IN THE HIGH COURT OF SWAZILAND

CRIM.CASE NO.175/98

IN THE MATTER BETWEEN:

THE KING

VS

TONY ORGIL LAPIDOS

CORAM	**:**	**MASUKU J.**
FOR THE CROWN	**:**	**MS S.W. NDERI**
FOR THE ACCUSED	**:**	**MR M.P. MNISI**

JUDGEMENT
13/8/99

The accused stands charged with the crime of murder. The indictment alleges that in or about the 14th June, 1998, and at or near KaMchoza Bar, Ezulwini area in the Hhohho Region, the said accused person did wrongfully and intentionally kill **MARTIN ROBERT MUIR** and did thereby commit the crime of murder.

The accused pleaded guilty to the lesser charge of culpable homicide, which plea the Crown rejected. The Crown persisted in the charge preferred in the indictment and to which the accused pleaded not guilty, a plea which was confirmed by the Defence counsel.

By consent between the Crown and the Defence, the evidence of one **ALVINAH HLOPHE** (PW 5 in the summary evidence) was admitted by consent. She was the identifying witness. By further agreement, the post-mortem report of Professor (Dr) C. Rammohan, the Police Pathologist was also admitted and marked Exhibit "A".

The post-mortem report records that the deceased's death was occasioned by shock and haemorrhage consequent to stab injury of the lung. It records further that there was an incised penetrating wound 2 cm x 0.5 cm obliquely placed in vertical plane over the left side of the chest, 12 cm above and inner to the left nipple in the 10 0'clock position, 3 cm away from the midline and 143 cm above the undersurface of the left heel.

Furthermore, it records that the upper inner angle is clean cut and the lower outer angle which is 4 cm away from the midline showed the splitting of the skin. The chest wall was penetrated through the 2nd intercostal space. Underneath the upper lobe of the left lung was penetrated through and through. The wound on the lung measured 2.5 cm in length and was obliquely placed in vertical plane. The minimum depth of the wound was 11 cm.

The Crown then called Happy Nompilo Dlamini (PW 1), who testified that in June, 1998 she was in the deceased's employ at KaMchoza Bar as a Bar Lady. In June, 1998, she had been employed there for one year and three months. Her hours of work were from 4 pm to 12 midnight.

Furthermore, she testified that she knew the accused person very well as he was one of the patrons of the bar and was leasing a room at the deceased's homestead. It was her further testimony that on the 14th June, 1998, at or about 02h15, she closed one side of the bar entrance to signify to the patrons that the bar was about to be closed for business. Whilst standing behind the counter, the accused entered the bar and purchased a 340ml can of Castle milk stout together with some peanuts, which she served the accused. The deceased told the accused that it was time to close down the business and that the accused should take his leave.

The accused, to whom she always referred to as Tony, then insulted the deceased who was in the bar, talking to a Zambian friend of his, calling him a lunatic. The deceased called the accused and the accused went to where the deceased sat and they talked, although PW 1 could not hear the content of their conversation. The deceased then stood up and politely told Tony to leave and eventually pushed him out of the bar, telling him to go home as the bar was closed. Tony was resisting. Notwithstanding the resistance, the deceased pushed Tony outside the bar for about fifteen to twenty metres and when they reached the public telephone booth, the accused produced a knife and stabbed the deceased with it.

The accused then ran away and the deceased tried to follow him slowly. After a few minutes, the security guard came to PW 1 and told her that the deceased had fallen down. PW 1 and the security guard proceeded to where the deceased was, looked at him. He was lying facing upwards and was bleeding on the left side of the chest. She then telephoned the Lobamba Police.

PW 1 then proceeded to the deceased home and woke up the deceased's son Gary and brought him to the scene. They found the deceased lying on his face. Gary took the keys from the deceased's pockets, put the deceased in a sedan, assisted by PW 1 and a security guard and said he was conveying the deceased to hospital.

Gary instructed PW 1 to close the bar and wait for the arrival of the Police. PW 1 complied. When PW 1 attempted to open the till with the intention to removing the money there from, the till would not open. Tony then approached PW 1 and told her and the security guard that when the Police arrive they must tell them that they do not know what had happened to the deceased.

The accused then demanded the keys to the safe from PW 1, who said she did not know where they were. He repeatedly told her that they must go with him to take the money. The accused further threatened PW 1 saying that if she refused to open up the place where the money was kept he would stab her. At this juncture, the accused pushed her and she fell on her back and her blouse got torn. It was this witness' evidence that she knew the accused very well and that she knew him both in the state of sobriety and insobriety. On the night in question, the accused, she testified, appeared sober.

