IN THE APPEAL COURT OF SWAZILAND

Holden at Mbabane Cri. Appeal No. 13/81

Thomas P. Mahlangu Appellant vs

REGEM Respondent

CORAM: Maisels J.P.

Isaacs J.A.

Mahomed J.A.

FOR APPELLANT: Earnshaw

FOR RESPONNENT: Thwala

JUDGMENT

(Delivered 27th Jan. 1982)

MAISELS J.P.

The Appellant was convicted in the High. Court of murdering one Joseph Magongo on the night of the 27th October 1980, No extenuating circumstances were found and he was duly sentenced to death.

That the Appellant killed the deceased is indisputable. The cause of death was shock due to haemorrhage following' multiple stab wounds. The Post-mortem examination conducted by a pathologist Dr. Khare, showed some bruises around the eyes and eighteen stab wounds on the back which had penetrated the lungs. Of the eighteen wounds, three were superficial and the remaining fifteen were at least 6 cm in depth. According to Dr. Khare, the fifteen deep wounds were inflicted with considerable force by a screwdriver with a sharp end or by a skewer but not by a knife. He described the instrument which in his opinion must have been used, as a long narrow one with a sharp edge at the tip. I have referred to the nature of the injuries received by the deceased and

to their severity in some detail for reasons which will appear later.

The events leading to the killing of the deceased on the night in question may be briefly summarized as follows:

The Appellant undoubtedly broke into the house of a Mr. Friedlander at a fairly early hour in the evening. He had apparently forced open a big aluminium sliding door which opens from the inside to the outside and gained entry into the house in this manner. The door, according to Mr. Friedlander, has a jemmy lock and can be opened by inserting a screwdriver. It is clear from the evidence that there had been stolen from the room in Mr. Friedlander's house, certain items of clothing, glasses, a wallet and a packet of travellers cheques. Mr. Friedlander was at the time when the house had apparently been entered by the Appellant watching Television with his

children, who are aged 10 and 6. They stopped at about 8pm and Mr. Fiedlander went out to dinner.

After he had gone out to dinner an employee of Mr. Friedlander heard dogs barking in the garden, as a result of which deceased, who was also employed by Mr. Friedlander, went out to investigate the cause of the dogs barking. He came back and asked for a torch which was given to him by Reginah Maseko, Mr. Friedlander's employee who had first heard the dogs barking. Apparently the deceased had seen a figure lurking in the garden. Reginah stated that this figure was that of a human being. The deceased left the house, according to Reginah, carrying only a torch and, again, according to her, the person who was outside looked at the window where she and the deceased had been and ran away. The deceased went tout in order to give chase. He never came back. The Appellant claimed that he was in the garden innocently pursuant to an arrangement he had made with Reginah to meet her later that night but this story was correctly rejected by the Learned Chief Justice as being completely false.

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The body of the deceased was found in the garden and it was admitted by the Defence Counsel on behalf of the Appellant that the Appellant had inflicted the wounds which caused the death of the deceased. The Appellant's story, apart from the alleged assignation with Reginah, was a pack of lies from beginning to end. He denied having broken into the house and it was clearly established from evidence which I need not relate, that he had done so. According to the Appellant he happened to be carrying a paper carrier and was walking off with it when a man, apparently the deceased, walked outside carrying a stick and a torch. He asked the Appellant what he wanted and came running towards him. The Appellant stated that he ran away but was pursued by the deceased and eventually the Appellant got tired. He ran round a tree in the hope, according to him, that the deceased would stop pursuing him. He stated further that the deceased picked up a stone which he threw at him and it landed on his left wrist. The Appellant, again according to his story, then picked up a tree branch which had been chopped off and was lying on the ground, in order to try and protect himself. He ran away from the tree but was struck on the back of his shoulders with a stick which the deceased had. He struck back with the branch and saw something shiny fall to the ground. This object was a knife which he picked up. He then says, and I quote:

"I ran. He struck me again with the stick. I again ran around the tree. As I was running be caught hold of me. I fell down. He was then on top of me. He hit me with a clenched fist. I stabbed him with a knife hoping the pain would scare him off. I could not see where I stabbed him - I was lying on my back. I thought I was stabbing him on the shoulders hoping he would get off, but I could not tell exactly where the stabs landed as this happened so quickly. When I eventually broke loose I went away and ran."

According to the evidence of Dr. Khare, some of the wounds inflicted on the deceased were so inflicted when the deceased was standing and some when he was lying with his face down.

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Dr. Khare was of the opinion that the deceased would have fallen after the first few stabs or he must have been followed by the assailant who continued to jab at him. The Learned Chief Justice rejected the evidence of the Appellant which I have set out in some detail. Of course, one of the most important aspects upon which his evidence was rejected, was the question of the knife which, according to the Appellant, fell to the ground and which he picked up. There is not the slightest doubt on the medical evidence that this story of the knife is a fabrication and that the wounds were inflicted by means of the instrument with which he gained access to the house originally and the nature of which was described by Dr. Khare and to which I have referred in an

earlier part of this judgment.

The case is really a very simple one in the sense that there can be no doubt that having succeeded in breaking into the house and stealing certain articles the Appellant, having seen Mr, Friedlander depart, was probably waiting to effect another entry probably to steal further articles. Be that as it may, he remained in the garden of the house after Mr. Friedlander had left. His presence was described by Mr. Friedlander's employees, one of whom went to find out what he was doing there or to apprehend him. The Appellant, having regard to the fact that he was then in possession of goods belonging to Mr. Friedlander which he had stolen as a result of his house-braking, wanted to avoid arrest and his method of avoiding arrest was to inflict the wounds on the deceased which caused the latter's death. Mr. Earnshaw, who appeared for the Appellant before me, contended that the latter acted in self-defence. There is absolutely no warrant, in my judgment, for this submission and I reject it completely. That the Appellant was correctly found guilty of murder can be in no doubt. Mr. Earnshaw

further argued that the Learned Chief Justice should have found extenuating circumstances on the ground that the murder was not premeditated. It is quite true that the Appellant did not come to the house with the object of killing anybody but it is equally true that he did not hesitate in order to avoid being apprehended for his theft to use the most extreme violence and brutality in killing the unfortunate deceased who was endeavouring to protect his employer's property. The violence used by the Appellant was of a perilous nature and, in my judgment, is a factor to be taken into account in considering whether the moral blameworthiness of the Appellant can be reduced merely because there was no premeditation (of S v Witbooi 1982 (1) SA 30 AD). The onus was on the Appellant to establish the existence of extenuating circumstances. This he failed to do and, in my judgment, there are no grounds for interfering with the Learned Chief Justice's exercise of his discretion in imposing the death sentence. It follows, therefore, that in my opinion this appeal fails and must be dismissed.

SIGNED

I.A. MAISELS J. P

I agree

SIGNED

I. ISAACS J.A.

I agree

SIGNED

I. MAHOMED, J.A.