

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL TRIAL NO. 329/08**

In the matter between:

**REX**

**VS**

**ZANEMPI SIFISO SHONGWE**

**FOR THE CROWN**

**MR. P. DLAMINI**

**FOR THE ACCUSED**

**IN PERSON**

**J U D G M E N T**

**SEY J.**

[1] The accused Zanempi Sifiso Shongwe is indicted on a single count of culpable homicide as appears on the indictment dated at Mbabane on the 18<sup>th</sup> day of September 2008. The particulars of the indictment being that upon or about the 5 August 2008, at or near Othandweni area in the Lubombo Region, the said accused did unlawfully assault Mshengu Tsabedze and inflicted upon him certain injuries which injuries caused the death of the said Mshengu Tsabedze on the 6<sup>th</sup>

August 2008 and the said accused did thereby negligently kill Mshengu Tsabedze and commit the crime of culpable homicide.

[2] On the 24<sup>th</sup> day of November, 2010, the accused appeared before me and before the indictment was read to him the accused was reminded of his rights to be represented by an attorney of his choice. He intimated to the Court that he so wished to be represented and thereupon the case was postponed to the 29 November, 2010 to avail the accused time to engage the services of an attorney. On the adjourned date as aforementioned, the accused requested for more time to enable him finalise arrangements pertaining to his attorney's fees. The case was further postponed to the 1<sup>st</sup> day of December, 2010 and the witnesses were warned to be present in Court on that day.

[3] However, when the case was called on the 1<sup>st</sup> day of December, 2010, the accused indicated that he would conduct his own defence on account of his impecunious state. He pleaded not guilty to the indictment. The Crown led the evidence of six (6) witnesses in support of its case, closing it on 2<sup>nd</sup> December, 2010.

[4] Let me point out at this stage that it is the Crown which brings this case and it is for the Crown to satisfy the Court so that it is sure of the accused person's guilt. To put it simply, the burden of proving the guilt of the accused remains with the prosecution and continues throughout. If at the end of and on the whole of the case, there is reasonable doubt, created by

the evidence given either by the prosecution or the accused, as to whether the offence was committed by him, the prosecution has not made out the case and the accused is entitled to an acquittal.

[5] PW1 was Dr. R.M. Reddy who conducted a post-mortem examination on the body of the deceased on 12 August 2008. He told the Court about the injuries he had found present on the body of the deceased and he stated that severe excessive force had been applied. He further testified that, based on those findings, he had concluded that the cause of death was due to multiple injuries consistent with injuries from blunt hard objects like kicking and stoning. PW1 went on to state that he had compiled and duly signed a report of his findings. The said report was produced and tendered without objection and admitted in evidence as Exhibit A.

[6] Under cross examination by the accused, PW1 maintained that the contusions on the head of the deceased were due to impact from a blunt hard object like a stone or kicks.

[7] The next witness was Detective Constable 3552 Vusie Dlamini, a member of the Royal Swaziland police who was stationed at the scenes of crime office at the Simunye police station. He testified that his duties include collecting any possible scientific evidence that would be of great evidential value in Court and also to try and preserve the crime scenes by means of photography. He further testified that whilst he was on duty on 12<sup>th</sup> August 2008 he had received a phone call instructing him to go to the Good Shepherd Mortuary where he was shown the body

of the deceased. PW2 went on to testify that he could see some blood stains on the chest and face of the deceased and he noticed that the deceased had a small cut on the cheek. He stated that he placed a directional arrow on the cut and then he photographed the body of the deceased. He produced and tendered, without objection, four photos which were admitted in evidence as Exhibits B, C, D and E.

[8] PW3 was Mantombane Shongwe the mother of the deceased and an aunt to the accused. She and the accused are neighbours. It is pertinent to note that she was the only eyewitness. Her testimony is to the effect that on the 5<sup>th</sup> August 2008, the accused went to her homestead, woke her up and asked her to accompany him to the gate; that on the way she and the accused came across her son December; that the latter asked her where she was going and she replied that she did not know because she was accompanying the accused; that when they reached the gate the accused told her that the deceased had insulted him at the spot where they were drinking beer; that when the deceased arrived he was very drunk and he was singing and that she called him but he did not say anything to her.

[9] PW3 then went on to narrate in detail how the accused assaulted the deceased. For ease of reference, I shall reproduce hereunder that part of PW3's testimony which runs thus:

"the accused also called him but the deceased ran away and the accused ran after him. I found them in a playing area. The deceased was already on the ground and the accused was kicking him. As it was dark I did not notice where the accused was kicking the deceased but I did notice that he was kicking him. I tried to stop the fight but to no avail. My son December then

went to arm himself because the efforts we had made to stop them was not succeeding because the deceased was already on the ground. The deceased was not carrying anything on him. He was not able to fight back because he was just lying down on the ground motionless."