On the arrival of the Police, the accused told the Policeman that he did not kill the deceased person. The Police put the accused in their van in spite of his resistance.

In cross-examination, Mr Mnisi put it to PW 1 that the accused was extremely drunk. This the witness emphatically denied and reiterated that she knew the accused in a state of sobriety and inebriation. It further came out in cross examination that the accused had come to the bar earlier, around 21h00 and sat outside with his friends.

When put to PW 1 that Tony had had drinks from another bar in Ezulwini, the witness denied this, stating that theirs is the only bar and is the only one that opens until late in Ezulwini and that most people drink there. It was further put to PW 1 that the accused never demanded money from PW 1, but she maintained her story. This witness also adequately described the knife and denied any suggestions that she did not see it. According to her evidence, she saw it when the accused threatened to stab her and when the Police took it from him.

This witness, in my assessment was impressive in her evidence. She was calm through the examination, both in chief and under cross-examination. She stood up well to cross-examination and never wavered. She stuck to her story and I have no reason not to accept her evidence as she struck me as being an honest and truthful witness.

The Crown then called PW 2 Gary Denzel Muir, the deceased's son. He testified that he knew the accused very well as the accused stayed at Gary's home with his mother and rented a house there and had known him for many years, more than ten years. He testified that there were no ill –feelings between his family and the accused's family.

Regarding the incident in question, Gary's evidence was that at or about 03h00 on the 14th June, 1998, he was woken up by PW1, who knocked on his window. She told him to come down because the deceased had been stabbed. Gary got up and rushed down to the scene, where he found the deceased lying next to the shop facing downwards. He turned the deceased around and with trembling hands, he felt for a pulse but could not feel anything. He then saw blood coming out of the deceased's nostrils.

The deceased was wearing a white shirt soiled with blood. On lifting up the deceased's shirt, it was PW 2's evidence that he saw a hole on the deceased' left side of the chest. He searched the deceased's pockets and took out keys for the deceased's motor vehicle, ran to the vehicle and drove it to where the deceased lay. He then requested PW 1 and the Security Guard who were standing at a distance to help him put the deceased in the back seat of his sedan, a Mercedes Benz.

Gary testified that whilst approaching the deceased with PW 1, when he was coming from his room, the accused said to him "I want to talk to you". Gary ignored him and proceeded to his father. Whilst carrying the deceased into the motor vehicle, the accused kept insistently telling Gary that he wanted to speak to him. This frightened Gary very much. Gary also testified that he knew the accused very well and that on the day in question, the accused was in a state of sobriety.

It was Gary's further evidence that the death of his father had affected the whole family immensely as he was the head of the family. As a result, Gary's mother and grand-mother have had to attend hospital every now and then and his brother and sisters no longer performed well at school. The whole family was still shattered by the deceased's demise. Lastly, Gary testified that his family had received no indication of remorse, either from the accused or his family.

Mr Mnisi did not cross examine this witness. In my assessment, he also gave a good and graphic account of the events he saw. Although he was not cross – examined, I have no reason to doubt his honesty and the truthfulness of his evidence.

The Crown then called PW 3, 3516 Constable Mpumelelo Dlamini, who testified that on the 14th June, 1998, he was stationed at Lobamba Police Station and was on duty. At or about 02h50, he received a report from KaMchoza Bar and acted on it, arriving at the said Bar at or about 03h00.

Around the gate, PW3 found three people, PW 1, the Security Guard and the accused. He enquired from them what exactly had happened and PW1 and the Security Guard pointed at the accused, alleging that he had stabbed a person. On enquiring on the where abouts of the victim, PW 3 was informed that he had already been conveyed to the Mbabane Government Hospital. PW 3 then requested the accused to accompany him to the hospital and the accused asked why he should go. PW 3 replied, saying that he wanted the accused to see how much damage had been occasioned to the victim. The accused flatly refused to go with PW 3.

PW 3 then forced the accused into the Police van and the accused resisted and moved his hand towards his back pocket, at which juncture, one of the witnesses to the event

shouted to PW 3 saying that that is the knife which the accused used to stab the deceased. PW 3 managed to dispossess accused of the knife.

