

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Crim. Case No. 195/05

In the matter between

REX

vs

SIFISO DUMSANI KHUMALO

Accused

CORAM

Mamba J

FOR Crown

Mr. M. Nxumalo

FOR Accused

Mr. M. Dlamini

JUDGMENT

28<sup>th</sup> April 2011

[1] The Accused, Sifiso Dumsani Khumalo, stands facing an indictment that alleges that he is guilty of two counts. On the first count it is alleged that he is guilty of the murder of Boy Makhanya. The crown alleges that this crime was committed on or about 17<sup>th</sup> March, 2005 at Lavumisa Town in the District of Shiselweni. The exact date, according to the crown is unknown to the Public Prosecutor. The second count charges a contravention of section 14(2)(c) of the Immigration Act 17 of 1982 (as amended). In this regard, it is alleged that on or about 18<sup>th</sup> March, 2005 and at or near Lavumisa Town in Swaziland, the accused being a South African citizen and not being the holder of a valid permit allowing him to be in Swaziland, he unlawfully and wrongfully entered and remained in Swaziland.

[2] Upon being arraigned on 8<sup>th</sup> November, 2010, the accused, who was represented by Mr M. Dlamini, entered a plea of not guilty on both counts.

[3] In its quest to establish its case on the second count, the crown led the evidence of two witnesses, namely; 3458 Constable Simon Mavuso and 1823 Sgt. Paul Magagula. They are both police officers and at the material time were stationed at Lavumisa Police Station. They gave their testimony as PW5 and PW6 respectively. Both witnesses testified that on 18<sup>th</sup> March 2005, they received information that a citizen of South Africa, an escapee or a man who was a fugitive from justice in the Republic of South Africa was in one of the bars in Lavumisa. This person turned out to be the accused. After introducing themselves to the accused, the police demanded that he produce to them written or documentary evidence permitting or allowing him to be in Swaziland. He failed to produce any such proof and was accordingly charged, arrested and detained at the Lavumisa Police Station for being in Swaziland illegally.

[4] In his defence, the accused testified that he is not a citizen of the Republic of South Africa but he is a citizen of Swaziland. He said he was born in Swaziland and of Swazi parentage. His Chief, he said, is Ntunja Mngomezulu and his Indvuna is Kwachukane Mngomezulu. He admitted that he has neither a Personal Identity Number nor a graded tax certificate or document issued to him by any authority in Swaziland. There is nothing sinister or criminal about this, at least in terms of the Immigration Act.

[5] The crown has, in my judgment, failed to establish that the accused is not a citizen of Swaziland and therefore he needs the necessary "permission to be in the country. The fact that the accused was not able to produce any document allowing him to be in the country does not detract from the basic fact that it is the crown that has to prove that he ought to have such documentation. To hold otherwise would be to put the cart before the horse. The crown has failed to establish its case on this count and the accused is accordingly acquitted and discharged thereon.

[6] On the first count, the crown has led the evidence of eight witnesses. These include the two police officers I have referred to above.

[7] The identity of the deceased and the cause of death has not been challenged by the defence. These two facts, ie identity of the deceased and the cause of his death, are contained in the postmortem report that was handed in as exhibit A herein. Dr Komma Reddy, the Police pathologist who conducted the postmortem examination noted that the deceased, Boy Makhanya died as a result of multiple injuries, which were, in the main caused by a sharp cutting instrument. He testified that there was a depressed fracture of 4 x 5 1/2cm on the left temple region of the head, a slash wound of 10 x 7cm, with sharp margins, oblique in direction present on the right side of the neck and a spindle shaped stab wound with sharp margins of 3x3cm present over the left nipple, on the chest and these three injuries were all mortal. The postmortem examination was performed by the pathologist on 22<sup>nd</sup> march 2005. The crown alleges that these injuries were

unlawfully and intentionally inflicted on the deceased on or about 17<sup>th</sup> March, 2005, the exact date being unknown to the crown.

[8] It is common ground that the accused and the deceased came to Lavumisa in search of employment in about January, 2005 or as it has been said, three months before the Accused was arrested. He was arrested on 18<sup>th</sup> March 2005. It is common ground further that when both accused and deceased arrived at Lavumisa, they rented a house at PW4, Siphon Madumeyane's brother's home at the Maplotini location. It has not been disputed that both persons settled there from South Africa and they soon interacted and mingled with some of the people in the small town and became acquaintances with them. Nhlanhla Siphon Bheki Zuma Mabuza (Pw3) and Wethu Thernbinkosi Mngomezulu (Pw8) were two of such persons.

[9] Pw3 told the court that during one incident in one of the bars at Lavumisa, the accused who had just sold his cellular telephone was buying beers for the group. Making up the group were the accused, the deceased, Mandla and PW3. The accused is said to have come out of the bar carrying two bottles of beer and told the deceased that, he, the deceased had cultivated or acquired a lot of friends for himself in the area and these friends did not relate or speak to the accused. Because of this situation, the accused threatened "to hit the deceased on the head". The deceased pleaded no wrong doing towards the accused. However, the threat by the accused worried him so much that he left the scene together with Pw3 after finishing the beer bought for them by the accused. He told Pw3 that they had to leave the scene because of the "bad words" or threat by the accused. •

The two of them went to the Lavumisa Hotel before they went to their respective homes. The two met the following day and the deceased informed Pw3 that he wanted to change his money into South African currency. They separated and Pw3 never saw the deceased again.