[10] It is PW3's further testimony that the deceased then woke up and he went to his hut to sleep. The following day being the 6<sup>th</sup> August 2008 she discovered that the deceased had died whilst he was sleeping in his hut. She said she sent for the accused and when he came she informed him that the deceased had died and that the accused then told her that it was not his intention to beat the deceased to death. She said they later conveyed the body of the deceased to the mortuary.

[11] In answer to questions put to her by the accused during cross examination, PW3 maintained that, regardless of what the accused was wearing, she did see him kicking the deceased. She vehemently denied the accused person's allegation that she had hit the deceased with a log and thrown stones on him because they were not on good terms. She further denied the allegation put to her by the accused that she and the deceased used to chase after each other at their home. Finally, in exasperation PW3 retorted that she did not see the significance of the relationship between her and the deceased because whatever the relationship was between them did not mean that the accused should kill him.

[12] One Bheki Tsabedze testified as PW4 and he told the Court that the deceased was his elder brother and that he was one of those who identified him as Mshengu Tsabedze.

[13] PW5 was Philile Mlambo. She testified that on 9<sup>th</sup> August 2008 the accused, who is her cousin, had gone to her homestead to ask her to accompany him to Siphofaneni police station. That the accused had explained to her that the previous day he had assaulted the deceased because the deceased had insulted him when they were drinking. She said she asked the accused what he had used to assault the deceased to the point of death and the accused replied that he had used his fists and kicks.

[14] At the close of the case for the Crown the rights of the accused were explained to him in terms of the provisions of Section 174 of the Criminal Procedure and Evidence Act. After being told how he could present his case and the implications associated with each of the options available to him, the accused elected to give evidence under oath. He further stated that he had one witness to call.

[15] In his defence, the accused told the Court that the deceased had insulted him when they were drinking traditional brew at one Nathi Matsenjwa's home. He said the insults did not go down well with him and that after 15 minutes he decided to go to the deceased's mother (PW3) to report the matter. The accused further testified that when he arrived at the deceased's home he found that they had gone into their house as it was past 6:30 p.m. He said he knocked and he

asked PW3 to come outside because there was something that he wanted to discuss with her. That after she came out they went and stood by the gate to wait for the deceased; that when the latter was about to enter the gate PW3 asked him to stop so that they could talk to him but the deceased refused to stop and he increased his pace and walked away. The accused went on to state that PW3 then instructed him to run after the deceased and hold him. He said that the place where the deceased was running was full of stones so the deceased stumbled on one of the stones and fell down.

[16] The accused continued his narration of the incident as follows:

" I was able to get hold of him. He was trying to find his way out so he could run away. I was trying to hold him down so he could not run away and then his mother came. She was carrying a log which I think was two metres. When I was still holding him his mother asked him why he was insulting me. She even told him that before he left for Nathi's home he had insulted her. The deceased did not answer and he just remained quiet. At the time no one was holding him and he was just seated on the ground. The deceased's aunt was present at the time. The only time he started to answer to the questions put to him was when his mother started to hit him with the log. The deceased asked his mother to be lenient with him as he would now explain why he was insulting me. The deceased explained that he did not know why he makes the insults to even refer to us as people who are practising witchcraft. He said it just comes to him. I said to the people around that I did not like the insults and I would report to the elders. At that time the deceased's brother December was present. He came armed to stop any fight but he found that no one was hitting the deceased. That is when the deceased's parents asked me to leave and they also asked me not to report the matter to the elders. They said they would speak to the deceased. I then left the deceased together with his aunt and his mother who were still talking to him".

[17] The accused went on to tell the Court that he later accompanied his wife and children to a revival at the bus station and that on their return around 11 p.m. they heard the deceased still arguing with his mother. He testified further that on the following day he was notified by PW3 that the deceased had died.

[18] In cross examination, the accused denied having assaulted the deceased. He also denied the Crown's suggestion that he had told PW5 Philile Mlambo that he had assaulted the deceased with fists and kicks. He stated that PW5 was not telling the truth and that she had a reason to fabricate evidence against him because he had borrowed money from her which he was not able to pay back. Moreover, he said that the witness had been schooled as to how to answer the questions because he had found that all the witnesses were together in a certain office in Mbabane. When prosecuting counsel put it to the accused that PW5's evidence was based on the statement she had made to the police on 9<sup>th</sup> August 2008 the accused replied that he did not know about that.

