

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Case No. 443/2010

In the matter between:

REX

And

THULANI MANKWEMPANE TSABEDZE

Neutral citation: Rex v Thulani M. Tsabedze (443/10) [2017] SZHC 226
(31st October 2017)

CORAM: J,S MAGAGULA J

HEARD: 14th September, 2017

DELIVERED: 31st October 2017

Summary: Criminal law – accused charged with Culpable Homicide – deceased hit with piece of concrete block on back of neck and several times on chest whilst lying on ground – died on spot.

- [1] The accused person is charged with the offence of culpable homicide and part of the indictment reads:

“ Upon or about the 19th September, 2009, and at or near Matsapha Swazi National High School, in the Manzini Region, the accused did unlawfully kill DAVID VILANE”.

- [2] Upon arraignment the accused who did not have a legal representative, pleaded guilty to the charge. In view of the seriousness of the offence the crown elected to lead evidence in proof of the offence.

THE EVIDENCE

- [3] The crown first called the Police Pathologist, Dr Komma Reddy (Pw1) who described himself as a Forensic Pathologist in the Police Department. He holds a Medical Degree from Ismania University in India. He has been working as a Police Pathologist since 2001.
- [4] Dr Reddy informed the court that on the 20th September, 2009 he conducted a post mortem examination on the body of the deceased. During examination he observed a contusion of 3 ½ x 1 ½ centimetres on the left side of the forehead. He further observed an abraded contusion of 3 x 2 centimetres from the Midline and 11 centimetres above the umbilicus.

He also observed an abraded contusion of 5x1 centimetres on the left side of the back which was some 2 centimetres from the midline and 128 centimetres from the heel of the left foot.

There was also another contusion of 2 x 1 centimetres on the right side of the back situated some 10 centimetres from the midline and 121 centimetres from the heel of the right foot.

The Doctor also observed that the left side of the frontal bone and left temporal bone were fractured. Extradural and inter – cerebral haemorrhage was present. There was some 200 millilitres of blood in the pleural cavities and the lungs were congested.

From these observations the Doctor concluded that the cause of death of the deceased was multiple injuries. The Doctor also handed in his Post Mortem Report which is marked Exhibit “P1”.

- [5] The crown then called PW 2, Mr Sibusiso Goodwill Mabhanisi Dlamini. This witness told the court that on the 19th September, 2009 he and others were at a social soccer game next to Swazi National High School. The time was around 11:00 in the morning. Whilst they were waiting for the game to start, the deceased who was in Pw2’s car, said he forgot to buy cigarettes. Pw2 gave him E20.00 so that he could buy cigarettes. They were inside the fence of the school, which means they were within the school premises.
- [6] The deceased then alighted from the car and proceeded towards the gate as he could only buy tobacco from a shop outside the school premises. On his way to the shop the deceased met the accused who was accompanied by a lady. The deceased was a

bit drunk and suddenly a squabble ensued between the deceased and the accused person. The deceased uttered some derogatory words to the accused. He called him “ litaki” which is some Siswati slang meaning that someone is a fool. The deceased continued insulting the accused and the accused started to retaliate by also hurling insults to the deceased.

[7] Pw2 told the court that upon noticing such he and the others who knew the deceased peeped through the school fence and told the accused to ignore the deceased since he was drunk. They also apologized on behalf of the deceased but as they talked to him the accused got the more angry.

[8] The school security personnel also noticed the squabble and made some efforts to broker peace. The security guards told the accused that the deceased was drunk. PW 2 and others also got closer and tried to broker peace. The accused then proceeded with his journey together with the lady he was travelling with.

[9] Pw2 and the others returned to where they were,inside the school fence. The deceased proceeded with his journey to buy cigarettes. However before the deceased had travelled much distance, and whilst still within the school premises, Pw 2 saw the accused following the deceased and carrying a piece of concrete block which Pw 2 thought was a stone. The accused hit the deceased with the piece of concrete block on the back. The deceased fell to the ground facing up. The accused took the piece of concrete block and continued to hit the deceased with it whilst he was lying on the ground.

It was Pw2's evidence that the accused hit the deceased on the head, body and on the chest. Pw2 stated that he saw all this clearly since when accused hit the deceased with the concrete block Pw2 and his companions ran towards the two to try and stop the violence.

