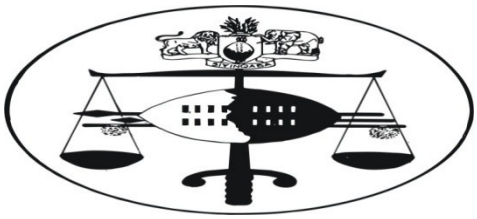

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CRIMINAL CASE NO: 267 /2009

In the matter between:

SENZO BHUTI BAPTISTA

AND

REX

Neutral Citation:	Senzo Bhuti Baptista *vs. Rex (Case No. 267/09) [2016] SZHC (63) (2016)*
Coram:	MLANGENI J.
Heard:	09/03/16 & 15/03/16
Delivered:	31/03/16

Summary: *Criminal Law – Accused charged with the murder of one Saneliso Marambule Khumalo whom he stabbed once with an okapi knife on the ear.*

Before the stabbing the accused and a friend had been on a drinking spree at the small town of Siphofaneni, but intoxication was not pleaded, neither was provocation.

Although the accused pleaded that he acted in self-defence, the circumstances leading to the fatal stabbing are far from clear.

While the Crown failed to prove intention, self-defence was also not sustainable on the facts. Accused found guilty of culpable homicide.

JUDGMENT

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[1] Two teenage friends – the accused and one Simanga Mamba, were residing within the precincts of the small town of Siphofaneni at all times material to this case. On the 13th December 2008 they were at the home of Simanga Mamba. They left the home before sunset and set out on a drinking spree in Siphofaneni town. The town is said to have many drinking spots and the two proceeded in a manner known as bar-hopping, which means moving from one drinking spot to another. Simanga Mamba is later referred to herein as PW1.

[2] The accused is **SENZO BHUTI BABTISTA**. He faces one count of murder, **"In that upon or about the 13th December 2008 and at or near Siphofaneni area in the Lubombo region, the said accused person did unlawfully and intentionally kill SANELISO MARAMBULE KHUMALO."** He has pleaded not guilty to the charge. The accused was born on the 15th December 1991, which means that he was almost exactly seventeen years when this unfortunate incident happened.

[3] It is common cause that when the teenagers set out on a mission to imbibe alcoholic drinks the accused took with him a pocket knife known as an okapi. The purpose for taking this knife with him came out clearly during his cross-examination by the Crown. He said that it is common in the area for people to carry weapons for self-protection because there are often physical fights. I took it that he was referring specifically to people who visit drinking spots rather than the general public. When Crown Counsel Nxumalo asked what type of weapons, the answer was **"Anything. Bush knives, broken bottles, anything ---".** Upon hearing this answer I quipped that it seemed to describe a war zone.

[4] As they proceeded from one drinking spot to another the night set in. The incident which is the subject of this trial occurred as they were moving from ka Mvelo Bar to a third one known as Bandiso Bar. It appears that the distance between these bars is not long. It is also apparent from the evidence that the passage is not well lit. As the two proceeded PW1 lagged behind for a while. He does not recall whether he was answering the call of nature or was answering a call on his cellular phone. He estimates the distance between him and the accused to have opened up to about ten metres.

[5] PW1 is the only witness who was led by the Crown. This is despite the fact that the summary of evidence has thirteen witnesses, including two ladies who, so the summary goes, were in the immediate vicinity when the deceased was stabbed.

[6] A statement of admitted facts in terms of Section 272 of The Criminal Procedure and Evidence Act No. 67/1938 was handed to the court. The admitted facts are as follows:

6.1 The contents of the post-mortem report were admitted, being that the deceased died of a stab wound on the middle portion of the left ear, measuring 3 X ½ centimeters.

The post-mortem report of Dr. Reddy was handed in and marked **“Exhibit B”.**

6.2 Pictures of the deceased upon examination, as well as pictures of pointing out of the knife by the accused and blood-soiled clothes that were worn by the accused at the time of the assault.

