

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO .10/96

In the matter between:

REX

VS

LONGUBO MSHESHENGWANE MATIBUKO

CORAM

: J.M. MATSEBULA J

FOR THE CROWN ; MR. J. MASEKO

FOR THE DEFENCE : MR. P. SMITH

JUDGMENT 20/06/96

In this matter the accused is charged with the crime of murder, the allegation being that on the 31st May 1995 near Madwadwa area in the Hhohho District he did unlawfully and intentionally kill Hlobile Fakudze. He pleaded not guilty to the charge and was represented throughout the trial by Mr. Perry Smith.

At the commencement of the trial, the Crown informed the court that the autopsy report was not being challenged and it was accordingly handed as exhibit 'A'. The court was also informed that the witness who identified the body of the deceased would be dispensed with as the identity of the deceased was not in dispute.

2

According to the autopsy report exhibit 'A' the deceased Hlobile Fakudze died as a result of extensive burns. The Crown led PW1 witness Sophie Matibuko. Her evidence was that she is the deceased's and accused's daughter. She shared the same homestead with her parents but occupied a different hut. She stated that she was on good terms with her parents and they were on good terms with each other as far as she was aware. She stated that the accused and deceased left together in the morning of 31st May 1995 to a place not far from the homestead.

She further stated that the deceased was a traditional healer. They had gone to fetch some money from her patients. According to the witness they returned after sunset. It was her evidence that she had already retired to bed but not asleep when they returned. She came out of her hut to welcome them and went back to sleep.

During the night she heard her father call her name and went out and saw that the hut in which her parents slept was ablaze. She stated that she rushed-out to the burning hut to her surprise the door was locked with a padlock. It was her evidence that the accused was standing outside saying to her this so-called mother of yours is burning. She immediately got hold of an axe. forced the door open entered and removed her mother out. She stated that the deceased was ablaze. She scooped loose sand and threw it on

the deceased in an attempt to extinguish the flames but failed. She ultimately used water and succeeded in putting out the flames.

She then asked the deceased in the presence of the accused who stood nearby within a hearing distance how did her mother caught the fire. The deceased told her that the accused had set her alight by dosing her with paraffin and setting her alight. It was her evidence that she then noticed that the accused's personal effects had been removed from the burning hut and they were outside. In the burning hut only the deceased's effects remained. She had raised an alarm and people nearby came as a result of the alarm. One of those people was Sonile Hlaleleni Nkhambule who was subsequently called as PW2 by the Crown.

PW2 told the court that she found the deceased on the ground and removed some of the burning clothes on her body. She then asked the accused why she had set the deceased alight and the accused denied he had done so. PW2 also told the court that accused had not long go burnt one of the huts and she wanted know why was the accused doing it again. She stated that the accused had said he knew about the other hut to which she was making reference to but he knew nothing about the present burning.

It was PW1's evidence that PW2 had asked deceased why

accused had burnt her and she the deceased had told her that it was because of her money. This PW2 did not state in her evidence. According to PW2 the accused heard this allegation and denied that he had burnt the deceased. The deceased was subsequently conveyed to hospital and the court may mention that this was done by PW1 the daughter and the accused had nothing to do with the conveyance of the deceased to the hospital.

PW1 also testified that they used paraffin at the homestead for lighting purposes and that she had seen her mother purchase some days before the incident. At the time of the incident this paraffin had since been half-used. She said that the accused had immediately disappeared after this incident and had not assisted in taking the deceased to the hospital.

PW1 was extensively cross-examined by Mr. Smith but in the court's opinion she was not shaken.

PW2 Sonile Hlaleleni Nkhambule was the second witness who was called by the Crown. She stated that she knew the accused and the deceased and on the said date she was washing herself when she heard an alarm and went to the accused's homestead and saw the hut ablaze. She went there and found the deceased rolling on the ground, PW1 was there and so was the accused standing five paces away. She had asked the deceased what happened and she told her that the accused burnt her and the

accused disappeared immediately when more people arrived at the homestead.

Under cross-examination this witness stated that the deceased had told her that the accused had dosed her with paraffin and set her alight.

The next witness for the Crown was Constable Richard Mahlalela PW3. He said he went to the scene of the crime after receiving the report and found attached to a frame a locked padlock. He had

eventually arrested the accused at Louwscreek in the Republic of South Africa and charged him with murder.

Accused testified in his own defence. He stated that he left in the morning of 31st May 1995 together with the deceased to check on a sick beast. They came back in the evening together and found that the padlock they used in locking the hut was replaced with a strange padlock. He said it became necessary for him to break open the frame of the door in order to allow the deceased to go in.

