

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.81/95

In the matter between:

THABSILE NHLAMBO

VS

REX

FOR CORAM : J.M. MATSEBULA A.J.

FOR CROWN : MR. MASEKO

FOR DEFENCE : MR. T. NKAMBULE

JUDGMENT

09/02/96

The accused, whose age has been given by her father Elias D. Nhlambo, PW5 as being 24 stands charged with the crime of murder of her youngest child of her three children. The allegation being that on the 17th October 1994 and at a near Manjeni area in the Lubombo District she did unlawfully and intentionally kill Nkosingiphile Magongo. She pleaded not guilty when the charge was put to her and was represented throughout the proceedings by Mr. Nkambule.

The deceased's remains were discovered when a boy of 16 years Jabulane Maseko PW1 noticed dogs coming from the direction of a forest carrying what appeared to be bones of a human head. This find was subsequently reported to the police and confirmed as human remains. There were also

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found with the human remains items of clothing which have been identified as being similar to those worn by the deceased before his disappearance. In view of the fact that the deceased's body had totally decomposed at the discovery, it was not possible for the police pathologist to ascertain the cause of death and Exhibit 1 - the post mortem report states that the "cause of death was unascertained".

The events leading to the disappearance of the deceased and finally the discovery of the remains of the body were as follows:-

The deceased was in the custody of its great grandmother Nyamayabo Sifundza PW6 who stated in her evidence that she, the deceased, the accused and a daughter of the witness Nyamayabo Sifundza, PW4 Siphwe Maziya had all attended a customary wedding on the 17th October 1994. At the close of the day on the 17th October 1994 the great grandmother handed the deceased to the accused its mother as she, the great grandmother would not be returning home immediately. One of the Crown witnesses Siphwe Maziya PW4 also left immediately after the wedding proceeding to Ngomane where she and the accused were staying together. Accused was to follow subsequently with the deceased.

Siphwe Maziya and indeed Nyamayabo Sifundza told

the court that when the deceased was handed over to the accused it was according to them well and they had not seen any signs of illness. When the accused arrived at Mhlume on a bus which was proceeding to Ngomane area she did not have the custody of the deceased. Siphwe Maziya asked her what had become of the deceased and accused told her that the deceased had developed a running tummy and had discharged watery stools on her and she had decided to leave the deceased with a relative of hers one LaMhlanga. Siphwe Maziya was not convinced of this explanation by the accused and asked the accused to accompany her to LaMhlanga. When LaMhlanga was confronted she denied having received the deceased from the accused. Accused then told Siphwe Maziya that she had left the deceased with a relative at Mafucula area. Siphwe Maziya then reported the matter to the Ngomane security men who advised her to take the matter to the police. Siphwe Maziya then asked the accused to accompany her to the police and to her father (accused's). On the way to the police station the accused protested to witness Siphwe Maziya and said "What are you doing to me, you also have children what has befallen to me can befall you as well". PW4 Siphwe Maziya's evidence is to the effect that

after she had reported the matter to her husband (PW4's) the accused had then disappeared and she saw the accused again when she had been arrested. According to this witness, Siphwe Maziya the accused had disappeared for a period of plus minus three months. Obviously this could not be, because according to PW3 Sergeant Edward Fakudze the accused was arrested by him on the 7th November 1995 after the discovery of the remains of the deceased's body. And that was hardly three months.

Accused's father who also gave evidence PW5 Elias D. Nhlambo stated amongst other things that the accused had cared and maintained her children whenever she was in employment. And that she had continued so maintaining the children after the death of her husband one Mazulu Magongo. He stated that in 1993 the accused had taken the child to the police when she was unable to feed it and that he had come to her rescue and had fetched the child at the hospital where the child had subsequently landed. He stated in this court that because of all this behaviour by the accused he did not think that the accused could have murdered the deceased the father so stated.

PW5 the father of the accused also told the court that he had seen the accused after the disappearance of the deceased and had asked her where the deceased was and the accused had said the deceased had not been well and she had administered some herbal cure (imbata) and the deceased had become weak and died. Accused had feared to board the bus with the dead child and had left it in the veld near Mananga Police Station.

At the commencement of the trial it was revealed to the court that the accused had made a statement to her Magistrate which was handed in by consent as Exhibit 'B' . In her statement she gives an explanation of how the deceased had died. That is reported at Page 6 of her statement in the middle.

"I left his the traditional healer's (inyanga) home and along the way I brought down the child from my back with the sole purpose of giving the child some juice. However I realised that my child was so weak that is how the child died."

Then she continues, "A motor vehicle approached, I asked for a lift but he refused stating that he would have given me the lift if the child was still alive."

