



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 225/08

In the matter between:

REX

VS

NKOSINATHI RICHARD NEL

Neutral citation: *Rex vs Nkosinathi Richard Nel (225/2008) [2012] SZHC253 (2012)*

CORAM

MCB MAPHALALA, J

Summary

Criminal law – accused charged with murder and Attempted Murder – *mens rea* in the form of *dolus directus* established – accused accordingly convicted and sentenced to 25 years and nine years imprisonment respectively – sentences to run concurrently to date of arrest.

Judgment
13th September 2012

[1] On the first count the accused was charged with murder and the Crown alleged that on the 30th January 2008 at Timbutini area in the Manzini region, he unlawfully and intentionally killed Florence Sigudla. The accused pleaded guilty to culpable homicide. The Crown didn't accept the plea.

[2] On the second count the accused was charged with Attempted Murder and the Crown alleged that on the 30th January 2008 at Timbutini area in the Manzini region the accused with intent to kill unlawfully assaulted Stanley Nel. He pleaded not guilty to the charge.

[3] A Memorandum of Admitted Facts was presented in Court by consent and duly signed by the defence and the Crown Counsel: Firstly, the accused admitted that on the 0th January 2008 at Timbutini area in the Manzini region, Florence Sigudla was killed. Secondly, the report of the post-mortem examination on the body of the deceased in count 1 which was conducted on the 7th February 2008 was admitted as part of the evidence. Thirdly, the two reports of Dr. N. Tshilumba compiled on the 30th January 2008, one for the deceased and the other for the complainant are admitted as part of the evidence. Fourthly, the photographs taken at the scene were also admitted in evidence.

[4] The medical report of the deceased shows that the deceased died before her arrival in hospital, her clothing was bloody and she had suffered a penetrating wound to the right side of the chest. The medical report was admitted and marked exhibit 1.

[5] The post-mortem report prepared and signed by Dr. Komma Reddy who conducted the autopsy states that the cause of death was due to multiple stab wounds. The report further shows four stab wounds on the right side of the front chest, the right side of the abdomen, on the right and middle side of the left elbow. There was also a cut wound on the middle backside of the left upper arm. The postmortem report was admitted in evidence and marked exhibit 2.

[6] The medical report of Stanley Nel, the complainant in the second count, prepared and signed Dr. N. Tshilumba who conducted the medical examination states that the condition of the deceased's clothing was bloody; and there was a penetrating wound inflicted on the abdomen. The medical report was admitted in evidence and marked exhibit 3.

[7] PW1 Stanley Jimmy Nel testified that he resides at Timbutini area, and, that he knew the accused person as his cousin; they have stayed together at Timbutini homestead for three years.

[8] On the 30th January 2008 he was sleeping in one of the houses within the homestead; and, he was woken at up 6 am by a sharp pain on his back. He woke up screaming, and, as he looked back he saw the accused carrying a spear. He stabbed him for the second time on his stomach; then he ran out of the room. The first stab wound was inflicted whilst he was asleep.

[9] He went to the deceased's house where she was sleeping and knocked at the door; she opened the door and he asked her to rush him to hospital since he had just been stabbed by the accused. His other cousin Bongani Mahlalela came out from another house and tried to assist PW1 to board the bakkie; and, they drove towards the gate. Bongani Mahlalela was driving the motor vehicle and PW1 was sitting on the bakkie. The deceased was on the front passenger seat.

[10] They found the gate locked, and, the keys were in the deceased's room. Bongani Mahlalela went to fetch the keys leaving PW1 and the deceased in the motor vehicle. He heard Bongani Mahlalela screaming from the deceased's room; the accused came towards them carrying the spear. PW1 jumped from the bakkie and tried to get over the gate.

