IN THE COURT OF APPEAL OF SWAZILAND

CASE NO. 40/97

In the matter between:

Thandi Tiki Sihlongonyane — Appellant

vs

Rex — Respondent

Coram — Kotze, JP
Tebbutt, JA
Browde, JA

For Appellant — In person
For Crown — Ms Nderi

JUDGMENT

(24/9/97)

TEBBUTT JA:

The appellant appeals to this court against the sentence of 7 years imprisonment imposed by Matsebula, J in the High Court after finding her guilty of murder with extenuating circumstances. The appellant stabbed her sister twice with a kitchen knife in the course of a drunken brawl during which the two sisters started by using vulgar and abusive language towards one another and ended in a physical fight in which the deceased was the initial aggressor. She struck the appellant with an open hand and then with a walking stick, drawing blood from the appellant, who retaliated by throwing two portable stoves at the deceased. Evidence was that the deceased then left the house in which they had been fighting. The appellant followed her and stabbed her in the neck. The deceased tried to run away and appellant then stabbed her again in the back.

The deceased died as a result of the stab wounds. It was upon these facts that Matsebula J found the appellant guilty of murder on the basis of ***dolus eventualis***.

Although the appellant has appealed only against the sentence we considered it necessary to take into review again the facts of this matter in order to find whether that was the correct verdict or not.

This is one of a number of recent cases in this court in which the use by the accused of a knife to inflict stab wounds from which the deceased in those cases died, has resulted in a finding by the trial court that the accused is guilty of murder on the basis of ***dolus eventualis*** rather than a finding that the accused is guilty of culpable homicide. This has also occurred in cases where the evidence is that the accused was under the influence of liquor at the time or where there had been provocation of the accused by the deceased. There would appear to be a tendency on the part of trial courts in Swaziland to overlook verdicts of culpable homicide as possible verdicts in cases such as this or at least not to pay sufficient attention to such a verdict being the correct one even in stabbing cases. It seems to me therefore that it is perhaps convenient to restate the tests applicable to ***dolus eventualis*** on one hand and to culpable homicide on the other. It is particularly apposite to do so in the light of the facts in the present case.

Put very basically, murder is the unlawful killing of a human being with intent to kill while culpable homicide is the unlawful killing of a human being either (a) negligently (***see State v Alexander 1982(4) SA 701(T) at 705 G - H)*** or (b) Intentionally in circumstances of partial excuse. ***(See per Schreiner P in Annah Lokudzinga Mathenjwa v Rex 1970 - 1976 SR 25 at 26 A - E)***. As to the latter form of culpable homicide it is the preponderance of judicial opinion in South

Africa that on a charge of culpable homicide the accused may be convicted of that offence despite the killing being found to have been intentional, if partial excuse is established.

(See S v Ngubane 1985 (3) SA 677(AD) at 684 C - E and the numerous cases therecited). That form of culpable homicide does not arise in the present case but it should not be overlooked that such a form of culpable homicide does exist and would be equally permissible of application in Swaziland as in South Africa. It should not be lost sight of as a possible verdict.

The distinction between murder and the form of culpable homicide with which the court is concerned in this case - and which will be the predominant type of culpable homicide which trial courts and this court will generally have to consider - is that in the case of murder the requisite legal element is ***dolus,*** in culpable homicide it is ***culpa.*** That has consistently been regarded as the distinction both in South Africa and in Swaziland. ***(See S v de Bruyn en 'n Ander 1968 (4) SA 498 (AD) at 510 D - E; and the numerous cases in which that decision has been followed; and Anna Lokudzinga Mathenjwa v R case supra; Maphikelela Dlamini v R 1979 - 1981 SR 195(CA).***

Dolus can, of course, take two forms:

(I) ***Dolus directus*** where the accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and

(ii) ***dolus eventualis*** where the accused foresees the possibility of his act resulting in death, yet he persists in it reckless whether death ensues or not.

