



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 72/2011

In the matter between:

REX

VS

NJABULO MAMBA

Neutral citation: *Rex vs Njabulo Mamba (72/2011) [2012] SZHC181 (2012)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Law- Accused charged with murder- *mens rea* in the form of *dolus eventualis* established – youth and drunkenness of accused constitute extenuating circumstances – accused convicted of murder and sentenced to eighteen years imprisonment

JUDGMENT
20th AUGUST 2012

[1] The accused was charged with murder, and, it was alleged by the Crown that on the 24th October 2010 at Lusoti Village in Simunye in the Lubombo region, he unlawfully and intentionally killed Brian Carvalihio. He pleaded not guilty to the charge.

[2] PW1 Banele Percy Ndlandla, a friend of the accused and schooling at Apex School in Manzini told the court that he knows Simanga Maziya who is a member of the Umbutfo Swaziland Defence Force; he confirmed that Simanga Maziya was present at the scene and witnessed the commission of the offence.

[3] He further told the court that on the 24th October 2010, he attended the annual Simunye Fun Fair with Njabulo Shongwe and Elvovo Dlamini. On arrival at Simunye, they met the accused who was in the company of Mampengane Mdluli whom he introduced to them. They entered the stadium together; Njabulo Shongwe and Elvovo Dlamini then disappeared. He was left with the accused and Mampengane Mdluli.

[4] He showed the accused and Mampengane Mdluli a certain boy who was attending school at Gilgal High School, and, he told them that the boy had previously beaten him next to the school; the accused and Mampengane Mdluli beat the boy and further took a knife from his pocket. The time was about 4 am.

[5] Elvovo Dlamini returned and joined them. They saw two boys standing and, Elvovo asked one of them why he was looking at him; and, the boy told him to stop harassing him. The accused and Mampengane Mdluli beat the boy with fists and kicked him. Simanga Maziya who is PW2 intervened and stopped the fighting; and, the accused ran away.

[6] The boy chased after the accused for three metres; and, the accused stabbed him, and, he heard the boy screaming. PW1 went to Mampengane who was standing next to a toilet and told him that the accused had stabbed the deceased. Mampengane Mdluli told PW1 that they should run away to the Kombi. The accused found them in the kombi and told him that he had stabbed the fool three times.

[7] Elvovo Dlamini and Njabulo Shongwe boarded the kombi; however, Zakhele Mabuza told PW1, Elvovo Dlamini and Njabulo Shongwe to alight from the kombi. The accused was a friend to Zakhele Mabuza; he told them not to alight from the kombi, and, that they would use the kombi when going back home.

[8] They stood next to the kombi; Zakhele Mabuza and Mampengane Mdluli were also standing outside the kombi. A coloured man who was a friend to Mampengane Mdluli told him that Zakhele Mabuza was harassing him; the man beat Zakhele Mabuza. However, the accused, Mampengane Mdluli and Zakhele

Mabuza beat the coloured man. Zakhele Mabuza further retrieved a knife from the kombi and stabbed the coloured man three times. Mampengane Mdluli also took a bottle and hit the man.

[9] The security personnel came and chased after them; they ran to the sugar cane fields. Zakhele Mabuza was bleeding and Mampengane Mdluli told him to stop running; but he refused. Subsequently, they ran into the Hlane Game Reserve. A kombi approached them full of people, and, they stopped the kombi thinking that it was their kombi. Many police officers alighted from the kombi and they ran away. The police fired shots at them, and, they fled again to Hlane Game Reserve; the police pursued them.

[10] PW1 stopped running, and, the police apprehended him; he was driven in a white police van to Simunye Police Station. The police later arrested the others including the accused and brought them to the police station. The accused was wearing a navy blue and white jean written GP and a red T-shirt written Echo United. During the trial, PW1 was able to identify the clothes which the accused was wearing during the commission of the offence.

