IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 137/2008

In the matter between

REX

and

NDUMISO MUZI MAZIYA

Neutral Citation: *Rex v Ndumiso Muzi Maziya* (137/08) [2013] SZHC 59 (14 March 2013)

Coram: **Mamba J**

Heard: **11 March 2013**

Delivered: **14 March 2013**

[1] Criminal Law – Accused, a 19 year old man, stabbing a ten year old boy with a screw-driver on the head. Victim suffering a fractured skull and dying as a result.

[2] Criminal Law – Murder and Culpable homicide discussed and distinguished.

[3] Criminal Law – Culpable Homicide – defined – unlawful killing whether or not risk of death ought to have been realized.

[4] Criminal Procedure and Evidence – a pointing out, accompanied by an exculpatory statement by accused is not a confession and thus need not be shown to have been freely and voluntarily made by him.

[1] The accused has pleaded not guilty to the indictment that alleges that on or about 7th August, 2007 he unlawfully and intentionally killed and murdered Sabelo Magongo (hereinafter referred to as the deceased) who was at the time about ten years old. The crime, it is alleged was committed at Mavubetse area in the District of Lubombo.

[2] The essential facts surrounding the death of the deceased are largely or substantially not in dispute. Indeed after the evidence of the two crown witnesses, the court was requested by both parties to record that the defence admits that the accused caused or inflicted the injury that resulted in or caused the death of the deceased but denies that the accused when he did so had the intention to commit the crime of murder.

[3] As would appear from the above concession by the defence, unlawfulness of the acts of the accused is not conceded nor is there any concession to any of the various competent verdicts on a charge of murder.

[4] The post-mortem report in respect of the deceased was handed in by consent as exhibit A. It was further admitted by the defence that the deceased person mentioned therein was the deceased; or that the post-mortem report was in respect of the deceased. It was no doubt because of the above admissions by the defence that the crown only led the evidence of

two witnesses. These were Andile Maziya and 4928 Constable Sandile Maseko, who gave evidence as Pw1 and Pw2 respectively.

[5] Pw1 testified that at about 230 pm on 07th August, 2007 he was on his way home from school in the company of his schoolmates from St. John's Primary School. The deceased was one of such schoolmates. About a kilometre away from school, they came across the accused who, without any provocation by any of them told them that he would beat them up together with their brothers who were not there. He, the accused, then walked with them for a while before suddenly taking out a screw-driver from his pocket and stabbing the deceased with it once on the right side of his head. The deceased immediately fell down and was bleeding profusely from his head injury. The accused paid no particular attention to him and proceeded on his journey. Pw1, together with some of his schoolmates picked up the deceased and took him back to St John's School where he was handed over to three of his teachers. From there he was conveyed by car to Tikhuba Clinic.

[6] It is common ground that from Tikhuba Clinic, the deceased was transferred to Good Shepherd Hospital in Siteki where he later died.

[7] It is common cause further that the accused person had taken some intoxicating liquor and was drunk at the time when he stabbed the deceased as described above. It is further not in dispute that when the accused stabbed the deceased, the latter had not said or done anything to the former. The attack was thus totally unprovoked.

[8] The relevant screw-driver herein was described and identified by Pw1. It is about 15 cm long with a thin shaft and yellowish handle. Pw1 was able to notice these features at the time of the incident in question and was also able to identify it in court. I pause here to note that, although there was no objection or demur by the defence when Pw1 identified this weapon in court, defence Counsel in her submissions argued that I should disregard this piece of evidence because the screw-driver so identified was the only one in court and therefore such identification was worthless. Without making a firm finding on this submission, on the face of it, this argument appears to me rather strange, curious or even disingenuous and misconceived. This is particularly the case because Pw1 had committed himself to a description of the item in question before identifying it in court. And, when he did so, there was no objection by the defence, despite the court inviting defence counsel to indicate her views thereon at that time before the screw-driver was handed in and marked as item A1 for purposes of identification. Later on it was handed in as exhibit 1 by Pw2. Even at

that stage, there was no objection by the defence. And, in the context of the admissions by the defence noted above, this is a no – argument – argument in my judgment.

[9] According to Pw2, the accused told him that he had accidentally stabbed the deceased and had then thrown away the screw-driver next to his brother's homestead. The accused then led the police to this place and the screw-driver was retrieved in some thick grass.

[10] When Pw2 gave his evidence on how the screw-driver was recovered, there was again no objection by the defence and the screwdriver was handed in as exhibit 1. In cross-examining Pw2, the defence denied that the accused was ever cautioned or warned in terms of the judges rules at any time in the course of his arrest and detention. In his evidence in chief, the accused also denied that he was cautioned by the police during the investigation or course of his arrest. This laid the ground-work or platform for the argument during submissions by the defence that the evidence of the pointing out of the screw-driver by the accused and what the accused said about him accidentally stabbing the deceased, should be rejected as inadmissible; simply because it was not preceded by the said caution or warning.

[11] The pointing out by the accused of the screw-driver to the police should be viewed in its proper context. That context is the accused telling the police that he had committed no offence at all as he had accidentally stabbed the deceased. In a word, the accused said 'I am innocent. I accidentally stabbed the deceased and here is the screw-driver I used.' This is an exculpatory statement. It does not have to conform or satisfy the strictures relating to admissions or confessions by an accused as laid down in JULY MHLONGO and OTHERS v R, (Appeal case No. 185/92) and ALFRED SHEKWA AND ANOTHER v REX (Appeal Case No. 21/94) both yet unreported. In both these cases our Court of Appeal approved and followed the South African Appellate Division judgment in *S v Sheehama,* 1991 (2) SA 860 (A) that:

> 'A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of section 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily.'

