

IN THE HIGH COURT OF SWAZILAND
Held at Mbabane

Criminal Case No: 155/2007

REX

Versus

DENZEL DUNGUZELA GAMEDZE

Coram

Hlophe J.

For the Crown

Mr. M. Nxumalo

For the Defendant

Mr. B. J. Simelane

JUDGMENT

[1] The accused person appeared before me charged with the offence of murder, it being alleged by the Crown that he, the said accused had, on the 25th May 2007, and at or near Logoba area in the Manzini Region, unlawfully and intentionally killed one Bongile Jabulile Mabuza and had thereby committed the crime of murder.

1.1. I must clarify that this matter having been dealt with as a culpable homicide, I had, in avoiding delay and anxiety to all the parties concerned, delivered an ex tempore judgment and indicated that my reasons would follow. This judgment comprises such reasons.

1.2. Owing to what transpired in Court when the matter was heard, it is important for my Judgment to give a background to this matter so as to put issues in proper

[2] When the charge was put to the accused person he informed the Court that he was denying having intentionally killed the accused and said no more. Owing to the confusing manner of the accused's plea, I had to ask him about three times on what he meant by saying that he denied killing the deceased intentionally. Instead of clarifying what he meant by that he was to inform the Court eventually that his knees had just become weak and asked that the matter be postponed to some future date. In fact for this to be put in proper perspective the following has to be disclosed.

[3] The accused was represented by Attorney Mr. B. J. Simelane whilst the Crown was represented by Crown Counsel Mr. M. Nxumalo. I must say that up to that point the Court had not been informed by defence Counsel that there was anything wrong healthwise, with the accused. In fact the Court had already been informed by both Counsels that the accused person was to plead guilty to the lesser crime of culpable homicide which was to be accepted by the Crown. The Court had already been informed that a statement of agreed facts had already been prepared. In fact the matter had been postponed the previous day for this purpose. It was for this reason I found it confusing when the accused person's plea was neither an unequivocal plea of not guilty nor was it one of guilty to culpable homicide in line with the information the Court had already received from both Counsel earlier that day as well as on the previous day when the matter had to be postponed to enable the Attorneys prepare the statement of agreed facts.

[4] Furthermore the allegation by the accused that his knees had just given in did not make sense given that it had in fact taken

him time to express it after I had repeatedly asked him to explain what he meant by saying he denied killing the deceased intentionally. It sounded as an after thought of sorts to me, by the accused to force a postponement of the matter, particularly because upon noting that he was not forthcoming, his Attorney Mr. Simelane had asked to assist and had approached him and had a short discussion with him which I had allowed. Mr. Simelane, had not on his return informed the Court of having been informed by the accused of any sudden ill-health or problem with his knees which I have no doubt he would have done given his experience. Instead Mr. Simelane informed the Court that there was nothing wrong with the accused except that it was the manner in which the accused expressed himself and nothing more. The accused's subsequent and sudden statement expressing ill-health did no more than confirm my fears amidst the surprise with which it took all parties concerned including his own Counsel.

[5] Even after the intervention by his Attorney, who had a brief discussion with him, the accused, still maintained his strange plea

and said that he was pleading not guilty to having intentionally killed the deceased. I sought clarity from him and my intention at that stage was to enter a plea of not guilty to murder and have the matter proceed as a trial when the accused indicated, in answering my question that he was not feeling well and could not talk that day, which as I have already stated was very strange because he had not indicated that to his Attorney just then.

[6] Answering a further probe on what the accused person's problem was, he clarified to the Court that the problem was not quite with his speech but with his knees which he said had just given up, whilst his body was left shaking.

[7] This shaking body I must say I had not observed. When asked why he had not informed his Attorney who had approached him to seek clarity when he had already failed to clarify what exactly he was saying in his plea between that of not guilty to murder or that of guilty to culpable homicide, he had not been able to make himself understood.

[8] I have left out the fact that the matter had initially been given some three days as trial dates with the previous day to this one having not been utilised for that purpose because both Counsel had informed Court they had already agreed on proceeding with the matter on the basis of culpable homicide after the Crown had indicated it would accept such a plea when tendered. The matter had therefore been postponed the previous day to this day so that it could proceed on those basis which however the equivocal plea by the accused was hindering.

