

CRIM.CASE NO. 180/99**IN THE MATTER BETWEEN:****REX****vs****JOHANNES MFUNWA DLAMINI**

CORAM	:	MASUKU A.J.
FOR THE CROWN	:	MR. J.W. MASEKO
FOR THE ACCUSED	:	MR. P.C. SMITH

JUDGEMENT
14/05/99

The accused stands charged with the offence of murder, it being alleged that upon or about the 3rd January 1998, and at or near Shisizwe area in the Shiselweni District, he did unlawfully and intentionally kill Joseph Mdluli (herein-after referred to as the “deceased”).

When the accused was called upon to plead to the charge, he pleaded guilty to the crime of culpable homicide, which plea was rejected by the Crown. The trial then proceeded on the charge of murder.

By agreement between the Crown and the Defence, certain concessions were made and which include inter alia:-

- i) the identity of the deceased;
- ii) the cause of death;
- iii) the knobstick over which the deceased and the accused quarreled;
- iv) an okapi knife;
- v) the evidence of 2197 D/Const. T. Dlamini, which was reflected as PW8 in the summary of evidence;
- vi) the post-mortem report was admitted by consent, thereby dispensing with the

evidence of the Pathologist, Dr. Reddy.

Furthermore, the evidence of the following witnesses was admitted wholesale and by mutual agreement, namely the evidence of MUSA MDLULI, (PW2 in summary of evidence), MANDLENKOSI SIYAYA (PW5) and the evidence of 1197 D/SGT DAVID NTSANGASE.

I will now proceed to briefly refer to the highlights of the evidence agreed upon.

The Pathologists' post-mortem report reflects that the deceased died as a result of haemorrhage resulting from a penetrating injury to the heart. Furthermore, it records that the deceased had a penetrating injury over the front chest obliquely present 3.2 x 1.1 cm which entered the right atrium of the heart. The report also refers to a cut wound over the outer aspect right chest 4 x 1 cm deep, 7 cm away from the nipple.

Musa Mdluli is the deceased's son and he identified the deceased's body to the Pathologist. The next witness whose evidence was accepted by consent was that of Mandlenkosi Siyaya, whose evidence was that the accused handed him the okapi knife which the accused used to stab the deceased. Siyaya then handed the knife to the Royal Swaziland Police.

There is also the evidence of 2197 D/CONSTABLE T. DLAMINI of Hluti Police Station, whose evidence as reflected in the summary was to the effect that on the 3rd January 1998, the accused was brought to the Police Station by three men and it was reported to him that the accused had stabbed the deceased with an okapi knife which was handed to him. The accused was injured on the right hand and which injury necessitated that the accused be taken to Matsanjeni Clinic for treatment.

This officer, in the company of 1197 D/Sgt Ntshangase proceeded to the scene of crime whereat they found the deceased lying dead with two stab wounds on the chest. A knobstick was found next to the deceased and which stick was the cause of the quarrel between the accused and the deceased. The deceased's body was then conveyed to Matsanjeni Clinic mortuary.

1197 D/Sgt David Ntshangase's evidence was to the effect that he introduced himself to the accused as a Police Officer and cautioned him in accordance with the Judge's Rules. He then proceeded to question the accused about the deceased's death and the accused elected not to say anything in connection therewith. The accused was later charged with the murder of the deceased.

The Crown then led the evidence of Malitha Victoria Ngobese (PW1) of Shisizwe area. Her evidence was that on the 3rd January 1998, she was walking from the homestead of Magelo Ndlangamandla, where there was some traditional brew, which she and many others had been invited to drink. At or about 14h30, she decided to leave for home as the children were alone back home and there was one to look after the cattle. When she had walked away, she saw the deceased following her. The deceased had also been drinking the traditional brew at Ndlangamandla's homestead. The deceased caught up with her and they walked together.

Thereafter, PW1 and the deceased looked back and saw someone whistling at them, indicating that they should stop. It was the accused person. The accused caught up with them and asked in an insolent manner why the deceased was leaving him behind. The accused told the deceased to bring back his stick, wresting it away from the deceased. The accused and the deceased began to fight over the stick and the deceased fell. Frightened and surprised at what these old people were doing, PW1 decided to move away.

