IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.25/2000

In the matter between:

SIPATJI MANDLA MOTSA APPELLANT

VS

THE KING RESPONDENT

CORAM : Leon J.P.

: Steyn J.A.

: Beck J.A.

For the Crown : Mr Ngarua

For the Appellant : Mr Simelane

JUDGMENT

Beck J.A.

The appellant was convicted of murder and was sentenced to 7 years imprisonment. The sentence was backdated to 26th August 1998, that being the date on which the appellant was arrested and from which time he was kept in custody awaiting trial.

There were no eyewitnesses to the killing of the deceased, a man by the name of Ali Mohammed. The culpability of the appellant can only be judged on the basis of the evidence that he himself gave of how and why he fined the shot that killed Ali Mohammed. The gist of the appellant's evidence is as follows:

The appellant occupies a room at a place called Fairview. It appears to be the end room in a row of rooms each of which is occupied by a different owner or tenant. The room two doors away from the appellant's room was occupied by a woman by the name of Happy Bennett, whom the appellant knew to have a Mozambican boy friend.

On the night of 21/22 August 1998 the appellant was elsewhere. On returning to his room on the morning of 22nd August he found that it had been burgled during the night and a great deal of bis property had been stolen. He immediately reported the burglary to the police. Two days later the police informed him that a man named Kaitaine had been arrested and that they were looking for two other suspects. The next evening, 25 August, a number of armed policemen arrived at the rooms at Fairview in search of a man named Armando Ntunzini, whom they found and arrested in Happy Bennett's room, he being the Mozambican friend of hers that I have mentioned above. The appellant says that when the police found and arrested Armando Ntunzini they told the appellant that one Ali Mohammed was also wanted by them.

It must be said that none of the five policemen who went to Fairview to arrest Ntunzini, and who gave evidence for the Crown, recalled telling the appellant anything about Ali Mohammed. However it is not without significance that the police witnesses did confirm that Ali Mohammed was a wanted man. Constable Dlamini testified that the police wished to interview Mohammed regarding cases involving firearms; Detective Constable Sibandze testified that he knew Mohammed to be a receiver and seller of stolen goods and that he was wanted by the police in connection with breaking and theft cases; Detective Constable Mamba testified that Mohammed was a suspect in various breaking and theft cases and that he was wanted by the police; and Detective Constable Motsa testified that Mohammed was known to the police who used to arrest him.

After the police had departed with Armando the appellant spoke to Armando's girlfriend and she described Ali Mohammed's appearance to him and added that he usually carries a gun. The appellant recalled that on the morning of 22nd August a man of that description had stood outside the door to the room that she and Armando occupied and had watched with unusual interest the appellant welding stronger burglar bars to the door of his room in the place of the burglar bars that had been forced loose the previous night.

Some little time later on that same evening of 25th August the appellant saw a man outside the door to Armando's room whom he thought was Ali Mohammed, and he said aloud to Happy Bennett, who was also standing outside in the company of another woman, "Is this not Ali Mohammed?" whereupon the man, who was indeed Ali Mohammed, took off from his shoulder a large bag that he was carrying, put it down, put his hand in his pocket and advanced on the appellant saying "Who are you?"

The appellant, who had come to believe that Ali Mohammed was a wanted man who was known to the police to be a criminal, that it was he who had burgled his room, and that he was likely to be armed, was alarmed by this menacing advance upon him. The appellant, whose work involves the control of cash in a supermarket, owns a licenced pistol which he had on his person, and he produced it and told Ali Mohammed to put his hands up and to get into Armando's room, adding that the police were looking for him. Undeterred by what the appellant said and by the production of the pistol, Ali Mohammed continued to advance towards him, whereupon the appellant retreated and fired a warning shot in the air. At that the two women fled indoors. Despite the warning shot, Ali Mohammed still continued to come towards the appellant who retreated until his retreat was halted by a fence that was behind him, and when he backed into it Ali Mohammed physically took hold of him and they grappled. Ali Mohammed caught hold of the hand in which the appellant held his pistol and the appellant feared that Mohammed might succeed in dispossessing him of the loaded weapon. With the help of his free hand the appellant pulled down on Ali Mohammed's hand and fired a second shot, which struck Ali Mohammed above the right scapula and travelled downwards into his chest cavity to exit above the sternum. The appellant then succeeded in pushing the grievously wounded man into his room, locked the door and at once telephoned the police, who came, carefully searched Ali Mohammed in case he was armed (which he was not) and then took him away. Before he could be medically treated he died, the upper lobe of his right lung and large blood vessels having been lacerated by the shot that the appellant had fired downwards into his shoulder.

