THE HIGH COURT OF SWAZILAND

REX

Vs

WILLIAM MAZIYA
THEMBA MATSEBULA
JULIUS MSIBI

Criminal Trial No. 115/2000

Coram	S.B. MAPHALALA – J
For the Crown	MISS N. LUKHELE
For the Accused	MR. O. NDZIMA

JUDGEMENT

(12/08/2002)

The Indictment and Pleas

The three accused persons are charged with the murder of one Logece Dumsane Simelane where the crown alleges that upon or about 11th March 2000, at or near Timbutini area, Manzini region the accused persons each or all of them acting jointly in common purpose did unlawfully and intentionally killed the deceased aforementioned.

When the indictment was read to them accused no.1 pleaded not guilty whilst accused no.2 and 3 pleaded not guilty to murder but guilty to the lesser offence of culpable homicide.

The Crown's Evidence

The Crown called a total of four witnesses to prove its case.

PW1 Phineas Msibi who is the deceased younger brother and the three accused persons' uncle told the court that they all resided at the same homestead where the offence is alleged to have been committed. He told the court that he came home late at around 7.00pm and found the deceased already injured. He does not know how the deceased sustained those injuries except what he was told by his mother PW3 Zondekile Mamba. The deceased was still alive when he first saw him lying sprawled in his hut with multiple injuries. He together with his sister Linah Msibi and the chief's runner Magidzigidzi Ndwandwe tried in vain to secure transport to convey the deceased to hospital. The reason was that it was late at night. The deceased died during the night. The witness also told the court that when he came to the homestead he found his mother PW3 weeping. The following day the accused persons were sent to the police station to report the matter. He also told the court that the deceased was a sickly person who had a paralysed left arm after he has been assaulted in previous fights. The deceased was portrayed as a violent type who was quick of temper, more so when he had imbibed in liquor.

This witness was cross-examined at some length by Mr. Ndzima for the accused persons. He repeatedly told the court under cross-examination that he did not witness the fight between the accused persons and the deceased. That what he knew about what happened he was told by other people after the event.

The Crown then called its second witness PW2 2703 Sergeant D. Ngcamphalala who was at the Mafutseni Police Station when the accused persons came to make a report of what had happened the previous day the 11th March 2000. He proceeded to the scene of crime where he found that the deceased had already died. When he asked the accused persons what had injured the deceased he did not get any answer from the accused persons. However, PW1 their uncle divulged the information that the accused persons were responsible for the injuries on the deceased which ultimately led to the death of the deceased. He then cautioned the

accused persons in terms of the Judges Rules there and there. Subsequently, he charged the accused persons with the murder of the deceased person.

He called the Scenes-of-Crime squad to take photographs of the scene. The officer handed to court as part of the Crown's evidence the photographs which were six (6) in number and were entered for the record as exhibit A1 to A6. These photographs showed the deceased and the injuries on him. The officer also handed to court a shovel and a sjambok and these were entered in evidence as exhibit 1 and 2, respectively. It is alleged that these were used in the assault on the deceased.

The officer was also cross-examined at some length by the defence. The thrust of the defence cross-examination was that the fight between the deceased and the accused persons took place outside the hut where the deceased finally died. The officer maintained that the fight which led to the death of the deceased occurred inside the hut. He found that the household items like sleeping mats were in disarray thus proving that there was some struggle there.

PW3 Zondekile Mamba who is the mother to both PW1 and the deceased and the grandmother to the three accused person also gave evidence of what transpired on that day. Her evidence was taken in *loco* due to her inability to attend court in view of her advance age. Her evidence is that she picked a quarrel with the deceased earlier on that day complaining to the deceased that he was responsible for the disappearance of her goats. The deceased did not take kindly to this accusation and hit her mother on the hand with the back of his knopstick. She told the court that the deceased was in a violent mood as he had imbibed in liquor. That the deceased was a terror in the homestead every time he came from his drinking sprees. The deceased by nature had a violent disposition in that his own homestead was burnt down in one of his violent forays. His wife has deserted him as she could not stand him any longer. The deceased then came to live with his mother PW3 together with the accused persons and others including PW1 in one homestead.

