

IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Criminal Trial No. 51/2004

In the matter between

REX

versus

NOAH TSABEDZE

Coram

J.P. Annandale, ACJ

For the Crown

Mr. M. Mkhwanazi

For the Defence

Mr. P. Dlamini

JUDGMENT

(Transcript of ex tempore judgment delivered in open court)

24 AUGUST 2005

The accused person before court has been arraigned on a charge of murder, not of culpable homicide. When the charge was put to him he pleaded guilty to the lesser crime of culpable homicide and not guilty

to the more serious crime of murder, as it is set out in the indictment. (The crown did not accept the plea to the lesser crime and adduced evidence to support the charge of murder).

Most of the elements of both the crimes of murder and culpable homicide are before court as common cause. From the evidence of the witnesses called by the crown and from the evidence of the accused it is common cause that on the date alleged on the indictment the accused caused the death of the deceased.

A colleague of the deceased, Ruth Mohlala, testified how the deceased, shortly before she met her untimely death, took off from work to prepare herself to go somewhere else and would have come back to the clinic to say goodbye to Mohlala. When she did not arrive to do so, Mohlala, PW1, went to the house of the deceased and discovered a gruesome find. Her evidence is in line with that of the Police Sergeant Dlamini, PW4 who also testified that when he got to the house he found blood in various places, in the passage, especially on the bed. There were quite a few places indicative of a struggle and a protracted death of the deceased, not a quick clean kill, so to speak. The observation by both PW1 and PW4 pertaining to the various places where the deceased was bleeding prior to her demise is confirmed furthermore by the evidence of Dr. Reddy, the pathologist.

His evidence is that in all there were twelve different wounds on the body of the deceased and at least three of them each could have been

fatal in that they were deep stab wounds ending up into the lungs. Over and above the at least three wounds that each in itself could have been fatal, there were quite a number of other cut and stab wounds over the body of the deceased and notably, the last injuries he described were on the inside of the hand on the fingers of the deceased. In his opinion it could well have been caused by the deceased trying to take hold of the "weapon", he did not use the word "knife". The conclusion drawn by the police pathologist, Dr. Reddy, which was not contested at all, is in line with what a person would do in the circumstances where under attack as the deceased where the weapon used, which in this case is found to be the knife exhibited before court as exhibit "B", that the deceased tried to take hold of that whilst it was in the hand of the attacker and in that in the process of trying to defend herself, got the inside of her fingers cut.

This is however not the only one way in which she tried to defend herself against the attack of the accused. There is further evidence of Dr. Ogunjumo who examined the accused the day after the incident and his evidence is that there were scratch marks on the accused and he concluded without vigorously justifying his conclusion but it was uncontested that the marks appeared to him to be scratch marks caused by finger nails of someone defending that person-self against the accused as he attacked. That was his conclusion, which is common cause also.

The reason why I highlight this particular aspect is in view of the defence of the accused. By all indications available to this court,

established and uncontroverted evidence is that the incident was not an instantaneous affair. It was at minimum protracted to the extent that in various places of the house of the deceased pools of blood were found and also blood against the walls. The deceased tried to defend herself at least in two manifest ways by trying to get hold of or take the knife used against her and also scratching the body of the accused. The duration thereof remains unknown.

From the evidence of the accused himself and that of Nomsa Dlamini, PW3, it is furthermore clear that the accused, having committed the killing, thereafter spent a considerable time in delaying to report the incident to anybody. At least two hours would have gone by, according to the evidence of the accused. The evidence of the accused is that the house of the deceased is right at the clinic at Sigangeni which is also in line with the evidence of Ruth Mohlala. The house was situated very near to the clinic where a first report could have been made about the events and which was not done. The report was made much, much later.

There is no evidence before this court to know whether the deceased was still alive or not at the time that the accused left the house. The court therefore cannot make a definitive finding on that although there are indicators that more likely than not the deceased would have been dead already by the time that he left in that the accused's version is that he feared mob justice. This is accepted by the court and furthermore but more especially that he reported the incident not as

an injury or something else but as a homicide when he eventually notified the police. But that is besides the point.

