

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL CASE NO. 441/02

In the matter between;

REX

VERSUS

SIFISO SIGWANE

CORAM

SHABANGU AJ

FOR THE CROWN

MR. MAKHANYA

FOR DEFENCE

MR. BEN SIMELANE

9th November, 2004

The accused is charged with murder it being alleged that he is guilty of murder "in that upon or about the 27th January, 2002 and at or near Mzilikazi location in the District of Lubombo the said accused did unlawfully and intentionally kill one Photsiwe Dlamini by stabbing him with a sharp instrument on the chest and thereby committed the crime of murder,"

A medical report on the nature of the injuries found on the body of the deceased was handed in by consent of the parties in court. The medical report described the cause of

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death of the deceased as "haemorrhage as a result of penetrating injury to the heart." The injury as observed by the investigating police officer, a certain sergeant Thabo Kunene and the Police Pathologist is that of a penetrating injury over the front of his left chest above the left nipple.

The only evidence which implicates the accused in the killing of the deceased is the testimony of one Jackie Gamedze who says that he was with the deceased during the early hours of Sunday 27th January, 2002 when the deceased was stabbed by another man.

This witness testified that he was at his home asleep on the 27th January, 2002 when the deceased woke him up at about half past twelve after midnight. The deceased asked the witness to accompany him to his girlfriend. The witness reluctantly agreed following some efforts by the deceased in persuading him to accompany him to his girlfriend. The deceased also told the witness that he had been involved in a quarrel with another man earlier that evening. The deceased did not disclose the identity of the person he had quarreled with when he was asked by this witness. Along the way, however, as the deceased and the witness walked towards a place called KaBhila during the night, a person who the witness describes as a stranger in his testimony came running towards the two and confronted the deceased. The deceased and the strange man are said to have begun fighting. The witness goes on to say at this stage of his testimony that he did not know the man who was fighting with the deceased and that he had never seen him before this night. As the two were fighting the witness realised that the other man had a sharp instrument or object with him. The witness shouted to the deceased alerting him that he might be stabbed, to which the deceased responded by saying the man could not stab him. At that stage the other man stabbed the deceased and ran away. Furthermore according to the said Jackie Gamedze's testimony the source of light which was available was electricity light from a nearby homestead. There were trees also which made vision difficult. Gamedze says that he was about three metres from the deceased and the man as they fought. He says he was unable because of the poor light to see the nature of the sharp instrument which the other man had in his possession. Later the witness says he

had known the accused as a person he had seen at a distance in the Siteki town. The accused and this witness were not close acquaintances according to his testimony. Strangely, the witness says, later in his testimony, that he was able to recognise the person who fought with the deceased and stabbed him to be the accused person. He says he had known the person he saw fighting the deceased as a track driver at Dyson and Lincoln. This aspect of the testimony given by Mr. Gamedze seems to contradict his testimony to the effect that he did not know the person who fought with the deceased and that he had never seen the person before this day. This apparent contradiction does not inspire a conviction in my mind that his testimony on this aspect of the matter can be relied upon. His evidence is clearly unsatisfactory. His testimony in implicating the accused as the person who stabbed and killed the deceased is for the above stated reason open to serious doubt.

Furthermore the surrounding circumstances during the fight and stabbing of the deceased, namely the state of the light, the mobility of the scene, and the degree of the prior acquaintance or knowledge the witness had of the culprit does not eliminate the reasonable possibility of error in the identification of the accused as the culprit. *S V. MTHETHWA* 1972 (3) SA 766(A), *R V. MOKOENA*, 1958 (2) SA 212 (T) @ 215, *S V. MEHLAPE* 1963 (2) SA 29. In *S V. MEHLAPE* supra the court made the following remarks in its analysis of the identification evidence in that case which remarks are apposite in the present case;

"In the circumstances of the present case there were three important facets of the evidence of the single witness, the complainant, as to the identity of the appellant as one of the three persons who robbed him. In the first he said he had often seen the appellant before. The value of this alleged prior knowledge of the man he subsequently recognised at the robbery remained entirely uninvestigated. The court did not know how often he had seen this man, or whether he had ever seen him close by or had ever spoken to him or anything at all about the opportunities of accurate observation of the appellants' face afforded on the prior occasions; he said that he recognised him by his face.

Similar criticism can be made against the evidence of prior knowledge of the accused by the said Jackie Gamedze. The result is that the value of the evidence of prior knowledge of the accused alleged by the said Jackie Gamedze is greatly diminished. This taken together with what appears to be a contradiction in the testimony of Jackie Gamedze on whether he had ever seen the man who fought the deceased prior to the date of the alleged murder leads me to a conclusion where I cannot say that the guilt of the accused has been established beyond a reasonable doubt. In the premises I have no other alternative but to find the accused to be not guilty of the crime of murder. He is therefore acquitted and discharged.

ALEX S, SHABANGU

ACTING JUDGE