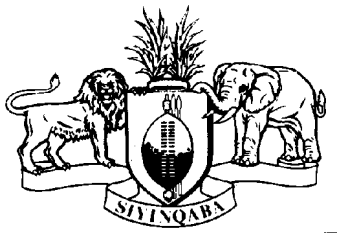

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.15/2000

In the matter between:

SANDILE MKHABELA		**APPELLANT**
VS		
REX		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BECK JA**
FOR THE APPELLANT	**:**	
FOR THE CROWN	**:**	

JUDGEMENT

Browde JA:

This appeal arises from the conviction and sentence of the appellant by the High Court, the indictment alleging that on or about 10th December 1997 and at or near Mhlaba area, Shiselweni Region the appellant unlawfully and intentionally killed MNDENI MWELASE. The appellant was found guilty as charged and sentenced to 7 years' imprisonment.

The events leading to the death of the deceased as deposed to by the Crown witnesses was briefly as follows:

> On the 10th December 1997 the appellant was sitting on a rock near a bus stop in the Mahlaba area when the deceased arrived on the scene. The appellant

called him and the deceased came to the appellant who immediately asked the deceased "to repeat what he had been saying the previous day." The deceased denied having said anything whereupon the appellant started assaulting the deceased with a stick. The deceased ran away, was chased by the appellant who caught up with him and hit him several times on his arms and body. The deceased fell to the ground and then the appellant produced a knife which it seems he could have used to stab the deceased; he did not however do so. After the collapse of the deceased the appellant left the scene. He was thereafter asked what he would say if he had killed "the child" (the deceased was about 17 years of age) to which the appellant replied he did not care if the deceased died.

The deceased was described by the Crown witnesses as obviously being very angry. In this regard the appellant, in reply to questions from the Crown witness at the scene, referred to events of the previous evening and an altercation with a gang of six young people of whom the deceased was one. According to the appellant these young people were molesting a girl, a niece of the appellant and it later appeared they had attacked a priest who was a friend of the appellant and also other young girls in the neighbourhood. The molesters then splashed the appellant with water from the road and once again turned their attention to Sibongile – that was the name of the appellant's young niece – and pulled her for a distance and threatened her "because she didn't want to fall in love with them". They also assaulted the appellant and before leaving threatened that they would "get" him and that he should never walk alone. That was all at about 8pm on the night prior to the assault by the appellant on the deceased.

That assault was a fatal one and the post-mortem revealed that the deceased had-

a) A contusion below the left nipple;

b) Contusions on the left forearm, over the sacral region and left leg;

c) An abrasion over the front upper region of the chest.

The cause of death was given as "haemorrhage as a result of left lung contusion". This haemorrhage wound appear to have been caused by the blow in the region of the left nipple.

The learned Judge approached the question of whether the appellant should be found guilty of murder by considering whether or not the provocation described by the appellant negatived the existence of an intention to kill. He came to the conclusion that "the accused had not proved a clear case of provocation." What the learned Judge failed to do, in my opinion, was to evaluate the Crown evidence in order to

decide whether, on that evidence, the Crown had proved an intention to kill. Had he done so he would not have failed to observe that the blows were all inflicted with a stick mainly on the arms and legs of deceased – which do not seem to be vital parts of the body – and one blow – or at most two – on the chest. The Crown witnesses deposed, as I have said, to the appellant having a knife which he "waved" over the fallen deceased but did not use. If the intention to kill was present the appellant could easily have delivered the ***coup-de-grace*** with the knife. This he did not do and, despite what he said after the event, i.e. he did not care whether the deceased died or not, in my judgment the intention to kill was not proved beyond reasonable doubt. Consequently I am of the view that the proper verdict should have been guilty of culpable homicide.

In regard to the sentence, the degree of moral guilt of the appellant is clearly considerably reduced if it is accepted that when he assaulted the deceased he did not do so intending to take his life. I am also reasonably sure that had the learned Judge found, as I am of the view he should have, that the appellant did not intend to kill he would have imposed a lesser sentence than the 7 years' imprisonment backdated to December 1997 which he did impose. As this court is now at large, I would alter the sentence to one of 5 years' imprisonment of which I would conditionally suspend 2 years.

To sum up, I would uphold the appeal and set aside both the conviction and sentence and I would substitute therefor the following:

> The appellant is found guilty of culpable homicide and sentenced to five years' imprisonment backdated to December 1997 of which two years is suspended for three years on condition that during that period the appellant does not commit an offence involving violence for which he is sentenced to a
>
> term of an imprisonment without the option of a fine.

J. BROWDE JA

I agree : J.H. STEYN JA

I agree : C.E.L. BECK JA

Delivered on the ----- day of December 2000.