IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 26_97

IN THE MATTER BETWEEN:

JABULANI ZAKHELE DLAMINI APPELLANT

VS

REX RESPONDENT

CORAM : BROWDE J A

: VAN DEN HEEVER A J A

: SHEARER A J A

FOR THE RESPONDENT : MS. LANGWENYA

FOR THE APPELLANT : MR. NTTWANE

JUDGEMENT

Browde J A:

The appellant was charged in the High Court before Matsebula J with murder and assault with intent to do grievous bodily harm. The charges arose out of events that occurred at the homestead of P.G. Dlamini (PW1) on 9th February 1995. During a fracas involving the appellant and his wife (the deceased) the latter received, inter alia, a violent blow with an axe wielded by the appellant which left the axe-head embedded deep in her skull and into the brain. The deceased was admitted to the RFM Hospital in Manzini where she died 10 days later on 19th February 1995. During the same incident, PW1 was alleged to have received injuries inflicted by the appellant which necessitated his receiving stitches. This formed the basis of the second count.

At the commencement of the trial the appellant, on the murder charge, tendered a plea of guilty to culpable homicide and on the second charge a plea of not guilty. The Crown accepted neither of these pleas, so the trial proceeded. It resulted in the conviction of the appellant on both counts and sentences of 10 and 2 years respectively, to run concurrently and backdated to 9th February 1995 which was the date of appellant's arrest.

This appeal is brought against the conviction and sentence on the first count i.e. that of

murder on the following grounds: -

In regard to the conviction it is alleged by the appellant that the trial court erred in fact and in law in finding and holding that the doctors and medical team of the RFM Hospital (where the deceased was admitted and treated before her death) did not treat her negligently and that there was no novus actus interveniens which broke the chain of causation in the events leading to the death of the deceased.

In regard to the sentence on the murder count the appellant contends that the court a quo failed to take into account factors submitted in mitigation of sentence and passed a sentence that was excessive in the circumstances.

It was argued at the trial that there was a novus actus interveniens arising out of the treatment, or rather the lack thereof, of the deceased in the hospital, which absolved the appellant from responsibility for the death of the deceased. I will return to this argument later in this judgement but I think it relevant at this stage to observe that this approach conflicted with that of the appellant and his legal adviser Mr. Ntiwane when the plea was tendered since in that plea neither causation nor unlawfulness were put in issue. The only contested issue was whether the appellant had killed the deceased intentionally or negligently.

Before us Mr. Ntiwane, who again appeared for the appellant, confined himself to the argument that on the facts of the case the court should have found that the deceased died as a result of the novus actus already referred to. In his argument, counsel made no reference to the court a quo's findings of fact which preceded the blow with the axe and the injury to PW1, and consequently those facts must be regarded as being accepted by the appellant.

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Here follows a resume of those facts.

The appellant and the deceased had been married since 1991. At the time of the marriage the deceased had had two children by another man and the appellant one by another woman. There were no children born of the union but the appellant accepted her two children, maintained them, and paid their school fees. In January 1995 there had developed unhappiness in the relationship and the deceased left the appellant and hired a room for herself from PW1 near the school where her elder sister was a teacher. It took some time before the deceased was traced to her room by the appellant who, because the deceased was out, left a message that she should leave a key for him as she, so it seems, was in possession of some of his belongings. Thereafter the appellant visited the room twice on the 4th February and 9th February 1995. On the first occasion he removed the articles he wanted in the presence of his two uncles and PW1. On the second occasion, which turned out to be the fateful visit, the deceased was present and was requested by the appellant to accompany him to her sister so that they could discuss the proposed divorce. Instead of following him she went to the house of PW1 and was followed by the appellant and also by PW1. Once inside the house the appellant, armed with an axe, struck at the deceased and fled, leaving her lying with the axe-head embedded in her skull. In attempting to go to the assistance of the deceased PW1 was also injured. The weight of the blow with the axe on the deceased's head may be gauged by the fact that the handle of the axe was broken by the impact. PW1 and the deceased were taken to hospital where the former's wounds were stitched and the latter lay unconscious until she died on the 19th February.

The appellant's version of the events differed toto caelo from that of the Crown witnesses. In short he suggested that he had injured the deceased accidentally while protecting himself from a murderous attack by PW1. He asked the court to believe that the axe and the blade of a spade being wielded by PW1 came into contact with one another. This caused the axe to drop and cleave into the skull of the deceased. Apart from the fact that this story differed in material respects from a sworn statement which

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was made by the appellant to the police on the 19th February it has not been submitted to us that the learned Judge a quo erred in rejecting it. There was, in any event, no misdirection in the approach of the learned Judge, and that he rejected the highly improbable and often self-contradictory evidence of the appellant is hardly surprising. Nor, in the circumstances, is it surprising that Mr. Ntiwane made no effort before us to attack the factual findings of the court a quo concerning the events of the 9th February and that he confined his submissions to legal argument namely whether the treatment or, as he would have us find, the lack of treatment in the hospital was the cause of death of the deceased. Counsel submitted that this was a case

of a novus actus interveniens or a new intervening cause breaking the chain of causation and resulting in that actus being the cause of death and not the original act of the appellant. To absolve the appellant on the basis of a novus actus the latter must be one that by itself and independently of the act of the appellant i.e. the burying of the axe into the skull and brain of the deceased, caused the death which the Crown now seeks to lay at the door of the appellant. An example given in the textbooks is that a victim is given slow-acting poison by A. Thereafter a burglar B, independently breaks in and shoots the victim. A would be guilty of no more than attempted murder, the death of the victim having been caused by B. See, for example, THE LAW OF SOUTH AFRICA, FIRST RE-ISSUE VOL.6, p31, para 32 R V MOUTON 1994 C. P. D. 399; R V STEEL [1981] 2 AER 422 (CA) at h-i; S V WILLIAMS 1986(4) SA1188 (A) 1195.

