

IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO.25/96

In the matter between:

HENRY MATANA XABA

VS

REX

CORAM

: J.H. STEYN J A

: W. H. R. SCHREINER J A

: R. LEON J A

FOR THE CROWN : MR. NSIBANDE

FOR THE APPELLANT : IN PERSON

JUDGMENT

Steyn J.A.:

The appellant in this matter was convicted in the High Court on the charge of murder. He was sentenced to undergo imprisonment for a period of five years. He has appealed against both his conviction and his sentence.

One of the grounds of the appeal raised by him is that he should not have been convicted of murder because he did not have the intention to kill the deceased; that he should be convicted of culpable homicide and that the sentence should adjusted accordingly.

We raised the issue with counsel for the Crown as to whether

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the Crown in this case did succeed in proving beyond a reasonable doubt that the appellant did have an intention to kill. In my opinion very fairly and correctly Crown Counsel conceded that the evidence taken as a whole did not prove that the appellant did have the necessary intention. I say fairly and correctly because the evidence discloses that there was an argument between the appellant and the deceased as a result of which there was a skirmish between these two persons. There is evidence that the deceased assaulted the appellant by striking him on the head with a beer crate and that he bled from the forehead as a result of this assault. It was in these circumstances that he produced a knife and that he slashed the deceased across the stomach with a knife. The deceased subsequently died as a result of peritonitis and what the doctor calls bowel necrosis.

If one takes into account the situation of the wound, the fact that there was only one stab wound inflicted, the fact that the appellant was not the initial aggressor and that he was assaulted by the deceased, I believe that there must be a reasonable doubt; as to whether Appellant did have the

requisite intention to kill. In these circumstances a conviction of culpable homicide would have been the just verdict. Accordingly the appeal succeeds to the extent that the conviction on the murder charge is set aside and the appellant is convicted of culpable homicide.

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On the issue of sentence counsel for the Crown has contended that the sentence of five years' imprisonment imposed by-court a quo was in fact a sentence which would have been appropriate on a charge of culpable homicide. The sentence of five years was indeed a lenient one on a murder charge. However, I do not believe that that sentence can stand if one bears in mind that the moral guilt of the appellant must be regarded significantly reduced by virtue of the circumstances I referred to and more particularly in the absence of an intention to kill.

The appellant is a first offender. I believe that he would benefit from the imposition of a partly suspended sentence in addition to the period of imprisonment which he has already undergone. It is my view that an appropriate sentence taking into account all the circumstances would be one of five years' imprisonment half of which, that is two and half years of which will be suspended for the period of three years on condition that the appellant is not convicted of a crime involving violence and in respect of which a sentence

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of imprisonment without the option of a fine is imposed. The sentence imposed by the High court is altered accordingly. The sentence aforesaid is backdated to the 30th October 1994.

J.H. STEYN J A

I agree :

W. H. R. SCHREINER J A

I agree :

R.N. STEYN J A

Delivered on the 3rd day of April 1997.