



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 137/2013

In the matter between:

REX

VS

MCOLISI SICELO DLAMINI

Neutral citation: *Rex vs Mcolisi Sicelo Dlamini (137/2013) [2014]*
SZHC167 (7th August 2014)

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

Summary

Criminal Law – Murder - accused charged with murder – accused pleads that he acted in self-defence – essential requirements of the defence considered – held that there was *mens rea* in the form of *dolus eventualis* – held further that self-defence is not competent on the basis that the accused had unlawfully attacked the deceased – accused convicted of murder with extenuating circumstances – accused sentenced to twenty years of imprisonment.

JUDGMENT
7th AUGUST 2014

- [1] The accused was charged with murder, and, it was alleged by the Crown that on the 20th February 2013 at Mpakeni area in the Shiselweni region, he unlawfully and intentionally killed Melusi Simelane. He pleaded not guilty to the charge.
- [2] PW1 Phumlani Mngometulu testified that on the 20th February 2013, he was walking from a shop in the company of Gabsile Masuku and Siceliwe Masuku. Along the way they met Njabulo Mamba, the deceased Melusi Simelane, Xolani Khumalo and Phumelela Mngometulu. The deceased told PW1 that he had been assaulted on the head with a knobstick by Mthembeni Dlamini. As they continued talking, the accused arrived at the scene. Mthembeni Dlamini also came carrying a bushknife; PW1 tried to stop him from threatening to attack the deceased and his friends. Mthembeni Dlamini was heard saying that there was something they would soon witness.
- [3] Suddenly PW1 saw the accused hitting the deceased with fists. Njabulo Mamba tried to intervene by hitting the accused; thereafter, Njabulo Mamba was heard shouting to the deceased to run away because the accused was armed with a knife. Before the deceased could react, the accused stabbed him with a knife two times on the chest, and he staggered and fell to the ground. Mthembeni Dlamini came and shook the accused's

hand celebrating the death of the deceased. PW1 phoned and reported the incident to certain people.

[4] PW1 maintained his evidence under cross-examination and further denied that Phumelela Mngometulu, also known as Vandam, had kicked the accused on the instructions of the deceased. However, he admitted that insults were exchanged between the deceased and accused. He further conceded that when the accused hit the deceased with fists, Njabulo Mamba joined the fight on the side of the deceased and assaulted the accused. He reiterated his evidence that both the deceased and accused had insulted each other. He further reiterated his evidence that Mthembeni Dlamini had shook hands with the accused in a celebratory mood after the death of the deceased.

[5] PW2 Gabsile Masuku testified that on the 20th February 2013, she was walking from a shop together with Phumlani Mngometulu and Siceliwe Masuku. PW2 is also the shopkeeper at the local shop. They met the accused along the way who told them that he was going to his aunt's place next to the shop. Meanwhile PW1 and Siceliwe Masuku joined the group of boys along the road who included the deceased, Njabulo Mamba, Phumelela Mngometulu and Xolani Khumalo; PW2 subsequently joined

this group. The deceased told her that the other group of boys with the accused and Mthembeni Dlamini were attacking them.

[6] Suddenly, Mthembeni came carrying a bushknife and, PW2 tried to stop him from proceeding to the deceased. Siceliwe Masuku and PW1 followed PW2. Mthembeni Dlamini stopped advancing to the deceased but he was heard saying that they would soon witness some incident. Meanwhile the accused who had not gone to his aunt's place as he had said approached them. PW2 told the accused to go home but he continued walking towards them saying the deceased was young and could not fight him.

[7] PW2 together with the accused, Njabulo Mamba and the deceased exchanged insults. The accused and deceased began a brief fist fight, and, later Njabulo joined the fight on the side of the deceased. The accused took out a knife and stabbed the deceased two times and, he fell to the ground dead. Xolani Khumalo, Njabulo Mamba and Phumelela Mngometulu ran away, and, Mthembeni Dlamini shook the accused's hand in celebration and said that is what they had always wanted; "Awuva ke nako ke lebesikufuna". PW2 asked the accused why he had killed the deceased, and, he said he was defending himself. She then left the scene for fear of being attacked by the accused and his brother Mthembeni Dlamini.

Under cross-examination she denied that it was the deceased and his friends who had attacked the accused. Her evidence was that it was the accused who had attacked and assaulted the deceased who then retaliated in defence. The fight was very brief, and, Njabulo Mamba joined the fight on the side of the deceased; it was a fist-fight.

