IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.24/97

In the matter between:

THE KING VS BHEKI S. PHAKATHI

CORAM : SCHREINER J A

: LEON J A

: STEYN J A

FOR THE APPELLANT : IN PERSON

FOR THE CROWN : MR. J. MASUKU

JUDGMENT

Leon J A

The appellant, despite his plea of not guilty, was convicted of murder in the High Court and extenuating circumstances having been found he was sentenced to ten years imprisonment. The appeal has been brought both against the conviction as well as the sentence. In his argument before us yesterday, the appellant drew attention to the fact that none of the Crown witnesses saw the actual stabbing. And that there was a conflict in the Crown case as to how many people were present.

With regard to the sentence, it is said that the sentence is extremely harsh. The appellant is a first offender with two children to support. The defence admitted the identity of the deceased as well as the correctness of the post-mortem report. The latter shows that the cause of death was haemorrhage as a result of a stab wound on the left side of the neck which penetrated 5.6cm. Having regard to the nature and extent of the injury, its position and the fact that on the Crown case it was inflicted with a knife, the learned judge in the court below was quite correct in finding that murder was the crime, at least in the form of dolus eventualis. However, the question which

we have to decide is whether it was the appellant who caused the death of the deceased.

The Crown evidence was to the following effect - Miss Phindile Matse was PW1. The deceased and one Sifiso Sihlongonyane are her cousins while the appellant is her brother-in-law. On the night in question which was Christmas eve 1995 the appellant, the deceased, Sifiso, Sandile Phakathi and Wonder Phakathi came to her house. The deceased asked her to accompany him to his grandmother's house. All those who had arrived in her house went along. They all smelled of liquor but she was unable to say whether they were drunk or not. The deceased gave her his cap to keep but on the way the cap fell down which was picked up by the appellant. She asked him for the cap but he denied knowledge of it. Then the deceased asked for the cap, the appellant first refusing to give it to him but later relented.

At the request of the deceased she proceeded ahead of the others then heard the deceased

crying behind her saying Bheki (appellant) had stabbed him. She became confused, she did not go back but proceeded to her grandmother's house. It was dark at the time and if she had looked back 20 metres she would not have been able to see the stabbing, it must have been pitch black. Both Sandile and Wonder were away and were not called as witnesses. In cross-examination it was not suggested that the deceased had not uttered those words and no motive for her to give false evidence against her brother-in-law was suggested.

Sifiso was PW2, Sandile Motsa is his cousin while PW3 one Tsabedze is his cousin by marriage. Five of them had been drinking at Lavumisa. They arrived at PW l's house and were joined by two others making seven in all. That number, as the appellant rightly points out, was in conflict with what PW1 said. They then proceeded towards the grandmother's house. The evidence about the cap was substantially the same as that of PW1. He heard Wonder saying to the appellant that it was not good for him to take his cap as they were all boys of the same area. The appellant then walked towards Jabulani and Sandile and returned. When he returned he heard the deceased saying 'you will only stab me if you had taken a chance, in fighting with fists I will kill you.' The appellant replied using the words 'ngizokubamba ngothayela.' But those words were never translated and take the case no further. He did not see the actual stabbing as it was dark. Later he heard the deceased say you will end up stabbing me only. The witness went to the

deceased who fell down.

Sandile did mention that they saw that deceased had died on the spot. He had an injury to the left side of his neck. PW3 confirmed that he did not see the appellant stab the deceased as it was dark although at one stage he suggested he did, but no regard can be had to that. The remarks to which he alluded are not clear and indicative of something which the appellant might do in the future. Those remarks cannot in those circumstances, in my view, be regarded either as a dying declaration or as a spontaneous exclamation and therefore part of the res gestae. I shall refer later to the earlier remark 'Bheki has stabbed me." PW3 was a one Tsabedze,

At about 11.00 o'clock that night the appellant came looking for accommodation at his home. The following day the appellant's younger brother arrived and they went to the appellant's father. On the way the appellant told him that he had quarrelled with the deceased and had injured the deceased with a knife by stabbing him once in the back and once in front on the chest. In fact the deceased was stabbed only once, neither in the back nor in the chest but on the left side of the neck. However, I do not think that this is a serious discrepancy, given that it was pitch black at the time and the appellant might have been under the wrong impression. When they reached the appellant's father's house the latter asked the appellant for the knife which the appellant handed him. It was an okapi knife similar to that produced in court. The father was not called as a witness. The last Crown witness was Inspector Khumalo who went to the scene finding the dead body of the deceased with a large wound on his neck.

