IN THE COURT OF APPEAL OF SWAZILAND

CRMINAL CASE NO. 10/05

SONNYBOY NJONJO DLAMINI APPELLANT

and

THE KING RESPONDENT

CORAM

RESPONDENT

R. N. LEON J.P.

P.H. TEBBUTT J.A

. N.W. ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The appellant was charged with murder, the allegation being that on 26 July 1997 he unlawfully and intentionally killed Simo Mohale. When the charge was put to him the appellant, who was legally represented, pleaded not guilty to murder but guilty of culpable homicide. This plea was not accepted by the Crown and at the end of his trial the appellant was found guilty of murder. Extenuating circumstances were found to be present and he was sentenced to 15 years' imprisonment. Our records are incomplete in that they do not contain the judgment given apparently ex tempore by the trial judge. It has not been possible to have the judgment

reconstructed and it was agreed that we deal with the matter on the evidence before us and without the benefit of the trial judge's findings and his reasons for coming to the conclusion to which he did.

In his notice of appeal, apparently drawn by himself (he appeared in person to argue his appeal), the appellant asks that he be given "a better sentence". He however also states that the termination of the deceased's life was not intended. We accordingly regard his notice of appeal as an appeal against both his conviction and his sentence.

It is common cause that on the afternoon and evening of 26 July 1997 the accused and the deceased were seen drinking and sitting together at a shebeen. No one saw them leave the shebeen and there were no eye witnesses to say what happened thereafter. The appellant alleged in his evidence that the deceased then accused him of being smart, and attacked him. He admits stabbing the deceased and then leaving the scene. He made a report to his brother and to other people and then left Swaziland for South Africa where he spent approximately four years working there before returning to Swaziland and handing himself over to the police.

The appellant was the only witness who could say what happened at the time when the deceased was killed.

The evidence given by the appellant was contradicted by the evidence of the Crown witnesses in three respects. The appellant's brother stated that when the appellant spoke to him he told him that he had killed the deceased; the appellant alleges that he merely told his brother that he had injured the deceased. Sgt. Shabangu told the court that the appellant told him that he had stabbed the deceased with an okapi knife and had thrown the knife away; the appellant denied this. He said that it was the deceased's knife that he had used and that he had left it at the scene where the stabbing took place. It was clear from the evidence given by the Crown witnesses that after the stabbing the deceased's body was dragged a distance of approximately 500 metres and concealed under a tree near a river; the appellant denied having moved the deceased's body from where the stabbing took place.

From what is stated above it may be said that the appellant was not in all respects a satisfactory witness. However, he was the only one who could tell the court how and under what circumstances he came to stab the deceased.

When arguing the matter before us Mr. Magagula, for the Crown, submitted that a correct verdict might have been one of culpable homicide rather than murder. The appellant indicated to us that he would be satisfied if the verdict was altered to one of culpable homicide. We however raised the question whether on the evidence the Crown had succeeded in proving that the appellant, when he stabbed the deceased, had not acted lawfully in self-defence. In order to determine this question it becomes necessary to consider more carefully the evidence given by the appellant.

The appellant stated that when the deceased accused him of being smart he turned to face him and told him that that was not so. He then felt a sharp object on the bridge of his nose and he fell down onto his back. The deceased climbed on top of him and started strangling him. He felt something cold and saw that the deceased had a knife in his right hand. They fought over the knife which fell to the ground. He grabbed it and stabbed the deceased with it, he could not say how many times. The deceased was then still on top of him. He pushed the deceased off him, threw the knife down and ran away, thinking that the deceased would chase him.

There was no evidence to contradict the appellant's evidence of the altercation and struggle between him and the deceased, and without a judgment by the court a quo we do not know what impression the appellant made when giving his evidence. What he told the court must therefore be accepted as the factual situation upon which the case has to be decided.

There is one further aspect which requires consideration and that concerns the nature of the injuries inflicted

upon the deceased. According to the post mortem report and the evidence of the witnesses there were at least two large incised wounds on the deceased's neck. The witness Solomon Thembe indicated that his neck was cut from one side to the other and he said "he was cut like a goat". The question is whether these injuries are inconsistent with the appellant's description that he stabbed the deceased, but could not say how many times he had stabbed him.

There is evidence that the deceased was a strong and a violent man, and the onus lay upon the Crown to prove that the appellant, when he injured and killed the deceased, had acted unlawfully. The Crown had to prove, beyond a reasonable doubt, that the appellant had not acted lawfully in self-defence.

We have considered the evidence and the nature of the injuries inflicted upon the deceased. The appellant's evidence is that the deceased, armed with a knife, had attacked him and was strangling him when he managed to obtain possession of the knife and stab the deceased with it. We cannot reject or disregard this evidence and, despite the nature of the injuries inflicted upon the deceased, it is our finding that the Crown failed to exclude the reasonable possibility that the appellant had acted lawfully in self-defence.

In the result the appeal is allowed and the conviction and sentence are set aside.

N.W. ZIETSMAN

JUDGE OF APPEAL

I Agree

R. N. LEON

JUDGE PRESIDENT

I agree

P.H. TEBBUTT

Judge of Appeal

Delivered on the Day of November 2005.