IN THE HIGH COURT OF SWAZILAND

REX

rd

Vs

VUSI NHLEKO FREEDOM

SIHLONGONYANE THULAM TREVOR

DLAMINI

Criminal Case No. 148/2005

Coram S.B. MAP HAL ALA - J MR.

For the Crown P. DLAMINI MR. S.

For the Defence SIMELANE

JUDGMENT 8th

March 2007

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[1] The two accused persons before court were indicted with one other Thulani Trevor Dlamini whose indictments were withdrawn by the Crown and he was released forthwith. The present accused persons are indicted on two counts where on the first count it is alleged by the Crown that the accused persons are guilty of the crime of murder in that on or about the 3

September 2004, and at or near Mhlaleni area in the Manzini region, the accused persons acting jointly and with common purpose did wrongfully, unlawfully and intentionally kill one Dumisani Thwala and did thereby commit the said offence.

[2] On the second count they are both indicted for the crime of robbery where it is alleged by the Crown that on or about the 3rd September 2004, and at or near Mhlaleni area in the Manzini district the accused persons acting jointly and with common purpose did assault Dumisani Thwala using force and violence to take and steal from the said Dumisani Thwala a cell phone Nokia 6210 model, valued at El, 500-00, his property or in his lawful possession and did rob him of the same.

[3] The two accused persons pleaded not guilty to murder and tendered pleas of guilty in respect of the lesser crime of culpable homicide. These pleas were not accepted by the Crown. The accused persons pleaded not guilty in respect of the crime in the second count that of robbery. Both Counsel in order to curtail proceedings prepared very comprehensive "formal admissions and statements of agreed facts" and by this no witnesses were called to give *viva voce* evidence. The court was invited by the parties :o assess these statements and issue an appropriate verdict's. I must applaud ±e practice of both Counsel in this regard.

[4] For the sake of completeness I shall proceed to reproduce what is reflected in the formal admissions and statement of agreed facts together with the *addendum* to these formal documents. It is stated therein as follows:

The accused persons admit that they assaulted the deceased and that the injuries sustained and contained in the post mortem were inflicted by them.

Further, that they took deceased phone because he was owing them some money.

Again thai injuries were inflicted using the weapons before court being two slashers.

Further, that they approached PW2. the herbalist with a view of being cleansed.

From the above facts the accused contends that they should be found guilty of culpable homicide because they had no intention to kill the deceased but they had gone to collect their money.

.And they are pleading not guilt}' to the crime of robbery because they contend that they intended to keep the cell phone as security for the money owed by the deceased.

The Crown does not accept the plea of guilty to culpable homicide and is of the view that calling witnesses is not necessary as the accused are adrnitting all the necessary fac3 which would in any event be told by the Crown's witness.

However, the Crown will address the court and submit that from the fees and admissions, the court should find the accused persons guilty as charged in respect of both ccunts.

[5] In the *addendum* to the above the following appears:

1. It is agreed that the accused persons met the deceased aloig ±e road a: Nfhlaleni. They asked for the mooey in the sum of E300-00 which *vzs* being owed by the deceased :o the 1* accused person. The deceased stated he die **do**: have the money and could no: siy when he would have the money.

2. The accused then *suggtszsi* that he give them his (deceased' sj :e!i phone as security for the debt. The deceased refused with the cell phone. Toe accused then tried to grab

broke out as the accused were trying to grab the deceased and he was resisting. It was during the course of that fight that the accused hit the deceased with the slashers. 5. It is further agreed that at the time the accused were from watching a soccer match and the time was around 8.00 o'clock in the evening. The accused has also taken alcohol.

[6] The post mortem report was entered by consent as exhibit "A". The two slashers mentioned above were entered collectively as exhibit "1".

[7] The post mortem report shows the following injuries on the deceased at paragraph 20 thereof:

3. Sutured wound over occipital region 9cms, 5.3cms length, bone deep (cut on bone) 30ml subdural haemorrage present.
4. Sutured wound over nose 2.2cms. lower hip 3.1 cms, chin right 3.2 cms length muscle deep.
5. Sutured wound front of left chest 4cms length, outer aspect 2cms length intercostals space deep.
6. Sutured wound 18cms length front of middle of abdomen vertically placed abdominal deep (surgical).
7. Sutured wound 7cms length above and outer to abdominal cavity deep repair of intestine (jegunus) and mesenny present with 7.4cms area bleeding in the mesentry.
8. Sutured wound over left shoulder from 4cms length muscle deep.
9. Sutured wound over left arm 3cms length, elbow 2crns length muscle deep.
10. Sutured wound over left writs front Zems length muscle deep.
11. Cut wound over front of right ring linger 1.8 x lcms muscle deep.

