

IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO. 14/07

In the matter between:

MADODA GAMEDZE

VS

REX

CORAM

BROWDEJA

TEBBUTTJA

RAMODIBEDIJA

FOR THE APPELLANT IN PERSON

FOR THE RESPONDENT MR. B. MAGAGULA

JUDGMENT

Browde JA

The appellant was indicted in the High Court on two counts, the first being a charge of murder and the second assault with intent to do grievous bodily harm. The appellant pleaded guilty to culpable homicide on the first count which was accepted by the Crown. As to the second count it was recorded that he pleaded "*guilty to assault with grievous bodily harm My Lord, that he was injured but I didn't have intention My Lord!*" That plea too, was accepted by the Crown but its exact meaning is not clear since the indictment alleged an intention which was denied in the plea.

In the statement of agreed facts, it appears that on 28th January 2005 the appellant was requested to keep the peace at a traditional wedding ceremony in the Esihlatjeni area. There present were the appellant's blood brother Datho Gamedze ("the deceased") and one Musa Khumalo ("the complainant"). The appellant, armed with a knobstick, beat the deceased and the complainant who were fighting each other over meat and making a noise, in order to get them to stop the noise. This resulted in the deceased wresting the stick from the appellant and hitting the appellant with it, while the complainant advanced towards the appellant. A fracas developed, so it seems, between the complainant and the appellant during which a knife fell from the appellant's pocket. Then followed a fight for the knife. Eventually the appellant got hold of the knife and stabbed the deceased once on the upper arm and also stabbed the complainant once on his back.

Both the deceased and the complainant were taken to hospital and, after handing himself over to the police that day, the appellant went home. He was not taken into custody until 4th April 2005 when the deceased died.

In the period between the day when the deceased and complainant were stabbed and when the deceased died some two months later, the appellant paid their medical bills. The cause of death of the *deceased* was described in the report on the post-mortem examination as "*Due to complications of stab wound to left upper arm*

It was also common cause that the appellant was "*very remorseful for his actions and to this end was very co-operative with the police in their investigations*".

The learned Chief Justice found, in considering what sentence he should impose on the appellant, that there were compelling mitigating circumstances (to which I shall briefly advert) and sentenced the appellant to 9 years imprisonment, backdated to 4th April 2004, on the culpable homicide verdict and 4 years on the assault to run concurrently with the 9 year sentence.

It is against those sentences that this appeal has been brought based on the submission that the sentences are too harsh and that they induce a sense of shock.

This court is fully cognizant of the prevalence of deaths due to the use of knives and similar sharp instruments and also the need for the courts of this country to do all they can, within the confines of the law, to assist in deterring those who carry such instruments from using them to inflict injury on other people. We must bear in mind, however, that courts would be failing in their duty to pay attention to the circumstances of each case

before deciding on condign sentences, if they were to become rubber-stamps, as it were, by setting benchmarks for the different offences upon which they are called upon to adjudicate. See in this regard the judgment of this court per Tebbutt JA in the case of **MUSA KENNETH NZIMA vs REX CRIMINAL APPEAL NO.21 /2007.**

Although the sentence of 9 years imprisonment may be appropriate for cases of culpable homicide which are "*at the most serious end of the scale of such a crime*", (*per Leon JP in BONGANIDUMSANI AMOS DLAMINI VSREX- CRIMINAL APPEAL CASE NO. 12/2005*), I am of the view that the instant case does not fall into that category. The appellant was given the responsible duty of keeping the peace; the deceased and the complainant were disturbing the peace and only when the appellant attempted to curb their behaviour did the fracas develop. The appellant, a first offender, inflicted an injury on the arm of the deceased, which cannot be regarded normally as a lethal area of the body. As a result the appellant finds himself to be the killer of his own younger brother, a stigma which he has told us he will bear for the rest of his life.

His conduct after the event, coupled with the other circumstances I have referred to, no doubt caused the Chief Justice to describe the mitigating circumstances as "*compelling*". That being so, I am of the view that the *sentence* of 9 years' imprisonment which is a sentence appropriate for more serious cases, is so far in excess of what this court thinks is appropriate in this case, that it warrants our interference..

The appeal against the sentence is accordingly upheld and the sentence is set aside. It is substituted by the following:

On count 1 the appellant is sentenced to 5 years' imprisonment backdated to 4th April 2005 and on count 2 the appellant is sentenced to 2 years imprisonment similarly backdated. The two sentences will run concurrently.

J. BROWDE
Judge of Appeal

I AGREE

P.H. TEBBUTT
Judge of Appeal

I AGREE

M.M. RAMODIBEDI
Judge of Appeal

DELIVERED IN AN OPEN COURT ON THIS *14* DAY OF NOVEMBER 2007