

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 10/04

REX

VS

MGIDI SIBUSISO SIMELANE

CORAM FOR

K.P. NKAMBULE-J MS.

CROWN FOR

LUKHELE MR.

ACCUSED

MAZIYA

RULING IN TERMS OF SECTION 174 (4) OF THE CRIMINAL
PROCEDURE AND EVIDENCE ACT AS AMENDED
2/12/04

The Accused, Mgidi Sibusiso Simelane, was indicted before this court on a charge of murder. It was alleged that he is guilty of the crime of murder - in that:

"Upon or about 26th October, 2002 and at or near Mahlanya area in the Manzini region, the said accused did unlawfully and intentionally assault one Sabelo Sacolo thereby inflicting injuries from which the deceased died thus committing the crime of murder".

The Accused pleaded not guilty to the charge.

At the close of the crown's case an application was made on behalf of the Accused person for his discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended). Mr. Maziya for the Accused stated that the crown has failed to advance a *prima facie* case to put the Accused to his deface and that he should be discharged forthwith.

The evidence adduced reveal that on the evening of the 26th October 2002 at Mahlanya the Accused and the deceased were at Lobamba Lomdzala Royal Residence enjoying some home brew at a drinking sport situated in the residence. A crown witness who was introduced as PW5 Zandile Sizakele Fakudze related how the deceased died. It was around 7.30 p.m. when she heard the noise from outside. She was already in the house and about to sleep. According to this witness she heard somebody shouting some expletives. She peeped through a slightly opened door and saw a figure of a person lying under a mango tree. The one who was standing was busy kicking. She however did not see at the stage who the two people were. She could not see because it was dark at the time. According to PW5 the distance from her hut to the mango tree where the action took place was around 35 metres.

She however, recognised the voice of the assailant because he kept on saying, "*You know Mgidi? I am Mgidi*". As the person was talking he went past PW5's door and then again came back to the mango tree as the victim moved his lower limbs and said "*You are still moving, I am Mgidi*".

After the person who seemed to be the assailant disappeared downwards in the guava trees PW5 went to see the person who was lying down and

she could not recognise him because he had been defaced. It was only after she called the children that the person was identified.

PW1 Mfanfikile Mndzebele told the court that on the day in question they were at Lobamba Lomdzala Royal Residence drinking home brew. The deceased and the Accused had some argument and started quarrelling. PW1 did not give the quarrel any particular notice as he thought they were playing. He proceeded with his drinks.

As it got dark the witness heard some noise as the two were chasing each other. As they were seated enjoying their drinks his uncle PW3 Bhekinkosi Themba Dlamini came and ordered him to go home as something nasty was happening in the royal kraal. On the following day he heard that the deceased had died.

PW2 Mathabi Betty Dlamini told the court that she stays at Lobamba Lomdzala Royal Kraal where she sells home brew. On the day in question she was at home seated in the veranda with his customers. Among them there was Accused and the deceased. Present was PW3 Bhekinkosi Dlamini, the community policeman. PW2 went into the house with a certain lady who had just arrived. Whilst in the house they heard noise as if somebody was pulling some chairs. After a few minutes the Accused came into the house saying, "*I am Sigidi whoever wants me must come here*". The community policeman ordered him to stop making noise. The Accused who was at the time inside the house went out. After a short time PW2 opened the door and found that all the persons who were seated in the veranda had gone away. PW2 heard the story of the deceased on the following day.

Bhekinkosi Themba Dlamini, the community policeman, told the court that on the day in question he went into the Royal Residence passing

through. On arrival there he found that the Accused and the deceased were making noise as they wanted to fight. He then ordered them to stop making noise at the Royal Residence. As it was becoming dark he left.

3015 D/Constable Nhlabatsi told the court how die report of the matter was related to him and how he went to Lobamba Lomdzala where he found the body of the deceased. He further told the court how he carried out his investigations which led to the arrest of the Accused, who produced a bush knife which was handed into court as exhibit No. 1.

In arguments Mr. Maziya submitted that the Accused should be discharged under the provisions of Section 174 (4) of the Act (as amended). The argument states that all the witnesses did not identify the Accused as the assailant.

According to Mr. Maziya the evidence that tends to bring the Accused closer to the charge is that of the last witness, Zandile Sizakele Fakudze. The witness told the court that she heard a person insulting another. When she peeped through the door she saw two figures under the mango tree. She could not see who the two were as it was dark. In view of the distance at which she was observing and the scene as described she would not be in a position to figure out what was happening there. He therefore states that there is no *prima facie* case made by the crown.

The test to be applied at this stage was enunciated in Rex Vs Duncan Magagula and Ten Others criminal case No. 43/96 (unreported) per Dunn J, as he then was. The test 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 a trial court. However, such discretion must be properly exercised depending on the

particular facts of the matter before court. This Section is similar in effect to Section 174 (4) of the South African Criminal Procedure Act No. 51 of 1972. The words "No evidence" in the Section has been interpreted to mean no evidence upon which a reasonable man acting carefully may convict. (See a recent Judgement of this court in Rex Vs Rington Fofu **Dube** Criminal case No. 38/2003 (unreported) per Maphalala J- at page 8 to 9.

It is common cause that on the 26th October, 2002 there was a fight at the Lobamba Lomdzala Royal Kraal as a result of which Sabelo Sacolo the deceased died. It is further common cause that the Accused and the deceased once exchanged blows at a funeral in the area where the Accused was severely beaten.

It is common cause further that on the day in question the deceased and the Accused had been drinking home brew at Lobamba Lomdzala Royal Kraal.

The case against the Accused is that he assaulted the deceased and thereby inflicting injuries from which the deceased died. Among the five witnesses called by the crown there is not even one witness who told the court that he saw the Accused assaulting the deceased. The witness who came nearer this is PW5 who said he heard the Accused saying "*I am Sigidi*". She however, did not say he saw the Accused assaulting the deceased. She said she saw two people under a mango tree. As it was dark (at 7.30 p.m.) she could not see who the people were. She was further asked by Miss Lukhele for the crown if she could be able to identify two people and differentiate them in description if they could pass nearer her door she said she couldn't.