It is well settled law in South Africa, and it is also the same in Swaziland, that the test of the foresight or foreseeability which the accused must have in order to constitute ***dolus eventualis*** is a subjective

one. ***(See Rv Nsele 1955 (2)***

SA 145 (AD)) a decision that has consistently been applied in South Africa since then. ***See e.g. S v Sigwhala 1967(4) SA 566 (AD), ; S v de Bruyn en 'nAnder supra; S v Bradshaw 1977(1) PH H60 ; S v Ngubane supra at 685 F; and in Swaziland see Annah Lokudzinga Mathenjwa v R supra at 31 B - F & Maphikelela Dlamini v Rex supra).***

In the light of the aforegoing it is as well to enumerate those characteristics which form the basis of ***dolus eventualis*** so as to serve as a reminder of what a court must look for in order to find whether the Crown in cases of wrongful killing has established ***dolus eventualis.*** They are conveniently summarised by ***Holmes JA*** in the South African Appellate Division decision of ***S v de Bruyn en'nAnder supra at 510 G - H*** They are:

1. Subjective foresight of the possibility, however remote, of the accused's unlawful conduct causing death to another;

2. Persistence in such conduct, despite such foresight;

3. The conscious taking of the risk of resultant death, not caring whether it ensues or not;

4. The absence of actual intent to kill.

It will be appreciated that cardinal to the whole concept of ***dolus eventualis*** is the element of foresight. It is perhaps this that has caused the greatest confusion in deciding whether the Crown has established ***dolus eventualis*** or merely ***culpa,*** due, it would seem, to a lack of a proper appreciation of the distinction between the two. In the case of ***dolus eventualis*** it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he

actually foresaw it. It is here, however, that the trial court must be particularly careful. It must not confuse "must have known" with "ought to have known". The latter is the test for ***culpa.*** It is an objective one. In our law it is whether a reasonable man in the position of the accused ought to have foreseen the consequences of his conduct. It is vastly different from the test for ***dolus*** where, as stated, the test is subjective. The issue in ***dolus eventualis*** is whether the actual accused himself or herself foresaw the consequences of his or her act - not whether a person in the position of the accused ought to reasonably have foreseen them. Moreover the trial court must be warned against any tendency to draw the inference of subjective foresight too lightly. I agree with what was said in ***S v Bradshaw supra by Wessels JA*** where he said this

> *"The court should guard against proceeding too readily from "ought to have foreseen" to "must have foreseen" and thenceto "by necessary inference in fact foresaw" the possible consequences of the conduct being enquired into. The several thought processes attributed to the accused must be established beyond any reasonable doubt having due regard to the particular circumstances which attended the conduct being enquired into."*

Again in ***S v Sigwhala supra, Holmes JA*** in the South African Appeal Court expressed the degree of proof as follows:-

> *"Subjective foresight like any other factual issue may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so*

drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so".

I agree with those sentiments. Similar sentiments were expressed in this court by ***Milne JA*** in ***Anna Lokudzinga Mathenjwa v R supra at P 31 D - F*** where the learned Judge of Appeal in that instance, having concurred in a judgment by ***Schreiner P*** with whom again ***Caney JA*** concurred, dealing with the question of the actual consciousness of the possibility of death having resulted from stabbing, said the following:

"I quote what seems to me to be the inescapable logic of this in the following passage from the judgment of ***van Blerk JA in R v Horn 1958(3) SA 457(AD) at 466 F - H:*** *'It is clear that in the case of* ***dolus eventualis*** *intent to kill will be present where the wrongdoer pursued the act with recklessness as to whether or not his act is fulfilled in death. The natural concomitant of this recklessness is that the wrongdoer must in fact have (not ought to have) preconceived death as a result; for it would be impossible for him to be reckless as to whether death ensues or not if he never actually appreciated that death was a possible result. The appreciation of death as a possible result is a fact which cannot be proved by an objective test. However difficult it may be for the Crown this must be proved as an actual fact by inference from all the circumstances."*

Again, the learned Judge of Appeal ***Milne JA*** at p32 F - G referred to the judgment in that case of the presiding judge, ***Schreiner P,*** and said this:

"I should liketo associate myself very strongly with the learned

> *President's view that when it is correctly held that a person "must" appreciate that his act involved a resk of another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the rist."*

As also stated by ***Milne JA*** at p31B of the ***Annah Lokudzinga Mathenjwa*** case

> "There is no doubt that what the court must do is to try mentally to project itself into the position of the accused at the time that the fatal act is done".

