**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE** CRI.T. CASE NO. 493/11

In the matter between:

**REX** Applicant

And

**PLEASURE MPHUMELELO SIBANYONI** Respondent

Neutral Citation: *Rex v Pleasure Mphumelelo Sibanyoni (493/11) SZHC7 l (2019)*

Coram: **MAPHANGA J**

Date Heard: 24 September 2018

Date Delivered: 03 May 2019

***Summary :*** *Criminal law - Accused charged with murder - charge predicated on existence of dolus eventualitis as aform of intent.*

*Dolus Eventualis doctrine and the requisite elements comprising the last for mess rea in such instances discussed and applied.*

*Test for do/us constrasted with thatfor culpa applied.*

*Accused's plea of private defence not multring test for self defence - pertinent principles discussed and applied.*

*Accused found guilty of culpable homicide.*

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**JUDGMENT**

[ 1] The accused is charged with the crime of murder it being alleged that on the 15t1 October 2011 and at or near Marcos Bar at Ngwenya he did unlawfully and intentionally kill one Mancoba Sibeko.

[2] When the indictment was read out and put to the accused he pleaded not guilty to the murder charge but offered a plea of guilty to a lesser offence of culpable homicide.

[3] The Crown elected to press on with the trial on the murder charge thus rejecting the accused's plea. The matter proceeded to trial on the murder charge. The Crown then led evidence of three witnesses to prove-its case against the accused. At the close of the crown case the Defence led the accused as a sole defence witness.

[4] Before I go into a narration of the evidence it would be convenient to set out the basic facts that are common cause. That the deceased, the said Mancoba Sibeko, died as a result of a stab wound intentionally inflicted by the accused on the evening of the 15th October 2011 is not in dispute. It is also common ground that the deceased was frequent patron at the said Marcos Bar and that the accused was one of two bartenders employed at the drinking spot.

(5] On the fateful evening the accused was on duty at the public place and the deceased was one of a few customers enjoying alcoholic drinks. The bar by all account serves as a key social venue for the community at the village and also offered its clients light meals from a limited menu.

[ 6] At about 18h00 that evening there was a brawl between the deceased and the accused in the course of which the accused stabbed the deceased in the chest with a sharply bladed knife commonly known by its brand name "Okapi". This was a fatal wound to
which the deceased shortly succumbed.

[7] A post-mortem medico legal report prepared by the Police Pathologist Dr. R. M. Reddy (PWl) was handed in by him as part of his evidence and accepted into the record by consent. It detailed the findings of an autopsy conducted on the deceased on the 21st October 2011. In it, the following ante mortem injuries were noted on the deceased' s body.

1. A contused abrasion over the forehead 3 x 1 cm;

2. A 2.3 x 0.9 cm penetrating injury over the clavicular region, which involved a perforation of the upper lobe of the deceased's lung.

[8] The pathologist determined the latter to be the cause of death resulting in excessive bleeding (hemorrhage) in the right lung.

[9] Prior to the conduct of the autopsy, the deceased's body was positively identified by his uncle called Ben Sibeko who was called as PWl by the crown.

[10] A statement recorded by the accused before the Principal Magistrate at the Mbabane Magistrate Court was also handed in by consent. In it the accused narrates the events leading to the fatal stabbing of the deceased. I note here that the statement is largely consistent with the accused's own testimony in his defence before the court. It iterates also the accused's defence maintained during the proceedings that although admitting he stabbed the deceased, that this was in self-defense and also that the killing was unintentional.

The evidence

[11] The key direct evidence led by the Crown was presented through the testimony of PW2 Sifundvo Dlamini. He was a colleague of the accused; being the senior of the two bartenders. He and the accused were both on duty that evening. He told the court that the bar is run in a building with a designated customer area, which is furnished with tables and chairs. The area is demarcated and isolated by a service bar

screened off with a steel-mesh with a service-hatch through which customers would be served with their drinks. There is a staff access through a lockable security door between the customer area and the staff section and storeroom. There is also an adjacent kitchen on the staff side of the bar from which meals would be prepared.