She denied that the accused was injured during the fight; according to her, it was only Njabulo Mamba who was bleeding. She reiterated her evidence that Mthembeni Dlamini shook hands with the accused and celebrated the killing of the deceased.

[8] PW3 Njabulo Mamba told the Court that on the 20th February 2013, he went to the parental homestead of the accused and Mthembeni Dlamini; he was in the company of Xolani Khumalo, the deceased as well as Phumelela Mngometulu, and, they found many people drinking marula liquor. PW3 also drank the marula liquor with his friends including the deceased. Mthembeni Dlamini and the deceased started arguing about their prophetic gifts; thereafter, they started fighting. Mthembeni Dlamini's father came and hit the deceased with a knobstick, and, he further chased the deceased and his friends from his homestead.

The accused and his brother Mthembeni Dlamini then started assaulting PW3. The accused's father as well as another community police told the other patrons not to intervene in the fight on the ground that the deceased and PW3 were rude.

[9] PW3 and the deceased left the Dlamini homestead; the accused and his brother Mthembeni Dlamini followed them. Mthembeni was carrying a bushknife and another boy in their company called Sju was carrying two knives. The accused was boasting saying PW3 and the deceased were young and could not fight him. The accused touched the deceased over the head saying they could not fight him; a fist-fight ensued between the accused and the deceased. Phumelela Mngometulu told Mthembeni Dlamini to go home and not use the bushknife in the fight against the deceased and his friends. Njabulo Mamba shouted to the deceased telling him to run away as the accused had taken out a knife; however, before the deceased could react, the accused stabbed the deceased twice on the chest and, he fell to the ground and died. The deceased was not armed with a weapon.

[10] PW3 maintained his evidence under cross-examination. He denied that Phumelela Mngometulu fought Mthembeni Dlamini at his parental homestead. He reiterated his evidence that the fight was between

Mthembeni Dlamini and the deceased over their prophetic gifts, and, that Mthembeni's father also hit the deceased with a knobstick. He denied that it was the deceased or his friends who were provocative as alleged but that it was Mthembeni Dlamini. He also told the Court that the accused assaulted both the deceased and himself. He denied that the accused was injured during the fight and insisted that it was himself who was injured when he was trying to assist the deceased.

[11] PW4 Phumelela Mngometulu testified that on the 20th February 2013, he went to the parental homestead of the accused to drink marula liquor together with Njabulo Mamba, Xolani Khumalo as well as the deceased. Mthembeni Dlamini and the deceased started arguing over their prophetic gifts; then Mthembeni stood up and assaulted the deceased. Thereafter, Mthembeni's father chased PW4 and his friends Njabulo Mamba, Xolani Khumalo and the deceased from his homestead saying they should leave his homestead because they did not belong there. The accused and Mthembeni followed them; and, they met PW1, Siceliwe and Gabsile Masuku along the road.

[12] The accused arrived at the scene and said he was going to the shop but PW2 told him that the shop was closed. The accused changed tune and said he was going to his aunt's homestead next to the shop. The boy called Sju

who was in the company of the accused and Mthembeni was at the scene. Mthembeni approached them carrying a bushknife; PW1, PW2, PW4, and PW5 attempted to stop him from attacking the deceased and his friends. Suddenly, they heard the deceased screaming, and, when they came closer, they discovered that he had been stabbed twice on the chest by the accused, and, he died on the scene. They left the scene. Shortly thereafter, members of the community started arriving at the scene.

[13] PW4 maintained his evidence under cross-examination. He denied that the deceased was provocative and said it was Mthembeni Dlamini who was provocative. He further told the Court that it was the accused who was attacking the deceased and Njabulo Mamba. He further denied that his friends as well as himself had hurled insults at the accused as they left the Dlamini homestead or that the accused's father had intervened in the fight. He also denied kicking the accused. Similarly, he denied that the deceased together with Njabulo Mamba and himself had encircled the accused and assaulted him.

