

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

In the matter between

CRIM.APPEAL NO. 1/2008

FANOSE THOKOZANINKONYANE

APPELLANT

Vs

REX

RESPONDENT

CORAM

BAND A, CJ

RAMODIBEDI, JA

FOXCROFT, JA

HEARD ON: 8th MAY 2008 DELIVERED

ON: 23rd MAY 2008

JUDGMENT

FOXCROFT, JA

The appellant was convicted in the High Court of culpable homicide and sentenced to seven years imprisonment. A charge of murder had been put to him, but a plea of guilty to culpable homicide tendered by the appellant was accepted by the Crown.

The appeal is directed only to sentence. What further expedited the hearing was a "Statement of Agreed Facts" handed in by agreement from the Bar. It reads as follows:

"STATEMENT OF AGREED FACTS

1. During October 2006, accused who was working in South African mines was on leave;
2. One evening he found that his wife Zandile Tsabedze was away and the children did not know where she was. He searched for her and found out that she was in the house of the deceased;
3. Finding her in deceased's house, a fight broke out over the love affair that deceased had with accused's wife. Accused also beat his wife and she sustained some injuries which necessitated that she be hospitalized;
4. While she was in hospital accused paid her a visit and found that deceased had come to wish her early recovery as well. A fight broke out between the men which was stopped by the Horo Police's intervention;
5. Accused instructed his wife to go to her parental home on recovery, which she did;
6. On the fateful day, accused visited his wife and children at his inlaws home. When he approached the home he saw deceased going towards his wife's house. Accused then went into the house and fought the deceased, accused had

with him a baton, which he used to assault deceased all over the body;

7. Accused accepts that deceased died as a result of his unlawful actions and that there is no intervening cause of death;

8. Accused accepts the contents of the post-mortem report which may be handed in by consent;

9. Accused has been in custody since 4th November 2006."

The post-mortem report handed in reveals that the cause of death was due to multiple injuries.

These were six lacerated wounds to the head, right cheek and right forearm; contusions to the chest and back; and fractures of both arms. In addition the report records that the frontal bone, parietal bones, occipital bone, and jaw bone were also fractured.

There was also extra-dural, sub-dural and intra-cerebral brain haemorrhage present.

These injuries demonstrate a most vicious, uncontrolled and prolonged attack upon the deceased which resulted in his death.

In sentencing the appellant, the trial Judge, Maphalala, J remarked that:

"I have come to the considered view that the present case does not fall within the run of the mill of accidental death. The post-mortem report reflects the extent of the injuries on the deceased and indicates that the assault on the deceased was vicious and is not the run of the mill case of

culpable homicide. "

Mr. BJ. Simelane who appeared for the appellant sought to make something of this categorization of the offence, suggesting that it amounted to a misdirection.

In my view, the learned trial Judge aptly described this case as an unusual example of culpable homicide. There is nothing about the injuries to suggest a sudden reaction to provocation. The appellant had become fully aware of his wife's affair with the deceased and on the day of the assault he had seen him walking towards his wife's house.

The appellant followed him, fought with him and beat him mercilessly. The appellant was probably very angry, but could have turned away and taken other steps to exact retribution.

While he may not have desired the death of the deceased, he clearly ought to have foreseen this and was certainly guilty of culpable homicide. The severity and sustained nature of the assault made it unusual (not "run of the mill") and called for severe punishment. Mr. Simelane also urged that the trial Judge had failed to take into proper account the personal circumstances of the appellant.

There is no merit in this submission. The judgment shows that the Court dealt with argument in mitigation of sentence and weighed it against the aggravating features of the case. The relative leniency of the sentence of seven years imprisonment indicates that due weight was given to the personal circumstances of the appellant.

The appeal against sentence is accordingly dismissed, and the conviction and

sentence confirmed.

J.G. FOXCROFT

I agree

R.A. BANDA C.J

I agree

M.M. RAMODIBEDI J.A.