

**CRIM. CASE NO. 51/99**

In the matter between

**REX**

**VS**

**MAPHOSUKUFA MAGONGO**

Coram  
For the Crown  
For the Defence

S.B. MAPHALALA – J  
MR. J. MASEKO  
MR. G. MASUKU

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**JUDGEMENT**

**(11/11/99)**

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Maphalala J:

On this indictment, the accused person is charged with murder of one Magwazane Magongo at Ngcina area in the Lubombo District on the 6<sup>th</sup> September 1998, by stabbing him to death with a knife.

He denies this charge. Accused through his attorney tendered a plea of guilty of the crime of culpable homicide. However, this plea was not accepted by the crown. The crown then led evidence to prove the crime of murder.

At the commencement of trial it was placed on record by consent that the following issues were admitted:

- i) The identity of the deceased is not in issue
- ii) The cause of death is not in issue
- iii) It was admitted that the knife is the weapon used to kill the deceased.
- iv) It was also agreed that the knife was found in accused homestead in the presence of his wife LaMaziya who stated that it was left by the accused. It had bloodstains on it and it was

recovered on the same day of the incident.

The knife was entered as exhibit "1" to form part of the crown case. The post-mortem report was entered as exhibit "A".

The crown called a total of five witnesses to prove its case.

The first witness called was PW1 David Mathunjwa who told the court that he knew both the accused and the deceased. In the afternoon of the 6<sup>th</sup> September 1998, he was seated at a certain homestead enjoying some alcoholic beverages when the accused came along carrying a knobstick and a knife. This was a Gamedze homestead. PW1 was in the company of Sisane and LaMaziya. The accused person told them he was going to stab Sikelela, the deceased and one Landrover. PW1 asked the accused to hand over the knife to him as he could see that it was going to land him into trouble. Then the three came along. PW1, the accused and the others were seated in the kitchen hut imbibing in this traditional brew called "Emambhawu". The accused then came out of the hut carrying the knife and approached the three people. The other two (Sikelela and Landrover) retreated and he stabbed the deceased. Before the accused stabbed the deceased the deceased was facing him with his head facing downwards. PW1 told the court that there was no fight prior to the stabbing. There is nothing which the deceased said before he was stabbed by the accused. Sikelela wanted to find out from the accused what they had done. After that he stabbed the accused on his left breast. Thereafter they went to call the deceased uncle who instructed them to take the accused to the police. They got a motor vehicle to the police station but it broke down along the way to the police station. He told the court under those circumstances the accused ran away.

He was the cross-examined by the defence.

It was put to him that it was not true that the accused was carrying the knife openly but he had it in his pocket. However, this witness was adamant that accused person was carrying the knife openly. It was also put to him that the accused told PW1 that he (accused) prior to his coming to the Gamedze homestead had survived a serious assault by three people an hour prior to his arrival at the Gamedze homestead. To this question he answered in the affirmative. The defence advanced was that the accused was attacked by the three prior to this stabbing. These three people at another homestead had made allegations that of witchcraft. PW1 did not have knowledge of what happened prior to the accused coming to the Gamedze homestead where he was with others drinking "Emambhawu" A question was put that accused never threatened anyone at the Gamedze homestead but the witness stuck to the story he gave in his evidence-in-chief. He was further asked about what happened when accused was conveyed to the police. However, in my view this has little bearing on the matter.

The crown then called PW2 Khekhe Tsabedze who was at the Gamedze homestead on the day in question enjoying some drinks with other people. He testified that he did not see the actual stabbing. He heard an alarm being

raised that the accused was killing the deceased. He then rushed to the scene where the deceased was. After the stabbing the accused ran away and they chased after him until they arrested him at his homestead. The witness further related at length how the accused escaped from their custody.

He was cross-examined briefly by defence counsel but nothing much was revealed touching on the material aspects of this case.

The crown then called PW3 Landrover Matse who is a Chief's runner (umgijimi). He told the court that on the day in question he was at the Gamedze homestead when he saw the accused coming from the hut where people were drinking carrying a knife and he stabbed the deceased who was outside. The accused then licked the knife and left the homestead and said those dogs who wanted him should follow him. PW3 said he did not know why the accused stabbed the deceased. The deceased had not said anything to the accused prior to the stabbing. He told the court that the deceased never threatened the accused person. Prior to that he saw the accused person chasing after Sikelela and accused was carrying a knife. He asked him why he was chasing after these children. Accused answered that these people were being disrespectful and also that they were children of a witch. This witness then called the boys and asked them what they did to the old man. They told him that they did not do anything to him. When this conversation was taking place Sikelela and the deceased were coming from their father who is the brother to the accused person. The witness further identified the knife exhibited before court as the knife, which was carried by the accused that day.

