



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

REPORTABLE

Case No: 332/2012

In the matter between:

REX

v

NTOKOZO MABHULANE HLANZE

Neutral citation : *Rex vs Ntokozo Mabhulane Hlanze* (332/2012) [2013]
SZHC 256 (20th November, 2013)

Coram : MAMBA J

Heard : 04 November, 2013

Delivered : 20 November, 2013

- [1] Criminal Law and Procedure – On a charge of Murder – Accused confessing to his brother that he accidentally killed deceased whilst trying to hit a cow with a stone. No evidence to gainsay this. Killing unlawful. Accused guilty of Culpable Homicide.
- [2] Criminal Law – offence of Culpable Homicide defined. Unlawful killing failure to realise the risk of death, whether or not the accused ought to have realised such risk.
- [3] Practice and Procedure – role of precedent and stare decisis – Hierarchy of Courts – as a general rule lower courts have to follow law and decisions propounded or laid down by higher courts unless such decisions clearly per incuriam.
- [4] Criminal law and Procedure – Part of statement made by an accused before a judicial officer disputed by accused. Crown failing to lead evidence on disputed portion of statement. Disputed portion not severable from main statement. Whole statement inadmissible.

- [1] The accused is charged with the crime of murder in that on or about 09 March 2012 and at or near LaMgabhi area, he did unlawfully and intentionally kill Sinethemba Maziya. On being arraigned, he pleaded not guilty to the charge. His plea was confirmed by his attorney, Mr N. B. Mhlanga.
- [2] The defence, notwithstanding the said plea by the accused, made certain important concessions herein. First, the defence consented and conceded that the post-mortem examination report be handed in as an exhibit herein in the absence of the maker or author thereof. Further, in making this concession, the defence specifically conceded that this report was in respect of the death of Sinethemba Maziya, the deceased in this case. This report was consequently handed in as exhibit B herein.
- [3] Secondly, the defence consented that a statement made by the accused before a judicial officer on 20 March 2012 be admitted and received by the court as part of the evidence by the crown herein. This statement was handed in as exhibit A. I shall return to this statement presently.

- [4] The crown led four witnesses in support of its case. As this evidence was largely or substantially not challenged, I shall only refer to its essential features.
- [5] At the time of his death, the deceased was six years old. He lived at Lamgabhi area with his aunt Celiwe Felicia Dlamini (PW2). On 09 March, 2012, PW2 sent the deceased to a shop in the area to purchase certain goods or items for her. She gave him E20.00 for this purpose.
- [6] The deceased wore the following items: a
- (a) green woollen satch around his waist,
 - (b) powdered blue underwear,
 - (c) navy blue track suit pair of trousers and
 - (d) white and blue sweater, with long sleeves.
- [7] It is common cause that the deceased never returned from the shop and that despite a search for him being mounted and conducted on the days that immediately followed, he could not be found. It was not until 18 March, 2012 that his cloths and bones or remains were discovered in a wattle forest in the area. On that day a dog was seen in the area carrying a decomposed human leg and foot. This led to the discovery of the

deceased's cloths and remains or bones. Again, that the cloths found in the forest that day were those worn by the deceased when he was last seen alive, has not been disputed by the defence. There were of course, and rather disturbingly no DNA tests conducted on either the clothing or the bones in question to determine in any scientific way whether or not these items were connected with the deceased. I mention this because one would have thought this was, in this day and age, a basic, logical and crucial exercise to carry out under such circumstances. The court was merely told by PW1, Detective Constable 3996 Sukati that the cloths found at the scene were taken to South Africa 'for examination.'

[8] The accused was at the relevant time employed as a herd boy at the home of Njabulo Joseph Hlophe (PW3). The latter spent most of his time at his rented house at Mahwalala in Mbabane. He was slightly older than the accused who was then about 19 years old. The two were quite close and referred to each other as brothers.

[9] According to PW3, when the news that a dog had been seen carrying a leg of 'the child' was relayed to him, he was in the same room as the accused at his home at Lamgabhi. PW3 told the court that as Thandi

Msibi told them this news, the accused immediately walked out of the room they were in and went to sit outside quietly alone.

