



## **IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CRIM. CASE NO. 229/2009

In the matter between:

**REX**

v

**MANDLA SHADRACK PHAKATHI**

<u>CORAM</u>	:	Q.M. MABUZA -J
FOR THE CROWN	:	MR. M. NXUMALO OF THE DIRECTORATE OF PUBLIC PROSECUTIONS
FOR THE ACCUSED	:	ADVOCATE S. HLANZE

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**JUDGMENT 21/10/10**

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**Mabuza J:**

[1] The Accused was indicted with the crime of murder it being alleged that on or about the 4<sup>th</sup> January 2009 at or near Makhukhula area in the Shiselweni District the

- Accused did unlawfully and intentionally kill Dumsane Phakathi.
- [2] When the charge was put to the Accused he pleaded not guilty.
- [3] The post-mortem report was handed in by consent. It reveals that the cause of death in respect of the deceased was due to injury to the head. It states that there was a lacerated wound of 6 x ½ cm present on the middle portion of the left side of the top of the head. The left temporal bone, left parietal bone and occipital bone on the skull were fractured.
- [4] The pathologist was not called to give evidence; which is unfortunate because he is an expert in such matters which the Court and both Counsel for the Crown and the defence are not. The prosecution case is often weakened by the failure to call the pathologist who often explains how the fatal wound was inflicted and is able to match the weapon used to the fatal wound. Intention is often confirmed by a full description of the nature of the wound, where on the body it was inflicted and the strength used by the suspect. Counsel for the Crown have a tendency of doing away with the pathologist's evidence often stating that they are

saving time; in the meanwhile evidence of a pathologist is often very short and precise and is extremely illuminating to the Court who has to pass an appropriate sentence and write a comprehensive judgment.

[5] PW1 Paulina Phakathi is the natural mother of the Accused. She testified that at the time of the deceased's death she had three children. The deceased had been the eldest among the living children, the Accused the second born and a third born Bongane. Her husband was still alive though very frail and was hard of hearing. On the 4<sup>th</sup> January 2009 there was a ceremony in honour of the ancestors hosted for a cousin Majazi Mavuso who worked in South Africa. The homestead is on a farm which was given to the family by a Mr. du Plessis, who had since left the area. The Accused and the deceased had their homes within the farm but away from the main family homestead. An older brother who had predeceased the deceased had built his home within the family homestead.

The deceased was employed at Matsapha. The Accused used to assist their father around the farm. The father is a traditional healer and the Accused assisted him.

- [6] Because the Accused lived around home he was expected to play a pivotal role in the preparations for the ceremony and was in charge. However, according to PW1 the Accused arrived late; people had already arrived. He was expected to cook the goat to be used during the ceremony.
- [7] PW1 testified that she rebuked the Accused whereupon he petulantly replied that he was not the only person expected to work; and if that was the case such expectation should stop. After the meal was ready, the family moved into the main hut in order to interact with the ancestors.
- [8] Two Mkhabela men joined the Accused outside and the Accused rebuked them for grazing cattle in the Phakathi family fields and thus destroying the maize. The deceased rebuked the Accused; the Accused did not take kindly to this rebuke.
- [9] Following hereunder is the account by PW1 of the disagreement and fight by her two sons:

She testified that the accused began to behave strangely and started to pick a fight saying that he would kill the deceased or Bongane.

[10] She testified that the Accused insulted the deceased and called him by his mother's private parts and thereafter assaulted the deceased on the chest. They took the fight into a hut and the Accused held the deceased against the wall whilst assaulting him. At this point PW1 began shouting for her daughter in law PW2 to come and help. The Accused took hold of a burning log and PW1 tried to remove it from him but she let go of the log as she had grabbed the burning part of the log. PW2 came in between the Accused and the deceased; whereupon the Accused let go of the log and picked up a tripod stand. PW2 dispossessed the Accused of the tripod stand; the Accused got hold of a hoe. PW2 again dispossessed the Accused of the hoe and he rushed into the house and fetched a stick.