[11] The deceased went out of the motor vehicle and asked the accused what was happening. However, the accused pushed her towards the motor vehicle and she fell

on the ground. He stabbed her whilst she was on the ground facing up. Bongani Mahlalela came to help her by taking the spear from the accused. PW1 came back and together with Bongani Mahlalela they tried to attend to the deceased who was seriously injured and was bleeding very heavily.

[12] Bongani Mahlalela threw the spear at a distance; then he put the deceased in the front seat and PW1 jumped on the bakkie. The accused retrieved the spear and started breaking the car windows with the spear trying to get hold of the deceased and Bongani Mahlalela inside the motor vehicle. Bongani Mahlalela then drove the motor vehicle over the gate in order to run away from the accused.

[13] Along the road they found a police checkpoint, and, they reported the incident to the police. The police instructed Bongani Mahlalela to drive PW1 and the deceased to RFM Hospital. PW1 was admitted at the RFM Hospital for ten days. He learnt from reading the newspapers on the next day that the deceased had died. He further told the court that he had not fully recovered from his injuries.

[14] Under cross-examination PW1 told the court that they have been staying with the accused since 2005, and, that prior to that time, he was staying with a criminal gang at the Matsapha dump site. He further told the court that the deceased was good to the children of her siblings; hence, she lived with them and gave them a proper education.

[15] PW1 denied that he had hit the accused with an ashtray on the head and further kicked him for using airtime in his cellphone; he admitted exchanging serious words with the accused. PW1 further denied that a fight had ensued between them resulting in the accused picking up a spear from the house they were occupying at the time; and that the fight went outside the house where the deceased intervened by hitting the accused with an object on his back. PW1 denied that there was a fight at all between him and the accused and insisted that the accused attacked him for no apparent reason.

[16] PW2 Bongani Mahlalela testified that on the 30th January 2008 at about 0530 hours he heard noise from outside the house and opened the door. He noticed that PW1 was bleeding and heard the deceased asking what had happened to him. The deceased, PW1, the accused as well as PW2 slept in separate houses within the homestead.

[17] PW1 told the deceased that he had been stabbed by the accused; the deceased asked PW2 to put PW1 in the motor vehicle so that he could be driven to hospital. PW2 boarded the motor vehicle with PW1 and the deceased; they found the gate locked, and, the deceased told PW2 to fetch keys from her house.

[18] The accused emerged from behind PW2 and stabbed him with a spear. PW2 locked himself in the deceased's house; and, the accused went to the gate. PW2 peeped through the window and saw the accused stabbing the deceased, and, PW2 ran to the gate and found the accused still stabbing the deceased. PW2 wrestled with the accused and took the spear; he threw it away into the fields. PW2 drove the motor vehicle over the gate causing it to open. Meanwhile the accused ran to the fields where he retrieved the spear and tried to stab the deceased through the car window and bending the spear in the process; the window was broken but PW2 was able to drive the car away. The accused ran after the motor vehicle but couldn't reach it.

[19] They found police mounting a check-point along the road to RFM Hospital; PW2 reported the incident to the police, and, they advised him to drive the deceased and PW1 to hospital, and, that they would look for the accused. The deceased died on arrival at the hospital.

[20] PW2 described the relationship between the accused and himself as cordial, and that he never said anything before stabbing him, PW1, and the deceased. PW2 denied that he was stabbed when he together with the deceased tried to overpower the accused who was fighting with PW1.

[21] PW2 further denied as alleged by the accused that the deceased was stabbed by mistake whilst he was defending himself against the attack by PW1. PW2 reiterated his evidence that the accused committed the offences deliberately because there was blood on the bed where PW1 was sleeping, blood at the gate where he stabbed the deceased and blood in the Rondavel where he stabbed PW2.

[22] PW2 further denied as false an allegation by the accused that prior to the incident, he had gone to PW1's house to ask him to drive him to school; PW2 stated that this could not be true since schools were still closed for the Christmas holidays.