[10] On the next day, whilst the two were on their way to talk to PW 3's uncle who was giving motor vehicle driving lessons to the Accused, the accused started running ahead of PW3 towards the Lusushwana river. On being asked by PW3 what the problem was the accused told him that he wanted to kill himself at the river. Again on being asked by PW3 why he wanted to kill himself the accused first refused to tell him the reason for this but on being asked the second time, the accused started crying and told this witness (PW3) that he, the accused, 'had accidentally killed the child.' He said he had aimed or thrown a stone at a cow but had accidentally hit the deceased who had died as a result. The accused said he was sorry for this. The accused pleaded with PW3 not to tell anyone about this. PW3 assured the accused that he would not divulge this to anyone but he, PW3, surreptitiously reported this first to Slomo at home and later to the Police. This report finally led to the arrest of the accused.

[11] PW3 told the court that although the accused in their conversation never referred to the deceased by his name, it was mutually understood between

them that the child being referred to or talked about was 'Maziya' the deceased. This again was never disputed or challenged by the defence in court.

[12] PW3 also told the court that the accused informed him that he had taken the E20.00 from the deceased, after killing him. PW3 testified further that the accused repeated his confession made to him to one Mapondweni Addison Kunene. (Mr Kunene was, however, not called as a witness herein).

[13] At the close of the crown case, the defence applied for the acquittal and discharge of the accused in terms of section 174(4) of the Criminal Procedure and Evidence Act 67 of 1938; alleging or arguing that there was no evidence implicating the accused with the commission of the crime charged. The defence argued that as per the evidence led by the crown, there was no evidence that the accused had committed the crime of murder inasmuch as the accused had not confessed to the intentional killing of the deceased but of 'the child' and further that the said confession or admission made to PW3 specifically said the killing was accidental.

[14] I rejected or refused this application and pointed out that the defence had not disputed the evidence that the post-mortem report was in respect of the death of the deceased and that it was mutually understood by both the accused and PW3 that the child referred to in their conversation was the deceased. The accused referred to the child rather than a child. He was being specific. And most importantly it was the ruling of the court that the said section 174(4) refers to not only there being no evidence implicating the accused of the crime with which he is charged but also “any other offence of which he might be convicted thereon.’

The court pointed out further that culpable homicide and common assault were competent verdicts on a charge of murder. (See section 186(1) and (2) of the Criminal Procedure and Evidence Act 67 of 1938).

[15] It was held or ruled by this court that unpalatable or controversial as it may appear or sound, the law in this Country as propounded or laid down by the Court of Appeal in *Annah Lokudzinga Matsenjwa v R 1970-1976 SLR 25* is that Culpable Homicide is the unlawful killing of another human being or person if the accused did not realise the risk of death and it is immaterial whether or not he ought to have done so. This killing

need not be shown to have been negligent. See also the decision of this court in *R v Ndumiso Maziya, case 137/2008 judgment delivered on 14 March 2013*.

[16] I reserve my comments on the judgment in *Annah Lokudzinga* case. Suffice to say that, for this court and the lower courts, that judgment states and or lays down the law on what constitutes the crime of Culpable Homicide in this jurisdiction. It is the precedent or authority on that issue and has to be followed. As Lord Scarman stated in **Duport Steels Ltd and Others [1980] 1 All ER 529 at 551:**

‘My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law. When one is considering law in the hands of the judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

In our society the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as lawmakers. The common law and equity, both of them in essence systems of private law, are fields where, subject to the

increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law. The judges, even in this, their very own field of creative endeavour, have accepted, in the interests of certainty, the self-denying ordinance of stare decisis, the doctrine of binding precedent; and no doubt this judicially imposed limitation on judicial lawmaking has helped to maintain confidence in even-handedness of the law.

But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires. Further, in our system the stare decisis rule applies as firmly to statute law as it does to the formulation of common law and equitable principles. And the keystone of stare decisis is loyalty throughout the system to the decisions of the Court of Appeal and this House. The Court of Appeal may not overrule a House of Lords decision; and only in the exceptional circumstances set out in the practice statement of

26th July 1966 will this House refuse to follow its own previous decisions.

Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning MR himself shows, have a genuine creative role. Great judges are in their different ways judicial activists. But the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.

In the present case the Court of Appeal failed to construe or apply the statute in the way in which this House had plainly said it was to be construed and applied.'

See also *S v Katamba*, 2000 (1) SACR 162 at 166-167. Then what about my judgment in *R v Sandile Shabangu* case 233/2006, judgment delivered on 07 May 2007 where the court, notwithstanding a long line of cases went headlong or courageously and jettisoned the cautionary rule in sexual cases, one might ask: That decision was correct by default.

- [17] The accused opted not to testify or lead evidence in his defence or to call any witness.
- [18] Before exhibit A could be received by the court, its contents were read over to the accused and interpreted to him. He confirmed the contents thereof save that he denied that he had told the learned Magistrate that he had sodomised the deceased after killing him. The crown, however, did not lead any evidence to show or prove what the accused had actually said to the Magistrate pertaining this very issue. Therefore as it stands, a portion, perhaps a significant or an important part of the statement by the accused to the learned Magistrate is denied by him. This point or issue remains unresolved.
- [19] To my mind, the next question that immediately announces itself is: can the disputed statement be severed from the rest of the statement that is exhibit A? Or put another way, is it permissible to expunge the disputed portion of the statement and receive the rest of the statement? On first principles of law and procedural justice, I think not. This court may not, as it were, edit the statement of the accused and choose for itself what is or is not receivable in evidence. The statement must be read and understood in its entirety and not in a truncated fashion, as no doubt an

edited statement would be such. Neither the court nor the accused may pick and choose which pieces of the statement are admissible or not.

[20] I therefore hold, notwithstanding that the defence has not challenged the admissibility of exhibit A, that this statement is inadmissible in evidence in the circumstances of this case.

[21] The evidence of PW3, Jabulani Joseph Hlophe, as stated above has not been disputed or denied by the defence. This evidence is very clear and straight forward and I need not repeat it herein. What is significant from that evidence is that the accused confided in PW3 that he had accidentally injured and killed the deceased whilst trying to hit a cow with a stone. The accused also admitted having taken the E20.00 from the deceased after killing him. The statement made by the accused to PW3 was freely and voluntarily made by him and is plainly admissible in evidence.

[22] The accused told PW3 that he had accidentally killed the deceased under the circumstances described by him. He also expressed his apologies for his actions. He was so distraught that he wanted to take away his own life.

[23] There is absolutely no evidence to gainsay the evidence of the accused that he did not intend to kill the deceased or that though he foresaw that in throwing the stone in an attempt to hit the cow, this might cause the death of the deceased but he persisted in his actions regardless of such foresight. Consequently, I cannot hold that the crown has, beyond a reasonable doubt, established a case of murder against the accused.

[24] However, there is no doubt that the killing of the deceased by he accused was unlawful. In *Maphikelela Dlamini v R 1979-1981 SLR 195 at 198D-H* the court stated:

‘The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R 1970 – 1976 SLR 25*. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah’s* case the law was stated as follows, at 30A: “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”.

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah's* case to which I have referred the then President of this court, Mr Justice Schreiner said: "It has been suggested that a finding that a person must have foreseen or appreciated a risk is not the same as a finding that the person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have". In this statement of the law Caney JA on the same page concurred. Milne JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: "I should like first of all to associate myself very strongly with the learned President's view that when it is correctly held that a person 'must' have appreciated that his act involved a risk to another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk". I thought it right to mention these matters because for many years to my knowledge *Annah's* case has been followed in Swaziland and although I share the regret expressed by Mr Justice Schreiner in *Annah's* case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p29 of *Annah's* case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah's* case to which I have referred.'

Isaacs JA concurred and also added: ‘My agreement is not to be considered as being an agreement with a departure from Annah’s case.’

[25] For the foregoing reasons, the accused is found guilty of the crime of Culpable Homicide.

MAMBA J

For the Crown : Mr. T. Dlamini

For the Defence : Mr B. N. Mhlanga