

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. S.41/84

In the matter of

REGINA

vs

ANDREAS D. ZAMISA

CORAM: D. WILL, C.J.

FOR THE CROWN: MR. SHIYUMLABA DLAMINI

FOR DEFENCE: MR. W.M. PUPUMA

JUDGEMENT

(15/6/84)

D. Will, C.J.

The Accused is charged on Count 1 with the murder on the 16th August, 1983 of Alfred George Kurik and on Count 2 of the attempted murder of Randolph Kurik on the same day. The two Counts arose out of the same set of circumstances and it is convenient therefore to deal with the two Counts together. The Accused pleaded not guilty to both Counts but I understood him to plead guilty to Culpable Homicide on Count 1 - a plea which was unacceptable to the Crown.

His Counsel in his address to the Court submitted that the verdict should be Culpable Homicide based on Accused's having used more force than was justified in defending himself.

It is not disputed by the Accused that he caused the death of the Deceased by stabbing him with a knife nor does he dispute that he stabbed Randolph Kurik with the knife in the chest. Although the Accused has admitted the stabbing on both charges it is necessary, I think, to describe the stab wounds of the Deceased in some detail. The death resulted from the stab wound in the heart and from another in the lung. In addition to these wounds there was a stab wound

2

in the left arm, the abdominal wall near the navel, and a superficial incised wound also in the area of the navel. Randolph Kurik suffered a 3 cm penetrating stab wound in his right shoulder and chest.

The Deceased was aged 54 and was the father of Randolph Kurik who is aged 27. It is convenient at this point to deal also with the injuries which the Accused sustained in the course of the events which led to these charges. He had fractures of both elbows. The Magistrate, to whom he made a confession saw also a swelling of the right elbow and a laceration on the top left side of his head. The events which resulted in these charges were set in motion by the Accused's admitted attempt, at about 4a.m., to steal a radio of a car belonging to the Kuriks and which was in their open car port. The two Kuriks went out to deal with the matter and a struggle ensued which resulted in the injuries of the Accused and Randolph Kurik and the death of the Deceased. Up to this point in the judgement these facts are common cause, but from this point onwards there is a conflict between the versions of the Accused and of Randolph Kurik.

According to Randolph Kurik he heard dogs barking and went out to investigate. He took a pick handle with him and found the Accused in the car and he bold him to get out of it. He dealt the Accused a hard blow

and he fell to the ground. Deceased then joined Randolph and lay on top of the Accused until Accused bit him on his arm. Randolph went to Deceased's assistance and called his mother to ring the police. Accused grabbed Randolph by his private parts and then stabbed him as he tried to remove the Accused's hand from his private parts. Randolph fell down and Accused ran away followed by the Deceased. Randolph shouted to warn the Deceased that Accused had a knife, but the Deceased nevertheless grabbed the Accused who then stabbed the Deceased several times. Deceased had apparently not

3

heard the warning about the knife.

Accused's version was that whilst he was removing the screws of the car radio with a screw driver he heard a noise and tried to move backwards out of the car. Someone forced him to the ground.

He then noticed that there were two men, one of whom pressed him to the ground while the other hit him several times with a pick handle. One of the blows was on his head and he was dazed for a moment and when he recovered consciousness he found that he was still being beaten with the pick handle. He bit the man who was pressing him to the ground, who was the Deceased. The Deceased let him go but the other man continued to hit him with the pick handle. He tried to run away but stopped by a fence. The Deceased came up to him and started hitting him again with the pick handle. He feared for his life and stabbed the Deceased.

Randolf Kurik was the only witness for the prosecution and the Accused was the only witness for the defence on the events that led to these charges.

I am of course aware of the cautionary rule in dealing with a case in which the prosecution relies on one witness only. In the well-known case of R. vs. Makhwena 1932 OPD 79 it was stated that the evidence of a single witness must be clear and satisfactory in every material respect and the witness should not have a bias against the Accused. In R. vs Abdorham 1954 (3) S.A. 163 Broome J.P. doubted whether the dictum in Makhwena's case laid down a proposition of law. He stated that "The Court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respect an unsatisfactory witness". In R. vs Makhwena 1956 (1) S.A. 86 it was stated in the Appellate Division that it was improbable that the judgement of the 1932 O.P.D. case intended to lay down a requirement of law that must be strictly applied. I must however be on my guard in considering

4

the evidence of only one Crown witness.

