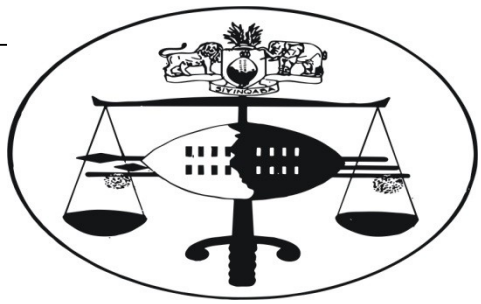

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CRIM. CASE NO. 21/2010**

In the matter between:

REX

VS

MFANIMPELA MALINDZISA

Neutral citation: *Rex v Mfanimpela Malindzisa* (21/2010) [2015] SZHC 155 (24 September 2015)

CORAM **MAMBA J**

HEARD: **13 April, 2015 & 21 September, 2015**

DELIVERED: **24 September 2015**

[1] Criminal Law – offence of Culpable Homicide defined. Unlawful killing failure to realise the risk of death, whether or not the accused ought to have realised such risk.

[2] Practice and Procedure – role of precedent and stare decisis – Hierarchy of Courts – as a general rule lower courts have to follow law and decisions propounded or laid down by higher courts unless such decisions are clearly per incuriam.

[1] The accused has been charged with the crime of murder. The crown alleges that on 06 August 2009, the accused unlawfully and with intent to kill and murder Thulani Nkwanyana, did unlawfully and intentionally assault him and inflict injuries upon him from which injuries, the said Thulani Nkwanyana (hereinafter referred to as the deceased), died on 25 August 2009 whilst at the Pigg's Peak Government Hospital.

[2] Upon arraignment, he pleaded not guilty to the charge. The crown led evidence from four witnesses. In turn, the accused led his own testimony and only one witness on behalf of the defence.

[3] Save for the issue of causation, which I shall deal with later in this judgment, the facts surrounding the assault on the deceased are generally not in dispute and they are as follows:

3.1 The accused and the deceased were relatives. On 06 August 2009 they were both present at a sheeben or drinking place at Eluvinjelweni area in the Hhohho region of Swaziland.

3.2 Prior to 06 August 2009, a misunderstanding between the accused and the deceased had developed whereby the accused person

accused the deceased of having stolen and sold his mobile telephone. The accused also accused the deceased of having stolen and sold another mobile telephone belonging to a certain Mr. Gabela.

3.3 The accused threatened to reveal to Mr Gabela the information he had about the deceased having stolen his mobile cellular telephone. The deceased denied having committed any of these offences.

3.4 On the day in question, the accused started drinking castle milk stout beer at about 8 a.m. whilst the deceased started drinking much later than this. In all, the accused estimated that he had taken about 2-3 litres of this beer and he was drunk. He informed the court though that despite his inebriation, he was still in a position to appreciate logically and accurately what he did and what happened around him.

3.5 The people involved in the drinking, were seated in separate distinct groups. The accused and the deceased had their own separate groups too.

3.6 The deceased, with a beer bottle in hand, approached the accused as he set down drinking beer and confronted him about the allegations pertaining to the theft of the mobile telephones referred to above and an altercation ensued between them. During these verbal exchanges, the deceased poured beer on the face of the

accused and the accused retaliated by hitting the deceased with an open hand on the side of the head. The upshot of this assault by the accused was a fierce and violent fist fight between the two. This occurred in the front of the shop.

3.7 The two proceeded towards the back of the shop, still fighting. The accused hit the deceased near his eye and caused him to fall onto the ground. Linda Trevor Malindzisa, DW2, was the shop assistant at the relevant shop at the time. That is as far as the evidence is common cause goes.

[4] The evidence by the crown is that after the deceased fell to the ground the accused kicked him on numerous occasions as he lay on the ground. PW1, Sibusiso Nkwanyana testified that the accused kicked the deceased several times in the stomach or abdomen and in the groin area. The accused continued with the assault until he was hit with a stone by Gcina Nkwanyana. The accused denied that he ever kicked the deceased in the abdomen or groin, but PW1 was adamant that he did.