[11] The Accused struck the deceased with the stick but PW1 and the deceased's children were able to restrain the Accused and pushed him out of the gate so that he could go to his home. At the gate the Accused picked up stones and threw them at the children and they ran away. PW1 was standing 100 metres away from the

gate. The Accused ran back to the house leaving PW1 behind.

[12] The Accused went to a tree against which was a spade, he took the spade and armed with the spade and a knob stick, he attacked the deceased. PW1 did not witness this assault. When she joined them the deceased had already been struck and he had fallen. PW2 was holding him. At that juncture the Accused ran into a house nearby to fetch a knife. He returned with it and threatened to finish the deceased off with it; but ultimately did not use it; instead he threw it away and ran off. When PW1 was asked if the Accused was drunk when he made the threats to kill the deceased and Bongane; she replied that the Accused was sober because the brew that she had prepared was a small amount and it would not have caused him to do what he had done. She did concede however, that when the Accused had arrived earlier he was full of cheek and attitude.

[13] When the Accused ran off he ran into the police at the gate who had been called earlier during the fray. The police arrived with the Accused whom they apprehended at the gate. The deceased was taken to hospital but later that night he succumbed to death.

PW1 described the relationship between the Accused and deceased to have been good prior to the 4<sup>th</sup> January 2009.

[14] The Accused's defence was that the altercation between the Accused and the deceased was over the family farm which the Accused said the deceased was selling. When confronted with this fact the deceased denied making any attempts to sell the farm. This defence was put to PW1 in cross-examination but she denied that it was so and yet in the summary of her evidence the reason for the altercation between her two sons is clearly stated to have been over the family farm which the Accused said that the deceased wished to sell.

[15] When the reason for the altercation was put to her, PW1 evaded a direct answer until the Court intervened and warned to her to answer the question. Her response was that it was actually the deceased who warned the Accused to leave the herd boys who were grazing cattle on the farm alone as it was her husband who had allowed them to graze their cattle on the farm. The question about the altercation being about selling the farm was put to her several times and each time she responded that she did not hear the deceased talk

about the sale of the farm but about the herd boys. She lamented that the Accused did not have to kill her son over the conversation relating to the cattle grazing.

[16] Pressed further by defence counsel about the reason for the altercation being the sale of the farm she eventually agreed that she did not hear her sons talking about the sale of the farm and that she was hearing it for the first time in Court.

[17] Another factor which added to an already volatile situation to obvious sibling rivalry was when the family went into the main hut to offer thanks to the ancestors. It is customary to pour some home brew on the floor in order to quench their thirst. Apparently the Accused poured what appeared to be a substantial amount. The deceased rebuked him for wasting good potage; the Accused became angry and went out. The question of the exchange with regard to the brew was put to PW1 and the deceased's reaction thereto. PW1 responded with her own question that the Accused did not have to kill her son for that rebuke; and she denied having heard the deceased rebuke the Accused.

[18] It appeared that a fourth aspect of this saga was the skin of a goat which had been slaughtered for the



ceremony. When the Accused tried to take the skin for himself the deceased is reported to have commented that the Accused wanted to take everything as though he was an *inkhosana* (meaning the firstborn and heir). The Accused nonetheless took the goat skin and while outside playing with some children the deceased assaulted him. All this was put to PW1 and she denied any knowledge of the goatskin episode or the assault on the Accused by the deceased.

[19] The Accused version of the assault was put to PW1; that when the deceased assaulted the Accused he fell down to the ground and the deceased continued to beat him up even though he tried to roll away. PW1 denied that the deceased assaulted the Accused because the deceased was diabetic and would not have the strength to assault the Accused.

[20] She was told that the Accused whilst rolling away came across a spade took it and threw it in the direction of the deceased. He did not see where it struck the deceased as he was himself in flight. She denied this and repeated her version of how the Accused got hold of the spade. She did earlier say that she was not there when the deceased sustained the injury that eventually led to his death.

[21] She was further told that the Accused never insulted nor assaulted the deceased; nor did he hit him with a burning log, or throw a tripod stand at him, or hit him with a stick or hoe. She denied this.