[9] I had made up my mind to enter a plea of not guilty to murder so that a full blown trial be embarked upon when I was urged by both Counsel to adjourn the matter and afford them an opportunity to discuss it as well as afford Mr. Simelane an opportunity to take instructions. I had made it clear at that stage that they should not make it sound like the accused was being forced to take a particular plea suffice it to say that there had to be sound reasons for the postponement of the matter to some other future date particularly because it was not appropriate to

postpone matters for the asking as this tends to lead to a backlog which the Courts have to fight against.

[10] I must also clarify that because of the manner in which he handled himself which sounded consistent with an attempt to evade trial, I indicated to Counsel that it was my consideration not to extend his bail. In fact I suspected that he wanted to elope and avoid trial altogether. I was however clear that if any medical attention would be required by the accused he would have to be afforded same in custody. I otherwise granted the adjournment I had been asked to grant.

[11] What is important is that the accused person, after this adjournment indicated that he was pleading guilty to culpable homicide. I had to enquire from him several times if this plea was being made by him freely and voluntarily which he confirmed. His Attorney also clarified that the matter was indeed being proceeded with on the basis of culpable homicide in keeping with his instructions. Consequent thereto the Crown read the statement of agreed facts.

[12] The contents of the said statement were as follows:-

"On the 25th of May 2007 the accused went to Logoba where the deceased was staying with her sister, PW3. Upon arrival the accused found the deceased alone. The accused enquired from the deceased the whereabouts of her sister, who was the accused's girlfriend. The deceased responded by telling the accused that she, the deceased did not know PW3. When the accused asked what PW3 said before she left, the deceased responded by telling the accused as to how many times he should be told.

The accused waited about one and a half hours in the house and thereafter asked the deceased to tell him the truth concerning the whereabouts of PW3 as he, the accused had seen them exchanging bags in town as the deceased told the accused they were just exchanging bags only.

The accused asked the deceased why she did not mention that they had exchanged bags in town at first. The deceased told the accused that she was called by her sister PW3 to bring her bag and he, accused, should have asked her sister. The accused then told the deceased that if she had told him all that at first they would not have gone that far with the conversation. The deceased told the accused that he was failing to treat her sister well as he was ill-treating her. The accused told the deceased that ever-since she came to stay

*in the house there was a lot of trouble between the accused and PW3, that is his girlfriend as the accused would not find PW3 everytime he had visited PW3. The deceased responded in a very disrespectful manner by telling the accused to sort his problems with PW3. She said, "Ungangizeki wena, sewehlulwe nausisi utocaphatana nami" (which means **stop** fucking me around, uou have failed mu sister and now uou are turning on me.) (or words to that effect). The deceased told the accused that if she knew she would not have left her place of employment to live with PW3 and the accused and had she been able to pay rent in her own house.*

The accused became angry and told the deceased to leave immediately but the deceased refused and told him to do whatever he wanted to do to her, that is the deceased. A fight started and the deceased grabbed the accused's private parts. The accused then took a rope from the shelf and tied the deceased and tightened it until she became weak.

The accused realised that the deceased was not breathing anymore, he then tried to hang her on the roof but he failed as the deceased was heavy. The accused was trying to make it look like a suicide.

The accused stayed in the house until morning and thereafter went to Mqfutseni to collect his tools and went to work. The accused surrendered himself to the Manzini Police in the company of PW6 Musa Vilakati on the 1st June 2007, and was released after three weeks.

The accused concedes that there is no novus actus interveniens between his unlawful act and the subsequent death of the deceased. The deceased died as a result of his unlawful actions. The accused acted negligently when he killed the deceased.

The following will be handed over as exhibits:- the rope, the post mortem report, the statement made to the Judicial Officer, the statement made, agreed and signed by both Counsels and the accused or his representative on the 12th October 2010 at the High Court of Swaziland being a statement read and understood by the accused and his representative."

[13] The statement was confirmed by the accused's Attorney as being in accord with his instructions. Owing to the previous hesitation exhibited by the accused person I enquired from him personally if he understood the contents of the statement which he also confirmed including that same reflected his instructions to his Attorney.

