

**CIV. CASE. NO. 110/98**

In the matter between

**REX**

And

**SANDILE MKHABELA**

Coram  
For the Crown  
For the Defence

S.B. MAPHALALA – J  
MRS. M. DLAMINI  
MR. G. MASUKU

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**JUDGEMENT**  
**(08/04/99)**

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Maphalala J:

The accused person is charged with the murder of one Mndeni Mwelase.

The accused pleaded not guilty to the offence. The postmortem report compiled by the police pathologist Dr. R.M. Reddy who performed the autopsy on the deceased was entered by consent as exhibit "A". The pathologist opined upon the examination of the deceased that the cause of death was "haemorrhage as a result of left lung contusion".

The crown called a number of witnesses to prove its case. The first crown witness called was PW1 Sihlangu Dlamini who told the court that the 10<sup>th</sup> December 1997, on the day of the incident he saw the deceased and the accused. The accused was seated alone on a rock at the bus rank. He was seated with the accused and another man. The deceased approached them and he was passing by. The accused called on the deceased and asked him what he (deceased) said to him the previous night. The deceased replied that he had not said anything. The accused asked him for the second time and he replied him the same way. The accused started to assault the deceased and the deceased ran away. The accused chased after him. The accused was using a stick in assaulting the deceased. The witness identified a stick that was exhibited here in court as the one which was used by the accused in assaulting the deceased. He together with the other man tried to intervene to stop the assault. The accused told them not to involve themselves in this matter as they knew nothing about this matter. PW1 testified that the deceased was not hitting back. He was not carrying any weapon. The deceased ran towards his homestead. The accused assaulted him further and they tried to intervene. The deceased fell down. After the deceased has fallen down they saw that the

accused was holding a shining knife and he held the deceased by his front part of his shirt. PW1 stated that at that time he was scared. He then saw some women, one of them was Make Mnisi. After that he does not recall much of what took place. Make Mnisi directed them to take the deceased to a place underneath a tree. He then went to report the matter to a Mwelase family.

This witness was cross-examined by Mr. Masuku where it was suggested to him he did not know what transpired the previous night between the accused and the deceased and he answered in the affirmative. It was also put to him that it was not true that the accused had a knife with him on the day in question in which he answered in the negative. He conceded though that accused was angry when he assaulted the deceased.

The crown then called its second witness PW2 Mabandla Dlamini whose evidence is substantially the same as that of PW1. For the sake of proximity I am not going to relate it here. The cross-examination by Mr. Masuku was substantially the same as the one that was directed to PW1.

The crown then called PW3 Angel Maduma. She told the court that on the 10<sup>th</sup> December 1997, she was from nearby grinding mill. She saw the accused assaulting the deceased until the deceased fell down. The accused left the deceased after he had fallen down and went to an opposite direction. She asked the accused what he could do if he had killed the deceased. The accused in response was that he did not care. If he dies because he was still looking for the other six boys who were with the deceased the previous night. Make Mnisi sent her to fetch water to try and resuscitate the deceased but the water was not used because when she came back the deceased was already dead. The body of the deceased was then conveyed to the mortuary.

She was cross-examined briefly by the defence but nothing of substance came out of her cross-examination, except that she confirmed what PW1, and PW2 said that accused was angry when he was assaulting the deceased.

The crown then called its fourth witness PW4 Lucy Lomoya Mnisi who told the court that her homestead was next to the grinding mill. She heard a Tsabedze girl and PW1 shouting saying to the accused he should leave the deceased alone. She then left her homestead to see what these people were fighting about. As she entered the road she met the accused and she asked him what was the matter. The accused did not reply her but he was carrying a stick. She saw PW1 standing and the other was lying down. This was the deceased. When she got to the scene she found that the deceased was already dead. She then called after called after the accused to come and see the "dog" he had killed. The accused did not respond he kept on walking away from the scene. There were other persons in the scene and eventually the deceased was taken away to the mortuary. She was also cross-examined briefly and nothing much came out of it.

