

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 64/98

In the matter between

THE KING

And

SIPHO PETROS SUKAMAGONSO MKHONTA

Coram S.B. MAPHALALA - J

For Crown MR NSIBANDZE

For Defence MR MDLULI

JUDGEMENT

(30/11/98)

The accused stands charged with the murder of Dikiza Jahelidzala Ndzimandze in that upon or about the night of the 17th January 1998 and at or near Khalambazo Location, Malkerns in the Manzini Region the accused acting unlawfully and with intent to kill, did assault the deceased with a "sizeze" a traditional Swazi weapon and inflict an injury upon him from which the deceased died at R. F. M. hospital in Manzini on the 24th January 1998.

The accused pleaded not guilty to the offence. The evidence of the Government Pathologist Dr. R.M. Reddy was entered by consent. In the post-mortem report he opined that the cause of death of the deceased was "cranio-cerebral injury". Further the evidence of Dr. Dejene of the R. F. M. hospital in Manzini who treated the deceased before his death he stated under "remarks" that when the deceased was admitted at the hospital he had a "compound right parietal skull fracture".

The crown proceeded to call its witnesses to prove its case. The first crown witness is PW1 Mavis Sizakele Dlamini. She told the court that she knew both the accused and the deceased. She told the court that Fombo Mamba was accused lover. On the 17th January 1998 the deceased came to her homestead in the company of one Nhlanhla and they were from Guy's place. Then Fombo came after they have come to visit as usual. They all partook to liquor. The accused then came to the scene and also partook in the festivities that night. PW1 then asked the revellers to leave as it was late but they told her that they were still enjoying themselves. At that juncture they all move from the house to sit outside as there was a bright moonlight. Then the accused called Fombo and said "Fombo up! Up!" and hit her twice with a baton. Fombo ran to the children's room. The deceased then intervened and told the accused that he should not cause a fight in another person's homestead and that they should go

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to his (accused) homestead. PW1 then said they dispossessed the accused of the baton whereas the accused passed hot air and then defecated on himself. Accused then threw his faeces on them. He smeared the deceased on the face with the faeces and PW1 was smeared on one of her arm and apron. PW1 then went to the room and collected a dish to get water to wash off the faeces. As they were washing the faeces the accused laughed at them. He said that it what he does to people. The accused then went to his house with Fombo. PW1 and the deceased remained washing themselves off the faeces. The accused came back again. The deceased then approached the accused and asked him why he had

done this. The accused hit the deceased with an instrument PW1 did not see which he had come with it from his house. He hit the deceased once and deceased fell down and they went to pick him up. The accused then ran away. They did not see what he had with him.

The deceased was injured at the side of his head above the left temple. He was bleeding profusely. She took a white cloth and covered the wound. Nhlanhla and the other friends took the deceased to the army camp from there he was conveyed to hospital.

PW1 told the court that when they dispossessed the accused they never throttled him. She never pushed the accused from the house. She never entered the house to take the "sizeze" (traditional weapon) and gave it to the deceased she said she did not know that "sizeze" even her husband did not own one.

This witness was cross-examined at length by Mr. Mdluli where it was suggested to him that PW1 together with the deceased throttled the accused but that was denied by this witness. It was also put that it was PW1 who took out the battle-axe (sizeze) from her house and she gave it to the deceased. The deceased tried to hit the accused with it but it was blocked by branches and the accused took it and hit the deceased. That the accused hit back in self-defence.

The crown then called its second witness Nhlanhla Dlamini who told the court that he was part of the drinking party at the house of PW1 on the 17th January 1998. PW1 gave him liquor and he sat outside and drank his liquor. Whilst seated the accused came and the deceased at that time was in the house. There was Fombo next to him. Accused said to Fombo "up! up!". Fombo refused to get up and said she was still drinking. Thereafter Fombo ran away to PW1's house. The accused was wearing traditional regalia. PW2 then left afterwards and heard that they had smeared each other with faeces. PW1 then washed off the deceased. The accused left for his homestead and came back shortly and there was an altercation. It was in the dark where they were standing and he could not see what happened. The deceased was not carrying anything in his hands. Then PW1 washed off blood from the deceased. PW2 was called to where they were and was informed that the deceased was injured. He did not see any struggle. It happened in a matter of seconds. Thereafter he left with the deceased. Along the way he went to a toilet and left the deceased with a Mdluli boy and when he came back he found that the accused had left leaving the Mdluli boy. Deceased went to his wife. Later on he heard that the deceased had died. This witness was cross-examined briefly and he told the court that he could not see what happened which led the deceased having been injured because it was dark.

