



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 28/06

In the matter between:

REX

VS

THULANI PETER DLAMINI

Neutral citation: *Rex v. Thulani Peter Dlamini (28/2006) [2013] SZHC183 (2013) 15th August 2013*

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

Summary

Criminal Law – accused charged with murder and pleads provocation and self-defence - requisites of both defences discussed – accused convicted of murder with extenuating circumstances in light of intoxication and provocation and sentenced to fifteen years imprisonment.

**JUDGMENT - SENTENCE
15 AUGUST 2013**

- [1] The accused is charged with murder, it being alleged by the Crown that on the 10th September 2005, at Nkomonye area, in the Shiselweni region, he unlawfully and intentionally killed Jabulani Mahlambi. He pleaded not guilty to the offence.
- [2] PW1 Pat Richard Dlamini resides in the same neighbourhood with the accused at Nkomonye area. He knows the accused and they grew up together. He knows the deceased as well; they were neighbours. On the 10th September 2005 there was a ceremony at PW1's homestead called "Umshisanyongo", in which the family of PW1's wife had brought her back to her marital home after she had been smeared with red-ochre signifying that she was now lawfully married to PW1 in terms of Swazi Law and Custom. PW1's family had slaughtered a cow to feed the bride's family as well as members of the community who were in attendance. Liquor was freely available to those people who take it. The ceremony ended between 4 pm and 5 pm in the afternoon.
- [3] Immediately after sunset, the accused knocked at PW1's house but PW1 did not open the door. PW1 told the accused to say what he wanted from outside the door. At the same time he heard a quarrel between the deceased and the accused outside his house; then, he heard the deceased asking the accused why he was killing him. He opened the door and found the deceased lying on the ground with two stab wounds. The accused was standing nearby close to the

deceased together with PW2. He raised an alarm and further sent children to report the incident to the homesteads of both the accused and deceased. He further phoned the police and reported the incident; the police arrived and found the deceased still lying on the scene of crime and the deceased's blood was flowing on the ground; the accused had since left the scene. PW1 told the Court that before the accused left the scene he asked him why he had stabbed the deceased, and, the accused told him that the deceased knew the cause of the conflict between them.

[4] Under cross-examination PW1 admitted that both the deceased and accused were drinking liquor at his homestead from the morning until 4 pm; he recalled that the accused had arrived at 10 am but he could not recall what time the deceased had arrived except that he arrived prior to the accused. He conceded that he did not witness the actual stabbing of the deceased but only heard the deceased asking the accused why he was killing him, and, that when he opened the door, he found the deceased lying on the ground bleeding with two stab wounds; and, the accused was standing next to the deceased.

[5] PW1 confirmed that when the offence was committed, it was dark outside. He further told the Court that when the ceremony ended, the accused and deceased left with the other people who were in attendance; he denied that the accused had remained behind at the homestead drinking alcohol. PW1 insisted that the accused left and later came back. He denied knowledge of the accused's

destination after leaving his homestead; in addition, he denied as alleged that the accused went to look for a motor vehicle to transport the deceased to hospital.

[6] PW2 Celumusa Goma Dlamini resides in the same community with PW1, the accused as well as the deceased. On the day in question at about 6 pm, he witnessed the quarrel and subsequent fighting between the accused and deceased. He could not ascertain the cause of the quarrel. He heard the deceased crying that the accused had stabbed him; and then he fell down. PW2 was fifteen to twenty metres away from the scene of crime. He reported the incident to the family of PW1, and, they found the deceased still alive.

[7] Under cross-examination PW2 conceded that he was related to the accused as his uncle. However, he denied telling the accused that the source of the statement he recorded with the police came from the deceased's stepmother. He further denied that he drinks alcohol or that he was drinking alcohol at the ceremony. Similarly, he reiterated his evidence that at the time of commission of the offence, it was slightly dark and there was only visibility of about one hundred metres away; hence, he witnessed the fighting between the deceased and the accused.

[8] PW3 Constable Mpumelelo Manyatsi testified that on the 10th September 2005, the accused arrived at his official residence at Dumako Police Post at about

2115 hours. The accused informed him that he had stabbed the deceased but that the injuries sustained were minor. PW3 phoned the Hlatikulu Police Station asking for transport to attend the scene. The accused handed the knife over to PW1 and it was blood-stained; and, he appeared to be drunk. PW3 told him to go home and return in the morning.

[9] On the 11th September 2005, at about 0500 hours, PW3 received a report from the Hlatikulu Police Station that the deceased had died the previous day. At about 0700 hours the accused arrived at Dumako Police Post, and, he introduced himself to the accused as the police officer investigating the murder case; he cautioned him that he was not obliged to say anything and that whatever he said would be used as evidence during the criminal trial. The accused opted to say something; and PW3 charged him with the offence of murder. PW3 maintained his evidence under cross-examination.

