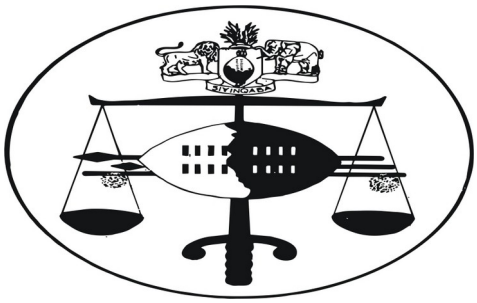

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Criminal Case No. 200/2007

REX

Vs

KHOTSO MUSA SAMUEL DLAMINI

Coram	S.B. MAPHALALA - J
For the Crown	MR. MASINA
For the Accused	MR. S. MAGONGO

JUDGMENT

27th February 2009

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[1] The accused Musa Khotso Samuel Dlamini is indicted for the crime of murder which occurred on the 20th June 2006 following the death of one Sipho Kawu Mntambo

(hereinafter called the deceased).

[2] The particulars of the crime are that in count 1 accused No. 1 and 2 are guilty of murder in that upon or about 20th June 2006 and at or near Mabovini area, Mankayane sub-region, in the Manzini Region, the said accused persons each or all of them acting jointly in furtherance of a common purpose did intentionally and unlawfully kill one Sipho Kawu Mntambo.

[3] In Count 2 thereof accused No. 1 and 3 are guilty of contravening Section 11 (2) as read with Section 11 (8) of the Arms and Ammunition Act 24 of 1964 as amended. In that upon or about 5th July 2006, at about 0600 hours and at or near Logoba area, in the Manzini region, the said accused persons not being the holders of a licence or permit did unlawfully have in their possession 8 live rounds of

ammunition.

[4] Further in Count 3 that accused No. 1 and 3 are guilty of contravening Section 7 as read with Section 8 (1) of the Opium Habit Forming Drug Act No. 37 of 1922.

[5] At the commencement of trial the Crown withdrew the indictment against the 2nd accused Musa Bongani Shabangu and made him an accomplice witness in the Crown's case. More of this aspect of the matter will be revealed later in the judgment. The 3rd Accused Sibusiso Gomora Mhlongo did not appear before court and the Crown made no mention of him except that his name came up throughout the trial. Again more of this aspect of the matter will be mentioned as I proceed with the judgment.

[6] Accused No. 1 remained as the only accused person

and he pleaded not guilty to murder but tendered a plea of guilty in respect of the lesser offence of culpable homicide. On Count 2 and 3 he pleaded guilty to these offences.

[7] The court heard the evidence of the Crown and the Defence which I will outline briefly later on this judgment. But what has emerged from this evidence is that it is common cause that the first element of unlawfulness, second element of killing and the third a person is not in dispute. Put differently, beyond a reasonable doubt it was accused person before court who unlawfully killed the deceased person by shooting him twice at close range on his upper body with a 9mm pistol.

[8] On the other hand the Defence contends that the shooting of the deceased was “accidental” and that the accused person had no intention to kill.

[9] The Crown's case is based upon the testimony of seven witnesses led during the trial. The evidence of PW1 was that of an accomplice witness which should be treated with caution.

[10] PW1 the accomplice witness testified that when the deceased wanted to see what was in the plastic he was carrying, the accused person, took out a gun. The deceased then grabbed hold of PW1 and in that midst, the accused fired a shot. The second shot was discharged from a very close distance of about 2 metres away from the deceased. The deceased was already sprawled on the ground.

[11] PW2, a brother to the deceased, who was also present at the scene, testified that the physical entanglement was between the deceased and the tall and darker one. It goes without saying that of the two assailants at the Mntambo homestead; the tall and darker one was Musa Shabangu, who was later introduced as an accomplice witness.

[12] PW2 stated that the shorter and lighter one (whom it is common cause is the accused person shot at his brother

uttering the words **“vele besifuna wena”** (loosely translated) “indeed it is you we wanted”. A second shot also rang but at that point in fear of his life he was running away and did not see it.

[13] PW3 Dumisani Thambolenyoka Jele stated that he knew the accused person at Matsapha Correctional Services and that accused person knew that this witness was a prophet who prayed for and cleansed people of bad luck. This witness told the court that on the 4th July 2008, the accused person came to him and admitted that he had killed a person at Mankayane and as such required strong **muti** to cleanse him and assist him evade arrest.