After she had been beaten by the deceased she retreated in anger to another hut within the homestead to sleep. She heard the accused persons accusing the deceased of assaulting their grandmother (PW3) every time he was drunk and that she could hear some fracas outside.

Later on she woke up to investigate the cause of the noise and when she got to the hut where the deceased was, she found him lying down critically injured. She started to weep. The matter was subsequently reported to the police.

Under cross-examination PW3 told the court that she did not witness the fight between the deceased and the accused persons and also that she does not know where the fight took place.

The Crown then led the evidence of Dr. Reddy in terms of Section 221 of the Criminal Procedure and Evidence Act (as amended). The original doctor who examined the deceased has left the country to his home country. There was some opposition to the leading of the evidence of this witness by Mr. Ndzima, however I allowed the leading of the evidence of this witness on the basis that he was to shed more light as to the nature of the weapon used to inflict the injuries on the deceased. He was introduced as an expert witness. He opined that after reading the medical report compiled by the other doctor the weapon used was blunt and considerable force was exerted to cause the injuries as reflected in the pictures taken by the Scene-of-crime officers. He told the court that the shovel which has been entered as exhibit "1" by the crown might have been the weapon used in the commission of this offence.

The medical report was entered as exhibit "C". This witness was not cross-examined by the defence. The doctor in exhibit "C" described the deceased injuries in the following terms:

> "Dried blood stains all over the face.
>
> Head: - 1) Lacerated wound 5cm x 3cm x bone deep over the top of the right parietal eminence. Internal aspect of the scalp contused in the right side frontal, temporal and parietal regions. Depressed communicated facture 6cm x 6cm over the top of the right parietal eminence. Brain lacerated and depressed underneath. Subdural haemorrhage throughout the brain substance.
>
> Back: - 2) multiple irregular contusions and lacerated wounds intermingled together all over the back.
>
> Right upper limb: -3) Compound fracture of the right side forearm bones (radius and ulna) at the junction of middle third with lower third. 4) Linear contusions and abrasions inter-mingled with each other all over the outer aspect of right upper arm and all over the back and outer aspect of right forearm.

> Right lower limb: - 5) multiple contusions and abrasions grouped together all over the front of the right leg in its lower two thirds.
>
> Left lower limb: - 6) contusions of the outer aspect of the left thigh in its upper third. 7) Lacerated wound 4cm x 3cm x bone deep, obliquely placed in vertical plane over the front of the left leg in its upper third. 8) Lacerated wound 6cm x 2cm x bone deep, obliquely placed in vertical plane over the front of the left leg in its middle third".

It is clear from the above description that the deceased died of multiple injuries. Further, that such injuries were of a gruesome nature.

The crown then closed its case.

The Defence Evidence

Mr. Ndzima for the accused person applied for the discharge of accused no. 1 in terms of Section 174 (4) of the Criminal Procedure and Evidence Act that the crown has not adduced a *prima facie* case to put him to his defence. Mr. Ndzima argued that there is no evidence linking the accused person to the commission of the offence. The evidence presented by the crown is of a hearsay nature and would not pass the test required under this section.

Miss Lukhele argued *au contraire* that the crown has led evidence which satisfied the prescribes of the Act. She directed the court's attention to the evidence of PW1 and PW2 the police officer who testified that the accuse persons admitted assaulting the deceased.