[22] PW2 Nonhlanhla Phakathi next took the witness stand. She is PW1's daughter in law as she is married to Bongane Phakathi. She too confirmed that there was a ritual ceremony at her in-laws home. She testified that while she was washing dishes the Accused was seated next to the sink that she was using. He asked her the whereabouts of the deceased and Bongane. He informed her that he was waiting for them so that he could kill one of them that day as he wanted them to abide by his orders. She took some dishes back into the house. While inside the house she heard PW1 call out to her for help. She left the house and found that the Accused was carrying a tripod stand and she dispossessed him of it. After that he picked up a hoe. She dispossessed him of it. She took these implements to the kitchen. When she returned she found the Accused striking the deceased with a burning log. PW1 dispossessed him of the log and he ran into his father's house and returned carrying two knob sticks and hit the deceased with them. Both PW1 and PW2 dispossessed

him of these two knob sticks. PW1 and some children thereafter led the Accused out of the homestead.

[23] Shortly thereafter the Accused returned took up a spade in his left hand which was leaning against a tree and a knob stick in his right hand. After warning the Accused to desist from his behaviour PW2 wrestled with him for the knob stick. She dispossessed him of the knob stick but he pushed her away and struck the deceased with the spade. The deceased fell on her and held onto her. The Accused went to another house to fetch a knife. When he returned he threatened to finish off the deceased by slitting his throat with it but when he saw the deceased lying down, he left. The police arrived shortly thereafter and conveyed the deceased to the hospital.

[24] She confirmed that the Accused's mood was that of anger or annoyance at his mother for reprimanding him that he was late when he was expected to prepare the goat. Otherwise she testified that the relationship between the Accused and the other family members was normally fine.

[25] PW2 testified about the incident at the main hut. She told the Court that there was a small clay pot with some

traditional brew; it had some froth at the top. The Accused took a stick of grass and removed the froth and the deceased rebuked him. The Accused left the hut and went to sit outside.

[26] She confirmed that the farm had been left in the care of her father in law. She also confirmed that a Mkhabela family grazed their cattle on the farm without her father in law's permission. She confirmed that the Mkhabela's were also at the ritual ceremony; but she did not see or hear the Accused talk to them.

[27] During cross-examination PW2 admitted that she was not present all the time the Accused was with the deceased. She admitted that she did not see or hear the altercation about the farm; she did not see when the Accused spilt brew in honour of the ancestors; she saw him remove the froth. PW2 disclosed that the Accused was left handed.

[28] The investigating officer PW3, 2639 Constable Moses Ndlangamandla testified that while on duty on the 4/1/2009 he received a report at about 6.30 p.m. about a fight taking place at the Phakathi homestead; he proceeded there. As he entered the gate he found the Accused and Bongane fighting, he separated them.

When he enquired why they were fighting he was informed by Bongane that the Accused had killed the deceased back at the house. He arrested the accused after cautioning him and placed him at the back of the police van. He requested some assistance from the traffic department to convey the deceased to the hospital. Meanwhile the Accused was locked up in the police cells. The following day the Accused after being duly cautioned pointed out the spade that he had used to strike the deceased. The Accused was charged with the crime of murder.

[29] There was an altercation between counsel for the Accused and the witness about events that occurred at the gate. Counsel stated that it was the Accused who approached to report that he had injured the deceased, and that Bongane was from the local grocery shop when they met at the gate. There was no fight. PW3 denied this. There was no corroboration of either observation as Bongane was reported to have died. The Crown closed its case.

[30] The Accused next gave evidence. He testified that on the 4<sup>th</sup> January 2009 he left his home for his parental house at about 9.15 a.m. Upon arrival at his parental home he greeted everyone including his cousin Majazi

Mavuso in whose honour the ceremony was. He went to greet his mother and aunt who were seated under a tree and apologised to his mother for being late. He went to fetch the goat from the main hut. He had killed and skinned it on the previous day. He cut it up and cooked it with Majazi's assistance. It was cooked by 2.00 p.m.; and as is customary he dished up separate bowls for the women, men and grandmothers.

