

IN THE HIGH COURT OF SWAZILAND

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CASE NO. 83/95

IN THE MATTER BETWEEN:

REX

VS

SIGAGA DUBE

CORAM: S.B. MAPHALALA - A J

FOR CROWN MR D. WACHTRA

FOR DEFENCE: MR N. HLOPHE

JUDGEMENT

(04/05/98)

As a foreword to this judgement I wish to fully associate myself with the sentiments expressed by Mr Hlophe for the defence in his submissions at the close of evidence that this is a sad and unfortunate case. The sadness of this case will unfold as I proceed with my judgement.

The accused person is charged with the murder of Phineas Mkhonta. The crown alleges in its indictment that upon or about the 3rd June, 1995 at Mahlabatsini area in the District of Manzini the accused did unlawfully and intentionally kill Phineas Mkhonta.

The crown called four witnesses to prove its case and the accused gave evidence under oath in his defence. The accused pleaded not guilty to the charge.

The evidence of the crown as deposed by these witnesses is that at around 7.30pm the deceased came at the home of the accused where he was renting a room. The accused was his landlord who had seven other tenants renting around accused's house. This is common in the peri-urban areas around Manzini where such arrangements offering accommodation to people working in Manzini and Matsapha Industrial Site. The deceased was in the company of a newly found girlfriend one Xolile Lokotfwako who was introduced by the crown as PW2. In that homestead there was deceased's other girlfriend by the name of Jabu Rose Lukhele who was introduced as PW3 by the crown. PW3, it appeared from the facts, had been a long standing girlfriend to the deceased as they had children born out of wedlock. PW3 used to stay together with the deceased for sometime until her parents advised her to find alternative accommodation as they did not like her staying together with the deceased out of wedlock. PW3 then rented a house in the same homestead of the accused to be in close proximity with her loved one. On that day the deceased

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had left his house keys with her telling her that he was not coming home that night as was visiting with male friends. The deceased action of coming with PW2 the newly found girlfriend arose the mire of PW3

who it appeared from the facts claimed to have more right to the deceased's affections. PW3 was full of jealousy about this and she proved that by her subsequent actions towards these two love birds. The actions of PW3 reminds one of the sentiments expressed by William Congreve in his work titled The Morning Bride where he had this to say:

"Heaven has no rage like love to hatred turned, nor hell a fury, like a woman scorned". Coming back to the case the deceased demanded his keys he had left with PW3 that morning. PW3 kicked a storm and a struggle ensued over the possession of the keys until both parties fell down and deceased struck PW3 with an open hand. The fracas ensues for sometime until PW3's brother who had come to visit PW3 with her girlfriend intervened and admonished her sister to give the keys back to the deceased. PW3 grudgingly gave the deceased the keys. The deceased then invited PW3 and PW2 his new girlfriend to come to the room so that they settle matter but PW3 refused and stormed to her room.

The two entered the room and at about 8.00pm when they were just preparing to go sleep someone threw an object through the window and a window broke . This angered the deceased but at this stage he did not take any action. Evidence of PW3 confirms that she was the one who threw a litre bottle in a spate of jealousy. Again at about 10.00pm another object was thrown in breaking a window and again the deceased kept his cool under the circumstance. Round about 1.00am another brick was thrown breaking a window. There is variation in the versions by PW2 and PW3 on the number of times the breaking took place and the time but it is established fact that PW3 did smash the windows of deceased house a number of times and there is agreement that PW3 made such an excursion at 1.00am which is the time crucial to this case.

The last occasion PW3 threw a brick at 1.00am was the straw that broke camel's back (so to speak). As far as the deceased was concerned his anger may perhaps be understood of being denied the opportunity to consummate his newly found love by PW3's jealous spats. Evidence of PW2 which was not challenged is that he then took his knopstick and furiously stormed out of the house in pursuit of this offending jealous girlfriend. Other tenants heard these disturbances including the accused who earlier on at 10.00pm went out to investigate thinking there must be a break-in going on. As that area was notorious for such crimes . On the second occasion he went out to investigate at 1.00pm he armed himself with a spear that is the tragic time when deceased was also coming out of his house at the same time. The accused testified that he saw two dark shadows but he could not tell exactly but they appeared to be two people lurking about in the shadows of the night. It was dark wintry night in the deep of night. What came to his mind is at that time these were thugs committing a break- in. At that very moment one of the shadowy figure approached him at great speed. He then realised that it was a man carrying a knopstick coming towards him in a violent manner. The figure made contact with him and went through a spear he was carrying and it pierced the man and broke inside the man's upper body.