This witness was cross-examined by the defence where it was suggested to him that accused was threatened by the three boys prior to the stabbing. This witness denied this. This witness further confirmed under cross-examination that the accused licked the knife after stabbing the deceased.

The crown then called PW4 Sikelela Magongo who told the court that the accused person was his uncle. The deceased person was his older brother. On the 6<sup>th</sup> September 1999, they went to the Gamedze homestead in the company of PW3. The accused came out of the hut and he ran towards them. PW3 retreated and the deceased did not see the accused advancing towards them. The accused person had a knife with him and he stabbed the deceased with it and then licked the blood from the blade. He then went inside the hut to retrieve his knobstick. This witness told the court that prior to the stabbing there is nothing that was said between them.

He further enlightened the court that prior to the incident at the Gamedze homestead they were at a Matsenjwa homestead where the accused opened a knife and wanted to stab him. He ran away. The accused told them that they should leave the Matsenjwa homestead as he was in a foul mood. He agreed and they left with the others. As they were walking in some fields the accused came and walked between them. He opened a knife and chased after them.

This witness was also briefly cross-examined by defence counsel. It was put to him that the three (PW2, PW3 and PW4) are the ones who started the whole fracas by pelting the accused with stones and insulting him that he was a "witch". As a result of all this abuse the accused got so annoyed that he lost his self control. The witness denied all this and stuck to his story he gave in-chief.

The crown then called its last witness PW5 3459 Rueben Mbatha who is the arresting officer. He told the court that he arrested the accused at the homestead of a certain Thwala who is an inyanga (traditional healer).

This witness was briefly cross-examined and nothing of consequence was revealed.

The crown then closed its case.

The accused gave evidence in his defence under oath led by his attorney Mr. Masuku. He gave a lengthy account on what transpired that day from the time he was attacked by the three with stones up to the time he was arrested in connection with this offence. The long and short of his story is that he was attacked by these people and as a result of this attack he lost control. He does not deny that he stabbed the deceased. His defence is that he did so defending himself.

He was cross-examined at length by the crown. He denied most of the suggestions put to him by the crown.

The court then heard submissions from both counsel. The crown is of the view that it has proved its case beyond a reasonable doubt. It is common cause that before the stabbing of the deceased there was a dispute between the two at the Matsenjwa's homestead. The evidence of Sikelela Magongo has been materially corroborated by that of Landrover. The accused story cannot be reasonably be true. The accused person was portrayed as a sickly person suffering from asthma and is also old and there is no way he could have outran these young men taken that they were the aggressors. That accused defence of self-defence cannot stand in the circumstances. The court was referred to the case of ***R vs Joan Ndlovu 1970 – 76 S.L.R. 389*** where the case of ***S vs Matholeni 1976 (1) S.A. 403*** was cited with approval in this connection.

The defence on the other hand hold the view that accused was pelted with stones in the fields and tried to run away to the Gamedze's homestead. He suffered an unlawful assault from the deceased group and decided to seek refuge at the Gamedze homestead. As the accused was relating to the occupants therein what had befallen he saw the three people who had earlier on assaulted him. In his mind he believed that these people were coming to kill him. He then armed himself with a knife and then the fatal stabbing took place. Mr. Masuku referred the court to the case of ***Rex vs Zikalala 1953 (2) S.A. 568 (AD)*** where Van Der Heever JA cautioned that courts must be careful to avoid the role of arm chair critics wise after the event, weighing the

matter in the secluded security of the court-room, by putting themselves in the position of the accused at the time of the attack. This does not let in an element of subjectivity, it only means that the matter is considered objectively in the particular circumstances of the case. (see also **J M Burchell South African Criminal Law and Procedure Vol. 1 on General Principles of Criminal Law (3<sup>rd</sup> ED)** at page 79 and the cases cited thereat)

All in all it is Mr. Masuku's contention that these things happened at the spur of the moment.

These, therefore are the facts and the legal issues before me. I have carefully considered them in reaching my conclusion in this case. It appears to me to be common cause that the accused stabbed the deceased with a knife in the chest on the day in question. It is also common cause that the deceased died as a result of the stab wound. It is also common cause that the knife found in accused homestead was the knife used by the accused in stabbing the deceased to death. The parties in this case seem to be at **ad iddedum** as regards these material facts. The only point of divergence is - under what circumstances did the stabbing take place. The crown hold the view that the accused should be found guilty of murder and that his defence advanced that of self defence should be rejected as an afterthought. On the other hand the defence is of the view that in the circumstances the accused acted in self defence. I respectfully, disagree with the latter view. Here we have the evidence of a number of witnesses for the crown who corroborate each other in all material respects.

