

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 18/00

In the matter between:

MARWICK ABRAHAM SIBANDZE

VS

THE KING

CORAM

: BROWDE J A

: VAN DEN HEEVER JA

: SHEARER JA

FOR APPELLANT :

FOR RESPONDENT :

JUDGMENT

VAN DEN HEEVER JA:

The appellant was despite his plea of "not guilty" convicted in the High Court of murder, and of assault with intent to do grievous bodily harm. He belatedly lodged an appeal against both conviction and sentence, explained the reasons for his delay, and asked that that be condoned. The Crown did not oppose and it was granted.

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The charges are based on the events of the 10th April 1998, first at the homestead of Simiso Mkhonta and thereafter at the homestead of the appellant himself, in the District of Shiselweni.

The appellant has two brothers who were involved with him in the events of that day. Undisputed facts are that the appellant and a brother - a reasonable inference is that it was Maguma - left home at about ten that morning to go to a soccer match. When it was over, they went to Mkhonta's homestead where they and a number of others had drinks. Mkhonta reported to the appellant that his (appellant's) epileptic brother Habula was in the throes of a seizure and needed attention. The appellant's attitude was that it was Mkhonta's responsibility to cope with Habula's seizure, since Habula worked for Mkhonta (The precise nature of that relationship is in dispute but also irrelevant) Mkhonta made arrangements with the owner of a vehicle, Ngwavuza Malinga, to convey Mkhonta to the latter's own homestead. Mkhonta and a number of others put Habula into the vehicle, and accompanied him to his homestead and deposited him there. The appellant stayed behind, still drinking, until Maguma said they had better leave and report at home that Habula had suffered an attack. The appellant left, but was sidetracked because en route Themba Vilakati wished to speak to him. When he did arrive home, he found a number of people there, who had brought his brother Habula home. Shortly afterwards the appellant pulled an okapi knife from his pocket, stabbed Hoshu Ndlovu in the heart and Jabulani Vilakati in the back, and then sat down. Hoshu died then and there. The appellant was arrested there some hours later by the police to whom some of those who had conveyed Habula home, had gone to report. The

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death of Hosha Ndlovu is the subject of the murder count, the stabwound Jabulane received, that of the assault charge.

When he was arrested, and in his evidence in court, the appellant claimed that he had been attacked and had acted in self defence.

The prosecution witnesses all denied that there had been any quarrel at Mkhonta's homestead, though the deceased had asked why the appellant was neglecting his brother; and others admitted that they did not approve of the appellant's having refused to assist his brother. They were all ad idem that neither the deceased nor Jabulani nor any else involved in taking Habula home, had attacked the appellant, or had any weapon in his hand when the appellant stabbed the two.

The appellant's version was that:-

1. At Mkhonta's house the deceased, who was brother-in-law of Mkhonta, suggested that he, the accused, should be beaten up, pushed him up against a wall, insulted him, because the appellant was "always talking politics" - scil. classifying as such the appellant's attitude that Haluba's seizure was a cross his employer rather than his brother had to bear.
2. At the appellant's own homestead, the deceased had called him a fool, accused him of abandoning his brother, slapped him on the cheek with his jacket three times. When, his own patience having run out, he tried to retaliate, Mkhonta kicked him on the chest. When he tried to flee into his house, Jabulani blocked his way.

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The three started attacking him. He felt his leg go numb and afterwards saw a stabwound on his left thigh. He took his knife out of his pocket, stabbed the deceased who moved out of his way leaving him with only two to contend with. Jabulane was trying to deprive him of his knife, but got a knife-wound in the back. "They" then ran away towards the car which had brought Haluba.

The appellant's version is riddled with improbabilities and self-contradictions (e.g. that he had "rushed" home to report about his brother's condition, which does not tally with his admitted conduct after Mkhonta spoke to him). Most of the detail of his version is not detailed enough (e.g. exactly what the three alleged attackers had done to necessitate his drawing out his knife, and how it happened that an attacker should have been stabbed in the back). Moreover most of his tale was never put to the Crown witnesses. Nor did he call any of those he alleged had witnessed the attack upon him, his wife and/or his brother - to support his own testimony. To accept his evidence as being reasonably possibly true, would involve acceptance that the Crown witnesses had put their heads together to lie in concert to implicate him falsely in the criminal activity laid at his door. He testified that he had asked the police to take him to a doctor because of the wound he had allegedly received. They denied that he had mentioned any wound to them. There was no suggestion that he sustained any other injuries - even a bruise - which the police could and should have seen in the three-against-one "fight", the only detail of which he gave, was that the deceased had hit him three times on the cheek with his "slumber jacket".

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The statement he made at the police station, which was handed up as exhibit C makes no mention of any wound. He admitted that it had been read back to him before he signed it, and did not draw attention to the alleged omission. Nor did he produce anything like a slashed pair of trousers which must inevitably have been occasioned by the thigh wound he spoke of in his evidence. And he admitted under cross-examination that the relationship between him and the three alleged assailants had been a good one in the past, and that he could think of no reason why they, or Bhutana Xaba, should come and lie against him. The last of these - not someone who had anything to do with any argument or alleged attack, - he tried to eliminate from the picture by saying that Bhutana had not been there at all - which makes it even less probable that he would come forward and tell lies in concert with the others to further the Crown's case against the appellant.

There is no misdirection discernable in the reasoning of the court a quo. In my view the conviction of the accused was inevitable.

The sentences imposed - to run concurrently - were one of eight years for the murder and four years for the assault, backdated to the 10th April when the appellant was arrested. Although the appellant was a first offender and had six children of whom three are still school-going, the sentence on the first count if it errs, does so in being too light. The appellant had liquor, but there is no suggestion that he was seriously affected by what he had imbibed. His conduct towards his brother Habula was callous, in leaving him to non-relatives to care for while he

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himself finished drinking what they had bought until his brother Maguma urged him that they should leave. "The reason that made me not to go to see my brother was because of the way Mkhonta approached me. He did not approach me in a very good manner". And he admitted that the deceased (one of those who had brought Haluba home) had done him no damage other than allegedly to hit him on the cheek with his jacket. He himself was not stabbing wildly when he was "attacked". "In fact I bore a grudge with the deceased because he was one who had tried to pick up a fight with me at Simiso's homestead and again at my homestead".

The appeal is dismissed, the convictions and sentences are confirmed.

L VAN DEN HEEVER J A

I AGREE :

J. BROWDE JA

I AGREE :

D.L.L. SHEARER J A

Delivered on this day of June 2001