[31] The Accused, his father, Majazi, Bongane and the deceased seated themselves outside under a tree. Two men: Moses Mkhabela and Themba Mkhabela joined them. The latter is a member of the community police. The Accused's father complained to Themba that because of them grazing cattle in the mealie fields at the farm there was no more food. The Accused confirmed his father's concern that the cattle were a problem because they ate the maize. Often times the Accused tried to shout at them but they were too far to hear him. The deceased and Bongane wanted to know why the farm was still being kept instead of being sold, as they had their own homes in town. Their father informed them that the farm could not be sold until after his death. The Accused agreed with their father and added that he made a living from the farm. He chopped trees from it and sold them as logs. The

Accused further stated that the farm should not be sold because their children who are boys would not have a place in which to build their homes.

[32] Their father admonished them to desist from talking about the sale of the farm they would talk about it later. The Accused stood up and took the goat skin and spread it out before the gathering. He brought food and they ate it. After eating, their father said that they should go to the main hut to give thanks. After their father had given thanks, he asked the Accused to take the calabash of brew and ordered that they start drinking. After they had finished drinking their father gave thanks a second time and after he had finished they started dancing. The Accused stood up did a jiggle and went out and sat down on a bench where he drank some brew from a calabash that had been left there before they went into the main hut to give thanks. The amount imbibed by him was between four to five litres. The brew that remained in the hut was about 7 litres.

[33] The others came out of the hut and sat in the yard and drank beers and spirits. The Accused stated that Majazi Mavuso had given them money to prepare for the ceremony. A total of 25 litres of traditional brew was made. A small calabash was placed in the hut for the

ancestors. The Accused and the deceased also drank of the beers and spirits. Between 4.30 p.m. and 5.00 p.m. Majazi wished to leave; so they all got into their cars and drove off leaving the Accused and the deceased behind. The deceased stood up and went into his house. The Accused remained drinking; he too drank some beers and spirits which the deceased had purchased. At about 5.30 p.m. the Accused got up to leave, took the goat skin dusted it and stated that he was going to make beautiful loin skins with it as his had been eaten by rats. His father agreed that it was a beautiful skin; he wished that it would grace his home but the Accused reminded him that he had plenty skins he did not need any more.

[34] After the friendly exchange with their father the deceased interjected and told the Accused not to object to what their father has said just because he (Accused) wished to rule them. The deceased accused the Accused of being insubordinate and that he needed to be disciplined. The Accused asked the deceased to stop it, took the skin and playfully put it around his waist and announced that he wished to do a dance with it on. He turned to some children nearby and played with them. As he was playing with them the deceased struck him with fist on his right ear. The Accused



turned around and the deceased struck him again and as he tried to ward off the blow he fell because he was drunk.

[35] He rolled when he fell and the deceased kicked him. He rolled away from the deceased to avoid further kicks from the deceased. While rolling he encountered a spade on the ground and when he next looked at the deceased the latter was carrying a stick coming after him. He testified that even the children were kicking him. He picked up the spade and threw it face up at deceased but did not stop to see whether it struck him or not. He demonstrated for the court how he hurled it using his left hand towards the deceased. He heard the sound as it connected with the deceased and made his getaway. He staggered away as he could not run fast because he was drunk. When he got to the gate he met Bongane. Bongane blocked his way and they held one another and Bongane asked what the matter was and he informed him that he had hit the deceased with a spade and was not sure whether he was injured or not.

[36] Bongane suggested that they return to the house to find out but the Accused declined saying that he knew the type of character the deceased had and he was

afraid that the deceased would beat him up. The police van arrived at that time while Bongane was trying to pull him back home. PW3 asked what the matter was and the Accused informed him about the fight with the deceased. PW3 alighted with a gun, opened the back of the van, handcuffed the Accused placed him at the back and drove on to the homestead; and that is how he was arrested.

[37] He testified that contrary to what PW1 and PW2 had stated, he did not make any threats to the deceased on the material day. His relationship with the deceased was always good; more so because the deceased did not live at home he would visit during weekends and they would share some good moments. He denied having spoken harshly to PW1; he denied that she reprimanded him for arriving late. He denied having told PW1 or PW2 that he would kill the deceased or Bongane. He had no motive to kill either of them; he wondered how he could have said such when he had been talking and laughing with both his brothers all day. He denied assaulting or attempting to assault the deceased with a tripod stand, a hoe, a burning log and two knob sticks. He denied being removed from the scene to the gate by PW1 and the girls.

