HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.81 /02

In the matter between:

REX

VS

MATHANDA KHUMALO

CORAM	MATSEBULA J
FOR CROWN	MS. LUKHELE
FOR DEFENCE	MR. B.J. SIMELANE

JUDGMENT 7™ JUNE 2004

You have been charged with the crime of murder in that upon or about 30th July 2001 and at or near Mthombe area, in the Shiselweni region the said accused did wrongfully, unlawfully and intentionally kill one Thulani Mkhonta by stabbing him and did thereby commit the crime of murder.

The first Crown witness was Makhosi Mavuso PW1 that on the 30th July 2001, the three of you, Thulani Mkhonta (deceased), yourself and

PW1 left a certain Mkhonta homestead for a Hlophe's homestead where there was an ancestral feast. While PW1 was conversing with Mfaniseni Dlamini (PW2) and the deceased, the deceased mentioned his regret on being in the company of the accused and PW1 because of the embarrassing manner they ate meat. Upon hearing the comment the accused challenged the deceased and started insulting deceased. When deceased asked the accused to stop insulting him, he then started assaulting deceased. After a while accused ran away and deceased sat down having difficulty in breathing. When PW1 and PW2 tried to help deceased stand he could not and when they checked deceased's chest it was sticky. They then lit a match and discovered that deceased's chest was full of blood and they raised an alarm. This matter was reported to the Mkhonta family but when they came back they found deceased dead.

Under cross-examination the witness admitted that in 2001 he would have been aged 12 years but he was already drinking intoxicating liquor. He admitted that the group started drinking at 9am and continuously drank until dusk. He admitted that he was getting drunk. He denied it was deceased who put his hand on accused's chest in a threatening manner before the trouble ensued.

Mfaniseni Dlamini PW2 was also a member of the group of boys on this day in question. His evidence is more or else along the same line as that of PW1. The court formed the impression that even though this group indulge in drinks they were not drunk as not to know what was happening around them. There is corroboration between PW1 and PW2's evidence.
Under cross-examination PW2 also admitted that they had been drinking from 9am and further mentioned that by the evening he was drunk but not very drunk. He said everyone in his or her group was drunk. He said the utterance about how accused ate the meat was made in his (accused's) absence. Accused took these utterances as being gossiping about him.
Under cross-examination he said deceased was calling on accused as though challenging him to a fight. The Crown led the evidence of PW3 1305 Detective Constable Jeremiah Mtetwa who was the investigating officer who confronted the accused and told him about the case he was investigating. He also warned him in terms of Judges" Rules. Accused produced and handed to him an "okapi" knife.

Accused made a statement to a judicial officer, so said the witness. This was handed in by consent as exhibit "B". Accused made the statement in siSwati and it reads as follows:

We left together with Thulani the deceased from a homestead near our own to a Hlophe homestead. It was late in the afternoon. In that homestead where we were before leaving for the Hlophe homestead there was an ancestral feast and the people who had attended that feast were drinking traditional brew. Upon arrival at the Hlophe homestead we found Mfaniseni Dlamini who was staying at home with us. We waited at that homestead together with some people. At that homestead they had made fire for us to bask in the kitchen. Thulani came to me and greeted me. He said, 'Yes boy' and I responded to his greeting. He then went out and talked to some people, I heard that they were talking about me and I tiptoed so that I could hear what they were really saying. Mfaniseni saw me and said, There he is'. I asked him whom was he referring to when he said those words. He then slapped me approximately three times on my cheek. I then took out a knife, stabbed him and ran away. I went home and slept. I woke up the following morning and left to Chibidze."

That is all the contents of this statement. The court accepts the contents of this statement and it was not challenged.

4

Accused also gave evidence in his defence. His evidence basically is in - agreement with that of the Crown witnesses in so far as the movement of the group of which he was a member. He said at some stage he had remained behind of the group and when he was about to join it, he heard deceased mentioned his name. He objected to what was said about him. Deceased approached him and the accused retreated towards Sibongile's hut but he tripped and fell. Deceased struck him with his open hand when he asked him why he was hitting him but deceased continued to hit him. He said he eventually used a knife to defend himself. He also confirmed-that the group had been drinking since morning, the incident happened towards dusk. He said he was not very drunk and that there was no bad blood between him and the deceased at the time and they were there as friends. He denied that he would have put his hand on the deceased's chest and said he had been patient with him and that he had found him. He said he retreated because deceased wanted to beat him up.

