

IN THE APPEAL COURT OF SWAZILAND

In the matter of: App. No. 24/80

MINAH BESSIE MABUZA

vs.

REGEM

CORAM: MR. JUSTICE I.A.

MAISELS, J.P. ,

L. DE V. VAN WINSEN,

J. & I. ISAACS, J.

FOR APPELLANT: MR. SHILUBANE.

FOR RESPONDENT: MR. A. THWALA

JUDGMENT.

(Delivered on 4th June, 1981)

Van Winsen J. A.

Appellant was charged with the murder of Linda Thoshi Dlamini, a male apparently 48 years of age. She was found not guilty of murder and convicted of culpable homicide and sentenced to imprisonment for six and a half years. She appeals against her conviction and sentence.

It was common cause in the Court a quo that appellant had stabbed the deceased with a screwdriver. The post-mortem report disclosed that the deceased had suffered a deep penetrating stab wound of the chest which entered the pericardium and pierced the aorta. The consequent bleeding into the pericardium caused the death of the deceased.

Appellant claimed to have acted in self-defence when she was attacked by the deceased intent upon raping her. The trial Court rejected the defence and found that although it could be accepted that the deceased had inflicted a blow over her eyes she was not justified in reacting to this by stabbing him in a vital part of his body.

The evidence of what happened immediately before and at the stabbing comes from the appellant. There were no other eye-witnesses to this occurrence. According to

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the witness Gertrude Khumalo there was a longstanding and quarrelsome relationship between the appellant and the deceased in which the two fought each other on more than one occasion resulting in the appellant being charged with and convicted of an assault on the deceased. According to this witness appellant and deceased were drinking together on the day the latter met his death.

The witness Mhyaka Mabuza testified that there was a long-standing quarrel between appellant and deceased over some money which the latter had won at a card game which money was taken from him by deceased. On the day in question there was again a dispute between them about this money. The witness claimed that they were lovers and from his description of their conduct towards each other it would appear that there was some sort of love-hate relationship between them.

Kanga Mabuza testified that after the stabbing of the deceased appellant came to his house and said to him (the witness) that deceased had been "grabbing" her or "grappling with her" which the witness understood to mean that appellant claimed that the deceased had been fighting with her when she stabbed him. The witness denied that appellant had reported to him that deceased had tried to rape her.

Appellant's own version of what led up to and had occurred at the time of the stabbing differed materially from this evidence. She denied having had any relation -ship with the deceased. They were not lovers, she said, and were not constantly together and had not quarrelled about money. She admitted that deceased had made sexual advances to her on previous occasions but these she rejecte. She denied having left Gertrude Khumalo's house -

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where beer drinking had taken place and at which house appellant and deceased were both present - in the company of the deceased. She testified that she had left on her own and that the deceased ran after her and caught her up and said he wanted to have sexual intercourse with her and when she refused he assaulted her and she ran off to Kanga Mabuza's house and reported to him what deceased had done. Later she followed another path hoping to avoid meeting the deceased but he was lying in wait for her. She then described what happened in the following terms :-

"He then said did you not think I would get you today. I want to sleep with you today. He swore at me by my mother's private parts and hit me on the face. He got my head under his armpit and shut my mouth. I cried. He shut my mouth and hit me. He pulled me up to the road where he kicked me and I fell to the ground. He tried to come to me but I kicked with both feet and then I got up. When I got up I put my hand in the pinafore pocket where there were nails and a screwdriver, I pulled up the latter and stabbed him."

Thereafter she said she ran to the home of Gertrude and reported what had happened viz., that she had fought with the deceased and he had got injured. She did not say to Gertrude . that the deceased had attempted to rape her.

It was argued on behalf of appellant by her counsel that the Court a quo court not convict her unless her version of what took place was beyond reasonable doubt false. He argued that the trial judge was too critical of her evidence and that as her eyes were proved to have been swollen and she shouted for help her evidence could

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reasonably be true. He further claimed that the Court a quo erred in allowing evidence to the effect that appellant had previously stabbed deceased for which she had been sent to prison.