[10] PW4 Constable Bafana Kunene testified that on the 10th September 2005 at about 2015 hours, he received a report from PW1 of the incident. He proceeded to the scene of crime together with Constable Mpendulo Dlamini. PW1 directed and led them to the scene of crime where they found the deceased lying on the ground dead. His clothes were full of blood; and, the body had two injuries, on the abdomen as well as the left shoulder. They preserved the scene of crime pending the arrival of the Scenes of Crime Officers; on their arrival they inspected the scene. PW4 told the Court that

after interviewing possible witnesses, the police discovered that the deceased and accused had a quarrel even prior to this incident.

[11] Under cross-examination PW4 conceded that the deceased and accused had a previous quarrel and a subsequent fight which was won by the deceased. He further conceded that even on this fateful day, the deceased and accused had a quarrel which led to the fighting. However, he denied knowledge of the cause of the fighting. He further denied knowledge of the allegation by the defence counsel that on the day in question, the deceased had insulted the accused by calling him a dog. He further denied knowledge that the knife used to commit the offence belongs to the deceased as alleged by the defence.

[12] The post-mortem report was admitted in evidence by consent and it was marked Exhibit 1. The cause of death was due to a stab wound of 3 x 1 cm with sharp margins, vertical in direction, present on the middle and front portion of the left portion of the chest, which is 15 cm from the midline and 13 cm from and above the left nipple. Secondly, an elliptical shaped stab wound of 2 x 1 cm with sharp margins present in the middle and lower portion of the front side of the chest which is 26cm from the umbilicus and 9 cm from the right nipple. The Pathologist also noted that there was a stab wound in the lower left lobe of the left lung; similarly, there was a stab wound present in the left ventricle of the heart.

[13] The accused testified that on the 10th September 2005, he attended the traditional ceremony at PW1's home; he arrived at the homestead at 10 am, and, found the deceased and other community members sitting under a tree. He joined them, and, the deceased insinuated that the accused had returned to the area to unseat his younger brother who had been installed as chief of the area. The accused disclosed that during the lifetime of their late father, Chief Mbhekwa Dlamini, he had been staying in one of his father's homes at Nokwane area at Maloma where his father's cattle were kept; and, that when his father became sick, he had advised him to return to the Chief's main residence at Nkhomonye area.

[14] The accused told the Court that the deceased was influenced by his stepmother Sibhekile Ntuli, the mother of his younger brother who was now the Chief of the area. He further told the Court that when the deceased insulted him, the Chief's headman (i.e. Indvuna) Mantjingelane Nhlabatsi, Hhala Nhlabatsi the community police, Mfana Nhlabatsi, Nkukhu Mahlambi, and Samkeliso Dlamini were present. The deceased is further alleged to have said that the accused together with the Chief's headman had hired non-residents for a project of constructing a government sponsored orphanage in their constituency instead of hiring residents.

[15] When the bride arrived, they entered the house to welcome her and her entourage; and, that the deceased again insulted him. The Chief's headman

Mantjingelane Nhlabatsi intervened and rebuked him telling him to stop what he was doing. The deceased threatened to fight him, and that he decided to move out of the house and the deceased followed and grabbed him; the community police Hhala Nhlabatsi pulled the deceased back into the house. The accused took liquor which was provided outside the homestead and drank.

[16] Later in the evening, he heard the deceased shouting saying they should leave him alone to kill the dog. The deceased came over to where the accused was seated and kicked him all over the body without uttering any word. He saw a shiny object as he was rolling on the ground, and, grabbed it; he tried to defend himself, and, in the process, he heard the deceased saying that the accused had stabbed him. However, the accused doesn't say how he was trying to defend himself when he stabbed the deceased to death.

[17] The accused told the Court that after stabbing the deceased, he looked for transport to convey the deceased to hospital but could not find it even at Dumako Police Post. He handed the knife used in the commission of the offence to the police, after reporting the incident. Thereafter, he went back to the scene where he found that the deceased was still alive. He went to a nearby Nhlabatsi homestead to look for a motor vehicle to transport the deceased to hospital; he was told that the motor vehicle did not have fuel. Thereafter, he went to the main homestead, at the uMphakatsi, where his stepmother Sibhekile Ntuli told him that the deceased had died. He went to

the Police Post where he reported that the deceased had died. The police took him to Hlatikulu Police Station where he was subsequently charged with murder.

[18] Under cross-examination the accused reiterated that the deceased insulted him when they were inside the house welcoming the bride and her entourage. He further stated that on a previous occasion the deceased had ambushed and stabbed him on the leg. He told the Court that initially they were friends with the deceased. The accused denied that he knocked at PW1's house and demanded to talk to him. He further denied that he quarrelled with the accused outside PW1's house or that he stabbed the deceased outside PW1's house. He further denied that when PW1 came out of the house, he found the deceased lying on the ground in front of his house. However, the accused conceded that the defence did not dispute the Crown's evidence that he overheard the accused and deceased quarrelling with each other when he was inside his house; then he heard the deceased crying that the accused had stabbed him, and, that when he went out of the house, he found the deceased lying on the ground.