[12] PW2's evidence is that he and the accused had been serving customers behind the counter /bar when the deceased arrived and ensconced himself in the customer section of the pub. At a certain point the deceased had casually perched himself in a seated position on one of the tables. According to PW2 the deceased manner of sitting as this was against the etiquette and house rules at Marcos' bar. For this reason PW2 instructed the accused to tell the deceased to get off the tabletop but the latter refused to do so and persisted on sitting on the table regardless.

[13] At some point during that evening PW2 sent the accused to gather and clear the bar of empty beverage bottles. Dlamini told the court that it was one of the routine safety precautions regularly carried out at Marcos' to remove such material which could possibly be used as potential weapons or missiles by patrons from the bar area.

[14] It was PW2's evidence that after the accused returned from collecting the bottles he had lingered behind the counter bar to watch news on a TV set in the customer section of the bar. It was at that point that he witnessed an altercation between the accused and the deceased. He told the court that the deceased had instigated the trouble in that he had provoked and taunted the accused as the latter was sitting watching the news on the bar television set. Noticing the deceased's unruly behavior, PW2 intervened and admonished him to behave. A material part of PW2's evidence was that shortly after the altercation, he witnessed the deceased attack the accused by head-butting him repeatedly on the chest whilst holding him by his lapels. During this encounter he saw the accused draw out a knife stabbing the deceased on the shoulder. The deceased recoiled and ran outside the pub.

[15] At that point the accused called out to PW2 to open the security door access into th, staff section to let him in.

[16] The Crown also called PW3 one Sergeant Mangaliso Dlamini. He was the police officer who attended the scene of the incident at Marcos Bar. He had been on patro around the Ngwenya Village area when his vehicle was frantically flagged down by certain persons who informed him of a stabbing incident that had occurred at the nearby Marcos Bar. He immediately proceeded to the scene.

[17) On arriving at the pub he found the deceased lying on the concrete step of the pub verandah or porch bleeding. He radioed the Mbabane Police Station for dispatch of support personnel. Shortly the Police investigation contingent arrived and set about examining the scene and collecting evidence. This was the Scenes of Crime Unit

[18] PW3 told the court that he subsequently located the accused in the storage room of the pub where he had been sitting.

Defence

[19] The accused gave evidence in his defence. He had started his duties at about llhOO that morning and went about his chores. With him was Sifundvo Dlamini, (PW2). Both he and PW2 would serve the customers from the service staff-section of the bar behind the security wire mesh screen. The bar also served light meals to its customers. In the course of the afternoon he went into the kitchen where he has started peeling potatoes to be processed and cooked as potato chips or fries as part of the pub fare. He told the court that he was using an okapi knife to peel the potatoes. When quizzed about whether this was the only knife used to prepare the meals, the accused told the court that there was a regular kitchen knife but it so happened that he would also use the okapi; which was his own personal implement. He recalls that it was at that point in time that he was instructed by PW2, Sifundvo Dlamini to collect and clear empty bottles from the customer lounge area and outside. He told the court that he recalled

that he had folded and put the okapi knife in his back pocket before he exited the sta area to collect the empty drink bottles.

[20] The deceased had arrived at about 18h00 at the bar and joined a few other patron whom the accused estimated to must have been just fewer than 10 in number. Th deceased was a regular at Marco's bar. According to the accused the deceased wa generally known as a trouble- maker and belligerent customer. This was als corroborated by PW2 during cross-examination.

[21] The accused also told the court that he first had a brief encounter with the decease when he asked the latter refrain from sitting atop one of the bar tables and a altercation between them ensued when the deceased refused to obey. Wary of troub with the deceased the accused had decided to leave him alone as the decease defiantly persisted with seating on the tabletop.

[22] It was the accused's further evidence after that incident and having collected th empty bottles he had brought them inside the pub and used the service-hatch of th security screen to push them into the staff section so they could be packaged away. A that moment he then lingered around the customer section of the bar and sat on a ba stool at the counter watching television.

[23] According to the accused what happened next is that the deceased had approached th bar counter where he was sitting near the service hatch and then roughly pushed th accused off as if shoving him away. The accused told the court that initially he ha the impression the deceased was only trying to catch his colleagues' attention fo service and for that reason (the accused) yielded and sat on a bar stool nearby. Sti the deceased prodded and pushed the accused. That caused the accused to ask th deceased what was the matter to which the deceased reacted by violently, holding th deceased by his lapels pushing and challenging him to fight. According to the accuse he was repeatedly taxed by the deceased as to whether he wanted to fight an

challenged the accused to hit him. The deceased harassed the accused and repeatedly asked the latter if he wanted to beat him up; an invitation to the accused to fight. It was the accused evidence that he declined the challenge and tried to calm the deceased.

