SWAZILAND HIGH COURT

REX

v

Shabangu**,** Qamalaza Vusie

Accused

Crim. Trial No. 111/1998

Coram	Sapire, CJ
For Crown	Mr. M.N.Maseko
For Defence	Mr. Mamba

JUDGMENT

(11/10/2001)

The accused was originally charged on 12 counts. The first 3 counts were murder charges. Counts 4 and 5 were abandoned during the course of the trial and the accused has already been found not guilty thereon.. Counts 6 related to the rape allegedly committed by the accused on [A]. Count 7 related to a rape of [B]. Count 8 was a charge of rape involving the

complainant [C]. Count 9 related to an assault on one [D]. On counts 10 and 11 the accused was found not guilty following the abandonment of the prosecution in respect thereof, the 12th count which is one of housebreaking and theft. I turn to counts 6 and count 7. The complainants on these rape charges have described how the same person raped them successively. There is really only one issue in this case as the accused denies the allegations against him and has not controverter the evidence of the complainants having been attacked and sexually molested. The question is whether the accused has been properly identified as the person who committed the offences.

The evidence of identification by the prosecution witnesses is affected by great irregularity. This is that although the complainants claim to have been able to identify the accused as the person who raped them no identification parade took place prior to the trial. The only identification is that the complainants pointed out the accused here in court. I am satisfied that these complainants are telling the truth and that they were raped as they say they were and it may be that they are correct in pointing out the accused. The courts however have again and again pointed out the dangers of relying on dock identification. Although there are two complainants in this case and they have both identified the accused both identifications are merely dock identifications. They did not know the accused prior to the attack and the only identification was the pointing out in court. There is a great possibility that the accused is seen as being the person who the Police have arrested in connection with the charge and who is facing trial, thus to identify him as the person who committed the offence. This consideration makes it impossible to say it beyond reasonable doubt that it is the accused who committed these offences. It would not be proper to find him guilty of such evidence and he is accordingly not found guilty on counts 6 and 7. This result is due to inexpert investigation and although one cannot say that the complainant or either of them would have pointed out the accused, as their assailant at a properly held identification parade the fact remains that no conviction can take place.

I now turn to count 1. Count 1 relates to the murder of the deceased [E]. The identity and cause of death of the deceased were admitted and it was clear that he died of stab wounds. The question is, is it the accused who inflicted the stab wounds. The deceased was last seen alive in the company of the accused. She was found the following day murdered or at least done to death by stabbing in the vicinity of where she was last seen in the accused company. This evidence of course would not be sufficient to fix the accused with the responsibility of the death but there is important evidence, which emerged from a witness in evidence on another charge. This witness was [C] and she said quite clearly that when the accused was trying to force himself on her he threatened to kill her as he had done to[E]. [C] did not know the significance of this name, but she clear that this is the name the accused used indicating someone who he had killed. This boast made to the terrified woman clearly impressed her strongly. In the circumstances of the case it can only be inferred beyond reasonable doubt that the accused was talking about the deceased in this case and he was trying to impress his victim on the rape charge what happened to women who crossed him. Of course the accused denies that he had anything to do with [C] at all and he also implies that he denies having made this boast of having already killed[E]. But his defence on the rape charge that he knows nothing about the matters at all is controverted by the evidence of [C] and her companion [D]. The accused is well known to [D] to whom she refers to as son-in-law. The account as given by [C] has complete credibility and could not have been fabricated, as she claims not to have known who the person [E] was. The accused (and [D]) knew who[E] was and he knew what he had done to her.

That he was in fact the last person to be in the company of[E] whilst she was alive and his boast of having killed her leads me to the conclusion beyond reasonable doubt that he is responsible for her death.

The evidence indicates that she was stabbed and the person who did the stabbing intended to kill her or must have foreseen her death as a result of the vicious attack with a lethal weapon. That person being the accused, he is guilty of murder as charged. He is found guilty of murder on count 1.

On count two he is charged with the murder of Thoko Sukati his former lover. Former lover, for although the accused claimed that there was still relationship between them this is denied by witnesses who were close to the deceased.

In this case there is an eyewitness Gcinaphi Ndwandwe. She described how she and others including deceased had gone to bed on the night in question. The accused entered the housing by pushing the front door and she heard the deceased crying out that Vusie was killing her. Then the deceased was shot and she died of a bullet wound, which entered in the shoulder area and exited at the buttock.

The accused has not denied that the deceased died as a result of a bullet wound caused by a firearm which was in his hand at the time but he claims it was an accident. He has given an account in this court that he had come to the house to pay maintenance for a child born to him and the deceased and as he entered the house the pistol in question somehow fell to the ground from his person. He suggests that the deceased made some effort to grab the pistol but he succeeded in keeping possession of it and while she lunged at him he shot her by mistake without intending to discharge the firearm.

