

IN THE HIGH COURT OF SWAZILAND

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CRIMINAL CASE NO. 143/96

IN THE MATTER BETWEEN:

THE KING

VS

ABSALOM VELIBANTI MATSABA

CORAM

S.B. MAPHALALA - AJ

FOR CROWN:

MR D. WACHIRA

FOR DEFENCE:

MR G. MASUKU

JUDGEMENT

(09/10/97)

The accused in this matter is charged with murder. It is alleged that on or about the 5th August 1996, at or near Dwaleni area in the District of Manzini, the said accused unlawfully and intentionally killed Zimbili Makhanya.

The accused pleaded not guilty to the offence. At the commencement of the trial a statement made by the accused to a magistrate in terms of Section 226 of the Criminal Procedure and Evidence Act No. 67 of 1938 was entered by consent and entered as part of the crown case as exhibit "A". Further a post-mortem report by the police pathologist Dr Reddy was also entered by consent and marked as exhibit "B". According to Dr Reddy, the police pathologist, the deceased died as a result of "head injury with penetrating injury over right neck (involved vertebra, large blood vessels)". Furthermore, the identity of the deceased was not an issue.

The crown called three witnesses to prove its case. The first crown witness PW1 Gugu Sithembile Mathunjwa told the court that on the day in question she saw the accused who is known to her talking to the deceased. She heard the accused asking the deceased why he had robbed him of his money.

The deceased then apologised to the accused. She saw the accused attacking the deceased and she decided to go into her house. She emerged later. She went to where deceased was and she found him lying down dead. She was cross-examined at length by

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defence counsel and it was suggested to her that in this case it was the deceased who was the aggressor. However, the witness was not wavered and she stuck to her original story that she saw the accused hitting the deceased. I believe her and I have no reason to doubt her testimony. She

appeared to me to be an honest witness who had no reason to fabricate a story against the accused.

She was so honest in that she said she did not see what the accused used to hit the deceased.

The crown then called its second witness PW2 Sibonginkosi Cyril Xaba. He told the court that on the day in question he was at home when he heard the accused telling the deceased that he wanted his money back which the deceased had pick-pocketed at Kasoso. He heard the deceased telling the accused to forgive him. He heard a loud noise as if a person was hitting another. He was later informed that the deceased had died.

This witness was also cross-examined at length by the defence, however he maintained his story that he did not see the actual assault but heard a loud noise as if one person was hitting another.

The crown then called its last witness PW3 1736 Moses Dlamini the investigating officer in this case.

He told the court that upon receiving a report on deceased death on the 5th August, 1996 he proceeded to the scene. At the scene he found deceased body lying down dead. The deceased had a bleeding wound near the ear. He then conveyed the body to R.F.M. hospital mortuary. He then arrested the accused person on the 7th August 1996 at Sidvokodvo. He then took the accused person to the Malkerns Police Station where he cautioned him in terms of the Judges' Rules. The accused stated that he wished to make a statement before a Judicial Officer. He then took the accused to Magistrate J.M. Gumedze. Later on the accused took him to Dwaleni area near a river where he removed a stick and a knife from a bush.

At this stage the crown closed its case. Whereupon the accused gave evidence under oath being led by his attorney Mr Masuku. The accused gave a lengthy account on what transpired that day leading to the death of the deceased. The gist of his story is that the cause of the friction between him and the deceased was that sometime in 1993 he was pick pocketed by the deceased the sum of E50-00. He was again in 1996 at Kasoso's place the deceased pick pocketed him a sum of E10-00 it transpired from his evidence that the deceased had some reputation in the area as a pick pocketeer. On the day in question he confronted the deceased and asked for his money back. This was taking place at a shebeen and they were drinking liquor. A fight ensued between him and the deceased over the money. Other people in shebeen intervened and calmed them down. Thereafter, they proceed to drink with others. At about 7.45pm he proceeded to go home and he was carrying a stick for support when walking. As he was about to reach a small gate of the shebeen the deceased emerged and demanded to know why he had picked a fight with him earlier on in the day. He shouted three times for help but no one came to his rescue. The deceased then pretended as if he was ducking he then hit him with the stick to neck once and accused came down on his knees. The deceased rose up and came to him. The stick fell behind him. The

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accused tried to kick the deceased but lost balance and nearly fell. The deceased advanced towards him and he pushed him. He then felt a cut on the finger. He then took the knife and stabbed randomly and he did not see where he had stabbed the deceased. He later gathered that he had injured the deceased near to the ear.

He then took his stick and left the deceased there. The deceased complained that he had stabbed him. The accused told him that he had started this early in the day. He learnt the following day that the deceased had died.

The accused was subjected to lengthy cross-examination by the crown. I must say that the accused did not project a favourable impression to this court. He gave contradictory answers to questions. His version of what took place that fateful night conflicts materially with the account he gave to the magistrate in exhibit "B".

The court then heard submissions from the crown and from defence counsel. I have listened to these submissions by counsel very carefully and I have also availed myself to the authorities cited by defence counsel on the question of self-defence (see South African Criminal law and Procedure Vol II Hunt's Milton (2nd ED) Page 341)

In the present case we have the evidence of two crown witnesses against the evidence of the accused. The two crown witnesses did not tell us much for one to infer that the accused had the necessary "mens rea" to commit the offence. PW1 only saw the accused attacking the deceased. She does not tell us with what was the accused attacking the deceased. She then went indoors. Her evidence was not helpful at all to this case. PW2 did not even see the attack he heard a loud noise emanating from where the accused and the deceased were. He surmised that the noise was like when a person was assaulting another. This does not tell us what was the weapon used and by whom. Again this evidence is of little assistance to the court. What the court is left with is the evidence of the accused. No one other than himself know what lead to the death of the deceased.

Accused story has a grain of truth in it and I have no reason to reject it. In the circumstances of the case I give the accused the benefit of the doubt that he intended the death of the deceased. It is my considered opinion that a proper verdict in the circumstances of this case would be that of a lesser offence of culpable homicide. It was not denied by the defence that the deceased died as a result of the wound inflicted by the accused.

I thus, find the accused guilty of the crime of culpable homicide and not murder.

SENTENCE

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The court has taken all the personal circumstances of the accused into consideration in arriving at a proper sentence in this case. The accused has told the court under oath that he is 53 years old and is married with two wives. He has 24 children in all and that these children depend on him for material, emotional support as a father figure. The accused is a first offender for the purposes of these proceedings.

However, the offence committed by the accused is a serious one where a life was lost. There are far too many such cases before this court where knives are used with fatal results in drinking places.

Invariably, the accused persons in these cases come before these courts shedding crocodile tears for lenient sentences.

In the circumstances of this case I sentence the accused to 7 (seven) years imprisonment of which 5 (five) years is suspended for a period of three years on condition that the accused is not convicted of an offence in which violence is an element committed during the period of suspension.

The sentence is backdated to the 7th August, 1996.

S. B. MAPHALALA

ACTING JUDGE