IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL CASE NO. 245/2005

In the matter between:

REX

vs

VUSI VILAKATI 1ST ACCUSED

THANDO VILAKATI 2ND ACCUSED

GCINA VILAKATI 3RD ACCUSED

SISANA VILAKATI 4TH ACCUSED

THEMBI VILAKATI 5TH ACCUSED

Neutral Citation: Rex v Vusi Vilakati & 4 Others (245/05) [2020] SZHC 205 (13 October 2020)

Coram : MABUZA – PJ

Heard : 21/09/2020

Delivered : 13/10/2020

SUMMARY

Criminal Law: Accused charged with Murder – plead guilty to Culpable Homicide – Crown accepts plea to lesser charge – convicted per their plea.

Criminal Law: Sentence – Accused each sentenced to 6 years imprisonment – 3 years suspended for two years.

JUDGMENT ON SENTENCE

MABUZA –PJ

[1] The accused were indicted with the crime of murder. When the charges were put to them they pleaded not guilty to murder and guilty to Culpable Homicide in the death of Bhekimphi Vilakati. Ms. Ndlangamandla confirmed the pleas as being consistent with here instructions. The Crown accepted their pleas to Culpable Homicide. The Crown withdrew the charge against Accused 1.

[2] The evidence which was read into the record is set out in the statement of agreed facts and is as follows:

1.

"*The accused persons,* ***Vusi Vilakati*** *(hereinafter referred to as Accused No.1),* ***Thando Vilakati*** *(hereinafter referred to as Accused No. 2),* ***Gcina Vilakati*** *(hereinafter referred to as Accused No. 3),*

Sisana Vilakati *(hereinafter referred to as Accused No. 4) and* ***Thembi Vilakati*** *(hereinafter referred to as Accused No. 5) stand charged with the offence of MURDER, in that upon or about the 24th February 2005 and at or near Makhungutsha area in the Manzini Region the said accused persons each or all of them acting in a furtherance of a common purpose did unlawfully and intentionally kill* ***BHEKIMPHI VILAKATI****.*

2.

The accused persons plead guilty to unlawfully and negligently killing the deceased. In effect the accused persons plead guilty to a lesser offence of Culpable Homicide which the Crown accepts.

3.

It is therefore agreed between the Crown and the accused persons that the following events took place before and after the commission of the said offence.

4.

During the evening of the 21st February 2005 Accuse No. 1 was relaxing in a cooking hut (edladleni) together with his sister Tobhi Vilakati, PW1 Sizakele Vilakati and some children. Accused No. 1 was roasting maize while Tobhi was cooking supper. This happened at a Vilakati

homestead at kaNdinda where Accused 1, the deceased, Tobhi and PW1 resided.

5.

While Tobhi was putting firewood in the open fire the deceased entered the cooking hut. The deceased became violent and started insulting everyone including Accused No. 1.

6.

The deceased then took a burning wood and assaulted Tobhi Vilakati with it. Tobhi ran away and deceased then took the iron used to support a 3 legged pot (lidelefudi) and chased her. The deceased got hold of Tobhi and he started assaulting her repeatedly with the iron on her back. Accused No. 1 attempted to stop the deceased from assaulting Tobhi.

7.

The deceased quickly rushed to his house and came back with a slasher. He used the slasher to assault Accused No.1 who ran away to Thabani Vilakati's homestead. Tobhi also went to seek refuge at the same homestead. The deceased followed them and upon arrival he found that Accused No. 1 and Tobhi had locked themselves in one of the houses at Thabani's homestead. The deceased attempted to forcefully open

the house where Accused No. 1 and Tobhi were hiding. Accused No. 1 and Tobhi never returned home but spent the night at Thabani's homestead.

8.

On the 24th February 2005 during the evening Accused No. 1, Accused No.2, Accused No. 3, Accused No. 4, Accused No. 5 and PW8 Sdudla convened a meeting at the latter's homestead. In the meeting a plan was hatched on how to attack the deceased with a view to discipline him since he was a troublesome person and had been reported to kaNdinda Royal Kraal but nothing was done.

