

IN THE HIGH COURT OF SWAZILAND

Cr. Case No. 179/95

In the matter between:

THE KING

vs

HENRY SITHEMBISO NGWENYA

CORAM: S.W. Sapire A.C.J.

FOR THE CROWN Mr. Wachira

FOR THE DEFENCE Mr. B.J. Simelane

Judgment

(14/5/96)

The accused in this matter is charged with murder. It is alleged that on or about the 22nd day of June 1995, at or near Sagula area in the District of Lubombo, the said accused unlawfully and intentionally killed Mtekeleni Hlanze.

The deceased was a half brother of the accused. They share the same mother but not the same father. At the commencement of the trial, certain admissions were recorded which made it unnecessary for the crown to prove the identity of the deceased as being the person named in the charge sheet and that the deceased had died as a result of the stab wound inflicted by the accused on the 22nd June 1995.

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A post mortem was carried out and the report thereon is Exhibit "A". The correctness of the report is not in dispute. It is further admitted that the accused made a statement before a magistrate and this has been admitted in evidence as Exhibit "B". Furthermore, evidence regarding tests of blood found on the knife which was the weapon used in this offence is also admitted. On the evidence which was given, there can be no doubt that it was the accused who inflicted a fatal wound on the deceased who died as a result thereof. What was urged on court is that the infliction of the wound was intentional this being the contention of the crown, while the accused through his counsel has urged that the infliction was accidental. The crown contends that the offence committed is murder, while the contention of the defence counsel is that at most, the accused is to be found guilty of culpable homicide.

It is necessary to examine the circumstances immediately preceding the fatal stabbing to come to a conclusion and to determine which of these two contentions is correct. The first witness Thandie Mavis Mazibuko was living with a man Samuel Nhlengethwa. He was the father of their children. He has apparently died since the events giving rise to this case took place. On 22nd June 1995 she had been at her parents home. She was in the company of her brother Khathaza Jacky Mazibuko and the deceased. The deceased is her cousin. She explained that her brother went to spend sometime at her mother's home while she herself and the deceased walked together until they reached the gate of her home. She told the court that about this time she heard the sound of footsteps of a person running towards them and as she said goodbye to the deceased and told him to wait at the gate for her

brother, she saw the accused approaching.

The deceased it is common cause was at one time the secret lover of the accused. About the status of that

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relationship, there was some difference. Thandi Mazibuko says that they had enjoyed some occasions of clandestine love and that there had been no further incidents for some months before the day in question. The accused indicates that the affair was still ongoing at that time.

In any event Thandie says that her greeting to the accused went unanswered. This in itself is an indication that the accused was not happy at seeing Thandie together with his brother. The evidence also suggests he must have seen them sometime earlier and ran up to Thandie's house because of his reaction to seeing them together. In any event Thandie went into her house, and whilst in her house she heard the deceased crying for help. Before she got out of the house, she also heard the accused saying "go and die to where you are going to". The accused when he gave evidence denied that the deceased had raised an alarm and he also denied that he had used words which Thandie attributed to him.

She says that she rushed out of her house and saw the accused running away. The accused says that he did run away but in the sense that he tried to avoid further fighting with the deceased. The fact remains that the accused indeed ran away from the scene. Thandie then went to the deceased who had fallen down. He was in a state of collapse which prevented him from speaking to her. He was lying in a pool of blood. Thandie reported to her mother and together they also informed Johannes Mamba and Koni Simon Mamba about what had happened.

The deceased died before any help could be rendered to him. On being informed of these incidents, Johannes Mamba and Koni Simon Mamba repaired to the home of the accused. There they found him lying on his bed with the knife which is the exhibit in this case under his head. This fact is not seriously disputed by the accused who says that the knife was under a jacket by him but which was then used as

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a pillow. , Johannes Mamba and Simon Mamba informed the accused why they had come and requested him to accompany them to the scene where the deceased was lying. Both of them described how the accused produced the knife and attempted to wipe it clean of the blood before he was prevented by them from so doing. Simon Mamba took possession of the knife.