[14] PW5 Siceliwe Masuku corroborated the evidence of PW1, PW2, PW3 and PW4. She further told the Court that Mthembeni came to the scene carrying a bushknife and threatening to assault the deceased and his friends Xolani Khumalo, Njabulo Mamba and Phumelela Mngometulu. Together

with PW1 and PW2, they tried to stop Mthembeni, telling him not to attack the deceased and his friends since they were young children. She also confirmed that the accused came and assaulted the deceased with fists; Njabulo Mamba joined the fight on the side of the deceased. The accused took out a knife and stabbed the deceased twice on the chest, and, he fell down and died. Thereafter, Mthembeni shook hands with the accused congratulating him for stabbing “the dog to death”, referring to the deceased. She emphasised that the fist-fight between the accused and the deceased took a few minutes and didn’t last long. She maintained her evidence under cross-examination; and, she denied that the accused was acting in self-defence when he stabbed the deceased. She reiterated her evidence in-chief that when the accused arrived at the scene, he pushed the deceased by his shoulder, triggering the fist-fight between them. Within minutes the accused stabbed the deceased twice on the chest and he died instantly. She also corroborated the evidence of other Crown witnesses that Mthembeni Dlamini had told them on his arrival to watch what the accused would do; immediately thereafter, the accused stabbed the deceased to death.

[15] PW6 detective Constable Thulani Gama, a Police Officer attached to the Scenes of Crime Unit testified that on the 20th February 2013, he received a report at about 1930 hours of the killing of the deceased. He found other

police officers at the scene who handed the scene to him. The deceased's body was lying along the road and covered with a blanket. The deceased was wearing a gold T-shirt with a black track suit. He uncovered the body of the deceased and noticed two stab wounds on the chest. He took photographs of the scene of crime and improvised for lighting using the police van. Thereafter, he transported the body of the deceased to Matsanjeni Mortuary. On the next day he took more photographs of the scene. The body was further transferred to Mbabane Government Mortuary for post-mortem examination on the 27th February 2013. The investigator in the case further handed to him exhibits taken from the accused, a red T-Shirt, a blue trouser as well as a wood-handled knife for onward transmission to South Africa for forensic analysis.

The photographs taken from the scene were admitted in evidence and marked exhibits 1-8. The sketch plan of the scene of crime drawn by PW6 was also admitted in evidence and marked Exhibit 9. The defence did not cross-examine PW6.

[16] PW7 Constable Mfanimpela Dube, the investigator in the case, received a report of the killing of the deceased and proceeded to the scene with other police officers. The deceased was lying on the side of the road facing upwards. Members of the community were standing nearby. After taking

statements from eye-witnesses, they transported the body of the deceased to Matsanjeni Health Centre.

Further investigations led to the arrest of the accused on the 21st February 2013. The accused was surrendered to the Hluti Police Station by his father Mandoyi Dlamini. PW7 introduced himself to the accused and further informed him of his right to remain silent as well as his right to legal representation. The accused opted to say something with regard to the case and he further produced a knife; he was formally charged with murder. PW7 handed to Court as exhibits the knife, a blue trouser as well as a red T-shirt; and, these items were admitted in evidence and marked Exhibits A, B, and C respectively. PW7 maintained his evidence under cross-examination.

The post-mortem report was handed in evidence by consent in accordance with section 221 of the Criminal Procedure and Evidence Act, and, it was marked Exhibit 10. The cause of death was due to stab wounds to the chest.

[17] After the close of the Crown's case, the accused gave evidence in his defence. He told the Court that on the 20th February 2013, four boys arrived at his parental homestead being Phumelela Mongometulu, Njabulo

Mamba, the deceased as well as Xolani Khumalo. They found them drinking marula beer; the accused and his family had just finished weeding maize fields. These boys were also given marula beer to drink by the accused's father.

Thereafter, the accused was sent by his father to roast meat in the kitchen. He heard noise outside the kitchen and saw the deceased and Njabulo Mamba fighting his brother Mthembeni Dlamini. Meanwhile his father was trying to intervene and stop the deceased from assaulting Mthembeni. He never ascertained the cause of the fighting; however, he described the deceased as being provocative. The accused's father then chased away the deceased and his friends from his homestead.

The accused admitted that his father told him and Mthembeni to return home and not follow the deceased and his friends. There is undisputed evidence that it is Mthembeni Dlamini who started an argument with the deceased which consequently led to a fist-fight between them. Mthembeni's father had joined the fight and assaulted the deceased with a knobstick; thereafter, he chased the deceased and his friends from his homestead.