PW 3 then described the knife which he took from the deceased accurately and said it was 30 to 40 centimetres in length. He took the knife from the accused's hand. The knife has a blade of about 21 cm and has a sheath, which looks like a short stick and cannot easily be identified as a knife. The knife was handed in as Exhibit 1.

On arrival at the hospital, PW 3 left the accused in the back of the van and went to the Out-Patient Department, where he found the deceased covered and he was already dead. PW 3 unfastened the deceased's shirt and noticed a sharp wound on the left side of his chest, which wound had been bleeding. No other injuries were observed on the deceased's person. PW3 with the assistance of the nurses conveyed the deceased person to the mortuary.

PW3 then left the hospital and drove back to the Police Station where he formally charged the accused with the crime of murder. The officer testified that in his assessment, the accused had had a few drinks but was not drunk. Again, Mr Mnisi, in his wisdom, did not cross examine this witness whose evidence I consider credible, reliable and trustworthy and I accordingly accept.

The Crown then called its last witness, David Philemon Dandane (PW4) who was then in the employ of Buffalo Soldiers security firm. PW4 testified that on the 14th June, 1998, he was stationed at Ka-Mchoza Bar for the first time. He reported for duty at 18h00 and there met the deceased, who issued instructions to him.

PW4 recounts that at about 21h30, a young man whom he did not know, but later gathered was Tony asked him to go inside the bar to purchase some cigarettes. PW4 obliged. There were many people inside the bar. After buying the cigarettes for Tony, PW4 went outside to continue with his duties. Tony went inside the bar and sat with the deceased. Sometime later, PW4 heard some noise inside the Bar and he saw the deceased holding the accused by his arm, telling the accused to take the beer which he had bought together with the money with which he had purchased the beer. The accused refused to leave the bar. The deceased then held the accused with his hand, moving him out of the Bar but the accused was obstinate.

The deceased then pushed the accused intending to get him out of the Bar. The accused fell down. PW4 then went inside, picked up the accused and took the accused outside. Outside, continues PW4, the accused said to the deceased words to the effect that because of what you are doing you hate yourself. At that point, the accused pretended to return to the Bar and the deceased and PW4 tried to get him out of the yard. The deceased was holding the accused and PW 4 followed closely behind in case the accused decided to fight with the deceased.

When they reached the telephone booth, the deceased stopped and the accused

continued walking as if he was leaving the yard. After walking about fifteen metres, the accused turned back and came charging at the deceased. The accused had the knife, which at first glance looked like a pipe hanging on his belt. He produced the knife and stabbed the deceased using his left hand.

PW4 shouted at the accused telling him to stop and at which point the accused ran towards PW4 who, in turn, ran away. The deceased fell down. The deceased got up and tried to follow the accused but he became faint and fell down just outside the gate in front of the shop.

PW4 then rushed to PW 1 and told her to telephone the Police, which she did. PW 1 then went to tell the members of the deceased's family. The deceased had fallen facing downwards but the accused turned him over and thereafter went to hide. He then came running to PW 4, threatening to kill him if he did not carry out instructions that the (accused) was giving to PW4.

Holding PW4 by the scruff of the neck, the accused said both of them must go into the bar and take the money which would help them both. PW4 told the accused that there were some people in the bar but the accused denied this. The accused pulled PW 4 into the bar, closed the door and then locked PW4 in a toilet.

He then let PW4 out of the toilet and told him to go and take the money. PW4 then said that there were people outside at which point the accused took out the knife, tried to stab PW 4 but the latter avoided the knife successfully. When PW 1 came into the bar, the accused stopped the attack and put the knife back into his pocket.

The accused then accused PW 1 of having hidden the money, during the time she had gone to inform the deceased's son of the stabbing of the deceased. PW 1 retorted, saying that she had actually gone to hide herself because she was afraid of the accused and having known him, never imagined that he could do such a thing, namely, stabbing the deceased. It is at that point that Gary, the deceased son came and was assisted to place the deceased into the motor vehicle for conveyance to the hospital.

After Gary had left, the accused according to PW 4, then told PW 1 and PW 4 that should the Police come and enquire as to how the deceased met his death, they should never disclose that it was the accused who was responsible. They should instead inform the Police that they, (PW 1 and PW 4) were inside the yard and the deceased was speaking to some people at the gate who then stabbed him. The accused stayed with both PW 1 and PW 2, waiting for the arrival of the Police.

