CRIM. CASE NO. 49/97

In the matter between

REX

VS

VELAPHI SIMON MAGAGULA

Coram	S.B. MAPHALALA – J
For the Crown	MS S. NDERI
For the Defence	MR. M. MAHLALELA

JUDGEMENT
(09/12/98)

Maphalala J:

In this case, Velaphi Simon Magagula is charged with the crime of murder in that upon or about the 11th February 1997 and at or near Timpisini area in the Hhohho Region, the accused did unlawfully and intentionally kill Nkwili Dlamini.

The accused pleaded not guilty to the crime. He was represented by Mr. Mahlalela and the crown is represented by Miss Nderi.

The evidence of Majuba Dlamini who is cited as PW8 in the crown's summary of evidence was dispensed with and it was agreed that the identity of the deceased was not in issue. So was the evidence of Dr R.M. Reddy who is cited as PW9 in the summary of evidence by the crown was entered by agreement. The witness is the Government Pathologist who conducted the post- mortal on the deceased body. He recorded his findings in a report. The report was entered to form part of the crown's evidence as exhibit "A". The good doctor in his "remarks" stated that the cause of death was a "head injury".

The crown called five witnesses to prove its case.

The first crown witness was PW1 Petunia Zodvwa Gwebu who told the court that on the 11th February 1997, she was at home in the company of Nomcebo Dlamini who was called as PW2 by the crown. They were having marula beer. The accused arrived riding on a bicycle. On arrival the accused made allegations to the effect that someone had stolen from him for purposes of muti. Initially the allegation was not directed at anyone but the accused soon made it plain he was referring to the deceased. The deceased all along had been sitting quietly drinking his liquor. It appeared a confrontation was brewing and an attempt was made to have the accused leave peacefully. This failed and the accused started fighting the deceased. The deceased tried to retaliate but could not. The deceased went towards the goat's kraal

and the accused went to his bicycle. The deceased came back and sat down again. The accused came to where the deceased was and at that time he was carrying a stone. The deceased stood up again and went to the goat's kraal. The accused followed the deceased and took a stick and hit the deceased with it. He beat the deceased with the stick and thereafter they started fighting. They fought and it appeared that the deceased was losing the fight. The deceased would fall down every time he was hit by the accused. They continued to fight and went towards the goat's kraal. The accused then picked a pole from the goat's kraal and hit the deceased. He hit him on the forehead. The deceased fell down. He continued to hit him. He was hitting him on the back of the head. They then raised an alarm but no one came to the scene to assist. The accused stopped hitting the deceased. He then came to where they were and said he did what he did to the deceased intentionally as the deceased was the one who was bewitching him. The accused then left and took his bicycle. PW1 stated that the fight took about five minutes. The deceased then was sprawled on the ground. He was facing down and not moving. They then reported the matter to the elders in the homestead.

This witness was cross-examined at length by the defence counsel. The thrust of the defence cross-examination was that it was the deceased who provoked the accused that day and this culminated in the fight between the two. In my view, the witness answered candidly and proved to be an honest and credible witness and she answered in the negative.

The crown then called PW2 Nomcebo Treasure Dlamini whose evidence is materially similar to that of PW1 and I am not going to outline it for the sake of brevity. She was briefly cross-examined by the defence however nothing of substance came out of it.

The crown then called its third witness PW3 Makhundu David Thwala. He told the court that he was an induna of the area. That on the 11th February 1997,he received a report concerning the accused. Acting on the report he went to the accused home. On the way he met the accused. He charged the accused for the crime. The accused did not say anything but he asked him if the deceased was really dead and he answered him in the affirmative. He then arranged for a motor vehicle that the accused be taken to the police station as in his opinion this was a police matter. The accused was arrested. This witness was cross-examined briefly and nothing of relevance came out of the cross-examination.

The crown then called its fourth witness PW4 Sergeant S. Mlilo who told the court that he was on duty at Horo Police Post on the 11th February 1997. The induna of Msahweni, (PW4) arrived at the station and made a report that he was bringing in the accused who had caused the death of the deceased. He took the accused and placed him under arrest. He contacted the Piggs Peak police station and made a report. Officers from Piggs Peak came to Horo Police Post and he went to the scene where they found the deceased already dead. The deceased body was removed to Piggs Peak mortuary.

The crown then called its fifth and last witness PW5 D/Inspector 1571 J. Ndlela who told the court that he received a report concerning the death of the deceased and

arrested the accused from Horo Police Post. He was directed to the scene at a homestead in the Timpisini area. PW1 showed him the dead body of the deceased. The body was lying on the ground next to a goat's kraal facing down. There was a pool of blood. He removed the body to Piggs Peak Government mortuary. On the 12th February 1997, he collected the accused from Horo police post. At the scene he was shown by the accused the log which was alleged to have been used in the commission of the offence. The accused gave a statement of why they fought with the deceased. The statement was taken after the accused had been cautioned in terms of the Judges Rules. The statement, to wit, RSP 218 was entered as part of the crown case as exhibit "C". The officer then took photographs of the scene of crime. The photographs were entered as exhibit "B" collectively as part of the crown's case. The accused also told him that he sustained an injury in his right leg as a result of the fight he had with the deceased. The witness took the accused to Piggs Peak clinic for treatment where he was attended by Dr. Ongole on the 17th February 1997 and remarked that the accused had a "wound on the right lower leg which is about 1-2cm wide and chronic cannot be ascertained to one week of injury" (per exhibit "D"). This witness was cross examined at length by the defence and it was suggested to him what is contained in exhibit "C" – the statement by the accused was suggested to him (accused) by PW5 and other officers who were interrogating him. The witness maintained that was not true.

