IN THE APPEAL COURT OF SWAZILAND

APP. CASE NO.24/84

HELD AT MBABANE

In the appeal of

VINCENT SIPHO MAZIBUKO Appellant

and

THE QUEEN

CORAM: WELSH, J.A.

AARON, J.A.

HANNAH, C.J.

FOR APPELLANT MR. LIEBOWITZ

FOR THE CROWN MR. DONKOH

JUDGMENT

(14/1/86)

Hannah, C.J.

The appellant in this case was convicted by Hassanali A. C. J. of murder and, extenuating circumstances having been found, was sentenced to eight years imprisonment. He now appeals against conviction and sentence.

The appellant did not give evidence at the trial, but there was admitted in evidence at the trial without objection an affidavit which he had sworn in support of a bail application. In that affidavit the appellant claimed that the deceased, the woman with whom he had been living for more than four years, met her death accidentally in the following circumstances. He said that he returned to their flat on 2nd April, 1983 at about 9p.m. and found the front door barricaded from inside with items of furniture.

He forced his way in and discovered that the deceased had locked herself in a spare bedroom. He said be heard a male voice within the bedroom but as there was no response to his knocking he retired to bed and fell asleep. He checked the door of the spare bedroom at about midnight and, having found it still locked, again retired to his bed.

At about 5a.m. he again awoke and heard the door of the spare bedroom being opened and some conversation taking place between the deceased and a man. He said he went to his bedroom door and caught sight of a man just leaving the flat by the front door. He intended to follow the man to identify him but the deceased rushed forward, caught hold of him and pushed

him back into the bedroom. There then ensued a scuffle between the two of them resulting in the appellant falling backwards by the bed with the deceased on top of him. The affidavit continues:

"I struggled to rise, and deceased locked her teeth on my ear. In great pain I grasped deceased's head and pushed her away desperately. She finally let loose and I threw her off me. When I recovered a little, I noticed that deceased was lying prostrate and breathing with difficulty."

The appellant then went on to say that he fetched assistance but upon his return with neighbours he discovered that the deceased had stopped breathing. He concluded his account of events by saying that he did not know the cause of the deceased's death and assumed that she had hit her head on the wall or floor during the course of the struggle.

The medical evidence, however, tells a different story. The pathologist discovered a small cut under the chin of the deceased the shape and size of the edge of a finger nail and five small

irregular bruises on the left side of the throat and two on the right. An internal examination of the neck revealed gross bruising around the larynx and a portion of the upper part of the trachea was also bruised. The windpipe contained froth, the lungs were fully expanded and congested and showed numerous subpleural pinpoint haemorrhages. The heart also contained pinpoint haemorrhages. The lips and finger and toe nails were blue.

Having regard to the foregoing findings the pathologist concluded that the cause of death was strangulation. He also gave a firm opinion that continual pressure must have been exerted on the deceased's throat for about four minutes although she may have been rendered unconscious after one. The learned trial judge accepted the evidence of the pathologist and I am unable to say that he was wrong in doing so.

In view of the findings based on the medical evidence I find it difficult to see how any credence can be placed on the account given by the appellant in his affidavit as to the manner in which the deceased met her death. All he admits to in that document is grasping the deceased's head and pushing her away. In view of the medical evidence there must have been more to it than that.

It is necessary at this stage to say something about the value of that affidavit. An exculpatory statement made by an accused other than in the course of his trial, whether made in an affidavit or otherwise in writing or made orally, is not evidence of the facts spoken to save insofar as it contains an admission in which case the admission is admissible as a declaration against interest and is evidence of the fact admitted. Those representing an accused at a criminal trial would do well to bear this in mind and should not think that an exculpatory statement is a substitute for evidence on oath given from the witness box. The position was set out by

James L.J. in R v Donaldson and Others (1976) 64 Cr. App. 59 at p. 65 as follows:

"In our view there is a clear distinction to be made between statements of admission adduced by the Crown as part of the case against the defendant and statements entirely of a self serving nature made and sought to be relied upon by a defendant. When the Crown adduce a statement relied upon as an admission it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein. If the jury find that it is an admission they

may rely upon it as proof of the facts admitted. If the defendant elects not to give evidence then insofar as the statement contains explanations or qualifications favourable to the defendant the jury, in deciding what, if any, weight to give to that part of the statement, should take into account that it was not made on oath and has not been tested by cross-examination.

When the Crown adduce evidence in the form of a statement by the defendant which is not relied on as an admission of the offence charged such a statement is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction

5

"which is part of the general picture which the jury have to consider but it is not evidence of the facts stated." (See also Leung Kam-Kwock v The Queen 1985 Cr. App. R.83) in which this passage was cited with approval.