The three of them then proceeded to the place where the deceased was lying and these two witnesses questioned the accused about the deceased's death. Although he admitted having stabbed the deceased, the accused waited until the police arrived to give his explanation. The accused apparently maintained as he has in this court that he did not know that he had injured his brother, let alone killed him, but at some stage, it is common cause, he in explanation of why the deceased had been killed, said that two dogs cannot eat off one bone without one getting injured. This was generally accepted as referring to what the accused saw as a triangular relationship between him, the deceased and Thandi.

The exact phrasing differs in each account but the import is the same. It is quite clear that the accused believed that he was in competition with his brother, the deceased for the sexual favours of Thandie Mazibuko. In other words the motive for the killing for the reason was jealousy.

The accused's version is somewhat different. He says that when he arrived at Thandie's house, he only saw his brother there. He asked him what he was doing and the deceased, his brother gave a cheeky answer at the same time taking one or two steps back. Then says the accused, he noticed something flashing in the hand of the his brother. He grabbed his brother's arm or wrist and rested the knife from him and then in turning to run away, he must have struck the deceased with the knife not realising

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that he had inflicted a fatal injury on his brother, he ran away.

He denies that the deceased called for help or that he used the words which Thandie says that he did use. The accused's version is unacceptable and cannot reasonably be true .

Firstly, the wound which killed the deceased could not have been inflicted by a right handed person in the manner described by the accused. The wound enters about the left nipple somewhat medially thereof and the track leads straight through the pericardium to the heart.

This could not have been inflicted by the accused with his back to the deceased and while he was running away. I find it inconceivable that the deceased could have been struck such a penetrating and fatal wound without the person in whose hand the knife was knowing about it.

The knife must have been bloodied in the assault and in fact tests were done on blood stains found on the knife.

The accused's version of how the deceased came to be in possession of his knife seems to be an after thought. It was only after defence counsel had put to witnesses that the knife was not the property of the accused that the accused claimed that the deceased had come into possession of his (the accused's) knife earlier that day.

Furthermore, if it had indeed been an accident, the explanation given so colourfully in the expression about the dogs and the bone would not have been given if it had not been jealousy which prompted the accused to stab his brother. If it had been an accident, as I have said, the accused would have realised what had taken place. He would not have run some considerable distance believing that he was being followed by the deceased. The fact that

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he did not even take any opportunity to see what had been done and to get assistance for the deceased if necessary is indicative that this was no mistake and no accident. The evidence strongly indicates that the accused incensed at seeing Thandie walking together with his brother was, overcome by jealousy and rage, and so prompted stabbed the deceased.

In these circumstances there can be no doubt that he had the intention to kill and he is accordingly guilty of murder. The accused is accordingly found guilty as charged.

Henry Ngwenya, you have been found guilty of murder and you have killed your brother. Throughout this trial I have been reminded of early biblical case, Cain killed his brother Abel. Jealousy was a motive in both cases. In Cain's case, it was not over a a woman but it was a case of jealousy. A heavy penalty was imposed on Cain and a heavy penalty is appropriate in this case. The message cannot go that if you become slightly affected by liquor, and incensed by reasons and if you kill somebody, a lenient sentence will be meted out.

You have killed a man. The extenuating circumstances in this case are very thin and slight. You attacked your brother with a knife and stabbed him right through the heart, and this was all over a woman who was not even your wife, somebody else's wife, and by this I do not mean to indicate that the court has found that the deceased even had an affair with this woman. That was entirely in your mind, and according to the evidence you had no justification whatsoever for the aggressive and violent action which you took.

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Your sentence will be twelve years imprisonment and it is to date from the 22nd June 1995 taking into account that you have been in custody since that day.

S.W. SAPIRE

ACTING CHIEF JUSTICE