

CRIM. CASE NO. 103/98

In the matter between

REX

Vs

SWAZI SIPHIHLI TSELA

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MS. LANGWENYA
MR.M. NXUMALO

JUDGEMENT
(30/03/99)

Maphalala J:

The accused person is charged with the crime of murder of one Lephilinah Tsela. The crown alleges that the accused upon or about the 21st December 1997, and at or near Ngcoseni area in the Manzini district the accused did unlawfully and intentionally kill Lephilinah Tsela.

The accused pleaded not guilty to the offence.

The crown called three witnesses to prove its case. The first crown witness called was PW1 Nomcebo Tsela who told the court that deceased was her grandmother and the accused is her uncle. She together with her grandmother and her brother and sisters went to the other homestead as their home had two different homesteads. When they got there her grandmother saw some pots and she asked if these were her pots. The witness confirmed this fact. The deceased then went to the kitchen and approached the accused as to why he had borrowed other people her pots without her permission. The accused came out carrying a knopstick and a baton and entered the kitchen where the deceased was and started assaulting the deceased until she fell down on the ground. The accused then left for a nearby Gama homestead. PW1's aunt then raised an alarm calling the Malinga people. PW1 further told the court that during the assault on the deceased a certain LaDludlu who is accused wife and her aunt tried to stop the assault. The witness told the court that the accused was assaulting the deceased on the head with the knopstick. The deceased was not carrying anything. The accused and the deceased prior to this incident were in good terms. The witness further identified the knopstick and the baton exhibited in court as the weapon which were carried by the accused on the day in question. She told the court that she did not know the iron bar.

This witness was cross-examined by the defence where it was put to her that the accused apologized to the deceased for lending the pots to a neighbour who was conducting a funeral of his child. The witness stated that she did not hear the apology. It was further put to her that it was the deceased who started the row by throwing a stone at the accused to which she answered in the negative manner. She also stated under cross-examination that it was not true

that the accused took the knopstick merely to scare the deceased. Also that it was not true that the deceased assaulted the accused with the iron rod.

The crown then called its second witness PW2 Gamalezwe Sibandze. He told the court that on the day in question he heard LaHadzebe and other people raising an alarm. He went to the scene and found that the deceased was already dead. He heard from the people *in situ* that the accused had beaten his mother to death. The accused then came to the scene and he asked him what he had done and accused told him that he had killed the deceased. The matter was subsequently reported to the police.

The witness was cross-examined briefly by the defence where he told the court the accused told him that he had accidentally killed the deceased.

The crown then called its last witness PW3 2110 Detective Constable A. Motsa. He told the court that on the day in question he was on duty when he received a report that a person had been killed at Ngcoseni. Acting on that report he together with 1540 W/Inspector Mthethwa, 2297 Detective Sergeant Ngwenya, Lukhele and Motsa proceeded to the scene. On arrival at the scene he found the deceased lying facing down. There was blood coming from her ears and she was already dead. Next to her body there was a metal rod and a long baton. The accused emerged from the homestead. He then cautioned the accused in terms of the Judges Rules. He asked the accused what he had used in assaulting his mother. The accused showed him a baton. The witness found the iron rod next to the body of the deceased. Accused told him that he is the one who placed the iron rod together with the baton next to the body of the deceased. The accused told him that the iron bar fell from the deceased clothing which implied that the deceased had hidden it in her clothes.

The witness was cross-examined by the defence. At this point the crown handed the postmortem report which was entered by consent as exhibit "A". Exhibit "A" was compiled by Dr. C. Rammohan who is the government pathologist who performed an autopsy of the body of the deceased. He stated in the report that to the best of his knowledge and belief death was due to "crano-cerebral injury".