[24] According to the accused, there was a momentary respite as the deceased appeared to relent and walk away but after taking only a few steps the deceased hastily came back to where the accused was sitting accusing him of having cursed him by making a vulgar clicking sound *(Kumnxata* in *Siswati. Kunxata* is a Siswati word for a clicking sound which when uttered to another person is considered a contemptuous expression).

[25] The accused told the court he was taken aback as at this time the deceased seemed more upset and aggressive. According to the accused the deceased had grabbed him by the shoulders and rammed him with his head on the chest repeatedly, although his specific recollection was that this must have been at least 3 times.

[26] Upon this aggression and assault the accused says he was forced to retreat but did not have much room to escape as he was in a confined space. He recalls that at that point he reacted by pushing the deceased away and off him before reaching to his pocket, whereupon he drew out and swiftly opened the okapi knife and there and then stabbed the deceased on the shoulder.

(27] According to the accused at that moment the deceased's immediate reaction upon being stabbed is that he ran outside of the bar. The accused told the court that at that point he shouted calling upon PW2, Sifundvo, to open the security door and let him inside the secure staff area.

Analysis of the evidence

[28] The defendant's case is simply that in stabbing the deceased he acted in self-defence.

The law on private defence

[29] In a criminal trial the onus of proving the guilt of an accused person rests and remains on the crown. That is fundamental and so well established rule of our criminal justice as should be regarded trite. Any invoking self-defence an accused person earns a lesser onus or evidential burden not of proving the truthfulness of what version he tenders to the court, but of showing not so much that his explanation is probable or even more probable that the crown's version as that the explanation is reasonably possible. That standard of measure has been succinctly stated by the Supreme Court in the case of *Bhutana Paulson Gumbi v Rex CR* - Appeal No. 24/2017 where at paragraph 19 the court said:

> *"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, that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitles to his acquittal"*

[30] This statement follows a well-established common law position one enunciated by *Nangent Jin S v Van de Mayden 1999* (1) SACR (W) of the exculpatory effect of a finding by a court in evaluating the evidence that an explanation given by an accused might be true. See also *Rex v Sabelo Elias Dlamini* (226/2009) [2016] SZHC 93 (09 June 2016); also *Malungisa Bataria v Rex* (06/2014) (2014) SZHC 45 at paragraph 21;

[31] The requirements of self-defence have been percolated into this brief statement of the applicable test:

1) there must have existed an unlawful attack of imminent threat of an attack to the persons of the victim as to give rise to a reasonable apprehension of death of physical danger .

2) the means of defence or repelling the danger must be such as to have been proportionate to the danger or risk; and

3) the means used in self-defence or force must be the only available reasonable option or least dangerous means of repelling the harm (see *Bhutana Paulson Gumbi v Rex* (24/2012) (2012] SZHC 32 (30 November 2012); *R v Molife* 1940 AD 202 at 204; *Motsa, Sipatji v Rex* 2000 - 2005 SLR 79 (CA).

(3 2] In *Rex v Sandile Mbongeni Mtsetfwa'* Masuku J had occasion to quote with approval an opposite of eloquent expression the principles on private defence ------ of the law by Dr. Twum JA as follows:

> *" .•• (W) hen 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 the degree of force employed in repelling the attack should be no more than is 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 would not*

[1] P.R. v Sandile Mbongeni Mtsetfwa (81/2010)[2010]SZHC145 at para 45 relying on direction in Mmoletsi v State [2007]ZBLR 708.

*avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self-defence".*

[33] The field of evidence led before the court is fairly clear without much divergence as between the crown and defence case; as versions of events that unfolded leading to the death of the deceased. From the eyewitness's accounts it is common cause that the deceased was the aggressor behind the brawl that led to the stabbing. The accused had tried to avoid a confrontation with the deceased despite the latter's persistent behaviour which clearly shows he was spoiling for a fight with the accused. It is also eminently clear by all accounts that the accused person had earlier been subjected to persistent taunts and threatening action by the deceased. His evidence is corroborated by PW2 in so far as it is said that the accused was subjected to verbal and physical attack from the deceased who pushed and manhandled him in the pub without provocation.

