IN THE SUPREME COURT OF SWAZILAND

.

HELD AT MBABANE

CRIM. APPEAL NO. 31/2010
CITATION: [2010] SZSC 17

In the matter between:

NKULULEKO FREEDOM SIHLONGONYANE **APPELLANT**

and

REX **RESPONDENT**

CORAM : A.M. EBRAHIM J.A.

DR. S. TWUM J.A.

S.A. MOORE J.A

FOR THE APPELLANT : O. NZIMA
FOR THE RESPONDENT : P. DLAMINI

HEARD : 5 NOVEMBER 2010

SUMMARY

Criminal Law – Murder – Robbery – Appellant convicted on both counts – Both counts taken as one for sentence – Sentenced to 12 years imprisonment – Conviction of Robbery set aside – Splitting of charges. Sentence held not to be excessive.

Ebrahim J.A.

The appellant was convicted in the High Court of Murder and Robbery. He was charged with two co-accused but the Crown withdrew charges against one of his co-accused. The two remaining co-accused were sentenced to twelve years imprisonment. Both counts were taken as one for sentence. The sentence was backdated to 13 September 2004.

No evidence was led before the learned judge ***a quo*** but the following admissions were placed before him in terms of which he convicted the appellant and his co-accused:

> "The accused persons admit that they assaulted the deceased and that the injuries sustained and contained in the post mortem were inflicted by them.
>
> Further, that they took deceased's phone because he was owing them some money.
>
> Again that injuries were inflicted using the weapons before court being two slashers.
>
> Further, that they approached PW2, the herbalist with a view of being cleansed.
>
> From the above facts the accused contend that they should not be found guilty of culpable homicide because they had no intention to kill the deceased but they had gone to collect their money.
>
> And they are pleading not guilty to the crime of robbery because they contend that they intended to keep the cell phone as security for the money owed by the deceased.
>
> The Crown does not accept the plea of guilty to culpable homicide and is of the view that calling witnesses is not necessary as the accused are admitting

all the necessary facts which would in any event be told by the Crown's witness.

However, the Crown will address the court and submit that from the facts and admissions, the court should find the accused persons guilty as charged in respect of both counts.

[5] In the addendum to the above the following appears:

A post mortem report was also handed in at trial by consent. This reflected the following ante mortem injuries:

"1. Sutured wound over occipital region 9 cms, 5.3 cms length, bone deep (cut on bone) 30ml subdural hemorrhage present.

2. Sutured wound over nose 2.2 cms, lower hip 3.1 cms, chin right 3.2 cms length muscle deep.

3. Sutured wound front of left chest 4 cms length, outer aspect 2 cms length intercostals space deep.

4. Sutured wound 18 cms length front of middle of abdomen vertically placed abdominal deep (surgical)

5. Sutured wound 7 cms length above and outer to umbilicus abdominal cavity deep repair of intestine (jegunus) and mesentery present with 7.4 cms area bleeding in the mesentery.

6. Sutured wound over left shoulder front 4 cms length muscle deep.

7. Sutured wound over left arm 3 cms length, elbow 2 cms length present muscle deep.

8. Sutured wound over left wrist front 2 cms length muscle deep.

9. Cut wound over front of right ring finger 1.8 x 1 cms muscle deep."

The pathologist concluded that the deceased died of MULTIPLE INJURIES.

The appellant lodged an appeal in person, stating in his "notice of appeal".

> "In fact Judge Maphalala rightfully found me guilty for the offence of murder and robbery and he then sentenced me to twelve years behind bars. I pleaded guilty for the murder trying to co-operate with the Court but the Court never considered that, and it never considered that I am a first offender. So now I am imploring the Honourable Court to reduce the sentence because it is too harsh for me".

In this court however, consideration has been given to whether the appellant was properly convicted of both Murder and Robbery as two separate courts.

At the outset, I indicate that the conviction of Murder was entirely proper and is unassailable. It is beyond dispute that the deceased was assaulted and brutally beaten by the appellant and his co-accused with slashers (lashers) and in the process they killed him. They could have been in no doubt what the result of their conduct would lead to and they were reckless as to the consequences.

The issue which falls for further consideration is whether the appellant and his co-accused should have been convicted of Robbery in addition to the offence of Murder.

