IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.6/99

In the matter between:

SIPHO NKWANYANA

VS

THE KING

CORAM : LEON J P

: STEYN J A

: TEBBUTT J A

FOR THE CROWN : MISS S. NDERI

FOR THE APPELLANT : IN PERSON

JUDGMENT

Steyn J A:

The appellant was charged with the offence of murder. He appeared before the High Court, the Chief Justice presiding. After evidence was led by the Crown and the appellant himself had testified, he was convicted of the crime of culpable homicide, the court having found that the State had failed to prove that he had the intention to kill the deceased. The appellant was sentenced to serve a term of seven (7) years' imprisonment and this sentence was backdated to the 20th March 1998 which was the date of his arrest.

In his original notice of appeal, the appellant contended that the charge was altered and he could not adequately defend himself on the lesser charge of culpable homicide. However, when he appeared before us today he confined his appeal and submissions to the question of the propriety of the sentence which was imposed upon him. In this regard, he advanced several submissions. That is, that he was not offered an option of a fine; that he was a first offender; that a partially or wholly suspended sentence should have been considered as appropriate; and that the court below did not give proper consideration to his personal circumstances as he is the father of a female child who is

wholly dependant on him because her mother is unemployed. He also referred to the fact that his health was not good and that he is receiving treatment whilst in prison.

The evidence established that the deceased died as a result of an assault and it is common cause that that assault was committed by the appellant. The evidence led by the Crown was that of the deceased's sister and a youngster of nine (9) years of age who actually witnessed the events. Their evidence which was accepted by the court below, was to the effect that an extensive and persistent assault was committed by the appellant on the deceased, a young lady of 25 years. The evidence of the circumstances in which this assault occurred paints a picture of ongoing ill feeling between the appellant and PW2, the deceased's sister. This ill feeling manifested itself also in a complaint by PW2 to the community police as a result of which the appellant was ordered to leave the homestead where he was a tenant of PW2.

According to PW2, the appellant was also in arrears with his rent and she expected him to vacate the premises. However, when she came to the homestead with her sister on the evening in question, she found the appellant in the house, he having made a fire inside the house. PW2 remonstrated with the appellant that it was not proper for him to make a fire inside the house. This led to an altercation and it culminated in the assault to which I have already referred.

The appellant's version was different. He said that PW2 kicked over his pot of porridge which was on the fire and that PW2 also kicked a Bible of his which was inside the house. In so far as the deceased is concerned, she apparently annoyed him by referring to him as a "fool" and it was in these circumstances that he decided "to discipline" the deceased. Appellant admitted that he kicked the deceased on the head on three occasions. As I have indicated, the court below accepted the evidence of the Crown and rejected the evidence of the appellant contending that he had minimised the gravity of his conduct.

In his reasons for sentence, the Chief Justice gave consideration to all the circumstances of the offence as well as to the personal circumstances of the appellant. It is correct that there was ill feeling between the parties and the probabilities are that the appellant was incensed by the fact that he had lost his tenancy and that he had been reported to the community police. It is also clear that whatever happened inside the house on the day in question triggered in the appellant a violent response and that he lost control of

himself. In other words, it was not a premeditated offence but it occurred on the spur of the moment.

However, there are several aggravating features in this case. The deceased was a young, defenceless woman. The assault was a sustained one. There was an opportunity for reflection in the sense that after he had assaulted the deceased on the first occasion, the appellant went away and came back again and then according to the Crown witnesses, proceeded again, to stamp on the head of the deceased. Indeed, the Chief Justice when delivering the sentence said to the appellant and I quote:

"If you understood the argument which is taking place, you will understand that there is a very thin line between your conduct and murder. "

In other words, what the court below found was that this case of culpable homicide fell into a most serious category of that crime.

We also find that there was some provocation that triggered this offence. The conduct of the appellant and the nature of the assault was completely out of proportion with that provocation. We have given careful consideration to all the arguments advanced by the appellant, to his personal circumstances and to the mitigating circumstances. However, bearing in mind the gravity of the offence which he committed and that he brought the life of this young woman to an end it is our view that the sentence which was passed upon the appellant is perfectly proper. It is our view that the appeal should be dismissed and that the conviction and sentence should be confirmed.

J. H. STEYN J A.

I agree : R. N. LEON J. P.

I agree : P. H. TEBBUTT J A

Delivered on the 24th November 1999.