IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

In the Appeal of:- CRIM. APP. NO. 9/80

MAPHIKELELA DLAMINI (Appellant

vs.

THE STATE (Respondent)

CORAH: THE HON. MR. JUSTICE I.A. MAISELS, JUDGE PRESIDENT

THE HON. MR. JUSTICE DENDY-YOUNG AND THE

HON. MR. JUSTICE J. ISAACS

FOR APPELLANT: MR. A. S. P. NXUMALO

FOR RESPONDENT: MR. RWEYEMAMU

J U D G M E N T

(Delivered on the 27th January, 1981)

DENDY-YOUNG, J. A.;

In this case the Appellant is charged with the crime of Murder, the particulars of the indictment being that on 27th October, 1979 at or near a certain kraal in the Hhohho district the Appellant assaulted one Mngomezulu and inflicted injuries upon him from which the said Mngomezulu died at the Mbabane Government hospital on the 6th November 1979.

The Appellant pleaded not guilty and tendered a plea of guilty to Culpable Homicide which tender was rejected by the prosecution; the trial proceeded on the charge of Murder, In the event the trial Court found the Appellant guilty of Murder and having found no extenuating circumstances, the Appellant was sentenced to death.

The Appellant has appealed on the grounds that the trial Court erred in finding the necessary mens rea for the crime of Murder and also that the trial Court erred in holding that provocation had not been proved; there is also an alternative ground of appeal directed towards the trial Court's finding that there were no extenuating circumstances.

The only issue on the indictment was whether the Crown had proved the necessary intention to kill, to support the charge of Murder. For the rest the Crown allegations are common cause. The post-mortem report established that the deceased died from inter-cranial hemorrhage due to fractures of the skull and the pathological finding of the doctor who did the postmortem was that there was a 4 cm. wound which was stitched at the time he saw the deceased, on the back of the head on the left side. The doctor's report also established that the deceased had at some stage suffered from leprosy. He found fingers, toes and right hand deformaty due to leprosy and he mentioned that the little toe on the right foot had dropped off due to leprosy. It also emerged from the evidence that the deceased was a smaller man than the Appellant. The Appellant is a man of some 65 years of age, a local Chief with 7 wives and 6 children. The deceased was a neighbour of the Appellant and his subject; there was no bad blood between the two of them.

On the sad day the Appellant returned home after dark from a wedding beer drink, (this latter fact that the

Appellant had spent the day at a beer drink did not emerge before the verdict but is contained in the evidence on extenuation). In the kitchen hut of one of his wives he found the wife, her children and the deceased. The deceased was seated. It is alleged that the association between the wife and the deceased was perfectly innocent but their situation raised the suspicions of the Appellant, The Appellant in evidence said this: "As I entered the kraal premises I heard that there were some people talking. I heard my wife say 'Mngomezulu you keep on talking about a child is it not true that you gave me E10 so that I can take my child to school'. I then entered in the kitchen hut where these people were. My wife used to sleep in that kitchen hut in my absence. As soon as I entered the hut I asked the

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deceased "why did you give the money to my wife", he did not reply to me. I then asked my wife and said "why did you take the money from this man", she also did not reply me. I then again asked the deceased "why did you give her the money" and he again did not reply. I then asked the wife, "why did you take the money", she again did not reply, I was annoyed because I suspected that these people were possibly having a private affair and they had given money to each other without my knowledge. I then walked out and as I walked out I looked around and came across this knob stick. When I returned to the kitchen I delivered a blow at each of these persons, one blow on the deceased and one blow on my wife. My wife ran out of the kitchen hut and I caught her. I struck her one blow outside the hut and I took my wife into my sleeping hut and as I was returning to the kitchen hut I saw that the deceased was then outside that kitchen hut and he was shouting the name of Mapopi. When I realised that he was injured I did not go to him but I went to the Chief's runner's kraal. At the Chief's runner's kraal I did not find him but I found his wife to whom I reported that I had made an accident; I had beaten up some people. I came back to my kraal with the Chief's runner's wife. When we got back to my home I told the Chief's runner's wife that I had last seen Mngomezulu by the gate and we went there and found him lying down. We tried to lift him up and we observed that he was getting weak. We then carried him into the kitchen hut where I had found him; it is because it was raining and we thought he might get something while in the rain. I covered him with a blanket and then sent the Chief's runner's wife to go to my brother who had a motor vehicle to request him to come and collect the deceased and convey him to hospital. We then put the deceased and my wife into that motor vehicle because she was also not well. I then gave my brother E20 for fuel expenses and also for paying admission for the 2 persons.

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I did not go to hospital on that same night but I went on a Monday; this had happened on a Saturday. At the hospital I found the deceased lying on his back and I was told that my wife was in the X - Ray room I visited the deceased at hospital for 8 days and on the 9th day when I visited him I learned that he passed away. I was heart broken and as it had not been my intention, I went to the police station to make a report.

There is one or two of these matters which I think are relevant. In reply to this question: "Is it usual in your area or according to your knowledge as an elderly person for a man to be found with another man's wife in a kitchen hut at night? the Appellant said, "it is uncommon and this is what astonished me and the conversation about money which the deceased had given to my wife; that is why I am now here". In regard to the stick he said: "I got it by chance next to the wood braker where chickens sleep". He was asked this question, "when you hit the deceased with the stick did it occur to you that he might die?, the answer was "No I was scaring him off because he had annoyed me". The following question put to him was, "when you hit your wife were you hitting her with the knob stick? he said "I hit her indiscriminately but I can say she was really fortunate because she was never struck on the head" "How many times did you hit your wife? the answer was "twice and I hit the deceased only once".