The acts of the doctors in the RFM Hospital, which Mr. Ntiwane referred to as gross negligence, were the following:

i. They failed to ask the relatives of the deceased whether they could afford and were willing to have her transferred to and paid for in the Nelspruit hospital. This assumes that the answer would have been in the affirmative and that the deceased's life would have been saved had the transfer taken place - both pure conjecture and quite incompatible with the evidence before the court to which I shall advert below.

ii. The deceased was given a drug called Gentomycin which, it was suggested, was dangerous if uncontrolled. There was no evidence of the lack of control in

relation to the administration of the drug nor was there any evidence of any effect of the drug on the deceased's condition.

iii. No cultures were taken to establish whether the drugs - including the broad spectrum antibiotic which was given to the deceased - were having any therapeutic effect. It was not suggested that the taking of such cultures would have had any bearing on the prolongation of the deceased's life and this argument, in any event, also disregard the evidence

As I have already indicated Mr. Ntiwane has, in making the above-mentioned submissions, chosen to disregard the evidence which was attested to by the Crown witnesses and particularly that of Dr. Genaye who during a long and, I should add, unnecessarily aggressive cross-examination in the course of which the witness was often interrupted by the attorney in the middle of a sentence, said the following, inter alia:-

i. The wound in the skull of the deceased was 10cm long and about 4 to 5 cm deep, and so deep into the brain,
ii. When asked what her chances of survival were with that type of injury he said, "I would say,nil. In fact, it is quite amazing that the patient stayed so long... a simple shock will injure the brain and in our practice we know very well that head injury is the leading cause of death in trauma."

iii. That although there were better facilities in South Africa and the United States than existed in Swaziland, in this case death was inevitable, She (deceased) survived so long because of the life support given to her... but the
iv. life support cannot go on for years, you don't give life support for a year.

Youcan give life support probably for less than 30 days, so she can be maintained in life for 30 days in that facility.

(Mr. Ntiwane did, not dispute that life support was the reason for her surviving as long as she

did),

v. "In fact the mortality rate for a severe brain injury like this is 100% even in the best care...(even) in a neurological facility."

When it was asked of the witness by Mr. Ntiwane, "Would the level of care, in a different hospital have made her survive?" the doctor said, "I don't think so."

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vi. "This was a very deep, a very severe brain laceration.... and the injuries were at the vital centre. Life is incompatible with this type of injury."

As I have indicated Mr. Ntiwane submitted that the deceased received nothing in the hospital which could be termed as treatment. What prompted him to make this scathing criticism is difficult to understand since Dr. Genaye, in recounting the treatment given to the deceased, referred to a document of 11 pages which contained details of the management and treatment of the deceased from her admission on 9th February to her death on 18th February. Here follows, in resume, what the evidence was:-

i. She was treated for shock arising from severe loss of blood.
ii. She was operated on for removal of the axe-head.
iii. She received oxygen and a blood transfusion.
iv. She was given drugs such as mannitol and dexametal for the oedema in the skull, antibiotics to combat infection and pethidine for pain,
v. The wound was cleaned and dressed,
vi. She was given fluid and put on medication for energy,
vii. Physiotherapy was administered to ease the breathing process,
viii. She was x-rayed to check for signs of pneumonia,
ix. As stated already she was attached to life support equipment.

The doctor concluded by saying that, "at about midnight she died and every measure was attempted to rescue her with all measures the hospital could afford - but she succumbed."

In the light of that evidence the submission by Mr. Ntiwane that the treatment afforded the deceased in the RFM hospital by the doctors was grossly negligent is scurrilous. There is no evidence whatsoever that anything done in the hospital contributed to the death of the deceased nor that any other treatment or the transfer of the deceased to South Africa or, for that matter, any other part of the world, would have saved the life of the deceased. Mr. Ntiwane harped on the so-called concession by Dr. Genaye that had she been transferred to Nelspruit she might not have died when she did. This averment is meaningless in the face of the unrebutted evidence that the only reason why the deceased

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survived for some 10 days was that she was afforded artificial life support and that a devastating brain injury such as suffered by the deceased had a 100% mortality rate: even if there had been a neuro-surgical facility, she would have died.

In my judgment there is no substance whatsoever in the argument relating to a nevus actus interveniens and consequently the appeal against conviction has no merit.

The appeal against sentence was not proceeded with.

In the result the appeal is dismissed and the convictions and sentences are confirmed.

BROWDE J A

I AGREE : VAN DEN HEEVER A J A

I AGREE : SHEARER A J A

Dated at Mbabane this.....day of June 1999.