

[1] The accused person Mxolisi Gamedze faces the

following

criminal

charges:

Count 1 -

Murder

Count 2 -

Robbery

Count 3 -

Rape.

[2] In Count 1 the brief facts of the case are that on the

13th February 2007, at or near the Mtimpofo forest in the Lubombo Region, the said accused unlawfully and intentionally killed one Margaret Shongwe by forcing her to drink a poisonous liquid, a cotton insecticide. The events leading to her allegedly drinking the liquid were related to the Court by several witnesses, including PW 2, one Sicelo Mashela Thobela, who is a friend to the accused and the accused was arrested for the offences at his homestead.

[3] The police had been led to PW 2's house by PW 1,

who had initially taken them to the accused's homestead, where the party was informed that the accused was at PW 2's house. The party found the accused at PW 2's house, whereupon he was arrested, and on being searched, was found with the deceased's cellular phone and he was also found with sealed packets of cigarettes^' PW 2 confirmed that the accused had come to his home and that he brought the questioned cellular phone and cigarettes with him. He»further said that the accused told him that he had made the deceased woman drink the poison, further that he had raped and robbed her of the cellular phone, some money and cigarettes, after which he ran away leaving her in the Mtimpofu forest.

[4] He further said that the accused used to carry pesticide with him, saying that it was muti to charm women or ladies. On this day, the accused said that he made Shongwe, the deceased, to drink the pesticide because he did not want her to cause him to be arrested for raping her, since this is a serious offence. After the accused's arrest, PW 2 says that the party was led by the

accused to the Mtimpofu forest where more goods were recovered. PW 3, Siphon William Ngwenya, is a neighbour to whom the deceased first reported the alleged rape and that she had been made to drink poison, and by that time, the witness says that she was visibly sick and was vomiting and spitting.

[5] After she reported to PW 3, her husband was called and so were the police. He later accompanied the husband to hospital when the deceased was taken there. He left the couple at the hospital when it became clear that the lady was better after being treated. The husband later joined the witness and police and the party was taken to PW 2's house by PW 1 as related earlier. He confirmed what was said by PW 1 and PW 2 regarding the arrest and searching of the accused. PW 4, the deceased's husband, confirmed being informed by phone that his wife (deceased) was not well. He ultimately found her at PW 3's house and at that point, she could not talk, but he was told that she has been raped and made to drink a concoction. He took her to

the Nazarene Hospital. She was treated and admitted for two days.

[6] The deceased told PW 4 that she was walking from her homestead to the Manzini hospital when she met a young man who was with a pack of dogs. The dogs threatened her and she told the young man to help her which he did. They had crossed a river, when he suddenly stood in front of her, drew a knife, and told her to walk into the forest, failing which he would set the dogs on her. They walked into the forest and he raped her, after which he forced her to drink a concoction. She further said that the dogs barked at something so he left and she struggled to go back to the village and to PW 3's homestead. The deceased, having been discharged from hospital after the two days, died some seven to

eight days later, while waiting for transport at a bus station to go back to hospital.

[7] The investigating officer Detective Sergeant Mfanasibili Dlamini, related the circumstances leading to the arrest of the accused at PW 2's house as above. After the arrest, he says the accused led the police to the scene of crime in the forest, where many other items were retrieved. The accused also led the police to his house where he produced a bottle that allegedly had contained the concoction.

[8] After the woman died, he says a blood specimen was extracted from her and from the accused, and these were sent to the police regional head quarters together with the bottle that allegedly had the pesticide, for investigation, to establish if poison would be found in her body and the bottle. The accused gave a confession statement to His Worship Magistrate Khumalo, which confession was challenged by the defence, but I

ruled that it was admissible after a trial within a trial. In it the accused confirmed robbing the deceased, to which he has pleaded guilty in Court. At the close of the Crown's case, the accused, through his attorney, applied for an acquittal and a discharge on the Counts of murder and rape, essentially for lack of evidence.

[9] In Count 1, the State alleges that the deceased died of poisoning, the poison being the concoction that she was allegedly made to drink by the accused. The State relies on what the accused told PW 2 and on what the deceased woman herself told PW 3 and PW 4. Under any other circumstances, the information that was passed on by the deceased could possibly be treated as a dying declaration. I need not go into an analysis of this concept, because on the facts of this case, many arguments can be raised for and against the application of the concept.

[10] Under any other circumstances, what PW 2 says the accused told him could be used against the accused, but the uphill battle that the Crown

faces in this case is that there is no proof of the commission of the offence of murder itself. The alleged concoction was not analyzed for poison, this would be through the contents of the bottle. The specimen that was lifted from the deceased's body was never analyzed. The investigating officer confirmed that these specimens were sent to the police regional office, for onward transmission to South Africa for forensic or chemical investigations.

[11] Neither this Court nor anybody else knows what happened to the specimen. This is a crucial omission on the part of the Crown. No matter what the accused said to whom and no matter what the deceased said to whom, the point is that there is no evidence that she died; from poisoning. The doctor that treated her after she was admitted, following the incident did not give evidence. This leaves me none the wiser about what she was treated for and why:

[12] The autopsy results in this particular case could

only have come from the chemical and forensic analysis. The results are unknown. Confirmation - of what the concoction was could only come from analysis of the contents of the bottle, this was not done. These would have proved the actual cause of death. Another observation I need to make is that the deceased was admitted and discharged and she only died about eight days afterwards and her husband said that she had recovered during the interim period-.'

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[13] This introduces another difficulty for the Crown. In the event that the deceased had indeed ingested poison, was treated and discharged, and from what her husband says, was actually better or fine when discharged, what happened between the time she was discharged and the time she suddenly died? I cannot say and this introduces the issue of nexus or lack thereof. Given the above, I find that I cannot link the death to the alleged poison. There is no evidence that the deceased ingested poison. There is 'no evidence

that the deceased died as a result of ingesting' the concoction that the accused claims to have given her.