At about 04h00, the Police came and enquired as to what had happened. After having initial difficulty in telling the Police on account of fearing the accused person, PW 4 eventually told the Police what he had seen. The Police then took hold of Tony, who offered some resistance and attempted to take out the knife. The Police managed to dispossess him of the same and overpowered him and eventually put him in the back of their van. The Police then left saying that they were proceeding to hospital in order to ascertain the condition of the deceased person. As the Police vehicle was driving

off, the accused said that he is the one who killed the deceased and that the deceased would not rise again.

This witness also confirmed that from his observation of the accused, the latter appeared to have been in a state of sobriety, judging from the manner in which he spoke and walked. There is some hearsay evidence that this witness adduced and Miss Nderi properly requested not to be admitted and has as such not been considered or mentioned.

Again, Mr Mnisi did not cross-examine this witness and the Crown accordingly closed its case and Mr Mnisi moved an application in terms of the provisions of Section 174(4) of the Criminal Procedure and Evidence Act, 1938 as amended, for the acquittal and discharge of the accused person. I refused that application and indicated then that the reasons for the refusal would be handed down in the main judgement and these now follow:-

The gravamen of Mr Mnisi's submission in support of the application was that the Crown's witnesses had failed to identify the accused as the person who committed the offence in question because they never pointed at him as the culprit whilst they were in the witness box. In support of his submission, Mr Mnisi referred this Court to a decided judgement of this Court by Dunn J. in **THE KING vs ELPHAS LINGTON SHONGWE CRIM. CASE NO.72/95** (unreported).

In that case, an application in terms of Section 174 (4) was moved by the defence on the grounds that the Crown failed to lead any **evidence** (my underlining) identifying the accused as the person who shot and killed the deceased. The Learned Dunn J. granted the application in that case.

The Court was further referred by Mr Mnisi, to authors Lansdown and Campbell in their work entitled "South African Law and Procedure" Volume V, Juta, 1982 at Page 935, where the question of the corroboration of the identity of the accused person as the criminal is dealt with.

In response, Miss Nderi, in a spirited address submitted that the application had no merit and was clearly frivolous and vexatious. She submitted that the Crown's witnesses, particularly PW1 said she knew the accused person well and PW 4 also said he saw the accused person on the night in question. Miss Nderi further stated that Courts have in recent times frowned upon dock identification.

Section 174 (4) of the Act states as follows:-

> "*If at the close of the case for the prosecution, the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.*"

Dunn J. in the unreported case of the **KING vs DUNCAN MAGAGULA AND 10**

OTHERS CRIM.CASE NO.43/96 laid out the test to be applied in Section 174 (4) applications as being whether there is evidence on which a reasonable man might or may convict. The test is not whether a reasonable man should convict. The decision to discharge or to refuse a discharge is a matter resting solely within the discretion of the trial Court. This discretion (against which no appeal lies, as stated in **GEORGE LUKHELE AND 5 OTHERS Vs REX** Court of Appeal case No.12/95), must be properly exercised, depending on the attendant facts of the matter before Court.

The **ELPHAS LINGTON SHONGWE** case (supra) is clearly distinguishable from the present matter as in that case, the deceased and his colleagues were running away from four members of the Umbutfo Swaziland Defence Force. As they were fleeing, one of the soldiers, who was said to be wearing a red top shot at them thus killing the deceased. No **evidence** was led linking the accused to the shooting. None of the Crown witnesses was in a position to say who among the soldiers wore a red top. The witnesses, who were then running away could not see the soldier in question and they met the soldiers in the late afternoon on a road without having a sufficient opportunity to identify them.

This case stands on an entirely different footing because direct evidence was led implicating the accused. In particular, PW1 stated that she knew the accused very well having known him for three months and that he was a regular patron of the bar and stayed at the deceased premises. She always referred to him as "Tony" and she saw him on the night in question and even served him. PW4, also testified that he saw the accused on the night in question, spoke to him and was with him for some hours in a place that was sufficiently illuminated by fluorescent light. Gary also gave evidence that he knew the deceased, who was at the scene of the deceased's stabbing and had known him for more than ten years.

In Lansdown & Campbell (supra) at page 935, it is stated that the identifying witnesses' previous acquaintance with the accused, his appearance or clothing, opportunities for observation or recognition must be investigated in detail. Without such careful investigations, a reasonable doubt as to the identity of the accused must persist. As mentioned in the aforegoing paragraph, the identity of the accused was never an issue since the Crown witnesses knew him or saw him well to negative any doubt regarding his identification.