No evidence was led before the trial judge, reliance being placed on submissions being made by Counsel for the Crown. He stated:

> "Yes my Lord. As the Court pleases. 'It is agreed that the accused persons met the deceased at Mhlaleni road. They asked for money in the sum of E300.00 which was being owed by the deceased to first accused person. The deceased stated that he did not have it and did not say when he would have the money. The accused then suggested that he give them, his the deceased's cell phone as security for the debt. The deceased refused with the cell phone. (sic) The accused then got him and took away the cell phone, trying to take away the phone. The deceased resisted and fought back. A fight broke out and it was during the fight when the deceased was assaulted by the accused with slashers. If it further agreed that at the time, the accused were from watching a soccer match and it was around 8 p.m. and they had taken alcohol."
>
> My Lord, I would go on to read the formal admission.
>
> Both the accused persons have been charged with both counts of murder and robbery and having pleaded guilty to culpable homicide and 'not guilty' in respect of count 2, the accused persons admit that they assaulted the deceased and that the injury sustained and contained in the post mortem report, were inflicted by them. Further that they took deceased's cell phone because he owed them some money. Again the injuries were inflicted, using weapons which will be exhibited before this Court. Further that they approached PW2 …… a herbalist, with a view of being cleansed. From the above facts, the accused contends that they should be found guilty of culpable homicide because they had no intention to kill the deceased but they

had gone to collect their money. And they are pleading ‘not guilty’ to the crime of robbery because they contend that they intended to keep the cell phone as security for the money owed by the deceased.

The Crown does not accept the plea of ‘guilty’ to culpable homicide and it is of the view that calling witnesses is not necessary as the accused are admitting all the necessary facts which would in any event be told by the Crown witnesses. However, the Crown will address the Court and submit that on the facts and admissions, the Court should find the accused persons, guilty as charged in respect of both counts. My Lord the two slashers are handed in by consent to form part of the evidence, these are the weapons used.”

For the appellant, and his co-accused, it was their Counsel’s case at the trial that as regards the Robbery charge the basic elements of Robbery had not been established as there was no evidence establishing the intention by the offenders to permanently deprive the deceased of his phone.

In the absence of ***viva voce*** evidence being led in this case, I am of the opinion that it would be more appropriate to consider this matter on the basis of whether there has been a splitting of charges.

In dealing with this issue I have had particular regard on what the learned judge ***a quo*** stated in his judgment. He stated:

“In the circumstances of the case I have combined the two counts of murder and robbery as they constitute one single transaction---.” (my underlining)

In my view this statement is entirely correct. An examination of the Statement of Agreed Facts outlined above and the submissions made by the Crown stating what the appellant and his co-accused did clearly emphasise that their course of conduct “constitutes one single transaction”. It is my view that to have

charged them with two separate counts amounted to a splitting of charges

In Sipho Lucky Fakudze v Rex Criminal Appeal No. 19/2008 Foxcroft J.A. stated:

> The history of the rule of practice against splitting of charges in South Africa may be traced back to a *dictum* in R V MARINUS, 5 S.C. 349, in 1887. The rule was fully considered in S V GROBLER, 1966 (1) S.A. 507 (A.D.) where Wessels, JA said at p 523B:

> In S.A. Criminal Law and Procedure Vol. 5 by Lansdowne and Campbell at 226, the matter is fully dealt with and the equitable objections to splitting of charges listed, at p. 231, the following appears:

> "where one act or series of acts constitutes at the same time offences of different species, as for example, when an act of carnal intercourse is committed in circumstances which amount to both incest and rape, the proper cause, it is submitted, is whether to charge only one of the offences, or to charge both alternatively".

The learned judge went on to state:

> “Although there appears to be no statutory bar to splitting, as there is in section 336 of the Criminal Procedure Act of 1977 in South Africa, the rule of practice is a sound one and ought to be applied on this jurisdiction in appropriate cases”.

These remarks are apposite to the facts of this case. The appellant’s and his co-accused’s conduct was really one course of conduct and this was recognized as such by the trial judge. It follows that the proper charge against the appellant and his co-accused should have been of Murder only. In the result the conviction of Robbery must be set aside. They could have been charged with Robbery in the alternative.

I do not believe however, that there is any basis to interfere with the sentence imposed on the appellant. The appellant with his colleagues inflicted a brutal beating on the unfortunate deceased and in the process killed him. The deceased clearly died a painful death. A sentence of twelve years imprisonment on the basis of the facts of this case cannot be said to be excessive.

Accordingly the conviction of Robbery is set aside and the conviction of Murder is confirmed.

The appeal against the sentence imposed is dismissed and the sentence confirmed.

A.M. EBRAHIM J.A.

JUSTICE OF APPEAL

I agree

S.A. MOORE J.A.

JUSTICE OF APPEAL

I agree

DR. S. TWUM J.A.

JUSTICE OF APPEAL

Delivered this 30th day of November 2010.