

IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO. 103/98

In the matter between

REX

VS

MFANOSE JIMSON MAMBA

Coram S.B. MAPHALALA - J

For the Crown MR J. MASEKO

For the Defence MR. B. SIGWANE

JUDGEMENT

(02/11/98)

The accused is charged with the murder of Boy Dlamini on the 27th January 1998.

The accused pleaded not guilty to the offence and he is represented by Mr. Sigwane. The crown is represented by Mr. Maseko.

It appears from the evidence of Dr. R.M. Reddy who performed the post-mortem on the deceased that the cause of death was haemorrhage as a result of penetrating injury to the right lung. This is a common cause that can be inflicted with a clamp knife produced before the court.

The crown called five witnesses to prove its case. The first witness is PW1 Sellinah Ntfombi Mncina that on the 27th January 1998 she was in the company of the deceased from Phonjwane Primary School to a local shebeen at Ndzimandze's homestead. At the shebeen each of them bought his own beer and also the deceased sat drinking his traditional brew. After some time whilst at this homestead came out Mfanose Mamba, the accused who went to where the deceased was seated and asked for his radio. She did not hear the deceased response but only saw the deceased leave and followed by the accused. She followed them as she was also leaving going home and accused was her neighbour.

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As they went past Vikizijula Supermarket the accused again asked for his radio from the deceased but the deceased did not respond. The accused went into the supermarket came out and told the deceased that he had bought a knife and the deceased would tell him about the radio. The accused left and the deceased followed him. The deceased then asked what he had done to him. The accused drew a knife and stabbed the deceased on the chest and thereafter left. Before the stabbing she saw the accused pushing the deceased. The deceased did not re-iterate. This is about the extent of her testimony. She was cross-examined at length by Mr. Sigwane where in my view she did not portray a favourable impression to the court. I shall revert to her evidence later in my judgement.

The crown then called PW2 Abel Fayase Shiba who told the court that he is a teacher at Phonjwane High School. He told the court that on the 27th January 1998 he was from his home to the supermarket when he came upon two men who looked like they were fighting. These two men were the accused and the deceased. He went to these two men and intervened. He saw that the deceased was bleeding profusely.

The accused was carrying a knife. He listened to PW2 and left the scene. The deceased fell down. PW2 did not see when the stabbing took place he came after the fact. He did not see who was the aggressor in this fight. He saw that the accused was carrying a knife and the deceased was carrying a stone.

He tried to stop the bleeding but that did not help, he saw a boy who was in the scene and he sent the boy to seek for help. The witness was cross-examined at length by the defence.

The crown then called its third witness PW3 Simon Mandzinda Gamedze who is a Security Officer at Vikizijula Supermarket. On the 27th January 1998 he was on duty as usual when the accused came into the shop and bought a knife. Shortly after the accused had bought the knife he then learnt that he had stabbed somebody. The witness was also cross-examined at length by the defence.

The crown then called PW4 3129 Constable P.E. Dlamini who told the court he received a report on the deceased being stabbed at Vikizijula supermarket. He attended the scene, found the deceased lying on the ground with chest injury (stab wound) and was still alive. He quickly took the deceased into the police van and rushed the deceased to hospital. Shortly on arrival whilst being attended to, the deceased passed away.

The crown then called PW5 3488 Constable J. Hlatshwayo who told the court that he arrested the accused and cautioned him according to the Judge's Rules on the day of the stabbing of the deceased. Having been cautioned the accused produced a knife and handed it to him.

The crown then closed its case.

The accused took the witness stand being led by his attorney Mr. Sigwane where he gave a lengthy account of what took place that day. The long and short of his story is that he acted in self-defence in stabbing the deceased. That on the day he had gone to the primary school to look for a place for his daughter and he was in the company of his daughter. From the school he went to the supermarket where he bought a loaf of