The *raison detre* for the investigation in these matters is to ensure that the Court is convinced that the right person is before Court to answer the charges and not some other person. In *casu*, I am satisfied, not only about the sincerity of the Prosecution witnesses, but also with their accuracy in identifying the accused, who was, as stated earlier, well known to them.

I also wish to point out that the question of the accused's identity was never raised by the defence in cross examination as I have stated that save for PW1, the defence never cross examined the Crown's witnesses. Even in PW 1's cross examination, the issue of the identity of the accused as the person who killed the deceased was never canvassed. I am further fortified in my conclusion by the accused's initial plea of

culpable homicide, which is clearly inconsistent with the spirit of the application.

In the unreported decision of THE **KING vs LUCKY LUKE ZWANE AND TWO OTHERS CASE NO.198/94 HULL C.J.** dealt with issue of identification. At page 4, the Learned Chief Justice (as he then was) stated as follows:-

> *"One underlying reason for the need for great caution is that a witness who honestly believes that he – or she – recognises a person can, as a matter of notoriety, be quite mistaken. Another, I think, and one which is not unrelated to that in the case where a victim identifies a person as the offender, is that there is a danger that there may be a psychological need to feel that he or she has done so successfully. These risks are compounded where, in the manner in which a witness is brought into contact with a person who has been arrested on suspicion of an offence, there is a danger that the identification is thereby suggested to the witness."*

I am in respectful agreement with Hull C.J's reasoning but in this case, I entertain no doubt that the accused was properly identified by the witnesses and the possibilities of the witnesses pointing out a wrong person are eliminated. In view of my foregoing comments, I threw out Mr Mnisi's application. There clearly was ample evidence that the accused stabbed the deceased and it was not necessary that the Crown's witnesses should have pointed at the accused in the dock as the culprit.

Should I be mistaken in the view that I have stated for refusing the application in terms of the provisions of Section 174 (4), then I state that the omission, (if there was) to point out at the accused person in the dock is not fatal to the Crown's case because this Court should not allow the course of justice to be frustrated by unduly technical stratagem. In this regard, I find it apposite to quote with approval from the judgement of Curlewis J.A. in **R V HERWORTH 1928 AD 265 AT 277,** where the learned Judge of Appeal stated as follows: -

> *"A criminal trial is not a game where one is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides, a Judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control proceedings according to recognised rules of procedure, but to see that justice is done."*

Appraisal of Crown's Evidence

In summary, I formed the distinct impression that the Crown witnesses evidence was truthful honest and worthy of credit. The evidence, could however not be tested because the defence only cross examined one of the four Crown witnesses, namely PW1. The balance of the evidence therefore was entered uncontroverted and there is, save for what appears below no reason to reject it.

The only issue worth mentioning however, is that there seems to have been some inconsistencies regarding the time when the incidents relating to the deceased's stabbing took place. For example, PW 1 stated that it was around 2h30. PW3 said he received a report of his father's stabbing at about 03h00. PW 4, the Police Officer said he received the report at 02h50 and arrived at the scene at 03h00. Dandane, on the other hand stated that the Police arrived at about 04h00.

These inconsistencies are however minor in my view and do not materially affect the Crown's case. In any event, the impact of the sordid death of the deceased and the scary intimidation and threats meted to PW 1 and PW 4 by the accused may have had an effect on the Crown witnesses correct approximation of the time. I also take cognisance of the fact that one hardly takes notice of the time when specific incidents occur to the dot for purposes of adducing evidence in Court with mathematical accuracy.

Having arrived at the conclusion that the Crown's evidence, save for the few minor inconsequent blemishes was largely credible and reliable, I came to the view that the Crown had established a *prima facie* case against the accused. The accused was accordingly ordered to come to his defence, where he was led by his attorney to adduce sworn evidence.

The accused's story as follows:-

That he is a twenty – three year old who was at the material time in the employ of Bonacord Pump Services, Matsapha, as a plumber. On the 14th June, 1998, he went to town, (presumably Mbabane) and returned to Ezulwini, where he lived with his

mother, where they rented three rooms from the deceased. At around 20h00, he went to the deceased's bar at KaMchoza and sat there for about half an hour. He then purchased a bottle of Castle Milk Stout and thereafter bought more beer until the bar closed.

After the bar was closed, he went to his house to eat, after which he rolled his "tobacco" (cannabis) and smoked. Having had his food, (porridge and meat) he went to the bar and found that the discotheque was opened and there bought some more beer. He estimated buying four or five bottles of beer at the discotheque. After this, he remembered nothing i.e. he had a "blackout".