[5] It is common cause that after the assault, the deceased was taken to hospital and was admitted there for about a week before he was discharged. According to PW2, Skwanyalala Absalom Nkwanyana, the deceased spent two days at home and because he was still complaining

about abdominal pains he was taken back to hospital and readmitted. He later died on 25th August 2009, about 20 days after the assault by the accused.

[6] Dr. R.M. Reddy (PW3) conducted a postmortem examination on the body of the deceased on 28 August 2009. He concluded that the cause of death was 'due to complications consequent to abdominal injury'. This finding was reached after a histological examination of the tissues done by Dr L.S. Okonda, whose report is dated 20 January, 2010. The postmortem examination report was by consent admitted as exhibit A herein.

[7] Upon the examination of the body on 28 August 2009, PW3 observed or noted *inter alia*, the following ante-mortem injuries on it:

> '2. Contusion below umbilicus 2cm area in the anterior abdominal wall. Loop of small intestine 8.2 x2.7cm area contused on its surface.
>
> 3. Contusion of urinary bladder anterior aspect 5.4cm with 0.4cm rupture. Pelvic, peritoneal cavity contained about 500ml watery fluid present. (blueish black).'

Pw3 testified that the infection had occurred in the urinary bladder and intestine due to the injuries that the deceased had sustained. Pw3 explained that the injury in the bladder and rupture of the intestine had caused blood to be collected in the peritoneal or abdominal cavity and

this had caused or resulted in the infection that was the cause of the death of the deceased.

[8] The accused denied that he ever kicked the deceased. He stated that he only hit him with his fists on his face and chest and nowhere near the pelvic or hip girdle area or region. He stated further, that he had no intention to kill the deceased during the fight.

[9] It is clear from the evidence that DW2 did not witness the whole fight. He only went out of the shop when the fight was raging on at the back of the shop. He also saw Gcina Nkwanyana hit the accused with a stone in an attempt to stop the accused from continuing with the assault on the deceased.

[10] In passing, under-cross examination of PW1, it was suggested that the deceased, had before 06 August 2009 complained of some abdominal or stomach pains. This was denied by PW1. This suggestion to PW1 was not, however, stated by the accused in his evidence. In thus remained nothing more than a mere veiled and vague suggestion by counsel. It is, in other words, no evidence.

[11] Pw1 witnessed and was able to see the whole fight between the accused and the deceased. His evidence is indeed substantially corroborated by the accused person himself; save insofar as it relates to the kicking of the deceased by the accused and the location of those blows. The evidence of PW1 nonetheless finds support in the evidence of PW3, who observed injuries and bruises in the bladder or groin area and abdominal area of the deceased.

[12] From the above evidence, taken holistically, I have no hesitation whatsoever in coming to the conclusion that the accused did in fact kick the deceased as stated by PW1. He caused those injuries in the bladder or intestines that were noted by the doctor who performed the postmortem examination.

[13] Again, in argument, counsel for the accused suggested that the real cause of the death of the deceased was the infection that set in rather than the actual injuries inflicted on him by the accused. This is a quibble really. PW3 clarified that the cause of the infection was due to the nature of the injuries sustained by the deceased. He stated that the rupture of the intestine caused blood to be collected in the peritoneal or abdominal cavity and this caused the infection that ultimately caused the death of the deceased. Therefore the assault or injuries in the groin or bladder area

were the *causa causans* of the death of the deceased. As stated above, those injuries were inflicted on the deceased by the accused. He was thus the legal cause of his death.

