IN THE HIGH COURT OF SWAZILAND

REX

Vs

SIPHO NKWANYANA

Cri. Trial No. 143/98

Coram S.W. Sapire, CJ

For the Crown Ms Nderi

For Defence Mr. P. C, Smith

JUDGMENT (11/03/99)

The principal Crown witness is a sister of the deceased. She was present when the deceased was killed. The killing took place at or in a room hired by the accused from this witness. On the 9th of March, 1998, she, her sister the deceased, and two children went to what had been their parental home to make sure that the accused had in fact left the premises. When they came there they found the accused still in the premises but what was worse in their minds was that he had built a fire inside the room and they felt that this fire would damage the property. First this witness and then the deceased remonstrated the accused. While Alice and the accused were well known to each other the deceased was a stranger to the accused. It appears that this remonstration was the cause of a violent reaction in the accused. Both crown witnesses testified, and indeed it was admitted by the accused, that the deceased was grabbed by the throat and thrown to the ground. The accused then proceeded to kick

her and a number of kicks were directed to her head The accused maintains that only three blows were so directed. He also maintains that he was wearing soft sandshoes or takkies at the time. He says that only three of such blows were aimed or directed to the deceased head. There is evidence that the 2nd crown witness came upon the scene and observed that the deceased had been severely attacked and remonstrated with the accused. She describes how the accused then rearranged the deceased skirt which had been raised above her under garments in the course of the straggle but that immediately thereafter he resumed his attack on her. Eventually the accused left the premises and the matter was reported and the deceased was taken to the hospital where she died some 9 days later.

The accused himself gave evidence and while admitting the killing wished to indicate that he had been severely provoked by the deceased whose provocation of him was instigated by the 2nd Crown witness. He claims that both the deceased and her sister the Crown witness had been drinking or affected by drink and went on to allege that the deceased had reached far stage of intoxication. She had, he says, kicked over the pot, which was on the fire and had also kicked or in some way defiled his bible and thrown his clothes upon the floor. This was not observed by either of the crown witnesses. They denied that it happened.

One has to consider whether the party consisting of the deceased, second Crown witness and the two children went to this home in order to provoke the accused. Their evidence is to the contrary. They say they went there because they expected that he, the accused, had vacated the premises a day or two previously. This expectation was based on an undertaking given by the accused to the community police who had been consulted by the 2nd Crown witness in connection with the accused's continued presence on the premises.

I accept the evidence of the Crown witnesses and find that the provocation alleged by the accused to be highly exaggerated. There can be little doubt, certainly not a reasonable doubt, that the violence which resulted in the death of the deceased was occasioned by nothing more than the remonstration about the fire having been built in the room. The evidence of the assault was minimized by the

accused but it is quite

clear that the assault was neither as brief nor as restrained as he claims. I am therefore constrained to approach the question of the intent largely on the evidence of the prosecution. The presence or absence of intent is to be tested subjectively and one has for this to try as best one can to examine the thought processes if any of the accused person in relation to his acts. In this case the question really is, did the accused put his mind to the question as to whether the assault could result in the death. I have had the advantage of being referred by Ms. Nderi to the judgment of His Lordship the Judge of Appeal Mr. Justice Tebbutt in the case of Rex vs Thandi Tiki Sihlongonyane, Case No. 40/97. (Swaziland Appeal Court) In that case the South African Appellate Division decision of S v De Bruyn and another 1968 (4) SA 498 (A) at 510G - H. was revisited with approval

There are four components of dolus eventualis. The first is a subjective foresight of the possibilities however remote of the accused's unlawful conduct causing death to another. I have some difficulty with this formulation because there may be acts which may appear insignificant at the time which could by some remote possibility cause the unlawful death to another. There must also according to the judgment be a persistence in such conduct despite such foresight and there must be the incautious taking of the risk of the resultant death not caring whether it ensures or not. There must be the absence of actual intent to kill which is assumed in this case. It is dolus eventualis on which the crown basis its argument that the accused actions amount to murder. The accused clearly did not have a prior intent to kill. He clearly was fired by an irrational and seemingly uncontrolled reaction to be remonstrated by the women in regard to the fire.

His anger was channeled against the deceased because apparently she was a stranger and there may have been an element of him considering that she was interfering in a matter between him and the 2nd Crown Witness. There is no medical evidence to establish the likelihood of death from blows to the head from a takkied foot. There is evidence that the accused continued to rain blows and kicks on the deceased even after he had been called upon by the 2nd Crown Witness to decease. I am not satisfied that the accused foresaw the death of the deceased as a sufficiently viable possibility from the blows he was raining.

There is the overwhelming possibility if not probability that his mind in its rage state did not apply any rational thought to what he was doing. He seems to have acted impossibly and without heed to anything. There must be a reasonable

possibility that he did not in fact appreciate the possibility of the death of the deceased arising from his conduct. It is difficult to find any conscience taking of risk where the risk is not appreciated.

In the circumstances I am satisfied that the correct verdict in this matter is one of culpable homicide and he is found guilty accordingly.

SENTENCE

You have been found guilty of culpable homicide. If you understood the argument which has taken place you would understand that there is a very thin line between your conduct and murder. In the first place you raised your hand to a defenceless woman. That is unforgivable. There was no need for this at all, whatever the provocation. Your persistence even on your case of kicking her three times in the head is behavior worthy of an animal. A man does not behave like that and as I say there is a very thin line between your conduct and actual murder. Your sentence must be something which reflects the seriousness with which the Court regards such conduct. I have no regard to the previous convictions which are proved as they have little bearing to this offence but even treating you as a first offender there can be no possibility of avoiding a custodial sentence. The length of the sentence must reflect the seriousness of the crime and must go out as a warning to others that the answer to provocation is not to kill or to seriously injure a person who is responsible for provocation.

You will be sentenced to 7 years imprisonment to be deemed to have commenced on the date of your

arrest namely the 20th March, 1998.

S. W. SAPIRE

CHIEF JUSTICE