

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

IN THE MATTER BETWEEN:                      CRIM. CASE NO. 108/98

REX

vs

CALVIN MAGAGULA

CORAM:                                              MATSEBULA J

FOR THE CROWN:                                MS. LANGWENYA

FOR THE ACCUSED:                             MR. B. SIMELANE

JUDGEMENT

01/12/98

The accused stands indicted on one count of murder. The allegation being that on or about 9th February 1998 and at or near Herefords in the Hhohho District the accused did unlawfully and intentionally kill one Zwelithini Msweli.

According to exhibit "A" the report on post mortem examination which was handed in by consent and whose contents are not challenged, the deceased died as a result of complication consequent to abdominal injury involving the intestines. The report reveals the following:

(a)      Dressing over front right abdomen, back of left abdomen and left forearm.

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(b)      Sutured wound oblique 10cm present over front of abdomen right side present, involving a dissected muscle, peritoneum, repair of small intestine loop. This also involved the large intestines.

(c)      Sutured wounds over back of left abdomen +/- 6cm, left forearm +/- 5-6cm muscle deep.

(d)      Cut wound over lower third of forearm 1.9 x 0.3cm deep.

From the contents of exhibit "A" it is clear that a number of stabbings occurred. Also, handed in was exhibit "1" a certain dagger type of a homemade knife which it is common cause was the knife used in inflicting the injuries on the deceased. The accused has admitted that he inflicted these injuries on the deceased. The accused says he inflicted these injuries in private defence. He says the deceased approached him from behind and grabbed him by putting his arms around the accused's neck and strangled him. It was his evidence that in the process the deceased fell on the ground and rolled. Accused stated in his evidence in chief that it was as they rolled that he stabbed the deceased.

Mr. Simelane appearing on behalf of the accused drew the Court's attention to the conflicting accounts given by PW1 and PW2. PW1 told the Court that he had warned accused and deceased to stop arguing, as they were drunk. He told them they would talk about the matter the following day.

PW2 on the other hand says PW1 had actually separated the accused and the deceased and the deceased had slipped and fell. This conflict arose under cross-examination of the witnesses by Mr. Simelane.

PW1 said in his evidence in chief that a boy had tried to assist the deceased but found that the deceased had already been injured. The Court does not consider these conflicting versions to be of such a degree that it could affect the credibility of either PW1 or PW2. There is evidence that there were +/-11 people present at the time of the stabbing and any

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witness can easily confuse the sequence of events. What I have said above also apply to what the accused said he left the place and came back again.

I find the evidence of PW1 and PW2 corroborative in so far as the deceased putting his arms around the accused's neck and their account of what happened shortly thereafter. I also accept the reason why PW1 says accused went to fetch the knife at home. PW1 stated under cross-examination and I quote: "Before accused left for his home one could not see the knife sticking out of his trousers but after he came back one could see it sticking out."

Accused has given evidence and in his evidence in chief and also under cross-examination he raised private defence as the reason why he stabbed the deceased. His account of how the deceased strangled him differs substantially from the accounts given by PW1 and PW2. The accounts given by PW1 and PW2 were unfortunately not challenged by the defence. According to PW1 and PW2 deceased put his arms around the accused's neck and the two fell to the ground. The accused, according to this evidence managed to get on top of the deceased, produced a knife, and stabbed him four times.

I accept the version given by PW1 and PW2 as to what happened prior to the stabbing and on the basis of their version, I find no substance at all that the accused would have stabbed the deceased in self-defence.

Ms. Langwenya referred this Court to the case of SHIBA VS REX 1977/8 a case dealing with the question of self-defence, limitation thereof. In that decision a Court is cautioned about being careful not to adopt an attitude of an armchair critic. The test being an objective one, the Court should as far as possible imagine itself in the position in which the accused was. See in this regard REX VS K 1956(3) SA 353(A).

According to the evidence of both the accused and that of the Crown witnesses the accused was sitting minding his own business when suddenly the deceased grabbed him

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from behind and strangled him. They both fell and the accused states that he had suffered shortness of breath, the deceased was, according to the accused, on top of him and busy strangling him. The accused states that as they rolled the deceased got stabbed on the back, the arm, the hip and the side of the stomach. The accused states that he stabbed him because and I quote: "He was strangling me and I could not breathe."

PW1 testified that the deceased had put his arm around the accused's neck and that they had both fallen down. Accused had managed to get on top of the deceased, produced a knife and stabbed him. PW1 said nothing about the accused and deceased rolling on the ground and as I have already indicated this was never put to the witness to challenge their story. PW2 corroborated PW1's evidence in so far as the falling onto the ground is concerned. Here again, the version about the rolling on the ground and being further strangled according to the accused by the deceased was never put to the witness.

The effect of failure by an accused to put his version to Crown witnesses especially where an accused is represented places the trial Court in a very difficult position in that it becomes difficult to accept a story told by an accused person for the first time, in his evidence in chief, when it was never put to the witness to test the veracity. I am aware that I should not read too much into the failure of the defence to cross-examine Crown witnesses. The onus to prove the case beyond reasonable doubt being always on the

Crown but where factors which are material in the defence case are not put to the Crown witnesses, the trial Court is entitled, at the end of the day, to take cognisance of such failure to cross examine. To this end, in fact the Crown counsel has suggested that this was never put to the witnesses because it was an afterthought.

I now turn to consider whether on the evidence before this Court the accused can be set to have actually foresaw the possibility that his conduct might cause death. This enquiry is directed to all the circumstances having a bearing on the accused. The Court asked the accused how it was that he remembered the events so well and yet he had been drinking. To this, the accused responded that he was drunk but not too drunk. The Court in order

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to determine the accused's state of sobriety takes into consideration his evidence in chief and his answers to the questions put by the Crown. The accused displayed a very clear recollection of the events on that day.

I am therefore satisfied that although he had been drinking, he was not so drunk not to know what he was doing. I am taking into account the nature of the weapon he used to stab the deceased with, the number of times he stabbed him, I find that he foresaw what the consequences of his act would be. I reject his evidence that as they rolled on the ground the deceased was still strangling him. I find that after the initial strangling of the accused by the deceased there was no need for the accused to use a knife against an unarmed man at all. I hasten to add that had the deceased not started strangling the accused in the first place, the fight could not have occurred. This fact however, does not, in my judgement detract from the fact that the accused inflicted about four stab wounds on the deceased who was not armed at all. I find that the accused had the intention of bringing about the death of the deceased. I find further that the accused was not so inebriated to the extent that he did not know what he was doing. As for the defence of private, I reject that the accused was acting in self-defence, if anything the accused was being the aggressor at this stage, he stabbed the deceased.

In the result I find the accused guilty as charged.

J. M. MATSEBULA

JUDGE

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