This account does not explain why this woman should have at the moment of her death had cried out that it was the accused who was going to kill her. That she did so indicates that she perceived that he was about to deliberately shoot her.. She apprehended the accused's intention.

The evidence is clear that in order to try and avoid a shot being fired at her she did lunge towards the accused. This accounts for the track of the bullet though her body that indicates that the shot was discharged whilst her body was bent towards the accused.

But the accused version has this difficulty. Counsel at the time initially put to the witness Ndwandwe merely that the accused would say that this was an accident. I pointed out to counsel that more was required of him than merely to say it was an accident. It was for him to put to the witness what the accused version was as to how the shot came to be fired.. Counsel then put to the witness that "he merely pointed the gun to the deceased in order to frighten her." That is entirely different from what the accused said when giving evidence. The accused was also unable to explain why he should have wanted to come armed into that house, and what need there was to frighten the deceased. The pistol was loaded and in a

position ready to fire. However on the version of the counsel one cannot understand why he should have to frighten the deceased.

The account that the pistol should have fortuitously and inexplicably have fallen to the ground as he entered the dwelling has all the appearance of fabrication and I am sure that it is just that.

On the evidence as a whole I find that the accused came to the house intending to harm the deceased by shooting her and for this purpose he was armed with a pistol. It follows that he is responsible for her death and that his action indicates an intention to kill her. He is found guilty of murder on this count.

Count 3 relates to the murder of [E] who was a juvenile aged about 12 at the time. She is the daughter of the deceased in count 2. The only evidence against the accused on this count is that the deceased was in custody from early morning on the day of her disappearance. There is some suggestion that her having taken a strong drink angered him. It is clear that this young person had indeed been imbibing before that. There is further evidence of the accused having pointed out a spot near the river at a farm where he was working where a number of bones were found and a skull was also pointed out. The skull had not been buried with the other bones. Together with the bones there were garments, which were identified as those of the deceased, which she had on at the time of her disappearance. The bones in question appeared to be those of a young person corresponding approximately to the age of the deceased. This pointing out was apparently as a result of a statement made to the police, which could not properly be produced in evidence. There are inferences, which could be drawn from this, but one is not entitled to draw any adverse interest against the accused. The accused claims that he had been assaulted prior to the pointing out but the evidence he had given does not clearly indicate that the pointing out itself was a result of undue influence or an assault. In fact the accused denies that he did the pointing out at all and says that he was taken to that place by the police, uncovered the bones and the garments. But even if it were to be accepted that the accused had pointed the articles out, the bones and the garments, one cannot infer that he killed the persons whose skeletal parts were discovered. There was no evidence that the skeleton or skeletons were that of the deceased and in fact her death has not been proved beyond reasonable doubt.

The probabilities are that the bones were those of the deceased and that the accused did know something about the death of the deceased, he indicated to the police. But this does not amount to the evidence beyond reasonable doubt leading to a conclusion beyond reasonable doubt that the accused murdered [E]. He is accordingly found not guilty on this charge.

I have already previously dealt with counts, 4 & 5, which were abandoned, and the accused found not guilty. Similarly with counts 6 & 7.

I come to count 8, which was the rape of [C]. The complainant and her companion [D] were together walking through a wood with firewood on their heads when the complainant apprehended an armed person was following them. The complainant raised her companion's attention to this. The companion addressed him as "awu ngumkhwenyana" which means my son-in-law. [D] ran away and she was able to escape but the complainant [C], who was pregnant at that time, was unable to escape and she says the accused raped her there and then. This is the witness also said that the accused said that if she refused he would kill her like[E].

The complainant who had experience with sex said that the accused had full intercourse with her without her consent. Although [D] is unable to say of her own knowledge what happened to the complainant this being because she had already escaped confirms the evidence that it was the accused that accosted them and subsequently is the person who remained with the complainant. The accused denies all knowledge of the encounter but the circumstantial evidence, and the quality of evidence given by the prosecution is so convincing that his denial must be rejected beyond reasonable doubt.

I am satisfied beyond reasonable doubt that the accused person, armed as described by the witnesses accosted the two women, terrified the complainant and raped her in the circumstances, which she described. The accused suggested that [D] invented the story in order to get back at him because he rejected her sexual advances sometime earlier is denied by her and appears to be a figment of his imagination. In the result on count 8 I find the accused guilty of rape of [C].