[14] In line with the established procedure and practice before this Court which is governed by Section 238 read together with Section 272 of the Criminal Procedure and Evidence Act 67 of 1938, I found the accused guilty of culpable homicide on the basis

of his plea. In fact Section 238 (1) of the Criminal Procedure and Evidence Act 67 of 1938 provides as follows:-

"Conviction of accused person on a plea of guilty or evidence of confession"

"238 (1) If a person arraigned before any Court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is charged, and the prosecutor has accepted such plea, the Court may, if it is:-(a) the High Court or a Principal Magistrates Court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence."

[15] On the other hand the relevant portion of Section 272 of the Criminal Procedure and Evidence Act 67/1938 provides as follows:-

Admissions

"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...."

[16] I came to the decision to convict the accused on the basis of his plea of guilty to culpable homicide after having convinced

myself that the agreed facts taken together with the contents of the post-mortem report and the contents of the confession, disclosed the offence concerned in keeping with the observations of the Supreme Court in the case of **Zwelithini Dlamini v The King Criminal Appeal Case No. 5 of 2008,**

where Zietzman JA stated the following:-

"When a case has to be decided on a statement of agreed facts, it is necessary that sufficient particulars of the event be included in the statement not only to prove the guilt of the accused, but also to enable the Court to determine what will be an appropriate sentence."

[17] As these do not appear *ex facie* the statement of agreed facts as reproduced above, it is imperative that I set out what I consider to be the salient features of both the Post-mortem Report and the Confession.

The Post-mortem Report as compiled by Dr. Komma Reddy, and handed into Court by consent, provided the following as

having been reported or noted by the Pathologist on the body of the deceased:-

1. That she died due to strangulation
2. There was a contusion of 1 x 1 cms in the middle portion of the nose.
3. There were contusions of 1 x 1 cms and $\sqrt{1} \times \sqrt{1}$ cm on the left cheek.
4. There were ligature marks of $\sqrt{2}$ cm width, present around the neck, above the thyroid cartilage, with point of suspension on the right side of the neck, below the right eye.
5. Contusion of 3.5 x 1.5 cms, present in the middle portion of the right region.

[18] The confession provided the following which does not appear on the statement of agreed facts and I believe same was left out by mistake given that the said confession was itself filed by consent for its contents to be considered. In my view the contents of the confession should supersede where the statement of

agreed facts is silent because it is entered to be taken into account as part of the evidential material. The confession:-

1. Does not say anything about the accused having been insulted with the words "ungangizeki wena, sewehlulwe ngusisi sewutocaphatana nami" fi.e "stop fucking me around, you have since failed my sister and you are now mocking me or turning on me or words to that effect).
2. The confession also does not mention the grabbing of the accused by his private parts.
3. It also does not mention a fight between the two. It does however mention the offending talk by the deceased which could amount to provocation.

[19] I have also observed that the statement of agreed facts and the confession do not explain the interterm injuries recorded above, which however I have no doubt were inflicted during the scuffle between the accused and the deceased.

[20] Although I have found the accused guilty of culpable homicide on the basis of his plea, it is important for me to

mention the facts of the matter as indicated above that this is one of the most serious cases of culpable homicide which is at the most serious end of the scale as observed by Tebbutt JA in **Musa Kenneth Nzima v Rex Criminal Appeal Case No. 21 of 2007**

at page 8 when he said the following: -

"There are varying degrees of culpability in culpable homicide offences.

This Court has recognised this and in confirming a sentence of 10 years imprisonment in what it described as an extra ordinarily 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."

[21] I say this matter is at the most serious end of the scale because of the foregoing and the following:-

21.1 The deceased is not shown to have been armed. In fact the number of the ante mortem injuries observed by the Pathologist confirm that she was more on the receiving end. I say this further because the accused

did not disclose in his confession or in the statement of agreed facts where or what injuries he sustained. In fact what the facts of the matter bring about is that he was angry perhaps because he thought the deceased influencing his girlfriend badly against him and the provocative response by the deceased did not help matters.

21.2. After having inflicted such an assault on her body as borne out by the ante mortem injuries, there is no reason why he would have gone on to strangle her to death with a rope. Such a death should be one of the most gruesome ones.

