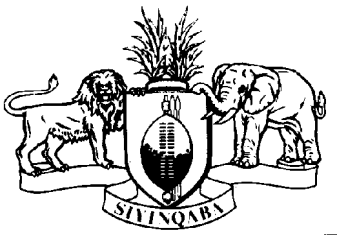

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.44_00

In the matter between:

TONY ORGIL LAPIDOS		**APPELLANT**
VS		
THE KING		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**VAN DEN HEEVER JA**
	:	**SHEARER JA**
FOR THE APPELLANT	**:**	
FOR THE CROWN	**:**	

REASONS FOR JUDGMENT

Shearer JA:

The appellant was charged with having murdered Martin Robert Mdluli on the 4th June 1998 in the vicinity of the KaMkhoza Bar in the Ezulwini area. He was convicted, and after finding that the accused's immaturity and intoxication constituted extenuating circumstances, the trial Judge sentenced him to 15 years' imprisonment.

The appellant had been represented by counsel at trial, who made it clear that the plea of "not guilty" his client tendered was based on the fact that the charge was not one of culpable homicide.

It was not disputed that he had caused the death of the deceased. His defence was that he had smoked dagga, went to a disco where he bought four or five bottles of beer until the bar closed, and remembers nothing of what happened thereafter.

The events of that early morning may be pieced together as follows: The appellant – then 22 years old – lived with his mother as a tenant at the homestead of the deceased, who owned the KaMkhoza Bar. At closing time in the early hours of the morning, the appellant arrived there and bought peanuts and milk stout from the Barlady PW1. She gave him the beer in a tin, making it clear that it was closing time. The appellant went to sit next to the deceased. When the latter soon after told him to leave, he refused. The deceased started pushing him out. PW2, a security guard in the employ of the deceased, came to help. When the three of them had walked about 15 metres from the Bar, and the appellant appeared to have accepted the situation, PW2 returned to his post. When he looked back he saw the appellant rush towards the deceased, produce a knife, and stab him. The deceased fell. The appellant, still armed, then came towards PW2, who fled. The appellant then did likewise.

PW2 phoned the police, then went to report at the deceased's home.

PW1 and the son of the deceased, PW3, arrived at the Bar together. PW3 found his father motionless and bleeding, took his car keys from the father's pocket, and, helped by the security guard and the Barlady, put the deceased in the car. The appellant whom he had known for years, was standing at a distance. PW3 asked the Barlady to lock the bar. He himself drove off to take the deceased to the hospital.

PW1 and PW3 both testified that after the son had left, they and the appellant went into the Bar, where the appellant was intent upon taking money from the till or the safe (or both) and was aggressive towards the two of them. Then Constable Dlamini, PW4, arrived on the scene, at about 03h00. He asked the appellant to accompany him but the appellant refused, resisted, and tried to draw his knife. PW4 took it, and in due course produced it in court as an exhibit. They drove to the hospital where PW4 learned that the deceased was dead. He then took the appellant to the police station.

All the Crown witnesses testified that the appellant had had liquor but was not drunk. Only PW1 was alerted – and only by a single question – to the fact that the appellant's evidence would be that he was very drunk that night; which she denied. She was the only witness who was cross-examined at all. Her credibility was not brought into question by that. The other three were not cross-examined at all, so that there can be no suggestion that they were lying as to the material facts.

The accused testified that his relationship with the deceased had been good. He told an improbable story to "explain" why he had gone to the Bar armed with a knife with a 21cm blade. He was supposed to meet its owner at the Bar and return it: one Seaboy Simelane, since deceased. He does not know what happened that night, only coming to his senses two days later on the Tuesday after his arrest, at Lobamba police station. He had had no intention "that such an incident occurred."

Under further cross-examination he said that he rarely smoked dagga. When he did, it calmed and relaxed him. After a good deal of questioning about irrelevancies, he was questioned about his first recollection after his alleged black-out. He said he was surprised to find himself in the police cells, and told PW4 so. The latter took his fingerprints and told him he was facing a murder charge.

"Q: Anything else?
A: He then asked me as to what I wanted to say.
Q: What did you say?
A: I then told him and replied him that what happened was a mistake."

He remembered having been served by PW1 and getting beer in a tin; which he later contradicts : PW1 gave him a glass. He had paid with money which he had removed from the left inside pocket of his jacket. (This relates to events shortly before he was evicted from the Bar and killed the deceased) The only reason he had told the policeman PW4 when informed that he had killed the deceased, that it was by mistake – by implication acknowledging that he had caused the death of the deceased - was "because I had been carrying the knife since about 8pm…because the knife was in my possession."

Since his memory was good enough for him to be able to relate detail such as the above extracts reveal, his story of a black out at that very stage cannot reasonably possibly true. On the Crown evidence, unchallenged, he was after money. No other motive for his conduct appears from the record to have existed.

The apparent misdirection by the Court *a quo*, that the appellant had failed to discharge the onus of establishing his defence, is irrelevant in the circumstances of this case. That the appellant's evidence should have been rejected was inevitable and therefore his conviction also.

The sentence imposed was undoubtedly severe, but then this was a gruesome attack prompted by the basest of motives, as the result of which a popular and well-loved man lost his life – moreover a man the appellant on his own evidence regarded as a father. Sentence is eminently a matter within the discretion of the trial court. I am unpersuaded that it misdirected itself in this regard.

The appeal is dismissed. The conviction and sentence are confirmed.

D.L.L. SHEARER JA

I AGREE : pp:J. BROWDE JA

I AGREE : L. VAN DEN HEEVER JA