

THE HIGH COURT OF SWAZILAND

REX

Vs

THEMBA KHUMALO SIBONELO SIMELANE

Criminal Case No. 54/2004

Coram: S.B. MAPHALALA - J

For the Crown: MR. P. DLAMINI

For Accused No. 1: MR. B. SIMELANE

For Accused No. 2: MR. S. MAGONGO

REASONS FOR SENTENCE

(15/04/2005)

[1] The two accused persons before court have been convicted of the lesser offence of assault with

intent to cause grievous bodily harm after being arraigned for the crime of murder where the Crown alleged that upon or about the 1st August 2003, and at or near Eteni area in the Manzini region, the said accused did unlawfully and intentionally kill one Bheki Dlamini and thereby commit the crime of murder.

[2] The accused person tendered a plea of guilty in respect of the lesser offence of assault with intention to do bodily harm and such plea was accepted by the Crown.

[3] The circumstances of this case are that both accused persons were working as watchmen at Embhuleni location in Matsapha. After knock-off time on the 1st August 2003, late in the day they proceeded to their respective homes. As they were proceeding along minding their own business the deceased in the company of three other boys accosted them demanding money. They were in a violent mood. A quarrel ensued in the process. The deceased and his friends were carrying a bush knife when they demanded the money from the accused. There was a struggle between the accused and the deceased over the bush knife. Eventually accused no. 1 stabbed the deceased and in the process the deceased friends ran away. Upon stabbing the deceased, the bush knife carried by him fell and was taken by accused no. 2. Then the two accused persons assaulted the deceased, even though they do not recall how many injuries were inflicted. However, the post mortem report (exhibit "A") reflects the cause of death as "due to multiple stab wounds". It also emerged that accused no. 1 had a knife in his possession and this was the knife which was used by the accused person in stabbing the deceased as shown in exhibit "A". The accused were then arrested and charged with the crime of murder.

[4] At this stage of the proceedings my task is to mete out a proper sentence. The guiding principles on

sentence were clearly enunciated in the South African case of S v Zinn 1969 (2) S.A. 537 (A) at 541 where the following words were uttered:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."

[5] I have also considered what has been referred to in legal parlance as the triad being the nature of the crime, the interest of the society and the interest of the accused per S v Zinn (op cit). It is on these principles that the sentence in the present case ought to be decided.

[6] Both Counsel for the defence advanced submissions in mitigation of sentence in respect of their clients. It was submitted on behalf of accused no. 1 that he is a first offender and was 34 years old when this offence was committed. Secondly, that he is unmarried but has four minor children to support; thirdly that he has been in custody since the 15th September 2003, and that whatever sentences the court imposes should be backdated to that date. The court was further told that the accused was a watchman at the time at Mbhuleni Location earning a salary E600-00. Furthermore, it was contended that the court ought to look at the circumstances of the case that the accused were law-abiding citizen, minding their own business when they were attacked by the deceased and his gang.

[7] The submission on behalf of the second accused also took a similar vein that the court ought to

look at the circumstances of the assault. It was further submitted by Mr. Magongo for accused no. 2 that he is a first offender and was 20 years old at the time. He is married with two (2) minor children and that he was in custody for nine (9) months prior to being released on bail. The court was told further that the accused has recently found employment after his sojourn in jail and the court should be slow to further disrupt his life after finding stability. Mr. Magongo submitted that a wholly suspended sentence will meet the justice of this case.

[8] Mr. Dlamini who appeared for the Crown submitted that there was no reason at all for the accused persons to have continued assaulting the deceased after they had dispossessed him of the bush knife. He further submitted that the first accused has not taken the court to his confidence in not disclosing why he had in his possession a knife that night.

[9] I have considered all the above facts and the position of the law in this regard. It appears to me that the deceased and his gang provoked the fight when they tried to rob the accused at knifepoint. The only criticism that can be levelled against the accused persons is that even after they had disposed the deceased of the knife he proceeded to stab him. There is no justification at all in law why he acted this way and as a consequence he lost the protection of the law which governs the defence of self-defence. Attack may be the best form of defence, but not necessarily in law. Counter-attack within the limits is permissible; but going over to the offensive when the real danger is over is another thing. Therefore, his subsequent actions will attract severe punishment by the court. I must hasten to add that this only applies to accused no. 1 in that accused no. 2 stands to be dealt with on a different footing. There is no evidence before me that he acted in tandem with accused no. 1 after the deceased had been dispossessed of the knife. I can only assume in his favour that he was not a party to the subsequent actions by accused no. 1.

[10] In the result, I sentence the accused persons as follows:

Accused No. 1 - 24 months imprisonment, 6 months of which is suspended for a period of three (3) years on condition that the accused is not convicted of an offence in which violence is an element committed during the period of suspension. The sentence is backdated to the 15th September 2003.

Accused No. 2 - 18 months imprisonment, the whole sentence is suspended for a period of three (3) years on condition that the accused is not convicted of an offence in which violence is an element committed during the period of suspension.

S.B. MAPHALALA

JUDGE