

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.70/2000

In the matter between:

**REX
VS
BHEKI MALANGENI DLAMINI**

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MS. LANGWENYA
FOR THE DEFENCE	:	MR. T. MASINA

JUDGMENT

15/11/2001

The accused is charged in count one with murder, count two with grievous bodily harm and count three with grievous bodily hard.

He pleaded not guilty to all three counts and is represented by Mr. Masina who confirmed the plea as being in accordance with his instructions.

At the commencement of the trial counsel for the Crown and defence indicated that the post-mortem report relating to the deceased was to be handed in by consent as also the medical report in respect to count three. These documents were handed in as exhibits "A" and "B" respectively.

The contents of exhibit "A" are the following:

1. Sutured wound over left side neck 3.1cm present, a removing sutures involved muscles, veinjugular, vertebral deep, vertebral artery effusion blood in soft

tissues of neck about 100ml, front to back medially (over muscles 2.1 x 1cm and vertebra (4) 1.4 x 0.4cm) edges clean cut.

2. Abrasion over right knee 1.7cm area present.

and those of exhibit "B" are the following:

- Abrasion extending from inferior; Surfacing the eye pristinely to the upper border of sternomastoid muscle.

PW1, Ngabisa Nhleko gave evidence in support of counts one and two. She stated that she was 19 years of age and lived at Lavumisa. She knew deceased by sight only and knew complainant on count two. Ephraim Maefani Mdluli. She also knows the accused having seen him when the crimes he is facing were committed. She said the deceased was a bus driver of Frank's Bus Service. On the night in question she and Sipiwe Nhleko and Thwana Phakathi were on their way to a watchover/night vigil service. On their way to the watchover/night vigil service they went via the hotel where they came across the deceased and his bus conductor. The deceased had bought liquor and she and her companions spent some time with them. The consumption of liquor continued until 12am when the bar was about to close down for the evening. The deceased suggested that some liquor be bought before the bar closed down. It was her evidence that six beer bottles were bought and the party continued drinking when the accused who apparently came from the bar emerged and stopped where deceased and the group was. PW1 testified that accused picked up each bottle containing beer and looked at it as if to gauge how much liquor it still contained. This behaviour by the accused prompted the (not clear) to enquire from the group but directing his question to the accused "why does he not ask for the liquor if he wanted some. PW1 testified that her companions Sipiwe and Thwana also asked what was wrong with the accused. Why did he not ask for the liquor. PW1 stated that it was at this stage that

accused asked if the group was in a fighting mood and placed his hands at the back and PW1 heard a clicking noise and noticed that accused had in his hands a shining object. PW1 then advised the other members to keep quiet as the accused was producing a knife. It was PW1's evidence that the conductor, Sipiwe and Thwana told the accused that if he dared stabbed them they would lay a charge against him as they were not engaging in a fight with him. If he wanted the liquor, his was to ask for it. PW1 said at that point the accused stabbed the conductor on his cheek and the conductor started bleeding. They all stood up and the conductor approached the accused. It was at this stage that the deceased intervened and asked them to stop fighting. PW1 said she and the others started to move towards the lower end of the area and they moved and noticed that the deceased was running to the upper end of the area and accused was following him at his heels. PW1 and the others went towards a watchman and reported the happenings. The watchman advised them to go and make a report to the police. PW1 said the watchman's name is Mgazi and he accompanied them to the police station.

PW1 said when accused stabbed the conductor with his hand she did not see where the knife was. She noticed however that the conductor only had a stick of cigarette in his hand. This was the evidence of PW1. The witness was cross-examined by Mr. Masina. The cross-examination was basically aimed at whether PW1 had known the accused before this night. How she recognised him as the person she testified about was by what he was wearing when he stabbed the conductor. Ultimately, Mr. Masina put it to the witness that all this happened because there was a quarrel between the accused and the conductor.

PW1 was adamant that there never was a quarrel until the accused stabbed the conductor with his hand.

PW1 admitted that accused was drunk.