The evidence further before this court is that the accused holds forth in his own evidence, for the first time in the proceedings, that at the time when he stabbed the deceased, it appears to the court that he tries to raise a defence of temporary insanity or that he did not know what was happening. He used the term " a blackout" and he agreed that it would perhaps be more appropriate not to use the term "blackout" but "blind with fury".

As a runner up to the incident the court accepts as a fact that the accused and the deceased had a continuously deteriorating relationship breakdown in their marriage culminating in the death on the 23<sup>rd</sup> of December 2003. From the evidence I accept that the accused had all the reason to believe that his wife was cheating on him. Further that he did not become aware of it for the first time at the time when he took the drastic action. For some reason the accused seems to hold the view that it is in order for himself to be consoled in the arms of a lover outside of the marriage between him and the deceased whereas the deceased was very strongly blamed for doing exactly the same. I mention this because it is not found that the accused suddenly became aware of any unfaithfulness on the part of his wife. He knew about it. All along he suspected it and just prior to stabbing his wife it was demonstratively so confirmed by a person, a man, whom the accused found hurriedly exiting the house of his wife when he arrived. The court finds it reasonably possibly to be true that when the accused got to the house the man ran out. He did not raise it

for the first time in his own evidence. It was put to crown's witnesses, it was conveyed to the Magistrate who took the statement and it was also so told the day of the killing to the girlfriend of the accused himself when he reported to her what had happened and when he phoned the police from her house.

What is relevant to this man running out of the house is the evidence of the accused that the man was fully dressed, his wife was fully dressed, certainly he did not find them in each other's arms. He did not even see from which room the man came running out and therefore it cannot be so that the accused found his wife in adultery with another man and that on the spur of the moment he overreacted and killed the wife. That is not the finding that can be made under these circumstances.

What is also common cause is that the accused was armed with a dangerous weapon, quite a big size fixed blade knife which he used to kill the deceased with and which he had been carrying with him for quite sometime prior to that. The accused accedes in cross examination that he knew that a knife is a lethal instrument that it could very well cause lethal injuries, that he did use it on his wife and that he stabbed her with it.

The material issue which this matter lingers on is whether the accused had the intention to kill or not. His defence of temporary insanity has to be carefully considered to see if it could not reasonably possibly be true. The crown's counsel convincingly argued that on the established

facts which are common cause, the accused knew that his wife was not being faithful to him according to his expectations for quite some time preceding the incident. Further, that when he arrived at the house he knew that matters were not "moonshine and roses" between him and his wife but that there was going to be differences of opinion about the alleged affairs which were admitted by her. When the two of them sat down to talk about it the accused then lost his temper and his self control to the extent that he started the attack on the deceased.

The court cannot find that the accused was deprived of his conative and cognitive abilities to the extent that he may be exculpated. His anger and his fury was viciously demonstrated by repeatedly stabbing the deceased many times. Would he have not been knowing what he was doing, at minimum twice he would have been shocked to his sober senses when the deceased person scratched his body trying to defend herself and also when she tried to take hold of the knife. The court cannot find that the accused did what he did whilst in automatism, in other words that he automatically did what his body did without his mind being aware and cognisant of what he was doing.

He fully well knew. That is the finding of the court. When he started stabbing her he must have foreseen that if he stabs the victim with a knife like the one he used, then surely there is a good possibility that she may die from the stab wounds. If the accused did not have the *dolus directus* at minimum it would be *dolus eventualis*. But from the facts before the court it is not at all in my judgment possible to find that the accused merely negligently killed the deceased or that he did

not know what he was doing at the time or that the defence of automatism can be found to be in existence.

He knew of the problem, he saw it coming. When he started talking with the deceased he then went way beyond the conduct of reasonableness. The accused knew that he was doing wrong and he recklessly carried on with his conduct by stabbing the deceased repeatedly until she died. Therefore the court cannot find that the accused is merely guilty of culpable homicide but the court does find that he is guilty of murder for intentionally killing the deceased on the day in issue and enters a conviction accordingly.

