

CRIM. CASE NO. 173/98

In the matter between

REX

Vs

SAMUEL MAGEJA MAGAGULA

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. M. SIBANDZE
MR. B. SIMELANE

JUDGEMENT
(31/03/99)

Maphalala J:

The accused person is charged with the crime of murder. It is alleged by the crown that upon or about the 4th March 1998 at Vuvulane compound in the district of Lubombo, the accused unlawfully and intentionally killed Lomgcibelo Dlamini.

The accused pleaded not guilty to the crime of murder and the crown proceeded to introduce a postmortem report compiled by the police pathologist Dr. L.S. Okonda which was not objected to by Mr. Simelane. It was thus entered by consent as exhibit "A". The postmortem report reflects that the death of the deceased was occasioned by "cerebral heamorrhage as result of assault".

The identity of the deceased was also not in issue and the identification witness was dispersed with.

The crown then called PW1 Dumisani Gulwako who is accused brother-in-law as the deceased was his sister. He related to the court that he was present when the accused killed the deceased. He told the court that at about 6.00pm they were drinking together, the accused, the deceased, another man and himself when the deceased asked the accused to go and check one of their children Musa as it was suspected that he might be involved in a certain burglary that had occurred at SEDCO. The accused left on that errand and came back. The deceased then asked the accused that as it was payday where was the rest of his pay. There was not enough money to pay for the children school fees and she ended paying them herself. The accused went into

the sleeping house and when he came back he slapped her with an open hand and PW1 realized at that point that a fight was going to ensue. The deceased fell backwards because she was seated on a chair. She thereafter rose up and they held each other and fierce fight ensued. PW1 intervened and separated them. The deceased had a beer bottle and she hit the accused with it on the forehead. It was that that the accused produced a knife and PW1 tried to block him. The accused told him that he should be careful, as he will get stabbed in the process. The accused then stabbed the deceased and after that he ran away. They chased after him until they caught up with him. They then took the accused to the police station and also the deceased was taken to the Mhlume clinic. Later the deceased was taken to KaDvokolwako mortuary. PW1 told the court that the knife was stuck on the deceased head but they removed it.

The witness further told the court the relationship between the accused and the deceased was a good one until this unfortunate incident.

He was cross-examined at length by the defence where it was suggested to him that whilst the accused had gone to look for Musa the deceased talked badly about him amongst the members of the drinking part where the witness replied that he did not hear that. It was also put to him that when the fight started he was in the kitchen and might not have witnessed what took place whereas the witness maintained that he saw what took place and it was not the old man who separated the two. He also told the court that it was not true that the reason the accused stabbed the deceased was because the deceased was going to hit him with the beer bottle.

The crown then called PW2 1823 Detective Sergeant P.M. Magagula who attended to this incident. He took certain exhibits from the scene of crime viz, the okapi knife, and three bottles of beer. Accused person handed him the knife through one Sibongile Ndzinisa. He found the accused at Mhlume clinic. He had an injury on his forehead. He caused the hospital to compile a medical report. The medical report was entered as exhibit "B". The officer was cross-examined briefly where he told the court that accused made a statement to him as evidenced by R.S.P. 79 which was entered as exhibit "C".

The crown then closed its case.

The accused took the witness stand and related his version of what took place that fateful evening. He told the court that the deceased was her live-in-lover and they had a number of children together. He does not agree that he had a fight with her. The deceased complained that he was not bringing enough money to cover for the children's school fees. She accused him of hiding the money. The accused at that point went out of the house as he sensed that she was getting heated up and that usually ended in a fight. He later went to look for Musa and when he came back he found that the deceased was scolding him in front of the other men that he had hidden the money in order to go and spend it with his prostitutes. She went on to insult him by calling him by his mother's private parts. The accused took a stick and hit her once with it. The deceased took a beer bottle and hit him on the forehead and he got injured. He tried to push her away but he was against the wall and could not run away. The deceased came for the third time to hit him and that is when he produced the knife and accidentally stabbed her. After that he got a chance to run away to

report the matter to the police station. Subsequently he was taken to the clinic for treatment. The accused told the court that it was not true what PW1 told the court that he slapped the deceased with an open hand as PW1 was in the kitchen and did not witness neither the fighting and the stabbing. Lastly he told the court that he stabbed the deceased accidentally and it was not his intention to stab her to death. This took place at the spur of the moment.

The accused was cross-examined at some length by the crown where he told the court despite relentless questioning by Mr. Sibandze that he did not intend to stab his live-in-lover to death. He also maintained that PW1 was not telling the court the truth in his evidence-in-chief.

The defence then closed its case.

The court then heard submissions from both sides. I have looked at all the evidence before me. It is trite law that the *onus probandi* lies with the crown to prove its case beyond a reasonable doubt. I tend to agree with Mr. Simelane that the accused story seems to be credible. Exhibit "C" a statement by the accused to a police officer a day after the incident is clear and removes any question of doubt that the accused has fabricated his defence. Accused has always been consistent with his version. It appears to me further that the accused was assaulted by the deceased on the head as evidenced by exhibit "B" the medical report on accused injuries. My view is that accused acted in self defence, however, in the circumstances of the case he exceeded those bounds. I find therefore that he is guilty of a lesser offence of culpable homicide as I could not find on the facts that there was the necessary *mens rea* to constitute murder. Clearly accused act was unlawful to the extent of exceeding the danger being averted (see *R vs Moufe 1940 A.D. 202 and R vs Hercules 1954 (3) S.A. 826 (A.D)*).

In the result I return a verdict of culpable homicide.

S.B. MAPHALALA
JUDGE