CRIM. CASE NO. 30/97

IN THE MATTER BETWEEN

REX

VS

JABULANE BONGANE NHLABATSI

CORAM **S.B. MAPHALALA – J**
FOR CROWN **MRS DLAMINI**
FOR DEFENCE **MR M. MAMBA**

RULING IN TERMS OF SECTION 174(4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT (AS AMENDED)
(17/08/98)

At the close of the crown case the defence applied for the discharge of the accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended) that the crown has not made a ***prima facie*** case to put the accused to his defence.

The accused is charged with the crime of murder. It is alleged by the crown that the accused on or about the 26th September, 1996 at or near Mzameya area in the Shiselweni District the said accused unlawfully and intentionally killed Toneleni Ndlangamandla. The accused pleaded not guilty to the indictment and pleaded sane automatism. The evidence of five crown witnesses, to wit PW7, PW3, PW5, PW4, and PW1 as reflected in the summary of evidence was entered by consent. The post-mortem report was entered as exhibit "A" by consent which reflected the cause of death as "cranio-cerebral injury" (injury to skull and the brain). A letter by Dr Hillary Dennis (PW6) was entered by consent as exhibit "B" dated the 23rd October, 1996 the import of which was that upon examination the doctor opined that the accused did not understand the allegation against him and was not mentally competent to stand trial. A report by Dr. Ndlangamandla dated the 17th June, 1997 was entered by consent as exhibit "C". Dr Ndlangamandla further gave evidence ***viva voce*** where he expanded on his report.

At this stage the crown urged the court to return a special plea of insanity. To revert back to Dr. Ndlangamandla where the doctor told the court that the accused could be viewed as insane at the

time he committed the offence, however, strictly speaking he cannot be described in medical terms as insane.

On cross examination by Mr. Mamba he stated as follows:

> Q: A person who is experiencing epileptic fits though he may behave in an abnormal way the bottom line is that epilepsy is not insanity?
>
> A: It is different although it has features of madness.
>
> Q: The accused was unconscious of what he did?
>
> A: He was.
>
> Q: His consciousness was induced by this condition?
>
> A: Yes

The agreed facts of the matter are that where the offence took place in this homestead the people therein were mourning the death of a family when accused came in the house where the rest of the people were. He PW7 Funani Dlamini asked accused what he wanted and he said he was sick. This witness then went outside and left accused and deceased inside the house. It was alleged that the accused was lunatic therefore he had gone out to call for help at LaSiguzu or LaMamba where he had been brought for treatment. He then heard the deceased screaming out and when he rushed to the house he found the accused pressing the deceased down. He fought the accused to let go the deceased and they all got outside. While outside, the accused picked a plank of wood and ran away with it. He later saw the deceased lying near one of the houses lying flat with her hear facing downwards. She was already dead.

Mr. Mamba in support of the application contended that the evidence of the doctor is that the accused was not aware of what he was doing at the time. His condition was not induced by madness or insanity but by epileptic fits. The doctor has said epilepsy is not the same as insanity although a person who has fits can do things that can be done by an insane person.

The crown as represented by Mrs. Dlamini applied that the courts invoke ***section 165 of The Criminal Procedure and Evidence Act*** on the evidence adduced by the doctor. The doctor said that at the time of the commission the accused the offence displayed symptoms of insanity so the section relied upon by the crown provides as follows:

> “165 (1) If an act either of commission or omission is charged against any person as an offence and it is given in evidence on the trial of such person for such offence that he was insane so as not to be responsible according to law for his act at the time when it was done, and if it appears to the court before which such a person is tried that he did the act but was insane as aforesaid at the time when he did it, the court shall return a special finding to the effect that the accused did the act charged, but was insane as aforesaid when he did it.

(2) If a special finding is returned the court shall report to the Attorney General.

These are the issues before me. It is common ground that the crown has no quarrel with the defence tendered by the defence. What appears to trouble the crown is the fact that accused if released might commit a similar offence and thus he is a potential threat to society and should be confine in a place of safe custody in terms of section 165 of the Act. Before considering the efficacy of the crown's position I wish to consider briefly the evidence of the doctor who examined the accused and proceed to consider the defence of sane automatism in our law. Dr Ndlangamandla at page 2 paragraph 8 and 9 wrote this.

> "Our assessment has therefore led us to the diagnosis of epilepsy and that during the occurrence of the incidence Mr. Nhlabatsi was having a psychotic episode secondary to epileptic attack. Of note here is the fact that it is fairly common for epileptic patients to be violet or aggressive with psychotic features with attacks. The psychotic behavior could be just before, during or after an epileptic attack. Patients usually have amnesia (do not remember) of what happened during such episodes.
>
> Even though Mr. Nhlabatsi is mentally fit now, we feel he cannot be held responsible for his actions at the time he killed the person because at that time he was suffering from an acute psychotic and confusional state which was part of an epileptic attack. But we leave all the final judgement to the court of law".

Our law on the subject state that involuntary conduct during sleep, or a state of amnesia ("blackout") or hysterical dissociation, or an hynotic state or resulting from epilepsy, arteriosclerosis, involuntary intoxication or the like, is not an act for the purpose of the criminal law and therefore does not attract liability (see ***Burchel and Hunt on South African Criminal Law and Procedure (Vol 1) at pages 220-221*** and the cases cited thereat). Where a sane person does an act which would otherwise be criminal while in a state of automatism, he has a complete defence and is entitled to an acquittal (see ***Rex vs Dhlamini 1955 (1) S.A. 120 (t)***. In the case in ***casu*** the accused pleaded sane automatism and the doctor in his report and even when giving evidence absolved the accused from liability in the commission of the offence. The doctor went further to state that medically speaking the accused could not have been described as insane when he committed the offence. He might have exhibited signs similar to those of an insane person but the bottom line is that he was not insane when committing the offence and certainly not now. This therefore causes the accused to escape the cluntches of section 165 of the Act. The Act is specific that the court is to come to a finding that the accused was insane when committing the offence. I am unable to say so in view of the expert testimony by the doctor. I am mindful of the dangers inherent in acquitting the accused but on the other hand for the protection of society I cannot legally invoke the section in view of the facts presented before me. I can only implore defence counsel to advise his client to submit himself to treatment of his condition.

I thus discharge the accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended).

S.B. MAPHALALA
JUDGE