[23] PW3 Detective Constable David Horton, the investigating officer in the case, testified that on the 30th January 2008 whilst conducting a police roadblock in Manzini next to Manzini Living Waters, a motor vehicle transporting the deceased and PW1 to hospital arrived driven by PW2; and that PW2 reported the incident to the police. He saw two injured people and further took their details; the deceased was unconscious and PW1 wrapped with a white towel which was bloodstained. He further took the details of the accused, and then proceeded to the deceased's homestead with two other police officers to look for the accused whilst the injured people proceeded to hospital.

[24] The police found the accused at the homestead and introduced themselves. They further cautioned him in accordance with the Judges' Rules that he was not obliged to say anything but that whatever he said would be recorded in writing and used as evidence during the trial. There were bloodstains in his hands, shirt, on the floor, on the couch as well as the Rondavel.

[25] In the house adjacent to the Rondavel, doors were open, and, there were bloodstains from the veranda to the other rooms. On the bed there was a pool of blood; tissue papers which were scattered on the floor were soaked in blood as well as a towel found on the floor which was also soaked in blood.

[26] The accused was arrested and taken to Manzini Police Station. Thereafter, they proceeded to RFM Hospital where they recorded statements from PW1 and PW2. The deceased had died upon her arrival at the hospital.

[27] Back at the Manzini Police Station, they formally charged the accused of Murder, Attempted Murder and Assault with Intent to cause Grievous Bodily Harm. After cautioning the accused in terms of the Judge's Rules that he was not obliged to say anything but that whatever he said would be recorded in writing and used as evidence during the trial. The accused decided to say something and thereafter led the police to the deceased's homestead where they found several neighbours gathered on the premises.

[28] The accused led them to the gate where they noticed that the gate was chain-locked but broken down. There was a number plate on the ground, broken window glasses of a motor vehicle as well as blood. The accused pointed a spear on the grass next to the gate; the spearhead was detached from the spear-handle and further bent. This evidence corroborates the evidence of PW1 and PW2 in all material respects.

[29] Items taken at the scene included the spearhead which was bent, the spear-handle which was detached from the spearhead as well as a bloodstained shirt worn by the accused during the commission of the offence. These items were admitted in evidence during the trial. The spearhead was marked as Exhibit A, the spear-handle as Exhibit B and the accused's shirt as Exhibit C.

[30] Under cross-examination PW3 told the Court that the accused was sober when he was arrested; that initially he was evasive but when the investigation progressed, he became co-operative. He told the Court that the Scenes of Crime Officer took pictures of the scene in the presence of the accused; and, that these pictures were part of the exhibits which were subsequently burnt by a mysterious fire at the Manzini Police Station. PW3 maintained his evidence with regard to the blood found on the premises.

[31] The accused in his evidence in chief testified that his mother Rose Dlamini is a sister to the mothers of PW1 and PW2. He told the court that he spent the night preceding the incident at the parental homestead of his friend. During the night he had received a phone from PW1 asking for his whereabouts. PW1 had chastised him for not sleeping at home; he told PW1 that he couldn't return at night because it was dark and that he was scared to walk alone at night.

[32] He returned home the next morning and prepared to go to school; however, PW1 and PW2 disputed that the accused had gone to school the previous day or that he was going to school on the fateful morning as alleged. According to PW1 and PW2, schools were closed.

[33] He went to PW1's house and knocked at the door; PW1 asked him where he was last night. Before he could explain anything, PW1 threw a glass ashtray at him; and that when he tried to run away, PW1 kicked him and he collided with a door. He took a spear which was in the house with the hope of threatening PW1 to stop assaulting him. However, PW1 didn't stop assaulting him; hence, he stabbed him in the stomach. Thereafter, he ran away and PW1 chased after him.

[34] On his way out of the house, he met PW2; and, he was still carrying the spear. He ran towards the gate and PW1 and PW2 threw a stick at him and he fell down; they kicked and hit him with sticks and the spear fell to the ground. The deceased came to assist him and pulled PW1 and PW2 away; hence, he was able to rise up. He took the spear and tried to defend himself. However, he was not aware how the deceased was stabbed; he only noticed that she was stabbed when she was being taken to the motor vehicle.

