

THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO 11/00

In the matter between:

SENZO MSANE

APPELLANT

VS

REX

RESPONDENT

CORAM

STEYN JA

ZIETSMAN JA

RAMODIBEDI JA

JUDGMENT

Steyn JA

1. The appellant was convicted in the High Court on a charge of culpable homicide. He was sentenced to 10 years imprisonment, 2 years of which were suspended for 3 years on certain stipulated conditions. He noted an appeal against his sentence only.

2. The appellant pleaded guilty to the charge of which he was convicted.

This plea was tendered and accepted on the basis of certain agreed facts. These were handed in by the legal representatives of the parties and reads as follows:

"Statement of agreed facts

1. ***Upon or about 19th February 2005 and at or near Eposini area, Shiselweni Region, the accused did unlawfully and negligently kill one Dambuza Lukhele.***
2. ***Accused person admits that the injuries deceased died of were inflicted by him. Further that no intervening action caused the death of deceased other than actions of accused."***
3. ***The report on post mortem examination by consent be handed in and form part of the evidence.***
4. ***The accused person was arrested on the 2(fth February 2005 and has been in custody ever since.***
5. ***On the fateful day:-***

6. *Accused and the deceased were imbibing in alcoholic beverages.*

7. *Deceased, who was three (3) years older than the accused, began assaulting accused with fists and slaps. Accused went to deceased's homestead to report to deceased's elder brother that deceased was assaulting him for no apparent reason. Deceased's elder brother was of no help.*

8. *Upon accused's return from deceased's homestead, the two met again and it was at that time that accused fatally stabbed deceased twice in the abdomen and once in the chest.*

6. *The accused remorsefully tenders a plea of guilty to culpable homicide which plea the Crown accepts."*

In her judgment the learned trial Judge says that she took into account the personal circumstances of the appellant. She expressed the view however that, "*The culture of drink and kill must stop.*" She adds the following:
"Otherwise our nation is

constantly decimated by these unnecessary deaths which are alcoholic (sic) related." In so far as the issue of the attempt by the appellant to address the confrontation with the deceased peacefully, the Court says that when the deceased's brother was unresponsive, the appellant should have gone to the police and reported the matter there. The Court also expressed the view that the assault on the deceased was grossly excessive in relation to the assault the latter had inflicted on him (the appellant).

We have encountered one major difficulty when assessing the propriety of the sentence. This is that there was no evidence as to how and in what circumstances the appellant stabbed the deceased when he i.e. appellant met the deceased on his return from his visit to the deceased's brother. Indeed it is difficult to evaluate the degree of the moral guilt of the appellant without a proper enquiry as to what actually happened when the two protagonists met again. Neither the Crown nor the appellant introduced any evidence as to how it came about that the stabbing took place. Was there an

regard it must be pointed out that the appellant inflicted 3 stab wounds on the body of the deceased. According to the report of the pathologist who conducted the post-mortem examination on the deceased, he found the following *ante mortem* injuries on the body of the deceased. (This report was handed in by consent and forms part of the record of the proceedings):

"1. An elliptical shaped, stab wound of 3 x 1 cms, with sharp margins, present on the middle portion of the front and left side of the chest which is 2.5cms from the mid line, 8 cms above the left nipple and 30 cms from the umbilicus.

9. *An oval shaped, stab wound of 6 x 4 cms, with sharp margins, present on the lower and left side of the abdomen which is 11 cms from the umbilicus, in the middle portion.*

10. *A stab wound of 8 x 4 cms, with sharp margins, present in the middle portion of the left groin. Muscles and blood vessels in the left groin severed."*

It seems to me that on appeal we are obliged to accept that there may well have been circumstances of a mitigating nature to which regard should be had concerning the events that occurred subsequent to the return of the appellant from the homestead. The grounds of appeal do not advert to this issue and we would ordinarily be confined to having regard to the prior provocative conduct of the deceased in punching and slapping the appellant. However, Crown counsel correctly conceded that there was a responsibility on the Crown to clarify why and in what circumstances the appellant stabbed the deceased.

The appellant's statement to this court that he was again slapped and punched by the deceased on his return from the homestead must therefore be given some credence. It is true that appellant had an opportunity to cool down after the assault on him by the deceased. Indeed he had initially taken the correct, peaceful route to address the issues between himself and the deceased. The mere fact that he failed to secure mediation can in no way serve as justification for an

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unsatisfactory wording of the statement and the concession correctly made by the Crown, we cannot exclude the possibility of a subsequent physical confrontation with the deceased. However, it is common cause that he was not armed and such acts of provocation were confined to fisticuffs.

6. It is important to note also that the appellant was only 20 years old at the time of these events and that he had imbibed alcohol which would have inflamed his passions.

7. However, the crime remains a very serious one, requiring a substantial period of imprisonment. In our view an appropriate sentence reflective of the degree of moral guilt of the appellant would be:

"8 years imprisonment, 2 years of which are suspended for 3 years on condition that the appellant is not convicted of a serious assault on the person of another committed during the period of suspension."

the conviction is confirmed.

The sentence is set aside and substituted

N.W. ZIETSMAN
Judge of Appeal

M.M.Ramodibedi
Judge of Appeal

Delivered in open court on the 2-May 2007.