After considering the pros and cons of the matter I gave an *ex tempore* judgment supporting the defence's stance that the crown has not led sufficient evidence as required by the Section. I indicated then that I would furnish fuller reasons for arriving at this conclusion in the main judgment. Following are those reasons. The test to be applied at this stage of the proceedings was correctly enunciated by Dunn J (as he then was) in the case of ***Rex vs Duncan Magagula and 10 others, Criminal Case No. 43/96 (unreported)***. The test to be applied in such applications is whether there is evidence on which a reasonable man, acting carefully *might* or *may* convict. It is clear from the wording of Section 174 (4) of the Act that the decision to refuse a discharge is a matter solely within the discretion of the court and must be properly exercised, depending on the particular facts of the matter before court. In *casu*

the evidence presented by the crown fell far too short in satisfying the prescribes of the Section. The evidence of PW1 was largely hearsay evidence in that he did not witness the fight. The police officer (PW2) was told about what happened after the fight by the accused persons themselves. The only evidence before court is that accused no. 1 was with the other accused persons when they reported the matter to the police the following day. There is no scintilla of evidence of how accused no. 1 participated in the assault on the deceased. It is because of these reasons that I discharged accused no. 1 under this Section.

Accused no. 2 gave evidence being led by his attorney Mr. Ndzima. He gave his version of what transpired that day. The long and short of his story is that he heard his grandmother (PW3) sounding an alarm. He went to the scene of the disturbance where he saw the deceased assaulting the PW3 with the back of his knopstick. He intervened to try and calm the situation where a fight developed between him and the deceased when he tried to dispossess the deceased of the shovel. He hit the deceased twice under his right armpit after the deceased had hit him in the head with the shovel. Accused no. 3 then came into the scene and also attempted to intervene to stop the fight. This commotion took place outside the deceased's hut. The accused person vehemently denied that the fight took place inside the hut where the deceased ultimately died.

Accused no. 2 further told the court that they were all drunk in the homestead, the deceased, PW3, accused no. 1, accused no. 3 and himself. He then went on to sleep with his girlfriend one Thulie Thani who was called as DW2. He woke up in the middle of the night and felt that he had a large gash on his head. DW1 explained to him that he had had a fight with the deceased. The following morning he went to check on the deceased in his hut and found him dead. The matter was then reported to the police.

This witness was cross-examined at length by Miss Lukhele for the crown. The thrust of the Crown's cross examination was that it is not true that he only struck the deceased twice but repeatedly thus the extent of the injuries on the deceased. However, accused no. 2 maintained that he struck the deceased twice in the heat of the fight between them when he came to intervene. The evidence of this witness does not tally with that of PW3 on a number of respects. I shall deal with these contradictions later on in the course of this judgement.

Mr. Ndzima at this juncture indicated that he was not going to call accused no. 3 to his defence as what he was going to say it materially the same as the evidence of accused no. 2. He urged the court to accept accused no. 2's evidence in so far as it involves accused no. 3.

Mr. Ndzima then called DW2 Thuli Thani who is the girlfriend to accused no. 2. She did not witness the fight which ensured outside although she heard the commotion outside. Her evidence does not advance the defence case in any way save to confirm that accused no. 2 came back with a gashing wound on his head and that she administered first-aid on accused no. 2.

The defence then closed its case. The court heard submissions at the close of evidence.

The Crown's Submissions

Miss Lukhele for the crown readily conceded that there is no eye witness in this case that the crown relies purely on circumstantial evidence. Miss Lukhele urged the court to take cognisance of the cumulative effect of the evidence of PW1, PW2 and PW3.

She argued that the Crown on the evidence presented has proved that the accused persons had a common purpose when committing this offence. To this effect the court's attention was drawn to what was decided in the case of ***R vs Mkhize 1979 (1) S.A. 946*** as regards the doctrine of common purpose.

She contended further that the court should find the accused persons to have had constructive intention *(dolus eventualis)* when one takes into account the extent of injuries on the deceased (see ***R vs S Tibane 1949 A.D. 720*** at ***729*** and the case of ***R vs Ntuli 1975 (1) S.A. 29 (A.D)***.

It was further argued on behalf of the Crown that even if the court were to find that the accused persons were provoked by the deceased the accused persons in the circumstances acted outside the boundaries of self-defence. Miss Lukhele cited the case of ***R vs John Ndlovu 1970 – 76 S.L.R 389*** at ***390*** where Nathan CJ (as he then was) cited with approval the South African cases of ***S vs Ntuli 1975 (1) S.A. 429 (A)*** and that of ***S vs Motleleni 1976 (1) S.A. 402*** where it was said that a person may apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack. The test

whether accused persons act reasonably in defence is objective. But force must be commensurate with the danger apprehended; and if excessive force is used the plea of self-defence will not be upheld.

