

SWAZILAND COURT OF APPEAL

Appeal Case No. 29/1997

In the matter between:

Henry Ngwenya

Appellant

vs

Rex

Respondent

Coram

Kotze, JP
Tebbutt, JA

Browde, JA

For Appellant
For Crown

In Person
Mr. D. Wachira

JUDGMENT

22/9/97

BROWDE, JA

The appellant in this matter is Henry Sithembiso Ngwenya. It is alleged that on or about the 22nd June 1995 at or near Sagula area he unlawfully and intentionally killed Mtekeleni Hlanze. The appellant pleaded not guilty but was found guilty by the Acting Chief Justice who sentenced him to 12 years imprisonment to run from the 22nd June, 1995 having found extenuating circumstances. It is not disputed that the deceased died as a result of a stab wound to the heart and that it was the appellant who inflicted the wound. It seems that the only issue on the merits is how the fatal blow was struck.

The learned Acting Chief Justice in my opinion with good reason found that the version given by the appellant in answer to that of the crown witnesses could not

reasonably possibly be true. The facts briefly stated are that Thandi Mavis Mazibuko who is referred to the trial as PW1 gave evidence to the effect that she had been to her mother's home to collect some maize on the 22nd of June, 1995. On the way home she met the deceased who according to her is the brother of the appellant. While she was in the company of the deceased the appellant came running from behind towards them. She entered her home and shortly afterwards she heard someone crying for help. She went outside to hear the appellant saying go and die wherever you are going to. The appellant ran away and then she heard somebody groaning. This person turned out to be the deceased who had been stabbed and was lying by the gate of the homestead. It is unnecessary to go into the circumstances under which the appellant was apprehended save to say that the 2nd state witness one Johannes Mamba gave the following evidence. He said, "we asked him whether he knew the deceased and the accused said that he knew the deceased and it was his brother. We further asked him why he killed his brother. The accused said that he did not anticipate that his brother would die. We asked the accused as to what they were fighting over, the accused said that there was nothing that they were fighting over but he will inform the Police about it.

When the Police came I asked him personally why have you killed your brother. He then answered me and said in Swazi language which translated means "if dogs share the same place it is possible that they will fight each other". In the light of the evidence it is clear that the incident which led to the death of the deceased arose from jealousy on the part of the appellant. It seems that the appellant had had intercourse on more than one occasion with PW1. It is obviously for that reason that Attorney Nxumalo put to PW1 that the accused was jealous of seeing you in the company of his brother.

Although the appellant in this court has not pressed the appeal against his conviction he has said that he did not intend to kill the deceased. As put properly in my opinion by Mr. Wachira who appears on behalf of the King the conduct of the appellant does not support that submission. The fatal blow was to the heart of the deceased and the reference of PW1 to "go and die wherever you are going" to shows exactly what the intentions of the appellant were. It seems in the light of what I have said in my opinion the learned Acting Chief Justice was perfectly correct in his verdict namely that of murder with extenuating circumstances. The extenuating circumstances briefly put were that the appellant was obviously under the influence of liquor and was guided into this very serious and fatal attack on the deceased by what appears to be jealousy. The appellant has asked us to consider the question of sentence and has said that the sentence in the circumstances is too harsh. We are fully conversant of the fact that the discretion in regard to the

sentence vests with the trial judge. The trial judge said that this is a very serious offence and we agree with that without hesitation. Obviously the courts cannot be seen to tolerate the unlawful use of knives to kill other people. The learned Acting Chief Justice found “the appellant was slightly drunk.” The appellant gave evidence in court and he has repeated it in this court that he had been drinking most of the day. He further records below that he had moved from shebeen to shebeen where traditional brew was sold as he was going back home. It would therefore seem that to call him slightly drunk may well have been an understatement in the circumstances. We have carefully considered the particular circumstances of this case. The appellant was suspicious that the woman with whom he had a relationship was being unfaithful to him. On the fateful day he saw her in the company of the deceased which obviously inflamed the jealousy and confirmed the suspicion. Acting as we said on the spur of the moment and without any prior premeditation he inflicted the one and unfortunately fatal wound. In these special circumstances coupled as they are with expressions of remorse by the appellant which expressions of remorse were repeated before us and which we accept as being genuine we have come to the conclusion that the disparity between the sentence that we would have imposed and that which the Acting Chief Justice imposed is so great that we feel we should alter the sentence. In doing so I feel it should be repeated that in no way can the courts be a party to any sympathy with people who unlawfully use weapons to satisfy either their jealousy or any other matter that they would have for killing innocent people. The sentence that we would have imposed would in the circumstances of this case be 8 years imprisonment.

In the circumstances therefore the appeal against conviction is dismissed but the appeal against the sentence is successful to this extent. The sentence of 12 years imprisonment is altered to the sentence of 8 years imprisonment.

BROWDE, JA

G.P.C. KOTZE, JP

I AGREE

AND SO DO I

P.H. TEBBUTT, JA