IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Cri. Appeal No. 25/98

In the matter between

CALVIN MAGAGULA APPELLANT

And

REX RESPONDENT

CORAM BROWDE, J.A.
STEYN, J.A.
TEBBUTT, J.A.

JUDGMENT

BROWDE, J.A.

The appellant was charged in the High Court with the crime of murder it being alleged that on or about 9th February 1998 and at or near Herefords in the Hhohho District the appellant unlawfully and intentionally killed Zwelithini Msweli. He pleaded not guilty but was convicted by Matsebula, J and sentenced to imprisonment for 5 years backdated to 10 February 1998. this appeal is against the conviction and

sentence.

It is common cause that the deceased died as a result of stab wounds inflicted by the appellant. The learned judge found that the wounds were inflicted by the appellant with the intention of causing the death of the deceased while it is submitted by the appellant that the necessary *mens rea* was not proved by the Crown and that if the defence of self-defence raised by him should fail he should then be found guilty only of culpable homicide.

The facts of the matter are the following. On the day in question the appellant, the deceased, the main Crown witnesses and others were at a drinking place imbibing what is referred to as "marula brew". Both the appellant and the deceased were described by witnesses as being drunk. For example the witness Watts (PW2) stated, *"they got drunk when we were already there because even after we arrived they continued drinking."* The witness Sikhumbuzo Simelane (PW1), in describing the struggle between the appellant and the deceased (to which I advert below), said

> *"………………….and in that process they both fell down since they were both drunk."*

During the afternoon bad blood appeared to have developed between the deceased and the appellant which led to the appellant leaving the place where they were drinking and returning sometime later armed with a knife. There are inconsistencies in the various witnesses' versions of what exactly occurred after the appellant's return. This is hardly surprising since they were all drinking and were probably under the influence of the alcohol at the time. What does appear to be common cause, however, is that the accused sat down and then the deceased approached him from behind. According to PW1,

> *"the deceased strangled the accused with his arm which he wrapped around his neck and strangled him and in that process they both fell down since they were both drunk."*

This is largely corroborated by PW2 who stated:-

> *"The deceased approached the accused from behind and jacked accused's neck with his arm as accused was facing away from him."*

The appellant himself put it thus –

> *"………………we continued drinking. Before any lapse of time I then felt someone breaking my neck, that is throttling me. I fell down and I felt that I could not breath and he came on top of me……………and continued throttling me when I was under him."*

It is, from the evidence, not difficult to visualise the scene. The appellant and the deceased, both the worse for drink (they had both been drinking for some hours) locked in a struggle on the ground with the deceased's arm tight around the appellant's neck. The appellant then manages to grasp the knife and it was then that 3 or 4 stabs were administered one of which, to the abdomen, proved fatal. The accused stated in evidence that he stabbed because he was being throttled and could not breathe. However he obviously exaggerated the severity of the attack on him since he stated in evidence that the throttling lasted about 10 minutes. This is irreconcilable with the evidence of the other witnesses one of whom (PW2) said that the deceased was stabbed after the two had been separated. The learned judge a quo appears to have rejected or at least underplayed the "throttling". He said in his judgment that "according to PW1 and PW2 deceased put his arms around the accused's neck and the two fell to the ground" The excerpts from the evidence which I have quoted above in my view demonstrate that the learned judge did not take into account the plight of the appellant caused by the attack on him by the deceased. The situation in which he found himself did not, however, justify the use of the knife by the appellant. While I can accept that he did not intend to kill the deceased and that he stabbed on the spur of the moment provoked by the feeling that he was being strangled, his reaction of stabbing the deceased several times went beyond what was necessary to defend himself. The argument, faintly advanced, that the appellant

acted in self-defence must therefore be rejected but in my opinion the Crown evidence fell short of proving the mens rea required for murder. The provocation of the attack by the deceased coupled with the drunkenness I have described are sufficient in my opinion to cast doubt on whether the appellant intended to kill the deceased. The appellant should have been convicted of culpable homicide. This was properly conceded by counsel for the Crown.

The sentence imposed by the learned judge was, as I have already said, 5 years imprisonment backdated to 10th February 1998. As I have come to the conclusion that the appellant's crime was culpable homicide it follows that his moral blameworthiness is of a lesser dimension than that associated with a deliberate and intentional killing. The sentence should therefore be reduced. Five years was a lenient sentence for murder and consequently I am of the view that justice will be done if 2 years of the 5 years are suspended.

In the result the appeal against the conviction and sentence are upheld and substituted by the following:-

The appellant is found guilty of culpable homicide and sentenced to 5 years imprisonment of which 2 years are suspended on condition that during the period of suspension he is not convicted of an offence involving an assault upon the person of another for which he is sentenced to imprisonment without the option of a fine.

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_BROWDE, J.A.

I AGREE

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STEYN, J.A.

I AGREE

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TEBBUTT, J.A.

DATED AT MBABANE THIS…………………DAY OF MAY, 2000