The Appellant did try to show in the evidence that the assault resulted from sudden anger and he never thought he would kill the deceased. He was most upset at having caused the deceased to die. The question in this case is whether the Crown proved an intention to kill. As I understand the law in Swaziland the South African concept of dolus eventualis has been applied an the test has been stated this way:

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"If the assailant realises that the attack might cause death and he makes it, not caring whether death occurs or not that constitutes a mens rea or the intention to kill". And the way this test has been applied is whether the

assailant must have realised the danger to life and if he must have realised it in the opinion of the Court then by inference he did realise it. This way of putting the test has created considerable difficulty in its application because it has been found difficult to distinguish the concept of "must have realised" from "ought to have realised"= But the concept of "ought to have" is of course one relating to negligence which has no place in a crime of murder. In a recent case the Appellate Court of the Supreme Court of South Africa, that is in the case of The State vs. Dladla 1981 S.A. Reports page 1 Jansen J.A. has pointed out that in applying the phrase dolus eventualis volition is a more convincing test than possibility. A man acts with dolus eventualis if he at least consents to, or approves of, or reconciles himself to, the possibility of death on the part of the deceased as part of the price he is prepared to pay for carrying out his intention; in other words, it becomes part of the bargain he makes with himself. Now applying that test, the test of volition as defined in that case, I have great doubt as to whether the Crown did prove the intention to kill on the part of the Appellant in this case. If everytime a Swazi citizen uses a stick to the head of another, he is to be deemed to will the death of his victim, then the whole concept of murder would, in my view, be distorted.

In my judgment it is abundantly clear that the circumstances do not justify beyond reasonable doubt the inference that the possibility of death entered into, as I put it, the bargain the Appellant made when he struck the deceased. Did his mind advert to it. Mr. Rweyemamu has argued that this Court should not

interfere with the conclusions of the trial Judge in circumstances where the trial Judge had the advantage of seeing and hearing the witnesses and is steeped in the atmosphere of the case. But with respect I do not think that that principle can be invoked in this case or these circumstances. The manner in which the Appellant behaved immediately after the assault indicates that he did not will or desire the death of the deceased, or at any rate casts doubt upon the matter.

In my view the correct verdict was one of guilty of Culpable Homicide. I would accordingly allow the appeal against the verdict on that ground and alter the verdict to one of guilty of Culpable Homicide.

As far as sentence is concerned, this is a serious case of culpable homicide. The deceased was a weak defenceless man sitting down, and for the Appellant to have attached him the way he did cannot in any circumstances be justified even if the Appellant did believe that there was something suspicious about the association. Another aggravating feature of the case is that the Appellanbt was the deceased's chief and he should have known better than to treat a subject in the way he did. Counsel for the Appellant has urged that the subsequent conduct of the Appellant was exemplary and he might also have referred to the evidence in mitigation that the Appellant was under the influence of liquor. However making every allowance for the Appellant, I still regard the matter as extremely serious, and I would impose a sentence of 8 years imprisonment.

In my view the appeal is allowed and the verdict of guilty to Murder set aside, A verdict of guilty to Culpable Homicide is substituted. The sentence of death is set aside and a sentence of 8 years imprisonment is substituted,

(I. DENDY-YOUNG)

(SIGNED)

JUDGE OF APPEAL

MAISELS, J. P:

I agree that the verdict of Murder should be set aside and a verdict of guilty to Culpable Homicide should be substituted. I also agree that a sentence of 8 years imprisonment is a fitting punishment in the present case.

My brother, Dendy-Young has referred to certain recent South African decisions which in his view have some

bearing on the present matter. The law in cases of this nature has been authoritatively laid down in Swaziland in the case of Annah Mathenjwa vs. Rex reported in the 1970-76 S. L. R. page 25 the test there laid down is as follows; and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In Annan's case law was stated 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 was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not he ought to have realised the risk, since he killed unlawfully".

My brother Dendy-Young in the Dladla case has referred to certain remarks and possibilities and appreciation of risks. At page 30 of the judgment in Annah's case to which I have referred the then President of this Court, Mr, Justice Schreiner said:

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"It has been suggested that a finding that a person must have forseen or appreciated the risk is not the same as a finding that the person did in fact foresee or appreciate the risk"

I do not agree. It is not a question of law but a meaning of words. I find it meaningless to say, "He must have appreciated buy may not have". In this statement of the law Caney J A on the same page concurred. Milne J A at page 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at page

"I should like first of all to associate myself very strongly with the learned President's view that when it is correctly held that a person "must" have appreciated that his act involved a risk to another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk".

I thought it right to mention these matters because for many years to my knowledge Annan's case has been followed in Swaziland and although I share the regret expressed by Mr. Justice Schreiner in Annah's case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P. at page 29 of Armani's case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my brother Young as being in any of the constituting in any way a departure from the principles as laid down in Annah's case to which I have referred.

(I.A. MAISELS) (SIGNED) JUDGE PRESIDENT

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ISAACS, J.A.;

I agree with the Order suggested. My agreement is not to be considered as being an agreement with departure from Annah's case.

(I. ISAACS)

(SIGHED)

JUDGE OF APPEAL

MAISELS, J. P.;

The Order of the Court is that the conviction of Murder is set aside as is the sentence of death. In substitution therefore the Appellant is found guilty of Culpable Homicide and is sentenced to 8 years imprisonment.

(I.A. MAISELS)

(SIGNED)

JUDGE PRESIDENT

JANUARY, 1981