



IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Criminal Case No: 153/03

In the matter between

REX

Versus

NDUMISO FAKUDZE

1ST ACCUSED

SIBUSISO FAKUDZE

2ND ACCUSED

FUTHI FAKUDZE

3RD ACCUSED

Neutral citation: *Rex v Ndumiso Fakudze & 2 Others (153/03) 2014*
[SZHC] 361 (8 October 2014)

Coram: M. S. SIMELANE J

Heard: 6 October 2014

Delivered: 8 October 2014

Summary: Criminal procedure – Culpable Homicide – statement of agreed facts – Accused found guilty and convicted on a charge of Culpable Homicide.

Judgment

SIMELANE J

- [1] The three Accused persons (hereinafter referred to as the Accused) pleaded guilty to the charge of Culpable Homicide. The charge alleged that upon or about 10 February 2003 and at or near eNtandweni area in the Lubombo Region, the said Accused persons, and each or both of them acting jointly and in furtherance of a common purpose did wrongfully, unlawfully and negligently kill one Jabhisile Fakudze. The defence Counsel Attorney J. M. Mzizi confirmed the plea and the Crown represented by Attorney K. Mngomezulu accepted the plea.
- [2] The Crown thereafter intimated to the Court that they had come to an agreement with the Accused and that they had prepared a statement of agreed facts which was duly signed by both Counsel.

[3] Mr K. Mngomezulu then read into the record the statement of agreed facts as well as the post mortem report which were handed in Court by consent and marked Exhibit A and B respectively

[4] The statement of agreed facts is to the effect that :

“1. The Accused persons are Ndumiso Fakudze, Sibusiso Fakudze and Futhi Fakudze (thereinafter referred to as Accused Number 1, 2 and 3 respectively).

2. The Accused person’s stand charged with the offence of Culpable Homicide in that upon or about the 10th February 2003 and at or near eNtandweni area in the Lubombo Region, the said Accused persons, and each or both of them acting jointly and in furtherance of a common purpose did wrongfully, unlawfully and negligently kill one Jabhisile Fakudze.

3. The Accused persons now admits as follows:

3.1 On the 9th February 2003 at eNtandweni area they took turns to assault Jabhisile Fakudze a female minor with a leather whip after suspicion that she stole money.

3.3 That after the assault, the deceased Jabhisile Fakudze was then caused to sleep on a sleeping mat with her hands bound together/tied.

3.4 That on checking up on her next day it was discovered that she was dead.

4. It is further admitted and agreed that:

4.1 The Accused person's conduct was unlawful and negligent in the circumstances.

4.2 The deceased died as a result of their unlawful conduct, *no novus actus intervenes*.

4.3 They did not have intention to kill the deceased and were merely meting out discipline on her.

4.4 The cause of death was hemorrhage as a result of multiple injuries.

4.5 The post mortem report be handed in as part of the evidence.

4.6 The leather whip be also handed in as part of the evidence.”

[5] On 13 February 2003, a postmortem examination was conducted on the body of the deceased and the police pathologist Doctor R.M. Reddy opined that the deceased died as a result of Haemorrhage due to multiple injuries. The following antemortem injuries were observed by the Doctor:-

“1. Contusion scalp on reflection frontal region 5 x 2.7 cms area subdural haemorrhage over brain right side 50 ml.

2. **Contused abrasion over left shoulder 5 x 1.2 cms area right shoulder 5.2 x 5.3 cm area right cheek 5.2 cm area.**
3. **Intermingled abrasions with contusions over back of trunk lower third right, buttocks, thighs back and outer, front aspects present 53 x 40 cms area varying in size (1.2 cm to 7.2 cms x 0.7 cm to 13 cms) effusion blood in soft tissues about 950 ml.**
4. **Abrasion over left leg back 9 x 0.7 cms area.**

[6] The leather whip that was used in the commission of the offence was also handed in and admitted in evidence as Exhibit C.

[7] In view of the evidence before this Court as well as the guilty plea advanced, the Court is convinced that the Crown has proved beyond reasonable doubt the commission of the offence of Culpable Homicide. I accordingly convict the Accused persons of the offence of Culpable Homicide.

