IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.19/98

IN THE MATTER BETWEEN:

DUMISANE SIMELANE

VS

REX

CORAM : SCHREINER A J P

: VAN DEN HEEVER A J A

: SHEARER A J A

FOR THE APPELLANT : IN PERSON

FOR THE CROWN : MR J.W. MASEKO

REASONS FOR JUDGMENT

Van den Heever, A J A

The appellant was charged with and convicted of the murder of a man described as being his grandfather. He had pleaded guilty to culpable homicide, but the prosecution was not prepared to accept this plea. He was sentenced to seven years' imprisonment. He appealed against both his conviction and the sentence imposed. He appeared before us in person. At the conclusion of the arguments, the court dismissed his appeal, and confirmed the conviction and sentence, undertaking to file reasons in due course.

They follow now:

On Tuesday 12 August 1997 at about noon or thereafter, people were drinking outside the cooking hut of the deceased. John Ndlangamandla, related to both accused and the deceased, was one of those present. He asked the deceased for some sugar, to flavour his liquor. The deceased went into his dwelling hut, and came out with a dish of sugar in his hand. The appellant came face to face with him, stabbed him in the chest, and went to the house of a neighbour where he reported that he had stabbed the deceased, and where the police could find him. He handed over to them when they came, the weapon with which he had stabbed the deceased. The deceased died in a hut near the scene of the incident, shortly thereafter, from shock and loss of blood occasioned by his lung having been punctured.

The prosecution conceded the evidence of the appellant that the relationship between him and his grandfather had been a bitter one, and that the appellant had been drinking and was under the influence of alcohol on the day in question. According to the appellant, his father, the son of the deceased, had been employed in Johannesburg. When he died, compensation was paid to his family, intended i.a. for the maintenance and education of the appellant. Instead, the grandfather had squandered the money on e.g. cars for his own pleasure or benefit. The appellant had started herding cattle when he was twelve, and had a beast allocated to him every year as reward. When his maternal grandmother who oversaw those died, the deceased had appropriated also those belonging to the appellant. He also

appropriated roofing and the contents of houses which had belonged to his predeceased son, the father of the appellant, and ordered the appellant to vacate the dwelling he occupied, since the deceased wanted to use corrugated iron roofing for a fowl run for himself.

What were in dispute, were the events which immediately preceded the stabbing of the deceased.

MR Ndlangamandla, PW1, testified in chief as though he had seen the appellant come from another hut, walk up to the deceased and stab him as he came out of his sleeping hut with the sugar in his hand, without any apparent reason or prior warning. It is however clear that this part of his evidence was based on either inference or what he

had heard from others: he admitted that he had not seen the actual stabbing, A hut between that of the deceased and the place where the drinkers were sitting, obscured his view. He had merely heard Mangaliso Dlamini, PW2, seated on the other side of the hut, say, "Why are you stabbing the old man?" after which he saw the deceased, clutching his breast and leaving a trail of drops of blood, head for another hut into which he was soon thereafter assisted and where he died. The appellant in the meanwhile had run off to the house of a neighbour, Agnes Simelane.

Mangaliso Moses Dlamini, PW2, had also been drinking at the deceased's place that day. He, too, is related to both the deceased and the accused, and to PW1. He had been sitting facing the door of the dwelling of the deceased, and saw the latter go in, and then come out with a small dish containing sugar in his hand. Just then the appellant came "from above the hut" and, being shorter than the deceased, jumped up and stabbed him. As PW2 rose and asked "Boy, what are you doing to the old man?" the accused swore at him before leaving hurriedly . Neither of these two witnesses knew of any dispute or ill feeling between the appellant and the deceased.

The appellant's version had been put to the two Crown witnesses. They did not dispute it, merely stating that they had not seen the events to which he testified. Those were that he had been summoned by Agnes to see the deceased. Inside the hut where the beer was sold, the deceased had ordered the appellant to clear out of his maternal grandmother's house. The appellant challenged him to first produce the corrugated iron of the appellant's father. The deceased attacked him with the stick used to stir the beer. When the appellant grabbed this, the deceased produced a knife with his left hand. It fell. The appellant picked it up and left the cooking or beer hut. He said, in chief,

"and nearby was another house which was used by the deceased for sleeping. And when I went out I went below his sleeping hut thinking that he was going to follow me but instead he went around that hut or above it and met me on the other side. We then met near a corner which is near the door of the deceased's sleeping house. He was carrying a red dish. He raised up his hand

or arm which had the dish and I do not know whether he wanted to close my eyes with the dish or to hit me with it, but when he raised his arm I then stabbed him with the knife on the left side of his chest. He then stopped even holding me because he was also intending to hold me and after I stabbed him he stopped trying to hold me and passed me a little bit. And I therefore left him and went to my uncle's place,...."

There he reported that "we had fought with my grandfather" and "we had hurt one another", and handed over the knife as being the property of the deceased which the latter had intended using against him.

Agnes was called as a defence witness. She is a sister of the deceased, sister-in-law of PW2, and maternal grandmother of the appellant. She supported the appellant's version that she had been asked to give him a message that his grandfather wished to see him; and that she had complied, but had herself left the scene and gone to her own home. She was not asked in chief about the relationship between her brother and her grandson. Under cross-examination she knew nothing of any dispute about cattle, did "know about corrugated iron sheets which belonged to the accused's father"; and said that when the deceased sent her to call the accused, the deceased had not appeared angry. In short, she provided only minimal support for the version of the appellant, but in relation to events which occurred earlier than the actual stabbing; namely that she and one Boy had been present at or near the cooking hut at some stage that day.

The evidence that PW1 had asked the deceased for sugar, and the deceased had gone to his cooking hut in order to comply with this request, was not challenged by cross-examination. Appellant's own evidence, quoted above, makes it clear that he stabbed the deceased outside the cooking hut. That the deceased was carrying the dish makes it clear that, whether or not there had been a previous incident between the two earlier, that was over and done with and the deceased involved in a matter relating to beer, not to battle. And it was never put to any prosecution witness that the knife had been the property of the deceased, so that this was not a matter investigated prior to or at the trial. This, however, can make no difference to the ultimate outcome of the matter. On the appellant's own version, as I have said, whatever may have happened in the beer hut between him and the deceased, was over and done with before he

stabbed the deceased outside his dwelling hut. Between those events - accepting that there is a reasonable possibility that there was some acrimonious incident between them in the beer hut - sufficient time elapsed for the deceased to have gone into his sleeping hut to fetch the sugar which PW1 had asked for. It is not disputed that the deceased was unarmed when the appellant stabbed him. The evidence of the latter as to why he stabbed at that stage, namely that he thought that the deceased may possibly have had another weapon and be intent upon attacking him (where he had a dish in one hand and allegedly grabbed hold of the appellant's clothing with the other - detail not put to the eye-witness PW2, incidentally) was rejected as untrue by the trial court, which found PW2 to be an impressive witness.

I cannot find that the trial Judge misdirected himself in his assessment of the evidence. In my view the appeal against the conviction cannot succeed.

As regards the sentence, every possible factor weighing in the favour of the accused was taken into account. The sentence imposed can likewise not be faulted.

For these reasons the appeal was dismissed and both the conviction and sentence were confirmed.

L. V. D. HEEVER, A. J. A.

I agree

W. H. R. SHREINER, A. J. P.

I agree

D. L. L. SHEARER, A. J. A.

Delivered in open Court on the 8th June, 1999