

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. T. NO. 261/93

In the matter between:

R E X

vs

DOREEN ANDERSON

C O R A M : A.F.M. THWALA  
FOR THE CROWN : MR. NGARUA  
FOR DEFENCE : MR KUNHE

JUDGMENT

06/12/94

The accused is charged with the murder of Peter Master Anderson at Fonteyn on the 9th August, 1993.

The murder was first reported to the police by the attorney of the accused, David Millin. After the shooting, the accused contacted her attorney. The statement of the attorney was tendered by the Crown as part of its evidence. Peter Millin as the attorney of the accused was not available for cross-examination. The accused was then in care of her attorney. She did what a normal person had to do in the circumstances as she had committed a serious crime and needed professional advice.

After the report by accused's attorney, police investigation started the same night on the 9th August, 1993. The report from accused's attorney was recieved by Sub-inspector Abraham Msibi of 999 police system. He proceeded to the scene of crime. He was met by one Petersen on his way. Mr. Petersen accompanied him to the scene. He opened the front door of the house.

When he entered, he saw the body of the deceased. He was shot on the forehead. His brains were scattered on the floor and the ceiling. It was lying in the dinning room or sitting room. He saw a spent bullet of a shotgun. He also saw two .22 spent bullets. He went to the bedroom where he saw a shotgun under the bed. He did not touch anything. He called detectives to continue with the investigation.

Inspector Zwane who headed the investigation team of detectives arrived at the scene at 11:30 p.m. the same night. He saw stains of blood on the walls and ceiling. The deceased's body was lying on the floor. There was a pool of blood next to deceased's head. There was a towel placed to stop the blood flowing further. On the floor next to the body he saw two spent .22 bullets. He came closer to the body and noticed that on the left hand side of the forehead at the beginning of the hairline, there was a big wound, the left eye was missing. The brain tissues were scattered. Next to the brain tissues at the corner, there was a plastic pellet container. He then went to the bedroom which was on the right handside of the deceased's body. He saw a shotgun behind the bed. He also saw an empty cartridge of of a 12 bore shotgun next to the door. He then ordered the police to guard the house.

From the scene, he went to Mbabane clinic to see the accused. The time was 1:30 a.m. When he talked to her, she did not say anything. He asked her what she was wearing the previous night. She handed to him a multi coloured jersey and a pair of ladies trousers. He took possession of the items.

On the following day he returned to the scene with the scenes of crime experts led by Mr. Stephen Evans, a British expatriate based at police Headquarters, responsible for the training of the Swazi police. He showed him the gun. He took the gun and opened it.

He found that there were two live rounds and one spent cartridge. He continued his examination of the scene. He also examined the scene for finger prints. He took the gun away. The gun, the two spent shotgun bullets and the plastic pellets container, were taken by Zwane to the ballistic experts in Pretoria. In the sitting room, there was a table on the right hand side. There were sofas before you get to the table.

The Crown also led the evidence of the police pathologist Dr. Berson. He said the cause of death was a shotgun wound of the head with skull and brain involvement. The report states that there was extensive compound commuted fracture of the left side extending from the frontal to the occipital region. A 2.2 cm wound was present on the left frontal region just to the left of the midline at the hairline. There had been extensive loss of brain tissue, with associated basilar skull which involved the posterior fossa. In addition, cracked skull fractures were present over the right occipital region. The scalp tissue was extensively lacerated. He also took x-rays of the skull. His comment was that the features were those of a shotgun wound to the head passing from the front to the back of the head. He was asked if the two shots were fired. He said although he could not rule that out, but there was nothing from the injuries to indicate that the two shots were fired. He could not determine at what distance the shot was fired.

I have summarised his evidence as it appears in the report. His comment was that the pictures were those of a shotgun wound, the head passing from the front to the back of the head. He was asked if two shots were fired. He said although he could not rule that out, but there was nothing from the injuries to indicate that two shots were fired. He could not determine at what distance the shot was fired.

The Crown also led the evidence of Senzenjani Ngwenya who said he was hired by the deceased to investigate the accused whom he suspected to be going with another man. He did not report anything to the deceased because he died before he did the investigation. This evidence partly confirms that the deceased wished to divorce the accused.