Count 9 is a charge of assault on the person of [D], the corroborating witness on the previous charge. This complainant on this count has described how the accused, again armed with a bush knife and a spear, came upon her at her home and assaulted her. She was cut in several places and she demonstrated the scars to the court. The serious injury caused by a chop of a bushknife is confirmed in the medical report, which has become an exhibit by consent. The report has been criticised as not indicating that the doctor observed any wounds other than that caused by the bush knife. It is a valid criticism because a true and diligent forensic examination should have revealed the other wounds. But these wounds were demonstrated in court and were observed by me and other members of the court. Despite the accused's denial of the assault, I am satisfied that the complainant is telling the truth and that the circumstances as well as the report in the incident and the examination by the doctor lead to the conclusion beyond reasonable doubt that she was assaulted by the accused.

Although the charge is one of assault with intent to murder it seems to me that the appropriate finding would be an assault with intent to cause grievous bodily harm and he is found guilty accordingly.

Counts 10 and 11 were abandoned when the accused was found not guilty.

Count 12, charge of housebreaking with an intent to steal and theft. The complainant in this count was Manjemanje Vilane. She is the sister to the accused. At about 1300 hours on the 1st July 1997 she left her house securely closed. When she returned she found the house broken into and the items later identified were missing and stolen. She later identified some of the items which had been recovered from the accused on the 14th July, 1997. This was at the Manzini Police Station. The accused having been found in possession of some of the items but claims that her sister lent him a number of them because it was a rainy day and his cloths had been dampened. There is evidence that the accused person did visit the complainant shortly before the alleged theft but the complainant denies that she lent the accused any of her husband's cloths. Moreover there were items among those found on the accused and taken from the house, which would not have been required by him because having been caught in a shower of a rainy day. One of the items is a knife. It is also curious why the house should have been broken into and this has not been denied. It is also correct that the complainant reported the matter to the police immediately and reported that these items were missing before the accused had been arrested. Why she should on the one hand have lent him clothing and other items in order to assist him and then despite her goodness of

heart had gone and reported the matter to the police. This is completely unbelievable. I accordingly find the accused guilty on count 12 housebreaking with the intent to steal and theft.

EXTENUATING CIRCUMSTANCES

I find the accused guilty of murder on counts 1 & 2. I am now to make a separate enquiry as to whether extenuating circumstances exist. Of course there is no onus in a matter such as this and I have to examine all the facts to see whether there are any circumstances relating to these murders, which are extenuation as recognised by the law. The accused has elected not to give any evidence in extenuation so that the only indication of there being extenuating factors will have to come from the record as it is. As far as count 1 is concerned I find no extenuating circumstances. I say this because the accused boasted of his having killed the woman in question, which indicates no remorse whatsoever. On the contrary the accused used the fact of having killed one woman in order to instil fear in the other. He did not regret his deed; he in fact gloried in it. . It is true that the accused and the deceased on count 1 were apparently on a friendly basis shortly before her death. It is also clear that they had a drink together but there is nothing on the evidence to show that the amount of liquor, which had been consumed by him in, anyway affected the accused's judgment
As far as count 2 is concerned the accused's expression of remorse is hollow when one considers the circumstances in which the deceased was killed. The accused came armed with a pistol to the house where the deceased had gone to bed. Obviously terrified, the deceased who apprehended that he had come there to kill her and was about to do so. Her fears and panic were just fully justified by what happened. In this case too there are no extenuating circumstances.

The callousness of the accused in these and the other crimes of violence the commission of which he has been found guilty led me to suspect that there may have been something abnormal in his mental make up. At an early stage in the proceeding at the request of defence counsel the accused had been sent for psychiatric assessment of his mental condition to determine both whether he was fit to stand trial and as to his mental condition at he time of the commission of the offences. Nothing emerged from the postponements and examination of the accused by a psychiatrist and the accused and his counsel were satisfied to proceed with the trial on the basis that there was and had been nothing in the accused's mental condition, which would prevent his understanding and facing the charges in the indictment. As the evidence unfolded se of his bizarre behaviour as recounted by the witnesses I again sent him for further psychiatric examination. After long delay a psychiatrist who reported on his findings in a letter saw him. This of course is not evidence and the doctor could not be persuaded to come to court to testify viva voce under oath. There were sufficient reasons not to subpoena him. Nothing emerged from this save evidence that the psychiatric facilities available in Swaziland are highly inadequate. Without expert evidence I cannot make any diagnosis but the accused's behaviour seems to be that of a psychopath. This in itself even if the accused were a psychopath would not constitute an extenuating circumstance see S v EIMAN[1] the headnote of which reads
"Where an accused is convicted of murder with extenuating circumstances and, in the light of the proven facts, there can be no suggestion of any other form of punishment than either the death sentence or a long term of imprisonment, the trial Judge is entitled to take into account,

[1] 1989 (2) SA 863 (A) F

where the accused is a dangerous, violent psychopath, that a long term of imprisonment cannot protect the closed prison community of prisoners against the accused.