The court finds this very strange that even before the accused could have tried to find out where the daughter was who was sharing the homestead with them. Why would he take this drastic measure to break the door instead of trying to find the person who had locked the door.

6

When the door was opened he asked his wife to go in and light a candle while he waited outside. That is very strange that he could break the door instead of going inside with his wife to look for the candle he waited outside and according to him he waited outside for thirty minutes and became anxious when his wife was not lighting the candle. He then called for his wife asking what was happening and she said she was still looking for a candle.

He stated in his evidence that it was at that stage that he noticed flames coming out of the door within the hut. He said he then called for his daughter who had not been present when they arrived but suddenly appeared when she was called and asked her to come and assist. He stated that he and his daughter rushed into the house and started removing items of clothing. That is another strange thing if one's wife is in a burning hut one is expected to worry about the person inside than to remove clothing first.

He stated that as they were busy removing his clothing his daughter stumbled onto the deceased and called out that the deceased was in the burning hut. She then pulled the deceased out and here again there is no evidence of what the accused did when the deceased was discovered in the hut.

The accused, according to his evidence, asked his daughter to take the deceased to hospital. Again a very strange

7

occurrence when your wife is burning you ask your daughter to take your wife to hospital. He stated that he did not accompany his wife to hospital because he wanted to guard against any further damage which might be caused by the fire to their huts. When the fire was put out he went to sleep in his son's hut.

The following morning he took his cattle to the dipping tank. When he came back he went to check at the clinic where his wife had been taken. At the hospital he was told his wife had been transferred to Pigg's Peak hospital. Instead of going there he then remembered that he had to collect his late brother's personal effects in the Republic of South Africa. He was later arrested by the South African Police for crossing without a passport and subsequently handed over to the Royal Swaziland Police.

The accused informed the court in his testimony that the reason why PW1 his daughter and PW2 the neighbour implicated him in the burning of his wife is that PW1 had returned from her in laws and he wanted her to go back and that was the reason why she was fabricating the story.

Accused's version of what happened leading to his wife's death through burning is totally a variance to that of PW1 and PW2. It is in conflict with the evidence of both witnesses and to some extent to that of

investigating officer. A whole lot of what the accused said in evidence-in-chief was never put to any witnesses and the reason for that according to Mr, Smith the accused did not know what the witnesses would say in their testimony. The court cannot accept this because once they had said it Mr. Smith ought to have challenged that and put it to the witnesses what the accused was going to say. The court is very much aware that it is not the accused who must prove his innocence but the Crown must prove that the accused is guilty beyond reasonable doubt. In this respect the court will refer to the case of REX VS DIFFORD 1937AD @373, I quote:

No onus rests on accused person to convince the court of any truth of any explanation which he gives, if he gives an explanation even if that explanation is improbable the court is not entitled to convict him unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal."

The court quotes this to make it very clear that the court is alive of the fact that it is the 'Crown who must prove that the accused did what he is alleged to have done. But the court would also refer to another exposition by LORD DENNING which reads as follows:

Relating to the criminal standards, "it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted too fanciful possibilities to deflect the cause of justice.

If the evidence is so strong against a man as to leave a remote possibility in his favour which can be dismissed with a sentence "of-course, it is possible but not in the least probable" the case is proved beyond reasonable doubt and the court will find that in this particular case that is the position."

The court in the circumstances find that the Crown has proved its case beyond reasonable doubt and find the accused is guilty of murder.

The accused was convicted of murdering his wife by setting her alight in a locked hut. The matter has been postponed from time to time to enable Mr. Smith to lead evidence in order to establish extenuating circumstances which he has now done, that is leading evidence.

In doing so Mr. Smith referred the court to the case of

PHILEMON MDLULI AND OTHERS 1970/76 SWAZILAND LAW REPORT @75 in which Their Lordships dealt with the question of what extenuating circumstances are. There are a number of things their Lordships said there, the list is a long one but there are a number of things which establish extenuating circumstances and I need only mention one which is intoxication. The effect of intoxication on a person's mind has the effect of reducing the moral blame worthiness of an accused's person who is charged with the crime of murder.

If an accused's person went into the witness' stand and stated that he had half a cup of beer and that had gotten himself drunk perhaps the court can doubt such assertion. But in this particular case the accused stated that he and his late wife have been drinking all the way, they drunk 'umqombothi' and

mixed it by drinking the stuff called 'mankanjane' which is a highly intoxicant drink so much so that the legislature has banned brewing of such intoxicant.

It is therefore clear to the court that to that extent the accused has established on the balance of probability the existence of extenuating circumstances. The court finds that there are extenuating circumstances in this matter.

J.M MATSEBULA

JUDGE