

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL CASE NO. 216/05

In the matter between

REX

VS

THULANI VICTUS NGWENYA

CORAM

BANDA, CJ

FOR THE CROWN FOR

THE ACCUSED

JUDGMENT

[1] The accused faced an indictment which contained one count of murder and one count of attempted murder. He pleaded not guilty to the charge of murder but offered a plea of guilty to culpable homicide. He also pleaded not guilty to the charge of attempted murder. The crown did not accept a plea of guilty to culpable homicide and the case proceeded to a full trial.

[2] It was alleged that on or about the 18th March 2005 at or near Ensuka Area in the Manzini Region the accused did unlawfully and intentionally kill one Bongani Ngwenya. It was further alleged that at the same time and place the accused did unlawfully and with intent to kill stab Sonile Ngwenya in the left elbow with a spear.

[3] This is a criminal case and I direct myself to the legal principle that it is the duty of the prosecution to prove their case beyond a reasonable doubt. There is no duty cast on the accused to prove his innocence. However the degree of proof required is now settled. In the case of **MILLER VS MINISTER OF PENSIONS** 1947(2) AER 372 at 373 where Denning J as he then was stated the principle in the following terms :-

"That degree is well settled. It need not reach certainty; but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice".

[4] The first witness for the prosecution was Nobuhle Nomsombuluko Mahlalela. She is married to one of the accused uncles and lives in the same homestead as the accused. It was her evidence that she was at the homestead on 18th March 2005 when the alleged murder took place. She said that she recalled seeing the accused leave his house and proceed to the house of Gogo Simelane while he carried a spear and a bolted stick. She said she followed the accused and that when she got to Gogo Simelane's house she found that the deceased Bongani Ngwenya was lying down facing upwards and that he, the accused, stabbed Bongani. She said that she saw the accused stabbing Bongani once with a spear.

[5] The second prosecution witness was one of the uncles of the accused. He is Nicholas Thandilehle Ngwenya. His evidence was that he knew the accused as a son of one of his brothers. He remembered that on this particular day he and his other two brothers had gone to a nearby homestead when they heard that some incident had happened at their home. He said that the alarm was raised by Topsile one of the children at his home and that when he got home he found that the deceased had already died. He made enquiries about the person who was responsible for the deceased death. As a result of what he was told he looked for the accused who was brought to where the deceased body was kept. It is the evidence of this witness that when the accused was asked about the deceased death he said that there was nothing that he could do as death had already occurred. It was further the evidence of this witness that the accused told him and his brothers that he had killed the deceased because he wanted his money back.

[6] The accused does not dispute that the deceased died as a result of the wounds he inflicted on him. He said that the deceased death happened as a result of a fight which had started between themselves. He argued that on the 17th March 2005 the deceased had gone to the accused house to take away the spear from the accused and that he, the accused, had managed to throw out the deceased from the house. The accused said that on the following morning Gogo Simelane had called the accused and the deceased so that she could reconcile the two of them. He said that the deceased, who was already at Gogo Simelane's house, had been waiting for him and a fight started between them and

that the accused stabbed the deceased in self defence. While the accused admitted stabbing the deceased he did not know how many times he had stabbed him.

[7] A medical report was produced in court by consent. It shows that the deceased suffered multiple stab wounds. There were at least nine (9) penetrating injuries on the body of the deceased, to the skull, brain, heart and intestines. There can be no doubt that the deceased had suffered a frenzied attack by the accused.

[8] The first witness stated that there had been no fight between the accused and the deceased on 17th March 2005 as was suggested by the accused counsel. The police witness No. 2869 SGT. L. Sukati who arrested the accused stated that there was no injury on the body of the accused when he arrested him. He stated that he would have taken the accused to hospital if he had found any injury on him. I am satisfied and I find that the accused story about an earlier fight with the deceased together with his story on how the fight and the ultimate death of the deceased came about is a rehearsed story and I reject it. It was clear that the story was a false one because when the accused was asked to repeat the story he stumbled and could not remember what he had said. He contradicted himself.

[9] The crown withdrew the charge of attempted murder and no evidence was called to prove the second count of attempted murder following the death of the complainant, Gogo Simelane.

[10] I am satisfied and I find that the accused was not acting in self defence when he inflicted the fatal wounds on the

deceased. There was no evidence that the deceased had provoked the accused in any way nor was there any evidence that the deceased had started the fight with the accused. It is difficult to accept that a person acting in self defence would inflict nine (9) penetrating wounds to the skull, heart, brain and intestines of a victim. This was a clear case of death which was inflicted to exact payment of a debt which the deceased had apparently owed the accused. The prosecution have proved beyond reasonable doubt a case of murder against the accused and I find him guilty as charged; and he is accordingly convicted.

Pronounced in open court at Mbabane on the 9th day of June, 2009.

BANDA, CJ

S.C. Simelane: I was consulting my learned friend if there were any extenuating factors. I am unable to find any extenuating factors except that the deceased was a brother. I would leave the issue of extenuating factors to the court. He instructs me that he is 28 years.

Dlamini: He was 24 years when he was arrested in 2005.

Accused: I am not married.

Court: This was a savage attack on the deceased and on the evidence, totally unprovoked. Just as his counsel had difficulty in finding extenuating circumstances, I, too, can find no extenuating circumstances except that the deceased was his own brother. In the circumstances, I believe a sentence of 20 years imprisonment with effect from 18th March 2005 is the proper sentence in this case.

09/06/2009