

CRIM. CASE NO. 95/98

In the matter between

REX

And

MARWICK SIBANDZE

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. D. WACHIRA
MR. MASUKU

JUDGEMENT
(10/05/99)

Maphalala J:

The accused person is facing two charges. On the first indictment the crown alleges that he is guilty of the crime of murder in that upon or about the 10th April 1998, at Hlushwana area in the district of Shiselweni the accused person did unlawfully and intentionally kill Hosha Ndlovu. On the second count he is accused of the crime of assault with intent to do grievous bodily harm in that upon or about the 10th April 1998, at Hlushwana area in the district of Shiselweni the said accused did unlawfully assault Jabulani Vilakati by stabbing him with a knife at the back with the intent of causing him grievous bodily harm.

The accused represented by Mr. Masuku pleaded not guilty to the two charges.

The evidence of the pathologist who conducted the autopsy on the deceased on count one was entered by consent in terms of **Section 272 of The Criminal Procedure and Evidence Act (as amended)** where the doctor opined that the cause of death was “haemorrhage as result of penetrating injury to heart”. The medical report in count two was also entered by consent, which indicated that the complainant was stabbed at the back. The two documents were entered as part of the crown’s evidence as exhibit “A” and “B” respectively.

Further, the evidence of the identifying witness was dispensed with.

The crown called four witnesses to prove its case. The substantial facts alleged against the accused are that on the 10th April 1998, accused person and deceased Hosha Ndlovu were drinking “sizulu” beer (traditional beer) at the homestead of Simiso Mkhonta. Habula

Sibandze brother to accused fell down in an epileptic fit. The deceased asked accused to take his brother home. Accused replied that he was not concerned with his brother. The deceased asked him the reason why and accused replied deceased that he should take Habula Sibandze because Habula used to help deceased in fetching water. An argument then arose between accused and the deceased. The accused person at that point left.

There were other people drinking at Simiso Mkhonta's homestead namely Jabulani Vilakati, Maguma Sibandze amongst others. Simiso hired Mgawuza Malinga's vehicle to convey Habuka Sibandze home. Simiso Mkhonta, Magongo Sihlongonyane, Maguma Sibandze, Bhutana Xaba, Jabulani Vilakati, deceased, Bheka Simelane, Enock Gawuza Tsabedze and Nsimbi Simelane all boarded the van and accompanied Habula Sibandze home as he appeared very sick. They passed accused along the way. Accused found them and deceased at his parental homestead where Habula Sibandze also used to live. He picked up a quarrel. Accused alleged deceased and others were all after him and that is why they had come to his homestead. He removed a knife and stabbed deceased once on the chest. Deceased fell down and died on the spot. He also stabbed Jabulane Vilakati on his back when the said Jabulani Vilakati went to restrain him. Accused upon being cautioned by 2559 Constable S. Mlangeni handed to him an "okapi" knife, which was taken as an exhibit.

PW1 Simiso Mkhonta told the court that when the accused stabbed the deceased and the complainant there had not quarreled with him. No one attacked the accused and there was no one who had weapons when they went to accused homestead. This witness was cross-examined by the defence at length. However nothing of substance came out of it.

The crown called PW2 Bhutana Xaba who was also at the scene of events at the material time, he gave evidence similar to that of PW1 that they had gone to accused homestead to convey accused brother who had fallen ill. Then accused put his hand in the pocket and produced an "okapi" knife. Jabulane went to intervene and accused stabbed Jabulane and after that accused advanced towards the deceased and stabbed him on the chest and deceased sat on his buttocks. He then with others proceeded to report the matter to the police.

The crown then called PW3 Jabulane Vilakati who is the complainant in count two. He also related the sequence of events in similar terms as the other two crown witnesses who had already given evidence.

The crown then called the police officer who attended to the incident PW4 2559 Constable S. Mlangeni who told the court that the accused showed him the scene of crime. He thereafter cautioned the accused in terms of the Judges Rules. The accused then produced from his pocket a knife and he handed it to him. The accused offered an explanation which was reduced to writing in the form of exhibit "C" viz, R.S.P. 79. This witness was cross-examined briefly by the defence where it was suggested that accused was also stabbed during the fracas, however, this witness denied that accused ever told him that. Further that it was not true that accused asked him to take him to hospital to treat the stab wound.

The crown then closed its case.