That explanation is in contradiction with the explanation the accused is supposed to have given her father PW5. Similarly the witness PW6 Nyamayabo Sifundza said the accused never told her what had happened to the child. She had obviously given different explanation to the witness Siphwe PW4 about where the child was.

At the close of the Crown case, Mr. Nkambule for the defence applied for the discharge of the accused in terms of 174(4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT. This Section has since been amended and it now no longer deals with a sufficient case but it deals with what the court had been referred to as a prima facie case.

Mr. Nkambule submitted, in the court's opinion correctly that the Crown had to make out a prima facie case upon which a reasonable man might convict. The amended Section now gives the court a very wide discretionary power which the court exercises judicially. In view of the conflicting explanation given by the accused to various witnesses as to what had become of the deceased after it had been given to her the court turned down the application and ruled that the Crown had in fact made out a prima facie case against the accused at the close of the Crown case.

The court is aware that no onus rests on an accused person to prove his or her innocence but that the onus rests on the

Crown to prove the guilt of the accused beyond reasonable doubt or at this stage-make out a prima facie case. It is appropriate at this stage to deal briefly with the standard the court applies at the end of the Crown case when we are dealing with whether or not there is a prima facie case. That standard is to consider whether or not there is a prima facie case made out against an accused person, and the court has got a discretion if that discretion is exercised judicially the application is granted or refused.

If the application is refused then the next stage is another standard to be applied, that is whether the Crown at that stage at the close of the defence case the Crown has proved the case beyond any reasonable doubt.

It is trite that the onus probandi in criminal matters rest on the Crown to prove its case beyond any reasonable doubt and that no onus rests upon the accused to prove its innocence.

When the application for the discharge of the accused was refused Mr. Nkambule then closed the defence case without calling the accused in the witness stand. The court then had to apply a different standard to find out whether the Crown had at that stage proof the case against the accused beyond any reasonable doubt not just a prima facia case.

There is no direct evidence linking the accused to the death of the deceased. Mr. Maseko for the Crown correctly

conceded in my view that the Crown would have to rely on circumstantial evidence. He submitted that because of the various explanations given by the accused and the fact that she the accused was the last person who had the custody of the deceased and subsequently that the deceased remains were found the court is to draw according to him the only reasonable inference that the accused had killed the deceased.

The question of drawing an inference from circumstantial evidence was spelt out in the case of REX VS BLOM S.A. LAW REPORTS APPEAL DIVISION 1939 AD @188. And the court will refer to Page 202 where the learned Judge of Appeal Watermeyer had the following to say:

"In reasoning, by inference: there are two cardinal rules of logic which cannot be ignored.

- i. The inference which is sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn;
- ii. The second ground, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct."

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Now what happened between the 17th October 1994 when the accused accepted the child which is common cause that she did accept the child, up to the time when the remains of the deceased that is the child in question were found, there are a number of explanations. The accused herself has given various explanations of what had happened to the child and; another aspect which has thrown some confusion into the whole matter is the time referred to by the witness Siphwiwe Maziya who stated that the accused had disappeared for a period of plus or minus three months before her arrest. That would seem to account for the contents of Exhibit 'B' that is the statement made to the Magistrate. There the accused gives long account of what happened to the child after she had received the child, she had been to Mamba who is an inyanga, she had been to the clinic, she had been to another inyanga and ultimately the child died. But in her statement the accused states that before the child died she had stopped on the side of the road and tried to stop some motor vehicle to assist her but because the child had died the person who was driving the motor vehicle said, "I'm not prepared to do that, I would help you if the child was still alive."

Then there is also the explanation not given in the statement but given by the accused to her father how the child had died. Now these are various things that could have happened irrespective whether they are given by the accused in explanation or some other person. Mr. Maseko

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said because of the fact that some of the explanation given by the accused were followed by witnesses and were found to be untrue therefore the court must draw the inference that she necessarily was the person who murdered the deceased. In the court's view that would be violating the cardinal rules the court has referred to in the case REX VS BLOM because there it is not stated that it is only when the accused has given straightforward explanation that those cardinal rules would apply. Now that coupled with the position that it is trite law that the Crown must prove its case beyond reasonable doubt, leaves the court with a doubt whether the Crown has proved its case beyond a reasonable doubt.

The court finds that the Crown has fallen short of proving the case beyond reasonable doubt and that the inference they are asking the court to draw cannot be drawn. All that the court has now is a very strong suspicion that the accused either murdered the child by some means which has not been given before this court or one of the explanation given by the accused could be true that the child died of some natural causes and the accused became frightened and did not want to go and report this matter to his relatives or the police. A suspicion is not sufficient to convince the court

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that an accused person is guilty. The court can only-convict an accused person if there is evidence of a guilt having been proven beyond any reasonable doubt.

In the results the court finds the accused not guilty and she is discharged.

J.M MATSEBULA

ACTING JUDGE