The Crown then called Samuel Mokoena who was the gate-keeper at accused's house. He worked a shift from 6 p.m to 6 a.m. He stated that on the 9th August, 1993, the deceased came to accused's place. He asked for the accused. He informed him that the accused was not present. He then left. At about 9 p.m., the accused and the deceased came driving separate cars following each other. He opened the gate for them. At about 11:00 the accused's car drove off. He noticed that the accused was driving and that there was a passenger whom he could not recognise because it was dark. At 12 midnight a van came to the gate.

The occupants of the van asked if the police had arrived, he told them that they had not arrived. The police then arrived. They went to the House. They entered the house and called him and asked him where the deceased was. He told them that he left with the accused. He was then shown the body of the deceased. He also said the deceased was not a regular visitor to accused's house.

When the police arrived, the children who stayed with accused were not present. His evidence was not clear as to how many people were in the premises of the accused that night. He could not say whether the occupants of the flats were present. He was cross-examined on a number of points and he did not give convincing answers. His evidence supports that of the accused that the deceased arrived at the premises that night.

The next was Bonginkhosi Khumalo. When this witness was called, the court was told that the police were unable to trace him. They had searched the whole of Mbabane in vain. This was not true because the witness's whereabouts were known. When police were told to go and look for him they brought him to court within fifteen minutes. The court does not know what was the intention of the police, when they said the witness could not be found.

This witness works for the accused. On the 9th August, 1993 cleaned the house. He did not see any gun. He did not see spent bullets. It was his first time to see the shotgun on the 10th August, 1993. On the night of the 9th he watched TV in accused's house with Amin and his friend. He left the house at 8 p.m. Amin and his friend remained watching TV. During the night he heard a bang and thought that someone was repairing a car. When he left, Amin's mother, father and children had joined them. He left them in the house.

In cross-examination he said the deceased came twice that night but did not find the accused. He did not see him when he came with the accused. His evidence did not advance the Crown case much.

The reports of the Ballistic experts were handed in by consent. the expert confirmed that the two spent shotgun bullets were fired from the shotgun used by the accused. The above evidence was offered by the Crown in the summary evidence. the summary evidence was received by the court on 6 July, 1993. almost one year from the date of the commission of the crime. The Crown intended to lead the above evidence. The above evidence does not implicate the accused in anyway. If one looks through the summary, it is clear that the evidence summarised by the Crown does not legally link the accused with the crime, i.e. at this stage there is no prima facie case against the accused as the Crown intended to lead its evidence up to this point.

I make this comment because it is surprising why the police and the prosecution omitted the evidence connecting the accused with the crime.

On the 2nd November, 1994, an application was made to lead the evidence of Mr. Evans before the 7th November, 1994. Attached to the application was the summary of evidence of Mr. Evans, a British officer who was due to leave during the week beginning 6th November, 1994. The summary shows that the evidence of this officer was made available on 10th August, 1993. The date of his departure was known to the police and prosecution. The court does not know what prompted the application. I can only infer that the officer asked about the case when he was winding up his affairs. The application was not proceeded with and the officer left without giving evidence.

The finger-prints evidence was eventually processed on the 7th November, 1994. Even if the application was granted, there would be no evidence to lead on that date as the finger-prints evidence was being processed on the 7th.

The evidence of Mamba was then allowed to be led in the trial. The defence did not object. The evidence confirmed that the accused handled the gun. This concludes the Crown case. It is clear that there was no eye witness. The only evidence which connects the accused is the fingerprint evidence.

The accused elected to give evidence on oath. She said she was married to the deceased in 1970. She lived with the deceased until 1990 when the deceased left her. From 1990 they lived separately until his death.

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There are two children of the marriage. The deceased had about seven other children. In 1988 the deceased made a will in which he left all his estate to his legitimate and illegitimate children and nothing to her. She was employed by the bank. She rose from the position of Manager's personal secretary to branch Manager when she left the bank in 1993. She helped her husband in his business in her spare time. Her marriage was happy at the beginning. Later the problems started. The deceased had many private lovers. He was weak with women and gave them money. She continued to live with him and kept her marriage vows. The deceased was a violent person. He used to beat her when she complained about his girl-friends. The last time he assaulted her was in 1988 when she had to go to hospital.

