



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 90/06

In the matter between

REX

Crown

and

DUMSANI SAMSON GINA

Accused

Neutral citation: *Rex v Dumsani Samson Gina* (90/06) [2012] SZHC 156 (27 JULY 2012)

Coram: Mamba J

Heard: **20, 21 February, 2012 & 7 June, 2012**

Delivered: **27 July 2012**

- [1] Criminal law - Murder - where an accused foresees or appreciates that his actions might cause the death of his victim but acts recklessly not caring whether or not death is caused and in fact he causes death, he is guilty of murder on the basis of indirect intention.
- [2] Criminal law - Murder - accused suffering from a mental disorder short of insanity - such not a defence.
- [3] Criminal law - Murder - where an accused acts on provocation that is not sudden and does not act in the heat of passion and

has not lost his self control, section 2 of the Homicide Act does not apply and he is guilty of murder.

- [1] The accused stands charged with the MURDER OF SAMUEL MPANDZA. It is alleged that the crime was committed by him on 27th February 2006 at Mdumezulu area in the District of Lubombo.
- [2] On being arraigned on 20th February, 2012 he pleaded not guilty to the indictment, and the postmortem report by the police pathologist was handed in by consent. It was admitted as exhibit A. In his report, the pathologist came to the conclusion that the cause of death was haemorrhage as a result of penetrating injury to the left lung. There were three ante-mortem injuries noted by the doctor on the body of the deceased; namely: a,
- (a) penetrating wound over front of chest. It involved muscles, intercostal structures, pleura and its edges were clean cut and its angle sharp in an oblique angle from front towards the back.
 - (b) cut wound over the front upper region of abdomen and was muscle deep, and
 - (c) penetrating wound over the back on the back of the left hand side of the chest and was 5 x 2 cm deep in an oblique angle. Like that described in (a) above, it involved muscles, intercostal structures, pleura, the lung and its edges were clean cut and sharp and it was from back to front.

- [3] The deceased was a resident of Mdumezulu area. He owned and operated a grocery shop in the area. This shop was about one hundred metres away from his homestead. On the day in question, the shop was being operated by his daughter Lindokuhle Mpanza who testified as Pw1. She was eighteen years old when she testified in February this year and she must have been about 12 years old in 2006 when the offence was allegedly committed.
- [4] She told the court that at about 5pm on 20th February 2006 she was in her father's shop alone and she noticed the accused and the deceased talking to one another over a fence about five metres from the shop. She did not pay much attention to their conversation and did not hear what they were talking about. She also informed the court that after a while both men left the scene and went their separate ways. His father went to his house and the Accused walked towards his own homestead.
- [5] After a short while, the accused returned to the shop and asked her to go and call the deceased from his home. She obliged. When the deceased came he did not go into the shop but remained under a tree within the shop premises and had a

conversation with the accused. Again she did not hear what these two men talked about. This witness went inside the shop and continued with her duties. After three minutes or so she heard noise from outside and the deceased was saying "Forgive me my boy." She immediately went out of the shop and saw her father lying on his back on the ground with blood all over his chest and the accused was sitting astride on top of him. She ran to the house to report what was taking place at the shop. When she returned to the scene she found her two siblings; her brother Nkosikhona (Pw2) and her sister Timo already there. The deceased was lying on the ground, his cloths covered in blood. The accused was carrying a knife. It was covered in blood too and he wiped off this blood on the cloths worn by the deceased and thereafter walked away. He stood at the gate to the shop and boasted that even if the police could be called, they would do nothing to him as he had an arsenal of firearms. The accused walked away towards his home and was eventually arrested by members of the community in the area. The deceased was rushed to hospital but died as a result of the injuries inflicted on him by the accused. The evidence of this witness is materially corroborated by that of her brother Pw2.

[6] In their evidence in chief and specifically under cross examination, both Pw1 and Pw2 were unable to say what prompted or sparked off the stabbing of the deceased by the accused. Both came to the scene after the actual stabbing. The rest of the puzzle is filled in or completed by the accused himself. He testified that on the morning of the day in question the deceased had asked him concerning a rumour in the area that the accused had, on several occasions, been chased around by some unknown people. The Accused had denied that there had been such incidents but the deceased had insisted or persisted in his enquiry. The deceased had repeated his questions when they met near the shop in the afternoon and had become angry when the accused persisted in his denials. The accused finally admitted that indeed there were unknown people who were chasing after him in the area. He then asked from the deceased why he was so much interested in the story but the deceased had no response to his enquiry.

