IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.80/96

In the matter between:

REX

VS

BHEKI SUNSHINE PHAKATHI

CORAM : MATSEBULA J

FOR THE CROWN : MR. J. MASEKO

FOR THE DEFENCE : MR. N. MASEKO

JUDGMENT

11/02/97

The accused stands charged with one crime of murder. It being alleged that he on the 24th December 1995 at or near Phumelela area at the Shiselweni District unlawfully and intentionally killed one Sikhumbuzo Buyakhulu by stabbing him with a knife on the neck. He pleaded not guilty and he was represented by Mr. Maseko throughout the trial.

As for the record there are two Masekos, one for the Crown and the other for the defence. Mr. N. Maseko represents the defence and Mr. J. Maseko the Crown respectively.

At the onset of the trial the two counsel for the Crown respectively informed the court that the identity of the deceased was not being disputed as also the cause of death,

the post-mortem report handed in as exhibit 'A'. This was done by consent between the two counsel.

According to exhibit 'A' the deceased died as a result of haemorrhage of stab injury over the left side of the neck which involved subclavian blood vessels. The stab injury was obliquely placed over the lower region and measured 5x2.lcm and 5.6cm.

The Crown led the evidence of four witnesses altogether. The first witness was PW1 Phindile Matse.

Her evidence was very short. She stated that she resided at the place called Phumelela and knew the deceased, accused and Sifiso Sihlongonyane who gave evidence as PW2. She also knew one Khishwa Tsabedze PW3, Sandile Phakathi and Wonderboy. PW1 stated that she was related to the deceased through their mothers being sisters and that the, accused was her brother-in-law.

On the 24th December 1995 a group of them comprising of about 6 to 7 were walking together to her grandparents' place. As they walked the deceased handed to her a cap to carry. At one stage the cap accidentally dropped and the accused picked it up and when she demanded it the accused denied any knowledge of it. The deceased thereupon also demanded the cap from accused who also refused at first but later handed it over to the deceased who in turn

again gave it to PW1 Phindile Matse.

It was PW1's evidence that she then walked ahead of the group but within an earshot distance. She suddenly heard Sifiso Sihlongonyane saying 'Bheki had stabbed him'. She stated she knew PW2's voice very well because he too was a relative of hers. She identified exhibit '1' the cap as the one in question which she was given by the deceased to carry.

PW1 was cross-examined by the defence and stated that she was plus minus 20 metres away when PW2 said 'Bheki had stabbed him'. PW1 made a favourable impression to me as being an honest witness who could easily have said she saw Bheki the accused raised his arm and stab the deceased but she stated, 'even if I had looked I would not have seen anything because it was dark then.'

Throughout the cross-examination PW1 was never challenged that she had heard PW2 say 'Bheki had stabbed him.' In answer to the court's question she stated that the group had taken drinks but she was unable to say whether or not they were drunk. And she stated that she knew the members of the group very well and the reason why she was saying they had taken drinks is because she smelt liquor from their breath.

The Crown then led the evidence of PW2 Sifiso Sihlongonyane. His evidence to a greater extent corroborated PW1's evidence

as to the exact number of the people and where some of these people stayed in 1995. PW2 corroborated PW1's evidence regarding the falling of the cap and also when PW1 asked accused for the cap and accused refused with it. PW2 stated that he had seen accused and deceased approach each other and speak. He stated that the deceased had said to the accused he was not doing well by taking the cap without borrowing it. According to PW1's evidence he tried to pacify the two and told the deceased to forget about the matter. It was his evidence that the accused had then passed them and joined Jabulani and Sandile but accused came back according to the witness and stabbed the deceased. PW2 did not see the actual stabbing taking place because he said 'I say accused stabbed the deceased because the deceased said you have stabbed me because there is about all you can do.' I'll come back later to deal with this declaration by the deceased.

It was PW2's evidence that the deceased had retreated when PW2 wanted to ascertain the extent of the injury inflicted on him. He retreated, fell and died. Sandile lit the matchstick and PW2 and the others saw the extent of the injury. The injury described by them answered to the description given in exhibit 'A' the post-mortem report.

PW2 also stated that the accused had used words to the effect which are in Zulu 'Ngizokubamba ngothayela'. These

words were uttered by the accused after he had stabbed the deceased. Unfortunately the Crown never endeavoured to ascertain from the witness what the phrase means. When Mr. Maseko for the Crown addressed the court he stated that the court should take judicial notice that 'ngizokubamba ngothayela' means, "I will stab you" which is far from being the truth. Because loosely translated means, 'I will hold you by a piece of corrugated iron, ' and that is far from being, "I'11 stab you with a knife." What the court can do because of the failure of the Crown to ascertain the meaning of these

words from the witness who said the accused had said to them. The court will accept that infact these words were used by the accused and that he had uttered them immediately after he had stabbed the deceased.

