

IN THE COURT OF APPEAL FOR SWAZILAND

In the appeal of Appeal No. 17/80

SAMUEL SHIBA & 2 OTHERS Appellants

vs.

REGEM Respondent

JUDGMENT

(Delivered on 26/01/81)

MAISELS, J .P.:

The 3 Appellants were indicted in the High Court on a charge of murdering one Petros Zacharia Ngubenio. They pleaded not guilty, but were found guilty of murder. The Learned Chief Justice found extenuating circumstances although he did so with some hesitation. He sentenced No.1 and 2 appellants to 12 years imprisonment each, and No.3 appellant to 10 years imprisonment.

As far as one can gather from the record, there had been some minor trouble between the second appellant and the deceaseds. The learned Chief Justice accepted again with some hesitation that the second appellant who was the Chief's Runner was sent by the Chief to take the Deceased to the Police Station.

What the trouble was between the second appellant and the deceased is not clear. But from the record it certainly appears to be of a minor nature. Be that as it may, however, the Learned Chief Justice found that the 3 appellants were sent under- the leadership of the second appellant to take the deceased to the Police. The evidence given by the Crown Witnesses, which was in my judgment undoubtedly correctly accepted by the Learned Chief Justice, shows that the 3 appellants arrived at the place of residence of the deceased all armed with sticks, the 3rd appellant put his sticks aside, grabbed hold of the deceased and held him tightly while the deceased was being assaulted by blows from sticks by the first

2

and second appellant. According to the evidence, it appears that the second appellant was the man who had a grievance against the deceased. He hit the deceased on the head causing an open wound while the first appellant joined in the assault by hitting the deceased with a stick across the body.

According to the Medical evidence, the deceased died as a result of intercranial haemorrhage, that is bleeding into the brain. This was extensive. There is no doubt this was caused by a blow, at least one blow to the head, and this blow was inflicted by the second appellant.

There were in addition, bruises and cuts all over the body. As a result of the intervention by the wife of the deceased, the deceased managed to run away, but he was pursued by the 3 appellants. All were armed with sticks. The account given by the 3 appellants as to what happened thereafter, is ludicrous, quite unbelievable. The deceased was eventually reduced to such a condition that he had to be carried into a military vehicle and taken to a Police Station, and he subsequently died.

There is no doubt that he died as a result of the injuries inflicted upon him, in all probability by the first blow struck by the second appellant on his head. It should be mentioned that Sergeant Matsebula of the Umbutfo Defence Force saw the Accused. They were standing around a person who turned out to be the deceased. Matsebula was driving a Motor Vehicle. He was stopped by the appellants who asked him to take the man over the fence, the border fence between South Africa and Swaziland. One of the appellants told Matsebula that they were looking for him so that he could take the deceased over the fence. I have used the word deceased for the 3rd time, but he was not yet dead.

The Sergeant asked why he should be taken over the fence and the answer given was that the deceased was a Shangaan, he didn't belong to Swaziland. They also said that he stole goats

3

and chopped or maimed cattle. There was of course, nothing to support this and the evidence given by the appellants never maintained this at the trial. The Sergeant's evidence was accepted and correctly so by the Learned Chief Justice.

There were reasons for going to fetch the deceased. As I have stated before, it was because of some minor quarrel between the deceased and the second appellant. The learned Chief Justice rejected the accounts of the appellants as to what had happened and what had caused the serious injuries to the deceased from which he died. There is not the slightest doubt that Chief Justice was correct in so doing. To say that the appellants are unmitigated liars is not to overstate the matter.

I will take no notice against No.2 appellant of the statement he made in this Court, that he should have gone and killed the deceased himself. I do that because I do not think he realised the consequence of that statement and I do not wish to use it against him.

The question remains, however, whether the evidence for the Crown established beyond reasonable doubt that the appellants are guilty of murder. That there was a common purpose to assault the deceased and to remove him by force there is no doubt.

In view of the fact that they were taking him to the Police Station as appears to have been accepted by the Learned Chief Justice, it seems unlikely that they had the intention of killing him. The law in Swaziland on this subject has been authoritatively laid down in the Court of Appeal in the case of AMAH LOKUDZINGA MATHENJWA versus REX reported in 1970-76, Swaziland Law Reports at page 25. The law as there laid down is as follows: "If the doer of the unlawful act, the assault, which caused the death, realised when he did it that it might cause death and is reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not

4

commit murder, but was guilty of Culpable Homicide whether or not he ought to have realised the risk, since he killed unlawfully."

In the present case, I come to the conclusion with some hesitation that it was not proved beyond reasonable doubt that any of the appellants realised that what they did might cause death and were reckless whether it would do so or not. But that they were guilty of Culpable Homicide admits of no doubt.

In view of the fact that the appellants are found not guilty of murder, but are found guilty of Culpable Homicide, it seems to me that there should be some reduction in the sentences imposed by the Learned Chief Justice. I wish to emphasise, however, that this is a very borderline case and I have already stated that I have had some hesitation in coming to the conclusion that they should be found guilty only of Culpable Homicide and not of murder.

It is clear from the evidence that the man who hit the deceased on the head was the second appellant. It is quite clear to me that he deserved greater punishment than the others. I consider that he should be sentenced to ten (10) years imprisonment. That is that second appellant that I have been talking about, AMOS NTSALINTSHALI - 10 years imprisonment. With regard to the first appellant, he also played a prominent part in the serious assault on the deceased, but as he has been found guilty, of Culpable Homicide his sentence is reduced to seven (7) years. I may mention that one of the reasons for imposing a more severe sentence on the second appellant than the first is the fact that the second appellant was a Chief's Runner.

With regard to the third appellant as recognised by the learned Chief Justice in the Court below, he probably acted: under the influence of the second appellant and should receive

a lesser punishment, I make the following order:

The convictions of murder against all three appellants are set aside and there are substituted in place thereof, a verdict of guilty on each of the Accused of Culpable Homicide. The sentences imposed on the Accused are set aside and the following sentences are imposed:

No.1 Appellant, Samuel Shiba, seven (7) years imprisonment, No.2 Appellant, Amos Ntshalintshali, ten (10) years imprisonment, and No.3 Appellant, five (5) years imprisonment.

(SIGNED)

(I.A. MAISELS)

JUDGE PRESIDENT.

(SIGHED)

I agree

J.R. DENDY YONG)

JUDGE OF APPEAL.

(SIGNED)

I agree

(I. ISAACS)

JUDGE OF APPEAL.