[14] This witness then hatched a plan, such that accused person showed PW3 his living quarters at Matsapha, Logoba. PW3 was further able to convince the accused person to leave his quarters until he came back with the missing

ingredients to the **muti**. This witness then went and alerted the police as to the whereabouts of the accused person. Indeed on the 5th July 2008, the police found accused person at exactly the same spot that PW3 showed them.

[15] PW4 was Fana Charles Ngwenya. He told the court that the accused came to his place with his brother and asked for a gun in exchange for a car, DVD and a solar panel. He later heard that the deceased had been shot at Mankayane.

[16] The fifth witness for the Crown was the Investigating Officer PW5 Constable Lawrence Simelane. He deposed as to how he investigated the shooting at Mankayane with other police officers. His evidence did not add much to the Crown case.

[17] The sixth witness called was PW6 Aaron Ngwenya who deposed that he was a traditional healer. He testified about the gun that was used in this case. Again his evidence did not add any value on the Crown case save to say that he saw the gun that was used by the accused in the commission of the offence on a prior date. He also clarified about the DVD player at the centre of the case.

[18] The last witness called was PW7 2182 Sipho Magagula who is a Scene-of-Crime Officer based in Manzini. He handed to the court photographs connected with the crime in this case.

[19] The Crown then closed its case and the accused gave a sworn statement being led by his attorney Mr. Magongo. The offshoot of his version is that they had proceeded to the house of the deceased because he wanted to collect some money which the deceased owed him. That he was the one who struggled with the deceased and not the other person he was with. That the gun in his possession went off accidentally in that he did not intend to shoot the deceased. After the shooting he left the scene and went away as he was afraid to go to the police to report what has happened.

[20] The accused was cross-examined at some length by the Crown where he stuck to his version of what transpired that

day.

[21] The court then heard arguments of Counsel in this case. Both attorneys filed very comprehensive Heads of Arguments for which I am grateful for their high standard of professionalism.

[22] The Crown contends that *in casu*, it is common cause that the first three elements are not in dispute (that of unlawfulness), put differently, beyond a reasonable doubt it was accused person before court who unlawfully killed the deceased person by shooting him twice at close range on his upper body with a 9mm pistol. It is only the elements of intention that is in dispute. The Crown alleges that at the time accused person fatally shot deceased he had formed the intention to kill him.

[23] On the other hand the defence contends that the shooting of the deceased was “accidental” and that the accused person had no intention to kill. As a primary basis

for their argument that the shooting was accidental, the defence argues before court, that the accused person and the deceased got involved in a wrestling duel for the gun and out of the blue and without knowing, the accused person squeezed the trigger and a few seconds later he shockingly realized that the deceased had been shot.

[24] From the evidence led it is a fact that the accused person at the scene of crime was never ever involved in a physical wrestling duel with the deceased. The direct evidence of two witnesses who were present at the scene of crime establishes this fact beyond a reasonable doubt. The direct evidence of these two witnesses only establishes that any physical contact at the scene of crime was between Musa Shabangu (PW1) and the deceased. PW1 the accomplice witness testified that when the deceased wanted to see what was in the plastic he was carrying, the accused person took out a gun. The deceased then grabbed hold of

PW1 and in that midst, the accused fired a shot. PW2, a brother to the deceased, who was also present at the scene, testified that the physical entanglement was between the deceased and the tall and darker one.

[25] It is clear in the evidence that of the two assailants at the Mntambo homestead the tall and darker one was Musa Shabangu who was later introduced as an accomplice witness. On the basis of these two witnesses I reject the evidence of the accused that he that he was involved in a physical entanglement/wrestle at the time he shot the deceased.

[26] The second fact established by the Crown is that accused person shot the deceased twice and at very close range. Exhibit "A", the post-mortem report at page 1 reflects the cause of death as multiple firearm injuries. At page 2 exhibit "A" reflects that two injuries were inflicted on deceased. These are described as follows:

> "1. Entry wound 0.5cm below left ear with exit wound on right side neck.
>
> 2. Entry wound 0.9cm over right side chest … entered the right arm bullet

embedded in soft tissues".