[34] The deceased in the final instance had aggressively held and rammed by the accused several times as he tried to retreat within the bar area. There is no question that the accused was subjected to an unlawful and wrongful attack.

[35] He gave a consistent and clear account of how the deceased was a well-known belligerent person in the area wanted to pick up a quarrel. In short he had a reputation of being a bully. He was of a relatively bury built with a physical advantage over the accused.

[36] He described how he had retained the okapi knife he had been using earlier in the kitchen when he went to collect bottles and had kept the knife in his back pocket.

[3 7] He was cross examined on this and denied that he had armed himself in advance with the knife for purposes of using it as a weapon. PW2 when asked about whether he had seen the accused using the knife in the kitchen he could not rule out that the accused had although he was not certain of this.

[38] There was evidence that the accused had retreated upon being charged and head• butted by the deceased to the point where being backed into a confined space he had pushed off the deceased. It was in that instance that he had pulled out the knife to stab him. I note that in view of the type of knife it is, in order to do so he would have had to open the knife by unhinging the blade from its fold into the handle.

[39] The post-mortem report ties in with the accused's testimony in so far as it indicates that the deceased had sustained a single pretreating would consistent with the stabbing event described by the accused. Noteworthy also is the reference in that medico-legal report to abrasions on the head of the deceased, which may have been caused when the deceased was head bulling the accused. The accused's story bears relation to features.

[40] I note that in his statement before the learned magistrate the accused mentioned that he stabbed the deceased twice. It seems he might have been mistaken as this is not consistent with the rest of the evidence and at variance with the post-mortem report. It is clear the deceased sustained and succumbed to a single stab wound.

[41] The evidence of the accused corroborated by that of PW2 is that the whole transaction between the deceased and the accuse in which the latter was under the deceased attack only lasted a very short time so that it was over within a few minutes.

[42] There is no evidence to support the hypothesis that the accused had the intention to kill the deceased nor can this be concluded by inference of the surrounding facts. On the other hand I am inclined to conclude that clearly the accused was impelled to act to protect himself from what was threatening conduct and attack by the deceased. The only issue would be whether in resorting to the use of a knife he did not exceed the bounds of self-defence regard being had to the danger and apprehended harm to himself at the time. Further I would have to consider if the use of the knife was the only and least dangerous means by which he could avert the harm.

[43] I am mindful of the appropriate criminal standard in regard to the requirements of the private defence doctrine in murder trials which are succinctly summarized in the Supreme Court judgment of *Bhutana Paulson Gumhi v Rex CR.* Appeal (24/2012) [2012] SZSC 32 (30 November 2012). There the court in tum quotes with approval the following remarks by Watermeyer AJA *in Rex v Difford* 1937 AD 370 at 373 as follows:-

> *"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 that court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but also that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal"*

[44] Following this crucial principle the applicable standard where private-defence is put up by an accused, has to be that it falls on the Crown to prove that the explanation tendered by the accused in support of his self - defence plea cannot reasonably possibly be true; in other words the burden forthe Crown is to negative self- defence beyond any reasonable doubt. *(Rex v Molife* 1940 Ad 202; *Motsa, Spatji v Rex* 2000 - 2005 SLR 79 CCA).

[45] The critical and incontrovertible set of facts that bear consideration may be summarized as follows: The accused whilst he was going about his duties found himself the focus of the deceased's attention. This was likely started by the accused's earlier approach to the deceased as one of the staff of the bar asking him to desist from sitting on a table to that the deceased refused to heed. Thereafter he was pursued by the deceased who appeared keen to provoke a physical confrontation with the accused.

[46] What followed by all accounts was that the deceased persistently taunted and physical and forcibly pushed the accused on one instance all the true uttering jibes at the accused.

[47] The accused's evidence which was corroborated by PWl was to the effect that the deceased was a patron of the bar who was given its bullying and aggressive behaviour in the manner he often carried himself whilst at the Marcos Bar.