The Defence Submissions

Mr. Ndzima for the accused persons argued *per contra* and attacked the Crown's evidence on a number of points. His first salvo is that the Crown has dismally failed to prove common purpose. Secondly, that the police officer Ngcamphalala failed in his duties to conduct proper investigations in this case. He was not aware of the knop-stick yet this weapon featured prominently in the evidence of PW3. Further, that the officer was not aware that PW3 was assaulted that day. Furthermore, the officer was not aware that the accused persons made statements in this matter and what they said in those statements they still maintained in the evidence in court thus proving cogency in their version.

The third point advanced by Mr. Ndzima is that the accused persons never intended to kill the deceased. The deceased himself was a catalyst to the event's which ultimately led to his own death. Accused no. 2 merely answered an alarm which had been raised by his grandmother (PW3). When he arrived at the scene he saw the deceased assaulting her with the back of his knop-stick. He intervened where he tried to dispossess the deceased of the knop-stick. The deceased took a shovel which was leaning against one of the huts and struck him on the head where he sustained a gashing wound. He then grappled with the deceased for possession of the shovel until he succeeded and hit the deceased twice in his torso. Then accused no. 3 came to the scene where he also joined the fray trying to separate the two.

Mr. Ndzima contended on the main that the deceased was the cause of what happened that night. He provoked the accused persons leading to the fight which ensued and subsequently led to his death. That no constructive intention on the part of the accused persons can be construed in the circumstances of this case. As for accused no. 3, so the argument goes, he never used any object to fight the deceased but he merely used his fists and also kicked the deceased.

Mr. Ndzima finally, contended that this is a clear case of culpable homicide and urged the court to follow what was said by Sapire CJ in the case of ***Rex vs Jaoa Sampaio and others Criminal Case No. 69/2001***.

Conclusion and Reasons therefor

Miss Lukhele readily and quite correctly conceded that the Crown relies on circumstantial evidence. In the case of ***Rex vs De Villiers 1944 AD 493*** at ***508*** Davis AJA stated the approach to be adopted by the court in dealing with cases based on circumstantial evidence. The learned Judge states the following:

> "The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence".

I must now ask myself, whether the inference of guilt for murder in *casu* is the only inference which can reasonably be drawn against the accused persons? I answer this question in the negative. The cumulative effect of the evidence led in this matter is not inconsistent with the accused persons' innocence in respect of the murder charge.

Before court we have the evidence of PW1 (the brother to the deceased) who came after the event; PW2 (the police officer) who was told by the accused persons what had happened the following day and PW3 (the grandmother) who did not witness the fight but heard an utterance by one of the accused person to the effect that they (the accused persons) were tired of the deceased behaviour of abusing PW3 every time he had had some liquor. It is clear from this evidence that there is no direct evidence from eyewitnesses who witnessed the fight which ensured between the two accused persons and the deceased.

The Crown urged the court to find that the accused persons had constructive intention to kill the deceased. The principles of law in this regard were formulated by Holmes JA in a

number of cases in South Africa. In ***S v Thibani 1949 (4) S.A. 720*** at ***729*** where the learned judge had this to say, and I quote:

> "The proposition is well established in our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether ensue or not".

In ***S vs Sigwhala 1967 (4) S.A. 566 A*** at ***570*** the same judge stated the following:

> "It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such".

Further, in the case of ***S vs Mshiza 11970 (3) S.A. 747 (A)*** at ***752*** the following was stated:

> "The test for such *dolus* is whether the appellant subjectively foresaw the possibility of death resulting from his assault on the deceased, but persisted therein, reckless whether such possibility became fact".