The crown then called its fifth witness PW5 Swazi Caroline Tsabedze who told the court that on the day in question she saw the accused hitting the deceased with a stick. PW1 persuaded the accused person to stop assaulting an unarmed person so vigorously. However, the accused continued assaulting the deceased. The deceased person collapsed. The accused then waved a knife at the fallen deceased. The deceased tried to stand up but only staggered some few paces and then collapsed to his death. The accused then left the scene. PW1 in the

company of Mabandla Dlamini (PW2), Sihlangu Dlamini and Make Mnisi tried to apply some first aid on the deceased but to no avail.

She was cross-examined by Mr. Masuku and it was suggested to her that she was not telling the court the truth that the accused had a knife with him, but this witness was adamant that she did see a knife in the possession of the accused and that it was an “okapi” knife.

The crown then called PW5 Clement Sihlongonyane who told the court that at the material time he was a police Constable stationed at the Nhlanguano Police station and he was on duty on the 10<sup>th</sup> December 1997. He received a report of the killing and he proceeded to the scene of crime. He found the accused and he was taken in for investigations for the murder of the deceased. He told the police that he had something to say about the killing. He was advised to go and make a statement before a magistrate. He was taken to a magistrate where he made a statement. PW5 further told the court that he found an exhibit at the scene and this was a stick from a wattle tree. He exhibited the stick as part of the crown's evidence as exhibit "1".

The crown then called its last witness PW6 1296 Sergeant Z.V. Dlamini. He arrested the accused after he got information of the killing.

The crown then closed its case.

The accused then gave evidence under oath led by his attorney-in-chief. He gave a lengthy account on what led to his actions on the 10<sup>th</sup> December 1997. The long and short of his story is that he was provoked, insulted and assaulted by a group of seven boys including the deceased the previous night the 9<sup>th</sup> December 1997. This gang of boys were trying to rape one girl Hlobisile Sibandze and he with others tried to intervene on behalf of the girl. The gang was just on a rampage and threatened to kill him and a pastor of his church as they were from a night church service. He told the court PW2 was with the group that was on his side.

On the 10<sup>th</sup> December 1997, he was taking cattle to graze when he was joined by PW2. The deceased then came alone. He asked him what they were doing to them the previous night with a view to resolve the matter. The deceased replied in an arrogant manner which angered him. Because of his anger he found that he had already assaulted him. He hit him three times. He denies that he had a knife with him that day. When the deceased fell down he was scared and he ran away from the scene.

The accused was cross-examined at some great length by the crown and I shall revert to some aspects of his answers in the course of this judgement.

The defence then closed its case.

The court then heard submissions from both sides. The crown is of the view that it is common ground that the accused assaulted the deceased until the deceased died. The issue is whether the deceased had provoked the accused the previous night. Mrs. Dlamini contended that in our law previous events should be disregarded. Such is not provided for by ***The Criminal Procedure and Evidence Act (as amended)*** neither is supported by any tenet of our common law. The provocation to be justified must occur at the heat of the moment. She argued further that all the evidence point to the direction that the accused assaulted the deceased and the deceased ran away. The accused chased after him. The issue that accused

was angered does not absolve him from criminal liability in this case. To this end she cited the Appeal decision in the case of *Isaac Mhlanga and the King (Appeal Case No. 6/98)*.

In sum, the crown implores the court to return a verdict of guilt in respect of murder.

Mr. Masuku for the defence argued *in contra*. He submitted that on the eve of the killing the accused was assaulted by the deceased with his gang who were carrying an assortment of weapons. He was assaulted with a stick. The accused was threatened with death. Such words planted fear in the mind of the accused. That the court should not look at the events of the previous night in isolation. The following day when the accused was trying to smoke the peace pipe with the deceased the deceased responded in an aggressive way. The defence does not dispute that the accused assaulted the deceased, but that such assault was occasioned by immense provocation.

Mr. Masuku further attacked the actions of Make Mnisi who covered the deceased with a blanket that this action might have contributed to the death of the deceased. Thus the act constituted a *actus nevus intervenes*. Further that the other crown witnesses testified that when accused left the deceased he was still alive. The police officer who attended the incident did not even confirm the death and he did not even caution the accused in terms of the Judges Rules.

