



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 447/10**

**In the matter between:**

**THE KING**

**And**

**MADEYI PARIS DLUDLU**

Neutral Citation: Rex vs. Madeyi Paris Dlundlu (447/2010) [2012] SZHC 35  
(1<sup>st</sup> June 2012)

**CORAM: SEY J.**

**Heard: 23 February 2012, 14 March 2012, 16, 19 & 30 April 2012**

**Delivered: 1 June 2012**

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**JUDGMENT**

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**SEY J.**

- [1] The accused **Madeyi Paris Dlundu** is indicted on two counts, being murder and assault with intent to cause grievous bodily harm. The indictment dated the 18<sup>th</sup> day of November, 2010 reads as follows:

**“Count One**

The accused is guilty of the crime of **Murder**,

In that upon or between the period of the 8<sup>th</sup> November 2009 and at or near Mambatfweni area in the District of Manzini, the accused person did unlawfully and intentionally kill Zandile Mabuza.

**Count Two**

The accused is guilty of the crime of **Assault With Intent To Cause Grievous Bodily Harm.**

In that upon or about the 8<sup>th</sup> November 2009 and at or near Mambatfweni area in the District of Manzini, the accused person acting jointly and in the furtherance of a common purpose with a person unknown to the prosecution did wrongfully and with intent to cause grievous bodily harm, assault **Bheki Siram Vilakati.**”

- [2] Upon being called upon to plead, the accused pleaded not guilty to both counts and defence counsel Mr. Dupont indicated that the pleas accorded with his instructions. In support of its case, the Crown led the evidence of seven (7) witnesses who adduced *viva voce* evidence. The accused was the only defence witness and he testified under oath.
- [3] I find it apposite to mention at this nascent stage that certain legal issues are common cause. In the first place, it is not disputed that the deceased person Zandile Mabuza is dead. There is also no

dispute as far as the identity of the accused person is concerned. The Crown witnesses who know him well gave evidence of this fact and identified him before Court and even the accused placed himself at the scene of crime during his testimony.

- [4] PW1 Nontobeko Ngwenya testified that on 8<sup>th</sup> November 2009, she was at the homestead of the accused where she was sleeping with the deceased and her four children. She said that all six of them were sleeping in one bedroom and that there was only one bed in the room and that she was sleeping on the bed with the deceased whilst the children were sleeping on a mat. PW1 also testified that the deceased was the accused's wife and that the accused came home around 1 a.m. and knocked on the door but there was a delay in opening the door because the deceased was attending to a child who had messed up the bed with human waste.
- [5] PW1 went on to tell the Court that when the deceased opened the door the accused assaulted the deceased and the accused hit the deceased with fists and hit her head against the floor whilst they were inside the house. That the accused then pulled the deceased outside the house and he continued assaulting her with fists. That the deceased tried to run away but she fell and the accused caught up with her and continued with the assault with fists and the accused then kicked the deceased on the head and that she was just lying down on the ground motionless. That one Gcina and Teen were trying to restrain the accused from assaulting the deceased.

- [6] PW1 further testified that the gentleman who had accompanied the accused helped her to take the deceased into the house and that they lifted her and placed her on the bed. She told the Court that the accused was present when they took the deceased into the house but that he did not assist them. She said that at about 4 a.m. she left the accused's homestead and she went to the main Dlundu homestead where she retired for the night. In respect of count 2, PW1 testified that when Bheki Vilakati was allegedly assaulted by the accused and the unknown person, she was not there as she had left the accused's homestead.
- [7] In answer to questions put to PW1 under cross examination, she maintained that, at the material time, she was together with the deceased and her four children and that they were all sleeping in one bedroom. She said that the accused had knocked on the bedroom window and the deceased had lit a candle after the accused had knocked. She confirmed that the accused had asked the deceased to light a candle. However, she maintained that they had originally lit a candle but it went off.
- [8] PW1 further stated that during the time the accused was knocking the deceased did not respond and that the deceased had waited for about 30 minutes before she went to open the door. She denied that there was a man who bolted out of the house when the accused was knocking and she said that there was no altercation between the

accused and the deceased about any man. She also confirmed that when the deceased opened the door the accused did not say anything but merely proceeded to assault her. She stated that she was present in the bedroom when the door was opened and that she saw the accused when he got into the house. PW1 maintained that the assault took place in the bedroom where the accused hit the deceased's head on the floor. She said at the time of the assault, the children who were sleeping in the bedroom woke up.