[18] Notwithstanding the accused's evidence, the Crown's evidence which has not been disputed shows that Mthembeni and the accused followed the deceased and his friends and ignored the directive from their father to return home. Along the road they met PW1 Phumlani Mngometulu, PW2 Gabsile Masuku and PW5 Siceliwe Masuku. Mthembeni arrived at the scene carrying a bushknife and threatened to assault the deceased and his friends; he was stopped by Siceliwe Masuku, Gabsile Masuku and Phumlani Mngometulu. Meanwhile the accused mocked the deceased and his friends saying they were still young and could not fight him. The accused pushed the deceased by his shoulder, and, a fist-fight started between them. Njabulo Mamba joined the fight on the side of the deceased but was injured and started bleeding. The fight lasted for a very short time. The accused suddenly stabbed the deceased to death two times on the chest.

[19] It is not in dispute that the deceased was not armed, and, that the accused was not injured; furthermore, the deceased's life was not in danger. Self-defence cannot avail the accused in the circumstances. The evidence shows that it was the accused's brother Mthembeni who initially provoked the deceased at the Dlamini homestead and further assaulted the deceased with the assistance of his father. It is equally not in dispute that when the deceased and his friends left the Dlamini homestead, Mthembeni, Sju and the accused followed them from behind threatening to assault them.

When Mthembeni arrived at the scene armed with a bushknife, he told Siceliwe and Gabsile Masuku as well as Phumlani Mngometulu that something big would happen, and, that they should watch out events as they unfolded. A few minutes later the accused stabbed the deceased to death. Despite the denial by the accused, there is over-whelming evidence that Mthembeni shook the accused's hand in celebration of the death of the deceased.

The accused also argued that he was drunk when he committed the offence. There is no evidence before Court that the accused was intoxicated at the time; and, his conduct does not show that he was intoxicated. The evidence shows that the accused was weeding maize fields together with members of his family as well as other community members who were assisting the family. When the deceased and his friends arrived at the Dlamini homestead, the accused and his family had just finished weeding the maize fields and had started drinking the marula beer.

[20] During cross-examination the accused conceded that the defence counsel did not dispute the evidence of the Crown that Mthembeni and the accused followed the deceased and his friends after they were chased from the Dlamini homestead. Furthermore, the defence did not dispute the evidence that Mthembeni arrived at the scene carrying a bushknife and threatening to

assault the deceased and his friends. Similarly, the defence did not dispute the Crown's evidence that the accused was the aggressor at the scene poking the head of the deceased and saying that he was young and could not fight him. The accused conceded not only that the deceased and his friends were not armed but that he stabbed the deceased twice on the chest killing him instantly.

[21] I am satisfied that the Crown has proved the commission of the offence beyond reasonable doubt. Hannah CJ in the case of *Mazibuko Vincent v. Rex* 1982-1986 SLR 377 (CA) at 380 said the following:

“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 result or not.”

See also the cases of *Rex v. Maphikelela Dlamini* 1979 -1981 SLR 195 (CA) at 198 as well as *Annah Lokudzinga Matsenjwa v. Rex* 1970 – 1976 SLR 25 (CA) at 30.

[22] Tebbutt JA in *Thandi Tiki Sihlongonyane v. Rex* Criminal Appeal No.40/1997 at pp 4-5 summarised the essential requirements of *dolus eventualis* as follows:

“They are: 1. Subjective foresight of the possibility, however, remote, of the accused’s unlawful conduct causing death to another. 2. Persistence in such conduct, despite such foresight. 3. The conscious taking of the risk of resultant death, not caring whether it ensues or not. 4. The absence of actual intent to kill.”

In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it.... The issue of *dolus eventualis* is whether the accused himself or herself foresaw the consequences of his or her act...”

[23] In the case of *Rex v. Zwelithini Maqumbane Nkambule* Criminal case No. 78/2012 at para 39 and 40, I had this to say with regard to self-defence:

“39. It is a trite principle of our law that a person may apply such force as it 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; and, the force used must be commensurate with the danger apprehended, and, if excessive force is used, the plea of self-defence will not be upheld. See the case of *Rex v. Nhlase Anthony Nxumalo* Criminal Case No. 87/2010 and *Rex v. John Ndlovu* 1970-1976 SLR 389 (HC) at p.390.