PW2 Thembinkosi John Dlamini gave evidence on all the counts. PW2 knows accused as his brother's son. He saw him in 1999 when he was arrested for the alleged crimes. PW2 was at the bus stop at plus minus 12 am waiting for a transport at a bus stop called

Bulawayo. Accused found him there and informed him that he had accidentally injured some one at the hotel. PW2 said accused told him he injured the person as the people were assaulting him. PW2 said the person he injured got stabbed. That was all PW2 said.

Mr. Masina cross-examined the witness about his state of sobriety and the witness stated that he too had taken drinks and was drunk. The witness said had accused show him an injury he would have seen the injury. He could not say that accused was drunk, but did say accused seemed to him to have taken some drinks.

Ntokozi Mbhamali gave evidence as PW3. His evidence was on counts one and two. It was his evidence that he knew both PW2 and accused. Accused is his cousin. PW3 also testified that accused had informed him on the night in question that he had accidentally injured people and they got stabbed.

Mr. Masina had no cross-examination for this witness.

PW4 Samuel Hlophe was called to give evidence. On the night in question he was in the company of the deceased and others. His evidence in the main evidence corroborated that of PW1 and 2. He knows accused. PW4 said Ephraem Mdluli at one stage asked if the person who was picking up the bottles containing beers and looking at the contents were known to anyone of the group, thereupon deceased replied that he did not know that person. PW4 then heard a voice saying "here he is producing a knife". It was PW4's evidence that accused went straight to Ephraem and stabbed him in the face and thereafter accused advanced on deceased and stabbed him in the neck. Deceased was then rushed to the hospital.

PW4 was cross-examined by Mr. Masina as to his state of sobriety and the witness stated he had not taken any drinks.

PW4 denied that there had been any quarrel prior to the stabbing in the face of the conductor by the accused. PW4 also denied that deceased stopped accused with an open hand.

Themba Nzalo gave evidence as PW5. He said on the 29th September he left the hotel and moved towards Nkwanyana's Tavern. At the gate of the Tavern he met the accused and said he knew him. Accused ordered him to go back and immediately proceeded to stab him with a knife below the left ear. It was PW5's evidence that accused never said why he was stabbing him. At the area where the assault took place there was electricity light. PW5

then went to lay a charge against the accused. He arrived at the police station and found the police busy attending to the injuries of deceased and PW5 then decided to go and lay a charge at Hlutse Police Station. It was PW5 that he did not even fight back when accused stabbed him.

Under cross-examination he stated that even though he normally drinks, he had not taken drinks on this evening. He was going to see his sister at the Tavern.

2267 Detective Sergeant Dlamini gave evidence as PW6. It was he who attended to deceased and conveyed him to Matsanjeni Clinic. It was his evidence that deceased was still alive when taken to hospital but was unable to speak.

PW7 Detective Constable Simon Mavuso. He investigated the murder charge and two assaults with intention to do grievous bodily harm. In the course of his investigations he contacted accused at Bulawayo area and informed him of his investigation and warned him in terms of the Judges' Rules. Accused then led him to his grandmother's parental home where he produced a press back clasp knife.

Accused told PW7 that he was being assaulted by the deceased and had to stab him in self-defence. Accused told him that on the other counts he was similarly defending himself, and he also told PW7 that he was drunk on that day. PW7 took some clothes of the accused which were blood stained. According to PW7 accused had no injuries on him.

Under cross-examination he stated that he did not remember the accused being taken to clinic for treatment nor did he report to him that he had sustained injuries.

Before the Crown rested its case counsel informed the court that on count two complainant had since withdrawn and the Crown was abandoning prosecution on that count.

The accused was also called to his defence.

Accused testified that on 29th August 1999 he and others went to the Tavern where they watched soccer on the television while enjoying intoxicating drinks of two large bottled of andemeester brandy. His uncle who was also present who bought yet another

large bottle of andemeester. From the Tavern they proceeded to Lavumisa Hotel. At Lavumisa a cousin of his joined them. It was his evidence that when they arrived at the hotel they were four (4) and he named the people.

I may just mention that it was never put to the Crown witnesses that accused had arrived at the hotel in the company of these persons whose names he mentions.

