

IN THE COURT OF APPEAL OF SWAZILAND

Crim. Appeal Case No. 28/04 In the matter between:

CYRIL LUKHELE APPELLANT

VS

REX DEFENDANT

CORAM R.N. LEON -J.P.

N.W. ZIETSMAN-J.A.

J.H. STEYN-J.A,

JUDGMENT

Zietsman J.A

The appellant was originally charged with murder, the allegation being that on 13 March 2004 he unlawfully and intentionally stabbed and killed David Phakathi. The appellant pleaded guilty to the lesser offence of culpable homicide. This plea was accepted by the Crown and the appellant was found guilty of culpable homicide. He was sentenced to 7 years imprisonment backdated to 14 March 2004, He appeals against the sentence. A statement of Agreed Facts, signed by counsel for the crown and by the appellant's counsel, was handed in at the trial. This statement contains the following allegations:

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1. Upon or about 13th March 2004 the accused did unlawfully kill David Phakathi by stabbing him with a knife on the neck.
2. Accused joined a gathering, who were drinking marula brew at Mhlatane compound. Accused also drank the marula brew and the deceased was also amongst those found drinking. The drinking session progressed for a while with the accused having joined the others.
3. There was a misunderstanding between the accused and the deceased as the drinking session progressed which resulted into a fight. The deceased was unarmed and during the course of the fight, accused produced a knife and stabbed the deceased once on the neck.
4. The deceased subsequently died a few minutes thereafter, due to "a stab wound to the neck", as stated in the report on the post mortem examination on the body of the deceased.
5. Accused was arrested on the 14th March, 2004 and has been in custody ever since.

The appellant was 24 years old at the time the offence was committed and the age of the deceased, according to the post mortem report, is given as "about 28 years". It is clear from the post mortem report that the deceased was stabbed once, in the neck.

The appellant has no previous convictions. He and the deceased were workmates and they apparently got on well together. After he had stabbed the deceased the appellant surrendered himself to the man who was at the time in charge of the compound where he stayed and he later made a statement to a magistrate.

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The appellant argued his appeal in person. He stated that the killing of the deceased was an accident and that after the stabbing he tried to get the deceased to the hospital as soon as possible. Both he and the deceased had had a lot to drink.

The trial judge correctly emphasised the fact that culpable homicide is a serious offence in that it involves the loss of life of a human being. He also referred to the prevalence of this type of offence in Swaziland. Each case must, however, be decided on its own particular facts.

In the present case the appellant clearly did not intend to cause the death of the deceased. After the incident he tried to get the deceased to hospital and he surrendered himself to the authorities. He was remorseful and it is understandable that he regarded the incident as an "accident". Of major importance is the fact that he has no previous convictions.

After considering the facts we have come to the conclusion that the sentence of 7 years' imprisonment is excessive, but will be an appropriate sentence if one-half of the sentence is conditionally suspended. The difference between such a sentence and the sentence imposed by the trial judge justifies interference by this Court.

In the result the following order is made:

1. The conviction of culpable homicide is confirmed.
2. The sentence of 7 years' imprisonment is confirmed, but three and a half years of the sentence are suspended for 3 years on condition that the appellant is not found guilty of murder, or of culpable homicide involving an act of violence, committed during the period of suspension.

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3. The sentence is backdated to 14 March 2004.

N.W. ZIETSMAN JUDGE OF APPEAL

I agree

R.N. LEON JUDGE PRESIDENT

I agree

JUDGE OF APPEAL

Delivered on 18.. day of March 2005.