40. *Ramodibedi CJ in Bhutana Paulson Gumbi v. Rex* Criminal Appeal No. 24/2012 at para 15 said:

“...self-defence is only available if three requirements are met, namely, if it appears as a reasonable possibility on the evidence that:-

- (1) the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;**
- (2) the means he used in defending himself were not excessive in relation to the danger; and**
- (3) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.”**

[24] It is apparent from the evidence that the accused unlawfully and intentionally killed the deceased; the Crown has proved beyond reasonable doubt both *actus reus* and *mens rea* in the form of *dolus eventualis*. Self-defence is not applicable in the circumstances on the basis that it is the accused who unlawfully attacked and killed the deceased without provocation. It is not in dispute that the accused was the aggressor and that he was not in danger of death or physical injury. The killing of the deceased was in the circumstances not legally justified.

[25] Accordingly, I find the accused guilty of murder as charged. The next inquiry relates to the existence or otherwise of extenuating circumstances. Section 295 of the Criminal Procedure and Evidence Act provides as follows:

“295 (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”

[26] The Crown concedes that the accused was intoxicated and that this constitutes an extenuating circumstance. Furthermore, it is not in dispute that the accused is generally a young man in his late 20's in age; and, that youthfulness constitutes an extenuating circumstance on the basis that it connotes immaturity on the part of the accused.

It is well-settled in this country that extenuating factors are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his legal culpability. The trial court has to consider whether there are any facts relevant to extenuation such as youthfulness and immaturity, belief in witchcraft, provocation, mental delusion, intoxication, breakdown in love relationship, lack of education, socio-economic background such as poverty and lack of education; as well as absence of premeditation.

Furthermore, the trial court has to consider whether such facts, in their cumulative effect, probably had a bearing in the accused's state of mind in doing what he did; and, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

[27] Section 295 of the Criminal Procedure and Evidence Act 67/1938 provides that if a court convicts a person of murder, it shall state whether in its opinion there any extenuating circumstances, and, if they exist, the court should specify them. The section further provides that in deciding whether or not extenuating circumstances exist, the court should take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.

Notwithstanding the provisions of section 295 of the Act, the general rule is that it is for the accused to lead evidence which would show extenuating circumstances in addition to circumstances appearing from the evidence led by or on behalf of the defence. The court should also have regard to all the relevant evidence including the evidence led on behalf of the prosecution. The determination of the existence of extenuating circumstances is at the time of commission of the offence.

See the cases of *Ntokozo Adams v. Rex* Criminal Appeal case No. 16/2010 SZSC10; *Mandla Bhekithemba Matsebula v. Rex* Criminal Appeal No. 2/2013 SZSC72; *Zwelithini Njovane Khumalo v. Rex* Criminal Appeal No. 5/2014 SZSC14.

[28] The accused is a first offender without any record of previous conviction. He is the sole breadwinner of a minor child of about six years of age. His wife is unemployed and depends solely upon him for financial support. It is not in dispute that the accused surrendered himself to the police, and, that he was co-operative to the police during the investigation of this matter. Furthermore, he surrendered the murder weapon to the police at the time when he surrendered himself.

Notwithstanding the mitigation factors submitted by the defence, aggravating circumstances exist. It is common cause that the accused followed the deceased's group from his homestead on the fateful day despite a warning from his father to return home. The accused was armed with a knife, his brother Mthembeni Dlamini was armed with a bushknife and their friend Sju was armed with two knives. They confronted and provoked the deceased with a view to instigate a fight. The accused without a warning took out a knife and stabbed the deceased twice on the chest, and, he died instantly. The accused and Mthembeni Dlamini shook hands and celebrated the death of the deceased; Mthembeni was heard saying that this was what they had all along wanted to happen. This shows that the accused had *mens rea* in the form of *dolus directus*.

[29] I have considered the triad, that is the personal circumstances of the accused, the seriousness of the offence as well as the interests of society. The crime of murder is highly prevalent in this country where innocent people are generally killed pursuant to a very minor misunderstanding. It is important for this court to protect innocent members of society against this ruthless and brutal wave of killings.

[30] Accordingly, the accused is sentenced to twenty years imprisonment. The period of seventy days spent in custody will be taken into account in

computing the period of imprisonment. He was arrested on the 21st February 2013 and released on bail on the 2nd May 2013.

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

For Crown

Senior Crown Counsel Qondile Zwane

For Defence

Attorney Nosipho Mazibuko