[9] PW2 testified that on 8<sup>th</sup> November 2009 at about 3.a.m he was awoken from his sleep by the accused's brother, Teenager Dlundu, who told him that the accused was calling him. He said no reason was given to him and he thought the accused was calling him as a friend. He said he did not respond to the call and then the accused and a person unknown to him came to fetch him at his homestead and they took him to the accused's homestead and assaulted him. He further testified that when they got to the accused person's homestead, they found the deceased lying on the ground and that the accused told him that he was going to do to him what he, the accused, had done to his wife.

[10] PW2 further testified that he was lying on the ground when the accused assaulted him and hit him on his back and on his eye. He said he was injured during the assault and he was rescued by one Sabelo Ngwenya. Exhibit "B" which is the medical report relating to PW2 was handed in by consent. It indicates that on examination,

PW2 had multiple bruises and abrasions on the face and back. The bruises on the face included bruising to the left eye and there was also bruising to the lower neck and part of the left side of the chest. PW2 said the accused had told him that he had assaulted him in the manner in which he did because he was sexually involved with his wife. He denied the allegation and he told the Court that he had no sexual relationship with the deceased and that he had told this to the accused when he was assaulted by him.

[11] Under cross examination, PW2 denied bolting out of the accused's homestead and he maintained that he had been fetched from his house where he was sleeping. He said that the accused pushed the door and entered his room and woke him up and then grabbed him without saying anything and that it was after the accused had assaulted him on reaching his homestead that he told him that he was sexually involved with his wife. PW2 admitted that the accused had on previous occasions told him that he did not like the idea of him drinking with his wife. He however went on to state that he had told the accused that he used to drink with his brother and not with his wife.

[12] The pathologist, Dr. Komma Reddy, who testified as PW3, produced and tendered his report which was admitted in evidence as Exhibit "A." PW3 went on to tell the Court that the following ante mortem injuries were present on the deceased:

*"Bruising around the left eye.*

*Contusion of 12 x 7 cms on the front portion of the right side of the head.*

*Contusion of 13 x 8 cms on the front portion of the left side of the head.*

*Right temple bone of the skull was fractured.*

*Extra-dural and intra-cerebral haemorrhage in the brain.*

*Mediastinum and thymus ruptured.*

*Pleural cavities contained about 200ml of blood.*

*Right and left lungs were congested.*

*Petechial haemorrhages on the heart*

*Contusion of 11 x 9 cms on the middle portion of the abdominal wall.*

*Peritoneal cavity contained about 300 ml of blood*

*Liver, gallbladder and biliary passages ruptured.*

*Pancreas congested.*

*Spleen ruptured.”*

[13] Dr. Reddy's conclusion was that death was due to multiple injuries caused by massive blunt force like stamping or kicking. This witness was not cross-examined by defence counsel.

[14] PW6 was 4023 Detective B. Dlamini who is a scene of crime examiner and photographer. He told the Court about the scene of crime and he handed into Court exhibits "C1 - C4".

[15] PW7 was Constable Mfanzile Dlamini who was the investigator of the charges faced by the accused. He told the Court that one of the

things he observed at the scene was that there was human waste on the bed on which the deceased was lying. This piece of evidence corroborates PW1's evidence that a child had messed up the bed with human waste and that was why the deceased had delayed opening the door for the accused. PW7 further testified that the accused was not at the scene of crime and that on the 11<sup>th</sup> November, 2009 he was at the charge office when one Sonto Dlodlu accompanied the accused to the police station where the accused surrendered himself. PW7 said he introduced himself to the accused as an officer and investigator of the case and that he cautioned the accused and accordingly charged him. Under cross-examination, PW7 was asked if he had seen any pool of blood or droplets in the room and he answered that there were droplets of blood in the room.

The Crown then closed its case.

### **DEFENCE CASE**

[16] The defence opened its case and the accused gave sworn evidence in his defence. The accused told the Court that the incident had happened on a Saturday evening past midnight after he came back from work in the Republic of South Africa in the company of a friend whom he works with. The accused further testified that upon reaching his homestead at Mambatfweni area, he proceeded to knock on the door of his house but there was no response and so he proceeded to knock on the window. He said that he knocked for about 30 minutes without any response and that whilst he was



knocking on the window a man bolted from the door of his house. The accused told the Court that he identified the man as Bheki Vilakati who had testified as PW2. He said that he and his friend tried to run after Bheki Vilakati but he outpaced them and that after they could not catch up with PW2 he went back to the house where the deceased opened the door.

[17] The accused further testified that he enquired from the deceased why she had not opened the door but there was no response from the deceased. He said that he slapped her with an open hand and told the deceased to light the candle but the deceased responded by saying there was no candle. Testifying further, the accused said that this angered him and he asked what the deceased had done with the sum of E2,000.00 (Two Thousand Emalangeni) he had left with the deceased a few weeks ago to buy household items.