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bread and coke for his daughter's lunch and a knife. The reason he bought a knife is that he was a craftsman who make "tinjobo" (traditional regalia) to supplement his income. He had been commissioned by the owner of the supermarket to make him loin skins. He then left his daughter eating at the shop and went to the shebeen for a drink. At the shebeen he bought himself traditional brew and there were a number of patrons partaking to the festivities there including the deceased and PW1 who was in the company of some women. Accused told the court that there had been some breakin at his house where a number of items were stolen including his radio. He got information that the deceased was seen selling the radio. He proceeded to the deceased and asked him about the radio. The deceased told him that he was going to fetch the radio at PW3's home. After a long while the accused decided to go home with his daughter. Along the way he saw the deceased and the deceased called him. The accused obliged, as he wanted to find out where his radio was. When he got to the deceased the latter asked him where he got the information from that the radio was with him. The deceased asked in an insolent manner. The deceased then punched him on the chin. The accused staggered back and nearly fell and shortly regained his composure. Then the deceased by then had a stone in his hand and wanted to strike the accused with it. The accused was ducking to deceased advances and he then remembered that he had a knife in his trouser pocket. He took out the knife with one hand and tried to ward off the deceased blows with the other hand. He then opened the knife and deceased got stabbed. Then PW2 arrived at the scene and separated them. The accused was cross-examined at great length by the crown but in my view he maintained his story throughout.

The court then listened to the submissions by both the crown and the defence.

The crown is of the view that it has proved its case beyond a reasonable doubt. The cause of death is not challenged so is the identity of the deceased and that the accused was the assailant. The crown urged

the court to consider the evidence of PW1 and that her evidence was materially corroborated by that of the accused. She saw what took place that fateful afternoon. Mr. Maseko contended that the defence of self-defence by the defence does not hold much water. To this effect he cited the case of Thandi Tiki Sihlongonyane Criminal Appeal Case No. 40/97 and further to the proposition that the court should find the accused person guilty on the basis of *dolus eventualis*.

Mr. Sigwane on the other hand contended that the defence of self-defence was put to the crown witnesses at the early stages of these proceedings and the crown failed to discharge its onus to negative this defence. To this effect he directed the court's attention to the case of *R vs Sifundza* 1970 - 76 S. L. R. 394 where the court in that case held that it was clear law that the onus of negating self-defence rest upon the crown. Mr. Sigwane attacked the evidence of PW1 in that she was given to exaggerate and had a lot of mistakes. Her evidence should not be relied upon as it was full of contradiction more particularly it contradicted that of PW2 in that she did not see PW2 at the scene of the stabbing. PW3 did not see anything. PW4 was the kind of a police officer who will go out of his way to suppress evidence, which is adverse to the crown's case. On the other hand accused's version of events was given in clear and accurate fashion. Accused explanation is a reasonable explanation in the circumstances. The accused never intended to stab the deceased. Mr. Sigwane urged the court to find the accused not guilty and acquit him.

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I have considered the whole evidence in this case and also the able submissions by the crown and the defence, I agree with Mr. Sigwane's lucid submissions that the evidence of PW1 should be rejected. Her evidence seems to be suggested. She gives the court the impression that she has been following the accused from when they left the school up to the time the stabbing took place. However, there is a flaw in her evidence in that she did not see PW2 who was at the scene of the stabbing and who played a major role in the scheme of things. It is curious how she did not see this if her version is correct that she was following the accused throughout culminating in the death of the deceased. Another flaw in her evidence is that after the stabbing she took custody of accused's daughter, however, this was disproved by the evidence of PW5 the police officer. It would be dangerous to accept the evidence of PW1 as the gospel truth of what took place that day. I am unable to find the accused guilty of murder on the basis, of *dolus eventualis*. *Dolus eventualis* is where the accused foresees the possibility of his act resulting in death, yet he persists in it reckless whether death ensues or not. (refer *R vs Nsele* 1955 (2) S.A. 145 (AD); *S vs Sigwhala* 1967 (4) S.A. 566 (AD)).

In the present case we only have the evidence of the accused of what happened between the deceased and himself. The story by the accused has a grain of truth in it and I have no reason to reject it. I believe that in the present case the accused person was acting in self-defence. In our law the use of force which would ordinarily be criminal is justified if it is necessary to repel an unlawful invasion of person, property or other legal interest. If the possibility of private defence is raised in the evidence, the onus is on the crown to prove beyond reasonable doubt that an accused person did not act in private defence. (see *Rex vs Sifundza* (supra); *S vs Manuele Sile* 1945 WLD 134 and *S vs Hele* 1947 (1) S.A. 277 (e) 277-278). In my view the crown evidence in the present case falls short of discharging this onus.

In the result, I find the accused not guilty and he is acquitted forthwith.

S.B. MAPHALALA

JUDGE