[19] I should interpose at this stage and state that there are issues which the accused raised for the first time under cross examination and which issues had not been put to the Crown's witnesses though they were material. Suffice it to say that I shall deal with the said issues later on in my judgment.



[20] Celiwe Mamba, who is the wife of the accused, testified as DW2. She sought to confirm those issues aforementioned which had been raised by the accused in answer to questions put to him under cross examination.

### **Analysis of the Crown's Evidence**

[21] Judging from the totality of the evidence adduced, I find that the evidence of the Crown is not only credible but reliable. To begin with, there is the evidence of PW3 who is the mother of the deceased and an aunt to the accused. As an eye witness, she gave a detailed description of the events that transpired from the time the accused arrived at her homestead up to the time he assaulted the deceased. I must say that I find her evidence about the assault itself to be quite graphic and full of clarity. According to PW3, the deceased was very drunk and he was already on the ground whilst the accused was kicking him. In my considered judgment, I must state that I find the evidence adduced by PW3 overwhelming and credible.

I closely observed her demeanour as she testified and I could see her anguish when she stated that the deceased was not able to fight back because he was just lying down on the ground motionless.

[22] In his closing Address, Crown counsel submitted to the Court that PW3 may be wrongly construed as having a bias against the accused since the deceased was her son, but that was minimised by the evidence of PW5 who is a relative of the accused person. In any event, I find that PW5 was truthful and honest. She told the Court that she was approached by the accused

who asked her to accompany him to the police station so that he could surrender himself. When PW5 enquired from the accused what the reason was, he told her that he had assaulted the deceased with fists and kicks. She further told the Court that the accused had said that he did not intend to kill the deceased and that the incident was unfortunate. The accused tried to discredit the testimony of PW5 by contending that she was schooled to fabricate evidence against him. In my considered view, I find this contention baseless and devoid of merit. It was the accused himself who went to PW5 to ask her to accompany him to the police station. I believe if she had been told or instructed to fabricate evidence against the accused then she would have concealed the evidence pertaining to the fact that the accused had said it was not his intention to kill the deceased.

[23] The next piece of evidence I shall examine is the post-mortem report which was admitted as Exhibit A. It established that the deceased died from multiple injuries. "The left parietal bone in the deceased's skull was fractured" and there was about "300 ml of blood present in the pericardial sac and petechial haemorrhage was present on the heart." The face was swollen and there was a "contusion of 8 x 5 cms present on the left side of the top of the head. A cut injury with sharp margins of 2 x 1 cms was present on the right side of the chin and another contusion of 11 x 9 cms was present on the front and middle portion of the chest."

[24] I must state that the said post-mortem report is consistent with the testimony of PW1 Dr. R.M. Reddy. Moreover, I have noted that these external injuries are clearly visible on Exhibits

B, C, D and E which are the photographs tendered by PW2. The indelible picture left in the Court's mind from these overwhelming pieces of evidence is of a weak defenceless man lying down on the ground helplessly. He was not armed in any way and he was not a danger to the accused. It is also in evidence that the deceased had walked away from the accused yet the latter pursued him and assaulted him in an irrational and reprehensible manner.

[25] I shall now proceed to consider the evidence of the accused as outlined earlier on in this judgment. I find that it is not only a bald denial of the Crown's evidence but it is peppered with lies and inconsistencies as well. As I had mentioned earlier on, there are issues which the accused raised for the first time under cross examination and which had not been put to the Crown's witnesses though they were material. For instance, the accused made the following allegations namely:

- (a) That after he was released from detention, PW3 had gone to his homestead to apologise to him for implicating him in the case;
- (b) That PW3 had been summoned to the Royal Kraal by the Chief;
- (c) That the said Chief had levied a fine of a cow on PW3;
- (d) That the reason given by the Chief was that the Tsabedze people had gone to report that PW3 had killed the deceased by beating him with logs and stones; and
- (e) That the Chief had stated that PW3 had called the accused to assist her in beating up the deceased with logs and stones.

[26] It is pertinent to note that none of these allegations was put to PW3 in cross examination important as they were to the accused's case. When he was asked by the Crown's counsel as to why he had not put these allegations to PW3 he replied "I didn't want to ask that particular

witness because she would deny it. I wanted to wait for other witnesses to come. I did not remind her about the trial at the Royal Kraal because I wanted to wait for December to come but then he did not come before Court. PW3 denied all my questions so I did not want to ask her that particular question."

At this stage, I must state emphatically that I do not accept the evidence of the accused in this regard and I would discountenance it as nothing but an afterthought to exculpate him from the charge. In any event, having carefully considered the evidence of the accused as a whole, I find it false and unreliable and I accordingly reject it.