[27] PW1, the accomplice witness stated in his evidence that accused person then took out a gun and pointed it at deceased then grabbed hold of him. Then a gun shot rang and the deceased and the accomplice witness fell. The accused person approached and then shot at the deceased. The second shot was discharged from a very close distance of about 2metres away from the deceased. At this stage the deceased was already sprawled on the ground.

[28] PW2 stated that the short and lighter one shot at his brother uttering the words "**vele besifuna wena"** (loosely translated "indeed it is you we wanted"). A second shot also rang but at that point in fear of his life he ran away and did not see it. From this evidence, it is clear that accused person in a deliberate manner pumped two bullets into the body of the deceased.

[29] On the above related facts the question to be answered is what was the intention of the accused when he shot the

deceased twice. In this regard I find the wise words of Cameron JA in the case of *S vs Tembani 2007 (2) S.A. 291 (SCA)* at para [25] and [26] at page *301 A – C* apposite where he said:

> "The deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must, in my view generally lead to liability for an ensuing death".

"… an assailant who deliberately inflicts an intrinsically fatal wound embraces, through his conscious conduct, the risk that death may ensue. The fact that others may fail to intervene to save the injured person does not, while the wound remains mortal, diminish the moral culpability of the perpetrator and should not in any view diminish his legal authority".

[30] In this regard I am in total agreement with Counsel for the Crown that the above *dictum* applies with equal force in this case because:

(i) The actions of accused were deliberate as earlier stated without any danger or provocation posed to him by deceased he shot him twice and the second time, as stated by Pw1, it was whilst deceased was on the ground and helpless and he, accused person was less than two metres away.

(ii) It is common knowledge that a 9mm pistol is not an automatic or semi-automatic gun. To discharge an individual bullet, the shooter has to release the trigger and bridge the gun. To discharge two bullets the shooter must bridge it twice. Clearly

one who shoots accidentally or recklessly does not bridge a gun twice.

(iii) The two bullet wounds were intrinsically dangerous wounds. Understood in context the phrase "intrinsically dangerous wound" means a wound that will kill you on its own. The court will note that upper body wounds, especially to the chest, neck and head will almost always invariably kill you even if it is one gun shot wound.

[31] In *S vs Mdala 1987 (1) S.A. 556 (25)* at page *559*, Zimbabwe Court of Appeal stated the following:

"To my mind, if a man sets out to commit a crime, such as robbery and takes with him a lethal weapon, he exhibits an intention to use that weapon against anyone who attempts to stop him or obstruct him in the commission of the crime. He exhibits, as in this case, a general intention to kill".

[32] Schreiner JA in *R vs Nsele 1955 (2) S.A. 175* stated the following:

"Grounds of criminal, one or more of who is armed with lethal weapons should realize the extreme risk they run in embarking upon ventures that are so evil and dangerous to the community".

[33] It would appear to me on the facts of this case that the accused person possessed *dolus directus* when he shot at the deceased. Firstly, he deliberately shot deceased twice. The second time when deceased was on the ground, defenceless and not posing any threat to accused. Secondly, the accused person in the course of shooting deceased uttered the words **“vele besifuna wena”** loosely translated as “indeed it was you that we wanted”. Thirdly, after shooting deceased, the accused person did not show any signs of panic, let alone remorse. He had the presence of mind, to take a pistol with him and further evade arrest for a good 14 days.

[34] Even if I am wrong to hold that the accused possessed *dolus directus* he cannot escape liability that he possessed *dolus eventualis* at the time of the crime. I say so because accused person deliberately shot at the deceased person

twice on his upper body, clearly intending to shoot him and only him. Secondly, the accused person brought the loaded pistol with him with the intention to use it in the course of the robbery if necessary. Accused person brought the gun along with him notwithstanding the warning PW6 gave him that the gun was dangerous and what if the accused person misused it. Thirdly, the accused must have foreseen and did subjectively foresee that there could be shots fired at the Mntambo homestead and those shots could have the effect of killing, particularly the deceased.

[35] On the basis of the above-cited facts I do not agree with the accused submission that *mens rea* has not been proved.

[36] In the result, for the afore-going reasons the accused is found guilty of the murder of the deceased that on or about 20th June 2006, and at or near Mabovini area Mankayane sub-region, in the Manzini Region, the accused did

intentionally and unlawfully kill one Sipho Kawu Mntambo.

S.B. MAPHALALA

PRINCIPAL JUDGE