[38] He revealed that he not only made a living from the logs but that he also assisted his father who was a traditional medicine man (*ligedla*). He stated that he did not harbour any resentments towards his brothers desire to sell the farm at least not enough to threaten them with death. He stated that he did not spill the brew, he was instructed by his father to quench the ancestors thirst and as it was customary his father always used to ask him to perform the ritual. When asked if the deceased had complained that he had spilt too much; he responded that the deceased being a town boy was not used to such a custom so that to him it did not matter what amount was spilt it was a waste. He did not take the deceased's comment seriously as after that, they left the hut and went outside where they talked and laughed.

[39] He denied that he used grass to remove froth from the brew. According to him there was hardly any froth on the brew and this pleased them as it signified that the ancestors had drunk the brew during the night. He used a grass stick to remove some scum around the inside of the calabash and used a small cup to pour on the ground for the ancestors.

[40] He denied that Bongane informed PW3 that the Accused had killed the deceased; as Bongane could not have known as he was not there when the fight took place; he was just also arriving from somewhere when they met at the gate. He could give no reason why PW1 or PW2 would tell a different version from his as he was on good terms with both of them. He thought that perhaps PW1 resented him for the death of the deceased; because she had never even visited all the time he had been in custody.

[41] Cross-examination of the Accused revealed that he started drinking as soon as he had arrived in the morning. He denied that PW1 admonished him for coming late. He denied that he got angry when the deceased chastised him for pouring too much brew for the ancestors. The version of events as told by PW1 and PW2 were put to him he denied these and stuck to his version of events. He denied that PW1 asked him why he was late upon his arrival; that it was actually him who talked about being late to her. It was put to him that the discussion about the farm took place after eating and he denied this and stated that it took place at about 12:30 p.m. before they ate.

[42] He disclosed that even though the deceased had sugar diabetes he was strong. He was not as ill as PW1 had made him out to be. The deceased was taller than the Accused even though thinner than the Accused. He divulged that whenever the deceased came home they would drink and smoke dagga. The Accused used to provide the deceased with traditional medicine (*timbita*) for his diabetes.

[43] He testified that he believed that his brothers would have long killed their father had he not been there to protect him. He stated that his brothers would be aggressive whenever they demanded that his father sell or lease out the farm. The Accused used to be the one to calm them down. This included the older brother Themba who had died long before this incident.

[44] The Accused requested that his father who had witnessed the events of that day be called to give evidence on his behalf. When the subpoena was served both Counsel informed the Court that having seen the senior Phakathi they agreed that he was too frail and senile to be called to testify. That being the case, the defence closed its case. The court has to decide whether the Crown has discharged the onus it has of proving the offence beyond a reasonable doubt.

[45] Murder consist in the unlawful and intentional killing of another person. The elements of the unlawful killing of another person have been proved. It is the element of intention that is in dispute. The Crown alleges that at the time that the Accused struck the deceased with the spade he had formed the intention to kill him.

[46] The defence on the other hand contends that the killing of the deceased was in self defence; after earlier incidences of provocation. The deceased struck the Accused at the back of the neck and the Accused fell down. The deceased kicked the Accused and continued to do so and the Accused rolled out of his way until he came across a spade, took it and threw it at the deceased without any particular aim to any specific part of his body; thus the defence argues that the Accused had no intention to kill the deceased.

[47] The Crown submitted that the Accused had direct intention to kill the deceased. This fact the Crown submitted was established by the evidence of PW1 and PW2 who testified as to how the dispute started and ended with the death of the deceased. Both witnesses testified that the Accused was spoiling for a fight with the deceased or Bongane from the time of his arrival to

when the deceased was eventually struck the fatal blow. The evidence of both witnesses has been outlined above.

[48] Mr. Hlanze for the Accused submitted that the evidence of PW1 and PW2 is not corroborated and that each witness should be treated as a single witness.