9.

It was resolved that the delegation should after the meeting proceed and attack the deceased. The accused persons armed themselves with all sorts of weapons including a slasher, knobkerrie, sticks and towing bar.

10.

They found the deceased sleeping in his house with PW4 Vuyisile Khanyisile Shongwe. The accused persons attempted to forcefully open the door while the deceased block it from being opened inside. The accused then set alight the thatched roofed house

accused eventually came out carrying a slasher and tried to assault the accused persons.

11.

The accused persons overpowered the deceased and they started assaulting him with the weapons. Accused No. 1 was carrying a slasher which he used to assault the deceased. The other accused persons used sticks and knobkerrie to assault the deceased who then succumbed to his death on the scene.

12.

The Police were then called and they came to attend the scene of crime. On the 3rd March 2005, PW9 Doctor R.M. Reddy a police pathologist conducted a post mortem examination on the body of the deceased at Mbabane Government Mortuary and pined that the deceased's death was due to multiple injuries. The said doctor prepared a report of his examination.

13.

Before the postmortem was conducted, the body of the deceased was identified by PW8 Solwako Vilakati who positively identified same.

14.

Now the accused persons admit that the injuries cited by PW9 are the cause of the deceased's death which were unlawfully inflicted by the accused persons who acted in common purpose. The accused persons further admit that there was no ***novus actus*** *intervening factors.*

15.

The following items are handed as part of the Crown's evidence by consent of both parties:

(a) Statement of agreed facts;

(b) Post mortem examination of the deceased;

(c) Knobkerrie;

(d) Slasher;

(e) Bushknife; and

(f) Sticks."

[3] The accused persons confirmed the contents of the statement of agreed facts. Likewise their Counsel.

[4] The exhibits were marked as follows:

(a) Statement of agreed facts – Exhibit A.

(b) Postmortem report – Exhibit B.

(c) Knobkerrie – Exhibit 1.

(d) Slasher – Exhibit 2.

(e) Bushknife – Exhibit 3.

(f) Sticks – Exhibit 4.

[5] I convicted the accused per their pleas of guilty to culpable homicide.

[6] Crown Counsel advised the Court that accused were first offenders. Thereafter their Counsel addressed me in mitigation.

[7] In mitigation she stated-

re: Thando Vilakati

That he was now 37 years when the offence was commited, he was 22 years old. The offence occurred on the 24th February 2005. The accused persons have waited 15 years to have the trial on 21/09/20. Thando had recently completed college where he studied TV and Film Production. He has three children. He is not married.

re: Gcina Vilakati

[8] He is now 34 years and at the material time he was 19 years old. He has no formal qualification. He attended school up to “O” Level (Form 5). He has five children and is employed

as a labourer. He is married. The deceased was his uncle being his father's brother.

re: Sisana Vilakati

[9] She is now 57 years old. She is married to one of the Vilakati males who is a biological brother to the deceased. She has seven children and three grandchildren. Both she and her husband are unemployed.

re: Thembi Vilakati

[10] She is now 53 years old. She too is married to a Vilakati male with whom she has five children and four grandchildren. Her husband passed away during March 2020.

[11] Counsel for the accused pleaded for mercy for her clients, particularly as the accused had waited for 15 years for the trial while their lives remained in limbo. Of importance was that the deceased was the author of his own misfortune. He began this entire fight which tragically ended in his death. The accused meant to discipline him and not to kill him. Counsel further asked the Court to take into account their low level of sophistication as well as that the area they come from is rural.