[11] Under cross-examination PW1 disclosed that they had taken liquor with his friends since midday, and that they were already drunk when the offence was committed. He reiterated his evidence that the accused and his friends had three

fight at the Simunye Fun Fair. He further reiterated his evidence as to the sequence of events leading to the stabbing of the deceased. He confirmed witnessing the stabbing and admitted that he was on the scene walking with the accused and his friends. He denied participating in any of the three fights.

[12] PW1 reiterated his evidence relating to the assault of a coloured man by Zakhele Mabuza and Mampengane Mdluli. He further confirmed that Zakhele stabbed the man three times. Both Zakhele Mabuza and Mampengane Mdluli were carrying Okapi knives. In addition Mampengane had a second knife which he had taken from the school boy whom they had earlier assaulted with the accused.

[13] PW2 Simanga Maziya, a soldier attached to the Royal Guard, testified that on the 24th October 2010, he attended the Simunye Fun Fair; and, that between 4 am and 5 am the following day, he witnessed an argument amongst a group of boys, and, he went to intervene. He saw one boy stabbing another boy three times; he later learned that the victim was the deceased. The deceased staggered and fell to the ground. The attacker ran away; and, he raised an alarm. The police identified the attacker and ran after him. The attacker was wearing a red T-shirt and a jean with in-built belts at the back. During the trial, PW2 was able to identify the clothes which were worn by the attacker during the commission of the offence. He maintained his evidence under cross-examination.

[14] PW3 Themba Sunnyboy Malangwane, a pastor based at Simunye Sugar Estate, testified that on the 20th October 2010, PW5 asked him to attend and witness the “pointing out” by the accused. PW5 was with the accused and other police officers. The accused led them to Hlane Game Reserve; he was not handcuffed.

[15] The accused, who was leading the way, pointed out a knife under a tree as the weapon used in the commission of the offence. PW3 further identified the accused from the photos shown to him in court during the trial which were marked exhibits 1 and 2. He further described the knife as having a wooden handle at the back and that it could be closed; the knife had bloodstains.

[16] PW3 maintained his evidence under cross-examination; he further told the court that during the pointing out, he was with PW4, the accused as well as the Scenes of Crime officer who was taking photographs. The other police officers were standing further away from them during the “Pointing Out”.

[17] PW3 further told the court that during the “Pointing out” the accused was relaxed and free, and, that he was treated well by the police; the accused was not threatened or intimidated. The knife was found underneath grass and thorns under the tree. The Scenes of Crime officer PW4 photographed the knife.

[18] PW4 Mfanukhona Gwebu, the Scenes of Crime Officer testified that on the 24th October 2010, he was on duty at Simunye Police Station when he received a report of a murder case; the time was 3 pm. Acting on the report, he proceeded to Hlane Game Reserve; he was with another police officer. On arrival at the Game Reserve, he found Detective Sergeant Elias Shongwe, PW5, other police officers as well as a young man who was wearing a red T-shirt and a blue jean.

[19] PW5 introduced PW4 to the accused and further explained his role in the matter; then he cautioned the accused in terms of the Judges Rules. Thereafter, the accused led them inside Hlane Game Reserve, about eighty metres from the main public road. Prior to the pointing out, PW5 further cautioned the accused. The accused pointed out a knife under a tree, and, PW3 witnessed the pointing out; the knife was an Okapi knife, and, it was folded.

[20] PW4 took pictures as the accused was pointing out at the knife; he further took pictures of the scene. According to PW4, the "Pointing Out" was done freely and voluntarily. He noticed blood-stains on the knife as well as rusting; he handed the knife to PW5 who was the investigator in the case.

[21] On the following day, he went to the scene where the deceased had been stabbed. He noticed a pool of blood on the ground. He took pictures showing the scene.

[22] On the 26th October 2010 at about 12 noon, he attended a post-mortem of the deceased at Good Shepherd Hospital. He also took pictures of the deceased's body before the post-mortem. He examined the deceased's body and noticed a stab wound below the chest.