[22] Lastly, I mention that in my view the accused was lucky that the Crown accepted the Plea of Guilty to culpable homicide which could on its own have been influenced by a number of factors on the part of the Crown such as the unavailability of witnesses. It is for this reason I find it unsafe or not advisable to criticise the handling of a matter in this manner by the Crown unless I have all

the facts at my avail. It may be that faced with a situation (e.g unavailability of witnesses) it was safer for it to at least obtain a conviction for a lesser offence than have an acquittal of the accused.

Sentence

[23] It was indicated by the Crown that although the accused had an 18 years old assault record such was as good as none because of its age and he was therefore as good as having no record of previous convictions. This I have taken into account in the accused person's favour. This factor I weighed against his current reputed age of 45 years and noted that although he apparently had some assault record, it was very old to stand, which means that he had been able to conduct himself well since then until now.

[24] I further took into account that although the accused had initially wanted to make it look like the deceased had committed suicide he had subsequently become remorseful and had handed himself over to the Police. He also no doubt indicated his remorse

by pleading guilty to the offence of culpable homicide. Although, it is not all the time when an accused person pleads guilty that he is remorseful as in some instances he does so because of having no options, I have accepted as persuaded that in this one the accused pleaded guilty because of remorse for what he had done.

[25] This approach by the accused has not only helped the Court conserve its time, but has also saved the witnesses and the deceased's relatives from reliving the unpleasant incident and reopening healing or healed wounds.

[26] I have also taken into account that unjustified and gruesome as the deceased's death was, there was an amount of provocation that had been directed by the deceased to the accused including the fact that they appear from the facts of the matter to have had a tenuous relationship.

[27] I was also urged to blend justice with mercy in the sentence I was issuing against the accused. I was also asked to give him a

sentence that gives him another chance in life as opposed to breaking him. I did take these submissions into account.

[28] I however, had to consider that the accused committed a serious offence where the life of a 22 years old woman was lost. I have not been shown that the deceased was armed with anything so as to deserve to die let alone in the gruesome and painful manner she did. I cannot accept a real fight would have ensued between the accused a male who at the time was at the prime of his life and the deceased, a young five months pregnant woman of 22 years. This to me depicts a senseless killing of another human being.

[29] The killing of people, particularly women, by men is on the rise. This necessitates that an appropriate message is sent out there, particularly to other would be offenders that such killing is not acceptable and will be dealt with harshly by the Courts, who can no longer tolerate it.

[30] Society expects all its members including women to be protected and that they must be able to lead a life free from fear of being assaulted and killed.

[31] I have mentioned the foregoing being fully aware of the difficulties brought about by this stage of criminal proceedings to Judicial Officers. I therefore cautioned myself against striving for severity just as I tried not to be overly lenient.

[32] I have in fact tried very hard to maintain the delicate balance I am required to maintain in terms of the triad which comprises the interests of society, the offender and the crime itself. I had cautioned myself against giving too much weight on any of the competing interests as observed in such cases as **R v Zinn 1969 (2) SA 537 (A)**.

[33] I was also alive to the fact that as I pass the sentence in this matter same, should take into account the main purpose of punishment which according to **S v Rabie 1975 (4) SA 855 (A)** is to be deterrent, reformatory, preventive and retributive. The

case of **S v Khumalo and Others 1984 (3) SA 327 (A)** is also instructive in this regard.

[34] It is for this reason that the sentence I gave in this matter, and notwithstanding the facts exhibiting it as one of the most serious cases of culpable homicide, I found it appropriate to give the accused a chance in life after he would have served ;his term by suspending a portion of it. I also ensured that the sentence takes into account the fact that the deceased's relatives and society at large do not find it meaningless so as to lose faith in the Justice system. I have also tried to ensure that other would-be-offenders are discouraged from committing the same offence and I had no doubt this could only be achieved through sending the correct message.

[35] Consequently it was for taking into account all the foeregoing factors that I imposed the following sentence which I considered to be appropriate :-

35.1. The accused is hereby sentenced to 10 years imprisonment.

35.2. Three of the said years will be suspended for a period of 3 years on condition that the accused is not convicted of an offence that involves violence to a person of another.

35.3. The accused was only in custody for a short period said to be 3 weeks and I therefore could not realistically talk of any backdating, particularly taking into account that a portion of the sentence was suspended.

Dated at Mbabane on this 06th day of April 2011.

N. J. HLophe J
JUDGE