6.3 Positive identification of the body of the deceased at the morgue before the post-mortem examination.

6.4 Other items of evidence that were handed in by consent were a three-star okapi knife **(“A”),** various photographs **(“A1 to “A7**), Levis T-shirt (Exhibit 2) and a pair of trousers (Exhibit 3) all of which belonged to the accused.

[7] The effect of the admitted facts is that it is not in dispute that the deceased died as a result of a single stab wound on the centre of his left ear, which wound was inflicted by the accused in the night of the 13th December 2008, using an okapi knife. The accused says that he inflicted the wound in self-defence. Most of what follows in this endeavour is an examination of the sustainability or otherwise of the defence of self. In this endeavour sight must not be lost, and will not

be lost, of the fact that the onus is upon the Crown to prove beyond reasonable doubt all the elements of the crime, in the circumstances of this case the focus being on the requirement of intention to kill the deceased. In self-defence the accused is therefore arguing that he inflicted the blow in defence of self as he was under attack by the deceased at that instance.

[8] The requirements of self-defence have been well articulated in numerous judgments of courts in this jurisdiction and beyond. The onus upon the accused is not onerous. He or she bears no burden to prove the truthfulness or otherwise of any explanation that he gives, per Ota J.A. in the Supreme Court case of **MALUNGISA ANTONIO BATARIA vs. REX, (06/2014) [2014] SZSC 45** at paragraph 21. In the same judgment Her Lordship quotes Ramodibedi C.J. in the case of **BHUTANA PAULSON GUMBI vs. REX,** Criminal Appeal No. 24/12 paragraph 19 where His Lordship had this to say –

> ***"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. It there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."***

[9] Simply put, the accused must allege an act or acts by the victim which, in the eyes of the law, warrant or justify the reaction which he offered. In reality this, simple as it may seem, requires an astute perception of the facts and circumstances by the trier of fact, involving in some circumstances a critical analysis of contrasting versions of the same incident. It is my understanding that the starting point is that the accused must state his version sufficiently clearly for the court to understand, without speculating or making inferences, what actually transpired in any transaction in question.

[10] In the case of **THE KING vs. SANDILE MBONGENI MTSETFWA**, criminal trial no. 81/10, Justice T.S. Masuku noted at paragraph 43 of the judgment that self-defence in this country has constitutional recognition in Section 15 (4) of the Constitution Act 2005, the essence of which is that **"a person shall not be regarded as having been deprived of life in contravention of the said section if the person dies as a result of force to such an extent as is reasonably justified in the circumstances for the defence of any person from violence."** What stands out in the preceding quotation is that the nature and extent of the reaction must be reasonably justified in the circumstances, suggesting an objective test

ex post facto which avoids “an armchair perspective (per **NTSONI vs. MINISTER OF LAW AND ORDER 1990 (1) SA 512 (C)**)**.**

[11] The above cited case, although a civil matter, states the requirements of self-defence in a manner applicable in criminal matters, the difference being only in the standard of proof.

11.1 there must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger.

11.2 The means of defence must have been commensurate with the danger and dangerous means of defence must not have been adopted when the threatened injury could have been avoided in some other reasonable way.

[12] I revisit the case of **THE KING vs. SANDILE MBONGENI MTSETFWA** where Masuku J., quoting Dr. TWUM J.A. had this to say –

> ***“Under the law of this country, when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should be no more than in reasonably***

necessary in the circumstances. The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would-be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self-defence."

[13] Dr. Twum J.A.'s reference above to **"this country"** is in relation to Botswana where he was sitting at the time, but Masuku J. rightly points out that on this aspect the Law of Botswana is the same as that in this country. Needless to mention that Masuku J. has served both jurisdictions at different times, and so has Dr. Twum J.A.

[14] I now come to the facts as shown by the evidence. The only witness led by the Crown, PW1 whose name is Simanga Mamba, had very little to offer. Other than placing the accused at the scene of the crime at the material time, an issue that is not denied by the defence in any event, other things that he said had hardly any probative value. As I pointed out earlier in this judgment the summary of evidence identifies two ladies that were in close proximity to where the stabbing occurred, but for inexplicable reasons they were not called. This may well be tactical misjudgment, but it is likely a result of heavy work load on Crown Counsel who do appear to be overstretched and may, in the

nature of things overlook some important aspects of the cases they handle.