[8] The task of the Court at this juncture is to impose an appropriate sentence that brings to equilibrium the triad. The *triad* is the seriousness of the offence, the interest of society and the interests of the Accused as well as his personal circumstances.

[9] It is pertinent for me to state that all three Accused persons did not give evidence in mitigation, Mr. Mzizi made oral submissions in mitigation.

[10] Accused 1 in mitigation stated that he is a first offender. He pleaded guilty to the offence. He was twenty-three years old at the commission of the offence. He has realized that his act was unlawful and is remorseful. He is married and has three children who are all dependent on him as a teacher as his wife is not employed. He is a guardian to his sister's child who is twelve years old and schooling. He pleaded for lenience.

[11] Accused 2 in mitigation stated that he is a first offender and was nineteen years old at the commission of the offence. He pleaded guilty and did not waste the Court's time. He is remorseful. He is thirty years old now. The deceased was his sister and the incident will haunt him for the rest of his life. He is sickly, is HIV positive and suffers from Tuberculosis. He has two children aged seven and four years. The first born is schooling and doing Grade 2. He takes care of his brother who is an amputee and seven other dependents. He is employed at a farm at Malindza.

[12] The third Accused stated in mitigation that she is a first offender and pleaded guilty to the offence. She told the Court that she was nineteen years old at the commission of the offence and is now aged thirty years. She is a sister to the deceased and the killing of her sister will haunt her for the rest of her life. She is a house wife. She has three children, the eldest is twelve years old and the youngest is five years old. Her husband is not employed, he is sickly and wheelchair bound. She is the sole bread winner in her family. The five year old child

was diagnosed with kidney cancer and travels to Johannesburg after every two months for chemotherapy. She further stated that the five year old child has one kidney as the other kidney was removed. The Accused further told the Court that she is asthmatic.

[13] Mr. Mzizi further told the Court that all three Accused persons spent eight months in custody before their release on bail.

[14] Having carefully considered all the factors *ante*, it is not in dispute that the offence of Culpable Homicide is very serious as it involves the taking away of another persons life which can not be resuscitated once lost. There must be instilled in this nation the sacredness of life as guaranteed by the Constitution Act.

[15] The Accused used a leather whip in beating the deceased in an endeavour to instill discipline on the deceased. Multiple injuries were inflicted on the deceased as per the postmortem report. It is a fact that the Accused went to the extremes when beating the deceased.

[16] I am of the considered view that there was no justification for the Accused to beat the deceased so severely, cause her to sleep on a mat with her hands tied or bound together throughout the night.

[17] I also find that even if it were true that she stole the money it was just unwarranted for all the three Accused to take turns and beat the deceased with such cruelty. The Accused did not bother taking the deceased to the hospital even after realizing the extent of injuries

sustained by the deceased or check on her during the night until the next day when it was discovered that she was dead. I am of the considered view that the Accused were negligent.

[18] I fully agree with defence Counsel Mr Mzizi that the incident will haunt the Accused for the rest of their lives as they killed their sister. This has indeed heavily weighed in my mind.

[19] In my view the interests of the society far outweighs the mitigating factors. I have endeavoured to balance the *triad* and I am mindful of the oft - quoted dictum of Holmes JA in the case of **S V Rabie 1975 (4) SA 855 (A)** where he stated that:

“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.”

[20] Furthermore, in **S V Harrison 1970 (3) SA 684 (A)** quoted in **S V Rabie supra at 861 H-862 A:**

“Justice must be done, but mercy not a sledgehammer is its concomitant.”

[21] The Accused are hereby sentenced to Eight (8) years imprisonment, Three (3) years of which are hereby suspended for a period of Three (3) years on condition that the Accused are not within the period of

suspension convicted of an offence in which violence is an element. Eight (8) months of the sentence is hereby deducted to take care of the period of incarceration before their release on bail.

[22] Rights of Appeal explained to the Accused.

M. S. SIMELANE J
JUDGE OF THE HIGH COURT

For the crown : **Mr. K. Mngomezulu**
For the Accused : **Mr. J. M. Mzizi**