[23] PW4 handed to court the following further photographs: a photograph marked MSG1 showing the scene of crime and it was admitted and marked Exhibit 3; a photograph written MSG4 showing the accused pointing out the knife and it was admitted and marked Exhibit 4; a photograph written MSG2 showing the scene and it was admitted and marked Exhibit 5; a photograph written MSG3 showing the site where the knife was found and it was admitted and marked Exhibit 6; a photograph written MSG7 showing the knife at close range and it was admitted and marked Exhibit 7; a photograph written MSG6 showing the distance between the knife under the tree and it was admitted and marked Exhibit 8; a photograph written MSG8 showing the opened knife and it was admitted and marked exhibit 9; a photograph written MSG14 showing bloodstains at the scene of crime and it was admitted and marked Exhibit 10; a photograph written MSG13 showing bloodstains at the gate was admitted and marked Exhibit 11; a photograph written MSG10 showing bloodstains at Simunye Club was admitted in evidence and marked Exhibit 12; a photograph written MSG11 showing the country club was admitted in evidence and marked Exhibit 13; a photograph written MSG9 showing gate No. 2 at the country club was admitted in evidence

and marked Exhibit 14; a photograph written MSG12 showing where blood was found in gate 2 was admitted in evidence and marked Exhibit 15; a photograph written MSG 17 showing the deceased's body was admitted in evidence and marked Exhibit 16; a photograph written MSG16 showing the body facing down was admitted in evidence and marked Exhibit 17; a photograph written MSG15 showing the stab wound was admitted in evidence and marked Exhibit 18; a photograph written MSG 18 showing a close view of the stab wound was admitted in evidence and marked Exhibit 19; a photograph showing the size of the stab wound was admitted in evidence and marked Exhibit 20.

[24] PW4 showed the knife which was pointed out by the accused at Hlane Game Reserve. He further identified the clothes which were worn by the accused during the commission of the offence being a blue jean with purple belts and a red T-shirt written Echo United.

[25] Under cross-examination PW4 reiterated his evidence that his role during the investigation of the case was to assist PW5 who was the principal investigator. Furthermore, his duties entailed taking photographs of the scene of crime, the "Pointing Out" as well as during the post-mortem examination. He confirmed that the accused was duly cautioned by PW5 on two occasions, that is on the side of the road where he found them as well as before the Pointing Out. PW3 was present when the accused was cautioned.

[26] He further told the court that he was responsible for packaging, sealing and conveying the exhibits to the Police Headquarters for forensic examination. He denied participating in the interrogation of the accused as well as in the investigation of the offence. He explained that his role as a Scenes of Crime officer precluded him from communicating directly with the accused; and, that his role was to photograph the scene as well as taking exhibits for forensic examination. He disclosed that the accused didn't deny that the knife belonged to him. The knife was closed when it was pointed out by the accused; he opened the knife before he photographed it. The knife had bloodstains and rust.

[27] PW5 Detective Sergeant Elias Shongwe, the investigating officer for this case, testified that he was on duty on the night of the 23rd October 2010; and, that he was patrolling the Simunye Fun Fair event. In the morning of the 24th October 2010; he received a message that a person had been stabbed at Gate No. 3 at the Fun Fair. He consulted the security personnel employed by the Simunye Sugar Company for possible eye witnesses, but, he could not find them. He asked for a description of the suspect from the police and he was further advised that the suspect fled through Gate No. 3.

[28] He went to the Simunye Clinic looking for the deceased; and, he found the Simunye Police Station Commander standing next to the deceased. He noticed the

presence of other people who were crying in the vicinity. He informed the police to take the deceased to a doctor so that he could certify him dead.

[29] He further received another message that a second person was stabbed outside the Fun Fair ground where kombis and other motor vehicles were parked. He went to the scene with other police officers. Along the way they met security personnel from the Fidelity Company who informed him that the stabbed victim was taken to Simunye clinic; and, that the attackers had fled into Hlane Game Sanctuary.

[30] PW5 instructed the police to pursue the group of boys. He further sent a message to the Hlane Game Rangers to look for the suspects. He instructed other police officers to board a kombi and drive towards Siteki and look for the suspects. Incidentally one suspect stopped the police kombi and a group of boys came forward to board the kombi.