Except for one point, to which I will refer later, I was much impressed by the evidence of Randolph Kurik. It appeared to me to have the ring of truth. The one point of his evidence with which I was not satisfied was his explanation on how the Accused sustained his injuries. The Accused's left elbow was broken in the struggle with Randolph, there was severe injury to his right elbow, and there was a wound on the Accused's head which was of a fairly serious nature. According to Randolph he delivered three blows with this pick handle and they might have caused these injuries. The head wound, he said, could have been caused by the Accused falling on stoney ground. According to the Accused both his elbows were fractured when Randolph twisted his arms. It would have been an advantage to have medical evidence of the doctor who attended to the Accused as to how the fracture occurred, but the doctor concerned was an expatriate who has now left the country. However I am prepared to accept that Randolph caused these fractures by twisting the Accused's arms. The Accused's evidence in regard to the fracture of his left elbow was that after Randolph had twisted his arm the palm of his hand was out of alignment with his upper arm and faced side-ways. This was a circumstantial detail in the Accused's evidence which impressed me as being true. So also I might mention another circumstantial detail in the Accused's evidence which appeared to be the truth. It was that whilst he was lying on his stomach, with the Deceased on his back, he suffocated because his mouth and nose were in contact with the ground and he breathed in dust. I am of the opinion that the assault upon the Accused when he was lying on the ground was more serious than was admitted

by Randolph.

As I have stated, however, I was otherwise much impressed with Randolph's evidence and I am completely satisfied with his evidence of what occurred in the final stages of the events when Accused stabbed the Deceased.

5

While Randolph played-down the seriousness of the attacks by him and Deceased on the Accused, the Accused over-played the seriousness of the attacks upon him. According to the Accused he was continually beaten with the pick handle over a fairly long period by the Deceased or Randolph. Accused does not, however, appear to have suffered any visible wounds or abrasions other than the three

I have already described and, in fact, if he had been beaten as seriously as he claims it is probable that he would have been rendered unconscious.

I am prepared to accept, at least for the purpose of this case, that the Accused's evidence of the early events which took place is correct. I have no doubt that his version of the subsequent events, which led to the killing of the Deceased, was completely untruthful.

Randolph's version of what I shall refer to as the final events is as follows; Accused was on his knees after the assault in which Accused and Randolph suffered their injuries after the scuffle on the ground. Accused crawled, and then ran, for a short distance. When he approached the fence he stopped and faced the Deceased who was following him. By then Randolph was incapacitated from the stab wound and he was lying on the ground with the pick handle next to him. The Deceased put his arm around the Accused to apprehend him and the Accused stabbed the Deceased four times.

Accused's version of the final events as the Deceased ran after him is that he ran towards the fence and, at a distance of about 1½ metres which separated them, Deceased again began to belabour him with the pick handle. Accused feared for his life and in self defence stabbed Deceased. The Accused was unable to explain satisfactorily how he was able to do this. Nor was he able to satisfactorily explain how; whilst lying on his back and was being beaten by

6

the Deceased when he was bending over him, and whilst he had also lost consciousness he succeeded in inflicting three stab wounds two of which were fatal. His evidence in court too does not correspond with his confession nor with his defence as put by his counsel to the Pathologist. I find that the Accused was seriously assaulted by Randolph and Deceased as he lay on the ground. The assault was by blows from the pick handle and the twisting of his arms. Accused ran off followed by the Deceased who grabbed the Accused by putting his arms around his body for the purpose of preventing his escape. Accused then stabbed him with a knife. Randolph at this time was incapacitated and the pick handle was lying near him. On these facts the Crown succeeded in discharging the onus that the Accused did not kill in self defence. It becomes unnecessary to consider the submission that a defence of self-defence was not open to him because Randolph and Deceased were entitled to use force in arresting him for the attempted theft. On my findings of the facts the Accused is guilty of murder and the only remaining issue is the matter of extenuating circumstances. It must not be overlooked on one hand that the Accused brought much of what happened to him upon himself by attempting to commit the theft. On the other hand Accused was seriously assaulted by Randolph and the Deceased who were incensed by the attempted theft and by the resistance put up by the Accused in biting the Deceased in pulling Randolph's private parts and by stabbing Randolph. We know of at least one blow to the Accused's head which might have caused some degree of diminished responsibility and he must have suffered considerable pain from his fractured elbows. Not without much hesitation I find that extenuating circumstances exist and I accordingly convict Accused of murder with extenuating circumstances on Count 1. I should mention that my Assessor agrees with this judgement except on the question of extenuating circumstances.

In his opinion no extenuating circumstances exist.

On Count 2 Accused admitted stabbing Randolf while resisting arrest. The Accused has not been shown to have intended to murder Randolf and the Accused is convicted on that Count of assault with intent to do greivous bodily harm.

In the course of this judgement I have mentioned that medical evidence on the injuries to the Accused's elbow by the doctor who first treated him would have been of great assistance to the court. This case has not been the only one in which the court has been deprived of necessary medical evidence because of the departure of expatriate medical officers. Steps should, I think, be taken by the prosecuting authorities in collaboration with the Ministry of Health to ensure that the evidence of expatriate medical officers who are about to leave Swaziland should be taken in those pending cases in which their evidence could be of assistance to the courts.

D.D. Will

CHIEF JUSTICE