IN THE HIGH COURT OF SWAZILAND

In the matter of:	Criminal Appeal No. 19/82
NEIL TAYLOR	APPELLANT
VS	
THE QUEEN	RESPONDENT
CORAM:	NATHAN C.J.
FOR CROWN:	MR. S. DLAMINI
FOR DEFENCE:	MR. P. DUNSEITH

JUDGMENT

(Delivered on 25th February, 1983)

NATHAN C.J.

The Appellant was convicted of common assault upon the complainant, his father-in-law, and was sentenced to a fine of E100 or 100 days imprisonment, the whole sentence being suspended for 3 years on condition that the Appellant is not convicted of any offence of which assault is an element, committed during the period of suspension.

The Appellant appeals against the conviction and also against the severity of the sentence.

There is a conflict of evidence between the Crown Witnesses, namely the complainant and Currie, on the one hand, and the defence witnesses, namely the Appellant and

Van Wyk , on the other hand, in regard to what happened in the admitted fracas between the complainant and the Appellant.

The complainant's evidence is to the effect that the Appellant, without provocation, struck him twice on the face with the back of his hand. It was put in cross-examination to the complainant that the Appellant struck in self-defence; but the complainant denied this.

Currie's evidence is to the effect that he saw the Appellant hit the complainant twice with the back of his hand. He was asked in cross-examination whether the Accused had not been struck by the complainant. He answered that he did not see that. This may be correct; but it does not necessarily mean that it did not happen; because Currie was coming through the door when the trouble started between the complainant and the Appellant who were both outside; and Currie may not have seen the initial stages.

The Appellant was very clear in his evidence that the complainant walked out of the door of the premises followed by the Appellant and Van Wyk. He said the complainant swung at him and he pushed the complainant so that he could clear his way from the door and slapped him with an open hand a number of times. The Magistrate in his reason for Judgment rather founds upon this statement; but there is no reason to believe that the Appellant slapped the complainant more than the twice deposed to by the complainant and Currie.

Vay Wyk's evidence was to the effect that just before the Appellant went through the door, the complainant hit the Appellant. The Appellant pushed the complainant and landed a blow at him. Vay Wyk's evidence does not read particularly impressively and he does not mention a second blow by the Appellant; but he does support the Appellant's defence that he struck in self-defence, because he said "Accused slapped him because the complainant had slapped Accused first."

The Magistrate said in his Reasons for Judgment that looking at the totality of the evidence he was of the view that the Appellant did not strike the complainant in self-defence. He then proceeded to quote an extract from the Record which suggested that the Appellant was no longer acting in self-defence when he struck the complainant, or that he had exceeded the legitimate bounds of self-defence.

Mr. Dunseith, who appeared for the Appellant, submitted in a careful argument that the onus was on the Crown to negative self-defence beyond a resonable doubt (see Burchell & Hunt, S.A. Criminal Law and Procedure, Vol. 1, p.282). He also drew attention to the very strained relationship between the parties that had developed as a result of the matrimonial suit between the Appellant and his wife, the Complainant's daughter. Evidence was directed at some length to this aspect of the matter and, without going into detail, there is certainly room for the view that the Appellant may have feared violence

at the hands of the Complainant, and that his actions in self-defence should be regarded in this light, Mr. Dunseith referred to the case of Shiba v R, 1977-78 SLR 165 at p.167, in which Smit J A said "Furthermore in considering the question of self defence the Court must endeavour to imagine itself in the position in which the Accused was (R v K, 1956 (3) SA 353 (A))".

We are of the opinion that the submission of Mr. Dunseith is correct, and that the Crown failed to establish that the Appellant acted beyond the bounds of legitimate self-defence. It follows that the appeal must succeed.

Before leaving the case I think I should make some observations in regard to the sentence that was imposed. This was by no means heavy and was, indeed, on the lenient side, regard being had to the fact that the whole sentence was suspended. But on one aspect it appears that the Magistrate gravely misdirected himself. The Appellant is the managing director of a Dry Cleaning business in Mbabane, and in regard to this the Magistrate said that the Appellant holds an exalted position in community. He equated the position of the Appellant to that of a Prince, considered in Prince Cetshwayo Dlamini v R, 1977-78 SLR 86. We think this was a bad misdirection. The Managing director of a Dry Cleaning business is in no different position from that of the proprietor of any other business; and on no basis can it be said that he occupies an exalted position in the community. We think there is no

doubt that the Magistrate would have imposed a considerably more lenient sentence if he had not been misled on this point; and in view of this misdirection this Court would be at large to impose an appropriate sentence. We think that an appropriate sentence would have been a fine of E10 or ten days imprisonment, the whole of the sentence being suspended as ordered by the Magistrate.

The appeal is upheld and the conviction and sentence are set aside.

C. J. M. NATHAN

CHIEF JUSTICE

I agree;

J. HASSANALI

JUDGE