[18] The accused told the Court that he then asked the deceased who the man who had come from the house was but the deceased did not respond. He said he assaulted the deceased with an open hand and he then took her outside where he continued to assault the deceased on the face with a fist and she fell against the wall and then she later on fell down.

[19] Testifying further, the accused said that his brother, Mbongiseni Teenager Dlodlu had woken up and was sent to call Bheki Vilakati twice but Bheki did not adhere to the call. The accused said he then

went to fetch Bheki from his homestead and he took him to his homestead where he assaulted him. The accused said that he then asked that the deceased be washed as she was bleeding. He said that in the morning after realising that his wife was not responding to him he sent his child to call a neighbour, LaMasuku, who, after touching the deceased and trying to turn her, then told the accused that Zandile had passed on.

[20] The accused testified that he told LaMasuku to call the police and to inform the deceased's parents as well as to arrange for the deceased to be taken to the hospital. He also said that he told LaMasuku that he was going back to South Africa to report at his workplace and that he would later return home. He told the Court that on the 11<sup>th</sup> day of November 2009, he returned from work and surrendered himself to the police in the company of his sister, Sonto Dlodlu. He said that he did not intend to injure or kill the deceased and that he also did not intend to assault Bheki Vilakati with intent to cause grievous bodily harm.

[21] In cross examination by Crown counsel, it was put to the accused that the cause of the fractured skull found by PW3 on the deceased was because the accused had kicked her on the head. However, the accused disputed this evidence and he also denied that he had subjected the deceased to a prolonged assault. The accused was also cross-examined on why he did not take the deceased to the hospital and his response was that the deceased had said that they

will see in the morning if she needed to be taken to the hospital.

[22] When it was put to the accused that there was no man found in his house he maintained that there was a man and that it was PW2 and, further, that he had seen him as he bolted out of the house. The accused was further asked where this man could have been inside the house as PW1 had said she and the deceased were sleeping on the bed whilst the children slept on the mat. The accused's response was that he would not know as there is also a sitting room and sofas in the house. It was put to the accused that he intended to kill Zandile, his wife, but he denied this and he told the Court that he was just angry and that he would not kill his wife as they had stayed together and they had children.

[23] Judging from the perspective of the accused, his version of the events as they unfolded on 8 November 2009 is simple. The accused told the Court that when he arrived home from work the deceased delayed in opening the door for him and, that when she eventually did so after thirty minutes, PW2 Bheki Vilakati bolted out of the house. His evidence was clearly contradicted by PW1 and PW2. However, he did corroborate PW1 and PW7 on the presence of human waste on the bed. The accused also sought to persuade the Court that his assault of the deceased was not as severe as put by PW1 who testified that he had hit the deceased's head against the floor and kicked her on the head. The accused maintained throughout that he only assaulted the deceased with his open hand and fist. However, this evidence by the accused was clearly

contradicted by PW3 who had conducted a post mortem examination on the deceased's body.

[24] It is submitted by defence counsel that the evidence of the Crown lacks credibility as during cross examination of PW1, PW4 and PW5 there were material contradictions in their evidence. It is further submitted that PW1 gave two different versions whilst testifying, in that she told the Court that she did not witness any assault outside the house but she then gave evidence that she did witness the assault on the deceased and that the accused kicked the deceased whilst they were outside the house. It is also submitted that although PW1 had testified that during the assault on PW2 she was not at the scene, the evidence of PW4 and PW5 is that PW1 was present during the assault of PW2.

[25] In my considered view, these are not material contradictions as they do not in any way negate the crucial issues in this case. As **H.C. Nicholas** aptly put it in his article on **“Credibility of Witnesses”** **1996 South African Law Journal, Vol. 102** at page 35:

*“The argument is often advanced in Court that, because witnesses’ accounts disagree, they lack veracity, and considerable time is spent in establishing and posing argument on contradictions and discrepancies. Such argument is fallacious. It is the case that where two or more witnesses give consistent evidence that may be a strong and indeed decisive indication that their story is a credible one.....But the converse is not true. It is not the case that lack of consistency between witnesses affords any basis for an adverse finding on their credibility. Where contradictory*

*statements are made by different witnesses, obviously at least one of them is erroneous but one cannot, merely from the fact of the contradiction say which one. It follows that an argument based only on a list of contradictions between witnesses leads no where as far as veracity is concerned."*

[26] On a proper analysis of the evidence adduced before this Court and the submissions made by both counsel, I find that the Crown's evidence was largely credible, corroborative on all material issues and therefore reliable. I find for a fact that PW2 corroborated PW1's testimony in relation to the point that the deceased was just lying down on the ground motionless and it is in evidence that when PW2 got to the accused's homestead, the deceased was lying on the ground motionless. I also find for a fact that PW4 Sabelo Ngwenya corroborated both PW1 and PW2 on the material issue that the deceased was lying on the ground motionless. Also, PW4 corroborated PW2 on the assault inflicted by the accused on him. Furthermore, I find for a fact that PW3 corroborated PW1 on the issue of the head injuries particularly the fractured skull. PW1 told the Court that the accused had hit the deceased's head against the floor and that he had also kicked her on the head. According to exhibit "A", the conclusion reached by PW3 was that death was due to multiple injuries caused by massive blunt force like stamping or kicking.