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He remained with the handle of the spear. The man which he believed was a thug ran crying through the gate out of his homestead. He then placed the remains of the spear in a fowl run. He went back to sleep thinking he had injured a thug who has been responsible for these unusual noises. He woke up at 4.30am and went around the tenants houses to find out if they also heard these noises. One tenant confirmed this and this was a crown witness by the name of Mvuselelo Gwebu. PW2 when asked by the accused confirmed that the deceased went out of their room at 1.00am in an angry mood chasing after his other girlfriend (PW3) who was causing all this fracas. It then dawned on him that the shadowy man was the deceased one of his tenants. Mvuselelo Gwebu also confirmed that when the accused approached him about this matter accused did mention He went out at night with a spear and a man got stabbed who he thought was a thief. He then went around the homestead to check for the deceased and about 100metres away from the homestead he found a body of the deceased sitting behind a fence, dead. He then went to his house and took a blanket and covered the deceased. He then went straight to the Manzini Police Station and related the whole saga to 730 Inspector Myeni who was introduced as PW4 by the crown. The officer duly cautioned the accused in terms of the Judges Rules and they proceeded together to the

scene. The officer inspected the body and found that it had a gaping wound at the front and back of its upper body. He then took the accused to the police station and again cautioned him where accused made a statement. The accused was then charged for murder and detained. The prosecutor Mr Wachira then related from the bar that on perusal of the record the DPP found that the charge was that of lesser offence of culpable homicide and was granted bail and he paid the bail and was released. It appears from what Mr Wachira told me that there was some pressure coming from the relatives of the deceased who were baying for accused's blood for killing their loved one. The charge was changed for some reason I did not understand when Mr Wachira related this to the court to that of murder. The accused was subsequently re-arrested and kept into custody pending his trial. These are the facts of the case. The facts appear simple prima facie. However, in my view they raise a number of vexed questions of law.

At the close of evidence the crown and the defence made submissions in the normal way. Before getting to that I must mention that the medical report was entered in terms of section 221 (as amended) of The Criminal Procedure and Evidence Act (as amended). Mr Hlophe objected to the submission of the medical report in the absence of the doctor who compiled it. His gripe was that this would be prejudicial to his client's defence. However, I overruled the objection on the basis that as I was informed by the crown from the bar and it appeared to be common knowledge that Dr S.D. Berson the pathologist has long left Swaziland after the expiry of his contract. Also I was fortified by the proviso to section 221 of the Act that it would not be prejudicial to the accused as the pathologist's report does not link the accused with the death of the deceased. It merely records the cause of death without apportioning blame to anyone about the death of the deceased. Another reason that made me come to this decision was because the tenor of the defence cross-examination put to crown witnesses was that accused stabbed a man thinking it was a thief. I do not believe I was wrong in overruling Mr Hlophe's objection.

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The crown in its submission conceded that the accused has established a defence of mistake of fact and that of private defence commonly known as self defence. The crown urged the court to adopt a subjective view in deciding this. I think Mr Wachira acted properly and was candid to the court under the circumstances.

Mr Hlophe for the defence echoed the crown's sentiments and I am not going to outline them here, least I be guilty of repeating myself.

The main issue to be determined is whether or not the accused is guilty of murder and if not, is he guilty of a lesser offence that of culpable homicide. These are the vexed question I have mentioned earlier on and I will proceed to determine them and will try to explain them in laymen's term if I can, in view of the sensitive nature of this case.

Murder is the unlawful and intentional killing of another person. In order for the crown to prove murder it has to prove all the elements of the crime. These are: (i) unlawful, (ii) intentional, (iii) killing of another person. Now looking at the facts of the case it is clear as day that the accused did not have the intention to kill the deceased that particular night. His evidence which largely went unchallenged when he said he thought the figure he saw that night was that of a thief was causing these unusual noises. This evidence is supported by that Mvuselelo Gwebu (PW1) who told the court that when the accused came to his house in the morning he informed him that he injured a thief who was terrorising the occupants of his homestead. To me these are not the actions of a man who had the requisite intention to kill the deceased. The manner in which the deceased was killed as I have outlined above does not indicate any pre-planning on the part of the accused to kill the accused, in particular that dark night.

