



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No: 140/10

In the matter between:

REX

and

MANCOBA MOKOENA

Neutral Citation: R v MANCOBA MOKOENA (140/10) [2012]
SZHC 65 (12 April 12)

Coram: MABUZA J

Heard: 12/12/2011, 14/12/2011, 9/01/2012

Delivered: 12 April 2012

Summary: Criminal law - Murder – Defences of provocation self-defence and intoxication raised; *mens rea* – proof of – intention in the form of *dolus eventualis* proved – Accused found guilty of murder.

Immigration – Contravention of section 14 (2) (C)
Immigration Act 17/1982 – illegal alien – Accused pleads
guilty.

[1] The Accused was indicted as follows:

COUNT 1

The Accused is guilty of the crime of **Murder**.

In that upon or about 24th February, 2010 and at or near Nyakatfo area in the Hhohho region, the said Accused did unlawfully and intentionally kill one **Canaan Khoza**.

COUNT 2

The Accused is charged with the offence of Contravening section 14 (2) (C) of the Immigration Act 17/1982

In that upon or about 24th February, 2010 and at or near Nyakatfo area in the Hhohho region, the said Accused person, not being a holder of a valid permit or licence, did unlawfully enter and remained in Swaziland without a valid residence permit and did thereby contravene the said Act.

[2] When the murder charge was put to him he pleaded not guilty and instead pleaded guilty to culpable homicide but the public prosecutor rejected his plea; the result of which the court entered a plea of not guilty to murder. He pleaded guilty in respect of count 2 and the public prosecutor accepted his plea.

[3] The Crown called a total of six (6) witnesses and the defence two (2).

[4] PW1, Tenele Zanele Mamba testified that on the 24th February 2010, she was at home at Nyakatfo in the Hohho District. She had brewed some marula beer which she sold to some people who were sitting in the yard under a tree. Among the people were the deceased Canaan Khoza, the Accused, Mageza Mthupha, Fana Masangu (PW3), together with a Malambe man. In between serving her customers she sat at the door of her house from where she could hear portions of their conversation. At some point she went to dish up food for her mother and when she returned she noticed that the deceased's T-shirt was wet on the chest. Apparently the Accused had spilt marula beer on him. In retaliation the deceased punched the Accused who promptly fell off the bench on which he sat.

[5] When the Accused lifted himself off the ground he went after the deceased who ran away. The Accused chased after him. They ran passed the first gate and at the second gate the deceased tripped and fell. All the witness saw thereafter was the deceased who was facing up kicking out at the Accused who was bent over the deceased making up and down motions. The witness called out to her mother who came onto the scene and rebuked the Accused. The Accused came away from the deceased who got up and ran outside the second gate and again fell further afield where cattle were normally herded. PW3 tried to help him get up but he failed as the deceased was too heavy. PW1 telephoned the police and reported the incident. The Accused left for his home.

The witness further testified that the deceased and PW3 had arrived at her home at 10:00 am. and had been drinking since then. The Accused had joined them at 2:00 pm. and had been there a short time before the fight between the Accused and the deceased started.

[6] When she was cross-examined she stated that the deceased was very drunk and the Accused who had just arrived was not so drunk and he had joined the others at about 2:00 pm. and that the incident had occurred at about 4:pm. She further confirmed that the Accused had shown her his right cheek where the deceased had punched him and it was swollen.

[7] PW2, Sarafina Mamba testified that the incident took place at her marital home and that PW1 was her daughter. She (PW2) was inside the house when she was alerted by PW1 that the Accused and deceased were fighting. She came out of the house and PW1 pointed them out and she (PW2) called out at the Accused to desist from beating the deceased. The Accused left the deceased and came towards PW2. She noticed that in his right hand he was carrying a knife the blade of which was bloodied. Someone brought the Accused's shoes and he left for his home. The deceased got up and went out through the cattle gate. Mr. Mzizi did not cross-examine her.