He stated that he was drunk when he went to the discotheque. Regarding the knife, exhibit 1, the accused's story was that the knife had been left by its owner, one Seaboy Simelane, who had died during the accused's detention in or about August/September, 1998. He further confirmed that he did not remember having a disagreement with the deceased; did not remember trying to stab PW 4, Dandane. The accused testified that he regained possession of his mental faculties on the following Tuesday (17th June, 1998) after his arrest at Lobamba Police Station. This was the day on which he was interviewed by the Police and then taken to the Magistrate's Court for a remand hearing.

The accused further testified that he never intended to injure the deceased and it was never his intention for the incident in question to occur. He continued to testify that he had a very good relationship with the deceased and had never been offended by the deceased neither had he ever offended the deceased person. In short, he regarded the deceased as his father.

Then followed an incisive and detailed cross examination by Miss Nderi, which covered many aspects of the Crown's and the accused's testimony. I will however confine myself to salient portions thereof.

Regarding the events of the night in question, the accused stated that at around 12 midnight he ate porridge and meat before smoking dagga in the verandah and that it

took him about seven minutes to eat. It further transpired that he warmed the food using a handigas stove, necessitating him lighting a match stick.

He further stated in cross examination that on that night, he spent about E40.00 on castle milk stout beer. As hitherto stated, the Crown, in my view successfully established a *prima facie* case and it now remains to be determined whether the accused discharged the onus upon him on a balance of probability.

The first issue to be pointed out is that the accused's case was never put to the Crown's witnesses, I dare say at all. Only PW1 was cross examined and the defence of amnesia that was advanced by the accused in the witness box was never put to her. There is a plethora of authority that points out the need for the defence case to be put to the Crown's witnesses in order to put the Court in a position where it sees their reaction thereto – **see S Vs P 1974 (1) S.A. 581** and **582 AND R Vs DOMINIC MNGOMEZULU AND OTHERS CRIM. CASE NO.94/90** (unreported).

In the latter case, Hannah C.J., with whom I am in respectful agreement stated as follows at page 17 of the judgement:.

"*It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution witness' testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross examination his intructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into 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 the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story*".

Based on the foregoing, I have come to the conclusion that an inference that the accused changed his story must necessarily be drawn. As indicated, it was never put

to any of the Crown's witnesses that the accused did not remember anything on account of his state of inebriation. Furthermore, it was never put to the Crown witnesses that the accused smoked dagga on the night in question. This only emerged when the accused took the witness' stand. Indeed he admitted under cross examination that he never told his attorney about this. Another example is the fact that it was never put to the Crown's witnesses that the knife did not belong to the accused. This also emerged when the accused took the witness box.

I would also like to point to areas which cause me to disbelieve the accused. Firstly, it was put to PW 1 that the accused imbibed alcohol at a bar other than at the deceased's bar. In his evidence in chief however, the accused stated that he was drinking at the deceased's bar and discotheque, which is completely at variance with what was put to PW 1. According to the latter portion of Hannah C.J.'s dictum, I am entitled to draw an inference that the accused changed his story and I accordingly draw that inference.

The accused's defence of drunkenness or amnesia is certainly inconsistent with the answers he gave during the scorching cross examination he was subjected to by Miss Nderi. It became abundantly clear that the accused remembered everything else but the killing of the deceased. For instance, during the "islands of recollection" or "lucid intervals" he remembered how much money he had on him that night and how much he spent on purchasing liquor, the type of liquor he bought: he remembered (in spite of being motherlessly drunk) what time he had his food; how long he ate; how he warmed the food (which needed co-ordinated action and caution); at what time he went to the discotheque; what was in the discotheque; what he bought and who sold him the liquor therein; where he allegedly smoked the dagga, remembered what he wore on the fateful day; remembered and could distinguish on the night between people he knew and those he did not e.g. PW 4. Finally, he remembered when he was arrested.

In his evidence in chief, the accused stated that following his drunkenness and his arrest in the early hours of Sunday the 15th of June, 1998, he regained possession of his faculties on Tuesday 17th June, 1998, when he was to attend a remand hearing. It

was established in cross examination that the accused signed a statement on Sunday the 15 June, 1998 in which he stated that the accused's death was a mistake. I shall return to this later.