PW1 David Matsenjwa who was a truthful and credible witness told the court he came to the Gamedze homestead carrying a knife and a knopstick and told the drinking party there that he was going to stab Sikelela, the deceased and Landrover. When he asked him to hand over the knife to him for safe keeping as he (PW1) could see that it was going to land the accused into trouble. The three then approached the drinking hut and the accused came out with his knife and advanced towards them. The other two retreated but deceased who was facing down did not see the knife and was subsequently stabbed by the accused. There was no fight between the accused and the group of three prior to the stabbing. PW2 Khekhe, the chief's runner told the court that although he did not witness the actual stabbing he answered an alarm that the accused was killing the deceased. The accused ran away after committing the act. PW3 (Landrover Matse) and PW4 (Sikelela Magongo) saw the actual stabbing and told the court in almost the same words that after the accused had stabbed the deceased he licked the blood from the knife's blade. PW3 has no reason to fabricate a story against the accused. He is a chief's runner in the area in charge of enforcing law and order in that area. He has nothing to gain by giving such damning evidence against the accused. As for PW3 the accused is his uncle. Although from the evidence there might appear to have been an altercation between the accused and the deceased group in my view I do not think the accused was justified in acting the way he did. In any event it is trite law that any measures taken by the accused after the complaint's attack has ceased would be retaliatory rather than defensive and, therefore, unjustified (see **J M**

**Burchell (supra)** at page 74 and the cases cited thereat).

The circumstances surrounding the fatal attack do not suggest that the accused was threatened at that stage. The defence of private defence cannot exonerate the accused in the present case and it thus fails.

In the result, I hold that the crown has proved its case beyond a reasonable doubt that the accused did unlawfully and intentionally kill Magwazane Magongo by stabbing him with a knife and he is thus guilty of the crime of murder.

**S.B. MAPHALALA**  
**JUDGE**

**SENTENCE**

Having found that there are extenuating circumstances in your case what remains for me is to consider factors in mitigation of sentence.

I have considered all your personal circumstances in arriving at a proper sentence. One cannot gainsay the fact that you have killed another human being and these courts do not take kindly to this type of behaviour. It is the role of the courts to uphold public peace and to administer justice between man and man and are enjoined to impose appropriate sentences to curb this scourge. In order to carry out this task I have sought guidance in the celebrated case of **S v Zinn 1969 (2) S.A. 537 (A)** where at page 540 the following was said;

“What has to be considered is the triad consisting of the crime, the offender and the interest of society (my emphasis)”

It has been submitted that you are an elderly man and I can also see that myself. It has been held in a number of decided cases that maturity would tend to increase the subjective blameworthiness of an offender since “he is old enough to know better”. Besides the insight that comes with age, he should also be able to resist temptation better than a younger, more impulsive type of offender.

With increasing age the situation is reversed. However, as one nears the “second childhood” the behaviour of some elderly people may become less responsible, often as a result of physical or mental illness. Their sensitivity to punishment usually also increase, since a fine might rest heavily upon the shoulders of a pensioner and a sick person might not survive a spell in goal. I have taken these factors into consideration.

It was revealed in evidence that you are a sickly person suffering from asthma. However, in **S v Berliner 1967 (3) S.A. 193 (A)** the accused in that case was aged 61 years, with a heart ailment that, according to uncontradicted medical evidence, allowed him only another four or five years to live. The court **a quo** imposed five years' imprisonment on a count of fraud and one year upon each of two counts of theft, but since the latter were ordered to run concurrently with the count of fraud, it came down to five years effective imprisonment. On appeal Ogilvie Thompson JA considered the matter carefully but declined to interfere with the trial court's sentence.

"While a convicted person's health may, depending upon the circumstances, sometimes afford a good reason for not sentencing him to imprisonment, there is certainly no general rule that ill-health automatically relieves a criminal from being imprisoned: medical and hospital facilities are, of course, available for convicts".

I have considered the principle enunciated in this case and a long line of other decided cases including the following (see **S v Heiler 1971 (2) S.A. 29 (A)**; **S v Makua 1993 (1) S.A.L.R 160 (T)**).

In my considered view a proper sentence would be six (6) years imprisonment backdated to the date of your arrest. What you did that fateful day was totally irresponsible and you have to bear the brunt of your own actions.

**S.B. MAPHALALA**

**JUDGE**