[14] In *Rex v Zama Gina, (142/2004) [2010] SZHC 144 (16 September 2010)* this court had occasion to state the following:

> "Was this injury the juridical (criminal) cause of her death or did the delay in receiving medical attention act as an interruption that broke the chain of causation between the blow on the head and the death of deceased?
>
> [13] In the case of **Minister of Police v Skosana, 1977 (1) SA 31 (A)**, Corbett JA (as he then was) said at 34:
>
> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to …the harm giving rise to the claim. If it did not then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem, in which considerations of legal policy may play a part."
>
> Similar views are expressed by *Gordon, CRIMINAL LAW, 2nd Edition at 104* where the learned author states that

"The 'legal cause' …is only the legally significant factual cause and even the legal cause may vary from one branch of the law to another. A may be regarded as having caused a particular injury for the purposes of determining that he is liable to pay damages in delict to the injured person, but it does not follow that he would be regarded as having caused the injury for the purpose of determining whether he is liable to criminal punishment in respect of the occurrence."

And in **R v Mubila, 1956 (1) SA 31 (SR)** on a point closer to the present case, Sir Beadle J at 33, after referring to *Gardiner and Lansdown, Vol. 2*, concluded the discussion or debate as follows:

"…it is clear that there is no obligation on an injured complainant to obtain medical assistance and thus attempt to alleviate the gravity of the wound inflicted upon him. Similarly it seems to me that there can be no obligation upon him to follow rigidly all the advice given to him by his medical advisers if he does seek that assistance, and provided that in disregarding that advice he does not introduce some new danger which would not have existed had advice never been taken at all, his failure to follow that advice can not be a factor which can avail the accused in any argument that the original injury was not the cause of death.

In my view, therefore, the accused is responsible for the death of the deceased. A striking of this blow with a knife was the direct cause of the deceased's death. It is idle to suggest that the cause of death was the deceased's getting out of bed, per se a harmless and normal act. The *causa causans* of death was the striking of this blow with the knife. …all [that] this passage means is that, if the wound inflicted upon the deceased is not one which is intrinsically

dangerous and likely to cause death, and if as a result of some subsequent negligent act of the injured person death occurs therefrom, then the accused can not be held responsible for the death. Here the true cause of death is the negligence of the deceased.

…In this circumstances I can not see that the deceased's failure to follow medical advice and remain immobile can be regarded as sufficient novus actus interveniens to break the chain of causation between the blow and the death. In my view the cause of death was the unlawful blow struck by the accused."

[14] The English Court of Appeal, per Lawton LJ in **R v Blaue [1975] 3 All ER 446** said:

"It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death."

I, respectfully agree with these views and they express the law applicable in this jurisdiction as well."

[15] It now remains for me to determine what crime, if any, is the accused guilty of. I must observe from the outset that counsel for the crown conceded that the crown had failed to establish beyond any reasonable doubt that the accused was guilty of the crime of murder. He argued, however, that the crown had proven that the accused was guilty of the crime of culpable homicide inasmuch as it had established that the attack on the deceased was without justification or excuse.

[16] In *Rex v Ntokozo Mabhalane Hlandze (332/2012) [2013] SZHC 256 (20 November 2013)* this court restated the law on the crime of culpable homicide in the following terms; which I hereby repeat.

> "[15] It was held or ruled by this court that unpalatable or controversial as it may appear or sound, the law in this Country as propounded or laid down by the Court of Appeal in *Annah Lokudzinga Matsenjwa v R 1970-1976 SLR 25* is that Culpable Homicide is the unlawful killing of another human being or person if the accused did not realise the risk of death and it is immaterial whether or not he ought to have done so. This killing need not be shown to have been negligent. See also the decision of this court in *R v Ndumiso Maziya, case 137/2008 judgment delivered on 14 March 2013.*

[16] I reserve my comments on the judgment in *Annah Lokudzinga* case. Suffice to say that, for this court and the lower courts, that judgment states and or lays down the law on what constitutes the crime of Culpable Homicide in this jurisdiction. It is the precedent or authority on that issue and has to be followed. As Lord Scarman stated in **Duport Steels Ltd and Others [1980] 1 All ER 529 at 551:**

'My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law. When one is considering law in the hands of the judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

In our society the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as lawmakers. The common law and equity, both of them in

essence systems of private law, are fields where, subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law. The judges, even in this, their very own field of creative endeavour, have accepted, in the interests of certainty, the self-denying ordinance of stare decisis, the doctrine of binding precedent; and no doubt this judicially imposed limitation on judicial lawmaking has helped to maintain confidence in even-handedness of the law.