Finally on a point of law he contended that when the accused assaulted the deceased he did so at the heat of passion. To this end he referred the court to *Burchel and Hunt* on the *South African Law and Procedure (Vol 1) at page 323*.

On points of law Mrs. Dlamini argued that according to the evidence before court there is no mention by the crown witnesses that the accused was assaulted by deceased group the previous night with the stick. The evidence is that the gang splashed water with a stick and it splashed on the accused and his company. Mrs. Dlamini argued that the defence has failed to put its case to the crown witnesses on the point of the stick and the defence story is to be disbelieved at this stage. She cited the case of *S vs P 1974 (1) S.A. 581 (A)* where the learned Judge President Macdonald at page 582 stated the following:

“It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial, so important is the duty to put the defence case that practitioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court”.

These are the issues before me. I have looked at the evidence in its totality and also considered the submissions by counsel. It is common cause that the deceased died as a result of an assault inflicted by the accused on the 10<sup>th</sup> December 1997, with a stick. It is the evidence of the accused himself that he struck the deceased three times with the stick. In my view the question of a *actus nevus intervenes* does not arise in the circumstances. The group of women who attended to the deceased were administering simple first aid which did not succeed due to the extent of the injuries sustained by the deceased as a result of the assault. The defence has raised two defences for this killing, viz, the defence of provocation the defence submitted that the actions of the deceased when he confronted him about what they did to him the previous night was so arrogant that they angered the accused and thus clouded his reasoning. According to the *dicta* in the case of *R vs Thabani 1949 (4) S.A. 720 (AD)* the sole and decisive issue is whether or not in view of the effect of provocation, the accused had

the *mens rea* for the crime in question, there is no reason why provocation should not serve to negative intention (whether “specific” or otherwise altogether. It has to be borne in mind that this South African case introduced a new approach to provocation which not what the Roman and Roman-Dutch law was in that it did not regard anger as an excuse from criminal liability but only as a factor which might mitigate sentence if the anger was justified by provocation. In the case *in casu* we have ample evidence that accused accounted the deceased who was passing by and proceeded to assault him after he could not get a satisfactory answer from the deceased. He proceeded to assault the deceased even after some people had come between them he even chased after the deceased. I do not think that accused lost control to assist him in invoking the defence of provocation. The vital question is whether it is sufficient if the accused lost his self control or whether it must be shown that in the circumstances a reasonable man would have lost self-control. In other words, is the test subjective or objective. My view of the matter is that the accused has not proved a clear case of provocation looking at the circumstances of this case. In this finding I am fortified by the decision of the Court of Appeal in the case *Isaac Mhlanga vs The King (supra)* where the majority judgement by Browde JA came to a following finding:

“The facts of the case show that the deceased came to the place where the appellant was living and informed the appellant that he, the deceased had assaulted the appellant’s mother and wished him to leave the place which did not belong to him. This caused the appellant great anger, so he said, and although he had a very close relationship with the deceased. He committed this very serious offence of striking the deceased on the head with an axe which led to the deceased’s death”. The appellant court confirmed the conviction on the crime of murder by the court *a quo* but only interfered with its sentence upon certain considerations.

In sum, therefore I find that the defence of provocation fails. Now coming to the defence of private defence, my view on the matter crisply put is that ought to fail. It is trite law that for such a defence to stand in law the attack must have commenced or be imminent (*see S vs Gerber 1966 (1) P.H. H. 53 (j)*). Any measures taken by the accused after the complainant’s attack has ceased would be retaliatory rather than defensive and therefore, unjustified (*see R vs Hayes 1904 T.S. 383*). This seems to be the case here. The attack, if there was any attack occurred the previous night. There is no way the accused can hide behind the veil of self-defence. If he feared for his life he would have adopted other lawful protective measures against any anticipated future attacks.

I also rule in respect of this defence that it fails. In the result I find that the accused is guilty of the murder of Mndeni Mwelase upon or about the 10<sup>th</sup> December 1997, at Mhlaba area in the Shiselweni Region.

**S.B. MAPHALALA**  
JUDGE