

IN THE HIGH COURT OF SWAZILAND

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REX

vs

MANDLA ALFRED PHAKATSI

Crim. Case No. 120/1996

Coram S.W. Sapire

For Crown Mr. J. Maseko

For Defence Mr. A. Lukhele

Judgment

(25/3/97)

The accused Mandla Alfred Phakathi has been indicted before this Court on two counts.

Count 1 is that of murder it being alleged that in that upon the 17th January 1996 in the District of Manzini the accused acting unlawfully and with intent to kill did assault John Soul Dladla with a bush knife and inflicted upon him certain wounds and injuries from which the said John Soul Dladla died on or about 8th May 1996 at the RFM hospital.

The second count is one alleging that the accused is guilty of the crime of assault in intent to cause grievous bodily harm in that upon or about 17th January 1996 and at or near the same place in the district of Manzini the accused did unlawfully and intentionally assault Nompumelelo Dlamini with the intention of causing her grievous bodily harm.

As far as the first count is concerned it is common cause and it has been proved that the deceased died as a result of a wound to his head inflicted by the accused with a bush knife. It is also common cause that this happened on the same day as the events which gave rise to the incident and to the charge which is a subject matter of count 2.

As far as count 1, the count of murder is concerned there is a sharp difference between the crown version and the defence version as to how it came about that the accused inflicted the fatal blow. Nompumelelo Dlamini testified to the effect that the accused was at one time her lover. She says that by the time of the assault this relationship had long been terminated.

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There was evidence from the complainant on the second charge, Nompumelelo and her friend both of whom confirm that the relationship which had existed had come to an end. The evidence also is that the accused did not accept the state of affairs and molested the complainant and had threatened to

assault her. The complainant, Nompumelelo said that on the 17th January 1996 late in the afternoon the accused entered the flat in which he was living and apparently after some argument he actually assaulted her seriously enough to leave her distressed and crying. When her companions came back in the afternoon they took a message from her to the deceased who since the termination of her relationship with the accused had become her lover.

According to her shortly afterwards the accused returned and tried to force open the door of the room. At that time while he was trying to do this the deceased who had been summoned by the complainant's companions arrived on the scene. He was in the company of the two women who had gone to take the message. Nompumelelo did not see what happened outside her door and this evidence as to what happened is attested by the two women who were present. They say that when the complainant had been found in a state of distress they had gone to report the matter to the deceased who was a policeman living in the nearby barracks. The three of them went to the flat in which the complainant stayed and as they approached the flat they saw the accused trying to open the door apparently with the bushknife while his companion one Mefika Dlamini was standing at a window of the room. These two women Thandi and Khosi gave a description of how the accused was asked what he was trying to do and without any further ado the accused turned on the deceased, striking one blow with the bushknife on his head and ran away.

The deceased was given attention and taken to the hospital and the incident was then reported by them to the Police. Mefika apparently did not stay to see what happened and went home. Mefika was originally to have given evidence for the crown but was not called and I was given to understand that the crown was unable to locate him. He did give evidence later as the defence witness and I will later examine the effect of what he said.

Constable Erick Msibi of the Manzini Police Station received the report of the assault. He went to the hospital and checked on the condition of the deceased. The deceased was then treated and bandaged and the gravity of the injury was not then apparent. He then got information as to where the accused was employed and early the following morning he went to arrest him at his place of work which was a bakery. This was as I say about 4 o'clock in the morning. When the accused arrived at work he then confronted him and charged him with assault with intent to do grievous bodily harm. The accused took him to a homestead where one of his girlfriends lived and produced and handed to Msibi the bushknife which had been used in the assault. The accused then took him to the premises where Nompumelelo lived and pointed out the place where the assault had taken place this being near to the door of the

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room. He noticed bloodstains which started from that place leading towards the road.

Khosi as I have said was a sister to Thandi who collaborated her in most material aspects.

The accused gave evidence. In so far as the second count is concerned he admitted that he had assaulted the complainant but it was argued on his behalf that the evidence did not amount to an assault with intent to cause grievous bodily harm. It is always difficult to distinguish where a common assault is and an assault with the intent to do grievous bodily harm begins and in the present case the accused will have the benefit of a doubt in this respect.

John Saul Dladla who has been referred to as the deceased succumbed to the injury which had been inflicted upon him some weeks after the assault. The injury which had been inflicted apparently did not heal and there is sufficient evidence to connect this injury with the ultimate demise of the deceased. It

is for this reason that the accused now faces the charge of murder.

The accused version of the circumstances in which the fatal blow was struck are in many respects different from that to which the crown witnesses attested. The accused has told the Court that the relationship between the complainant Nompumelelo and himself never ended. He says that prior to the 17th January 1996 the time when he and the complainant were still lovers she told him that she would be away for sometime. Accordingly he made arrangements with another girlfriend to visit him at his home. According to him the complainant called at his home and found the other woman, one Lungile waiting there for the accused. He says that the complainant actually assaulted her rival and when he arrived back at his home this was recounted to him. He accordingly went to the complainant's flat and he admittedly assaulted her because he says she instead of going away for sometime had come unexpectedly to his home, assaulted his girlfriend and had been generally deceitful in her conduct in promising to go away which she had no intention of doing.