[8] PW3 Fana Sicelo Masango testified that he was one of PW1's customers on the 24th February 2010. He together with the deceased began drinking at about 10:00 am. The Accused joined them at about 2:00 pm. Upon arrival the Accused purchased marula and placed the container in which it was served next to the container of marula belonging to the witness. The deceased and the Accused shared a bench. The witness dozed off and when he awoke saw the Accused chasing after the deceased. A fight had started between them while PW3 was dozing. He followed the Accused and the deceased. He saw the deceased trip and fall and the Accused bent over him and appeared to be assaulting him. As the witness walked towards them the Accused moved away from the deceased who got up and ran away but fell down along the way. The witness ran after him held him but the deceased spoke his last words and died thereafter. The last words that the deceased uttered were that he asked why the Accused was killing him?"

[9] The witness noticed that the deceased was injured and was bleeding and his clothes were blood stained. The witness confirmed that before the Accused and the deceased chased one another they had an

altercation which ended in the Accused throwing marula brew on the deceased. He did not know the reason why as he was drunk and had begun to doze off. He did not see how the deceased was injured. When he passed the Accused along the way to the deceased he did not see any weapon on the Accused.

[10] Detective Sergeant Mhlaba Hlatshwayo (PW4) testified that on the 24/2/2010 at about 4:00 pm. he was called to the scene of crime where he took photographs of the deceased. He handed in the photographs as part of his evidence and these were labeled Exhibit “A1 – 5”. This witness removed the deceased clothes and noticed two wounds on his back and another above his buttocks. There was a wound on his chest and another near the right shoulder. The witness noticed a total of five wounds in all.

[11] PW5 Dr. R.M. Reddy, is the government pathologist. He conducted a post-mortem on the body of the deceased after it had been identified by his grandmother Agnes Tsela. He recorded his findings in a report. He testified that the cause of death was due to haemorrhage as a result of penetrating injury to the heart and left lung. There were five

wounds in all which included the two fatal wounds; one which went into the heart and the other into the lung. The wounds were consistent with having been caused by a sharp object like a knife, spear or dagger. He handed in the postmortem report and it was marked Exhibit "B".

[12] PW6, 4086 Detective Sergeant Patrick du - Pont was the investigating officer. He testified that after receiving the report of the deceased's murder he proceeded to the scene of the murder at the Mamba homestead. He was accompanied by some other police officers. Upon arrival he was shown the body of the deceased. He examined the deceased and concluded that he was dead. He telephoned PW5 and instructed him to take photographs of the body. The witness proceeded to the Accused's home where he found the Accused seated outside with his aunt. She was bandaging one of his legs. The witness introduced himself and advised the Accused that he was investigating the murder of the deceased.

[13] He cautioned the Accused by advising him that he had a right to remain silent but if he said anything it would be written down and

used in evidence at his trial. He cautioned him about pointing out as well. The Accused led him to a one room flat where he pointed out a knife in the bed covered by a blanket. The knife had a yellow handle and a blade which was seven centimeters long. The witness removed the knife, arrested the Accused and charged him for the murder of the deceased. The witness handed in the knife as part of his evidence and it was labeled Exhibit "1".

[14] Cross-examination of this witness elicited the information that the Accused was injured on the lower part of his thigh and that he had given instructions to the police to take him to the clinic for treatment on the date of his arrest. He was unaware if his instructions were carried out. When asked why if the Accused had been taken for treatment it became necessary upon remand for the Magistrate to order that he be taken for medical treatment, the witness responded that he was not aware that such an order had been issued. Asked if he had examined the wound he said he could not because the aunt had already bandaged it. He too confirmed that the deceased had five wounds in all. The crown closed its case after the evidence of this witness.

