

IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.38/97

In the matter between:

REX

VS

SIPHO PHINEAS SIMELANE

CORAM : MAPHALALA A J

FOR THE CROWN : MR. J. MASEKO

FOR THE DEFENCE : MR. H. MDLULI

JUDGMENT

01/07/97

The accused is charged with murdering Zodwa Khumalo on the 5th December 1996 at Ngobeiweni by stabbing her with a knife.

On being arraigned, he pleaded not guilty to the offence and was represented by counsel.

It is not in dispute that the deceased died as a result of multiple stab wounds. In Dr. Reddy's post mortem report, which was admitted by consent at exhibit "A", he described the injuries of the

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person of the deceased in the following terms:

1. Abrasion left ala of nose 1.1 x 0.4cm;
2. Stab wound over left side neck slight transversely placed 1.2 x 0.5cm trachea deep involved muscles, left-carotid artery 3.7cm deep effusion blood in soft tissues edges cleanly cut sharp above downwards medially;
3. Incised wound adjacent to above injuries 1 x 0.2cm skin deep;
4. Incised wounds three in number over left should 0.6cm x 0.1cm, 1 x 0.3cm, 1.1 x 0.3cm muscle deep.

It is not in dispute that accused inflicted these injuries using the table knife which has been produced as exhibit "1". The Court observed that the said knife was sharpened on both side and has a very sharp point unusual for a normal table knife. The blade measured 8 centimetres.

The evidence of the Crown cannot tell us what happened in the hut where the stabbing took place and one has to consider whether the surrounding circumstances are such so to make accused's version incapable of being accepted.

The Crown called only three witnesses. The first Crown witness called was PW1 Linah Simelane who is the mother of the accused and the deceased's "mother-in-law." It emerged from the evidence that the accused and the deceased were live-in-lovers and the deceased for all intents and purposes was

regarded by her in-laws as a daughter-in-law in this homestead. The witness told us that at about 3.00pm she was at home when she heard the deceased crying inside her hut. She went to the deceased's hut. She found the door locked from inside and hence failed to open it after attempting to do so. This witness then went to her husband (PW2) to report the matter.

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She then together with her husband went to the deceased hut and they found that the door had been opened. She saw the accused holding the deceased with his left hand and carrying a knife on his right hand. She said she took the knife from the accused and the deceased at that point fell down next to the doorway as she was coming out of the hut and had blood coming out of her mouth.

She further told the court she did not hear any quarrel between the two prior to this incident. She did not notice anything peculiar with the accused prior to this incident.

She was cross-examined by the defence where it was put to her that the accused and the deceased quarrelled from time to time but she maintained that on that day she did not witness such a quarrel prior to the incident nor any unusual behaviour on the part of the accused towards the deceased.

The Crown then called PW2 Bulawayo Simelane who is accused's father. He told the Court that on the day of the killing he was seated inside his hut drinking traditional beer. At about 3.00pm he was called by his wife who reported to him that the accused was killing the deceased. He then rushed to where the couple were when he met the deceased who looked tired. The deceased thereafter fell down and died. The matter was then reported to the police.

The Crown then called its last witness PW5 2554 Constable Petros Muzi Mamba. He is the investigating officer in this case. He told the Court that on the 5th December 1996 he was on duty when he received a report from PW4 of the murder of the deceased at Ngobelweni. Acting on this report he went to the scene where he found the body of the deceased. He inspected the body and noticed that it had stab wounds on the neck and on the back. He arrested the accused.

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He cautioned the accused in terms of the Judge's Rules. The accused made a statement and this statement was entered as part of the Crown case as exhibit "B."

The Crown then closed its case. The accused then gave evidence under oath. He related the sequence of events leading to stabbing to death of the deceased. He told the Court that his wife the deceased died accidentally in his hands. The gist of his defence is that the deceased provoked him in that she spoke to him in an insolent manner and had taken some liquor - a habit he disapproved of.