In 1990, the deceased left her. He was involved with a lot of women. He said he wanted to live alone. She remained in the house in which they lived. She did not receive any income from his business.

The children decided to stay with her. She continued to advise him in his business. In 1991 she formed a relationship with another man. The deceased knew about the relationship. He was jealous. The relationship with another man could not stop her from returning to her husband. The deceased visited her weekly from June 1993 until his death.

The accused claimed to be a religious person from her childhood. She is now a member of the International Baptist Church. The deceased was not a religious person. This did not cause any conflict in their lives. She is also interested in ballroom dancing. The deceased was not interested, he told her to stop. She resumed ballroom dancing after the deceased had left her. On the night of the shooting, she was from ballroom dancing practice.

She bought a pistol in 1986. In 1991 she bought the shotgun. She bought a shotgun because she has poor eye sight. She was shown how to use it. She practiced at the shooting range or in the country-side.

On the night of the shooting, she left home for ballroom dancing at 6:50 p.m. She took the shotgun with her. When she drove home from the dancing practice the gun was in the car next to her. When she got home she parked the car in the carport. The deceased's car entered the premises. She took the gun and entered the house. The deceased parked his car next to the entrance. She then placed the gun on the table. She welcomed the deceased. The sitting room and the dinning room is one room. There is a table at the centre of the dinning area. Her nephews were present but in their rooms. They came and greeted her and the deceased. When the deceased came in, he uttered some words in an angry tone. She then told the children to retire to their rooms. The deceased then said "I have learnt that divorcing is simple, you do not need evidence nor the approval of the other party".

The deceased had mentioned divorce about a fortnight ago. In 1990 or 1991, the deceased tried to divorce her. Her Lawyers wrote to him to substantiate his accusation. She told him that she stood by her vows. He married her while she was young. They were still legally married. She said the deceased was fourteen years her senior. She attended school with the deceased's son. She indicated that she would not agree to divorce. She invited him to bed but without success. On the previous visit on the 6th August, 1993, they had sex. The deceased then said he was going to surprise her by bringing a document stating that he had divorced her.



He then mentioned the new man in her life. He said she had a boy-friend and why did she not marry him. He looked angry, jealous and there was pain in his voice. She said to him why did he bother her he must go ahead. The deceased then got up and came towards her. She got up and ran around the table. When she tried to run to the bedroom, he blocked her way. She then took the gun. She pleaded with him and asked him to come back when he was in a better mood. She took the gun to scare him away. He continued coming towards her. She was holding the gun in the firing position. He grabbed the barrel of the gun and pulled it away. Her right hand was in the normal firing position. There was a bang. She fell and the gun fell. She saw the deceased fall. He lay in the lounge. She did not check his condition. She took a towel and put it on the floor to stop the flow of the blood. She said she did not pull the trigger. The gun was pulled off her hands by the deceased. She took the gun and placed it in the bedroom.

She then called the children and went to her brother Mr. Petersen. She left the children at her brother's house. She did not tell her brother about the shooting. She wanted an expert advice. She met her attorney, Mr. Millin. She made a report to him. He then arranged for her admission to Mbabane clinic.

The following day she gave her clothes to the police. The police finger-printed her on the same day, i.e. the 10th August, 1993. She also said the deceased was slightly taller than her.

In cross-examination by the Crown counsel, she said although they were married in 1970 by civil rights and out of community of property, she had not been to deceased's parental home.

Deceased told her that he was from Nhlangano. The deceased was a divorcee. She invited the deceased to her parental home. She tolerated the deceased because she loved him despite his violence and many girl friends whom he gave money and cars. She said there was nothing wrong with the gun that night. She was shown how to use the gun. She said there were guns at her home when she grew up but she did not touch them. The shotgun was recommended by a salesman to her. The salesman did not show her how to use the gun. He did not tell her that it was a dangerous weapon. She sat with her husband in the sitting room. Her husband (the deceased) said she was wasting her time because he was going to get a divorce without her consent. She was puzzled when the mentioned divorce. She was hoping for a reunion. She was not scared by the mention of divorce. She invited him to bed. She repeated that she wanted to scare the deceased with the gun. When she took the gun, they were divided by a table. The deceased was not armed.