In R v Pearce (1979) 69 Cr. App. R.366 the Court of Appeal added that the evidence of such a statement as showing the reaction of an accused when confronted with incriminating facts is not limited to his reaction when first taxed, but the longer the time that has elapsed between arrest and the statement the less the weight which will be attached. In the same case the Court observed that there may be a rare occasion when an accused produces a carefully prepared written statement to the police with a view to it being made part of the prosecution evidence. The Court considered that such a statement should be excluded as inadmissible.

By virtue of Section 275 of the Criminal Law and Procedure Act 1938 the foregoing represents the approach to self-serving statements which should be followed by the Courts of Swaziland. In the instant case, the appellant not having given evidence, not having chosen to go into the witness box to verify his affidavit account and expose himself to questioning on the apparent discrepancy between that account and the medical evidence, the learned judge was, in my opinion, entitled to attach no weight at all to his description of the act which caused the death of the deceased.

The learned judge in fact went further and also rejected in its entirety the appellant's account of events preceding the fight which he said took place between himself and the deceased. In my opinion he had good reason for doing so. It is difficult to believe that a man, finding the woman he is living with has locked herself away in a bedroom with another man, would meekly retire to

6

his bedroom as the appellant claims he did. He would, I think, be in a towering rage and would do his utmost to gain entry to the bedroom and, if that proved impossible, would, at very least, continue to create a disturbance or remain on hand. For such an account to have had any real prospect of being accepted as reasonably possible it would have been necessary for the appellant to have given it from the witness box where its veracity could have been probed and tested. This, as I have said, the appellant chose not to do and that being so it was open to the learned judge to view it in the way he in fact did.

At the outset of his submission Mr. Liebowitz argued, albeit somewhat faintly, that the evidence before the court a quo was sufficient to form the basis of a defence of self-defence and that the appellant should have been acquitted outright. However, Mr. Liebowitz recognised the difficulties in the way of this argument and ultimately conceded, rightly in my view, that at very least the appellant was guilty of culpable homicide.

The real question before this Court, and the question to which Mr Liebowitz devoted most of his

submissions, is whether the only inference properly to be drawn from the evidence was that at the material time the appellant had the intent to kill the deceased. A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not. See State v Mini 1963 (3) S.A. 188A at p.192 and Mathenjwa v R 1970/76 SLR 25 at p.30. To apply continual pressure to the throat or neck for a period of about four minutes is obviously an inherently dangerous act which is likely to cause death. Even the most dull-witted person must realise this and the appellant is certainly not that. In the absence of explanation, and in the present case none which

7

was satisfactory or acceptable was forthcoming, in performing such an act the assailant must be taken either as realising or recklessly disregarding its probable consequences. Indeed, the immediate effect on the victim of such pressure must be plain to be seen. While I accept that there is substance in Mr Liebowitz's submission that evidence of the appellant's subsequent behaviour - evidence which I find it unnecessary to recite - indicates that he probably had no intent to kill in the sense of a positive desire on his part to bring about the death of the deceased, there can, in my view, be no doubt that he had what has been termed a constructive intent to kill.

In reaching the foregoing conclusion it is unnecessary to rely on any adverse inference which may be drawn from the failure of the appellant to give evidence. A strong prima facie case had been made out at the close of the prosecution case and the only effect of the appellant's failure to testify was to deprive the court of additional material from which the prosecution case might have been viewed in a different light. As I have said, without any such additional material the only inference which could reasonably be drawn was that the appellant had a constructive intent to kill. This effectively disposes of Mr Liebowitz's submission that the learned judge misdirected himself when he commented that the appellant's failure to give evidence could only strengthen the Crown case but as the matter has been raised I propose to deal with it, albeit quite briefly. Mr Leibowitz's submission, as I understand it, is that while an adverse inference may be drawn from an accused's failure to testify where there is direct evidence implicating him this is not the position where the evidence against him is only circumstantial. In the present case the evidence against the accused was circumstantial and therefore the learned trial judge

8

erred in saying that the failure by the appellant to give evidence:

"... could in the circumstances only strengthen the Crown case."

The extent to which the failure of an accused to give evidence may be taken into consideration by a court has been the subject of much judicial discussion and the opinions expressed have not always been consistent. I am content to set out and respectfully adopt the following passage from the judgment of Maisels J.P. in Attorney-General v Moagi 1981 (1) BLR 1, a judgment with which the majority of the Botswana Court of Appeal concurred. He said at page 14: "What is the approach of the South African Courts to the matter presently at issue?.. (Failure of an accused to give evidence). Firstly, as I have already stated, there is no obligation or compulsion on an accused to give evidence, of e.g. R v Nyati 1961 AD 319 at 324, R v Ismail 1952 (1) SA 204 at 210 AD, S v Matsupe 1962 (4) SA 708 at 716. However as has been pointed out in R v Dube 1915 AD 557 and in many other cases some of which are referred to in Gardiner and Landsdowne Volume I, 6th Edition on pages 405 and 406 and 461, the failure of an accused to give evidence on his own behalf is a circumstance which may properly be taken into consideration by a court of law. In Nyati's case, supra, at page 324 Sir James Rose-Innes C.J. said:

"It (i.e. the failure of an accused person to testify) should not be pressed too far. But where there is evidence, entitled to credence, which directly implicates an accused person the fact that he refrains from going

9

"into the box to contradict that evidence may well be regarded as an element to be weighed in connection with all the others in the case, bearing in mind always that the onus remains upon the Crown."