If the accused's story is to be believed, it is inconceivable that a person as motherlessly drunk as the accused alleged, would sleep without feeling an urgent need to urinate, having imbibed a lot of alcohol. The urge to urinate, the accused says, only came on Tuesday, i.e after seventy-two hours. He did not however wet his trousers. I thus reject this piece of evidence as outright falsehood. I also take into account what I consider to be credible evidence regarding the accused's state of sobriety adduced by PW 1, PW 2 and PW 3.

In cross examination, the accused admitted that he signed a statement, having been duly cautioned, to the effect that the deceased's death was accidental. The statement was shown to him. That statement was signed on the 15th June, 1998, and this suggests that the accused's recollection of the incidents that occured was very fresh. If indeed he did not remember how the deceased died, there was no reason for him to say that the deseased's death was a mistake. He would have said that he just did not remember. I also reject the accused's story because of this consideration.

The accused was highly unimpressive as a witness, particularly, during cross examination. He was evasive and deliberately avoided answering direct and clear questions. He was fidgety, uncomfortable and always looked to the floor. On one occasion, I had to tell him to look up whilst under relentless cross examination. He quickly went back to his posture – looking down. One particular incident, which left an indelible impression in me was when Miss Nderi asked him to hold the knife as he did on the fateful night. The accused was reluctant. Even when he took it eventually, he took a deep sigh of relief before taking some time to open it. He was visibly shaken. This reaction in my view, is incompatible with that of a person who did not remember anything relating to the deceased's death.

I also reject the suggestion that the knife belonged to Seaboy Simelane as an outright fabrication. The accused only attributed the ownership of the knife to Seaboy in his

evidence in chief there having been no mention of Seaboy in cross examination of the Crown's witnesses, especially the Police Officer. When questioned about the said Seaboy in cross examination, he said he gathered that Seaboy had died. He later went on to say that Seaboy had been arrested at the same Police Station at the same time but he never told the Police about that.

The accused also failed to explain in a convincing manner as to why he decided to carry the knife on his person on the fateful night. His answer was that he was to give it to Seaboy at 8 pm. Notwithstanding that by 9pm, Seaboy had not arrived, the accused did not find it proper to put the knife safely away. At 02h00 however, he was still carrying that knife, although according to him he feared carrying knives. It was put to him that there was no need for him to carry the knife on his person since he lived some seventy metres from the bar and as soon as he saw Seaboy, he could have asked Seaboy to come to his house to take the knife, especially because the accused said he knew that carrying a knife is illegal and he also feared carrying knives. No convincing reason for carrying the knife was advanced. It is unbelievable that Seaboy, who it is alleged was feeling cold took the accused's jacket and left his knife as if in exchange for the jacket. Seaboy could have easily carried the knife with him. The accused never bothered to fetch his jacket from the said Seaboy, and the only conclusion I come to is that the story about Seaboy is a figment of the accused's imagination, introduced in a quest to ameliorate the ugliness of the crime and I reject it outright.

Furthermore, the accused stated in cross examination that the knife was left by the said Seaboy with one Sabelo Dlamini, a friend of his, whose whereabouts are now not known to him. He expressed a willingness to call the said Sabelo Dlamini to testify on his behalf to confirm the allegation relating to Seaboy.. The said Sabelo Dlamini was however not called as a witness and I have grave misgivings about whether he exists at all.

It is also worthy of note that that whilst being examined in chief, the accused said that Seaboy had left the knife and took the jacket. In re-examination, he quickly changed the story, stating that the knife had not been "left" by Seaboy but had been "forgotten" by Seaboy. Since the accused was absent when the knife was left, these are issues

that the Sabelo would have clarified. This is just one example of the improbabilities in the accused's story, changing it as and when it suited him.

Miss Nderi, in spirited argument, submitted that even if the accused would plead that he was intoxicated, which is negatived by the Crown witnesses, such intoxication does not constitute a defence to the charge. In that connection, I was referred to The Criminal Liability of Intoxicated Persons Act No.68 of 1938, the relevant portions of which read as follows:-

> *2. (1) Subject to this Section, intoxication shall not constitute a defenc*
> *to any criminal charge.*
>
> *2. Notwithstanding subsection (1), intoxication shall be a defence to a a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or or omission was wrong or did not know what he was doing and –*
>
> *a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *b) he was by reason of such intoxication insane, temporarily or otherwise, at the time of such act or omission.*

It is clear, in the light of the evidence led that the accused cannot benefit from the provisions of the Act above cited. Firstly, the uncontroverted evidence indicates that the accused knew what he was doing and further suggests that he knew that what he did was wrong. The evidence of Dandane and Happy is clear. The accused told them to concoct a story and tell the Police that some people unknown to them killed the deceased at the gate and stayed with them to ensure that that concocted story was fed to the Police. Dandane states further that the accused went to hide for some time and later said the deceased would never rise or come to life again.