[12] Counsel directed me to authorities to use as a guideline in sentencing the accused namely: **Musa Kenneth Nzima v Rex Criminal Appeal No. 21/2007 (Unreported)**. The

Appellant caused the death of the deceased. The Appellant was 19 years old at the material time. He stabbed the deceased once on the stomach. Writing for the Court Tebbutt J cited several cases to support the reduction of a sentence of 9 years imprisonment imposed by the High Court to 6 years imprisonment *viz* the well-known dictum of Holmes JA in the South African Appellate Division case of **S v Rabie 1975 (4) S.A. 855 (A) at 862 G**_bears repetition. He said:-

> *"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".*

In the same case Corbett JA (as he then was) refers to Van der Linden's Supplement to the Commentary on the Pandects by Voet at 5.1.57 where Van der Linden notes that among the most harmful faults of Judges is inter alia a striving after severity. Stating the oft-expressed caveat that a judicial officer should not approach punishment in a spirit of anger, Corbet JA went on to say this:

> *"Nor should he strive for severity; nor, on the hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality."*

Proceeding further the learned Judge cited with approval, what was said in a judgment in Botswana where Moore JA stated the following in **Thapelo Motoutou Mosilwa Criminal Appeal No. 0124/05** regarding the question of sentence:-

> *"It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that he court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated."*

Ultimately the learned judge had this to say:

> *"The appellant in a drunken moment of negligent behavior, for that was what he was convicted of, stabbed a man who was his relative and neighbour once in the abdomen, leading to the latter's later death in hospital. It was his first offence in what was obviously an otherwise crime-free life of 30 years. He was, he said, very sorry for what had occurred. <u>To send</u>*

this man to prison for nine years was, in my view, excessively harsh and lacked the quality of mercy which, as set out above, should temper a sentence. (My underlining) As was said in ***S v Harrison 1970 (3) SA 684 (A) at 686 A****, quoted in* ***S v Rabie supra at 861 H-862 A:****"*

"Justice must be done, but mercy, not a sledgehammer, is its con-comitant".

[14] The learned judge thereafter reduced the sentence from 9 years' imprisonment to 6 years' imprisonment.

[15] I align myself with the dicta set our above.

[16] In the **King vs Mbekezeli Wiseman Dlamini & two others High Court Case No. 370/09** after traversing the authorities Sey J at paragraph 16 of her judgment stated:

"[16] In my judgment, I am reasonably sure that the accused did not intend to kill the deceased and as such the degree of the moral guilt of the accused is clearly considerably reduced. In the circumstances, the accused is hereby sentenced to 3 years imprisonment two of which is hereby suspended for a period of 2 years on condition that he is not convicted of crime of which violence to the person is an element committed during the

period of suspension for which an unsuspended period of imprisonment is imposed. It is hereby so ordered."

The accused therein was charged with Murder but pleaded guilty to Culpable Homicide. His plea was accepted by the prosecution. The deceased was shot once on the head with a firearm.

[17] In **R v Sabelo Dlamini High Court Case No. 406/2014** Langwenya J perused the following cases: **Musa Kenneth Nzima v Rex Criminal Appeal No. 21/2007; Petros Mangisi Masuku v Rex Criminal Appeal Case No. 11/2008; Vusi Madzabulule Masilela Criminal Appeal Case No. 14/2008 and Lucky Sicelo Ndlangamandla and Two Others, Criminal Appeal Case No. 8/2008 as well as Rex v Nkosinathi Bright Thomo High Court Criminal Case No. 203/2008**. She concluded that the sentence of ten years imprisonment in Culpable Homicide cases is considered proper for an offence at the most serious end of the scale for such crimes. She sentenced the accused to ten years imprisonment less the time he had spent in custody before his release on bail. The accused had assaulted his brother with the back end of an axe on the stomach and he died from that wound.