In S v Snyman 1968 (2) SA 582 (AD) Holmes J.A. said: "Where there is direct evidence that the accused committed the crime, in general his failure to testify (whatever his reason therefor) ipso facto tends to strengthen the State's case, since there is no testimony to gainsay it and therefore less occasion for material for doubting it."

But of course as stated above in Nyati's case and in Motsepi supra this must not be pressed too far. of also Ndwanda v R, 1970 - 76 Swaziland Law Reports 386 at 389 (C.C.).

These dicta accord in my view with common sense. They do not in any way conflict with the right, constitutional or otherwise, of an accused to refuse to give evidence. He cannot in my opinion complain if he elects not to give evidence, and if in so doing his failure to give evidence may be used as a factor in determining his guilt."

That is not to say, however, that in a case where there is no direct evidence implicating an accused his silence is a factor which must be ignored altogether. In S v Letsoko and Others 1964 (4) SA 768 Holmes J.A. said at page 776:

10

"The true position is that, in cases resting on circumstantial evidence, if there is a prima facie case against the accused which he could answer if innocent, the failure to answer it becomes a factor, to be considered along with the other factors; and from that totality the Court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances of each case."

That passage was cited with implicit approval by this Court in Ndwandwe v R 1970/76 SLR 386.

Turning to the present appeal there was, as I have said, a strong prima facie case against the appellant at the close of the Crown case arising from certain irresistible inferences to be drawn from the Crown evidence. In the absence of any answer or explanation from the appellant these unfavourable inferences remained irresistible. To that extent his silence can be said to be damaging to him. As the evidence for the Crown was, in itself, sufficiently strong to justify the inference of an intention to kill it follows, in my opinion, that the Crown duly proved that the appellant was guilty of murder. The appeal against conviction must, therefore fail.

Turning to the sentence of eight years imprisonment, it is accepted by the Crown that as the trial judge failed to give the appellant's Counsel the opportunity to call evidence in mitigation or to address him in mitigation, the learned jedge having passed sentence immediately following his judgment on the presence of extenuating circumstances, it is now open to this Court to consider the sentence afresh. Indeed, Mr. Donkoh for the Crown urges this Court to consider substituting a more severe sentence and to this

11

end has served a Notice on the appellant purporting to be in terms of Section 5 (3) of the Court of Appeal Act.

Section 5(3) undoubtedly gives this Court the power to substitute a higher sentence for that originally passed where an appeal is made against sentence but for my part I entertain strong doubts whether the Crown has any right to apply for such an increase or, for that matter whether, save in exceptional circumstances, the Crown should even be heard on the question of sentence. In Mthimkhulu v The State (Botswana Cr. App. 85/85)(unreported) Murray J. strongly deprecated the practice of prosecutors addressing the court on length of sentence. He cited the following remarks, admittedly made extra-judicially, by two Lord Chancellors and a former Haster of the Rolls in support of his view. Lord Hailsham of St Marylebone, the present Lord Chancellor, is reported as having said:

"Prosecuting Counsel was not an avenging angel but an instrument of justice. It was not, and it was to be hoped would never be, his business to ask the court to impose a particular sentence. Particularly it was not his business to ask a court to impose a particular sentence in the direction of severity."

Lord Elwyn-Jones, a former Lord Chancellor, is reported as having said:

"Those who prosecute an offender should have no say in his sentencing. That was for the judge. To depart from this principle is wrong and dangerously wrong. The prosecution's neutrality on sentencing is and always has been, an important factor of our system".

Lord Denning is also reported as having said:

"It has always been the duty of the Bar when prosecuting never to press for heavier sentences. They had always been matters for the judge to decide." I am aware that a different local practice has developed here but, in my view, the Courts should at an appropriate time, consider whether that practice should be allowed to continue. However, as Mr. Donkoh was not afforded the opportunity of addressing the court on this question I am content to leave the matter open for the time being.

The Court will now never know precisely what happened between the appellant and the deceased in the early morning of 3rd April 1983; but what is likely, I think, is that they quarrelled and in the course of a struggle or fight the appellant became so enraged that he strangled the deceased. Dealing with the matter in that way and accepting that the appellant is a. man of impeccable previous character who comes before the Court with the highest testimonials I am unable to say that a sentence of eight years imprisonment was not, in all the circumstances, a proper sentence. I would, therefore, dismiss this appeal.

N.R. Hannah

(Sgd.) CHIEF JUSTICE

I agree:

R.S. Welsh

(Sgd.) JUDGE OF APPEAL

I also agree:

S. Aaron

(Sgd.) JUDGE OF APPEAL