[10] The next link in the chain, the crown alleges, is provided by Wethu Mngomezulu (Pw8). As already stated above, this witness is one of those persons that were befriended by the accused and the deceased at Lavumisa. According to Wethu, when the accused and the deceased arrived and settled at Maplotini, they were friends. They would move around together. Initially they would visit him in his house together but this later changed and they would visit him separately. Wethu was to learn later that these two were no longer friends to one another and that the deceased wanted to go and visit his sister who was in the Mpumalanga Province in South Africa. This latter information was given to Wethu by the accused who also stated that the change in his relationship with the deceased was caused by the fact that the deceased had since changed and had acquired many friends in the area and these friends were not friendly to the accused.

[11] It would appear or seem that the above conversation between the accused and Wethu occurred a day after Wethu had requested the deceased to sell him one of his pair of trousers. The deceased had agreed to do so but the transaction was not concluded, one might assume, because the deceased was wearing the trousers then. That was the last day Wethu ever saw the deceased alive.

[12] It is the evidence of Wethu that when the accused told him about the bad blood that then existed between him and the deceased, he asked this witness to lend him his radio to which Wethu agreed but did not give him the radio that day. The accused came to Wethu's house carrying a plastic bag. After the customary exchange of greetings, the accused asked Wethu if he was brave enough or courageous. Wethu's immediate response was to ask what the accused meant exactly by that and when the accused insisted or persisted in the question, Wethu told him he was brave. The accused then told Wethu that he wanted to tell him something and he could only do so if Wethu had the necessary bravery mantle. The accused then told Wethu that he had since killed the deceased. He explained further that he had done so because the two were not friends anymore and the deceased had made many friends for himself at Lavumisa. The accused stated further that his estranged or strained relationship with the deceased was a threat to him as he had many serious issues or secrets that were known by the deceased. He feared that his identity or cover would be blown open or revealed or exposed by the deceased. The secrets related to the accused's identity and past life.

[13] As the accused related this story to Wethu, he was, according to Wethu very apprehensive or worried as he kept on looking out of the window of Wethu's house. Wethu was himself stunned or taken aback by the news of the deceased's killing by the accused, but as he was afraid and scared of the accused he tried not to show his emotions or feelings. Wethu also told the court that he was worried that he could be suspected of having been involved in the death of the deceased because the deceased and the accused were often seen in public with him. It was at this meeting between the accused and Wethu that the former handed over to the latter a plastic

bag containing the very pair of trousers that Wethu had offered to buy from the deceased about a day or so ago. The accused gave it to Wethu free of charge. Wethu noticed that the trousers were bloodstained. Later in the meeting, and presumably just before the two parted ways, the accused asked Wethu to give him the radio he had earlier borrowed from him. He expressed the desire to have it that day as he was going to be alone in the house that day. (Could this be because he had killed his housemate, the deceased?)

[14] The news of the death of the deceased worried or bothered Wethu so much that he was determined to have the accused arrested for it. First, he approached his brother-in-law Madumeyane Dlamini for advice. This was the person after all through whom he had come to know and be acquainted with the accused and the deceased. These two rented a house belonging to Madumeyane's brother. Secondly, he resolved to report the matter to the South African Police at the Golela Border Post and a plan was then hatched, involving the South African and Swaziland Police and Wethu for the latter to lure the accused to one of the bars in Lavumisa where he would then be arrested for being in the country illegally. (One can only assume that this was the case because the police did not at that stage have evidence of the death of the deceased). The next day, Wethu executed the plan by inviting the accused to the Kamshayazafe bar to teach him, Wethu, how to play a game of snooker or pool. The plan worked and the accused was arrested *m* the bar and charged under the Immigration regulations.

[15] Whilst Wethu could not say the exact dates when the accused told him he had killed the deceased and when the accused was apprehended at the bar, he was able to say these incidents or events occurred a day of each other. From the undisputed evidence of the Police, the accused was arrested on 18<sup>th</sup> March, 2005. It follows, I think, that the accused told Wethu about the killing of the deceased on 17<sup>th</sup> March, 2005.

[16] It is common cause that the decomposing body of the deceased was discovered by Pw2, Thokozani Simelane near the Lavumisa Traffic circle or roundabout and the local police were alerted and immediately took charge of the scene and proceedings that followed such discovery. The Police investigation that followed is a terrible damning indictment against the police officers that were involved. Photographs taken from the scene could not be used in court as the police officer responsible for them said they had been "over exposed" and useless. A sponge, wheelbarrow, two axes, bedsheet, various garments retrieved from the house rented by the accused and the deceased, the walls, floor of one of the rooms there, which were all said to have been awash with blood were amazingly, startling and inexplicably not properly examined and analysed for presentation as evidence in court. Certain body tissues or flesh samples were also collected and put in a test tube for examination but no evidence of such analysis was presented to court. The investigators in this case never seemed to get anything right. What was said by the crown to be a pointing out by the accused could not pass muster either. For example, the two axes allegedly pointed out by the accused were not in anyway linked to the crime herein. In the absence of such link, their production as exhibits takes the case for the



crown no nearer to its desired destination. The investigation by the Police was lackadaisical amateurish, incompetent and poor to say the least.