[14] A confession will be a confession proper in such a case, if there is evidence of the commission of the offence. In this case, unfortunate as it is, there is no evidence of the commission of any offence whatsoever, let alone murder. I take note of the prosecutor's request for me to reduce murder to a lesser offence, but there is no basis for that, given the facts. I

hope that this case and its result sends a very strong message to the police, that the prosecutor and the Court cannot be expected to convict on a vacuum. The accused is therefore found not guilty and is acquitted and discharged on murder.

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[15] Regarding Count 3, that of rape. Agairi the Crown

relies on what the accused allegedly told PW 2 and what the deceased told PW 3 and also: what the deceased told her husband and other witnesses-, to the effect that the accused raped her. Again, such admissions are non admissions, unless there is proof of commission of the offence of rape. It is trite that an allegation 'of rape/ needs independent corroborative evidence.

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[16] In this case, the deceased was indeed examined by a doctor, and under normal circumstances, that is a positive medical result, that would have provided the requisite corroboration. The lady was examined by a doctor T. Dube on the 13th February 2007 -and the,, doctor came to this conclusion: "In view of the semen like discharge in the vagina, penetration most likely effected even -though there are no injuries noted". All the doctor did was to order the lady to be sent for counseling and HIV testing. He also noted bruises on the left knee of the deceased. Unfortunately the bruises do not advance the Crown's case in -anyway.

[17] Medicine is so advanced that it is unacceptable for a doctor to note a semen like discharged and stop there. The discharge is not even confirmed to be semen and no effort was made to do that. The semen was not even matched to that of the accused to exclude that of the husband, although she is a sexually active married woman. I come to the conclusion that there is no other evidence pointing to a rape and specifically to the accused being the rapist. I am left in a very difficult situation where I am having to ignore the admissions that were allegedly made by the accused to PW 2, and as such, there is no other evidence to tie the accused to the offence of rape. The accused is found not guilty of rape and accordingly acquitted and discharged.

[18] This is a case that touches on the rights of the accused and the victim and her family and also says a lot about the investigations. These are..serious offences that should be given the seriousness they deserve; otherwise the whole system is put into disrepute. The attention of the Ministry of Health and the -Police department should be brought to these facts by the prosecutor.;

[19] With regard to the charge Bf robbery, the written admitted facts are read to the accused person and he responds as follows:

Accused: "I confirm that on the.. 13th February 2007 I met one Margaret Shongwe in the Mfefrn-pofu forest. By means of a knife I induced her to submit the property listed in Exhibit PI. - P. 12 to me. I further confirm that she was the lawful owner of such property and that Lhad no colour of right to the said property. I knew that it was unlawful for me to dispossess her of her goods, which I did "through threat of violence, and thereby committing the criminal offence-of

robbery". Defence Counsel: These are the agreed facts.

[20] The accused person is found guilty and convicted of the offence of robbery on his own plea of guilty and on the agreed facts.

Previous Convictions:

State Counsel: There are no previous convictions.

[21] **MITIGATION BY DEFENCE COUNSEL**

The accused is from Sigcineni area in Sphofaneni. He is a subject of Chief Buvuka. He is 20 years old, has never been to school, is unmarried and when he was arrested he was 20 years old. He is unemployed and has no dependents. He is a first offender, has no previous convictions and he has no pending cases against him. He is remorseful for his conduct, and as a result cooperated with the police and did not resist arrest. He also pointed out the remaining items to the police. He is of a less sophisticated mind, however this is not to

leave the Court with the impression that this is why he committed the offence. By pleading guilty to Count 2 he had no intention of further delaying the Court.

[22] I urge the Court to consider, the serious nature of the crime. The Court has always observed that these crimes are serious and that here in Swaziland it has become a practice for young men to carry knives and that it often results in injury to others. I urge the Court to strike a balance with the remaining factors by considering the interest of the community which is certainly tired of such conduct and which places the duty on the Courts to ensure such conduct does not recur. The community also expects that a person such as the accused can be rehabilitated and reincorporated into the community.

[23] I ask the Court to consider the accused's personal circumstances. He was arrested on 14* February 2007 and has been in prison since then. He asks for leniency and mercy; and that in imposing sentence it should be rehabilitative to the accused and we ask for a minimum sentence of 5 years with suspension.

[24] State Counsel: I have nothing to say.

[25] SENTENCE

The offence of robbery ranks as one of the most emotionally devastating criminal offences. In this case, a healthy, robust young man found it fit to put a law abiding woman, who was making a decent living for Her family by selling small goods, through the torment of being threatened with a knife and having her hard earned goods forcibly "taken from her. This is completely unacceptable behaviour.

[26] I have, however, taken into account the fact that the accused is a first offender who also pleaded guilty. His plea could be an indication of remorse. I have also taken his young age when he

committed this offence into account, and have given him the benefit of youthful exuberance, which could have played a part in the commission of this offence.

[27] Robbery is on a dangerous, increase in Swaziland

and proper messages should be sent' out to offenders and would be offenders, that Courts and the community will not tolerate such behaviour. I take into account his attorney's submission that I should temper justice with mercy, in the hope that he will rehabilitate. There • is no suspension of sentence in robbery convictions. . ■

[28] Given the totality of his antecedents and balancing

that with factors that militate against a lenient sentence as he requests, he is sentenced as follows:

1. 5 years imprisonment. .
2. The sentence shall be backdated to the 14th February 2007.

3. The recovered goods ' shall be. . handed
over to the
deceased's husband.

4. The knife should be forfeited to the State for
disposal.

Right of appeal against sentence only.

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