

IN THE HIGH COURT OF SWAZILAND

a:Fofidi

REX

vs

ENOCK FOFIDI MPUNDLE VILANE

Cri. Trial No. 131/1997

Coram S.W. SAPIRE, A C J

For Crown Ms Nderi

For Defence Mr. B.J. Simelane

Judgment

(24/2/98)

You Enock Vilane are charged with the murder of Mahhedle Joseph Magagula. It is alleged that on the 31st July in the Lubombo Region you killed Magagula with intention to kill. To this charge you pleaded not guilty.

It is common cause that you in the company of James Dlamiru went to the homestead of Solomon Magagula. When you got there you opened the door of the house forcefully and because you were a Community Policeman you insisted on taking the people who you found in the house to Andreas Dlamini. Your reason for doing this was that the deceased who was a brother of Solomon had not been reported as staying there. The evidence of Solomon's girlfriend and that of Solomon himself is that you entered the dwelling in a violent manner and that you behaved in an aggressive and rude way to the three people there.

2

a:Fofidi

The evidence is also clear that James Dlamini did not come close to the dwelling but stopped some distance away keeping himself out of sight. Why this was so is not clear.. According to your version James Dlamini had come to you as a messenger from Solomon Magagula to complain that his brother was interfering

with his wife. If that were so and James was acting at the request of Solomon it seems strange that he should try to keep his presence hidden. What is more consistent is that you, learning in some way that there was a third person staying at the homestead who had not been reported, you decided to take what you considered to be the appropriate action.

Because there was a friendly relationship between James and Solomon it is difficult to understand why James did not want to be seen to be associating with you in taking this action against the brother. In the event there is evidence that you caused the three people to dress themselves and to be led to the home of Andreas Dlamini. It is also evident that you were proceeding in a single file towards the home of Dlamini. Magagula and his wife were in front while the deceased was at the back, you following him.

It is quite clear that while this party were making their way to the home of Andreas Dlamini the deceased was assaulted as a result of which he later fell to the ground. When Solomon Magagula turned around to enquire what was going on he himself received a blow to the face. You were the only person present there. James was not seen and both Solomon and his wife are clear that it was you who assaulted the deceased.

As a result of this assault the deceased later succumbed and we have a graphic description of how you asked Solomon's wife to close the deceased's eyes and to stretch out the body. Solomon and his wife/girlfriend testified that you committed a second assault on the deceased by kicking him.

The medical evidence which has been submitted does not indicate that this assault by kicking caused any harm to the deceased which was noted in the postmortem examination. The postmortem report is to the effect that the deceased died of concussion of the brain and apart from this head injury the doctor noted injury to the right upper limb and right lower limb and a contused abrasion over the right cheek prominence. There is no connection between these injuries and the

3

a:Fofidi

kicking. And it is quite clear that the deceased died as a result of the blow received in the first assault.

I accept that you were surprised that the deceased died as a result of the blow inflicted on him. It is clear that you tried to shift the blame of the assault to James Dlamini. As a result of the report you made James Dlamini was in fact arrested together with yourself. After you had been in custody for sometime, about a week, you decided however to make a statement to the Magistrate in which you exonerated James Dlamini.

Now you claim that you made this statement to the Magistrate in order to rectify the statement you made to the Police because Dlamini induced you to make it. I find your explanation quite unbelievable. This is a statement made by someone who knew that has wrongfully implicated Dlamini and wish to set things right. The explanation tendered in Court for this statement is quite illogical. You knew too well that there were two people implicated in the assault on the deceased. One of the people was Dlamini and the other one was yourself. You have now cleared Dlamini and excluded him from culpability for the death of the deceased. The only other person who could be liable would be yourself. Why you should have made such a statement merely on the promise by Dlamini that he would assist you with a lawyer is difficult to believe. I am satisfied beyond any doubt that you are the person who inflicted the fatal blow.

I do not find however that it can be proved that the shovel was used as a weapon although there is clear evidence that you took the shovel from Solomon's house. There is also no evidence of the intention to kill either in a direct sense or in a sense that you were liable for the probable results of your action. There is nothing to show that the blow was of such a nature that the person inflicting it must have anticipated that death will ensue. The evidence being such it is not possible to find you guilty of murder.

I do find however that in overzealous exercise of your authority it was you who inflicted the fatal blow causing the death of the deceased. The intention to kill has not been proved, the correct and competent verdict is one of culpable homicide. You are accordingly found guilty of culpable homicide.

SENTENCE

4

a:Fofidi

It is unfortunate for you that you are unable to control and properly use the authority such as it is vested in you as a Community Policeman. I do not believe that the law recognises the Community Police as an

organ of Government but apparently the Community Police are a recognised authoritarian force in the communities where they exist. You acted in an aggressive bullying and high handed manner that evening and what is worse you did so violently. In finding you guilty of culpable homicide I have already given you the benefit of a doubt and come to the conclusion that you did not intend to kill the deceased but your actions are less acceptable because you committed the assault in exercise of the authority that you have.

The assault cannot be justified in anyway and the message must go up to all concerned whether you are a community policeman or you are a private individual it is not proper to assault another person. Where death ensues it is a very serious matter. It is not possible to give you anything other than a custodial sentence. I bear in mind that it is said that you have dependants but unfortunately most people who come before the Court do have children and I understand that these unfortunate children may suffer to some extent but this cannot be avoided. As I have said your punishment must suit the crime and the evidence does not prove an intention to kill. I must also take into account that no previous convictions have been proved against you and I must accordingly treat you as a first offender.

It becomes necessary to balance between the undesirability of sending first offenders to jail and the necessity of passing a sentence which does not make a mockery of human life. The sentence which I impose is five (5) years imprisonment of which two (2) years will be suspended for three years on condition that you the accused is not found guilty of a crime involving an assault on another person resulting in death or grievous bodily harm committed during the period of suspension. Because you have been in custody since the 1st of August last year the sentence will be deemed to run from the 1st of August, 1997.

S.W. SATIRE

ACTING CHIEF JUSTICE