This I find to be an unlikely story notwithstanding that the accused called Lungile who supported him in the version he gave. When it comes to considering who is telling the truth I am satisfied that it is the complainant who is to be believed and the accused and his witness in this respect are not to be believed. But not much turns on this because whatever the reason the accused had no justification for assaulting the complainant on count 2 and whether it is the crown version or the state version which is accepted the gravity of the offence remains the same.

The accused says that having assaulted the complainant he then returned home where

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the witness Mefika Dlamini came and delivered some speakers which apparently were part of some audio equipment. He is supported in this by Mefika. They then went to try and buy a battery in order to test the speakers. It is the evidence of the accused that while he and Mefika were walking along a path which does pass the complainant's home but leads to the main road a group of persons confronted him. They were at least two women and one man. He heard someone pointing him out by name and that the man immediately gave an indication that he was approaching him for some reason.

The accused in fear of this person ran away and had reached a spot very near the main road when he found that he was no longer able to get away so he turned on his pursuer and drew from his trouser's belt the bush knife with which he had armed himself before setting out with Mefika to buy the battery.

This evidence if it were to be accepted would have the following effect: In the first place it would mean that Thandi and Khosi could not have seen the assault take place and it would also turn what is an unprovoked attack on their, evidence to something amounting to self defence in his story. The accused version is far less cogent than that of the state witnesses but there are some aspects of it which lead me to the conclusion that it cannot possibly be true.

The first is that his evidence is contrary to what he told Erick Msibi. It is true that he told Erick Msibi that he had struck a blow in self defence but it would be recalled that he told Msibi that this had taken place right outside the door of the complainant's flat. As I have indicated it was important for the accused to transfer the place of the assault to a point where the witnesses could be said not to have seen him strike the deceased. This is the most important point I find which militates against the acceptance of his version but there are others. His account of how he came to be in possession of a bush knife and how he drew it in self defence have an air of fantasy in it. This is especially so as he was seen by the crown witnesses using the instrument to try and gain access into the complainant's flat. The weapon was already in his hand when the deceased arrived on the scene.

The accused also called the witness Mefika Dlamini to support his version. In chief he did indeed do so but his story was exposed for what it was by the production of a statement made to the Police early in the morning of the 18th January 1996 some hours after the incident giving rise to the charges had taken place. This statement makes no mention of the accused being accosted by a group of people, it makes no mention of the pursuit of the accused by the deceased. The evidence given by this witness Mefika is entirely untrustworthy. And contradicted in most material respects by his earlier account.

The witness tried to explain the difference between the evidence he gave in Court and the statement by alleging that he was under the influence of liquor. He says that after he left the

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accused he went home and proceeded to drink whisky in such quantity as to make him almost immediately unconscious. For a whisky drinker as the witness gave himself out to be he was seemingly unaccustomed to the names of the different brands of whisky and did not know the difference between whisky and brandy. He also was unable to explain how he had time to sleep off the effects of the liquor he was still at 1.00 in the morning so bemused that he could not give the true account of what happened that evening. The evidence given by this witness has remarkable signs of having been coached in order to support the accused version.

That being so I must accept the crown version of what happened that evening and the question now arises whether an intent to kill has been proved. In my view there is room for doubt to this extent and that is that the accused was clearly of a jealous nature and clearly was disturbed in his attempt to enter the room of the complainant. He reacted almost immediately to this disturbance and clearly without thought and without putting his mind to it may have struck the blow in an effort to run away he being overcome as I said by emotion at the time. It is true he used a fearsome weapon in striking the deceased but I accept that he may have done so because it was the weapon which he had in hand and which he had with him for a different purpose altogether. It is doubtful whether he had what is called *dolus directus* which is a direct intention to kill and the intention which may have been attributed to him by the use of the weapon to inflict the wound is negated by the fact that his actions were immediate and impulsive.

I accordingly find him guilty on count 1 of culpable homicide and on count two he is found guilty of assault.

#### SENTENCE

You have been found guilty of two offences. One is the assault on the complainant who used to be your girlfriend, Nompumelelo and the other is of killing John Saul Dladla. I have taken circumstances in your favour to the limit in finding you guilty of culpable homicide rather than murder. But having done so you are nevertheless found guilty of Culpable Homicide as you have killed a man.

On Count 1 you will be sentenced to imprisonment for 12 years of which 4 years will be suspended for a period of three after your coming out of prison on condition that you are not hereafter found guilty of murder or culpable homicide committed during the period of the suspension.

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In regard to count 2 you will be sentenced to 6 months imprisonment which is to run concurrently with the sentence on count 1. The date of imprisonment and your sentence is to run from the 12th May 1996.

S.W. SAPIRE

ACTING CHIEF JUSTICE