[19] The Crown further disputed the accused's evidence that he was seated outside the house when the fighting ensued but that he was knocking at PW1's house. The Crown further disputed the evidence of the accused that the deceased uttered the words, that they should leave him alone to kill the dog otherwise the defence would have put it to PW1 and PW2.

[20] The accused conceded that he was slightly drunk when he committed the offence; hence, he could recall everything that happened when the offence was committed. He told the Court that the offence was committed around 7 pm, and, that he was able to identify the knife as belonging to the deceased because it was not very dark. He argued that this was the same knife used by the deceased to stab him on the previous occasion, and, that the knife was known to belong to the deceased. He denied that he killed the deceased because he held a grudge against him for the previous stabbing. The accused further argued that he had no intention to kill the deceased, and, that he was stabbed accidentally. He insisted though that during previous fighting, the deceased had been hired by Sibhekile Ntuli to kill him.

[21] DW2 Hhala Nhlabatsi, a community police testified that when the accused and deceased started quarrelling inside the house at PW1's home on the day in question, he tried to intervene; and he asked the deceased to leave the homestead because the accused was a relative to the family of PW1. He further advised the accused not to fight the deceased but to lay a charge against him for insulting him.

[22] DW2 further corroborated the evidence of the accused that the deceased had criticised both the accused and the chief's headman for hiring non-residents to load sand in a truck for a community project to house local orphans instead of hiring residents. Both the Chief's headman and DW2 responded that the

people loading sand came with the truck and that they did not know them. When the accused tried to respond, the deceased told him that he was an illegitimate child; hence, his father had chased him from the area to live at Nokwane in Maloma. This made the deceased very angry; he left the house but returned shortly. Under cross-examination DW2 told the Court that he arrived at the homestead at 3 pm; and, that he was present in the house when the deceased insulted the accused.

[23] DW2 conceded that it was his first time to see the deceased and accused quarrelling; and, that they were always together. He argued that it is an insult to label a person illegitimate; and, that this insult made the accused very angry. The Crown put it to DW2 that neither the accused nor Crown witnesses had testified that DW2 had intervened in the quarrel; DW2 insisted that he was present and intervened in the quarrel; and, that the insult by the deceased angered the accused.

[24] It is apparent from the evidence that the accused stabbed the deceased with a knife; hence, the *actus reus* is not in dispute. The only issue before this Court is whether the accused had the necessary *mens rea* to commit the offence. The accused has pleaded provocation by the deceased. He contends that when they were sitting under a tree at PW1's homestead, the deceased told him that he had come back from Nokwane area to unseat his younger brother who had been

installed as chief. He further mocked the accused that his father, the late chief Mbhekwa Dlamini, had banished him from the area to Nokwane.

[25] The accused further argued that the deceased ridiculed him and the Chief's headman for allegedly hiring non-residents to work on the community project to house local orphans and neglected people from the community. The Chief's headman had denied such allegation contending that the workers had come with the truck and they did not know them. The accused has also argued that the deceased had called him an illegitimate child which insult greatly angered the accused. Subsequently, on the same day, the accused heard the deceased saying "leave me to kill the dog", just before the deceased attacked him.

[26] PW1 testified that immediately after the accused had knocked at his house, he heard him quarrelling with the deceased asking the accused why he was killing him. When he went out of the house to investigate, he found the deceased lying on the ground with two stab wounds. The accused and PW2 were standing next to the deceased. PW2 also testified that he witnessed the quarrel and subsequent fighting between the accused and the deceased. He could not establish the cause of the fighting. Thereafter, he heard the deceased crying that the accused had stabbed him

[27] There is no independent evidence on the ownership of the knife used in the commission of the offence. The accused contends that the knife belongs to the

deceased, and, that it fell from the deceased when they were fighting. The accused further contends that the knife is well-known in the community that it belongs to the deceased, and, that it is the same knife that was used by the deceased to stab him on the leg in a previous occasion. The accused alleges that he was with Fana Nhlabatsi when the deceased allegedly ambushed and stabbed him on the leg. However, Fana Nhlabatsi was not called to corroborate this evidence that the knife belongs to the deceased.

[28] The accused has pleaded provocation. Sections 2 and 3 of the Homicide Act No. 44 of 1959 provides the followings:

"2. (1) A person who –

- (a) unlawfully kills another under circumstances which but for this section would constitute murder; and**
- (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;**

Shall only be guilty of culpable homicide.

(2) This section shall not apply unless the Court is satisfied that the act which causes the death bears a reasonable relationship to the provocation.