[49] Mr. Hlanze submitted that PW1 testified that the Accused insulted the deceased and called him by his mother's private parts and further assaulted the deceased on the chest. They took the fight into a hut where the Accused held the deceased against a wall and continued assaulting him. At this point PW1 called to PW2 for help.

[50] He further submitted that up until PW2 arrived, there is no corroboration of PW1's evidence; that of the insult nor of the assault. The post-mortem report does not reveal any bruises on the deceased's torso indicative of any assault other than the fatal blow to the head.

[51] Mr. Hlanze further submitted that PW1 testified that the Accused took a burning log which she tried to dispossess him of but let go of the log as she held its live side. By that time PW2 had come in response to

her shout for help. PW2 came in between the Accused and the deceased; whereupon the Accused let go, of the log and took a tripod stand. On the other hand PW2 stated that when she responded to the call for help from PW1 she found that the Accused was carrying a tripod stand. She dispossessed him of it and he picked up a hoe. She dispossessed him of the hoe and carried both implements to the kitchen. When she returned she found the Accused striking the deceased with a burning log. PW1 dispossessed him of the burning log and he ran into his father's house and returned carrying two knob sticks with which he struck the deceased. Both PW1 and PW2 dispossessed him of these knob sticks. Thus says Mr. Hlanze that these witnesses do not corroborate one another on salient points and that they should be treated as single witnesses.

[52] His submission is that the sequence of events from both witnesses is inconsistent. I agree with him. Ordinarily this inconsistency would not be fatal to the Crown case; however had it been true that the deceased was struck with the burning log and the knob sticks the pathologist would have recorded such injuries in his report. There are no injuries that corroborate these assaults as testified to by PW1 and PW2. The only injury in the post mortem report is that on the head which is



consistent with either PW2's version or that of the Accused; that the deceased was struck on the head with the spade and this is the injury that caused his death.

[53] The inaccuracies of the evidence of PW1 and PW2 with regard to these assaults which are not corroborated by the pathologist lead me to believe the Accused's version of how the fatal assault on the deceased occurred. PW2 stated that she witnessed the assault that the Accused inflicted with a spade upon the deceased but there was no one who corroborated her version. The Accused version rings true to me; as for PW1 she was a poor witness who did not impress me at all. She was belligerent and evasive. She would not answer directly some questions put to her. She seemed determined to send the Accused to the hangman for killing her son. I understand that she was hurting and angry for the son who had died but the Accused is her son as well; there should be balance somewhere between the deceased's death and the possibility of the Accused date with the hangman. They are both her sons.

[54] Having stated that I accept the Accused's version of how the assault that led to the death of the Accused,

occurred I have to now consider whether there was any intention to kill the deceased.

[55] It is clear from the evidence of the Crown witnesses and that of the Accused that there was much drinking of traditional brew, beers and spirits. There is evidence that dagga was also smoked. Excessive drinking is very common at such ritual ceremonies in honour of the ancestors; it is usual too for tempers to flair up over the least provocation due to the intoxication. In this case there was the issue over the desire for the deceased to sell the farm. The Accused did not wish to sell the farm because it was his home and he made a living from the sale of logs there from. There was the issue of the traditional brew being poured to appease the ancestors. There was the issue of the Mkhabela men who grazed their cattle on the farm consequently destroying the maize leading to a shortage of food. There was the issue of the goatskin. Finally there was the issue of the assault on the Accused by the deceased whereupon the Accused fell down. There was the issue of sibling rivalry as well which is common in most families which culminated in annoyances and irritations occasioned by either the deceased or the Accused. The end result of which the deceased eventually hit the Accused and he fell. The rest is history. I apportion blame on both

parties, primarily because they had imbibed intoxicating beverages and each smoked half a joint of dagga.

[56] However, the self-induced intoxication of the Accused cannot afford him an outright acquittal. In my view the intoxication, the annoying or irritating incidences that occurred between the deceased and the Accused and the assault inflicted by the deceased on the Accused all serve to reduce the moral blameworthiness of the Accused. Consequently, he is acquitted of murder and found guilty of culpable homicide.

**Q.M MABUZA**  
**JUDGE OF THE HIGH COURT OF SWAZILAND**