Under cross-examination he maintained that all had been drinking together as friends and there was no bad blood between him and the deceased. Confronted by the Crown that in his statement to the Magistrate there was no mention that he had tripped and fell. He said he did not remember telling the Magistrate that he had tripped and fell. He said he was in the process of getting up when the deceased hit him. He said even though this was never put to the witness he had told his counsel. Accused denied throwing stones at the deceased. He said the deceased used no weapon against him. He said he could advance no reason why he used the knife when deceased only struck him three times with an open hand. The defence then rested its case.

It is against the above evidence that I must now consider the submissions made by both counsel before me. It is trite that the Crown bears the onus of proving its case beyond all reasonable doubt.

5

In other words the Crown must prove that accused killed the deceased with the requisite intent to bring about the death of the deceased.

Miss Lukhele on behalf of the Crown submitted that even assuming for the benefit of the accused that deceased had slapped him across his face such act cannot possibly justify the use of more lethal weapon like "okapi" knife on deceased. Miss Lukhele also submitted that were this court to assume that accused was provoked by such slapping by deceased then by using a knife accused exceeded the limits of bis defence. The counsel referred me to a South African case that is REX VS PATEL 1959 SA 121 AD @122. The court has had an opportunity to look at this case. There is a legal principle underlining that all cases that each case must be decided on its own merits. In that case were certain distinguishable differences.
Miss Lukhele submitted that, if I understood her correctly, that the injuries caused by the accused on

the deceased was disproportionate to the slapping of the accused by the deceased. It was Miss Lukhele's submission that the accused realised that the stabbing of the deceased by him would lead to the death of the deceased. She also referred me to another case REX VS JOHN NDLOVU SLR 1970/76 @389. The court has also had an opportunity to have a look at this case. This case deals with the application of force in private defence. It is stated that that force should not be disproportionate to that used by the aggressor because once you do that you become the aggressor yourself instead of defendant.

Miss Lukhele addressed me at length regarding the extent to which accused was intoxicated. She referred me to REX VS MKHONTO 1971(2) SA AD@327(A) read in conjunction with REX VS GROVEL MICHEL 1975(3) SA 417 AD. It was Miss Lukhele's submission that accused admitted that the use of a knife was not justifiable in the circumstances and that he was not so drunk as not to realise the

consequences of his action. Based on the above submissions, Miss - Lukhele urged the court to convict the accused as charged and submitted that the Crown had proved its case beyond a reasonable doubt.

Mr. Simelane on behalf of the accused on the other hand submitted that there is evidence that all these young men including the accused and deceased had gone on a drinking spree throughout the day until the incident of stabbing. He submitted that at the crucial time the deceased was the aggressor as accused was retreating the deceased advanced on him. It was Mr. Simelane's admission that even though a knife was used there are striking similarities in the present case and that of REX VS GILIJA S. DLAMINI AND OTHERS SLR 1970/76 at page 53. Mr. Simelane asked the court to read the ratio decidendi, in that case with AARON DLAMINI 1979/81 SLR at 34. The above cited cases should be read in conjunction with the Homicide Act 1959 so submitted Mr. Simelane.

Mr. Simelane also referred me to THANDI TIKI SIHLONGONYANE VS REX CRIMINAL CASE NO.40/97 (unreported) a matter that was handled by the Court of Appeal of Swaziland, The unanimous judgment was handed down by the Honourable Tebbutt JA.

Before dealing with the pros and cons of the submissions by the two counsel, I would like to take this opportunity to express my indebtedness to manner the counsel went at length in assisting the court to arrive at a well considered judgment. They both furnished the court with highly relevant decided cases that have assisted me tremendously. Having said that I am not going to lose sight of the general underlined principle applicable in trial situation i.e. each and every case must be considered on its own merits. You cannot simple take facts from one case which are similar and say therefore this case must also follow and convict or acquit an accused person.

In applying this principle I am going to focus my attention mainly on the ratio decidendi in the Thandi Tiki Sihlongonyane case supra. The trial judge in the court a quo found the accused guilty of murder with extenuating circumstances and sentenced her to seven years imprisonment. The accused appealed to the Court of Appeal and the Court of Appeal substituted the verdict of murder with extenuating circumstances of culpable homicide.