But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative

purpose of the statute may the judge select the construction which best suits his idea of what justice requires. Further, in our system the stare decisis rule applies as firmly to statute law as it does to the formulation of common law and equitable principles. And the keystone of stare decisis is loyalty throughout the system to the decisions of the Court of Appeal and this House. The Court of Appeal may not overrule a House of Lords decision; and only in the exceptional circumstances set out in the practice statement of 26th July 1966 will this House refuse to follow its own previous decisions.

Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning MR himself shows, have a genuine creative role. Great judges are in their different ways judicial activists. But the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it

becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.

In the present case the Court of Appeal failed to construe or apply the statute in the way in which this House had plainly said it was to be construed and applied.'

(See also *S v Katamba, 2000 (1) SACR 162 at 166-167*. Then what about my judgment in *R v Sandile Shabangu case 233/2006*, judgment delivered on 07 May 2007 where the court, notwithstanding a long line of cases went headlong or courageously and jettisoned the cautionary rule in sexual cases, one might ask: the answer is that; that decision was correct by default).

…

[24] However, there is no doubt that the killing of the deceased by the accused was unlawful. In *Maphikelela Dlamini v R 1979-1981 SLR 195 at 198D-H* the court stated:

'The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R 1970 – 1976 SLR 25*. The test there laid down is as follows, and I see no

reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah*'s case the law was stated as follows, at 30A: "If the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not … he ought to have realised the risk, since he killed unlawfully".

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah*'s case to which I have referred the then President of this court, Mr Justice Schreiner said: "It has been suggested that a finding that a person must have foreseen or appreciated a risk is not the same as a finding that the person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have". In this statement of the law Caney JA on the same page concurred. Milne JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: "I should like

first of all to associate myself very strongly with the learned President's view that when it is correctly held that a person 'must' have appreciated that his act involved a risk to another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk". I thought it right to mention these matters because for many years to my knowledge *Annah*'s case has been followed in Swaziland and although I share the regret expressed by Mr Justice Schreiner in *Annah*'s case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p29 of *Annah*'s case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah*'s case to which I have referred.'

Isaacs JA concurred and also added: 'My agreement is not to be considered as being an agreement with a departure from Annah's case.'"

See also *R v Dumisa Mabila (276/12) [2014] SZHC 50 (25 March 2014).*

[17] In the present case, it is significant to note that the fatal injuries suffered by the deceased are those that were inflicted on him whilst he was lying on the ground. There was absolutely no excuse or legal justification for the accused to have assaulted the deceased in this manner and to this extent. His actions were thus unlawful. I am also of the considered view that a reasonable man in the position of the accused at the relevant time would have realised that in assaulting the deceased in the manner and to the extent that the accused did, would lead to the death of the accused. The reasonable man would thus have guarded against this eventuality. The accused failed to forsee this and thus failed to guard against it. He was thus negligent for causing the death of the deceased.

[18] Because of the conclusion I have reached in the preceding paragraph, the accused is both guilty of Culpable Homicide as per the law stated by the Highest court in this jurisdiction in *Lokudzinga* (*supra*) and under the conventional common law crime of culpable; based on a failure to foresee that which a reasonable man would have foreseen and taken steps to guard against.

[19] For the foregoing reasons, I find the accused guilty of the crime of Culpable Homicide.

MAMBA J

For the Crown: **Mr. A. Matsenjwa**

For the Accused: **Mr. L. Gama**