IN THE COURT OF APPEAL OF SWAZILAND

Cr. Appeal No. 27/1997

In the matter between;

Johanne Mwelase 1st appellant

Sibangani Sifundza 2nd appellant

vs

Rex

Coram

Kotze, JP

Tebbutt, JA

Browde, JA

For Appellant In Person

For Crown Mr. J.W. Maseko

JUDGMENT

(25/09/97)

Kotze, JP

The appellants were tried by Mr. Acting Justice Maphalala on two counts. Count 1 directed against those appellants was one of murder in that it is alleged that on 29th March, 1996 the two appellants with common purpose unlawfully and intentionally killed Petros Mhlalisi Ndzimandze who I shall refer to in this judgment

as the deceased. Count 2 charged the appellants with attempted murder in that on the same date as in count 1 each or both of them with common purpose unlawfully and intentionally attempted to kill Bhekinkosi Ncongwane to whom I will refer as the complainant. In regard to count 1 the trial Court found that Appellant no. 1 did not have the intention to kill the deceased and found him guilty of culpable homicide. He sentenced him to 8 years imprisonment three years of which were suspended and which sentence was backdated to the 30th March, 1996. In regard to count 2 the Court found that the injury to Bhekinkosi was inflicted by appellant 2 and convicted him of assault with intent to do grievous bodily harm. He was sentenced to 5 years imprisonment no potion of it being suspended and which sentence also was backdated to the 30th March 1996. It is not in dispute that the cause of death of the deceased was haemorrhage as a result of stab wound to the left lung and that the complainant sustained a stab wound on the left chest at about the same time the deceased sustained his injury. The evidence on behalf of the crown established that one Charles Dlamini, the deceased and the complainant bought two carry-packs of beer at the Bulembu Mine Club. This happened in the late evening. When darkness fell appellant no. 2, that is the complainant, approached Charles, the deceased and the complainant requesting that they be sold some of their beer. By this time the bar

was closed and the second request was made to these people to sell some beer. There was a further refusal. This led to a confrontation in the course of which the 2nd appellant and the complainant got hold of each other. The complainant was heard to shout and asked appellant 2 why he was stabbing him. A knife was thrown on to the tarmac and led to a scuffle in the course of which appellant 1 got hold of the knife and stabbed the deceased who died soon afterwards from the stab wound.

The complainant also gave evidence on behalf of the crown and his evidence is to

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the same effect as that of Charles Dlamini. In addition he gave evidence that the deceased was also stabbed in the course of the scuffle. There was further evidence in the case, appellant 1's brother William referred to as PW4 testified that earlier on the 30th March, appellant 1 came to his home. He had a wound on the forehead and face and his face was covered in blood. Further evidence was to the effect that a blood-stained knife was found where appellant no. 1 lay on a flower bed during the night of the 30th of March. Those appellants testified on their own defence. The evidence of appellant no. 1 in a nutshell was that the complainant and the deceased attacked him and appellant no. 2 with a knife. They then acted in self defence. Appellant no. 1 denied entirely that he stabbed the deceased.

Appellant no. 2 story also was that the deceased attacked him and appellant no. 1.

The trial Judge did not accept the defence version of an unprovoked attack launched by the deceased and the complainant. This is an approach which in my view cannot be faltered. On the contrary I find that on the evidence produced it was an inevitable finding. The crown case was soundly based on a confrontation which arose as a result of the appellants helping themselves to the beer belonging to the deceased and the complainant. The Crown version provides a reason for the confrontation whilst the defence version is a fanciful one of a totally unprovoked confrontation. To repeat I find the approach of the trial Court entirely acceptable. The violent conduct which led to the death of the deceased and the injuring of the complainant is explained in a rational way, namely, that it arose out of wanting deprivation of the beer which they had bought and paid for was the defence version of an unprovoked attack is one which has no underlying cause in the evidence. The judgment in the trial Court that the evidence against the two appellants is overwhelming is fully borne out by a careful study of the recorded evidence. The convictions recorded in my view are correct and the appeal of

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appellant no. 1 against his conviction is dismissed.

Appellant no. 2 noted an appeal against the sentence only. We draw attention to the fect that by reason of the suspension of three years of the sentence of appellant no. 1 for a lesser offence attracted the same sentence. Therefore he contended that the sentence in his case was excessive.

The two charges which the trial Court dealt with were so intertwined that I cannot fault the trial Judge's approach of regarding them as part and parcel of the same chain of events. The sentence imposed on both the appellants struck me as entirely correct in the circumstances the trial Judge having stressed that the increase in offences of violence of the kind which arose in this case are so frequent that heavy sentences are called for.

In my view neither sentence induces a sense of shock nor can it be said that either sentence is attended by irregularity or improper considerations. The appeals of both appellants are therefore dismissed.

G.P.C. KOTZÉ, JP

I AGREE

P.H. TEBBUTT, JA

AND SO DO I

J. BROWDE, JA