The defence on the other hand had never challenged that PW1 had said he heard PW2 say ' Bheki had stabbed him' nor was PW2 asked whether or not he had said anything immediately about the stabbing or after the stabbing. The court will therefore accept the evidence of PW1 that infact PW2 had said 'Bheki had stabbed him' but that does not mean that the court will then say infact he had stabbed him. The Crown is still to prove that Bheki stabbed the deceased because that piece of evidence is important in so far as there are certain declarations made by the deceased prior to PW2's saying what he said about Bheki. In that declaration the deceased said, 'You would only stab me and

6

that's all you can do.'

Then the Crown also led the evidence of PW3 Mkhishwa Tsabedze who is the brother in law of the accused. His evidence is to the effect that the accused arrived late at the homestead and ask for accommodation for the night. It was PW3's evidence that the following day the accused's younger brother arrived and told PW3 that accused's father was asking him PW3 to accompany the accused to the accused's father's place. The witness stated that before they left the homestead he had confronted the accused about what the younger brother had told him that he had injured the deceased and accused had confirmed that; saying they had quarrelled and then he had injured the deceased.

PW3 further stated in his evidence that the accused had told him that he had injured the deceased with a knife once at the back and once infront on the chest. Once they arrived at the parental home of the accused accused was asked by his father, according to the witness if he killed the deceased and asked where the knife was and accused produced it and handed it to the father. The knife referred to was handed in before this court as exhibit '2'. Exhibit '2' was subsequently handed in at the police station by accused's father.

The Crown also led the evidence of PW4 7070 Sub-inspector German Nxumalo whose evidence corroborated that of PW3

7

in so far as the knife and also corroborates the evidence of the location of the fatal injuries which were inflicted to the deceased. PW4 stated that the accused had after he had been warned in terms of the Judges Rule opted to write a statement. From what the accused had said in his evidence and to a question put by the court to the accused it would appear that the statement which is extracurial statement was. exculpatory in nature and could not have been a confesion but the Crown again decided not to hand in the statement. From what the witness had said the court could only see the failure by the Crown to go into the question of extracurial statement that they failed to go into question of the admissability of such statement when made by an accused. This is so because the brother in law of the accused also confirmed that the accused had said he and the deceased had had a quarrel therefore it could never have been a confession because the accused had a defence and the deceased in the process was stabbed. Then it could never be a confession but at most it could be an admission coupled with a defence.

Accused also gave evidence and in his evidence he denied all evidence incriminating him with the stabbing of the deceased. The other occurrences as the group were walking along the accused admits. The accused also states in his evidence that when he arrived at his homestead he found his brother and it has not been given in evidence whether it is

the younger brother who subsequently went to the accused's brother in law to call the accused or an elder brother but he found his brother with a woman visitor who was apparently the girlfriend of his brother. He states that because of that reason he then decided to go and ask for accommodation at his brother in law's place; at a great inconvenience on the part of the accused because apparently at the brother in law's place there was no accommodation because he had to spend a night with nieces and nephews. The court can hardly be expected to accept this explanation because it could have been easier for the accused to find some accommodation at his parental home than going to the brother in law to seek accommodation there. Nor is the court prepared to accept the explanation of the accused's through the instructions he has given his counsel that his own father has falsely incriminated him into a crime for which the accused might likely be sentenced to death. Nor can the court find anything wrong with the evidence given by the accused's brother in law at whose place the accused had gone to find accommodation.

Mr. Maseko for the defence argued that the father of the accused ought to have been called by the Crown and the court cannot see what purpose that could have served because that evidence had already been given by accused's brother in law.

There has not been any reason advanced why the accused's

father and the brother in law would incriminate him falsely into a serious crime as crime of murder.

The court therefore rejects this version that he had gone to seek accommodation at his brother in law's place because his brother was with a girlfriend at his parental home.

I now turn to deal briefly with the extracurial declaration by the deceased that is the statement made out of court by the deceased. The court did not get any assistance from the two counsel inconnection with the statement made by deceased and such statements are very important in law. In terms of our law declaration made by a deceased person immediately prior to his death is admissible whether oral or written as an exception to the rule against hearsay evidence to show what occasioned his death provided the declarant refers to his death and that he was under a state hopeless expectation of death and further that he would have been a competent witness at the time of the declaration to give evidence himself. The ratio now behind this exception is that no person would wish to be untruthful just prior to his death. This is dealt with by the learned authors HOFFMAN AND ZEFFERT LAW OF EVIDENCE P.130 although at some point they also question the veracity of the statement I have just made. The following are the requirements before accepting a declaration of a deceased person in criminal trials:

1. the declarant must have died;
2. these statements are applicable in cases of murder or

culpable homicide and the statement can only be used to prove the way in which the deceased met his death. It can also be used even if it's in favour of the accused e.g. where it exonerates the accused. There is an old English case of SCAFE 1836(2) LEWCC150 where the deceased stated that he would not have been struck by the accused if he had not provoked the accused. That statement was acceptable as a dying declaration.