[15] The defence case opened with the evidence of the Accused (DW1). After taking the oath he testified that on the 24/2/2010 he left home at about 2:00 pm. for the Mamba homestead. He had been drinking marula brew prior to leaving home. He started drinking at 9:00 or 10:00 am. Whilst at home he received a phone call from PW3 who invited him to the Mamba homestead. He took a 5 litre container which had marula brew and proceeded to the Mamba homestead. When he arrived at the Mamba homestead he found PW3, Mthupha, the deceased and a Malambe man. They were all drinking. He placed his container on the ground and joined them and they sat in a circle. The deceased kept coughing and spat on the ground near to their drinks.

[16] The deceased was admonished by the Accused and his companions to desist but he refused and instead spat on the Accused's foot. The Accused angrily retaliated by throwing a cupful of marula brew at the deceased and it landed on his chest. The deceased stood up and punched the Accused on his face with the result that the Accused fell off the bench and landed on the ground. As he picked himself up, the

deceased ran away behind one of the houses at the homestead and out through a gate. The Accused chased after him. The deceased tripped and fell. When the Accused reached him, the deceased stabbed the Accused above the knee with a knife as he bent over him to try and hold him.

[17] They fought over the knife and rolled on the ground while doing so. The Accused managed to dispossess the deceased of the knife and PW2 called him and he went towards her while the deceased got up and ran away. When he got to PW2 she refused him entry into the homestead. Mthupha brought his shoes and he left for his own home. He testified that when he got home he was covered with blood as his leg was bleeding. He informed his aunt that the deceased had stabbed him and he showed her the knife he had taken from the deceased. His aunt cleaned his wound. She informed him that after she had finished cleaning the wound they should go and report the matter at the police station at Buhleni.

[18] While his aunt was talking to him the police arrived and informed them about the death of the deceased. The police arrested him and

charged him for the murder of the deceased. He advised the police that he was injured and wished to be taken for medical treatment but the police ignored him. He was taken for medical treatment after a magistrate had ordered it upon his remand. He has been in custody since his arrest.

[19] He was cross examined by Mr. Makhanya about his state of sobriety when he arrived at the Mamba homestead. He responded that he was drunk having started drinking early that day. It was put to him that PW1 had testified that when he arrived at the Mamba homestead he was not drunk but he denied this. It was put to him that when he arrived PW1 was seated outside and she saw that he was not drunk. He denied this. It was put to him that PW1 had testified that it was not long after his arrival that he was chasing after the deceased and that this proved that he was not drunk. He denied that he was not drunk. He disclosed that he had known PW1 for two years and that during those two years they had a love relationship and that they had broken up two weeks before the death of the deceased. He disclosed that during their relationship he had never drunk alcohol when with her and wondered how she could tell when he was drunk. He further

disclosed that when the deceased began spitting it was near their jar of marula brew. He further disclosed that he had known the deceased for two years and that the latter was very drunk on that fateful day. He stated that the deceased spat on his foot after spitting on the ground and he retaliated by throwing marula brew on him. None of the others saw the deceased spit on the ground as PW3 had dozed off as had Malambe.

[20] It was put to him that according to the evidence of PW1 she never saw them fighting or struggling over a knife with the deceased. She noted that after the deceased had fallen and the Accused had caught up with him all that she saw was the Accused bent over the deceased waving his hands while the deceased who was lying face up and waving his feet in the air.

[21] He denied that he stabbed the deceased 5 times and stated that five the wounds including the two fatal wounds found on the deceased may have accidentally occurred as they rolled on the ground while struggling for possession of the knife.

The Accused was asked how the deceased was injured on the back and not only on the front if he was only being dispossessed of the knife. His response was that PW3 had disclosed that he tried to pull the deceased from under the fence and he may have been injured by the barbed wire. When asked why he had hidden the knife in his bed, he denied that it was hidden. When asked if the knife had bloodstains, he agreed. When asked why it was clean when PW6 retrieved it from the bed he claimed that he had not washed it and stated that he did not know who had washed it as he was in police custody.