3. (1) Subject to this section, “provocation” means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a

conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.”

[29] It is a trite principle of our law that the defence of provocation can only avail the accused where the act which causes death occurs in the heat of passion caused by sudden provocation. In addition the provocation should be commensurate with the violence inflicted upon the deceased. The provocation should result in a loss of self-control to such an extent that the mental element requisite for murder is not present.

See the cases of *Rex v. Aaron Fanyana Dlamini* 1979-1981 SLR 30 at 35; *Rex v. Nkambule Paulos* 1987-1995 (1) SLR 400 at 405 (HC; *Sipho Isaiah Lukhele v. Rex* 1970-1976 SLR 164 at 164 (CA).

[30] From the evidence it is further apparent that the accused was provoked by the deceased. However, the defence of provocation cannot avail the accused in the circumstances for two reasons: Firstly, the accused did not act in the heat of passion caused by a sudden provocation. There is evidence that after the said provocation, the accused had time for his passion to cool. Secondly, the violence and injuries inflicted on the deceased were not commensurate with the provocation. The accused was not entitled in the circumstances to kill the deceased.

[31] Similarly, self-defence cannot avail the accused in the circumstances. It is trite law that a person may apply such force as is reasonably necessary in the

circumstances to protect himself against unlawfully threatened or actual attack. The test whether the accused acts reasonably in defence is objective. However, the force used in defence must be commensurate with the danger apprehended; and, if excessive force is used, self-defence will not avail the accused. See the cases of *Rex v. John Ndlovu* 1970-1976 SLR 389 (HC) at 390; *S. v. Ntuli* 1975 (1) SA 429, (A) and *S. v. Motleleni* 1976 (1) SA 403 (A). The accused was not in the circumstances justified in stabbing the deceased with a knife twice in the chest and killing him. The force used by the accused was in the circumstances of the case excessive, and, certainly not commensurate with the attack. The accused is on record conceding that he was “slightly drunk”. Furthermore, at the time of the stabbing, the deceased was not armed with any weapon.

- [32] The defence has further argued that the killing of the deceased was an accident. It is well-settled that an event occurs by accident if it is caused by an unforeseeable occurrence. In order to succeed in such a defence, it must be shown that the act by which it is caused is not done with the intention of causing it, and, that its occurrence is not so probable that a person of ordinary prudence ought to take reasonable precautions against it. See *Rex v. Sandile Mbongeni Matsetfwa* criminal case No. 81/2010, *S. v. Ndiwengu* (1990) BLR 409 at 416-417.

[33] In *S. v. Modise Mokwati Fly CHFT – 0000057-07* which was confirmed by the Court of Appeal of Botswana, cited as *Fly v. The State* BLRI 57 CA, the Court stated the following:

“...there appears to be two cognate elements to an accident. First, there must be no intention on the part of the doer to obtain the results of his action. In other words, the results of his action must be unintended by him or her. Secondly, it is the foreseeability test, which necessarily invokes the concept of a reasonable man, i.e. whether a person of reasonable prudence would have foreseen the harm and taken reasonable precautions to guard against it eventuating.”

[34] Clearly, the death of the deceased was foreseeable. The weapon used in the killing of the deceased was lethal; and, the deceased was stabbed twice in the chest which houses delicate human organs. Furthermore, the extent of the injuries sustained were serious and fatal, showing a reckless attitude on the part of the accused whether or not the deceased was killed. A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another, and, he acts recklessly as to whether such death results or not. See the case of *Mazibuko Vincent v. Rex* 1982-1986 SLR 377 at 380 (CA).

[35] Accordingly, I found the accused guilty of murder. However, I will accept for purposes of extenuating circumstances that the accused was intoxicated. Similarly, the provocation of the accused is capable of reducing his moral blameworthiness because it had an effect on his state of mind.

[36] In mitigation of sentence, the defence reiterated that the accused was intoxicated and acted under provocation. She further argued that the knife used in the commission of the offence belonged to the accused and that it fell on the ground during the fight; however, there is no evidence to substantiate this allegation. The accused was thirty-two years of age when the offence was committed; he is married with six minor children to support. The accused was arrested on the 11th September 2005 and released on bail on the 30th September 2009; this means that he was in custody for a period of four years and nineteen (19) days,

[37] In considering the triad, I accept that the offence committed by the accused is very serious when considering that a human life was lost. It is equally true that society expects the Courts to show its disgust and abhorrence at the loss of life of any person. However, when considering the personal circumstances of the accused, I am inclined to accept that a long period of imprisonment would not be in the interest of justice.

[38] Accordingly, the accused is sentenced to fifteen years imprisonment; and the four years and nineteen days spent 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 Accused

Attorney M. Langwenya

For Crown

Senior Crown Counsel O. Zwane