[27] It is also worthy of note that, in cross examination, the accused admitted that he was a truck driver of a 22 meter-long truck and that people who drive these big trucks are actually given hard shoes

to wear to work. He said these hard shoes are called "safety" and that they have iron on the outside. Mr. Magagula put it to the accused that at the time he assaulted the deceased he did kick her on the head, thus fracturing her skull. The accused denied this and he told the Court that the deceased might have hit a rock when she fell as the place where she fell was rocky. Nonetheless, upon perusal of exhibits "C1 - C4" which are the photos taken by PW6, and judging from the ante mortem injuries found on the deceased by PW3, I find for a fact that the injuries had been inflicted by the accused unleashing heavy fists and kicks on the face and head of the deceased. I hereby so hold.

[28] On the whole, I reject the accused person's version of the events that led to the death of his wife and, moreover, I find that the evidence of the accused was full of embellishment and totally unimpressive. I also observed the demeanour of the accused as he testified and, in my considered view, he showed no remorse and exuded the tendencies of a callous and cold-hearted person.

[29] The defence that the accused raised for killing his wife was provocation. According to his evidence, the accused felt provoked and angry that he had knocked for about 30 minutes without any response from the deceased and further that whilst he was knocking on the window a man had bolted from the door of his house and, literally, these feelings drove the accused to assaulting his wife and inflicting multiple injuries on her which caused her death. The

question requiring determination at this stage is whether the Crown has proved beyond reasonable doubt that the accused had unlawfully and intentionally killed the deceased.

[30] According to **Hunt Vol. II, The South African Criminal Law and Procedure, Juta, 1982** at 340, the crime of murder consists of the unlawful and intentional killing of another person. Intention is classified as legal or actual, the former being where the accused appreciates that his conduct might result in death but is reckless as to whether death results or not. It is also trite that “the intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.” See **R v Jabulane Philemon Mngomezulu 1970-1976 SLR at 7 (HC)**

[31] As His Lordship **Tebbutt JA** opined in the case of **Thandi Tiki Sihlongonyane v Rex Appeal Case No. 40/97**, Dolus can, of course, take two forms.

“(i) **Dolus directus** where the accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and

(ii) **Dolus eventualis** where the accused foresees the possibility of his act resulting in death, yet he persists in it reckless whether death ensues or not.”

[32] In this present case, the Crown has conceded that the accused may not have had direct intention to kill the deceased but that he had ***dolus eventualis*** which is legal intention sufficient for a conviction on murder. See the judgment of **Mabuza J.** in the case of **The King v Moses Siphila Ndwandwe Criminal Case No. 115/09**

[33] I must state that I totally agree with the Crown's submission as recorded in the foregoing paragraph. There is ample evidence, in my view, that the elements of ***dolus eventualis*** are extant in this case. These being (a) the subjective foresight of the possibility of death, however remote, as a result of the unlawful conduct of the accused; (b) persistence in such conduct despite such foresight; (c) the conscious taking of the risk of resultant death, not caring whether it ensues or not and (d) the absence of actual intention to kill. Briefly put, I find that the accused was reckless in the manner he assaulted the deceased and even though he appreciated that she might die he was reckless as to whether death ensued or not. I therefore find the said killing of the deceased by the accused unlawful and I so hold. In the circumstances, I find that the Crown has discharged the burden of proving the guilt of the accused beyond reasonable doubt. I therefore find the accused guilty of the crime of murder as charged in count one and I hereby convict him accordingly.

[34] In respect of count two, I am equally satisfied that the Crown has discharged the burden of proving that upon or about the 8<sup>th</sup> day of



November 2009 and at or near Mambatfweni area in the District of Manzini, the accused person, acting jointly and in the furtherance of a common purpose with a person unknown to the prosecution, did wrongfully and with intent to cause grievous bodily harm, assault Bheki Siram Vilakati. I therefore find the accused guilty of the crime of assault with intent to cause grievous bodily harm as charged and I hereby convict him accordingly.

**FOR THE CROWN**

**MR. B. MAGAGULA**

**FOR THE ACCUSED**

**MR. I. DUPONT**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE.....  
DAY OF JUNE 2012.**

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**M. M. SEY (MRS)  
JUDGE OF THE HIGH COURT**