He went to his father to enquire if the deceased had consumed any liquor. His father called her to ask her about this where she admitted that she had stolen the liquor. She then went back to their hut. The accused joined her after some time and found her seated on the bed. He greeted her and thereafter deceased asked him that they go to bed together. He declined telling her that he was still going to his father to discuss some family matters. The deceased did not take kindly to this and that is when another altercation took place. The deceased said that accused's family hated her and they did not want her in the homestead. Accused then hit her with the back of his hand. The deceased then took a knife and wanted to stab him. He avoided the blow and they fought for the possession of the knife.

When they were still fighting for possession of the knife the deceased grabbed him by his testicles and was about to lose consciousness. That is when he stabbed her.

The Court then entertained submissions from both the Crown and the defence.

The Court has looked at the evidence in its totality and also considered the submissions by both counsel. It is common cause that the deceased died as a result of the stab wounds. It is also common cause that stab wounds were inflicted by the accused inside a hut belonging to them

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both. The only person who know what happened that fateful afternoon is the accused. The other two witnesses (PW1 and PW2) did not tell us much to shed more light on what happened inside the hut.

The two witnesses told the Court that the relationship between the two was harmonious. The defence submitted that the accused was provoked by the deceased and after that the deceased grabbed at him and he slapped at the deceased. The deceased pulled up a knife from underneath a pillow and she attempted to stab the accused the accused was able to disarm her whereupon she grabbed at his testicles. He felt a lot of pain and reacted by lashing with the knife. According to the defence he then defended himself by the only weapon he had in his possession - the knife.

It is clear from the foregoing that the defence rely on the defence of provocation and self defence. I will proceed with the former. Provocation will only prevail as a defence if it resulted in a loss of self control to such an extent that the mental element requisite for murder may not have been present (See SIPHO ISAIA LUKHELE V R 1970 - 76 .S. L. R. 164. In the present case according to accused's version which is the only version of what happened in that hut the deceased provoked the accused by using insulting language where he slapped at her with an open hand. It is clear from this therefore, that accused had not lost all self-control at that stage. This defence would thus fail but can only be considered as an extenuating factor. As it is not a complete defence in our law.

Coming to the latter - the defence of self defence. In our law a person acting in self-defence may apply such force as is reasonably necessary in the circumstances to protect himself against an unlawful threatened acts reasonably in self-defence is an objective one. The force used must be commensurate with the danger apprehended; and if excessive force is used the plea of self-defence will not be upheld. (See R VS JOHN NDLOVU 1970 - 76 S. L. R. 389.

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In the present case it appears to me that the defence cannot succeed. The knife used was an extremely lethal weapon; and I do not think the accused was entitled to use it as he did by lashing at the deceased eight times as it is shown by the post-mortem report of Dr. Reddy. As much as the accused person was being held by his testicles I do not think he needed to have inflicted such injuries to repel the attack. Accused was arrested on the same day of the incident. The Court does not have evidence that accused sustained any injuries on his private parts to justify that he was held so tenaciously that he had to deliver so many blows on the deceased. The accused in his statement to the police does not say that the deceased was the aggressor. For the foregoing I hold that the accused acted excessively for the defence to succeed.

From the nature of the wounds I can only infer one intention and that was to kill. The accused used a knife not once but eight times. He was lashing at the deceased back reckless as to whether death could ensure or not. I do not believe that the deceased would have held on accused's testicles in the face of such an assault on her person.

I am forced by the circumstances of the case to return a verdict of guilty for the offence of murder.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

I find that there are extenuating circumstances. There is evidence that he was drinking on the occasion of the incident. Alcohol is to be taken, in my view, as a factor in deciding whether on the whole of the evidence his moral culpability for murder was diminished. I have also found in my judgment that there was some degree of provocation on the part of the deceased. This factor I have taken in your favour and it tends to diminish your moral blameworthiness.

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On the whole of the evidence, I consider that the proper conclusion is that there were extenuating circumstances.

SENTENCE

Murder is a serious matter. The Court in its rather short spell adjudicating here has found that there is an alarming rate of such cases where knives are used with fatal results. The Court is duty bound to impose a harsh sentence to send a message out there that such acts will not be tolerated.

The accused is sentenced to 12 (twelve) years' imprisonment backdated to 5th December 1996.

S. B MAPHALALA
ACTING JUDGE

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