Accused states that at the hotel he found other people from his area. Here, he and his companions bought further andemeesters bottles of brandy. He does not know how many, he says. They drank and he began to feel drunk. They had arrived at the hotel at 630pm he says and when he began to feel drunk it was plus minus 10pm. When they they left they left in a motor vehicle, but because of their number they could not all get into the sedan. He and two others remained behind when the rest left and the driver promised to come back and fetch them.

Accused say that however they waited until midnight and the hotel closed. At some stage his uncle went out of the hotel and he remained in the hotel chatting with the barman. He eventually went out and as he did he cold hear people talking and he thought these were those of his party. But as he listened further he became aware that these were not the people in his company. He had a fright and stood staring at them in silence. These strangers occupied two different cement tables. It was accused's evidence that he then enquired from these strangers if they had not seen a certain person go pass. He received no response from these strangers.

Here again, I may mention that this piece of evidence was never put to the witness.

Accused continued and said as he was about to pass this stranger, the stranger drew closer to him and raised a bottle to him asking him "had you left the people you are enquiring about with us?" It was accused's evidence that as the stranger asked the question, he (the stranger) struck him but he managed to evade the blow. Accused states that the others also stood up and approached him. They also had bottles in their hands. At this juncture accused asked deceased to remove his wristwatch from his wrist and placed it in his pocket. He noticed that one of the strangers had a bottle and the other had a knife. Accused kept on retreating and as he was descending the steps the advancing strangers hurriedly advanced. Accused then realised that of the two weapons the strangers carried, a more lethal one was the knife; he then grabbed hold of

the knife and dispossessed the stranger. However, the one who had the bottle struck him above his left eye. The bottle contained beer. The attacker struck him with the bottle and did not throw it at him. Accused's evidence is that he fell and was blinded when he regained consciousness he realised that he was bleeding. The assault continued as he lay on the ground. The number of the assailants were plus minus five. The accused was kicked all over the body as he lay down, and was bleeding profusely. He tried to get up but the people had surrounded him. It was at this stage that the one who got stabbed was stabbed. He says when he stabbed him he had managed to get up. It was his evidence that the one he stabbed is the one who had struck him so that he fell. He said the person who was stabbed was stabbed as he moved his hand and the person got stabbed around the neck. When the strangers realised that one of their members had been injured they opened up. Accused then fled.

He had just gone past the hotel when he saw people in front of him. He says he subsequently handed the knife to the police. He had no intention of either killing or injuring the person. He was acting in self-defence. He did not notice any woman present. It was accused's evidence that as he proceeded he was barred from going away by some people and he recognised one of them as being the one who had during the attack struck at him with the bottle. It was his evidence that this person ordered him to run back towards his attackers. The person tried to grab hold of the accused and as accused still had the knife and the stranger was cut. It was accused's evidence that he then fled. He thought of reporting the assault to the police but later decided against the idea as he knew police stations close at night. He was very drunk when he injured the person who got injured on the neck. He had sobered up when he injured the person on count two as he had been bleeding a lot.

Accused is found guilty as charged on counts one and three but not guilty as charged on count three.

SENTENCE

You have been convicted of a very serious case. A murder conviction and sentence has stood the test of times. There are modifications from time to time but overall almost all modern societies deal with convicted accused in a very severe manner ranging from very long term of imprisonment to capital punishment. This is understandable, because there is no way the **status quo ante** can be restored. The murdered person is gone forever. The consequences to the remaining relatives are unimaginable. Not

even time passage can heal their wounds. You have disposed of a matter you cannot afford to reinstate. No amount of words can console the bereaved.

I have taken into account all the factors mentioned by your counsel but I also have to consider the interests of the relative of the deceased.

Extenuating circumstances are found to exist and Crown counsel concedes.

On count one, you are sentenced to an imprisonment of ten (10) years backdated to the 29th August 1999 the date of your incarceration. On count three you are sentenced to three year's imprisonment. Sentences are ordered to run concurrently with the sentence of count one.

J.M. MATSEBULA

Judge