The accused has raised two defences which are largely conceded by the crown. I am going to define briefly each defence and the way it affect the blameworthiness of the accused.

I will proceed with the defence of mistake of fact. In our law where a person does an act in ignorance of,

or mistaking, the true circumstances or consequences, for instance, X assaults his friend Y believing him to be a burglar ignorance or mistake of fact negatives mens rea in the form of intention, and provided it is reasonable, it shows an absence of negligence. (see Burchell Hunt's South African Criminal Law and Procedure (Vol 1) and the cases cited there at page 250 - 251). It is clear therefore for the reasons advanced above that the accused in the case in casu is entitled to be acquitted forthwith.

Now I shall proceed to explore whether the accused was negligent to be found guilty of culpable homicide a lesser offence after murder has been disproved. In the Appellate Division case of R vs Mkize 1951 (3) S.A. 28(Ad) Centlivres CJ considered a similar situation. In that case the court having found the accused not guilty of murder since she lacked the intention to kill her husband owing to her bona fide belief that arsenic which she administered was a love potion went on to consider her belief that it was a love philtre was not a reasonable one and that

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she had, therefore, been negligent, the court substituted a verdict of guilty of culpable homicide. Mkize would have escaped liability for culpable homicide too if her belief was not only bona fide but also reasonable, since in the circumstances even negligence would be excluded. (See Burchell & Hunt at pages 258 - 259)(Supra).

Clearly, in the present case in view of the circumstances of the case there was no negligence on the part of the accused. He had a bona fide belief that the shadowy figure approaching him in the dark was a thief. He would therefore, in law, be exonerated in respect of the crime of culpable homicide and be entitled to his freedom.

Now I come to the second prong of his defence that of private defence. In our law the use of force would ordinarily be criminally justified if it is necessary to repel an unlawful invasion of person, property or other interest. This defence is a complete defence which means in the event it is not disproved by the crown the accused is entitled to an acquittal. There is a plethora of cases decided by this court over the past years to confirm this as stated law in this country. (Refer to R vs Mgijija Same Dlamini and others 1970 - 76 S. L. R. 53 and Shiba vs R 1977 - 78 S. L. R. 165). Here again the facts of this case are clear that the accused went out that night armed with a spear to investigate a burglary that he suspected was being perpetrated within his premises and was in fact entitled to do so as the landlord of the establishment. He would again be entitled to be acquitted forthwith on this ground as the crown did not disprove it. The story given by the accused to me, at least, is reasonable (see R vs Difford 1937 AD 370 at 373) and I have no reason at all whether on the a question of law or of fact to reject it as false. His story is to a large measure confirmed by the evidence of the crown witnesses.

It is clear therefore from foregoing that the accused is neither guilty of murder nor of a lesser offence of culpable homicide. I thus find him not guilty and he is acquitted forthwith. As a matter of comment it is clear from the facts of the case that PW3 (the original girlfriend) was an unknowing catalyst to this tragic coincidence that subsequently unfolded due to her jealousy. I must state though that no blameworthiness should be placed on her as she acted her natural instincts which unfortunately had dire consequences.

Now in conclusion, I wish to address myself on the revenge which seems to be planned by the relatives of the deceased. I do understand their sense of rage at losing a loved one under such circumstances. But I implore them to look at the facts of the case very carefully. The accused and the deceased were more or less friends in that the deceased would act as a caretaker landlord in the absence of the accused when duty called as he was a soldier by profession and would be called from time to time to come and execute his duties. There was a bond between the two which fate determined one would die in the hands of the other. We mortal souls do not know the workings of Providence. They must also ponder hard in the face of the facts that the family of the accused sent a mourning delegation in the Swazi traditional way. This to me, at least, shows that they shared the pain the relatives of the deceased felt that their own kith and kin has caused

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this tragedy.

I strongly appeal to them not to resort to self-help and take the law into their own hands as that action would erode the very tenets of the rule of law we are trying to preserve in this country. If they would do that this country will be thrown to chaos where dog eat dog. A philosopher in the 15th century who shaped in some degree, in the Western worlds' jurisprudential growth and thinking on the validity of laws by the name of Thomas Hobbes in his Leviathan aptly described that chaos in the following terms: that life would be "nasty, brutish, and short". These courts and the community of law-abiding citizens of this country would not want to return to that state referred to by that ancient sage and revert to a state of nature where there is general lawlessness.

S.B. MAPHALALA

ACTING JUDGE