[35] He told the court that he could not recall how PW2 was stabbed. After they had gone to hospital, he realized that he was covered in blood. He bathed himself; then, he took the First Aid bag and bandaged his injuries. He took money from the safe since he knew where the keys were kept; then he took car keys to drive to

Mafutseni Police Station to report the incident as well as to Pastor Thwala who attended church with the deceased. He also wanted to fill the car with petrol.

[36] About five hundred metres away from home, three police officers arrived looking for him; and, they asked him why he had stabbed the three family members. They demanded the spear used in committing the offence and he gave them. They further told him that the deceased died in hospital upon her arrival.

[37] He further told the court that he regretted the death of the deceased because she provided for all his needs; and, that he apologized to the court, the country, the family and his community for the death of the deceased.

[38] Under cross-examination, he told the court that he stabbed PW1 and PW2 in self-defence. He denied that he stabbed PW1 on the back but in front; however, the medical report states that PW1 was stabbed at the back. Such evidence corroborates the evidence of PW1 that the accused stabbed him at the back whilst he was asleep. Whilst admitting that after stabbing PW1, he ran away, he told the court, for the first time, that PW2 was also carrying a spear; however, this allegation is not supported by the totality of the evidence adduced.

[40] The accused further alleged that the deceased was trying to assist him when she was stabbed, and, that she was injured when he was brandishing the spear to defend himself. He admitted that the deceased sustained four stab wounds. Similarly, he admitted stabbing PW2.

[41] He admitted that the evidence of PW1 and PW2 was not disputed that the motor vehicle was driven over the gate to evade further stabbing by him. Similarly, he admitted that the evidence of PW3 was never challenged by the defence that the police found the gate chain-locked but broken when they came to arrest the accused.

[42] The accused didn't dispute the evidence of PW1 and PW2 that he stabbed the deceased repeatedly at the gate; and, that he used the same spear in stabbing the deceased, PW1 and PW2. Similarly, he didn't dispute the evidence of PW2 that he dispossessed him of the spear and threw it in the fields because he wanted to continue stabbing the deceased. Furthermore, the defence did not dispute the Crown's evidence that the accused ran to the fields where he retrieved the spear and attacked the deceased again, breaking the window in the process; the spearhead was also bent corroborating the evidence of PW1 and PW2.

[43] The Crown has proved the commission of the offence of Murder and Attempted Murder respectively against the accused beyond reasonable doubt. The *actus reus* is not in dispute, that it is the accused who inflicted multiple fatal injuries upon the deceased; and that he further inflicted injuries on PW1 and PW2. It is common cause that the deceased died upon arrival at RFM Hospital consequent upon her the multiple injuries inflicted upon her by the accused; similarly, it is common cause that PW1 suffered the injuries pursuant to the attack upon him by the accused. PW1 had to be hospitalized for the injuries sustained for ten days.

[44] The evidence of PW1 that he was stabbed by the accused in house whilst he was sleeping without any provocation has not been challenged. His evidence that he was stabbed at the back corroborates the medical evidence that he sustained injuries on the back. The evidence of PW1 is further corroborated by the evidence of PW2 that PW1 was naked at the time that he was stabbed and had to be covered with a towel before he boarded the car to hospital. PW3 also told the court that when the police stopped the motor vehicle at a police roadblock, PW1 was only covered with a towel.

[45] The evidence of PW2 that he was stabbed inside the house by the accused is corroborated by the medical evidence; furthermore, PW1 also corroborates the evidence of PW2 that the deceased had left the gate keys and she sent PW2 to look for

them in her house. The accused attacked him when he was in the deceased's house looking for the gate keys.