At this point the accused took the witness stand led by his attorney Mr. Nxumalo. He related his version of the sequence of events on that day leading to the death of his mother, the deceased. His recollection is that on the day in question he had lent pots belonging to his mother to his brother-in-law who had a funeral for a child. He collected them back the following day. His mother came and wanted to know why he had given the pots to another person without her consent. He apologized to the deceased but the deceased continued to insult him and she thereafter took a brick and tried to hit him with it and he ducked. He then went to his house to collect a knopstick. He did not intend to use it on his mother. He thought the deceased will see the knopstick and go away. He took an iron bar which was in the possession of the deceased. That is when the deceased was hit with the knopstick and she fell down. He then raised an alarm. He went to Jabulani Gama and asked him to go and report the matter to the police. The accused further told the court that what Nomcebo told the court is not the truth it was the deceased who first assaulted him. He said he hit the deceased twice although he was in a dizzy spell and could not quite recall correctly. When he hit his mother he was trying to disarm her. This is about the extent of his evidence. He was cross-examined at length by the crown where he maintained that he did not intend to kill his own mother that this happened in a spur of the moment and he was under a dizzy spell.

The court then heard submissions from both sides. I have scrutinized the evidence in its totality and also considered the submissions made by counsel. I am persuaded to agree with Miss Langwenya for the crown. The accused was not justified to act the way he did in the circumstances. Firstly the postmortem report shows that the deceased was a woman of 65 years and the accused is a young strong man of 35 years. Secondly, even if the accused was angered according to good Swazi grooming a younger person tends to get away from an elderly person who was angering him. Thirdly, the evidence of Nomcebo who said the deceased never threw a stone at the accused. Nomcebo was better placed to see what was taking place. Fourthly, the accused found time to get away from the deceased and went to get the weapons. He should have removed himself if he was annoyed with the deceased. He had a cooling off period. I accept the evidence of Nomcebo as being credible and truthful. I have warned myself on her evidence as a single witness but, in my view her evidence is substantially corroborated by that of the accused himself in his evidence-in-chief and under cross-examination by the crown. The question of self-defence on the part of the accused is misplaced in view of the circumstances of this case. The accused gets a chance to flee the scene instead of doing that he collect a knobstick and strikes an elderly woman twice on the head. Even though it might be doubtful that the accused formed a clear intention to kill his own mother but the circumstances of the case are such that intention in the form of *dolus eventualis* does exist in this case.

In the result I find the accused guilty of the murder of his mother Lephilinah Tsela.

S.B. MAPHALALA
JUDGE

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**RULING ON EXTENUATING CIRCUMSTANCES
(06/04/99)**

Maphalala J:

The court has found the accused guilty of the murder of his mother. In terms of the provisions of The Criminal Procedure and Evidence Act (as amended) the court upon such a verdict is to impose a death sentence unless the court finds extenuating circumstances, in that event the accused would escape the death sentence and be sentenced at the discretion of the court after taking accused personal circumstances in mitigation. My task in this quest to find extenuating circumstances has been made easy by the crown's concession that indeed there are extenuating circumstances in this case in that the actions of the deceased might have provoked the accused to act in the manner he did. This seems to be the view taken by the defence in its submission on extenuating circumstances. I have also looked at the facts of this case in totality and I am also in agreement with both counsel. Furthermore, it emerged from the facts that the deceased prior to the assault on her had an iron rod concealed under her rug, which she was wearing. This might have had an effect on accused actions on that fateful day.

As a matter of fact from the foregoing I find that extenuating circumstances exist in this case to lessen accused moral blameworthiness and thus escape the full rigours of the penal code.

SENTENCE

It is clear to anyone that this is a very tragic case where a mother died in the hands of her own son. I have considered all the factors submitted by Mr. Nxumalo on behalf of the accused. That for our present purposes the previous convictions have no consequence for the reasons advanced by Mr. Nxumalo. I am told that the accused is a relatively young man of 35 years married with three minor children who all look up on him for support as the wife is unemployed. I am also told that the death of accused mother in his hands greatly affects him as he is reported to have been the deceased last born and an apple of her eye. I must say this is a very difficult case for me to pass an appropriate sentence. The mere fact that the accused killed his own mother will be with him for the rest of his days and that would be more punishment than any period of imprisonment the court may find meet.

However, after everything is said and done the inescapable fact stares us in the face that the accused killed another human being with intent as the court has found. I cannot, therefore run away from imposing a custodial sentence despite any amount of sympathy I might have for the accused.

I am enjoined by law to impose a custodial sentence. My view is that a fitting sentence in this case would be a period of eight (8) years imprisonment, the sentence backdated to the date accused was taken into custody.

S.B. MAPHALALA
JUDGE