[15] Shortly after starting to give evidence this witness declared as follows:

> ***"I was drunk. When I am drunk I normally black out, I lose phones, shoes --- I saw very little."***

Well, what more can one expect of a witness who starts off his evidence in that manner? I got the clear impression that he deliberately wanted to say as little as possible. At some point in time I had to admonish him to take the exercise seriously when it seemed that he thought it was a mere formality or routine. This witness, according to his own evidence, was about ten metres behind the accused. He says the deceased was approaching in the opposite direction, followed by two girls. When the accused and the deceased were close to each other he saw movements by the accused's right hand and body, didn't see clearly as he was drunk, deceased was holding around the left ear. At that stage I asked him if he heard any sound of speech between the two or any cry of pain, he said he did not hear anything of the sort.

[17] After this witness the Crown closed its case. It's case therefore rested on the evidence of this witness as well as the admitted facts and the material that was handed in by consent. The accused gave evidence in his own defence, and it is only then that the dim account of what happened became clearer, but only very slightly. According to the accused this is what happened: he was walking ahead of PW1, he came across the deceased who was walking in the opposite direction; at the point when they would have been crossing, the deceased, who had a beer bottle in one of his hands, uttered the words **"fuseki mshana"** and at that instant assaulted him with the bottle somewhere on the face. Not much emerged in relation to this injury – whether it was serious or not, but it is not disputed that he did not require any medical assistance for it, although he alleges that the bottle broke on his face.

[18] In siSwati culture the word **"fuseki"** is generally accepted as a mild insult. It is usually a reaction of anger rather than a word which would start a conflict, let alone a deadly one. It is my considered view and opinion that, assuming that these words were in fact said by the deceased – and I very much doubt this – there would have been some antecedents to this. There would have been an earlier conversation, brief may be, which led the deceased to utter the words **"fuseki**

mshana”. Strictly speaking, “mshana" is reference to nephew or niece, but it now has looser meaning which is a friendly reference to a younger acquaintance or younger unspecified relative. To me this suggests that the two had an amicable relationship, despite the fact that previously the deceased had, according to the accused, once hit the accused on the head with a four pound hammer over a minor dispute, but even on that occasion the accused surprisingly did not need hospitalization. It is actually doubtful whether this incident did occur, or occurred in the manner described by the accused. A hammer of that size would cause considerable harm on a human head.

[19] Accounting on how the stab wound came to be inflicted upon the deceased, the accused relates that consequent to the blow with the beer bottle that he received, he fell down. As he picked himself up he pulled out the knife from the pocket and, noticing that the deceased had bent over him while holding the remainder of the broken bottle, he lashed with the knife without targeting any particular spot.

[20] If the accused was provoked in the manner that he describes, then there is a lot that he is not telling. In law he does not have to tell it all, but as I stated earlier in this judgment if he pleads self-defence there must, in my view, be at least a certain degree of clarity on what

happened and how. It can never be enough for an accused to simply utter one sentence, that he was attacked with a bottle and he counter-attacked with a knife, period. If as a general proposition this is correct, on the present facts it would have been in the interests of the accused to tell a story that is reasonably possibly true. In my opinion the one that he has told is highly improbable. A man who is significantly older than you is not likely, out of the blue, to utter the word **"fuseki"** and follow it up with the friendly word **"mshana"** and a sudden blow with a beer bottle, without prior provocation. Unfortunately the other party cannot talk, to one that is able to talk has advanced a version that does not, objectively, add up. It is, beyond any reasonable doubt, false.

[21] During cross-examination the accused did let out some telling evidence. He admitted that in the following morning he washed his knife which had blood on it, he hid it away in a toilet in the home where both him and PW1 had slept. He did not report what had happened to the Police or the anyone. He says he was still in a state of shock. Significantly, he also admitted the following:-

21.1 that an okapi knife is a dangerous weapon when used against a person.

