



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 95/2019

In the matter between:

REX

And

NTOKOZO PATTY SIMELANE

NCAMISO WELCOME SIMELANE

Neutral citation: *Rex v Ntokozo Patty Simelane & Another (95/2019) [2021] SZHC 179 (12 October 2021)*

CORAM : **T. DLAMINI J**

Heard : 15 September 2021

Delivered : 12 October 2021

[1] *Criminal law and procedure – Indictment on a charge of Murder – Plea of guilty to Culpable Homicide entered by first accused – Plea of not guilty entered by second accused – Plea entered by each accused accepted by the crown – Effect thereof.*

Summary: *First and second accused charged with crime of murder – First accused pleaded not guilty to murder but guilty to culpable homicide – Second accused pleaded not guilty – Plea entered by each accused was accepted by the crown – Statement*

of agreed facts was prepared in respect of the first accused and handed-in by the parties' attorneys – Statement confirmed by the accused as correct.

Held: *That the second accused is found not guilty – Acquitted and discharged.*

Held further: *That the first accused is guilty of culpable homicide based on his own plea and statement of agreed facts – Sentenced to a fine of E6,000 or imprisonment for six years, and half the sentence suspended.*

JUDGMENT

[1] The first accused, Ntokozo Patty Simelane, and second accused, Ncamiso Welcome Simelane, are before court on a charge of murder. According to the indictment, they both, either each or all of them acting in furtherance of a common purpose, unlawfully and intentionally killed one Arthur Simelane on or about the 24th December 2018 whilst at or near kaMfiza area in the Shiselweni District.

[2] When the charge was put to them, first accused pleaded guilty to a lesser offence of culpable homicide while the second accused pleaded not guilty. The pleas were confirmed by the defence attorney Mr. M. Dlamini.

[3] The crown accepted the plea of each accused person. This is sanctioned by **s.155 (2) (a)** of the **Criminal Procedure and Evidence Act, 67/1938** (as amended), hereinafter referred to as “**the Act**”. The section provides that when pleading, the accused may do so in the manner quoted below:

155. (1) ...

(2) **If he pleads he may plead either –**

(a) **that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of**

which he might be convicted on such indictment or summons;

[4] With the first accused being charged with murder, he could be found guilty of culpable homicide if on the evidence it is found that he caused the death of the person without an intention to do so. This is in terms of **s.186 (1) of the Act**, which provides as quoted below:

186 (1) Any person charged with murder in regard to whom it is proved that he wrongfully caused the death of the person whom he is charged with killing, but without intent, may be found guilty of culpable homicide.

[5] It is on the basis of the above quoted provision that the crown accepted the plea entered by the first accused.

[6] Following the plea of not guilty entered by the second accused and its acceptance by the crown, the court acquitted and discharged the second accused.

[7] A statement of agreed facts was prepared and handed-in concerning first accused. It was read into the record and the agreed facts are quoted below:

1.

The 1st accused person admits that on the 24th December 2018 he and his friends were travelling from Hlatsi to Ncangosini. They were travelling in a kombi and it was in the evening of that day. The second accused person Ncamiso Simelane was also in the kombi.

2.

Along the way an argument ensued. The deceased wanted to know who the 1st accused and his friends were and where they were from. The 1st accused tried to reason with the deceased but to no avail as deceased assured them that he would alight with them wherever they dropped. The deceased was with other friends. His friends tried to calm him down but did not succeed.

3.

When the 1st accused and his friends alighted from the kombi the deceased and his friends also alighted, following the deceased and trying to get him back inside the kombi. The deceased started assaulting the 1st accused and there was open fire between the accused's group and the deceased's group. The accused at that moment was hit on the head with a broken bottle by the deceased. Following this the accused produced a knife and stabbed the deceased on the chest. The accused then left the scene with his friends.

4.

The 1st accused heard the following day that the man he stabbed had died. A brother to the accused was informed of this incident. He was informed by the accused person together with accused number 2 Ncamiso Simelane. The 1st accused had travelled to Matsapha by this time. This matter was eventually reported to Matsapha Police by friends of the accused. The 1st accused was arrested eventually and transferred to Hlatsi Police for the charge to be formally laid.

IN PARTICULAR

- 4.1 The 1st accused admits that he unlawfully caused the death of the deceased.
- 4.2 The 1st accused admits that he negligently caused the death of the deceased.
- 4.3 The 1st accused person's conduct was the cause of the deceased's death and there was no intervening act.

DOCUMENTS AND ITEMS ADMITTED IN EVIDENCE

The parties have agreed that the following documents are admitted in evidence:

- a) Statement of agreed facts;
- b) The Post Examination by Dr. Komma Reddy.

Dated at MBABANE on this day of June 2021.