[27] With respect to DW2, I find that she was not present when the alleged assault took place. All she sought to do was to confirm the story by the accused person that PW3 had gone to their home to apologise. In cross examination she was asked whether she had reported to any of the traditional structures that the accused had been wrongly incarcerated and that he was not responsible for the death of the deceased. The witness conceded that she and the accused had never reported the matter to the Chief's Kraal, nor to Siphofaneni police or to any of the traditional structures in their community. DW2 was not an impressive witness at all and she was very evasive. In the result, I likewise reject her evidence.

[28] The law relating to the offence of culpable homicide is as set out under section 2 (1)(a) & (b) of the Homicide Act, No. 44/1959. The offence is defined as follows:

"2. (1) A person who -

- (a) unlawfully kills another under circumstances which but for this section would constitute murder; and
  
- (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;

shall only be guilty of culpable homicide."

[29] In the case of **S v Burger 1975 (4) S.A. 877 (A) at 878**, Holmes JA had this to say about the definition of culpable homicide: "As to the law, in general:

Culpable homicide is the unlawful, negligent causing of the death of a human being....."

[30] According to one textbook, the definition of culpable homicide means "the unlawful killing of a human being either (a) negligently, or (b) intentionally in circumstances of partial excuse."

See P.M.A. Hunt: South African Criminal Law and Procedure volume II at page 373.

[31] In the case of **Annah Lokudzinga Mathenjwa v. R 1970 - 76 SLR 25**, the appellant, a Swazi woman, had been convicted of the murder of a seventeen month old baby, Zakhele Fakudze, and extenuating circumstances having been found, was sentenced to life imprisonment. She appealed against the conviction on various grounds. Two of the Justices of the Court of Appeal opined thus:

"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." (per Schreiner P, Caney JA concurring)

It is noteworthy that this case was quoted with approval by a differently constituted panel of the Court of Appeal in the case of **Maphikelela Dlamini v. R 1979 - 81 SLR 195**.

[32] Turning back to this present case in hand, I must state that it is abundantly clear from the totality of the evidence adduced by the Crown that the accused person did unlawfully assault the deceased and did inflict upon him certain injuries which said injuries caused his death. The fact that the deceased had insulted the accused does not exculpate the accused from the offence of culpable homicide.

In my considered judgment, for the accused to have attacked the deceased with fists and kicks the way he did cannot in any circumstances be justified. The assault on the deceased was unlawful, thereby resulting in the negligent causing of the death of the said deceased. I so hold.

[33] In the premises, I am satisfied that the Crown has proved its case beyond reasonable doubt that indeed the accused committed the offence charged. I thus hereby find the accused guilty and convict him as charged.

[34] In mitigation, the accused told the Court that he had been involved in an accident whilst he was out on bail and that he is presently recuperating. The accused is also a first offender. He has a family at home with three children. He urged the Court to be lenient with him.

## **Sentence**

[35] In arriving at a proper sentence, I feel it is imperative that I do not lose sight of the principle that the sanctity of human life should be sacrosanct. The protection of right to life is one of the fundamental rights and freedoms of the individual enshrined in the Constitution of the Kingdom of Swaziland Act, 2005. Section 15 (1) thereto provides that a person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted.

As I have stated earlier on in the judgment, for the accused to have attacked the deceased with fists and kicks the way he did cannot in any circumstances be justified. I am therefore of the view that the offence committed by the accused calls for a severe sentence to act as a deterrent for other persons who might be minded to commit the same offence.

Be that as it may, however, I am mindful of the dictum in the judgment of the **Supreme Court of Swaziland** in the case of **Gerald Mvemve Valthof And The King Crim. Appeal Case No: 5/10** in which their Lordships stated that "the criminal jurisprudence of this Kingdom, like in some other nations, requires that the courts ought in appropriate cases to temper the severity of sentences they would otherwise impose to take account of human frailties." In the same judgment, their Lordships went further to refer to what they termed the oft - quoted dictum of **Holmes JA** in the case of **S v. Rabie 1975 (4) S.A. 855 (A)** where he stated as follows:

"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."

[37] In passing sentence in this case I will place reliance on the authorities I have cited above. I will also take into consideration the personal circumstances of the accused. In the circumstances, the accused is hereby sentenced to five years imprisonment two of which are suspended for a period of three years on condition that he is not convicted of an offence involving violence during the period of suspension.

Dated the 3<sup>rd</sup> day of March 2011

M M *SEY(MRS)*  
JUDGE OF THE HIGH COURT