[22] The second defence witness was Girlie Mokoena (DW2) aunt to the Accused. She testified that the Accused left home at 3:00 pm. on the 24/2/2010 in order to visit his friends. He returned at about 4:00 pm. She observed that he had been injured on his leg and asked him what had happened. In answer to her question he replied that a friend of his had injured him and he mentioned a name that she did not know. She bandaged him with her headscarf. The Accused was carrying a knife when he arrived which he took into his house. Thereafter the police arrived and arrested the Accused.

[23] She revealed in cross-examination that the Accused had informed her that the injury on his leg was caused by a knife. After her evidence, the defence closed its case.

[24] I must state at the outset that I had grave concerns which I expressed to the Accused's attorney Mr. Mzizi. My concerns emanated from the fact that no defence for either murder or culpable homicide was pleaded nor put to the Crown witnesses on behalf of the Accused throughout the Crown case. The Accused's defence only became discernible when the Accused gave his evidence in-chief and the defences advanced were provocation, self-defence and intoxication.

[25] I have to now determine whether the Crown has discharged its onus of proving beyond reasonable doubt that the Accused is guilty of murder.

[26] Did the Accused have the requisite intention to kill the deceased?

[27] The evidence outlined above reveals that while seated on two benches opposite each other and drinking the deceased kept coughing and spitting on the ground next to the jar of marula brew that they were

drinking from. This habit annoyed the drinking party and they complained to the deceased in particular the Accused. PW1 did not see this part of the story as she kept going in and out of the house or attending other chores such as plaiting one of the children and at one time dishing up for PW2.

[28] Instead of being suitably admonished the deceased spat on the Accused's foot; the Accused wore an open sandal and the spit landing on his partly bare foot must have annoyed him. He retaliated by throwing a cupful of marula brew at the deceased. The marula brew landed on the deceased's face and chest, wetting his T-shirt in the process. The deceased retaliated by punching the Accused who promptly fell off his seat and onto the ground. When he lifted himself off the ground he went after the deceased who ran away. PW1 witnessed the incident from the time the deceased punched the Accused. She did not see how the altercation began but she did notice the deceased's wet T-shirt. PW3 had dozed off so he did not witness the incident either he only awoke when the Accused was chasing the deceased.

[29] The above scenario is too minute and insignificant to give rise to a rage leading up to murder so we must look elsewhere for this.

[30] The deceased ran out through the first gate but tripped and fell with the Accused hot on his heels who caught up with him. Nobody saw what followed thereafter even though I got the impression that PW1, PW2 and PW3 were protective of the Accused. Though PW2 stated that the deceased fell 35 – 40 metres away from her she did not see how the deceased was stabbed. The only information before the court is that told by the Accused. He says that the deceased stabbed him above the knee of his left leg, they then struggled over the knife and the deceased got stabbed during this process.

[31] Assuming that the Accused is correct that the deceased stabbed him above his left knee he has not told the rest of the story as to how the deceased had five stab wounds nor how the two fatal wounds were inflicted. The Accused gave the impression that the two fatal wounds one on the chest and the other on the back were inflicted by accident while they both were rolling on the ground fighting over the knife. The likely story in my view is that when the deceased fell and the

Accused caught up with him he inflicted the wounds on the chest and shoulder. The deceased tried to ward him off by kicking him; hence the waving of the feet of the deceased as seen by PW1 and PW2. PW2 saw the Accused kicking the deceased while the latter was still on the ground. He may have tried to avoid the kicks by rolling away from the Accused who inflicted the three wounds on the back the centre wound being fatal.

[32] Mr. Mzizi for the Accused has asked the court to believe the story that the deceased inflicted the wound on the Accused's left leg. The investigating officer PW6 and the Accused's aunt corroborated the story that the Accused had a wound on the left leg just above the knee. PW6 did not investigate the circumstances surrounding the Accused wound and how he had obtained same. As an investigating officer he ought to have taken the Accused to the hospital to enable the doctor to explain to him the nature of the wound and what weapon could have possibly caused it. To this end a medical report would have been filed to controvert a possible defence of self defence or even strengthen it. He did not do so and I must therefore accept the Accused's story that the deceased caused the wound on the Accused's thigh.