- [8] The statement of agreed facts was signed by counsel for the crown and the defence attorney. It was marked as EXHIBIT "1" while the Post-Mortem Examination Report prepared by the Pathologist, Dr. Komma Reddy, was marked as EXHIBIT "2".
- [9] The statement of agreed facts takes the place of evidence. This is in terms of s.272 of the Act. It provides as quoted below:

272 (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact.

[10] The agreed facts were read into the record, and were confirmed by the accused as correct. They therefore constitute sufficient evidence as contemplated in terms of s.272 of the Act.

[11] According to the post-mortem examination report (EXHIBIT “2”), the cause of death was a penetrating injury to the heart.

[12] The Act allows the use of medical reports signed by medical practitioners as evidence in respect of any injury or concerning the condition of the body of a person. This is provided for in s.221 (1) (a) which is quoted hereunder:

Reports by medical or veterinary practitioners

221. (1) In any criminal proceedings in which any facts are ascertained –

(a) by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; or

(b) ...

such facts may be proved by a written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated therein:

[13] The post-mortem examination report (Annexure “2”) is therefore evidence in respect of the cause of death of the deceased person. The first accused admitted that he stabbed the deceased on the chest. He also admitted that his conduct was the cause of the deceased’s death and that there was no intervening factor.

- [14] On the basis of his own plea, statement of agreed facts and the post-mortem examination report, the first accused is found guilty of culpable homicide for unintentionally killing Arthur Simelane.
- [15] In mitigation, it was submitted on behalf of the first accused that he is a first offender. This fact was confirmed by counsel for the crown. It was also submitted that he is remorseful about the unfortunate incident in which the deceased was killed. As evidence of his remorsefulness, he informed his brother about the incident, and thereafter the matter was reported to the police. He did not waste the time of the court but pleaded guilty.
- [16] It was also submitted that the deceased was the aggressor. The first accused was provoked by the deceased who hit him using a broken bottle on the head. As a result, the first accused is now left with a permanent scar above his face on the right side. It was submitted that he took out the knife and used it to stab the deceased because by then he was heavily bleeding on his face and found himself in a do or die situation.
- [17] The defence attorney submitted that the knife which the first accused used was part of groceries that the accused purchased and carried home as it was time for Christmas celebration on the next day. It therefore was not carried by the first accused for committing any mischievous purpose, he submitted.
- [18] It was further submitted on behalf of the first accused that his mind was not thinking properly. It was impaired by alcohol which the first accused and his friends had been drinking on that day. They were drinking all the way from

Manzini to Hlathikulu, and later connected to their home area while still drinking.

[19] The defence attorney further submitted that the first accused was aged 25 years at the time and therefore was still young. He urged the court to take into consideration that he lost his employment because he remained in custody for three months before he was admitted to bail. At home he has two minor children aged three (3) and one (1) year respectively although he is unmarried. He survives by doing piece jobs.

[20] It was further submitted that in circumstances where the deceased was the aggressor, the courts have been lenient and deviated from the usual sentences imposed for the offence, and even granted the option of paying a fine. In this respect, the court was referred to the cases of **Rex v Sizwe Mzwandile Makama (350/2012) [2017] SZHC 161 (27 July 2017)**, **Rex v Mpendulo Bonny Ginindza (167/2017) [2020] SZHC 77 (29 April 2020)** and **S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)**.

[21] The crown submitted that the death of a person is a loss to society. The death of a young society member, as *in casu*, robs society of an asset that would have contributed a lot to the society. It is not only the society that suffers the loss but the family of the deceased as well. The family becomes deprived of a member who is expected to play an important family role as he matures and grows up.

[22] The crown also submitted that in cases of assaults that result in death, the type of the weapon used and the part of the body where it was used are considered. It argued that the first accused used a knife, a weapon which is regarded as dangerous. He also used it on a part of the body where there is the heart (a delicate organ of the body). The court was therefore urged to treat this case as a serious one.

[23] Regarding the submission made by the defence that in cases where the deceased was the aggressor the court becomes lenient on the sentence, the crown submitted that it accepted the accused's plea of guilty to a lesser offence of culpable homicide. It therefore argued that it would not serve the interest of justice if this lesser offence is further treated lesser than a culpable homicide case. It urged the court to impose a sentence that would not be inconsequential. It implored the court to impose the usual sentence for culpable homicide cases which range between three (3) and 10 years but urged it to impose between five (5) and 10 years sentence.

[24] In determining the appropriate sentence, I have taken into consideration the *triad*. The first accused is a first offender and is still a young person who can change his life and be of benefit to society and the country. He has two minor children aged three (3) and one (1) year respectively. He pleaded guilty. In my view and finding, he is remorseful of his action that led to the death of the deceased person. This is shown by opening up to his brother concerning the incident, and that it was thereafter reported to the police. That is how he was arrested. In court he pleaded guilty, and did not waste the time of the court.