When questioned by the court, she said she helped the deceased with his business. In 1988 deceased made a will and left nothing to her. She was not happy about that. She was also not happy when the deceased mentioned divorce. He said she was wasting her time as he was going to divorce her. She told him that she would hold to her vows. She continued to describe the fight. She said they were divided by the couch and table. She had the gun to defend herself.

She admitted that a reasonable man could not come to her at that stage as she had a gun, but the deceased came to her and pulled the gun. She could not explain the angle of the wound. She said the gun was in the deceased's hands when the shot went off. She said the deceased was not afraid of the gun. She said she always carried the gun in a cocked position in her car. She attributed her composure to her training in the bank.

She was able to take a towel to stop the flow of blood. She was able to think about informing her lawyer first to get an expert opinion. She said she did not tell her brother because he had guests in the house.

There is no dispute that the deceased died as a result of the bullet which was fired from the shotgun in possession of the accused. The accused is the only eye witness. She has given her explanation to the court. It depends now as to whether the court accepts her explanation or not.

The court must look at all circumstances leading to that night in assessing her explanation. Defence Counsel referred the court to two cases. The cases of SV KUBHEKA 1982 1 SA 534 AND SV MUNYAI 1986 4 SA 712. The headnote of Munyai's case reads as follows:

"In deciding whether the State has discharged the onus resting on it in a criminal case, of proving its case beyond a reasonable doubt, the real issue when dealing with the version of the accused is whether on all the facts, although the accused's evidence might be unsatisfactory, his version can be rejected beyond reasonable doubt as false; alternatively put, whether his version could not reasonably possibly be true, although the court was not satisfied with the manner in which the

accused gave evidence, or his as he put it to the various witnesses. The nature of this onus on the State is such that even if the State case stands as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view of discerning whether it is demonstrably false or inherently so improbable as to be rejected as false. There is no room for balancing the two versions, i.e. the State case as against the accused's case and to cut on preponderances. It is permissible for the court to look at the the probabilities of a case to determine whether an accused's version reasonably possibly true. If on all the probabilities the version is made out by an accused is so improbable that it cannot be supported to be the truth, then it is inherently false and should be rejected"


I shall approach the evidence of the accused with the above quotation in mind. I shall treat the accused as an ordinary person not as a religious person or a Saint. The accused was married to the deceased. It is clear in her evidence that the deceased had had many girl friends. This did not please the accused though she pretended that she did not mind as she kept her marriage vows. The deceased made a will in 1988 and left nothing to her. This was not a happy situation. She helped the deceased to build his businesses. In 1990 he left their common home and did not maintain the accused. This could not please a reasonable person. From the evidence of Ngwenya, the private investigator and that of the accused, it is clear that the deceased was preparing to divorce the accused. On the day he died, he had come to discuss about divorce. This did not please the accused. I do not think there was any room for inviting the deceased to bed. This part of the accused's story is not convincing. It is also not clear why the deceased decided to assault the accused when he had come to discuss the divorce.

The accused then described the fight. The deceased was not armed. The accused took a loaded fire-arm. She said the deceased advanced and held the barrel of the gun. This part of the story is also not convincing. A reasonable person cannot do what the deceased is alleged to have done. This position of the wound also suggests the gun was fired almost at the straight position. The accused was in no danger at the time as she was armed with the gun.

The accused said she was shocked after the shooting. Her behaviour after the shooting did not appear to be that of a shocked person. She remembered where she kept a towel and took it and put it on the floor to stop the blood from flowing. She did not wake up the people who stayed in the premises. She did not tell her brother about the shooting. She sought legal advice first because she knew that she committed the crime. She also told lies that she was not shown how to use the gun. I do not believe that she always carried the gun cocked in her car.

I do not accept her story description of the events of the night. What I must consider now is whether she should be found guilty of murder or culpable homicide. The events leading to that night started a long time ago. The deceased made a will and left nothing to the accused. In 1990 he left the deceased and did not maintain her. He then started preparations for the divorce. He came and told her that he would divorce her. This was distressing to the accused. She was provoked. The events had accumulated for a number of years. The mention of divorce that night was the last blow which could not be accepted easily by a reasonable man.

I come to the conclusion that this case falls within the scope of the HOMICIDE ACT NO. 44 OF 1959. I find the accused guilty of culpable homicide, not guilty of murder.

  
A.P.M. THWALA  
JUDGE

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