[31] When they realised that it was a police kombi, they fled into the Game Reserve; however, the police subsequently caught PW1. He introduced himself to PW1 and further cautioned him; thereafter, PW1 disclosed that the other boys had fled into the Hlane Game Sanctuary.

[32] The Hlane Game Rangers caught the accused as well as Mampengane Muzi Mdluli; they handed them over to the police. They were cautioned at the police station prior to interrogation; their rights to legal representation were also explained to them.

[33] The accused led the Police to the Hlane Big Game Park; PW3 and PW4 were invited by PW5 to come and witness the Pointing Out by the accused. PW5 introduced them to the accused and their duties in relation to the matter were duly explained.

[34] They parked their motor vehicles on the side of the public road and walked into the Hlane Big Game Park after administering to the accused the second caution relating to the Pointing Out. The accused led them inside the Game Reserve by foot for a distance of one hundred metres; then, he pointed the knife under a tree as the weapon used in the commission of the offence. PW4 took photographs of the accused pointing at the knife. PW3 was standing next to PW4. PW4 also took photographs of the knife.

[35] PW5 asked the accused to hand over the clothes which he was wearing on the day of the commission of the offence. The accused duly handed the clothes as advised to PW4 being a red T-shirt and a jean trouser. However, all his legal

rights were explained to him including legal representation, consultations with his family as well as making a statement to a Judicial officer.

[36] PW5 handed into court as part of his evidence the red T-shirt, the jean trouser as well as the knife; they were admitted in evidence and marked Exhibits A, B and C respectively.

[37] Under cross-examination PW5 told the court that the accused and his friends smelt liquor when they were arrested. He reiterated his evidence that the accused was cautioned three times, that is at the Police Station before the Pointing Out, at the side of the road before walking into the Game Reserve as well as prior to interrogation at the police station. He maintained his evidence under cross-examination.

[38] The Post-mortem report was admitted in evidence by consent. The cause of death was a stab wound to the chest. It was marked Exhibit 21.

[39] The accused gave evidence in his defence. He told the court that he was seventeen years of age when he committed the offence; and, that he was currently nineteen years of age and attending school at Mkhuzweni High School.

[40] He testified that on the 24th October 2010, they hired a kombi with his friends to ferry them to Simunye Fun Fair; they were fourteen in all. They were carrying liquor. PW1 Njabulo Shongwe and Elvovo Dlamini joined them in drinking the liquor.

[41] PW1 saw another boy who had beaten him at school; he went to beat the boy but the boy overpowered him because he was drunk and he fell. He grabbed the boy and Muzi Mdluli also known as Mampengane took a knife from the boy's pocket.

[42] They were drinking liquor and dancing inside the Fun Fair ground. Elvovo Dlamini stepped upon the toes of another boy; and, the boy beat him with an open hand. When Muzi Mdluli and himself intervened, the boy hit him with a tin full of liquor; the boy further hit him with an open hand, and, a fight ensued between the boy and his friends with the accused, Muzi Mdluli, PW1 and Elvovo Dlamini. PW1 further threw a bottle at one of the boys and hit him.

[43] Seeing that they were being overpowered, they ran away and two of the boys chased after them carrying bottles as their weapons. He retrieved a knife intending to intimidate them; he lost his balance, then he saw one of the boys on the ground bleeding. He could not recall how the boy was stabbed.

[44] He ran to the kombi and asked PW1 and Muzi Mdluli if he had stabbed the deceased; and one of his friends said he had stabbed the fool. He was not aware that he had stabbed him. However, this evidence is in sharp contrast with the evidence of PW1 and PW2 that the accused had stabbed the deceased. In addition PW1 told the Court that when the accused boarded the kombi, he told them that he had stabbed the fool. This evidence was not disputed by the defence.