The appellant was not arrested that night. He was asked by the police whether he had a licence for his pistol, which they took possession of, together with the empty cartridge case from the second shot that the appellant had fired. The police and the appellant searched for, but did not find in the dark the cartridge case from the first shot that had been fired. The next morning however, the appellant found it in the grass outside his room and he took

it, together with his pistol licence, to the police station on the morning of 26th August. That afternoon he was arrested a ad charged with murder.

This then was the evidence that the appellant gave. It was put to him that in an affidavit that he had made in support of an application for bail he had said that when he saw Ali Mohammed standing near his room he immediately drew his pistol and ordered Mohammed to put his hands up and get into Happy Bennett's room.

The appellant accepted that he had said as much in his affidavit, but he explained that the affidavit had been made in a hurry and he said that it did not put the matter properly; he repeated his earlier testimony that it was only when Mohammed, having put his shoulder bag down, advanced upon the appellant with his hand in his pocket, that the appellant produced his pistol and told Mohammed at gunpoint to put his hands up.

The difference between this brief passage in his bail application affidavit and his testimony at his trial is the only inconsistency that can be pointed to in the whole of the detailed account that the appellant has given of what occurred. It is apparent however, that this inconsistency materially influenced the learned trial Judge's assessment of the whole of the appellant's evidence and led him to put an interpretation upon it which is, in my view, unwarranted and misdirected. The following excerpts from the learned Judge's judgment are illustrative of this:

"The accused states that he saw the deceased standing next to his door... and asked if that man was Ali. He then drew his firearm and ordered the deceased to raise his hands and to go into Armando's house." (My emphasis).

".....the deceased who was not threatening the accused in anyway was suddenly pointed with a loaded firearm and ordered to raise his hands and to go into Armando's room for no apparent reason." (Again my emphasis)

It is clear from these observations that the learned trial Judge accepted the statement in the bail affidavit and rejected the appellant's evidence as to when, and why, the appellant produced his pistol and told Mohammed to put his hands up. In consequence he was led to say that the appellant failed to show

"that any attack was imminent. In point of fact, it is the accused who attacked the deceased.....The deceased was put in the position in which he found himself by the accused's untamed aggression. Even when forced to defend himself against this unwarranted attack the deceased did not resort to wielding any weapon to

necessitate the use of a firearm by the deceased" (sic. Scilicet "accused", not "deceased."). "Whatever fears the accused may have entertained they were not reasonable due regard being had to the circumstances of the case."

The penultimate paragraph of the judgment of the learned trial Judge reads;

"I say all this based on the accused's account of how the deceased died. It appeared in cross-examination that the accused filed an application for bail which was accompanied by a sworn affidavit in which he gave an account different from that given to Court under oath. This throws a doubt on the truthfulness of the account given in Court and which has been relied upon in arriving at a decision in this matter."

The concluding sentence that I have underlined appears to me to demonstrate an ambivalent approach by the learned trial Judge to the evidence that the appellant gave. He clearly decided to evaluate the appellant's conduct on the basis of the brief passage in the bail affidavit and to reject that portion of the evidence that the appellant gave in court concerning the moment when the appellant felt it necessary, for the reasons he gave, to produce his pistol in order to dissuade the deceased from physically closing in on him. But the decision to prefer the passage in the affidavit to the sworn testimony of the appellant is not one that could safely be made. Indeed, the explanation that the appellant gave in his evidence of the sequence of events seems, if anything, to be more probable than the sequence that is indicated by the disputed passage in his bail affidavit. Be that as it may, I can find no justification for accepting the passage in the bail affidavit, and rejecting that portion of the appellant's evidence which speaks of the moment when the appellant produced his pistol and of his reasons for doing so.

The incorrect slant which the trial Judge's preference of the bail affidavit led him to put upon the appellant's conduct becomes even more apparent when regard is had to the observations that were made in the course of the judgment on sentence. The learned trial Judge said in the course of sentencing the appellant that: -

"You subjectively thought that the deceased stole your possessions and out of anger you shot (him)". (My emphasis)

"Instead of using the firearm to protect yourself, you used it as a weapon of aggression to make even with those you perceived had wronged you. The possession of the firearm gave you a superlative sense of security and a feeling of control over the lives of others as was evident in this case, you ordered the

deceased to raise up his hands and go into Armando's room and on failing to do that you shot him.....you took the law into your own hands, instead of apprehending the perceived culprit and taking him to the Royal Swaziland Police for appropriate action, you felt it just in your eyes to shoot him." (Again my emphasis).