The court is therefore satisfied that the declaration made by the deceased prior to his death is

acceptable and admissable as evidence. In this particular case it is also reinforced by the evidence of PW2 who immediately after hearing what the deceased had said he also said 'Bheki had stabbed him' in other words confirming that the accused had stabbed the deceased.

Taking all these factors into account and the evidence in its totality the court is satisfied that the Crown has proved this case beyond reasonable doubt and found the accused guilty of murder.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

The court has considered the question of whether or not there are extenuating circumstances and I'll proceed to give judgment thereon.

11

On the 12th February 1997 I convicted the accused on the crime of murder and when I invited counsel to deal with the inquiry of whether or not extenuating circumstances were present Mr. Maseko on behalf of the accused applied that the matter be stood down to enable him to consult with the accused. When the matter was recalled at 2:15pm that afternoon Mr. Maseko informed the court that he had been instructed by the accused to extenuate from the bar without calling him to the witness stand. I then drew Mr. Maseko's attention to the inadvisability of adopting that procedure. Mr. Maseko informed me that he was aware of the procedure of calling accused person to the witness stand inorder to establish extenuating circumstances. Mr. Maseko then asked the court to have the matter postponed to the 18th to enable him to have further consultation with his client. However, on the 18th February 1997 when the matter was recalled Mr. Maseko informed the court that his instruction from his client is that he should address the court from the bar and the court afforded him that opportunity.

Mr. Maseko addressed the court. He drew its attention to the evidence of PW1 Phindile Matse and PW2 Sifiso Sihlongonyane their evidence were to the effect that the accused and his party had been drinking the whole day. The accused also confirmed this when he gave evidence. Mr. Maseko then submitted that notwithstanding that the accused had refused to extenuate on oath this was a fact that

12

evidence had been led to establish the effect.

Mr. Maseko then referred me to the following cases; REX VS NHLENYAMA and MAFA MABUZA VS REX all reported in the SWAZILAND LAW REPORTS 1970-76.

The Crown submitted that failure by the accused to go to the witness stand should entitle this court to draw an adverse inference and find that he has failed to discharge the onus of proving the existence of extenuating circumstances on the balance of probabilities. I asked the Crown to support its submission by any authority it was unable nor was I able to find it within the short-space of time that was at my disposal.

The court is inclined to agree with Mr. Maseko for the defence that the court can find that an accused has discharged on a balance of probabilities his onus of establishing extenuating circumstances from facts which had emerged from the evidence during the trial. Even before the accused is called upon to establish such circumstances at the end of the trial.

In practise it is not often that a trial court would indicate after conviction that it is satisfied that there are extenuating circumstances which have been established during the trial without the accused going to the witness

stand and the Crown counsel and defence counsel accordingly agree that Infact such extenuating circumstances have been established.

The court will refer to a page by the Court of Appeal of Swaziland on the case of PHILEMON MDLULI AND OTHERS VS REX. Also reported with the SWAZILAND LAW REPORT 1970-76 where their Lordships Justices Schreiner, Maisser J A and Milne J A presided over. In terms of that decided case extenuating circumstances were described as meaning any facts bearing on the commission of the crime which will reduce the moral blameworthiness of the accused as distinct from his legal culpability.

I have consulted a number of decided cases including those that Mr. Maseko referred me to and I found that these facts include but are not confined to the following:

a) the maturity of the accused person;
b) intoxication;
c) provocation;

The list is inexhaustible and secondly whether such facts as enumerated above in (a) in their cumulative effect by underlining the phrase cumulative effect has a bearing on the accused's state of mind in doing what he did and see whether such bearing was effeciently appreciable to albeit the moral blameworthiness of the accused in doing what he did. In deciding that the trial court exercises moral

judgment. If the answers to (a) (b) (c) is yes then the court will find extenuating circumstances has been established.

The court finds that the accused notwithstanding that he did not go to the witness stand to give evidence in establishing extenuating circumstances the court finds that from the evidence as a whole it has been established that he had taken drinks and that taken with the other factors such as considering why he had stabbed the deceased does not seem there had been some quarrel. The court finds that he was probably under the influence of liquor.
In the result the court finds that there are extenuating circumstances.

J. M. MATSEBULA

JUDGE