[45] The accused told the Court that he boarded the kombi and slept for thirty minutes. Zakhele Mabuza arrived and told them that they were leaving. Another boy came and spoke to Muzi Mdluli; then, the boy hit Zakhele Mabuza with a bottle. Muzi Mdluli beat the boy. Five other boys arrived and threw bottles at the kombi. He alighted from the kombi and Zakhele Mabuza retrieved a knife from the kombi and stabbed one of the boys three times. He confirmed that they had three Okapi knives in their possession which they had brought to cut meat; however, there is no evidence that the knives were used to cut meat other than stabbing people.

[46] The security personnel arrived at the scene and the boys ran away. Zakhele Mabuza was bleeding from a wound inflicted with a bottle thrown at him by one of the boys. When they reached the main road, a kombi came and they stopped it hoping it was a public transport. However, the police alighted from the kombi,

and, they fled into the Hlane Game Reserve. The police pursued them and shot in the air to stop them.

[47] The police caught PW1 but they continued running until they reached a certain tree where they sat down and had a rest. He was with Phumlani Matsenjwa and Muzi Mdluli. They continued running until they met the Hlane Game Rangers who agreed to transport them to the main road after they had claimed to be lost. Meanwhile the Game Rangers called the police who arrived immediately in three cars. They took them to Simunye Police Station.

[48] The police asked him why he had stabbed the deceased. They told him that PW1 had already told them everything. He claimed that he was tortured by PW5 and other police officers. They asked for the knife and he told them that it was lost when they were fleeing in the bush. They went with the police and retraced their steps in the Game Reserve until one of the boys found the knife under a tree where they had previously rested during their flight. He was photographed next to the knife.

[49] This evidence contradicts the evidence of PW3, PW4 and PW5 who testified that the accused led them to the Hlane Game Reserve where he pointed out the knife used in the commission of the offence. This evidence was not

disputed by the defence. Similarly, the defence did not dispute the evidence of the stabbing of the deceased by the accused.

[50] After the knife had been found, they went back to the police station; and, on arrival, the police asked for the clothes which he was wearing during the commission of the offence. He went with the police home to change clothes; and, he gave the police the clothes which he was wearing. They told him that his clothes would be sent for forensic examination in South Africa. He was subsequently charged with murder.

[51] He told the Court that he found the knife in the kombi with the braai meat. He denied stabbing the deceased three times; however, he could not recall how the deceased was stabbed. He conceded that Zakhele Mabuza, Muzi Mdluli and himself were each carrying Okapi knives. Whilst denying the Pointing Out, he conceded that he was walking in front to the site where the knife was found.

[52] He told the Court that he had no intention of stabbing the deceased; and, that he would like to ask for forgiveness from the Court, the deceased's family as well as his father for the death of the deceased.

[53] Under cross-examination the Crown reminded him that the defence didn't dispute the evidence of PW1 that Elvovo Dlamini was the one who provoked the

deceased by asking why he was looking at him; and, that the defence did not dispute the evidence of PW1 that the accused and Muzi Mdluli assaulted the deceased after the provocation. The accused conceded that it was not denied or disputed by the defence that after the assault, he ran for three metres, then he stabbed the deceased. The defence merely said that the accused could not recall what happened and how the deceased was stabbed.

[54] He admitted that his defence that he lost his balance before the deceased was stabbed was not put to the Crown witnesses; and, that the defence constituted an afterthought. He further admitted that the defence did not put to PW5 that he was tortured. Similarly, the accused admitted that the defence didn't dispute the evidence of PW1 and PW2 that the accused stabbed the deceased using the knife found under the tree. Furthermore, the accused admitted that the defence did not put to PW5 that he was only cautioned about his legal representation and was not cautioned prior to the Pointing Out and interrogation.

[55] It is apparent from the evidence that the accused did not deny that he stabbed the deceased; what he said was that he could not recall how the deceased was stabbed. The accused didn't dispute the evidence of PW1 that he and Muzi Mdluli assaulted the deceased after Elvovo Dlamini had provoked him. The defence didn't dispute the Pointing Out of the knife or the fact that the accused killed the deceased using the knife found under the tree in the Game Reserve.