[ 48] The court heard that the deceased was of a heavier and athletic built whilst the accused was of slight built. It may be inferred from the accused's testimony that he was clearly in awe of the deceased and therefore despite the latter's provocative conduct he tried to avoid him and did not retaliate to the physical confrontation.

[49] There is no doubt that the accused at all material times had in his possession, an okapi knife folded in his back pocket. He claims to have been using the same knife to peel potatoes in the bar kitchen earlier and upon receiving his supervisor's instructions to clear the bar of empty beverage bottles he had simply taken the knife with him without much thought of have no reason not to accept that explanation to be reasonably probable in preference to the notion that he had armed himself.

[50] In the final confrontation by the deceased the evidence is that he was head-butted repeatedly by the deceased who had placed his hands on the accused's shoulder.

[ 51] The accused described that incident as threatening in that he felt overwhelmed and pinned back without much room to escape. He reacted by drawing out the knife in his pocket and stabbing the deceased once on the clavicular bone area of the chest.

[52] The evidence of the accused was that the deceased was a bigger and belligerent character who was physically more powerful than him. I note however that barring the accused using his bare hands at one time to push the deceased away the accused did not use any other means to defend himself before pulling the knife out of his

pocket and swiftly opening it to stab the deceased. Indeed there is no evidence that he tried anything else to avoid or repel the obvious attack against him before resorting to the use of the knife. I am not persuaded on the evidence that the knife was the only available means he could have used to escape harm or that it was the least dangerous and proportionate means to the aggression.

[53) It is common cause that the deceased sustained only one stab wound as a result of which he immediately ran out of the bar, probably in shock or as was suggested by the defence in reach of a weapon.

[54] In the circumstance and based on the evidence I come to the conclusion that the private defence cannot avail the accused regard being had to his resort to a lethal weapon. There is no question that he was unlawfully attacked and assaulted by the deceased in an aggressive manner. His immediate means of repelling the attack available was the knife but it was not the only means nor was it the least deadly means he could have employed. In the circumstances although the defendant's plea of private defence cannot in my view stand for the above reasons I do consider that the facts do support partial excuse. I shall return to this aspect further in this judgment.

It is the Crown's case that the accused's conduct meets the requirement of an intention to kill the deceased by inference in the form of *dolus eventualis.*

*Dolus eventualis*

[55] Intention takes the form of dolus eventualis when the accused foresees the possibility of his act resulting in death, yet he persists in it reckless as to whether death eventuates or not. (See *Thandi Tiki Sihlongonyane* v *Rex* Cr. Appeal case No. 40/1997. Where there is no direct evidence to show intention, as is often the case this must be inferred from the circumstances to show that the accused bore the subjective foresight that death might result from his conduct.

[56] In *S v Dlodlo* 1966 (2) SA 401, at 403 Botha J has crisply enunciated the law on the imputation of dolus by inferential reasoning in such cases thus:

> *"The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference, then there must be reasonable doubt whether the inference sought to be drawn is the correct one. (See R. v. Blom, 1939 A.D. 188 atpp. 202-3)"*

[57] That said it follows therefore that in order to prove murder with *do/us eventualis* the Crown has to prove beyond reasonable doubt that when the accused inflicted the fatal injury on the deceased he did, as a fact, appreciate subjectively, the possibility of death resulting from his action at that time.

[58] Having regard to the circumstances and facts surrounding the sequence and developments at the bar on the fateful evening, it is clear that the accused was subjected to a persistent provocation in the form of taunts, threats of physical violence and continued harassment from the deceased. All this time the accused tried to avoid confrontation and declined the deceased challenge to fight. Despite this accused was physically confronted and harassed by the deceased and despite the accused's attempts at avoiding him, a conflict became inevitable when the deceased started to assault him by barraging him with his head several times whilst also holding him. It was only when the deceased was on the offensive and that the accused did after retreating to a confined space that he first pushed the deceased off and then reached into his back pocket for the knife and stabbed the deceased.

[59] There is evidence from the accused testimony that he thought he had stabbed him on the shoulder but it is also clear that the flurry occurred within so short a space of time that it can be said that in his reaction he had very little time for reflection. At some point he thought he had stabbed the deceased twice but it is clear that it was only once.