- [10] According to Pw2 the hitting of the deceased happened very fast. The security guards eventually came and got hold of the accused. Pw2 and his companions rushed to check on the deceased. As they were checking on the deceased a certain Medical Doctor named Futhi Dlamini arrived. He was also coming for the games. This medical practitioner is employed at Sibonginkosi Clinic. The Doctor advised that taking the deceased anywhere would not help because he was so seriously injured that he could die at any time. Pw2 and his companions then called the police. The police came some two hours later.

Pw 2 identified the piece of concrete block since it was brought to court. Pw 2 further told the court that when the police came they arrested the accused. But they left the deceased there for the attention of the scene of crime officers.

- [11] When the scene of crime officers came they took pictures of the scene and eventually took the deceased away. The deceased was not breathing at this time.
- [12] In cross – examination it became apparent that there were two gates leading to the school. There is an outer gate which has no security guards, and an inner gate which has security guards.

The incident happened somewhere in between the two gates. The squabble began at a spot closer to the inner gate.

[13] It was put to Pw 2 in cross examination by the accused that the deceased was still at the inner gate when he was injured and had insulted the accused again. Pw2 rejected this allegation and stated that the deceased was already leaving and that is why he was hit on the back. The accused also put it to Pw 2 that he only hit the deceased once. Pw2 maintained that the accused continued to hit the deceased several times whilst he was lying on the ground and the deceased did not retaliate.

[14] The court asked the accused if he denied that he hit the deceased when he was lying down. The accused denied hitting the deceased whilst lying down. I must point out right away that I totally reject this denial by the accused. The injuries outlined by Pw1 which are also evident from the photos of the deceased at the scene cannot have resulted from just one blow or from the fall of the deceased. They were evidently inflicted by several blows with a blunt object on the different parts of the deceased's body. Indeed they do appear to have been inflicted through hitting with an object similar to the piece of concrete block handed to court by Pw5 and marked exhibit "Pw3". The accused is therefore not telling the truth when he says he never hit the deceased whilst he was lying on the ground.

[15] The crown also called Mandlenkosi Phineas Ndzinisa (Pw3). This witness stated that during September, 2009 he was employed by Swazi National High School as a security officer.

He further stated that on same day during that month Pw2 came to the school for a soccer game. Pw2 was carrying soccer participants in his car and the deceased was among them.

[16] The deceased came to the road going to the school, the deceased came across the accused. As they met the deceased asked the accused where he was going. The accused's answer was that ***"you are provoking me"***. The deceased went on to insult the accused and called him a fool. This witness told the deceased to stop what he was doing and go back. The deceased refused to go back. After the accused had been provoked he proceeded towards the deceased. The deceased continued to insult the accused who then got angry, took a stone (concrete brick) and threw it to the deceased who fell to the ground. At the time he was hit, the deceased was some 20 to 30 metres from the gate where this witness was. It is the evidence of this witness that accused then went back. Pw3 could not tell whether or not the deceased was dead. After the deceased had fallen his companions went to him and accused went to his house which was apparently within the school premises. This witness was not cross – examined.

[17] The crown then called Pw4, Inspector Siphon Magagula. Inspector Magagula informed the court that he is a scenes of crime officer who is trained in this field. He holds a certificate as such and he attended a refresher course in South Africa during the year 2015.

- [18] On the 19th September 2009 Pw4 was stationed at Manzini Police Headquarters and he received a report which required that he attends a scene of crime at Swazi National High School. Upon arrival at the school he was shown the body of the deceased by a certain Sergeant Langa. The body was lying facing upwards and he started by taking photos of the deceased body. He noticed a bruise on the chest and upon turning the body upside down he noticed another bruise at the back. He also noticed another bruise on the right hand side of the body.
- [19] Pw5 took photos showing the bruises and indicated the bruises with arrows on the photos. This witness also told the court that the Matsapha police thereafter took the body to the mortuary. Pw4 then handed in the photos of the deceased showing his body lying down and the bruises on the chest area and at the back. The bunch of five (5) photos was marked exhibit "P5". This witness also told the court that the bruises he took photos of were new. This witness was not cross – examined.
- [20] The prosecution then called 3135 Detective Assistant Inspector Mcebo Langa (Pw5) who told the court that in September,2009 he was stationed at Matsapha Police Station under the Criminal Investigation Department. He is the investigating officer in this matter and he was on duty on the 19th September, 2009. On this date he received a report that there had been an incident at Swazi National High School where someone had been assaulted and was lying motionless on the side of the road to the school.

He proceeded to the scene together with 3108 Constable Masimula.