As post script to the crown case exhibit "C" the medical report compiled by Dr. Ongole who examined the accused at the Piggs Peak clinic was entered in terms of ***Section 221 of The Criminal Procedure and Evidence Act (as amended)*** and the defence did not offer any opposition.

The crown then closed its case.

The accused took the witness stand being led by his attorney in chief. Accused story is that he knew the deceased prior to the incident, which is the subject matter of this court case. He had hired the deceased to build him a house but deceased only built up to the foundation level of the house. He told the court that he owned goats. On another day while the deceased was still under his hire he noticed that one of his goats had its horns out on the sides. He then went to consult a traditional doctor to find out what had happened. The traditional doctor told him that it was the deceased who had cut the horns of the goats. He believed this. However, he did not confront the deceased with this because the deceased was no longer coming to his homestead to finish the house. On the 11th February 1997, he left his home at about 2.00pm to the shops. He bought the items he needed. He then went to Fiburfdo's homestead where there was maganu brew to quesh his thirst. When he entered the gate of that homestead he saw the deceased. He felt scared when he saw him and that he heard was the one he heard from the other witnesses. The reason he forgot is that he once had a mental illness. He was mentally ill that day. After his arrest he was taken to the National Psychiatric Centre for examination. This is the long and short of his testimony.

The accused was cross-examined at length by the crown where it emerged that there was a glaring contradiction in what he said in chief and what he wrote in his statement which was handed to the court. In his evidence in chief he told the court that what he

knows about the offence is that he heard from the crown witnesses yet in his statement at the police station he explained in graphic terms what he did that day up to the fight which ensued between him and the deceased and eventually led to the death to the deceased. The accused failed to reconcile this glaring inconsistency. It was also revealed in cross-examination that there were a number of questions material to the defence case, which were not put to the crown witnesses. The accused failed dismally to explain this anomaly.

The defence then called the evidence of DW2 Dr. Rogers Ndlangamandla who is a Psychiatrist at the National Psychiatric Centre in Manzini. He told the court that he examined the accused on the 20th February 1997, and compiled a report of his findings thereafter. He read the entire record of the report but what is of interest to this court is his opinions at page 2 of the report paragraph 4 which reads as follows:

> "Mr. Magagula is therefore diagnosed as suffering from epilepsy. It is concluded that during the commission of the crime he had a perfect of reasoning caused by his epilepsy, i.e. he had a seizure attack such that at the time of the criminal conduct he lacked substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of the law".

He was cross-examined by the crown where he disclosed that he did not ask other people around the accused and also that he only had one interview with the accused.

The defence then closed its case.

The court then heard submissions from the crown and from the defence.

Miss Nderi for the crown submitted that it was common cause that the accused went to the shebeen and it was also common cause that he provoked the deceased and hit the deceased with a log. The issue that lies for determination is whether the accused acted with full mental capacity. A person is presumed to be sane and the onus is on the accused to prove that he was insane at the time of the commission of the offence. To support this proposition Miss Nderi cited the case of ***Rex vs Kaukakani 1947 (2) S.A. 807*** where the court in that case held that in cases in which the defence is insanity the onus is on the accused to satisfy the court upon a preponderance of probability that he was insane. The court was further directed to the dicta in the case of ***R vs Kennedy 1951 (4) S.A. 435 – 438*** in support of the same proposition.

Miss Nderi contends that the crown's evidence shows that there was an involved fight between the accused and the deceased and the accused spoke that he had a belief in witchcraft. After the deed he spoke to PW1 and PW2 and appreciated the wrongfulness of what he has done. She referred the court to the case of ***S vs Loubscher 1979 (3) S.A/ 47 (AD)*** that when an accused is charged with murder evidence in connection with his mental condition must be connected with the facts of the particular case. The duty of experts on mental condition should not be merely to express general opinions, which in the medical field can perhaps be regarded as well-founded, but to give his opinions with a proper appreciation of what the task of a trial court is in the application of the criminal law and particularly in the consideration of criminal responsibility and criminal liability. It is the crown case that in the case in

casu the expert had not related his opinions with the facts of this case. She further referred the court to ***S v Harris 1965 (2) S.A. 340*** to drive home the point. Miss Nderi contended that the defence was adopting a hydra-headed defence. PW1 cross-examination was geared to show that the accused person was defending himself when he assaulted the deceased with the log. It was never put to the witness that the accused acted automatically in a fit of epilepsy. To this effect she referred the court to the ***dicta*** in ***S vs P 1974 (1) S.A. 581 (A)*** where Macdonald JP at page 582 has this to say:

> "It would be difficult to over-emphasize the importance of putting the defence case to the prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial, so important is the duty to put the defence case that practitioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court.