[S] In arguments before me it was contended for the Crown on count 2 tha: iom the facts as admitted by the accused, the crime of robbery has been prcven beyond a reasonable doubt. All the elements of robbery have been prcved even if the deceased owed the accused persons. Clearly, the cell

phone was taken from the deceased after an inducement by the accused that unless he consented to them taking the cell phone as security and/or as settlement of the debt they would assault or continue viciously assaulting him. This is shown by the fact that had the deceased freely given the accused the desired security (being the cell phone) there would have been no need to assault the deceased. This is clearly a sign of resistance from the taking of the cell phone by the deceased. More-so, because neither did the deceased owe the accused a cell phone nor did the accused have a *bona fide* belief that the cell phone belonged to them.

[9] Whether this court is of the opinion that the accused persons did or did not commit the offence of robbery *Mr. Dlamini* for the Crown contended that from the facts there is clear evidence beyond reasonable doubt that the accused had the necessary intention *(mens rea)* to kill the deceased. Having proven the crime of robbery the doctrine of *dolus eventualis* has clearly been proved. In this regard the court was referred to the South African case of 5* vs *Hlapho and another 1981 (2) S.A. 744* where it was held that during a robbery even for sight of virtual certainty of the deceased death did not deter ±e accused persons from acting recklessly. The recklessness can be deduced from the use of bush knives. The court was funher referred to me South African cases of *R vs Du Randt and another 1954 il) S.A. 313 (W> znd* that of *Rex vs Huebsch 1953 (2) S.A. 561* at *567 AD* where it was held ±at ~there need not be a purpose to kill proved as an actual fact~ *v.* is sufficient if there is "appreciation that there is some risk to life involved Ln the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death". The Crown funher ccntends that even if

the accused persons did not commit the offence of robbery on the deceased the principle laid down in the *Huebsch* case *(supra)* applies.

[10] The Crown further referred to the High Court case of *R vs Noah MkJiulisi Tsabedze (unreported)* as confirmed by the Supreme Court in *Noah MkJwlisi Tsabedze vs Rex - Appeal Case No. 4 of2006 (unreported).*

[11] For the accused persons Mr. Simelane also advanced very interesting arguments that firstly, the crown has not proved one of the elements of the crime of robbery in that the element of *animus furendi* has not been proved. On the second count of robbery the court in this instance was referred to the textbook by *P.M. Hunt, South African Criminal Law and Procedure Vol. II* at page *680"ind* the cases cited thereat.

[12] On the first count that of murder the argument is that on the facts the accused did not have the intention to kill the deceased as this was a fight where the accused were fighting the deceased and blows were exchanged in this situation. The argument in this regard is that foresight on the part of the accused person is doubtful. Funher. it was contended for the accused that in this case there would be no question of *dolus exentualis* in that the extent of injuries on the deceased will only be relevant on sentence.

[13] After assessing the evidence adduced in this case and the submissions by both Counsel I have come to the considered view that the position adopted by the Crown is correct in the

unless he consented to them taking the cell phone as security and/or as settlement of the debt they would assault or continue viciously assaulting him. This is shown by the fact that had the deceased freely given the accused the desired security (being the cell phone) there would have been no need to assault the deceased. This is clearly a sign of resistance from the taking of the cell phone by the deceased. Moreso, because neither did the deceased owe the accused a cell phone nor did the accused have a *bona fide* belief that the cell phone belonged to them. Secondly, having proved the crime of robbery the doctrine of *dolus eventualis* has clearly been proved on the facts. In this respect I find that the *dictum* in *S vs Hlapho (supra)* would apply on the facts of the present case. In the *Hlapho* case *(supra)* it was held that during a robbery even for sight of virtual certainty of the deceased death did not deter the accused persons from acting recklessly.

[14] It appears to me on the facts of the present case that "recklessness" in the present case can be deduced from the use of bush knives as they have been exhibited before court. For this reason I find the *dictum* in the South African cases of *R vs Du Randt and another (supra)* and *R vs Huebsch (supra)* apply on the facts of the present case. In the latter judgment it was held, *inter alia*, that **"there need not be a purpose to kill proved as an actual fact". It is sufficient if there is ~an appreciation that there is some risk to life involved in the action contemplated, complied with recklessness as to whether or not the risk is fulfilled in death".**

[15] In the result, for the afore-going reasons I find the accused guilty on both counts that of murder and robbery as stated in the indictments.

JUDGE