THE HIGH COURT OF SWAZILAND

CRIM CASE NO. 50/2001

In the matter between

REX

Vs

MAPHINDA TYSON BHEMBE

Coram	S.B. MAPHALALA – J
For the Crown	MR. P. DLAMINI
For the Defence	MR. BHEMBE

JUDGEMENT

(13/11/2001)

The accused is charged with the crime of murder. It is alleged that upon or about the 10th February 2000 at or near Nzongomane area, Shiselweni Region, the accused person did unlawfully and intentionally kill Jeremiah Ndwandwe and did thereby commit the crime of murder.

The accused pleaded not guilty to the indictment and was represented by Mr. Bhembe.

The crown was represented by Mr. P. Dlamini.

The cause of death according to the post mortem report entered as exhibit "A" in

terms of Section 221 of the Criminal Procedure and Evidence Act is recorded as follows:

> "Laceration on the upper lobe of left lung by a sharp instrument".

The crown called a total of five witnesses. The evidence of the crown is that on the 10th February 2000, the accused in the company of PW2 Bethusile Simelane and others were drinking liquor at the homestead of Simelane. While drinking, the deceased's hat got missing and he demanded it from the accused and the others. Accused and one Mbongeni Simelane responded by saying that deceased should use witchcraft to get his hat back. Thereafter, the deceased left the sheeben. The following day PW2 heard that the deceased was dead.

PW3 Bheki Vilakati told the court that he was also at the sheeben with PW2, the deceased and others. He also confirmed the evidence of PW2 in as far as the issue of the missing hat was concerned. He told the court that the deceased reported to his group that one Mbongeni and the accused wanted to assault him. Then one Vusi Simelane undertook to accompany the deceased home after the drinking spree. The deceased then left the sheeben in the company of Vusi Simelane. PW3 also went to his home. Along the way the accused met up with him in the company of another young man and told him that he (accused) had accidentally injured the deceased. He told the court that the accused offered this information freely and voluntarily. After that they parted ways.

PW4 Vusi Simelane was called as the crown's fourth witness. He was at the same homestead with the deceased on the day in question. He told the court that he left together with the deceased and along the way the deceased returned back to the same homestead. He later heard the deceased passing by his homestead singing. Some time later he was called from his homestead, as he was a community police officer that the deceased was dying.

The last witness for the crown called was PW5 3479 Detective Constable Sihlongonyane who was the investigating officer in this case. He explained to court how he proceeded with investigations and the circumstances surrounding the arrest of the accused person.

The accused also gave evidence under oath. He also related his own version of events at the shebeen that night. The accused denied that he ever told PW3 Bheki Vilakati that he had accidentally injured the deceased. All in all the accused person denied any involvement in the death of the deceased.

It is common cause that the deceased died of a stab wound as reflected in the post mortem report entered as exhibit "A". It is also common cause that the accused and the deceased were at the Simelane homestead consuming traditional beer there. It is

also common cause that the deceased whilst they were there had asked for his hat from the accused and his drinking mates.

The question that remains to be answered is who inflicted the fatal injuries on the deceased. According to the crown this is answered by the evidence of PW3 Bheki Vilakati.

Mr. Dlamini for the crown contended that this witness's testimony is crucial in that he told the court later after the drinking session had ended that he met the accused who told him that he had accidentally injured the deceased and that he said that freely and voluntarily. Mr. Dlamini directed the court's attention to Section 236 of the Criminal Procedure and Evidence Act (as amended) that the court may convict on the evidence of a single witness. The court was also directed to the case of ***R v Mokoena 1932 O.P.D. 79*** where it was held that a court may convict on the evidence of a single witness who has no interest in the matter. In the present case it is contended by the crown that PW3 had no interest and bias. His evidence was clear and did not have any contradictions.

Mr. Bhembe on the other hand contended that the court ought to treat the evidence of PW3 with caution. And that further the evidence of PW3 should have at least be corroborated by that of PW4. The evidence of PW3 cannot safely be relied upon by the court.

It is common cause that the evidence which links the accused person to the commission of the offence is the evidence of PW3 Bheki Vilakati and as such his evidence should be treated as evidence of a single witness.

Section 236 provides as follows:

> "Sufficiency of one witness in criminal cases, except perjury and treason.
>
> 236 The court by which any person prosecuted for any offence is tried, may convict him of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness".

The effect of this section was considered in ***R v Mokoena (supra)***, where the following was said:

> "this section should only be relied upon where the evidence of the single witness is clear and satisfactory in every material respect… and ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness-box, and where he has not had proper opportunities for observation, etc".

In ***R v J 1966 (1) S.A. 88 (SR AD)*** it was stressed that in considering the evidence of a single witness, judicial officers should not fall into the error of thinking that the

various tests which have been formulated displaced the normal test in criminal cases of proof beyond reasonable doubt. Such tests are no more than guides, albeit very valuable guides, which assist the court in deciding whether the prosecution had discharged the onus resting upon it.

The same warning against over emphasis of the cautionary rule came from the Appellate Division in ***S v Artman and another, 1968 (3) S.A. 339 (AD)*** where Holmes, JA at page 341 said the following:

> "…the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism".

In ***casu*** I find that the crown has not proved its case beyond a reasonable doubt. No one who gave evidence for the crown was able to say that he or she actually saw the accused stab the deceased or to offer evidence that might point to a motive. No one says that he or she saw him inflict the fatal wound. Whether he did so, whether in doing so he had the necessary actual or legal intention to kill him, and whether at the time he was acting unlawfully are all matters of conjecture.

There are two conflicting versions in this matter. PW3 told the court that the accused told him that he had accidentally injured the deceased. The accused on oath denies that he ever uttered those words. The court therefore has to determine which is the true version. The proper approach to be followed in such instances was established in the well known case of ***R v Difford 1937 A.D. 370*** where at page ***373*** the following appears:

> "No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is 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. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

In ***S v Singh 1975 (1) S.A. 227 N*** Leon J held that in criminal cases, where there is a conflict between the evidence of the crown witnesses and that of the accused, it would be quite impermissible to approach the case on the basis that, because the court is satisfied as to the reliability of the crown witnesses, it therefore must reject the accused's evidence.

Applying the test in ***S v Singh (supra)*** to the present case the accused gave an explanation which cannot on any basis be regarded as demonstrably false or inherently so improbable as to be rejected as false.

In the circumstances, I find that there is a doubt as to whether the accused person stabbed the deceased that night.

I thus give him the benefit of the doubt and find him not guilty and he is acquitted forthwith.

S.B. MAPHALALA

JUDGE