On the other hand the cross-examination of PW2 was geared to show whether or not the accused was drunk and also that he was not abnormal.

Miss Nderi argued further that the statement made by the accused to the police differs materially to what the crown witnesses said. If it should be taken that he wrote in the statement about what the witnesses had said there should be corroboration. To this effect she cited the case of ***S vs Van Zyl 1964 (2) S.A. 113 (AD)*** where an appellate had been convicted on a charge of murder, the defence raised (1) automatism and (2) irresistible impulse. The Court of Appeal found that the appellant by her conduct and actions at the time of the alleged shooting of her child showed that she knew what she was doing, and that the evidence militated against the existence of an irresistible impulse. The court held that the appeal from conviction should be dismissed.

She argued further that medical evidence is opinion evidence it only guides the court and is not binding. To this end she referred the court to the case of ***S vs Hutchinson 1990 (1) S.A. (AG Compilation) 149.***

The crown is of the view that the accused was actuated by his belief of witchcraft. In the event the court is entitled to return a special verdict in terms of ***Section 165 of The Criminal Procedure and Evidence Act (as amended).*** Dunn J in ***The Criminal Case No. 112/98 The King vs Simon Mashiphisa Mngometulu.***

The defence on the other hand is of the view that the evidence shows that all the elements of murder are satisfied. However, accused did not have intent. The accused person has been honest when giving evidence. Dr. Ndlangamandla said the accused person was insane when he committed the offence. The evidence of accused should be believed. The defence of insanity was proved. He referred the court to the case of ***Rex vs Simon Mashiphisa Mngometulu (supra).*** That in the present case the court can correctly reach a special verdict in terms of Section 165 of the Penal Code. He further referred the court to the case of ***S vs Mahlindza 1967 (1) S.A. 408*** to support that proposition.

On points of law Miss Nderi argued that the ***Mashiphisa*** case (supra) the accused killed all three people and it cannot be said that the violence was directed at a

particular person.

These are the issues before court. I have taken into consideration all the facts presented before me and also the congent arguments presented particularly from the crown. I have also availed myself to the legal authorities cited. It is common ground that the deceased died as a result of the actions of the accused on that particular day. The central question which is to be determined by the court is whether or not the accused when he committed the offence he was insane or not or that his prior mental problem as the crown contends has nothing to do with his conduct that day as his action showed that he had a bone to chew with the deceased for bewitching him and he did just that. The accused tells the court in chief that he experienced an epileptic seizure immediately he saw the deceased and he couldn't recall what he did thereafter. It is also put to the crown witnesses by the defence that what the accused knows about this incident is derived from what he heard from them. But this is contrary to the statement the accused made to the police. The crown witnesses did not know that the accused had been bewitched by the deceased who had cut the horns of one of his goats. Only his wife knew that. It appears to me that the accused is hiding behind the veil of insanity to wish away the consequences of his actions that day. His defence counsel put contradictory questions to the crown witnesses. One witness told the court that the accused was defending himself and the other crown witness (PW2) told the court that the accused was drunk and was acting in an abnormal fashion. Defence counsel does not put pertinent questions to the crown case (see ***S vs P (supra)*** and the dicta by Hannah CJ in the case of **The King vs Dominic Mngometulu and others Case No. 96/94 (unreported)** at page 17 where the learned Chief Justice had this to say on this point:

> "It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of the prosecution witnesses testimony may place the defence at risk of adverse aspects being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an adverse inference may be made that at the time of cross-examination his instructions where that the unchallenged item was not disputed by the accused, and if the accused subsequently goes to the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence accurately. If he does not and accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused story".

The actions of the accused that day showed a rational and methodical person and do not indicate at all that he was in a seizure of some sort. The accused before he went to the shebeen where the killing took place had something against the deceased. Upon his arrival there he started to taut the deceased to a fight until the two were engaged in a fierce fight which resulted in the death of the deceased. I agree with Miss Nderi that evidence in connection with mental condition must be connected with the facts of the particular case. The duty of experts on mental condition should not be merely to express general opinions, which in the medical field can perhaps be regarded as well-founded but to give his opinions with a proper appreciation of what the task of a trial court is in the application of the criminal law and particularly in consideration of criminal responsibility and criminal liability (see ***S vs Loubscher***

(supra).

The accused action before the assault on the deceased, as witnessed by PW1 and PW2 was rational. Rational behaviour of the accused before and after indicate that all faculties were not impaired by the condition of epilepsy at the material time. There is evidence that accused told PW1 and PW2 at the scene after the killing the deceased that he knew what he was doing and he repeated that to the induna of the area. (see ***S vs Hutchison (supra))***. I agree in ***toto*** with the lucid a submission by Miss Nderi in all respects and hold that ***Section 165 of The Criminal Procedure and Evidence Act (as amended)*** cannot be invoked in the face of sheer depta and breath of the crown case.

In the result, I find that the accused had the necessary intention to kill the deceased actuated by his belief in witchcraft all facts before me points towards that direction.

The accused is found guilty as charged.

S.B. MAPHALALA
JUDGE