[21] Upon arrival at the scene Pw5 observed the body of a dead man lying on the road. According to his observation this man was in his 30's in terms of age. He was about 30 metres from the school's boom gate. He was wearing a white shirt and khakhi trousers. Next to the body was a piece of concrete block. There were also two police officers who briefed Pw5 regarding the incident. Mabhanisi Dlamini (Pw2) and other residents of the area were also present and he interviewed them. He was also informed that accused was in the police van and was a suspect in the death of the deceased.

[22] On examining the body he noticed injuries on the sternum and at the back. He then proceeded to interview the accused in the police van. He first cautioned him in accordance with the judge's rules. The accused however elected to say something which prompted Pw5 to take him to the Police Station and detain him. After further questioning at the police station he then charged him for the killing of David Vilane. Pw5 also identified the piece of concrete block and handed it into court. The concrete block was marked as exhibit "P3". Pw5 also went on to identify the accused in the dock as the prson he arrested.

There was no cross examination for this witness. The crown then closed its case.

- [23] The accused person, after being advised of his rights to remain silent, make an unsworn or sworn statement and the implications thereof, elected to make an unsworn statement. The accused told the court that on the 19th September, 2009, he went to the bus stop to meet his lover. Upon his return and as he went into Swazi National High School, a man shouted at him. This man asked the accused where he was going. The man was next to the sports ground and there were other people there. The accused asked this man where he comes from if he did not know that accused stays within the school premises. This man proceeded to call the accused “litaki” (a fool). The accused got angry but accused’s companion told him to leave this person alone since he was not a properly reasoning person. Accused’s companion who was a lady actually pulled him.
- [24] This man (the deceased) went out of the inner gate and proceeded towards the second gate which leads out of the school premises. However before reaching the second gate the deceased turned back towards the accused and insulted him using the word “Fuseki”. Accused kept quiet and accused’s companion pulled him on.
- [25] The accused got more angry and then asked the deceased why he was provoking him. The deceased backoned upon accused to come to him while continuing to insult him. The accused then ran towards the deceased and in the process he saw a piece of concrete block which he took and hit the deceased with. It is the accused’s version that he only hit deceased once with the piece

of concrete block and deceased fell down. Accused also told the court that once the deceased had fallen to the ground he left him and went to his house.

ANALYSIS OF THE EVIDENCE


- [26] What comes out clearly from the evidence is that the deceased died in the hands of the accused. Another fact that is not in dispute is that the weapon used was a piece of concrete block which the accused came across by sheer coincidence at the scene of the crime. The accused was not carrying this weapon nor does the evidence show that he had placed it there.
- [27] Another thing that comes out clearly from the evidence of the witnesses who saw what happened namely “Pw2” and “Pw3” is that the deceased provoked the accused. The accused had not done anything warranting the contemptuous and insulting words dished out to him by the deceased. The deceased provoked the accused for no reason and humiliated him in the presence of his girlfriend.
- [28] There is however a sharp contradiction on the manner in which the accused hit the deceased. All witnesses and the accused are in agreement that the accused threw the piece of concrete block, exhibit “P3” at the accused and hit him with it. There is also consensus that this blow threw the deceased to the ground. The accused maintains that this is the only blow he inflicted on the deceased. Pw3 also testified that he saw this blow and did not mention any further assaults on the deceased.

[29] Pw2 however specifically stated that once the deceased had fallen to the ground, the accused proceed to hit the deceased with the piece of concrete block which was then in his hand. Pw2 actually used the expression “ **wamgandza**” which means to hit repeatedly with a hard object like a stone. The accused challenged “Pw2” on this statement maintaining that he only hit the deceased once when he threw the piece of concrete block at him.

[30] I must say that I am unable to accept the accused’s version regarding the manner in which he hit the accused with the piece of concrete block. Considering the multiple and nature of injuries observed by Dr Reddy in paragraph (4) hereof it seems quite clear to me that the evidence of “Pw2 is quite in line with such injuries. The injuries on the head, chest area and back of the deceased body could not have all resulted from one blow and fall of the deceased.

[31] In any event it is my finding that the accused did kill the deceased and the circumstances under which the deceased was killed do justify the charge of culpable homicide preferred against the accused. The accused pleaded guilty to the charge and in my view he correctly pleaded so.

I according find the accused guilty of culpable homicide as charged.



J.S MAGAGULA J

For the Crown: Mr S. Dlamini

For Accused: In person