[18] In the case of **Rex v Cebisa Motsa and 4 Others, High Court Case No. 13/10** Magagula J referred to the

comments of Corbett JA in the case of **S v Nxumalo 1982 (3) SA 856 A at 861 G-H** where it is stated:

> *"It seems to me that in determining an appropriate sentence in such cases, the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence cannot be disregarded."*

[19] After citing that authority the learned judge then stated:

> *'[68] In my opinion the culpability or blameworthiness of the accused persons in this case is very low. Also, I have doubts if they actually foresaw that the deceased would actually die from the assaults they inflicted on his person. They most probably were shocked themselves that the deceased had actually died.* (My underlining)
>
> *[69] In the premise each of the accused persons is sentenced to three (3) years imprisonment wholly suspended for three (3) years on condition that within the period of suspension the accused persons are not found guilty of a crime involving*

violence and sentenced therefore to imprisonment of not less than twelve (12) months without the option of a fine.'

[20] As mentioned earlier I align myself with the erudition of the authorities.

[21] Turning to the case in casu it was never going to be easy for the Crown to prove as to who struck the fatal blow. Suffice to say that the postmortem report recorded that the cause of death was due to multiple injuries. This is consistent with the accuseds' admission that when they went to attack the deceased they were armed with all sorts of weapons including a slasher, knobkerrie, sticks and towing bar. They are all guilty in equal measure.

[22] I am mindful of the fact that the deceased was the author of his own misfortune which led the accused in deciding to discipline him themselves. What puzzles me is that they decided to take the law into their own hands instead of going to the police. The royal kraal is hardly expected to deal with criminal matters, only the police are trained to do this.

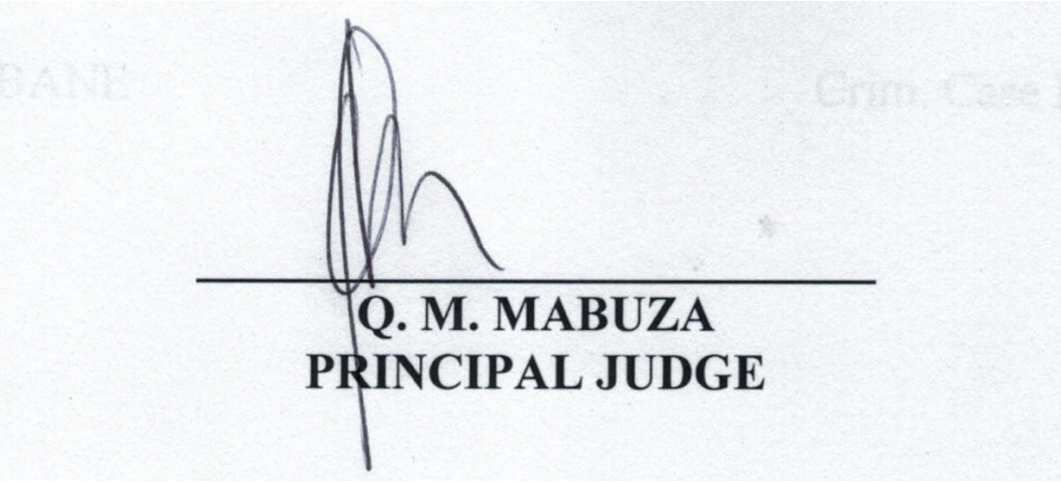
[23] I am equally mindful of the fact that the accused persons waited fifteen (15) years for the trial to take place. Their lives stood still and they could not make any meaningful plans for their futures while waiting for the proverbial sword of Damocles to fall. That is a crucial personal circumstance. Everybody has grown older especially the women and

serving long sentences at this point in their lives can hardly be said to be deterrent. However, a young life was lost and can never be brought back.

[24] In passing sentence I have considered their personal circumstances submitted by Counsel to me, particularly that the deceased was a family member.

[25] The Accused were arrested on the 25/02/2010 and released on bail on the 21/10/2010 (8 months)

[26] In the event, the accused are each sentenced to six years imprisonment without an option of a fine, three years are suspended for a period of two (2) years on condition they are not convicted of any offence of which assault is an element. Eight months is to be deducted from the sentence, being the time they spent in custody before being released on bail.



For the Crown: Mr. H. Phakathi

For the Accused: Ms. N. Ndlangamandla