[17] From the above facts, the case against the accused stands largely on the evidence of Wethu Mngomezulu. This witness was a close friend of the accused and the deceased. They both trusted and confided in him on some of their personal circumstances. When the friendly relationship between the deceased and the accused became sour or strained, each of them, separately, related this to Wethu. He was their confidant, individually.

[18] For his part, and I think I would not be doing an injustice to the accused if I say that his defence is simply that he did not threaten to assault the deceased, did not kill him or tell Wethu that he had killed him. Again, in fairness to him, I do not think that this stance could be classified or characterized as a bare denial. On the contrary, it is a pointed answer to the crown's allegations against him in the particular circumstances of this case.

[19] Despite his friendship with the deceased and the accused, Wethu gave his evidence in a very cool and dispassionate manner. His evidence was straight forward and his reaction to each incident was explained where such explanation was necessary and sought. He explained for instance that he had to report to the South African Police first about what the accused had told him because the accused had told him that he was a master in evading police arrest. He then resolved that as a fugitive or an escapee from South Africa, the South African Police would be more eager to arrest him, than would the local police. Again, it must be borne in mind that Wethu reported

the presence of the accused in Swaziland that culminated in his arrest before the dead body of the deceased was discovered. He also explained that he took the decision to alert the Police about what the accused had told him because he believed what had been said to him; he had been given a bloodstained pair of trousers which he knew belonged to the deceased and he had been aware of the strained relationship between the accused and the deceased.

[20] The evidence to the crown rests on the evidence of a single witness. That witness is Wethu Mngomezulu. In *Khumalo and Others v R*, 1979-1981 SLR 259 at 264 Van Winsen JA said;

"It is competent for a court to convict on the evidence of a single witness (see s236 of the Criminal Procedure and Evidence Act 67 of 1938) but it is established law that such a conviction can only follow if the evidence of the single witness is clear and satisfactory in every material respect - R v Mokoena, 1956 (3) SA 81 (A) 85-86, R v T 1958 (2) SA 676(A). The clarity and adequacy of the single witness' testimony requires to be determined with reference, inter alia, to such factors as the probabilities, the contradiction of his evidence by other evidence, and his interest adverse to the accused. It must be borne in mind that the ultimate enquiry is whether the crown on the strength of the single witness had discharged the onus of proving the guilt of the accused beyond reasonable doubt. Where; as in this case, the version of events as told by Dube and that as told by the accused is mutually destructive a court must be satisfied on good grounds that the version

of Dube is true and that of the accused false. See National Employer's Mutual General Insurance Association v Garry 1931 AD 187 at 199. R v M 1946 AD 1023 at 1026. It follows that this onus has not been discharged in relation to any accused whose evidence may reasonably be true."

In the present case, Wethu had no real interest adverse to the accused. The accused and the deceased were his friends. When Wethu reported to Madumeyane and the Police that the accused had confessed to him that he had killed the deceased, neither Madumeyane nor the police knew of the death of the deceased then. The defence criticized the evidence of Wethu, *inter alia*, that the pair of trousers belonging to the deceased and allegedly given to him (Wethu) was not brought to court as an exhibit. This criticism is not entirely justified. Wethu did say that he told the Police about this piece of clothing and he showed it to the police. The police, however, did nothing about it. This is yet another item in the bungling armory of the police. Having said that, one has to note that even if this item had been produced as evidence, its mere production, without more, would not have proven that it was given or not given to Wethu by the accused. At the end of the day the court would have to decide the issue on the evidence available to it; and decide whether or not Wethu's evidence can be relied upon in this regard.

[21] I have analysed the evidence of Wethu above and considered his situation as a confidant to the accused and the deceased. I have also

considered and compared his evidence with the denial by the accused that he did not tell him that he had killed the deceased. I have also considered the fact that both Pw3 and Pw8 testified that the accused resented the fact that the deceased had befriended many people in Lavumisa and was worried that the deceased would expose his past and identity to his new-found friends. As a witness, Wethu was far superior to the accused. He gave his testimony in a straight forward and logical manner with very little prodding from or by anyone. That can not be said of the accused. He was evasive, vague and often long-winded even on a simple question that required a short and precise answer. Whilst it may be unfair to blame him for his imprecision or inexactitude, his rambling responses could not be missed.

[22] From the evidence stated above, I have no doubt whatsoever that the evidence of Wethu (Pw8) is credible and truthful. The accused freely confessed to Wethu that he had killed the deceased and for the reason stated by him. The denial by the accused in this regard is a lie and is hereby rejected.

[23] The accused unlawfully and intentionally killed the deceased in order to prevent his identity and dark past from being revealed or exposed. He is guilty of Murder and I accordingly find him so.

**MAMBA, J**

