsel submitted that the accused should be given suspended sentences on the grounds that they were young when they committed the offence; in addition, that they are first offenders and have also pleaded guilty to the charge. It has further been submitted that the first accused was drunk when he committed the offence and could not appreciate the wrongfulness of his actions.

[15] Defence Counsel also submitted that it has taken four years for the accused to be brought for trial; that keeping suspects in suspense is a form of punishment. This submission overlooks the fact that the accused were out of custody and going about their businesses.

[16] The accused are sentenced to nine (9) years imprisonment without an option of a fine two of which are suspended for three years on condition they are not convicted during the period of suspension to an offence in which violence is an element. The sentence is with effect from 1st March 2010.

M.B.C. MAPHALALA
JUDGE OF THE HIGH COURT OF SWAZILAND