[25] I have also taken into consideration that the family of the deceased and society lost a young life that could have been of great benefit to both the family and society had his life not been cut short by the incident that caused his death. The crown submitted that even though the deceased is the one who alighted from the kombi and followed the first accused, the latter could have simply run away. I agree with the submission but do so in so far as that is what is expected of the accused in terms of our law which society endorsed. The facts before court as derived from EXHIBIT “1” do not, however, inform the court that a flight would have afforded the first accused a safe way of escape after he was hit on the head by the deceased using a broken bottle. The facts only show that the “*deceased started assaulting the 1st accused and there was an open fight between the accused’s group and the deceased’s group. The accused at that moment was hit on the head with a broken bottle by the deceased*”. Based on these facts, I am unable to find that the first accused could have afforded himself a safe escape by running away.

[26] The stab wound was inflicted on a very delicate part of the body where there is the heart. Given however, that the deceased was the aggressor whose pursuit of the first accused failed even attempts of his (deceased’s) friends to restrain him, I am unable to find that the first accused targeted the part of the body where the stab wound unfortunately got inflicted. What is common cause is that the offence was committed in circumstances where the deceased was the aggressor and attempted restraint on him by his friends failed.

[27] In **Oupa Zulu vs Rex (34/2012) [2014] SZSC 19 (30 May 2014)**, the Supreme Court considered the case to be an ‘extraordinarily’ serious case of culpable homicide. It therefore confirmed a sentence of nine (9) years. The

facts are that the deceased was slapped across the face by the appellant twice with an open hand whilst inside a room. The deceased then left the room and went outside. He was followed by the appellant who, whilst outside, picked up a pick-axe and struck the deceased in the vicinity of the forehead. The deceased fell to the ground but rose again after a few seconds. The appellant then took a beer bottle which lay in the vicinity and again struck the deceased on the head and the bottle broke. The deceased was cut and started bleeding profusely.

[28] In another culpable homicide case of **Vusi Madzalule Masilela v Rex (14/2008) [2008] SZSC 24 (19 November 2008)**, the appellant hit the deceased three times on the head using a wooden handle of an axe, felling him to the ground in the process. The appellant then fled the scene. The deceased spent the night unattended and eventually died the next morning. He suffered a fracture on the skull. The Supreme Court found that the attack on the deceased was brutal and unprovoked. It therefore confirmed a sentence of ten (10) years.

[29] In the case of **Musa Kenneth Nzima v Rex (21/2007) [2007] SZSC 35 (14 November 2007)**, **Tebbutt JA** stated what I quote below:

There are obviously varying degrees of culpability in culpable homicide offences. This court has recognized this and in confirming a sentence of 10 years imprisonment in what it described as an extraordinarily serious case of culpable homicide said that the sentence was proper for an offence ‘at the most serious end of the scale of such a crime’... A sentence of nine (9) years seems to me also to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction.

[30] Now coming to the range of sentences for culpable homicide cases, **Hlophe J** (as he then was), stated that the “*sentencing trend of our Courts is that sentences for culpable homicide range from zero (0) to ten (10) years, with each sentence being placed at a point within the range that ... reflects its seriousness or otherwise.*” **See: Rex v Mpendulo Bonny Ginindza (supra) at p.21 paragraph [42].**

[31] It has been held 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.*” **See: S v Rabie 1975 (4) SA 855 (A) at 862 (G).**

[32] The deceased was the aggressor *in casu*. His aggression towards the first accused was such that his friends who tried to restrain him from charging towards the first accused failed. The deceased was unprovoked, and in my view, was the author of his own misfortune.

[33] I will however not lose sight of the fact that a life was lost. Had it not been for the lost life, it seems to me that the matter could have qualified to be one warranting a caution and discharge. The offence appears to me to be on the lowest end of the scale given the evidence placed before this court. For this reason, I concur with **Hlophe J** that in circumstances like in the present matter, it seems inappropriate that the accused be given a custodial sentence without the option of a fine. This is so because the option to pay a fine is not prohibited for culpable homicide convictions. **See: Rex v Mpendulo Bonny Ginindza (supra), paragraph [46].**

[34] For the foregoing, I make the following order:

- 34.1 The second accused (Ncamiso Welcome Simelane) is found not guilty, and is acquitted and discharged.
- 34.2 The first accused (Ntokozo Patty Simelane) is found guilty of culpable homicide. He is sentenced to a fine of **E6000.00** or 6 years imprisonment.
- 34.3 Half of this sentence is suspended for a period of three (3) years on condition that the first accused is not convicted of an offence in which the use of a knife is an element.
- 34.4 The sentence is backdated to take into account any period that the first accused has spent in custody in respect of this offence.
- 34.5 The bail amount which the first accused paid is converted to form part of the fine.



T. DLAMINI
JUDGE

For the crown: Mr B. Masango
For the accused: Mr M.N. Dlamini