The underlining is mine and the relevant section of our Criminal Procedure and Evidence Act 67 of 1938 is 226(1).

[12] But again, whether the above evidence by Pw2 is rejected or not is in my view, totally irrelevant in view of the admissions by the defence recorded above. At the end of the day, counsel for the accused was constrained to accept this; that it did not advance the defence case one bit.

[13] Pw1 was adamant in his evidence that the accused first threatened to assault them before stabbing the deceased. He was also steadfast in his evidence that the accused produced the screw-driver from his pocket contrary to the evidence by the accused that he had approached the school children with the knife in his hand.

[14] In terms of Exh A, the post-mortem report, the cause of death was a stab wound or injury to the head 'on the middle portion of the left side of the head which is 7cm above the left ear.' This injury caused a fracture of the left parietal bone and left temporal bone which was perforated. This injury caused or resulted in extra-dural haemorrhage on the left side of the brain and intra-cerebral haemorrhage.

[15] I pause here to observe that Pw1 said the deceased was stabbed on the right hand side of his head. This is clearly contrary to the findings of the pathologist who conducted the post-mortem examination on the deceased. The pathologist had amble time and closely examined the body of the deceased and also committed his observations in writing upon inspection of the corpse. Of course, Pw1 himself had close contact with the deceased immediately after the stabbing as he helped take him to school, but I prefer the evidence of the pathologist on the exact location of the stab wound. In any event, the deceased suffered only one stab wound to the head. This stab wound was inflicted on him by the accused and it is this stab would that caused his death. At the end of the day nothing turns on its exact location on the head of the deceased.

[16] The accused stated that the deceased was accidentally stabbed by him whilst he, the accused played with him. He was unable to say what game or manoeuvres were involved or executed in the game in question. The accused stated that after the stabbing he continued on his journey home. He testified further that he was drunk and did not realise that the injury he had accidentally inflicted on the deceased was serious.

[17] I accept that the accused was at the relevant time intoxicated. He was, however, not dead drunk. Even on his own showing, he was in such a state

that he was able to remember everything that took place when he met the school children and the events immediately after the stabbing of the deceased. He said he realised that the Police would come for the screw-driver he had used and thus decided to hide it in the grass away from his brother's homestead where he was. These are clearly the actions of a man who has his full mental faculties with him and who is fully conscious and appreciative of the value of his actions and surroundings.

[18] At the time of the commission of the offence the accused was 19 years old and he was drunk. He had taken an intoxicating liquor made from grapefruit, he said. I accept this. There was, however, absolutely no justification for the stabbing. I accept the evidence of Pw1 that the stabbing by the accused was deliberate.

[19] I have examined and analysed the evidence above and what the court has to decide at this stage is determine whether or not the crown has proven its case beyond any reasonable doubt herein on the charge of murder or on any of the other verdicts competent on such an indictment.

[20] In *Maphikelela Dlamini v R, 1979-1981 SLR 195 at 198D-H*, Maisels P said:

'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'

vide also *Rex v Phiwayinkhosi Nhlanhla Ginindza, Crim 174/10* (judgment delivered on 4th July 2012) and the cases therein cited in particular Vincent Mazibuko v R 1982-1986 (2) SLR 377 wherein the headnote reads as follows:

> "A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."

[21] The established or proven facts in this case are as follows:

(a) the deceased was stabbed with a screw-driver on the head by the accused, once.

(b) the stabbing was not justified or excusable and thus unlawful

(c) the deceased sustained or suffered a fracture in the skull resulting in intra-cerebral and extra-dural haemorrhage.

(d) the deceased died as a result of the injury inflicted on him by the accused.

(e) the accused was intoxicated at the time he stabbed the deceased.

[22] From the above facts, particularly that only one stab wound was inflicted by the accused on the deceased and the fact that the accused was intoxicated at

the time, I am unable to hold that the crown has been able to discharge the burden resting on it that the accused had the requisite intent to murder the deceased; either in the form of direct or indirect intention. However, even in his stated state of intoxication, the accused should as a reasonable man would, have foreseen that striking the deceased on the head with a sharp object as the screw-driver exhibited in this case, would cause his death. He failed to foresee this. He failed to live up to the standard of the reasonable man. He was thus negligent – for failing to foresee that which a reasonable man in his situation would have foreseen.

[23] I am fully mindful of the fact that my formulation of the crime of Culpable Homicide in the preceding paragraph may appear different from that stated by the venerable Court in ANNAH LOKUDZINGA MATHENJWA v R 1970-1976 SLR 25 at 30. There, the court stated that the law of Swaziland is that a person is guilty of the crime of culpable "if he did not realise the risk …whether or not he ought to have realised the risk, since he killed unlawfully." That decision or formulation is binding on me and I am not about to depart therefrom. My formulation above is based on Roman Dutch Common Law. So, either way because the stabbing was unlawful and the accused did not realise the risk of death, the accused is guilty of Culpable Homicide as stated in ANNAH (supra); and, because he acted negligently

and failed to foresee that which a reasonable man would have foreseen, he is guilty of Culpable Homicide as well (under the common law).

[24] For the foregoing reasons I find the accused not guilty of the crime of Murder but guilty of the lesser crime of Culpable Homicide.

MAMBA J

For the Crown:	Mr Phila Dlamini
For the Defence:	Ms P. Da Silva