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The crown then called its third witness 2416 Makhosonkhe Mamba who is a police officer stationed at Malkerns. He is one of the officers who investigated this case. On the 6th February 1998, he arrested the accused for murder. He cautioned the accused in terms of the Judges Rules. The accused then handed to him a "sizeze" from behind the head-board of his bed.

The crown then closed its case.

Mr. Mdluli then called the accused to the witness stand where the accused gave a lengthy account on his own version of events that fateful night. He told the court that on the day in question he woke up from his house and his intention was to go to a funeral. He heard a noise and thought it came from where there was a funeral. He saw that Fombo his live-in-lover was not with him. Fombo had earlier on indicated that she will attend the funeral. He then took a baton and went outside. He realized that the noise was coming from one of his neighbours. He then went to PW1's homestead to look for Fombo. He found people drinking and dancing and Fombo was also involved in these activities there. He asked Fombo why she was there because he thought she had already proceeded to the funeral. He then gave her the keys and later sat down and joined the drinking party. The accused then heard PW1 say that it was now late going for 1.30am and hot. She suggested that they all go and sit outside. He sat on the steps. PW1 and the deceased were seated a distance away. PW1 then sent him to the house to get some liquor for a customer who was Nhlanhla. She again sent him for this errand. Thereafter for some reason PW1 picked a fight with him over Fombo saying that the accused has a bad habit of beating up Fombo. Suddenly PW1

held him by his throat and pushed in such a way that he fell on his back. She then placed her knee on his chest. The deceased also joined the fray and pressed his foot on his face and they strangled him. PW2 intervened and said they should leave him because they were killing him. PW1 then said they should leave him because he had defecated on himself. They left him and he went away to clean himself in the yard. He then heard PW1 say he had smeared them with faeces purposely. PW1 then said she had a "sizeze" and that they should go and take it to finish him. Whilst he was still cleaning himself he heard steps coming towards him. The deceased had a battle-axe and PW1 had a knobstick. The deceased struck at him and the battle-axe was caught by one of the branches of the tree. He then took it and then hit back not in a particular direction. The deceased fell down. He asked him what they were doing to him. The deceased did not reply and he told PW1 that he would give the battle-axe to the police. The accused denies that he ordered Fombo by saying "up! up!" He also denies that he smeared PW1 and the deceased with faeces. Prior to this incident the deceased was his friend and they used to attend royal duties together. All in all the accused deposed that he did not intend to kill the deceased.

The accused then called DW2 Fombo Mamba his girlfriend. Her evidence to a large extent corroborates that of the accused although there are some minor variations between the evidence of the two.

The court then heard submissions from both sides. I have listened to the arguments very carefully and also considered the evidence in its totality. The cause of death is not denied that the deceased died of an injury from a battle-axe (sizeze) which was caused by the accused person. It is my view that based on the facts presented before me. I am unable to find that the accused person had the necessary intention to kill the

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deceased that night. The evidence before me is clear that there was a fracas between the accused and PW1 aided by the deceased. It is my finding that PW1 was not candid with the court she concealed evidence which was adverse to her and her evidence cannot be relied upon as credible. The only evidence which remains is that of PW2, however, this witness told the court that he did see the fight that ensued there. He only came to the rescue of the deceased after the incident. To me it appears as if the accused acted at the spur of the moment. I am not able to find that accused had intention in the form of dolus eventualis as I had been urged by the crown to come to that conclusion. I have no reason to doubt accused story that he was attacked by the two and I reject the evidence of PW1 who proved to be selective in her evidence.

In the result, I find that the crown has not prove a case of murder beyond a reasonable doubt and therefore the accused is not guilty in respect of that crime. However, I find the accused guilty of a lessor offence of culpable homicide.

S. B. MAPHALALA

JUDGE