She then saw the accused wielding an open knife and shouted to the deceased warning him about the fact that the accused had an open knife in his hand. The accused then began to throw stones at the deceased. PW1 then drifted back, ran away and began to cry. At that point, she continues, the accused started to pursue her, carrying the knife, presumably to stab her. She then met a Mathe boy and asked him to rescue her from the accused who was trying to kill her. In the company of Mathe, PW1 returned to the scene of the fight and found that the deceased had died.

Under cross examination by Mr. Smith, PW1 maintained her story. There is however one aspect of her evidence meriting mention and this relates to the allegation that the accused threw stones at the deceased. I was not satisfied with PW1's responses to the questions by Mr. Smith. At first, she said that she saw three stones thrown by the accused landing on the deceased's head. When probed as to whether the deceased was injured by the stones, she said she did not see as she was running away.

She later changed her story and said that she saw the three stones thrown but did not see them actually land on the deceased's body. She even suggested that the deceased may have avoided the stones. When probed further, she said she may have made a mistake about the stones landing on the deceased and attributing the "mistake" to fear at the time.

I will reject PW1's evidence relating to this incident as it is highly unsatisfactory. She was evasive and was unimpressive in regard to this incident. Furthermore, there is nothing to indicate that the stones hit the deceased at all.

PW1 further stated that she knew the knobstick handed in by consent as belonging to the deceased. She maintained her story under cross-examination that the deceased had always carried it, particularly whenever he went to the Chief's kraal. I have no hesitation in accepting her evidence in this regard.

This witness was however unhelpful in describing how the deceased got stabbed by the accused as she had become frightened and ran away from the scene. She denied the suggestions put to her by Mr. Smith that the knife was produced by the deceased and stated that the knife was always in the accused's possession. She was not in a position to say whether or not the accused stabbed the deceased in self-defence.

The Crown then called Josephine Sibukiwe Mdluli, the deceased's wife (PW2). Her evidence was to the effect that she knew the knobstick that the deceased carried during his lifetime and positively identified it. She stated that on the morning of the 3rd January 1998, the deceased carried the stick with him when he attended a funeral.

Under cross-examination by Mr. Smith, this witness maintained her story and denied any suggestion that the stick belonged to the accused. She positively identified the stick and stated that the deceased never went anywhere without the stick. I have no hesitation in accepting PW2's evidence as she was clear and stood up well under cross examination.

The Crown closed its case and the accused went into the witness box and elected to adduce his evidence under oath. The accused's evidence ran thus:

That he is a seventy-year old man who was in good terms with the deceased as he called the latter his in-law. He went on to say that the stick belonged to him. He denied ever seeing the knife which was produced in Court.

Regarding the events leading to the deceased's death, the accused stated that he had woken up at about 04h00 on the 3rd January 1998, to attend a funeral together with the deceased. After the funeral, he went to a Dlamini homestead to drink traditional beer and afterwards, he went in the company of the deceased, to the Ndlangamandla homestead where they continued imbibing traditional beer.

After partaking of the beer for sometime, they were informed that the beer was finished and he rose to urinate. On his return, he found that his knobstick was missing and someone informed him that the deceased had taken it. He then followed the deceased and when he caught up with him, he politely asked the deceased to give him the stick back and he wrestled the stick away from the deceased, who refused to let go of it.

He proceeded to say that the deceased produced a knife from his pocket, opened it with his teeth. The accused then dispossessed the deceased of the stick and hit the deceased on the hand and as a result of which the knife fell from the deceased's hand. Both the accused and the deceased struggled for possession of the knife during which struggle the deceased got accidentally injured.

The accused then went to sit down about six metres away from where the deceased lay, whereafter some boys took him next to the main road and handed him over to the Royal Swaziland Police.

Under cross-examination by Mr. Maseko, the accused maintained that he was seeing the knife for the first time in Court. When asked why he did not run away from the deceased after he hit the knife from the deceased's hand he alleged that he was prevented from running away by a huge rock.

Furthermore, the accused stated that the stick belonged to him and he had cut it in the lowveld with Mbuso Dlamini. I must mention that the story of the huge rock and Mbuso Dlamini was never put to the Crown witnesses nor did the accused mention these in his evidence in Chief.

