IN THE SUPREME COURT OF SWAZILAND HELD AT MBABANE CRIMINAL APPEAL NO. 21/07

In the matter between:

MUSA KENNETH NZIMA

V

REX

FOR APPELLANT : MR. S. MAGONGO
FOR RESPONDENTS : MR. S. FAKUDZE

CORAM BROWDE J.A.
TEBBUTT J.A.
RAMODIBEDI J.A.

JUDGMENT

TEBBUTT J.A.

A drunken fracas ended in the stabbing by the appellant of a 19 year-old man, Njabulo Masuku, in the abdomen. He died later in hospital from the wound.

The appellant was, as a result, charged in the High Court with murder. He pleaded guilty to culpable homicide, which plea was accepted by the Crown, and was sentenced by Mamba J. to nine years imprisonment. He now appeals to this Court against his sentence contending that it was so unduly severe as to induce a sense of shock.

The story of events leading up to the stabbing is to be gleaned from a statement of agreed facts that was put before the trial court and from the judgment of that court.

It is that on the afternoon of 15 March 2003 a number of altercations had taken place between members of two rival groups of young men. The deceased belonged to one group while the appellant was a member of the other. All had been drinking and were drunk. Peace was eventually restored without incident.

Shortly after midnight on the next day i.e. 16 March 2003, the appellant, with one Mduduzi Makhanya, was proceeding home to his rented flat when he came across the deceased. The two started up an argument about the previous day's altercation. The appellant and the deceased started wrestling with one another and the deceased called for help from a companion of his, Sinikeni Shezi. Shezi responded by striking the appellant on his back with what is described as a "wire aerial". At this point the appellant drew out a knife from his pocket and stabbed the deceased with it once in the abdomen. The appellant then fled, as

a large crowd was gathering at the scene and he feared that they might attack him.

The appellant handed himself over to the police the next day. He was kept in custody for about a month before being released on bail.

It is common cause that the appellant was drunk, having been drinking on and off since the previous afternoon. It was also the appellant's evidence in mitigation at the trial that the deceased was "very drunk".

The appellant said that he felt "very sorry on all that transpired because the deceased was a relative to me" and also his neighbour.

In he
thought considered
) considering an appropriate sentence, Mamba J listed
what the mitigating factors were, as well as those
he were aggravating.

Among the former were that the appellant was a young man of 30 years and a first offender. He had pleaded guilty to culpable homicide. He was intoxicated when he committed the offence and had just been hit on the back by Shezi. Factors that aggravated the offence were that the deceased was not armed when the appellant stabbed him and was not attacking the appellant at the time. He had, said the learned Judge, shown little remorse as he claimed that he was not to blame for the death of the deceased. A knife had been used and there was "a ***prevalent or rampant and easy use of knives to deal with minor disputes and disagreements*****".**

The learned Judge also said that there were three stab wounds all inflicted in the abdominal region. He appears to have got this from the post-mortem report, as he makes reference to it in his judgment.

In this, however, the learned Judge was clearly in error. The post-mortem report, it is true, reflects three abdominal wounds but two of these were caused by surgical procedures carried out when the deceased was in hospital before he died. The report describes one of these as "(surgical laparotomy wound)" and the other as a "sutured wound (surgical) ... (for drain)". There was only one stab wound and that accords with the evidence that the appellant stabbed the deceased only once. Using his erroneous statement in this regard as an aggravating factor in the consideration of sentence was a misdirection by the learned Judge.

The learned Judge is also not correct when he says the appellant showed very little remorse. He never shied away from the fact that it was he who had killed the deceased and I have earlier quoted his expression of sorrow at what had occurred. This, too, was a misdirection.

This was another of those instances where in a drunken brawl a knife is used, with the unfortunate consequence that a young life is lost as a result. I am in complete agreement with Mamba J as to the prevalent, and what he describes as "the easy", use of knives in drunken disputes and brawls. And I also subscribe to the view that the only way in which the courts can attempt to curb this tendency is by imposing sentences of sufficient severity to hopefully deter this practice.