Postea:

Concerning the issue of extenuating circumstances, both crown and defence counsels hold the view that there are indeed extenuating circumstances present in the matter before this court that justifies the court to not be compelled by law to impose the death penalty. This court also holds that same view and without elaborating on the reasons therefore which must be abundantly clear from the judgment just handed down, the court does find that there are indeed extenuating circumstances present and that the court is not obliged to impose the compulsory death penalty wherefore I will proceed to hear mitigation.

Postea:



Mr. Tsabedze, the court faces the most difficult task of a criminal trial when it has to impose an appropriate sentence with far, far, far less available information and facts to consider what is for you the most important aspect, the sentence, than what the court had when it had to consider your guilt or innocence. What I take into account are your personal circumstances as set out by your attorney and by yourself during the course of your own evidence, and I know and I accept that you are a man who used to be married to the deceased and that you have five children of your own, that you were accused of not having enough money and that significantly you have no previous convictions and a very important factor is that you have actually shown remorse. I assure you that it certainly not the position that because you pleaded not guilty to murder but guilty to culpable homicide, although you were convicted the other way round that that will be held against you, that certainly will not. From the first time that you appeared in this court you accepted that you killed the deceased. You publicly apologised under oath to the relatives and family that are affected. Your plea of guilty to culpable homicide fortifies that and the fact that you have shown remorse to the extent that you have, also that you phoned the police, albeit somewhat later, that they did not have a problem getting hold of you is further taken into account.

The seriousness of this crime cannot be overemphasised. To take a knife and kill a wife is one of the worst things that a human can do. One aspect that the court has difficulty with is double standards. You have blamed your late wife for being unfaithful and that was to the

great extent the cause of her death yet whilst you were separated, so soon after the marriage, here yourself, Mr. Tsabedze, sought solace in the arms of a lover, openly admitting it and brazenly accusing your own late wife of unfaithfulness. That is double standards, if I have seen it. I do take into account, as your attorney urged me to do, that you have a handful of 5 young children who are dependant to a great extent on you and that they should not be made to pay for your crime. But on the other hand your late wife, who you killed with your own hands, she also had the children. They used to stay with her. They were used to be taken care of at her own house by her sister, who stayed with her frequently. Those children also indirectly pay for what you have done.

The interest of the community is something that the court cannot loose sight of. Hardly a week, frequently hardly a day goes by without it being put in bold print in the newspaper posters around town that yet another woman has been killed by a lover or her husband. Most definitely the court would err if I take that into account and to the extent by increasing a sentence for you Mr. Tsabedze. You are not responsible for the other killings. The court only has regard to the killing you did.

The community however needs to be protected and by the community I specifically refer to the women of Swaziland. They must be protected against abuse by husbands and lovers. This form of abuse presently under consideration is the worst example of abuse of a wife by a husband that I can imagine. To kill your wife by stabbing her repeatedly for failing to accede to your wishes and desires is

intolerable. You have been boasting a number of times in your own evidence for being such a good lover and having so many other women willing to accept you with open arms. You openly admit an adulterous affair while you were separated from your wife. You expected to come back into your house. That is no way to regard the women of Swaziland. They are not filth.

The court will gravely fail in its duty if it sends a message to the public through the publicity that this matter inevitably will get in the press and elsewhere. If the message goes out that if your wife does not return to you and you kill her then she gets her just dessert and the man she broke away from gets away with impunity. That is not the message that is acceptable. I will also err if I single you out to make you an example to the other husbands and lovers and men of Swaziland to say look what happened to Tsabedze. Noah Tsabedze has gone to jail for the rest of his life. The court very well could impose life imprisonment. If that is the only way the court could discourage this sort of crime then the court might have to consider that. The court must also show mercy despite you not showing mercy to you wife.

I have decided not to impose life imprisonment. The court has also decided not to impose a very long period of imprisonment that could well be appropriate, like twenty years imprisonment. When I have proper regard to all relevant and appropriate factors on sentence and also blend in a measure of mercy and taking into account everything I have mentioned above then this court is of the opinion that the most appropriate sentence fitting you, Mr. Noah Tsabedze, is one of twelve

years imprisonment, which I order to be backdated to the date of your arrest namely the 23<sup>rd</sup> December, 2003.

JACOBUS P. ANN AND ALE  
ACTING CHIEF JUSTICE