IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.10/97

In the matter between:

ALFRED MANDLA PHAKATSI

VS

THE KING

CORAM : LEON J A

: SCHREINER J A

: TEBBUTT J A

FOR APPELLANT : IN PERSON

FOR RESPONDENT : MR. J. MASEKO

JUDGEMENT

Leon J A

We have had the benefit in this case of an argument by the appellant in person who although he did raise the question of the appeal against the conviction he appeared to concentrate largely on the fact that the sentence appears to be too harsh but I shall deal with both matters in the course of this judgement.

The appellant despite his pleas of not guilty was convicted on count one of culpable homicide having been charged with murder on that count and on count two he was convicted of common assault. On count one he was sentenced to twelve years' imprisonment, four years was conditionally suspended while on count two he was sentenced to six months' imprisonment the latter sentence being ordered to run concurrently with the first. Although the appeal has been brought against both convictions, it was common cause on count two that the appellant had indeed assaulted the complainant slapping her twice and it was not disputed that she had an injured lip as a result of those assaults. On the admitted facts the conviction on that count cannot

be disturbed.

The real question I apprehend is firstly whether the court a quo was correct in convicting the appellant on count one and if so, whether the sentence was a proper one. The court was faced with two mutually destructive stories and in order to be satisfied the onus had been discharged it was necessary for the court to be satisfied upon adequate grounds that the Crown story was true and that of the appellant and his witnesses was false. See REX VS M 1946AD P.1023 &1026. It is to that question that I now address myself.

The first ground of appeal which is the same point which was argued by the appellant today was that the court a quo erred in accepting the evidence of Thandi and Nomkhosi who were unreliable and untruthful witnesses and secondly the court erred in rejecting the evidence of the defence. I pause to say in short that the appellant's defence was one of self-defence.

It is common cause that the appellant and PW1 were lovers. Her evidence was she had broken off the relationship as a result of being infected with a sexually transmitted disease by the appellant. She then fell in love with the deceased. The appellant admitted that he infected PW1 and he also admitted that she was very upset about this, he admitted that in the course of his evidence but he maintained that they were still lovers at the time of the death of the deceased. In this respect I regard her version as more probable than his. According to her evidence very briefly and broadly stated:

The appellant had after the time of separation in September 1995 used to come across her from time to time threatening to fix her up. On the day in question at about 7.30pm PW1 was at Thandi's place. The appellant arrived telling her she was in love with a police officer and then delivered a punch on her lips, kicked her, she raised the alarm. Thandi Oarrived and found PW1 bleeding, she went off to inform the deceased. Thandi returned with the deceased, PW1 was inside the house and the appellant was trying to force open the door. She heard the deceased's voice outside then went outside and found the deceased had a cut on his head.

I pause to say that that story seems to me to have some built-in probability because she could if she wished to frame the appellant as he claimed she did in his address to us today she could very easily have said that she saw the appellant strike the deceased but she did not. She also saw one Mefika, who was later called as a defence witness, standing against the window at the time they

conveyed the deceased to hospital. In my opinion her evidence was not discredited in cross-examination.

Thandi to whom I referred earlier was Thandi Mary Sibandze; she was PW4. She had stayed with PW1 from September to December 1995. She confirmed the relationship between the appellant and PW1 had ended in September 1995 because of a sexual disease problem. She infact gave PW 1 money for treatment; she also knew that PW 1 and the deceased were lovers.

On the day in question the deceased came to the room at about 3 o'clock leaving at 5pm. She left the room but on her return home she found PW1 crying. She was present with her sister. She said that she saw that PW1 (who is the complainant on count two) had a cut on her lip (which is consistent with the evidence of PW1). She then found the appellant outside the door wielding a bushknife chopping at the door. Then she saw the appellant hit the deceased with a bushknife. She observed that the deceased was injured by the appellant from the bridge of his nose right up to the middle of his head. She had been present on an earlier occasion when PW 1 informed the appellant that she was no longer in love with him. She denied the suggestion that the incident occurred on a footpath and she was emphatic that it had occurred outside the door of her flat.