[60] Without doubt the knife the accused was bearing andused to stab the deceased is a murderous lethal weapon. However in the circumstances of this case, I do not think an adverse inference can be reasonably and exclusively drawn :from this fact alone or that the stab wound was inflicted in the clavicular area of the deceased body, an anatomical part of the body that may be considered sensitive, given that the infliction was directed at the shoulder and not a vital area like the heart. As regards the knife the accused's version as to how he came to be in possession thereof in his person seems on the facts to be reasonably possibly true as not to attract an adverse inference as to a malevolent intent. The circumstances of the stabbing also indicate that the whole sequence of events occurred rather quickly as to have been almost spontaneous.

[ 61] It has been held that the fact that an accused person uses a knife to inflict a lethal injury does not necessary carry the inference thereby of the subjective foresight that death will result or that he would have necessarily foreseen death resulting.

[62] In *Anna Lokudzinga Matsenjwa v Rex* 1970-1976 SR 25, Milne JA conveys the same view when he says:

> *"When a person appreciates only that his act may injure another it does not follow of course that the injury may cause his death. (See R v John 1969 (2) SA 560 R (AD) at 570). Nor does it necessarily follow merely because the assailant uses a weapon such as a knife" (See S v Dlodlo 1966 (2) SA 401 AD)"*

[63] Taking the circumstances of this case taken as a whole does not exclude as a reasonable inference the conclusion that the accused may have acted in poor judgment out of fear and panic in an attempt to avert what must have seemed and inevitable imminent harm to his person. His action cannot be said to be reasonably inconsistent with the possibility that he did not at that moment appreciate that death might result from stabbing the deceased as he did. He was acting in the context of aggression preceded by acts of persistent provocation by the deceased.

[63] There is evidence that as soon as the deceased fled in shock the accused sought the refuge of the staff area by calling on PW2 to open the security door. His conduct is consistent with a person who panicked upon coming to his senses and tried to escape. In the .circumstances and the rapidly evolving situation at the time I have doubt that the accused was in a state to appreciate nor did he realize that death would result from his action but nevertheless indifferent whether it did or not. I am not satisfied that was his state of mind at all. His conduct in the aftermath of making the statement of admission before the magistrate is consistent with a state of remorse.

[64] In my view these are mitigating and extenuating circumstances that come to bear in this case. I also conclude from these circumstances of the matter and the mosaic of the evidence as a whole that the Crown has not discharged its onus of proving beyond reasonable doubt the intent necessary to find the accused guilty of murder.

[65] The abiding impression of the evidence and one on which I conclude herein is that regard being had to all the relevant circumstances and considerations of the matter, it cannot in my judgment be said that the events leading to and including the infliction of the mortal injury on the deceased exclude any other inference save that the accused subjectively appreciated the possibility that the injury so inflicted on the deceased would result in death.

[66] On an objective basis can it not however be concluded that he should, regard being had to the nature of the weapon used and its potentially deadly effects, reasonably foreseen death resulting? On the totality of the evidence and the proven facts it is my view that the objective test of establishing fault in the form of *culpa* on grounds of negligence is satisfied. In sum I find that regardless of the reasonable possibility that in his state he accused subjective foresight of the deceased's death resulting from the stabbing, on the objective test it can nonetheless be reasonably concluded beyond reasonable doubt that he reasonably ought to have foreseen the fatal consequence of his action; that being a test of what a reasonable person in his position. In plain language that means there is sufficient evidence that the accused was negligent in his action.

[ 67] As stated earlier there is no denying that the deceased died in consequence of injury inflicted intentionally on him by the accused. In such cases where the Crown case nonetheless falls short of proving *do/us* as examined above it is competent for the court to convict an accused person in such a position for the lesser offence of culpable homicide if partial excuse is established (See *Thandi Tiki Sihlongonyane* case supra; also *S v Ngubane* 1985 (3) SA 677 (AD) C-E and the cases cited therein)

[68] From the facts I am satisfied that on the objective standard of reasonable foresight of death arising from the use of the okapi knife by the accused in inflicting the fatal injury can be reasonably inferred from the circumstances to support the conclusion that the killing was negligent. I therefore find the accused guilty of the offence of culpable homicide.

**MAPHANGA J**

**Appearances:**

Mr. A. Matsenjwa for the Crown

Mr. M. Simelane for the Accused