On the following morning the appellant was brought by his brother-in-law to the police. The brother-in-law (Khishwa) handing over a knife to them. A policeman was given a cap and the appellant made a written statement to him. The Crown stated that it would not use the statement and the court ordered that any reference to it be expunged from the record. Despite that order, the learned judge made an assumption in his judgement that the statement was an admission or a confession. There is also a misdirection in the judgement when the judge observed 'Mr. Maseko for the defence' argued that the father of the accused ought to have been called and the court cannot see what purpose that would have served because that evidence had already been given by the accused's brother - in - law'. The purpose it would have served would have been to

corroborate the Crown's evidence. The failure to call the father is a weakness in the crown case, but it is not, in my view, a serious weakness for reasons which would presently appear. But it is not, in my view, a fatal weakness for reasons which will presently appear.

The appellant gave evidence under oath. He admitted being in the group drinking liquor and accompanying the group on the walk. He knew nothing about the cap other than seeing it fall. He denied having any argument about the cap and he denied having taken the cap. And he could not suggest any reason why these witnesses should falsely implicate him. He denied having made that confession to Khishwa saying that he was merely asked to produce his knife. Why that should be done for no reason indicates that his evidence is inherently improbable. He made some suggestion later that Phindile had given false evidence against him as he was courting her but that was not put to her in cross-examination.

With regard to Sifiso, he eventually testified that he had taken Sifiso's cattle from his fields and that Sifiso said he would get him. None of this was put to Sifiso in cross-examination. With regard to his visit to Khishwa's homestead he said that he had gone to his brother-in-law's hut as his brother had a girlfriend in the house. This was also not put to Khishwa in cross-examination. He was quite unable to suggest any reason why Khishwa who had accommodated him should give false evidence against him. After setting out facts, the learned judge held that PW1 made a favourable impression upon him. He mentioned that she could easily have said that he saw the stabbing but did not do so and he was correct. He regarded PW2 as being corroborative of PW1 and was correct. He also correctly did not rely upon the words 'ngizokubamba ngothayela'. He also, in my view, correctly held that any statements made by the appellant did not prove that the appellant had stabbed the deceased, having regard to the fact that it was pitch black at the time and the deceased may have assumed that it was the appellant.

In rejecting the appellant's evidence and quite correctly, in my view, the learned judge draws attention to the fact that the appellant denied all knowledge of the evidence about the quarrel and the cap. He also correctly drew attention to the fact that no reason was given as to why Khishwa, the brother-in-law, should lie against the appellant. In holding that all the statements made by the deceased were dying declarations, he appears to have found wrongly, in my view, that the

deceased referred to his death which he did not and that the statements were made in settled expectation of his death which they were not. However, in my view, the first statement made by the deceased is admissible not as a dying declaration but as a contemporaneous statement and as part of the res gestae. See HOFFMAN AND ZEFFERT (4TH ED) P. 160 and the cases cited there. However, that statement although admissible, in my view, carried very little weight, if any, because of the conditions which prevailed of extreme darkness.

However, what is critical in this case, is the evidence of Khishwa, PW3. The father not being called is a factor but he may have been a reluctant witness. Khishwa was a good witness who had no motive to lie and the appellant was a shocking witness and moreover, a good deal of his evidence was not put in cross-examination. On the evidence as a whole, I am satisfied that he court was quite correct in accepting the evidence of Khishwa and rejecting that of the appellant as false beyond reasonable doubt. The sentence seems to me to be a proper one in all the circumstances and no adequate grounds had been advanced as to why we should interfere with it. In my judgement the appeal must be dismissed and the conviction and sentence must be confirmed.

R.N. LEON J A

I agree:

W. H. R. SCHREINER J A

I agree:

J. H. STEYN J A

Delivered on this.....day of September 1997.