The facts on that case were briefly as follows:

The appellant was heavily under the influence of liquor (like in the present case) there was verbal abuse between the deceased and the appellant. Like in the first case, the deceased was first to resort to violence by striking the appellant with an open hand then hitting the appellant with a mantle walking stick drawing blood in doing so. Although the appellant thereafter seized a knife and proceeded to stab the deceased twice with it, the learned Judge of the Court of Appeal had regard to the mental state of the appellant who was clearly heavily under the influence of liquor and had been severely provoked by the verbal abuse by the deceased.

The Court of Appeal then said the Crown had not succeeded to prove beyond reasonable doubt that the appellant subjectively perceived that by stabbing the deceased that her conduct would result in the death of the deceased.

In the THAND TIKI SIHLONGONYANE case supra the learned Judge of the Court of Appeal held that the Judge in the court a quo should have had a reasonable doubt and gave that reasonable doubt the benefit of which to the accused. The learned Judge of the Court of Appeal held further that to hold that the appellant ought to have known as a reasonable person that stabbing of the deceased might

possibly lead to death was undoubted but should therefore not to - have been found guilty of murder on the basis of dolus eventualis but culpable homicide.

In the present case although under cross-examination, accused admitted that he was not so drunk as not to know what he was doing. The fact that they had been drinking continuously until the time of the stabbing and the fact that the cause of the quarrel was over the assertion that accused would have chosen some kind of pieces of meat when they were eating meat together indicate that the group was sufficiently intoxicated for the court to entertain a reasonable doubt as to whether the requisite intent to kill was present.

Based on the dolus eventualis principle the accused pursues the possibility of his act resulting in death yet he persists in it reckless whether death ensues or not. See ANNA LOKUDZINGA MTSETFWA VS REX 1970/76 SLR @ page 26 a-e. This case is the one that borders on a very thin line between murder and culpable homicide but there is a legal principle applicable in such cases that in such cases there is a slight benefit of the doubt which must be given to the accused.

In the result, I find the accused not guilty of murder but of culpable homicide.

JUDGMENT ON MITIGATING FACTORS

I have listened to your counsel, Mr. Simelane on your behalf submitting mitigating factors. The court takes into account that you were a young man aged 22 years at the commission of this offence and that you were employed. You are also a first offender. The court takes into account that you have been in custody since the 1st August 2001.

The court also takes into account that this is not one of these cases - where an accused picks up a knife or weapon and kills another for whatever reason. The court takes into account that the deceased was your friend and your neighbour and that this will haunt you for the rest of your life that you killed a person who is your friend and neighbour. I also take into account that you have shown remorse from the beginning when investigations started by admitting that you are responsible for having killed the deceased and also when the trial commenced you admitted and pleaded guilty to culpable homicide. That is indicative that you are sorry for what has befallen. However, the court cannot only look at the things that favours you as an accused person. The court has also a duty to take into account the interests of the society in which we live. As Miss Lukhele has correctly pointed out there are too many of these cases that have come before this court where at the slightest provocation a knife is being used which results into fatal consequences.

The court has been in the past very lenient in the cases of culpable homicide but it is about time that where a knife or any dangerous weapon is used not a stick then the court should show disapproval of the use of these dangerous weapons by imposing heavy sentences which will act as deterrent against other people who might also be prone to use a knife at the slightest provocation. The court should send a clear message to other people who might still be inclined to use these knives that if convicted even of culpable homicide because a life has been lost they will be dealt with severely.

The court was initially of the view that it should impose a sentence and not suspend any of it but in view of the factors as mentioned by Mr. Simelane of drunkenness and the fact that you had no quarrel with the deceased who was your friend. And showing remorse that you are sorry about what has happened has saved you from a straight sentence of imprisonment without any suspension. The court warns

you that if you commit a crime again do not expect this court to be lenient notwithstanding your age and the fact that you shall still say you are remorse about what has happened.

The court sentences you to an imprisonment of seven (7) years in jail two of which is suspended for a period of three (3) years on condition that you are not convicted of any crime of which violence is an element committed during the period of suspension of sentence and for which you are sentenced to an imprisonment without an option of a fine. The sentence will be backdated to 1st August 2001.

Judge