The learned judge quoted in support of this statement the South African decision in the ***S v Mini 1963(3) SA 188(AAD)*** where Holmes JA said:

> "In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time it seems to me that the trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of ***ex post facto*** *knowledge."*

I agree with those remarks,

In carrying out that exercise the court must take into account all factors which may at the time have affected the mentality of the accused in order to determine whether he or she foresaw (subjectively) that his or her conduct would result in the death of the deceased. One such factor would be the influence of liquor. In his judgment in this case **Matsebula J** referred to the fact that ***Ms. Nderi*** for the Crown had quoted to him a case viz ***R vs Zonke Fanukwente Zwane*** in connection with the question of intoxication of an accused person, where

learned Judge in that case had said "I agree with the submission on behalf of the crown that the accused's intoxication
is mitigatory and not escalpatory."

That statement is correct, as far as it goes. Intoxication can in certain circumstances be only mitigatory and not exculpatory. But the statement does not, in my view, go far enough. The influence of liquor may be such, and the degree of intoxication may be such, that the accused as a result could not subjectively have foreseen the consequences of his or her conduct. In the ***Annah Lokudzinga Matsenjwa*** case ***Milne JA*** said the following at p31 G:

> *"Among the circumstances which have to be taken into account is the fact that the appellant was under the influence of liquor. The learned trial judge when dealing with the question of extenuating circumstances seems to have accepted the appellant's evidence, which was not contradicted, that she was drinking quite a lot during the day. This could well, apart from the considerations which I have already mentioned, in some degree have adversely affected the capacity for realising all the possible consequences of what she was doing."*

I agree with those remarks.

There also may be other factors, such as provocation, which may affect an accused person's subjective foresight.

Finally, there would seem to be a feeling that the requisite foresight arises from the fact that in a case where the deceased is stabbed to death, a knife is used. The use of a knife is the ***causa causans*** of the conduct of the accused, namely the stabbing of the deceased. Without a knife there could not be any stabbing. The fact that a knife is used, however, does not necessarily go towards establishing the subjective foresight of the accused in using that knife. It does

not mean that he must, because he used a knife, necessarily have foreseen that it would result in the death of the deceased. Again I refer to the judgment ***Milne JA*** in the ***Anna Lokudzinga Mathenjwa*** case supra where he said the following:

"***When a person appreciates only that his act may injure another it does not follow of course that the injury may cause his death. (See R vs John 1969(2) SA 560 R (AD) at 570). Nor does that necessarily follow merely because the assailant uses a weapon such as a knife. (See S v Dlodlo 1966(2) SA 401 (AD)"***

In the latter case the appellant in the Appeal Court in South Africa was tried before a trial court, consisting of a judge and two assessors, with murder as a result of his having used a knife. In the judgment of ***BOTHA JA*** in that case at page 404 he said that the assessors were of the opinion that having regard to the nature of the weapon used, apparently a murderous looking knife, the nature and the situation in the body of the stab wound and the fact that the appellant had deliberately opened the knife which he had taken from the table, the appellant realised as a fact that death could result from such a stab but that he nonetheless stabbed the deceased with recklessness and indifference to the result. The trial Judge's own view in that matter was however entirely different. He said that the circumstances present (and it is not necessary for me to set out in detail what those circumstances were) were such that although a deadly weapon had been used and that the stab wound had occurred in a vital part of the body of the deceased, nevertheless it had not been proved beyond reasonable doubt that the appellant, even by stabbing the deceased with that knife subjectively foresaw that the stabbing would result in the death of the deceased.

It has been said that the difference between ***dolus eventualis*** and culpable homicide is a narrow one (see ***Sv Alexander*** supra at 684H) and also as Ms Nderi said in her argument in this Court, that the dividing line between them is frequently blurred. It is nevertheless my view that narrow though the difference may be, it is still a distinct one and one which need also not be blurred. In ***S v Alexander supra*** the Court there said (and I am translating from the Afrikaans version)

> "While the dividing line in ***dolus eventualis*** *and* ***culpa*** *is occasionally narrow there can be no doubt that there exist two separate and distinct forms of culpability".*

The distinction between the two forms of culpability becomes quite clear if one bears in mind that in order to establish ***dolus eventualis*** it must be proved that the accused subjectively foresaw the consequences of his act. There will obviously be many instances where the circumstances are such that the Crown will discharge the onus of establishing such foresight. If there is, however, a reasonable doubt as to whether the accused did or did not have that subjective foresight the benefit must be given to the accused who must then be found guilty of culpable homicide.

