IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 2/2002

In the matter between

QAMALAZA SHABANGU Appellant

And

REX Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA
For Appellant

For Respondent

JUDGMENT

TEBBUTT, JA

The appellant was convicted by Sapire, C.J. in the High Court of two counts of murder, one of rape, one of assault and one of housebreaking and theft. He was found not guilty on two counts of rape, and the Crown abandoned during the trial a count of rape, two of robbery and one of housebreaking and theft. All the events forming the basis of the various charges against the appellant took place in the Manzini district between 25 December 1996 and 7 July, 1997.

On the two murder charges no extenuating circumstances were found by the trial Court and the appellant was, as a result, sentenced to death on each of the two counts. On the rape charge the appellant was sentenced to 12 years imprisonment and on the assault charge to 3 years imprisonment, to run concurrently with the sentence on the rape charge. On the housebreaking and theft charge, the appellant was sentenced to 12 months imprisonment. All the sentences of imprisonment were backdated to 7 July, 1997, the date of the appellant's arrest.

The appellant now comes on appeal to this Court against his conviction and sentences on all the charges. He did not, however, pursue his appeal against his conviction and sentence on the charge of housebreaking and theft.

On the first murder charge the evidence against the appellant was circumstantial. The Crown witnesses said that the deceased and the appellant were seen leaving a party together on 25 December 1996. The deceased, Nonhlanhla Mhlaphetse Shabangu, was not seen alive again but was found dead in the vicinity of where she was last seen with the appellant. She was naked. A pair of her panties were found nearby. She had died, according to the post-mortem report, of stab wounds. Also found in the vicinity was a jar from which the appellant and the deceased had been drinking at the party and, which according to the Crown witnesses, the appellant had been carrying when they left the party together. Furthermore, after the arrest of the appellant, his room was searched by the police who found in it a black jacket which was identified by one of the

Crown witnesses as a jacket which the deceased had collected from her on the 25 December 1996 and had with her on leaving the party. Finally, there was an important piece of evidence from the complainant on the rape charge on which the appellant was convicted, Sophie Goodness Mamba. She said that when the appellant was trying to force himself upon her, and was threatening her with a spear, he said to her that he would kill her as he had done "to Mhlaphetse", a person she did not know. She had not heard the name before, but she was clear it was the name the appellant used indicating someone he had killed.

The learned trial judge in reference to this evidence said this:

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"This boast made to the terrified woman clearly impressed her strongly. In the circumstances of the case it can only be inferred beyond reasonable doubt that the accused was talking about the deceased in this case and he was trying to impress his victim on the rape charge what happened to women who crossed him."

He went on to make the following finding:

"That he was in fact the last person to be in the company of Mhlaphetse whilst she was alive and his boast of having killed her leads me to the conclusion beyond reasonable doubt that he is responsible for her death.

The evidence indicates that she was stabbed and the person who did the stabbing intended to kill her or must have foreseen her death as a result of the vicious attack with a lethal weapon. That person being the accused, he is guilty of murder as charged. He is found guilty of murder on count 1. "

I find no fault with the reasoning of the learned Chief Justice, fortified as it is by the other factors I have mentioned viz the presence of the drinking jar and of the deceased's jacket in his possession. His appeal on this charge must fail.

On the second murder charge, it is common cause that the appellant shot and killed the deceased, Thoko Sukati his former lover, at her home on the night of 13 May 1997. The deceased's sister described how she and others, including the deceased, had gone to bed that night. The appellant entered the house by pushing open the front door. The witness heard the deceased calling for assistance saying "mother, mother here is Vusie killing me ". She saw the appellant pointing a firearm at the deceased. She then heard a bang similar to that of a firearm. She saw the appellant emerge from her sister's house. He walked about 10 paces, then started running, jumped over a fence and disappeared into the maize fields. The deceased died from a gunshot wound, the bullet having entered her shoulder area and exited at the buttock.

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The appellant's evidence in his defence was that the deceased had been shot accidentally. He said that he went to the deceased's house to give her some maintenance money for the children they had together. He found the key to the door of the house and entered it. As he did so a firearm he was carrying fell to the floor. As he bent down to pick it up, the deceased, who had appeared on the scene screamed and ran to grab the firearm which went off and she was hit. He did not know how the firearm, which was loaded, had gone off. He had not at any stage pointed the firearm at the deceased. In saying that he was, however, clearly untruthful. In cross-examining the deceased's sister, defence counsel at the trial put it to her that the appellant would tell the court that he had pointed the firearm at the deceased "to frighten her so that she could stop shouting". His evidence that he had not pointed the firearm at her is therefore contrary to

what he told his own counsel.

The learned trial judge, in finding the appellant guilty on this count, said that the appellant was unable to explain why he should have gone armed with a loaded firearm to the house of the deceased and why he should have wanted to frighten her. He went on to say the following:

"The account that the pistol should have fortuitously and inexplicably have fallen to the ground as he entered the dwelling has all the appearance of fabrication and I am sure that it is just that.

On the evidence as a whole I find that the accused came to the house intending to harm the deceased by shooting her and for this purpose he was armed with a pistol. It follows that he is responsible for her death and that his action indicates an intention to kill her. He is found guilty of murder on this count. "

Again no fault can be found with this reasoning and on this charge, too, the appeal must fail.
On the rape charge Sophie Goodness Mamba testified that on 3 January 1997 she and a companion, Rose-Mary Makama, had been collecting firewood and were on their way home when she noticed that they were being followed by a man armed with a spear and a bushknife who Makama recognised as the lover of her sister-in-law,

Thoko Sukati, the deceased in the second murder charge, i.e. the appellant. Makama ran away but she, Goodness, was pregnant and could not run. The appellant tied her hands with her turban and ordered her to go into the forest and lie on the ground. When she resisted he raised his spear and told her "that if I do not want to do what he wanted me to do he would kill me like Mhlaphetse, a person I do not know". Goodness said that out of fear of the threat that he would kill her as he had killed someone else, she complied with his demands. He then had sexual intercourse with her against her will. He thereafter tied her to a tree saying he was going to look for Makama in order to kill her. Goodness said she managed to free herself and reported the matter to the police.

