THE HIGH COURT OF SWAZILAND

REX

Vs

HLABA ALFRED NTULI

Criminal Case No. 2/2002

Coram

S.B. MAPHALALA – J

For the Crown MR. N. MASEKO

For the Defence MR. B. SIMELANE

JUDGMENT

ON APPLICATION IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT (AS MENDED)

(17/10/2002)

The accused person is charged with the crime of murder. It is alleged by the Crown that upon or about the 10th March 2000, and at or near Mponono area in the Manzini district, the accused acting unlawfully and with intent to kill, did assault Edward Zwelithini Soko and inflicted multiple injuries upon him from which he died at Mankayane Hospital.

When the indictment was put to the accused person he pleaded not guilty to murder but guilty to culpable homicide.

The Crown is represented by Mr. Maseko and the accused person is represented by Mr. B. Simelane.

The Crown led only two witnesses to prove its case and these witnesses were cross-examined by defence counsel.

The cause of death is described by the doctor who compiled exhibit "A" as cranio-cerebral injury.

PW1 Ntombikayise Dlamini was the first witness called by the Crown. The Crown relied on her evidence as an eyewitness. She was a live-in-lover of the deceased. She described the sequence of events of what transpired that fateful night. Her evidence is that whilst she and the deceased were in their house they heard a knock on the door and deceased enquired as to who was knocking. There was no reply only a persistent knock. The deceased then went outside to investigate. She then heard a noise and then she went to investigate outside. She saw the accused person and she asked him why he was assaulting the deceased in his own homestead. She saw that the deceased had been assaulted then as he had a gashing wound at the back of his head. The accused replied that the deceased was in the habit of interfering with him whenever he (accused) had an argument with his younger brother. The accused was carrying a knopstick on one hand and an "okapi" knife on the other hand. She then fled the scene as she was afraid that deceased brothers would hold her responsible.

When this witness was cross-examined she totally broke down in that she said she did not see how the deceased was assaulted. She did not see what happened. I shall revert to some aspects of her evidence later in the course of this judgement. What can be said at this point though is that her evidence in chief did not tally with her replies in cross-examination.

The second Crown witness PW2 Shadrack Soko did not advance the Crowns case any further as he came after the fact.

The Crown was then to call the investigating officer 3262 Detective Constable Andreas Lukhele who could not come and give evidence as he was reported to be critically ill in hospital.

The Crown then closed its case.

At the close of the Crown case defence counsel moved an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) that the Crown has failed to advance a *prima facie* case to put the accused to his defence and that he should be discharged forthwith.

Mr. Simelane contended on behalf of the accused person that in *casu* we have the evidence of a single witness PW1 Ntombikayise Dlamini who was not corroborated. In her evidence there are material contradictions of her evidence she gave in chief with her evidence outlined in the summary of evidence. To buttress this point the court was referred to the case of ***Rex vs Duncan Magagula and 10 others Criminal Case No. 43/96 (unreported)*** as per Dunn J. Further, the South African case of ***S vs Kgoloko 1992 (1) S.A. 203*** was cited by Mr. Simelane in this connection.

Mr. Maseko argued *per contra*. He argued that the evidence PW1 gave in court is not different to what is reflected in the summary of evidence. The Crown conceded though that her evidence under cross-examination was different. Mr. Maseko actually admitted that this witness totally broke down under cross- examination. He left the assessment of this witness's testimony in the so-called "hands of the court".

I have considered the evidence of the Crown *vis a vis* the application in terms of the Section.

The test to be applied at this stage of the proceedings was correctly enunciated by Dunn J in the case of ***Rex vs Duncan Magagula and 10 others (supra)***. 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 trial court. However, such discretion must be properly exercised, depending on the particular facts of the matter before court.

Having laid the premise the court ought to operate within I now proceed to determine whether or not the Crown has made a *prima facie* case within the ambit of Section 174 (4) of the Act. It appears to me that on the strength of the *dictum* in ***Duncan Magagula (supra)*** and ***S vs Kgoloko (supra)*** that the evidence of PW1 the single witness was discredited during cross-examination by the defence.

The following excerpts from the record clearly demonstrate this, thus:

> "Q: After your lover opened the door within 5 minutes you heard a noise?
> A: Yes
> Q: The bottom line of your evidence is that you did not see how the deceased fell down?
> A: I did not.
> Q: You do not know what was spoken between the accused and the deceased?
> A: I did not know."

Further, on

> "Q: Accused instructs me that the knife belonged to the deceased and he dispossessed him of it?
> A: I may not deny that evidence".

Further on, the following appears:

> "Q: You did not see how the deceased sustained that injury?
> A: I did not see".

The above is totally at variance with what she said in chief and also what she told the police who later prepared the information contained in the summary of evidence.

A cautionary rule attaches to the operation of *Section 236 of the Criminal Procedure and Evidence Act (as amended)* which provides *inter alia* that a court before which any person prosecuted for any offence is tried, may convict him of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness. De Villiers JP in ***R vs Mokoena 1932 OPD 79*** at ***80*** formulated the cautionary rules in the following terms, and I quote:

> "Now the uncorroborated evidence of a single competent and credit witness is no doubt to be sufficient for a conviction by S 208, but in my opinion, that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, if for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonestly, where he has not had proper opportunities for observation, etc".

In subsequent judgements, including ***S vs Sauls and others 1981 (3) S.A. 172 (A)*** and ***S vs Kubeka 1982 (1) S.A. 534 (w)*** it was held, that the above remarks remain a useful guide in determining the reliability of a single witness.

The Crown conceded that this witness's evidence should be taken with a pitch of salt in view of the contradictions revealed under cross-examination. No credibility, whatsoever can be attached to her testimony. The evidence of PW2 does not advance the Crown's case any further as he came after the event.

In the premise, for the above reasons I have come to conclusion that the Crown has not proved a *prima facie* case in respect of murder but in respect of culpable homicide as there is clear evidence that there was an altercation between the accused and the deceased which led to the death of the latter. Also the accused person pleaded guilty in respect thereto.

In the result, the application succeeds in so far as the crime of murder is concerned.

S.B. MAPHALALA

JUDGE