Furthermore, it is clear from the accused's evidence in chief, if it is to be believed that he purchased the liquor and took the dagga on his own volition. It was never

suggested that there was an extraneous act, whether malicious or negligent by a third party which resulted in him imbibing the alcohol or smoking the dagga. Furthermore, it was never suggested whether in chief or under cross examination of the Crown witnesses that the accused was, as a result of the intoxication insane, temporarily or otherwise. If it so appears from the evidence that the provisions of Section 2. (2)(b) apply, then Court is at large to invoke the provisions of Section 165 of the Criminal Procedure and evidence Act, 1938.

Defences such as amnesia and automatism upon which the deceased seemed to rely in chief, must be carefully scrutinized by the Court. This is so even in cases where the defences are supported by medical evidence because that medical evidence is based on the hypothesis that the accused's account of the events is true. **See R vs H 1962 (I) 197 AD.** *In casu* such defences are not borne out by the Crown's uncontroverted evidence and are not even supported by the accused's own evidence. The accused's story, in the light of the Crown's uncontroverted evidence, as mentioned above is highly suspect such that I have rejected it as false and not worthy of any credit.

The accused, under cross examination said smoking dagga had the effect of soothing, relaxing and causing him to rest peacefully in all cases. He testified that he never suffered from epilepsy, had never consulted a psychiatrist nor had he ever been hospitalised after drinking excessively. After the lapse of memory alleged he never bothered to enlist the assistance of doctors. No medical or other evidence was led to corroborate the accused's story. I therefore have no hesitation, in view of the aforegoing to reject the accused's defences as an afterthought. I find that he has failed to discharge the onus of establishing the defences on a preponderance of probability.

From the Crown's evidence, which is largely uncontroverted, it is clear that the accused set out on the night in question, armed with his highly lethal knife with a blade measuring some 21cm, with the intention to obtain money through violence. He asked Dandane as to how many people were in the bar when he had sent Dandane to purchase cigarettes in order to ascertain if it was safe to strike. He went back after 2h00, when the bar was about to close and when most patrons had left, bought some liquor and peanuts and insulted the deceased for no apparent reason.. The latter, who wanted the accused to leave eventually pushed him outside and there stabbed him on the left side of the chest, notwithstanding that the money for purchasing the liquor was refunded. According to the post-mortem report, the minimum depth of the wound was 11 centimetres.

The accused then told PW 1 & PW 4 to lie about the deceased's death and started to demand money. He also threatened to stab them if they did not give him access to the place where money is kept. He demanded keys to the safe and PW 1's evidence is that some money she had left was found missing. Dandane also said the accused suggested that they would share the proceeds. Had Dandane not taken evasive action he also would have been stabbed by the deceased. Happy was violently pushed as a result of which her blouse was torn.

The conclusion I arrive at is that the deceased had a premeditated plan to get money on the day in question and killed the deceased hoping to get that money. I thus find that he had the necessary *mens rea.* His actions before and after the stabbing together with his utterances show that the deceased's killing was intentional. It is also clear, if

that finding is not correct, that he must have appreciated that stabbing a person (in a well lit area) with such a lethal weapon on the left side of the chest would result in that person's death and was reckless as to whether death occurred or not. With such a long blade, the accused must have appreciated that one plunge into the deceased's lungs accompanied by the force he exerted would suffice to kill him.

I accordingly find the accused guilty as charged.

As an aside, it appears from the evidence that the bar was closed after the time stipulated in the Liquor Licensing Act, 37 of 1964. Liquor License holders are encouraged to comply with the regulations and the endorsement on their licenses to avoid such ugly crimes being perpetrated in future.

T.S. MASUKU

JUDGE

SENTENCE

04/10/99

On the 24th September, 1999, I meted out a sentence of fifteen years' imprisonment on you but omitted to mention that the imprisonment was to be backdated and reckoned to run from the date of your arrest.

Your sentence be and is hereby reckoned to run from the 15th June, 1998 being the date of your arrest and it is so ordered.

T.S. MASUKU

JUDGE