Makama confirmed Goodness's evidence that it was the appellant who had accosted them and that it was he who remained with Goodness after she, Makama, had run away.

The appellant denied all knowledge of the encounter but in the light of Goodness's evidence, which the trial judge accepted, as corroborated by Makama, the trial judge rejected his denial. The appellant suggested that Makama had invented the story to get back at him because he had sometime earlier rejected her sexual advances to him. This was denied by Makama who said she regarded him as a son-in-law. The trial judge found the appellant's suggestion to be without substance and convicted the appellant on the charge of rape. I agree with the learned judge. The evidence against the appellant is overwhelming.

Makama was the complainant on the charge of assault. She said that on 2 February 1997 the appellant came to her at her home, again armed with a spear and a bush knife and stabbed and chopped her with these weapons. Some of her wounds were confirmed in a medical report, which was an exhibit at the trial and Makama also showed the scars left by the wounds to the trial court. Once again the appellant denied the assault. However in cross examining Makama as to her allegation that he stabbed her on her nose appellant's counsel at the trial said this:

But Madam he was just playing with you.....poking a little bit.....I mean
you wouldn't have a nose if he was stabbing you with a spear on the nose".

Makama replied to this as follows:

"He was serious because I do have the scars when I sustained those injuries ".

She then proceeded to show the trial court her scars, including one on her nose.
Appellant had originally been charged with assault with intent to murder but the learned trial judge felt a more appropriate finding would be one of guilty of assault with intent to cause grievous bodily harm. Once more no fault can be found with the finding of the trial court on this charge and the appeal against it must also fail.

As the appellant abandoned his appeal against his conviction and sentence on the charge of housebreaking and theft, I need say no more about it.

Mr. Mamba conceded that if Makama's identification of the appellant was accepted his appeal on the rape charge could not succeed. He argued, though, that Makama, who knew the appellant, would not have run away if he had appeared while they were out collecting firewood. He did not persist in the argument that she had a motive for implicating him as he had previously rejected her sexual advances to him.

On the rape and the murder charges, so the argument went, his story could reasonably possibly be true.

There is, in my view, no merit in these contentions . On the rape charge, Makama knew the appellant well. "She had unhesitatingly identified him and she obviously ran away because he threatened her and Goodness with a spear and a knife. The evidence against him on this count was overwhelming. In regard to the other counts the appellant was clearly not open and honest with the trial court. His story of an accidental shooting of the deceased in the second murder charge was obviously a fabrication and completely contrary to what he had told his counsel viz that he had pointed his firearm at her - which he then denied in his evidence - in order to frighten her. His denial of assaulting Makama was equally false having regard to his counsel's

questions to her. All the appellant could do when faced with the evidence of all the witnesses who testified against him was to aver that each one of them was lying.

As I have stated earlier herein, the findings of the trial Court on all the charges cannot be faulted . They were clearly justified on the evidence and the appeals in respect of each one of them fall to be dismissed.

On the question of sentence, I agree with the learned Chief Justice that in each of the two murder charges there are no extenuating circumstances present. Extenuating circumstances are, of course, any factors which serve to diminish the moral guilt, as distinct from the legal guilt, of an accused person who is convicted of murder. No onus rests on the latter to prove the presence of them or on the Crown to prove their absence. A consideration of whether such circumstances exist is an enquiry upon which the trial Court must embark and no factor, however remote, touching on the accused's moral guilt should be overlooked in such enquiry. Such factors are not only those mitigating such guilt but also any tending to aggravate it. (See Jamludi Mkhwanazi v Rex Cr. Appeal 4/1997; Daniel Dlamini vs Rex Cri. Appeal 11/1998).

In regard to the first murder charge this Court has searched in vain for any circumstance which might reduce the appellant's moral guilt. The trial Court could find none and neither can this

Court.

In respect of the second murder charge this was a deliberate intentional shooting of an innocent woman. It was urged on us that there had been no quarrel between the appellant and the deceased before she was shot. This, in my view, makes things worse. If he, without any apparent reason, deliberately and cold-bloodedly shot the deceased, as he did, there can in my view be no circumstances which can be regarded as extenuating. The trial Court's finding that there were none was fully justified.

Mr. Mamba, for the appellant, asked the Court to set aside the death sentences, despite there being no extenuating circumstances. The Court of Appeal, he argued, was a court of justice and had to dispense justice. The death sentence constituted "a grave failure of justice". It is, he contended, a barbaric sentence and a negation of

justice. Whatever anyone's views may be on the death sentence, the law in Swaziland is clear. Where a Court finds an accused person guilty of murder without extenuating circumstances it is obliged in terms of Section 296(1) of the Criminal Law and Procedure Act No. 67 of 1938 to pass the death sentence. This Court, like any other Court of the land , is compelled to apply the laws of Swaziland. Only Parliament can change the Act.

The sentences of death on counts 1 and 2 must therefore stand. No argument was advanced on the sentences on the other counts and they, too, will stand.

In the result, the appeal on all counts is dismissed and the convictions and sentences imposed by the trial Court are confirmed.

DELIVERED IN OPEN COURT THIS. 11th DAY OF JUNE, 2002.

P.H. TEBBUTT, JA

I AGREE

R.N. LEON, J.P.

I AGREE

C.E.L. BECK, JA