In R VS DOMINIC MNGOMEZULU AND OTHERS CRIMINAL CASE NO. 94/90 AND SVP 1974 (1) S.A. 581 & 582 (Rhodesia, A.D.), need for the defence to put the accused story to all the Crown witnesses was emphasised. I will lay the blame squarely on the shoulders of the defence Counsel. I can find no reason why these crucial issues were never put to the Crown witness and as such, I will infer that there has been a change in the accused's story relating to these issues. It is also worthy of note that the defence did not call the said Mbuso Dlamini to confirm the accused's story.

From the evidence, I find that the knobstick belonged to the deceased because the evidence of PW1 and PW2 was never shaken in this regard. They described the knobstick in a satisfactory manner and further stated that they had seen the deceased using it. I was more impressed with the evidence of PW2 regarding the ownership of the stick, who stated under cross examination that she had no reason to fabricate any evidence against the accused.

Furthermore, if it had been the accused's stick, why would he leave it lying at the scene as stated in the evidence of 2197 D/Constable T.Dlamini? Moreso because according to the accused's version, he was the last person to be in possession of the knobstick in question. I reject the accused's story regarding the ownership of the stick as false. Even if the stick was his, there was no reason to act the way that he did, given the fact that he is a venerable man. I thus find that the stick belonged to the deceased.

With regard to the knife, the position is not clear cut. PW1 only says she saw the accused wielding it. She does not say that she saw the accused actually producing it. The fact that the accused took it from the scene and gave it to Siyaya cannot lead to an irrebuttable presumption that he is the owner of the knife and such finding of fact would be far reaching. In the circumstances, I am not placed in a position to make a finding on the ownership of the knife, save to say the accused story regarding the knife is unconvincing especially when he denied ever seeing the knife before. This is moreso in the light of the evidence of Siyaya to the effect that the accused handed him the knife.

Notwithstanding the findings of fact above, it cannot readily be assumed that the accused killed the deceased intentionally. There is no satisfactory evidence which clearly states how the deceased was killed by the accused and from which it can be deduced that the deceased was killed intentionally.

It is however clear that the cause of the quarrel was the knobstick which was in the deceased's possession and which the accused believed belonged to him. The accused and the deceased struggled over the stick and the former wielded a knife by which the

deceased was killed.

Although the accused's version leading to the stabbing is not very satisfactory, I cannot find that there was actual or legal intention on the part of the accused to kill the deceased. It is clear that there was a skirmish between the two and during which the accused was injured on his hand, received treatment at Matsanjeni Clinic and the accused was stabbed fatally.

The post-mortem report refers to one injury penetrating the heart and to a cut 7cm away from the nipple. I do not regard the choice of language used by the Pathologist between "injury" and a "cut" as mere semantics or terminological inexactitude. There is a difference between an injury and a cut, the former being of a severe nature. In any event, the Crown did not call the doctor to explain the difference, if any. In the circumstances, I am compelled to assign the words used by Dr. Reddy their ordinary meaning. There is no suggestion that the cut was so serious as to have caused the deceased's death. I therefore accept that the accused killed the deceased accidentally and also take cognisance of the fact that the accused had taken some traditional brew which may have led to this unfortunate and sombre incident.

There is no direct evidence from the Crown which one can accept without hesitation that the accused killed the deceased intentionally and furthermore there was no motive suggested for the killing other than the misunderstanding over the knobstick. There was a suggestion by Mr. Smith to PW1 that the accused was acting in self-defence and this may be the case in the light of the fact that there was no eye witness to the actual stabbing of the deceased.

I cannot find beyond a scintilla of doubt that the deceased was stabbed by the accused with intent to kill him and the doubt that I have in my mind must operate in favour of the accused person.

The Court was referred by Mr. Maseko to the judgement of His Lordship Watermeyer A.J.A. in REX v DIFFORD 1937 A D 370 AT 373 where his Lordship stated as follows:

"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal,"

I am in respectful concurrence with the manner in which Watermeyer A.J.A. propounded the law. Turning the statement of the law to the facts of the instant case, I find that the accused's explanation, though not entirely satisfactory, it is probable. I cannot say that his explanation is beyond any reasonable doubt false. There is a

reasonable possibility that his explanation is true. In the circumstances, the doubt must operate in favour of the accused and I accordingly find him guilty of culpable homicide, to which he had initially pleaded guilty.

T.S. MASUKU

ACTING JUDGE