[7] The accused told the court that he told the deceased that since he had admitted to the deceased that there were these mysterious persons chasing him in the area, he, the accused expected no further questioning by the deceased on the matter. This angered the deceased who then slapped him with an open

hand across the face. The accused said he did not know what then happened that led to the deceased being stabbed by him. He also said he did not know how many times he stabbed the deceased or on what part of his body.

[8] It is common cause that the deceased and the accused were known to be on good terms to one another. The accused was often hired by the deceased and his wife to do certain tasks or errands for them.

[9] I accept the evidence of the accused that the deceased slapped him across the face in or under the circumstances described by the accused. I accept further that the deceased questioned the accused on the rumours referred to above and that this conversation or subject got to the stage that both men were angry with each other. The persistent questioning of the accused by the deceased and culminating in the deceased assaulting the accused annoyed and angered him. However, this did not excuse and cannot be an excuse for the actions of the accused in stabbing the deceased in the manner and under the circumstances described herein. The plea for forgiveness by the deceased referred to above suggests, very strongly, an acknowledgement by him that he had in some way wronged the

accused. There is nothing to suggest that this action by the deceased was such that the accused lost his self control and that he acted on the spur of the moment before his passion could cool down. On the contrary, his actions of wiping the blood off the knife and boasting about what he had done and the consequences thereof depict a deliberate, purposeful and conscious act on his part. It was an act of bravado.

[10] There were two wounds on the chest and abdomen of the deceased. Both were muscle deep and the third wound was over the back of the chest and was lung deep. It is these wounds that caused the bleeding that resulted in the death of the deceased.

[11] Whilst there is no direct evidence showing that the accused purposely set about to kill the deceased, he must have realised that in stabbing or injuring the deceased in the manner described above, his actions may result in his death but he persisted recklessly not caring whether or not death was the final outcome. In *MAPHIKELELA DLAMINI v R* 1979-1981 SLR 195 at 198D-H Maisels P Propounded the law as follows:

‘The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R* 1970 - 1976 SLR 25. The test there laid down is as follows,

and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah's* case the law was stated as follows, at 30A: "If the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not ... he ought to have realised the risk, since he killed unlawfully".

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah's* case to which I have referred the then President of this court, Mr Justice Schreiner said: "It has been suggested that a finding that a person must have foreseen or appreciated a risk is not the same as a finding that the person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have". In this statement of the law *Caney JA* on the same page concurred. *Milne JA* at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: "I should like first of all to associate myself very strongly

with the learned President's view that when it is correctly held that a person 'must' have appreciated that his act involved a risk to another's life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk". I thought it right to mention these matters because for many years to my knowledge *Annah's* case has been followed in Swaziland and although I share the regret expressed by Mr Justice Schreiner in *Annah's* case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p29 of *Annah's* case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah's* case to which I have referred.'

Isaacs JA concurred and also added: 'My agreement is not to be considered as being an agreement with a departure from *Annah's* case'

See also *VINCENT MAZIBUKO v R*, 1982 - 1986 (2) SLR 377; where the headnote reads:

'A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not.'

[12] About three years after the commission of this crime, the accused was examined by a psychiatrist, on 10th August 2009. The psychiatrist concluded that the accused "...had mental disorder at the time of the alleged offence [and] is now fit to stand trial." This conclusion is apparently based on the findings by the psychiatrist that the accused "hears voices inside his head and has symptoms of severe sadness."

This conclusion offers no defence to the accused. That the accused cannot remember how and why he stabbed the deceased is no evidence of his insanity as submitted by his Counsel. Incidentally, the accused was able to lucidly relate to court what took place between himself and the deceased on that fateful date. He had a memory lapse only when it came to the fatal stabbing of the deceased by him.

[13] From the foregoing, the crown has, beyond any reasonable doubt established the guilt of the accused. He is found guilty of murder on the basis of indirect intention.

MAMBA J

For the Crown:

Mr. Mathunjwa

For the Defence:

Mr. O. Nzima