One of the investigating officers in this case was PW5 Constable Msibi. On the following day about 10 o'clock he received a report about the assault on the deceased and saw him in hospital and on the following day he interviewed the appellant obtaining the bushknife from him. The appellant admitted that he used the bushknife on the deceased but he had done so because he had been cornered and he had no option but to do what he did. However, what is important about this witnesses evidence is the fact that the appellant told him that all this happened outside the door of the flat. This is entirely inconsistent with the evidence of the appellant. He went to the

door of the flat and found a cut on the door which is consistent with the evidence of the other Crown witnesses.

Mkhosi Nsibandze was PW5. On the day in question she went to PW1 's room and found her crying. She also was present and saw the appellant hack the deceased with a bushknife and ran away. She said the deceased was injured on the left-side of his forehead and that the deceased had done nothing whatever to provoke this attack upon him. Her evidence was not discredited in cross-examination.

The appellant gave evidence under oath. He admitted, as I said earlier, assaulting the complainant

twice the complainant on count two. On the night in question he saw people approaching him in an attacking fashion on a footpath for no apparent reason whatever. There is nothing suggesting that they had any reason to assume that he would be on the footpath or that he was emerging on the footpath. The story in this regard, is in my view inherently improbable. He ran away. A person caught up with him, clapped him and kicked him. He defended himself using a bushknife which he had in his possession which was hanging from his trouser belt. As I mentioned earlier he admitted that the complainant on count two PW1 was not happy about him infecting her with a sexually transmitted disease but continued to maintain that they were still lovers at the time of the incident. He could give no reason why Thandi and the complainant on count two should give false evidence against him. His evidence was equivocal and contradictory as to whether PW1 had assaulted his girlfriend Lungile. He said that is why he had beaten up PW1 but he contradicted himself in that respect and he denied the whole substance of the Crown case.

Lungile Dlamini was DW2. She said that the appellant had been her boyfriend since 1995. On the day in question she was at the appellant's place. PW1 arrived there saying that she was the lover of the appellant. That night the appellant spent the night with her. Her evidence was contradictory. In evidence-in-chief she said nothing about PW1 manhandling her yet that is what she alleged for the first time in cross-examination. She said that she made a mistake but her evidence does not read well and I can find no fault with the trial court's view that her evidence fell be rejected.

The last defence witness was Mefika Dlamini DW3 a friend of the appellant who supported his evidence but in cross-examination it appeared that he had made a statement to the police which was materially contradictory to what he said in his evidence. As my Brother Presiding pointed out that statement should have been produced in evidence. The policeman in question, however, was called to put in the statement but the statement was never produced. However, the witness admitted that he did make a statement and at least by implication admitted that his statement was materially different in many respects from what he said in evidence. However, he claimed to have been drunk when he made it. That statement on the evidence was a detailed statement which negatives the suggestion that he was drunk when he made it.

The court accepted the evidence of the Crown witnesses and rejected that of the appellant and his witnesses.

In my view in doing so, it did so upon adequate grounds and in my opinion no good grounds exists for disturbing the conclusion at which the court arrived that the appellant was guilty on count one and on count two.

The reason why the court convicted the appellant of culpable homicide rather than murder was because it was unable to find any intention either direct intention or intention in the form of dolus eventualis on the part of the appellant. The crime was committed on the spur of the moment as the deceased arrived on the scene and instead of chopping the door the appellant then chopped the deceased. That is why the court found that the correct verdict was one of culpable homicide.

The appellant is a first offender and having regard to all the facts in this case including the fact that the fact the crime was committed on the spur of the moment against a background of a jilted lover I consider the sentence which the learned Judge passed as being too severe. There is indeed a striking discrepancy between the sentence I would have imposed and that which the learned Judge imposed. That justifies this Court in interfering with the sentence.

To sum up, the appeal against the convictions on count one and two must be dismissed and the convictions must be confirmed. In my view the sentence of twelve years of which four was suspended must be set aside and must be replaced by a sentence of six years' imprisonment two years of which will be suspended for three years upon the condition that the appellant is not convicted of a crime involving an assault upon the person of another for which he is sentenced to imprisonment without the option of a fine and; the sentence on count two will run concurrently with that sentence and the sentence will run from the 12th May 1996. The suspension which I

referred to will be operative for a period of three years after the appellant has been released from jail.

R. N LEON J A

I agree:

W. H. R. SCHREINER J A

I agree:

P. H. TEBBUTT J A

Delivered on 15th April 1998.