[56] The evidence shows clearly that the accused had *mens rea* in the form of “*dolus eventualis*”. The accused foresaw that the stabbing of the deceased in the chest where there are vital internal organs would cause his death but he was reckless whether or not death would occur. See the cases of *Annah Lokudzinga Mathenjwa v. Rex* 1970 -1976 SLR 25 at 30A and 31E; *Maphikelela Dlamini v. Rex* 1979-1981 SLR 195 CA at 198; *Rex v. Siboniso Mazibuko* and three others criminal case No. 232/2008 at page 6.

[57] The Crown cited the case of *S. v. Thembani* 2007 (2) SA 291 SCA at paragraphs 25 and 26 where the Supreme Court of South Africa dealt with the infliction of a dangerous wound from which the victim is likely to die without medical intervention. The present case is distinguishable in the sense that the deceased died immediately after the stab wound. The knife penetrated the chest causing a stab wound of 4 x 1 ½ centimetres; the knife further penetrated the left ventricle of the heart and the pericardial sac was ruptured.

[58] In light of the conclusion to which I have arrived, the defence of accident raised by the accused cannot stand. I refer to the case of *Rex v. Zwelithini Tsabedze* criminal case No. 163/2012 where this court approved and applied the Botswana case of *S. v. Ndiwenyu* (1990) BLR 409 at 416:

“....An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequences of such act is not so probable that an ordinary prudence man ought under the circumstances in which it is done, to take reasonable precautions against it.”

[59] At the time of the commission of the offence, the accused was young and aged seventeen years; and, therefore he was immature. Furthermore, the accused was drunk; and, it was not disputed that the accused and his friends were drinking liquor since mid-day when they arrived at Simunye until the early hours of the following day. In the circumstances the accused is convicted of murder with extenuating circumstances. The youthfulness of the accused as well as his intoxication constitute extenuating circumstances.

[60] Extenuating circumstances refer to facts which have a bearing on the commission of the offence and which have the effect of reducing the moral blameworthiness of the accused. It is trite law that the youthfulness of an accused when combined with other factors which affect his state of mind and emotions may constitute an extenuating circumstance; otherwise, youth alone does not. The onus of proving the existence of extenuating circumstances rests upon the accused. See the cases of *Philemon Mdluli and Others v. Rex* 1970 – 1976 SLR 69 at 75; *Mbuyisa v. Rex* 1979-1981 SLR 283 at 285 (CA); *Nkosi Sifiso v. Rex* 1987-1995 (4) SLR 303 at 309F; *Rex v. Enos Khumbula Shongwe* 1977-1978 SLR 60 at

61F (HC); *Mantolomane Maziya and Another* 1987 – 1995 (2) SLR 318 at 319H (HC).

[61] In mitigation the accused submitted that he was a first offender; he was seventeen years of age when the offence was committed; he was remorseful for what he did; he co-operated with the police; and, that he committed the offence due to peer pressure. However, the Crown submitted in aggravation of sentence that a human life was lost, and, that the family is still mourning the death of the deceased; the Crown further decried the increase of the use of knives in stabbing and killing innocent people.

[62] In arriving at the proper sentence, I will consider the triad, that is, the personal circumstances of the accused, the interests of society, as well as the seriousness of the offence. There is a drastic increase in murder cases in this country particularly the use of knives to stab others to death over minor or petty disputes. The carrying of lethal weapons such as knives during public gatherings continues to be a great cause for concern because it has resulted in the loss of many innocent lives. The intake of alcohol during these ceremonies cannot be used as a justification for the loss of life that ensues in the process. This court has a duty to impose appropriate sentences which should serve as a deterrence for future conduct in the commission of similar offences.

[63] Accordingly, the accused is sentenced to eighteen years imprisonment. The period of seventeen months spent by the accused in custody prior to his release on bail will be taken into account in computing the period of imprisonment.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Crown
For Defence

Attorney Macebo Nxumalo
Attorney Mary Pias Da Silva