The accused then gave evidence under oath. He related his own version of what took place that day. He gave a lengthy account of what took place that day. The long and short of his story is that he was drinking with others at PW1's homestead after they had watched a football match. There were a number of people when he was informed that his brother was

sick. He told them to hire a motor vehicle to convey his brother home, as he could not walk in that condition. They asked him to take his brother home but he refused saying his brother worked for PW1 and it was PW1's responsibility to take him home. Then the deceased approached him and asked him what was the quarrel about and he told him. The deceased commented that accused always liked to politicize issues. The deceased said accused was supposed to be beaten. The deceased then held him by his shirtfront and he attempted to slap him. Accused did not reiterate and deceased pushed the accused towards a wall. The deceased spoke in English and called the accused person "stupid" and then left him. Thereafter he remained with the others and they partook in their drinking. Later on, the drinking party dispersed and he walked with Themba and they discussed that they were going to help each other with goats, which had been stolen the previous day. They walked together with Themba, as they were next to Themba's homestead he saw a motor vehicle coming behind them. He did not see who the occupants of the car were as it was dark. The motor vehicle passed them. As he got home he saw people. He did not see who these people were. He proceeded to his room and saw his children seated outside the room and also his wife was present. Thereafter a fight ensued between him and the deceased over the quarrel they had at the shebeen. The deceased struck him with a jacket on his cheek. The deceased hit him for the third time. Mkhonta kicked him on the chest. Accused rushed to his room but found that Jabulane had blocked the way. They then descended on him and started to attack him at the same time. He had a cramp but he had to fight. He saw that he has been stabbed on his thigh. He does not know who had stabbed him and he saw that he was dying. That is when he took out the knife from his pocket and stabbed the deceased. He then stabbed Jabulane who was trying to dispossess him of the knife. Then they all ran away. He then went inside the room. He sat there until the police came. The police came and asked him why he was killing people and he answered that he was acting in self-defence. He was arrested and thereafter the police refused to take him to hospital for his stab wounds saying that he should be thinking of the people he had stabbed.

The accused was cross-examined at length by the crown. It emerged from the cross-examination that there were a number of crucial questions which were not put to the crown witnesses by the defence but these issues emerged when accused was giving his evidence-in-chief.

The defence then closed its case.

The court then heard submissions from both counsels. I have scrutinized the evidence of the crown and that of the accused. I have also carefully considered the submissions by both counsels. The evidence is clear that the deceased died as a result of the stab wound inflicted by the accused. It is also clear that the complainant was stabbed at the back by the accused person that day. Further, evidence is that the knife exhibited before court belonged to the accused and was the knife that was used in the stabbing of those two people. The accused story is that he was acting in self defence when he stabbed these two people. However, in my view this is not correct in that the story by the accused that he was attacked by these people in front of his wife and children and as a last resort to protect himself he produced the knife and stabbed the deceased and Jabulane is an afterthought. The reason for saying so is that all this was not put to crown witnesses who are supposed according to the accused version to have participated in the attack on him. Neither is this material fact in his statement he made to the police after he was warned in terms of the Judges Rules. There is ample authorities in the proposition that a party should put as much of its case in cross-examination of the other sides witnesses for its evidence to have credibility. To this effect I refer to the often cited case of **R**

vs P 1974 (4) S.A. 581 by Macdonald JP at page 582 where the learned Judge President stated as follows:

“It would be difficult to over-emphasize the importance of putting the defence case to the prosecution witnesses and it is certainly not a reason for not doing as 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.

Further Hannah CJ in the case of ***Rex vs Dominic Mngomezulu and others Criminal Case No. 96/94 (unreported)*** at page 17 had this to say on this point;

It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of the prosecution witnesses testimony may place the defence at risk of adverse aspects being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an adverse inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused, and if the accused subsequently goes to the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not and accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused story”.

In the present case counsel failed to put the defence case. The accused person gave a lengthy, graphic account of events which took place that day when he was giving his evidence-in-chief. He revealed for the first time material facts which were not put to the crown witnesses to test their credibility. As much as it trite law that the ***onus probandi*** always lies with the crown to prove its case beyond a reasonable doubt but it would have lent credence to the defence case if accused wife who witnessed the whole spectacle as it unfolded was called. She was not called. One is left with one and the only conclusion that the accused committed the two offences as alleged by the crown. His story to me seems to be an after thought and I reject it ***in toto***.

In the result, I find the accused guilty in respect of both counts.

S.B. MAPHALALA
JUDGE