

THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO 10/00

In the matter between:

MLUNGISI MHLANGA

APPELLANT

VS

REX

RESPONDENT

CORAM

STEYN JA

ZIETSMAN JA

RAMODIBEDI JA

JUDGEMENT

Steyn JA

1. The appellant pleaded guilty to, and was correctly convicted of culpable homicide. Pie was sentenced to 10 years imprisonment, 2 years of which were conditionally suspended. He has appealed against this sentence only.

The facts upon which the propriety of the sentence has to be assessed were contained in a document handed in by the legal representatives of the two parties. This document headed, "*Statement of Agreed Facts* " reads as follows:

"1. Upon or about 3" September 2005 the accused did unlawfully and negligently kill Themba Khoza. The accused pleads guilty to the offence of culpable homicide.

2. On the fateful day, whilst having intoxicating beverages at Siyabonga Bar, there was a misunderstanding between the accused, who was in the company of a friend and the deceased. The deceased was also in the company of friends including PW1. The misunderstanding came about after the accused and his friends had provoked PW1. Accused had burnt PW1 with a cigarette accidentally and apologized. PW1 did not take kindly to this and went outside to report the matter to the deceased and his friends who were outside

3. He, deceased and his friends then approached the accused and enquired why he had burnt PW1 with a cigarette and at that point the misunderstanding intensified and a confrontation ensued. The accused then stabbed the deceased once on the chest with a

knife which had been handed over to him by his friend during the confrontation. The deceased collapsed and was subsequently conveyed to hospital where he was certified dead.

4 Accused accepts that deceased died as a result of stab wound injury inflicted upon him with the knife and that there is no intervening cause between the stabbing and the death of the deceased.

4. *The report on the post-mortem on the body of the deceased be handed in by consent to form part o the evidence.*

5. *Accused apprehended on the 23rd September, 2005 and has been in custody ever since. "*

3. The *court a quo* records in its judgment that it took the personal circumstances of the appellant into account. In regard to the circumstances surrounding the crime the Court records that, *"It is alcohol related. A knife was used"* and that this stab wound resulted in a penetrating injury to the left lung and aorta. This, the Court regarded as very serious. The learned trial Judge concludes by saying the following:

"Society expects me to sentence you appropriately so that would be offenders are deterred from this random taking of

lives. The friend that gave you the knife should also have been charged together with you. Our people continue to decimate one another without regard of the consequences nor for the deceased's family".

The appellant lodged a statement in support of his appeal. In paragraph 3 thereof he says:

"The fact is that PW1 was accidentally burnt and I apologized and that was what is expected at (sic) a person living in a society. My Lord, at that moment I was being attacked by a group of men including the deceased who actually was angered by PW1 to deal with me as they did. My Lord, I tried to behave in a civil manner although it was a bar, I apologized."

He urged the court, *"to be lenient with me and reduce the sentence accordingly."*

The appellant is a first offender and is 23 years old. In assessing the propriety of the sentence imposed, the Court has to have regard not only to these personal circumstances but must also assess the degree of the moral guilt of the appellant. This, the *court a quo* does not appear to have done. In terms of the agreed facts, it has to be accepted that the appellant was at least *"confronted"* by the deceased and the *"intensification"* of the *"misunderstanding"*. Whilst the language is imprecise and does nothing to clarify

exactly what happened, it must be assumed that in these circumstances the appellant must have been apprehensive of the outcome of the "*intensified confrontation*". Consequently his conduct of accepting the knife offered to him and inflicting one stab wound on the chest of the deceased, whilst reprehensible and culpable, does not constitute a crime which resorts in the category of the most serious degree of culpability. Certainly, the moral guilt of the appellant *in casu* is on the agreed facts significantly less than that of the appellant in the case of **MSANE VS REX CASE NO.11/06** tried at the same time and whose sentence was imposed on the same day by the High Court i.e. the 6th of November 2006 and who received the same punishment as this appellant.

6. As I have pointed out above, the Court appears not to have made a reasoned evaluation of the degree of moral guilt of the appellant. There is no recorded consideration of the fact that the appellant may well have acted in circumstances where he was either assaulted or was seriously threatened by the deceased and his friends. It is of significance that he did not carry the knife himself and inflicted only a single stab wound. It must also be borne in mind that it was not he who initiated the confrontation, but that this occurred at the instance of deceased, prompted as it was by the complaint of PW1.

7. The failure of the Court to take these factors into account taints its reasoning and obliges us to re-evaluate the propriety of the

sentence to be imposed. As stated above an examination of the facts paints a picture that is certainly capable of an interpretation that the appellant may well have been assaulted when confronted and outnumbered by his assailants. At the very least he could reasonably have apprehended that he was about to be assaulted by the deceased and such friends as accompanied him and who may well have been armed. If the Crown was of the view that this was not the case, it would not have incorporated language such as that "*a confrontation ensued*" and "*a misunderstanding escalated*" in the agreed statement of facts. We pointed out to Crown Counsel that it was unacceptable that the statement of agreed facts should be couched in such imprecise terms. It should express clearly and explicitly what occurred so that a proper evaluation of the degree of culpability of an accused can be made by the Court.

As indicated above, the Court imposed the same sentence on the same day on the appellant Msane. Bearing in mind the fact that the appellant's offence in that case was certainly more serious and his moral guilt greater than that of the appellant *in casu*, fairness also requires that he should receive a lesser sentence.

An appropriate sentence in all these circumstances would be:

"6 years imprisonment, 2 years of such sentence is however suspended for 3 years on condition that the accused is not convicted of an offence involving serious violence against the body of another person, committed during the period of