

IN THE COURT OF APPEAL OF SWAZILAND

Crim .Appeal Case No.20/2004

In the matter between:

ELPHAS GININDZA Appellant

VS REX

CORAM : R.N. LEON J.P.

: C.E.L.BECKJ.A.

: N.W. ZIETSMAN J.A.

JUDGMENT

Zietsman J.A,

The appellant in this matter was initially charged with murder, the allegation being that on 2nd March 2002 he intentionally and unlawfully killed Thembi Mazibuko. At the trial the charge was changed to one of culpable homicide and to this charge the appellant pleaded guilty. A statement of agreed facts was then presented to the court and on the basis of these agreed facts the appellant was convicted of culpable homicide. After admitting his previous convictions the appellant was sentenced to 10 years' imprisonment two of which were conditionally suspended for three years. The sentence was backdated to 2nd March, 2002.

The appellant appeals only against the sentence.

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The appellant's age at the time of the trial in August 2003 was given as 28 years. The age of the deceased in March 2002 when the offence was committed was approximately 21 years.

The facts of the matter can be stated briefly as follows. The appellant and the deceased were lovers and one child was born out of their relationship. At the time of the trial the child was 8 years old.

On 2nd March 2002 the appellant and deceased went shopping together. They returned to the appellant's flat and it was then decided by the appellant and his friends to have a braai at the appellant's flat. The appellant left the flat with the intention of purchasing some liquor at a liquor outlet. He left the deceased in his flat. Before he reached the liquor outlet the appellant met up with his previous girlfriend. She was short of money and asked him to help her, and he proceeded to give her E20.00. The deceased, who had also left the flat, saw the appellant hand money to his previous girlfriend and she apparently suspected a renewal of their love relationship. She immediately rushed back to the appellant's flat. The appellant followed her and found her destroying glasses and other breakable articles in his flat. She then seized a kitchen knife and proceeded to rip apart the appellant's work uniform and duvets with the knife. The appellant grappled with her and wrested the knife from her. She however continued to fight with him and grabbed hold of his testicles, and in the course of the further struggle she sustained the injury which caused her death. This injury was a stab wound in her chest.

In his argument before us the appellant stressed the fact that he had had no intention of killing the deceased and that the infliction of the stab wound that killed her was accidental and resulted from the deceased's frenzied destruction of his property. According to the appellant he did not grapple with the deceased while she was breaking the goods in his flat, but did so

only after she had seized the knife and was in the process of destroying his work uniform and his duvets.

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It is clear from the record that the appellant showed remorse for what he had done. He contacted the police himself and also told his friends what had happened, and he was apparently preparing to take the deceased to hospital when she collapsed and died. In his submissions to us the appellant stated that the loss of his girlfriend, the mother of his child, still causes him pain. He stated further that he had paid school fees for his child before he was arrested and he now does not know where his child is.

The trial judge emphasized the fact that a life had been lost because of the appellant's conduct and that the offence was therefore a serious offence. He stated nevertheless that under normal circumstances cases of culpable homicide are treated with some measure of leniency in view of the absence of any intention on the part of the accused to cause the death of the deceased. He stated however that in this case a more severe sentence would be imposed because of the appellant's numerous previous convictions for offences involving violence.

The appellant's previous convictions are eight in number. In 1995 he was found guilty of assault with intent to commit grievous bodily harm and was sentenced to 12 months imprisonment or a fine of E200.00. In 1996 he was found guilty of using insulting language and also of malicious injury to property. In 1998 he was again twice found guilty of using insulting language. In 1999 he was once more found guilty of using insulting language and also of assault with intent to cause grievous bodily harm. In 2001 he was found guilty of common assault. These cases were all tried in the Swazi National Court and in respect of each offence the appellant was given the option to pay a fine. The offences could therefore not have been offences of great seriousness.

In his judgement on sentence the trial judge referred to the appellant's "formidable previous convictions involving violence right-through starting from as late as 1995." He stated that the sentences in respect of his previous convictions "are very nominal" and

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that they had apparently had no impact on the appellant. He went on to state that he would in the circumstances treat the present case as a severe case of culpable homicide.

I have difficulty in accepting the trial judge's finding that this was a particularly serious case of culpable homicide. It is true that the weapon that caused the fatal injury was a knife, but it is clear from the evidence that it was the deceased and not the appellant who was initially in possession of the knife. The fatal injury resulted from an attempt by the appellant to dispossess the deceased of the knife.

It is clear from the evidence that there was a great deal of provocation on the part of the deceased and that the appellant's decision to grapple with her was an attempt by him to protect his property which she was destroying.

What seems to have overly influenced the trial judge was the appellant's previous convictions and his perception that they had not been adequately dealt with. He apparently came to the conclusion that the time had now come to deal severely with the appellant.

It is our finding that the trial judge over-emphasised the seriousness of the previous convictions and should have placed more emphasis on the actions of the deceased and the reasons why the appellant found it necessary to grapple with her.

Taking all the circumstances of the matter into account it is our conclusion that the sentence

imposed by the trial court is so unduly severe as to warrant interference by this Court.

In the result the conviction is confirmed but the sentence imposed by the trial court is set aside and is substituted by the following sentence:

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The accused is sentenced to 6 years imprisonment two years of which are suspended for 3 years on condition that the accused is not convicted of a crime in respect of which violence is an element, committed during the period of suspension, and for which the accused is sentenced to imprisonment without the option of a fine. This sentence is backdated to 2nd March 2002.

I agree N.W. ZIETSMAN J.A.

I agree R.N, LEON J.A

C.E.L. BECK J.A.

23rd Delivered in this .23rd..day of November, 2004