Now it is clear that the only defence raised is that appellant acted in self defence to ward off an assault made upon her by the deceased with the intention of raping her. It is correct, as submitted by appellant's counsel, that the onus is on the Crown to negative this defence. The Crown would not have succeeded in doing so if the evidence of appellant that the deceased assaulted her with the object of raping her could reasonably be true. The trial judge held that the Crown had adequately negated the defence and I am not convinced that the learned judge was wrong in coming to this conclusion.

Appellant was clearly not telling the truth when she denied that she had ever associated with the deceased, that he had slept at her house and that they had quarrelled about money. The witnesses Gertrude Khumalo and Mnyaka Mabuza testify to a long-standing relationship between them. The fact that, being a married woman, she did not wish to disclose this relationship in the course of her evidence affords no excuse for her lack of veracity. Her evidence was not accepted in the lower court, the trial judge remarking in the course of his judgment that she had made a bad impression on him as a witness. It is quite true that she is the only witness to the events surrounding the death of the deceased but it does not follow from this that a court is necessarily driven to the conclusion that her story may reasonably be true. Her story must still be tested against other relevant evidence and against probabilities.

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It can be accepted, regard being had to the swelling of her face in the region of the eyes, that it is reasonably possible that the deceased assaulted her. There is no suggestion that he attacked or even threatened to attack her with a dangerous weapon. The Appellant only claims that the object of the assault on her by the deceased was to force her against her will to have intercourse with him. If this were true she would almost certainly have complained of this to Gertrude Khumalo and Kanga Mabuza both of whom she saw after the event but they both claim that she did no such thing. Moreover Kanga Mabuza before the assault in her offered her the asylum of his house on the evening when she came to him complaining that she had been chased by the deceased but she refused it and went on her way. This indicate that she entertained little fear of the deceased. I have no doubt that the evidence and the probabilities point to the fact that if the deceased assaulted the appellant he did not threaten to rape her. That being so it is quite clear that in stabbing the deceased with a screwdriver the appellant grossly exceeded the bounds of self-defence and that she was clearly guilty of culpable homicide.

It was submitted by the appellant's counsel that the trial judge committed an irregularity in allowing evidence to be adduced that the appellant had been previously convicted of stabbing the deceased and had been sent to prison for this offence. He claimed that the admission of such evidence was in contravention of the provisions of Section 24-8 of Act 67 of 1938. Assuming this to be so it seems clear that the appellant suffered no prejudice from the admission of such evidence. There was ample other evidence on which the Court a quo could have and

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and in fact did rely in order to convict the appellant. A court will not set aside a conviction because of the irregular admission of evidence where it is satisfied that on the evidence unaffected by the irregularity there is proof beyond reasonable doubt of the guilt of the party being charged. See S. vs. Tuge 1966(G) S.A. 565(A) at p. 568, R. vs. Harris 1965 (2) S.A. 340 (A) at p. 362.

In the present case the Court a quo correctly found that there was such evidence. In my view therefore the appeal on the merits cannot succeed.

The fact that there appears to have been an assault by the deceased on the appellant at the time this offence was committed and that two of the assaults which constituted by far the most serious part of the appellant's previous conviction were perpetrated by the latter on the deceased and arose out of their troubled relationship persuades me that the sentence imposed was somewhat too severe. Accordingly 3 years and 6 months of the sentence imposed by the Court a quo will be suspended for 3 years on condition that within that time the appellant is not convicted of any crime involving violence in respect of which she is sentenced to a period of imprisonment without the option of a fine.

(L. de V. VAN WINSEN.)

JUDGE OF APPEAL.

I agree:

( I.A. MAISELS.)

JUDGE PRESIDENT.

I agree:

( I. ISAACS.)

JUDGE OF APPEAL.