The Court on appeal confirmed the imposition by the trial Judge of the death sentence on the appellant who had been convicted of murder with extenuating circumstances where the evidence indicated that the appellant, a psychopath, could again commit murder in prison and the trial Judge had taken into account that the prison community was entitled to be protected against such dangers and that, should the appellant escape from prison (and escapes were not unknown or rare occurrences), he would also be a danger to the wider community. The Court found that the trial Judge had correctly taken these and other factors into account in considering the question whether the death sentence or a long term of imprisonment should be imposed. The appeal against the death sentence was dismissed. That this was a case where serious consideration had to be given to the imposition of the death sentence cannot be gainsaid. It is plain that the crimes committed were of a most serious nature. Appellant murdered two defenceless people in a particularly brutal and callous manner. He obviously acted with *dolus directus*. His attacks on them were largely unprovoked. Moreover, no fault can be found with the trial Judge's classification of appellant, consequent upon his psychopathic personality, as an extremely dangerous person whose removal from society was required. Of course, this approach could be said to be in conflict with that adopted when extenuating circumstances were being dealt with. Then, it was held that appellant's psychopathy rendered him less blameworthy."
In S v Sampson 1987 (2) SA 620 (A) Nestadt JA said at 624I - 625E:

Having regard to the serious nature of his disorder and its direct connection with the crimes committed, this was a justifiable finding (S v Pieterse 1982 (3) SA 678 (A)). For the purpose of sentence, however, it was regarded as aggravating and indeed as the main reason for the imposition of the death sentences. In principle, this is understandable. Whereas at the stage of considering extenuation the Court was concerned with factors subjective to appellant, when it came to sentencing, the wider interests of the community had to be taken into account.'"
The headnote summary in S v KOSZTUR[2] reads

"A psychopathic condition is not by itself an extenuating circumstance to the offence of murder. Whether it is or not may be a difficult matter to decide and must in each such case be carefully considered. This is so because of the variable effect of the condition. In certain instances it may affect the moral blameworthiness of a psychopathic accused, in others not at all. Where, as in the present case, an accused convicted of murder and facing a possible death sentence, suffers from a severe degree of psychopathy, a trial Court must be careful in its assessment of the effect of that condition upon the moral blameworthiness of the accused. When, in such a case, a finding by the trial Court that despite such a condition there are no extenuating circumstances is taken on appeal, the Appellate Division should likewise scrutinise the evidence and the finding of the trial Court with great care."

In the present case there is no expert evidence of a relevant psychopathic condition, which in some views expressed in the quotations above could reduce the moral blameworthiness of the accused. Should it have been possible to make such a finding the other considerations would have come into play

SENTENCE

[2] 1988 (3) SA 926 (A)

I turn first to **count 8,** which is the count of rape where the complainant was [C]. This case is clear that you accosted the two women, and your appearance armed as you were frightened the women. [D] was able to get away but unfortunately [C] was pregnant and she fell and was unable to escape. You terrified her by telling her that you would kill her as you had done to another woman if she did not come to your desires. It is true that you did not use the weapons that you had. It is also true that the woman did not suffer great physical harm. But rape is a very serious crime and the indignity inflicted upon the woman and the terror make the offence particularly repulsive.

On this count you will be sentenced to 12 years imprisonment, which shall be deemed to have commenced on the date of your arrest. 7th July, 1997.

On count 9, assault with intent to cause grievous bodily harm on [D]. Here too because this was an assault on a defenceless woman and you were armed with a bush knife and a spear. You inflicted serious wounds on her, she being an innocent inoffensive unarmed woman. The attack was vicious terrifying and sustained.

The sentence will be 3 years imprisonment. Because the offences were somehow associated this sentence will run concurrently with the sentence on count 8 and also will be deemed to have commenced on. 7th July 1997

On count 12, housebreaking, taking into account that it was your sister's house which you broke and by taking into account that the goods you took had been recovered but nevertheless this is an offence against the property you have to receive the sort of punishment which is a warning to other people who commit this similar offence. In your case there is little question of corrective possibility of the sort of punishment and **I accordingly sentence you to 12 months imprisonment. I am not making this sentence run concurrently with the other sentences of imprisonment because there is no relationship between this sentence and the two others.**

On the two counts of murder, having found that there are no extenuating circumstances pertaining thereto there is only one sentence which I can pass in terms of Section 296(1) of the Criminal Law and Procedure Act 67 of 1938. The sentences of this court in terms of Section 297 are,

On count 1 you are sentenced to be returned to custody and that you will be hanged by the neck until you are dead

On count 2 you are sentenced to be returned to custody and that you will be hanged by the neck until you are dead

S.W. SAPIRE, CJ