[33] Turning to the issue of the knife: it was submitted by the Accused that the knife belonged to the deceased. Once again the investigating officer failed to investigate the circumstances surrounding the ownership of the knife. The relatives and friends of either the deceased or the Accused could have identified the knife and such evidence placed before this court. This was not done and I must believe the Accused's story that the knife belonged to the deceased.

[34] The Accused told this court that he began drinking in the morning even though PW1 stated that when he arrived at 2:00 pm. he was not drunk. Once again the investigating officer failed to investigate this piece of evidence. I believe the Accused when he says he began drinking in the morning and by the time he arrived at the Mamba homestead he was drunk.

I know from experience that during the marula season, there is a tendency to drink marula brew at all hours of the day because it is cheap and easy to brew and the season therefore is very short, so that everyone makes hay while the sun shines. By accepting the evidence

of the Accused that he began drinking during morning hours I am not thereby condoning a defence of intoxication. I do so for the reason that tempers easily flare up over insignificant things.

[35] For example the spitting near the jar of marula brew would have annoyed the imbibers of this revered fruit for fear that the spit would per chance fall into the sacred brew. That would have been sacrilege and would have started some argument as indeed it did in this case. The deceased after marula brew had been thrown at him retaliated by punching the Accused. PW1 testified that the Accused's face had swollen up where he had been punched. The above incidents in my view were not significant enough to lead to the death of the deceased.

[36] The incidents relating to the deceased spitting beside the jar of marula brew and on the Accused foot and the punch on his face are too trivial for the Accused to plead provocation to the slaying of the deceased. These incidents may have been exaggerated in the mind of the Accused because he had imbibed marula brew but the defence of drunkenness cannot avail the Accused in this matter. Mr. Makhanya has correctly contended that the intoxication was voluntarily self-

induced and cannot assist the Accused as a defence: see section 2 (1) of The Criminal Liability of Intoxicated Persons Act 1938.

[37] I also reject a possible defence of self defence. The stab wound inflicted on the Accused together with seeing the knife I concede would have angered the Accused and I accept also a measure of provocation but not enough to kill the deceased. Furthermore the deceased attacked the Accused from a position of weakness while he lay on the ground. The Accused was in a better position of strength as he was in an upright position. It was easy to dispossess the deceased of the knife who was reportedly very drunk and to simply walk away. He did not walk away instead he stabbed the deceased five times; two of those wounds were fatal. I reject the story that the Accused told the court as to how the deceased was injured as being a lie and an afterthought. He formed the intention to kill as soon as he dispossessed the deceased of the knife and repeatedly stabbed him not once but five times.

[38] After inflicting the aforesaid wounds he calmly walked away, fetched his shoes and left for his home. He did not raise an alarm that the

deceased has been accidentally injured nor did he assist in trying to convey him to a medical facility to enable him to obtain medical assistance. He did not wait for the police to arrive so that he could tell them his side of the story. When he arrived home he cleaned the knife and hid it inside a bed. All this does not show someone who lacked intention or who acted on the spur of the moment.

[39] I find therefore that the Accused had intention in the form of *dolus eventualis*; he was reckless whether death ensued or not see Thandi Tiki Sihlongonyane v R, case no 47/1997 Court of Appeal.

[40] In the event the Accused is found guilty of the murder of Cnaan Khoza.

[41] The Accused pleaded guilty in respect of Count 2 and the Prosecutor accepted his plea. I accordingly find the Accused guilty upon his own plea.

Mabuza J
Judge of the High Court of Swaziland

For the Crown : Mr. Makhanya

For the Accused : Mr. J. Mzizi