[46] The evidence of PW1 and PW2 corroborate each other that after stabbing PW2, the accused attacked the deceased who was at the gate and inflicted multiple injuries upon her. PW2 rushed to the scene and dispossessed the accused of the spear and threw it into the fields. The accused retrieved the spear and attacked the deceased, breaking the window and the spear. PW2 had to drive over the locked gate to avoid further stabbing of the deceased by the accused.

[47] The conduct of the accused shows that the accused had *mens rea* in the form of *dolus directus* in committing the murder as well as the Attempted Murder. In determining *mens rea* in the form of intention, the court must have regard to the lethal nature of the weapon used, the extent of the injuries inflicted as well as the part of the body where the injuries were inflicted. If the injuries are grave such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on delicate organs of the body using a dangerous lethal weapon, the conclusion would be inescapable that *mens rea* in the form of intention existed. See the cases of *Ntokozi Adams v. Rex* Criminal Appeal No. 16 of 2010 ; *Xolani Zinhle Nyandzeni v. Rex* Criminal Appeal No. 29 of 2010.

[48] In addition there is no evidence that the accused was provoked or that he was acting in self-defence. He stabbed not only the deceased on whom he inflicted multiple fatal injuries, but, he also stabbed PW1 and PW2. His conduct shows that the offences were premeditated, starting with PW1 who was naked and asleep as well as PW2 who was fetching the gate keys to rush PW1 to hospital.

[49] Both Murder and Attempted Murder requires *mens rea* in the form of intention. In the case of *Rex v. Heusch* 1953 (2) SA 561 (A) at 561 *Schreiner JA* held that in order to support a conviction for Attempted Murder there need not be a purpose to kill proved as an actual fact; it is sufficient if there is an appreciation that there is some

risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. This case was approved and followed by the court of Appeal of Swaziland, as it then was, in the case of *Henwood Thornton v. Rex* 1987 -1995 SLR 271 at 273. However, in the present case the two offences were premeditated.

[50] Accordingly, I convict the accused as charged. I am unable to find extenuating circumstances in this matter. The defence submitted two grounds as constituting extenuating circumstances, namely, youthfulness as well as provocation. As stated in the preceding paragraphs, there is no evidence of provocation. With regard to youthfulness, it is trite law that youth alone cannot be an extenuating circumstance unless it is combined with other factors which have a bearing on the moral blameworthiness of the accused; however, it has to be shown that the factors cumulatively had an effect on the accused's state of mind in doing what he did. See the case of *Nkosi Sifiso v. Rex* 1987-1995 (4) SLR 303 at 309 F (HC); *Rennie Bernard v. Rex* 1987-1995 (1) SLR 201 at 207h (CA); *Mbhamali v. Rex* 1987-1995 (3) SLR 58 at 62h (CA).

[51] In mitigation the defence submitted that he was a first offender; he was fifteen years of age; that he admitted stabbing the deceased and Stanley Nel; he was cooperative with the police during investigations; and that he was remorseful for committing the offence.

[52] In aggravation of sentence the Crown submitted that the accused used a dangerous weapon to commit the offences, that the deceased had not provoked him, that the deceased was her breadwinner providing him with shelter, food, education and all necessities of life.

[53] In arriving at the appropriate 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 offences for which the accused has been convicted. I agree with the

Crown that the aggravating factors exist in this matter on the grounds advanced by the Crown and that society expects the Courts to impose such sentences which are commensurate with the seriousness of the offence. *Holmes JA* in the case of *S. v. Kumalo* 1973 (3) SA 697 (AD) at 698A stated that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

[54] The accused is a young man of nineteen years of age who should be given a second chance in life for purposes of rehabilitation. He is also a first offender. Accordingly, a sentence of twenty five years imprisonment for murder and nine years for attempted murder would be appropriate in the circumstances. The two sentences will run concurrently with effect from the date of arrest on the 30th January 2009.

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

For Crown
For Defence

Senior Crown Counsel Brian Magagula
Attorney Justice Mzizi