With respect to the learned trial Judge, there was no evidence to warrant these highly damaging findings. The whole of the appellant's evidence reads well. It was thoroughly tested in cross-examination and it emerged unscathed therefrom, except only for the inconsistency with the passage in the bail application to which I have referred and which the appellant said had not been properly put because the affidavit was hurriedly made. I can find no justification for accepting the disputed passage of the affidavit and rejecting the whole thrust of the appellant's uncontradicted evidence in consequence. In my view, the passages that I have extracted from the trial court's judgement on the merits and on sentence show that the learned trial Judge's evaluation of the appellant's evidence was seriously flawed by misdirection.

The location and the track of the gunshot wound, as revealed in the post-mortem report, lend significant support to the appellant's description of how the fatal wound came to be inflicted in the course of the physical struggle that he described. The court is bound, in my view, to accept that the whole of the appellant's evidence of what happened might reasonably be true, to say the least. The question that then falls to be answered is whether or not the appellant acted in legitimate self-defence when he shot the deceased.

While the onus rests on the Crown to negative a defence of self-defence, it is trite law that such a defence is only available if certain conditions are fulfilled. In Rex v Molife 1940 A.D. 202 at 204 Watermeyer J.A. (as he then was) put it this way:

"Homicide in self-defence is only excusable under certain strictly limited conditions-the means of defence must be commensurate with the danger and dangerous means of defence must not be adopted when the threatened injury can be avoided in some other reasonable way."

It is not always easy to determine whether the facts of a particular case satisfy these conditions, bearing in mind that, in assessing the situation in which an accused person found himself and the means that he used to defend himself, one must be careful not do so

"from the angle of an arm-chair critic sitting afterwards in cool reflection." (Rex v Hele 1947 (1) S.A. 272 (E. D. L. D.) per Lewis J. at 276).

Accepting as reasonably possibly true the appellant's assertion that he believed, from what he had been told, that the deceased was a wanted criminal who was probably armed, it seems to me that the appellant may well have become very alarmed when the deceased reacted in a strange way to the appellant's query as to whether he was Ali Mohammed by taking off the bag he had on his shoulder, putting it down, putting his hand in his pocket, and advancing on the appellant saying "Who are you?". Apart from the two women who fled from the scene when the warning shot was fired there was nobody else on the scene who could be of any assistance to the appellant in case of trouble. That the deceased appeared to be bent on physical aggression would have seemed even more certain to the appellant when the deceased doggedly continued to close in upon him despite the production of a pistol and the firing of a warning shot. Had the appellant been motivated by anger and a spirit of revenge, as the learned trial Judge thought, one would expect that, instead of firing a warning shot in the air, he would have shot the deceased as he was advancing. Instead of doing so however, the evidence is that the appellant continued to back away until he could retreat no further because of the fence behind him, at which point the deceased reached him, grasped his gun hand and grappled with him. Fearing that the deceased was intent on dispossessing him of his loaded firearm with the risk that, if the deceased succeeded in doing so, the weapon might well be used against him, the appellant fired a second shot downwards from above the deceased's right shoulder in order to protect himself from the possible fatal consequences of being disarmed by the deceased.

In considering whether the appellant acted reasonably in his defence, and whether the force he used to defend himself was commensurate with the apprehended danger (S v Ntuli 1975 (1) S.A. 429 (A)), regard must be had to his uncontroverted evidence that after the deceased grappled with him the appellant tried to flee to the safety of his room but was physically unable to do so; and to the fact that, because the deceased had hold of his gun hand, he was unable to aim at a less vulnerable part of the body than the shoulder.

In all the circumstances that the appellant's testimony disclosed I am of the view that the Crown has not negatived the defence of self-defence. The appellant found himself under forcible attack by the deceased under circumstances when it was not unreasonable for the

appellant to fear that the deceased would succeed in wresting the appellant's firearm from him and would use it against him. Flight was unsuccessfully attempted, and no less dangerous way of protecting himself than the way be used has been shown to have been open to the appellant. Without other options available to him I do not consider that it can justifiably be found that he used excessive force to protect himself and it cannot be said that the nature of the force that he resorted to in the situation in which he found himself was not commensurate with the nature of the danger that he reasonably apprehended.

In the result I am of the view that the appellant was wrongly convicted and that he should have been acquitted of any criminal culpability for the death of the deceased. Accordingly the appeal succeeds and the conviction and sentence are set aside.

C. E. L. BECK J.A.

I agree

R.N. LEON J.P.

I agree

J.H. STEYN J.A.

Delivered in open court on the 13th day of June 2001