In the light of the afore-going it is well to enumerate those characteristics which form the basis of *dolus eventualis*. These are conveniently summarised by Holmes JA in ***S vs De Bruyn en" Andere 1968 (4) S.A. 498 (AD)*** at ***510 G – H*** they are:

1. Subjective foresight of the possibility, however remote, of the accused's unlawful conduct causing death to another;
2. Persistence in such conduct, despite such foresight;
3. The conscious taking of the risk of resultant death, not caring whether it ensures or not;
4. The absence of actual intent to kill.

Further, in the appeal case of ***Thandi Tiki Sihlongonyane Appeal Case No. 40/97*** the appellant stabbed her sister twice with a kitchen knife in the course of a drunken brawl during which the two sisters started by using vulgar and abusive language towards one another and ended in a physical fight in which the deceased was the initial aggressor. She struck the appellant with an open hand and then with a walking stick, drawing blood from the appellant, who retaliated by throwing two portable stoves at the deceased. Evidence was that the deceased then left the house in which they had been fighting. The appellant followed her and stabbed her in the neck. The deceased tried to run away and appellant then stabbed her again in the back. The deceased died as a result of the stab wound. It is upon the facts that the trial

Judge in the court *a quo* found the appellant guilty of murder on the basis of *dolus eventualis* the court sentenced her to 7 years imprisonment. On appeal the court found that the appellant was guilty of a lesser offence of culpable homicide and altered her sentence to 60 months imprisonment of which 40 months were suspended for 3 years on certain conditions. Tebutt JA who wrote the unanimous judgement of the court had this to say at page 5 of the judgment:

> "It will be appreciated that cardinal to the whole concept of *dolus eventualis* is the element of foresight. It is perhaps this that has caused the greatest confusion in deciding whether the crown has established *dolus eventualis* or merely *culpa*, due it would seem, to a lack of a proper appreciation of the distinction between the two. In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it. It is here, however, that the trial court must be particularly careful. It must not confuse "must have known" with "ought to have known". The latter is the test for *culpa*. It is an objective one. In our law it is whether a reasonable man in the position of the accused ought to have foreseen the consequences of his conduct. It is vastly different from the test for *dolus* where, as stated, the test is subjective. The issue in *dolus eventualis* is whether the actual accused himself or herself foresaw the consequences of his or her act – not whether a person in the position of the accused ought reasonably to have foreseen them. Moreover the trial court must be warned against any tendency to draw the inference of subjective foresight too lightly. I agree with what was said in ***S v Bradshaw(supra)*** by Wessels JA where he said this:
>
> > **"The court should guard against proceeding too readily from "ought to have foreseen" to "must have foreseen" and thenceto "by necessary inference in fact foresaw" the possible consequences of the conduct being enquired into. The several thought processes attributed to the accused must be established beyond any reasonable doubt having due regard to the particular circumstances which attended the conduct being enquired into" (my emphasis).**

There is often a very thin line and sometimes a grey area between murder on the basis of *dolus eventualis* and culpable homicide. The *onus* lies squarely upon the Crown to prove an intention to kill either as direct intention or in the form of *dolus eventualis*. When one has regard to the cumulative effect of the facts which I have outlined above, I have come to the conclusion that the crown has failed to prove that the accused persons had the necessary intention to kill. In these circumstances, the appropriate verdict should be that of culpable

homicide. This was a drunken brawl where people were fighting each other and it is not clear from the evidence who did what and when.

On the question of the doctrine of common purpose my view of the matter is that the Crown has not proved that the accused persons were acting in common purpose to kill the deceased. The essence of this doctrine is that, where two or more people associate in a joint unlawful enterprise, each will be responsible for any act of his fellows which fall within their common design or object. (see ***S vs Safatsa 1988 (1) S.A. 868 (A) 894, 896, 901***). The facts presented by the Crown in *casu* fail to satisfy the test propounded in the case of ***S vs Safatsa (supra).***

For the above-mentioned reasons I find that the accused persons are absolved in respect of the charge of murder and found guilty in respect of culpable homicide.

S.B. MAPHALALA

JUDGE