Turning to the facts of the present case the appellant was, on all the evidence, heavily under the influence of liquor. Verbal abuse in the most vulgar of language was indulged in by her and the deceased. The deceased was the first who resorted to physical violence, first striking the appellant with an open hand and then hitting the appellant with a metal walking stick, drawing blood in doing so. Although the appellant thereafter seized a knife and proceeded to stab the deceased twice with it, I find that having regard to the mental state of the appellant, who was clearly heavily under the influence of liquor and had been severely provoked by the deceased, the Crown has not succeeded in proving beyond reasonable doubt that the appellant subjectively foresaw that by

stabbing the deceased her conduct would result in the death of the latter. Indeed what her mental state was at the time is revealed in the following passage in the cross-examination of her at the trial.

The question was put by Ms Nderi for the Crown:

"You have told this court that you have been to school and you know that a knife is a dangerous instrument."

Accused - I know

The Crown: Did you realise then that you could injure your sister fatally , did you not?
Accused: I did not know that I would hurt her badly
The Crown: But you did not care, did you?

Accused: I did care (and the rest of the statement becomes inaudible because she was speaking very softly)
The Crown: Yes, afterwards but I am saying you did not care when you used the knife, did you?
Accused: I did not think."

The benefit of any reasonable doubt must, of course, ensue to the appellant. That she ought to have known as a reasonable person that the stabbing of the deceased might possibly lead her to her death, is undoubted and she should therefore, in my
view, not have been found guilty of murder on the basis of ***dolus eventualis*** but of culpable homicide.

There is accordingly substituted for a verdict of murder with extenuating circumstances, a verdict of guilty of culpable homicide.

This being the case this Court is at large to consider afresh the sentence to be imposed on the appellant. The appellant is 28 years of age and a first offender. She is the mother of two children, aged 13 and 10 years respectively. She stabbed to death her sister, a fact which will unquestionably remain on her conscience for the rest of her life. She showed immediate remorse for what she had done. At the trial she said this. She was asked by her attorney. "After you found your sister has been stabbed and she was very very hurt how did you

feel?" She said: "The police took me to where the deceased was and I saw the others cry and I also cried and asked the deceased not to die." Asked why that was, she said " I was sorry because I realised that she was injured and I was not aware that she would die".

She has shown the same remorse in this court.
This is a tragic case brought about, as so many of these cases are, by the parties to the event, the appellant and the deceased, having been under the influence of liquor. The use of knives by intoxicated persons in quarrels between them and others will not be condoned by this court. It will not be condoned in this case. A prison sentence to deter both the appellant from similar conduct in the future and others in similar circumstances from using a knife to settle their differences, was accordingly not inappropriate. However, having regard to the sad circumstances of the present case and taking into account the appellant's age, her remorse and the fact that she had had no brush with the law until now, I feel that a large portion of such sentence should be suspended. Ms Nderi does not object to that. Any sentence imposed upon the appellant would probably have been backdated, as is so often the position in this country, to the date of her arrest. The appellant has been in prison since the date of her arrest on the 21st January 1996, a period of 20 months. This, to my mind, would have both the deterrent effect of the punishment to which I have referred as well as any retributive element and suspending any further period of imprisonment would I feel serve a reformative purpose as far as the appellant is concerned. In my view an appropriate sentence would accordingly be the following:-

60 months imprisonment of which 40 months is suspended for 3 years on condition
that the appellant is not convicted of any offence committed during the period of suspension of which violence is an element and for which she is sentenced to imprisonment without the option of a fine.

The effect of the aforegoing is that the appellant is entitled to her immediate release from custody.

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P.H. TEBBUTT, JA

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I AGREE

G.P.C. KOTZE, JP

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AND SO DO I

J. BROWDE