21.2 that when a person is stabbed with an okapi next to the ear that person could die.

[22] Crown Counsel asked the accused to demonstrate to the court how the confrontation developed, particularly how he inflicted the stab wound. Accused refused to demonstrate the act using the body of the court orderly Mr. Vilakati. He said he was reluctant to demonstrate using **“another person”.**

[23] Accused did, however, repeatedly say that he did not intend to kill the deceased, that he was afraid of the deceased and had intended to ward him off.

[24] Before I come to my conclusions on the accused’s defence, I wish to make some observations regarding the fatal wound on the deceased’s left ear. The wound is right at the centre of the ear, and despite the visible clots of blood it appears to have a relatively tidy opening. This, to me, suggests a fairly accurate aim which is inconsistent with a blow landed blindly by a person in the course of picking himself up. The post-mortem report describes the size of the wound as **“3 X ½ with sharp margins”**. Sharp margins would appear to be in keeping with a

direct and forceful blow. The Crown informed me, the defence did not dispute, that at the size of 3 X ½ centimeters the wound was three centimeters deep and half centimeter wide. At three centimeters deep one would expect that a significant amount of force was applied from a relatively direct angle. There is hardly any doubt that some of the above observations would be better interpreted by an expert, but I am of the view that a different interpretation would not change my ultimate conclusion regarding the accused's defence.

[25] For the reasons that appear below, I reject the accused's account and defence of self. If he was attacked without provocation, which I doubt, he certainly exceeded the bounds of self-defence.

25.1 Although in law he carries no burden of proving that his account of events is true, it must in any event be reasonably possibly true so as, at the very least, to create a benefit of doubt that he was not entitled to act in the manner that he did.

25.2 The fatal wound is consistent with a calculated and well-aimed attack.

25.3 Some aspects of the accused's evidence show him as a not credible witness. For one thing his account of the fatal confrontation is quite cryptic.

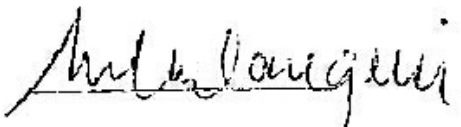
25.4 Also, he says he was once hit by the accused with a four pound hammer on the head, but he did not require any medical attention or hospitalization. This of course is highly improbable given the size and weight of a four pound hammer landing on a human head. If he has told lies about this straightforward issue, as I think he has, what else has he or has he not lied about?

[26] The result of rejecting the accused's defence of self is ordinarily that I should find him guilty of murder. During submissions defence Counsel urged that if it is not murder then it must be an acquittal. I respectfully disagree.

[27] It was the Crown's responsibility to prove intention beyond reasonable doubt. The Crown has not succeeded in doing that. At the same time the defence of self has not succeeded. There is no reason why, in the circumstances of the case the accused cannot be found guilty of culpable homicide and indeed I do find him guilty of culpable homicide. In this context I refer to the persuasive authority of **S V NGOMANE**

1979 (3) SA 859. The appellant was convicted of murder with extenuating circumstances where he had been threatened by the deceased with death by burning him inside his hut and the deceased had proceeded to fasten the door of his hut from outside. Accused later opened the door with intention to escape, but as the deceased entered the door the light from the paraffin lamp was extinguished by the resultant draught, leaving the hut in darkness. As the deceased entered the hut and the darkness occurring simultaneously, the accused fatally stabbed the deceased with a spear. He advanced self-defence but was found guilty of murder. On appeal the court confirmed that self-defence was not sustainable as the accused had acted precipitately and excessively in the circumstances. A verdict of culpable homicide was substituted. See also **REX vs. BONGANI MUNYAMUNYA MAZIYA, CRIMINAL CASE NO. 192/09.**

[2] I accordingly find the accused guilty of culpable homicide.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR THE CROWN: **MR. M. NXUMALO**

FOR THE ACCUSED: **MR. LEO GAMA**