One cannot, however, fail to realize that human nature being what it is, people will continue to over indulge in alcohol no matter what sentences the courts may pass and that, again, human tempers, particularly fired by intoxication, will continue to flare and find expression in violence. The courts cannot blind themselves to these frailties and must in appropriate cases temper the severity of the sentences they would otherwise impose in order to take account of them. Each case must be decided on its own facts and therefore a bench-mark of a certain number of years imprisonment, designed as an indication of the court's aim to ensure severity in sentences in cases where knives are used and lives are in consequence lost, without individualizing the facts of the case and the personal circumstances of the offender, is not an appropriate approach to sentencing.

The well-known dictum of Holmes JA in the South African Appellate Division case of **S v Rabie 1975 (4) S.A. 855 (A)** at 862 G bears repetition. He said:

> "***Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances*".**

In the same case Corbett JA (as he then was) refers to Van der Linden's Supplement to the Commentary on the Pandects by Voet at 5.1.57 where Van der Linden notes that among the most harmful faults of Judges is ***inter alia*** *a.* striving after severity. Stating the oft-expressed caveat that a judicial officer should not approach punishment in a spirit of anger, Corbett JA went on to say this:

> "***Nor should he strive for severity; nor, on the hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality*".**

I also cite, with approval, what was said in a judgment in Botswana where Moore JA stated the following in THAPELO MOTOUTOU MOSILWA CRIMINAL APPEAL NO. 0124/05 regarding the question of sentence :-

> **"it *is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated.*"**

In this session of this Court a number of cases of culpable homicide have come before us where, from the sentences imposed, a benchmark of 9 years imprisonment seems to have been applied by trial courts. It is the sentence imposed in each such case. In one case a sentence of 10 years imprisonment was imposed, one of which was conditionally suspended. Apart from the fact that the suspension of one year of a 10 year sentence would seem to achieve little either by way of deterrence or reformation of the offender, the benchmark of 9 years again becomes apparent. It is as stated above, also the sentence in this case. In all the cases concerned scant weight seems to have been given to the individual circumstances of either the facts or the offender, quite apart from the question of whether 9 years is a condign period of imprisonment for offenders convicted of culpable homicide.

There are obviously varying degrees of culpability in culpable homicide offences. This Court has recognised this and in confirming a sentence of 10 years imprisonment in what it described as an extraordinarily serious case of culpable homicide said that the sentence was proper for an offence "at the most serious end of the scale of such a crime" (see BONGANI DUMSANI AMOS DLAMINI v REX CA 12/2005). A sentence of 9 years seems to me also to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction.

The present appeal is one such case. Apart from the misdirections to which I earlier referred, it seems to me that insufficient weight was given to the individual facts of the case and to the personal circumstances of the appellant.

The appellant in a drunken moment of negligent behaviour, for that was what he was convicted of, stabbed a man who was his relative and neighbour once in the abdomen, leading to the latter's later death in hospital. It was his first offence in what was obviously an otherwise crime-free life of 30 years. He was, he said, very sorry for what had occurred. To send this man to prison for nine years was, in my view, excessively harsh and lacked the quality of mercy which, as set out above, should temper a sentence. As was said in **S v Harrison** 1970 (3) SA 684 (A) at 686 A, quoted in S v Rabie Supra at 861 H-862 A:

> "***Justice must be done, but mercy, not a sledgehammer, is its con-comitant[n].***

Having regard to all the factors in this case I am of the view that a sentence of 6 years imprisonment would appropriately meet all the criteria I have referred to above.

In the result therefore the following order is made:

1. The conviction of culpable homicide is confirmed.
2. The sentence of the trial Court is set aside and there is substituted therefor the following sentence:

6 years imprisonment.

P.H. TEBBUTT JUDGE OF APPEAL

I agree

J.'BROWDE JUDGE OF APPEAL

I agree

M.M. RAMPDlBEDI
JUDGE OF APPEAL

Delivered in open court at Mbabane on this / day of November 2007.