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**CASE NO. 6/97**

**IN THE MATTER BETWEEN**

**REX**

**VS**

**THEMBA MASWANE KUNENE  
SIPHO ZULU**

**CORAM:**

**S.B. MAPHALALA-AJ**

**FOR CROWN:**

**MR M. NSIBANDZE**

**FOR DEFENCE:**

**(1st and 2nd accused)**

**MR D.**

**MNGOMETULU**

**(3rd accused)**

**MR B. SIGWANE**

**JUDGEMENT**

**29/01/98**

The two accused persons before court are jointly charged with the crime of culpable homicide. The crown alleges that upon or about the 2nd November, 1996 at or near Elangeni area in the Hhohho District the accused acting in common purpose unlawfully assaulted David Mfundza Ndzinisa with fists and sticks and inflicted upon him certain injuries which caused the death of the said David Mfundza Ndzinisa on the 18th November 1996 and the accused did thereby wrongfully and unlawfully kill David Mfundza Ndzinisa and commit the crime of culpable homicide.

Both accused pleaded not guilty to the offence and are represented by counsel. Accused No.1 is represented by Mr Mngomezulu and Accused No. 2 is represented by Mr Sigwane. The crown is represented by Mr Nsibandze.

The crown called six witnesses to prove its case.

The crown called its first pathologist who conducted a post-mortem examination on the deceased body. He prepared a report which he read and hand in to court. He stated the cause of death "septicemia". The post-mortem report was entered as exhibit "A" as part of the crown case.

The facts of the matter in summary form is that the deceased was drinking traditional beer at the homestead of Mazwizwi James Magongo. A quarrel ensued between the deceased and the said Mazwizwi. As a result of which the deceased punched Mazwizwi who fell down.

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The two accused persons then came to the scene and joined the fray on the side of Mazwizwi. They uprooted twigs from a guava tree nearby and then assaulted the deceased with the branches. Thereafter the fight broke up and the parties settled down to their drinking. That this assault took place on the 2nd November, 1996 some days later the deceased was taken to the Mbabane Government Hospital with a swollen ankle and he later died.

At the close of the crown case the attorneys for the accused persons applied for their discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended). The import of which is that in the event the crown has not proved a prima facie case against the accused they will be entitled to their discharge. Counsel advanced a number of reasons for taking that view. On the other hand the crown opposes the applications and have also advanced submissions in opposition.

I have reviewed the evidence of the crown and considered the useful and cogent submissions by the defence counsel and of course considered as well the submissions by the crown. Without wasting too much time it is my considered view that the evidence of the crown the court is urged to rely on is riddled with a number of material contradictions. One crown witness told the court that the assault on the person of the deceased took place on the 16th November, 1996 and another crown witness told the court that the assault took place on the 2nd November, 1996. The crown failed to correct this anomaly in re-examination. Re-examination is to enable the witness to explain matters which his answers in cross-examination are thought to have left a misleading impression. Furthermore the evidence of the crown is to the effect that the deceased was assaulted with the twigs by the accused on the buttocks as per the evidence of Mazwizwi. The crown urged the court to conveniently disregard this witness testimony in this regard as false because the witness was partisan. The difficulty with this line of thinking is that Mazwizwi was the only eye witness in this case. The court will then be left with no direct evidence on which to impute the guilt of the accused.

There is no direct evidence which links the injury sustained by the deceased on the ankle with the assault inflicted by the accused on him. The court will only be speculating that he was assaulted all over the body and such speculation would be flying in the face of the evidence of Mazwizwi who was there when the assault took place.

The pathologist who gave evidence appreciated the inadequacy of his own evidence to what exactly caused the condition that led to the death of the deceased. He suggested that a doctor who treated the deceased be called to shed more light on that aspect. However, the crown did not see it necessary to call this doctor who is only a few metres away from the court room. I agree with the doctor and the defence counsel that this witness if called would have placed the court in a better position to determine the issues in this matter.

Finally the evidence before me is so shallow that the court is merely invited to speculate on material issues. The crown witnesses brought before court contradicted each other that it is

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difficult for one to sift fact from fiction.

For these reasons I hold that the crown has not made a prima facie case to put the accused to their defence. They are thus discharged in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended).

**S.B. MAPHALALA**  
**ACTING JUDGE**