



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No. 260/2012

In the matter between:

**REX**

**Appellant**

**vs**

**JABULANI VINCENT MAZIBUKO**

**Respondent**

**Neutral citation:** *Rex vs Jabulani Vincent Mazibuko (260/2012) [2014] SZHC 350 (15 September 2014)*

**Coram:** **MAMBA J**

**Heard:** 18 June 2014

19 June 2014

08 July 2014

**Delivered:** 15 September 2014

Summary: [1] *Accused and deceased fighting over possession of a spade. Accused gaining possession of spade and striking the deceased therewith two times on the forehead with it whilst*

*the deceased is lying on the ground – accused pleading self-defence.*

[2] *Criminal law – murder and intention thereof defined and discussed. **Dolus eventualis**/constructive intention to kill defined. Where an accused does an act which he foresees might result or cause the death of his victim but acts recklessly not caring whether death ensues or not and this victim dies as a result, he has the requisite intent to bring about the death of the deceased in the form of indirect intention or **dolus eventualis** and is guilty of murder.*

### **JUDGMENT**

[1] The accused, a Swazi male adult person of KaMzilikazi area near Siteki in the Lubombo region faces an indictment that alleges that he is guilty of the crime of murder. It is alleged by the Crown that on or about 2 August 2012 and at or near Mzilikazi area, the accused unlawfully and intentionally killed Victor Magongo who was a security guard at Mzilikazi Wine and Malt.

[2] Upon arraignment, the accused entered a plea of not guilty to the charge and the Crown led a total of nine witnesses in support of its case. In turn, the accused testified on his own behalf in his defence.

- [3] The first witness that was called by the Crown was Mzwandile Wesley Gama (hereinafter referred to as PW1). He told the court that on the evening of 2 August 2012 he went to the said bar for a drink. There were quite a number of patrons in the bar. These included Sajomba Bennett, Xolani Tfusi, Thulani Pato and Victor Magongo, the deceased who was a security guard at that establishment.
- [4] PW1 testified that an altercation took place between Sajomba Bennett and the deceased. This verbal altercation culminated in a fight between them. At one stage during the fight, they fell on him as he enjoyed his drinks. The deceased separated them and ordered and advised both of them to leave the bar. Sajomba complied and left the premises but the accused did not; he instead asked the deceased why he had allowed Sajomba to assault him. The deceased denied having done so and insisted on the accused to leave the bar. The accused went out of the bar and when PW1 went outside to smoke, he found the accused outside with another person only referred to as Lucky. The accused was carrying either a spade or shovel. PW1 advised the accused to calm down and leave the premises as Sajomba had done. He also advised him to speak and iron out his differences with Sajomba on the following day.

- [5] When the deceased saw the accused standing outside the bar, he approached him again to find out why he was still on the premises as he had been told to leave. At that point PW1 left the two still talking and went into the bar but immediately went out again and found the two men still talking outside. He (PW1) immediately returned inside the bar and was shortly followed by the accused who was still armed with the spade or shovel. Again, the deceased entered the bar. After a short while the accused went out of the bar and was followed by the deceased.
- [6] After a while, PW1 went out of the bar and found the two men engaged in a fight and wrestling over possession of the spade or shovel. They were a distance away from the bar near the road. They were on the ground. The accused won possession of the spade, stood up and started hitting the deceased with it as he was on the ground and using one of his elbows to balance or support himself on the ground. The deceased was using his other hand or arm to defend himself from the blows by the accused.
- [7] When PW1 tried to intervene and stop the accused from assaulting the deceased, the accused threatened to assault him with the spade too. This caused PW1 to go into the bar and report the incident to some of the patrons therein. Mr. Pato and Mr. Tfungi went out to investigate and PW1 followed them. PW1 observed that the deceased had an injury across his

forehead and was lying in a pool of blood. The accused was not at the scene.

[8] PW1 told the court that after winning possession of the spade, the accused told the deceased that he would kill him to which the deceased asked “What have I done to you?”

[9] The deceased was motionless on the ground. His limp and lifeless body was taken onto the bakkie of Mr. Pato’s motor vehicle by Xolani and Thulani. PW1 drove the vehicle as Thulani and Xolani set at the back with the body of the deceased. Before reaching the hospital, this motor vehicle collided with a cow but no one was hurt in the incident. The body of the deceased was then transferred into the motor vehicle of his brother (PW6) Petros Magongo who was following them in his own motor vehicle.

[10] PW6 testified that when he got to the scene where the deceased’s body was near the bar, the deceased showed no signs of life at all. It was limp and lifeless and some of his brains and blood were on the ground. He later returned from hospital that night to cover it with soil after the doctor had pronounced or declared the deceased dead. The doctor came to the

hospital after about 15 minutes of their arrival there with the body of the deceased.

[11] PW8, Dr. R.M. Reddy conducted a post-mortem examination on the body of the deceased on 7 April 2012. He came to the conclusion that the cause of death was due to cranio cerebral injury. He observed the following ante-mortem injuries on the body of the deceased per exhibit B namely:

- “1. Cut like wound over posterior third scalp repron 3x0.7cm bone deep, 2.1cm length & 2.7x0.7cm scalp deep adjacent to it.**
- 2. Laceration wound from forehead to right scalp bone deep 22cmx4.1cm with extended wound 12cm length skull fractured with laceration brain, mixed intracranial haemorrhage over brain about 140ml.**
- 3. Laceration just below injury number 2 transversely running from nose to left eye 12cmx2.2cm bone deep.**
- 4. Abrasion over left knee front 1.2cm, 2cm, over wrist 2x1.2cm skin deep laceration and over right abrasions 3.1cm area.”**

[12] The pathologist informed the court that the head injuries enumerated above could have been caused by a heavy blunt force or weapon and death could have been instant. He testified that in the instant case, where

amongst others brain matter had been caused to spill out of the deceased's head, death would have followed or resulted within 3-5 minutes. He referred in particular to injury 2 in exhibit B herein.

[13] Colin Xolani Tfusi (PW2) also testified regarding this incident. He also witnessed the fight between the accused and Sajomba and the involvement of the deceased therein. PW2 testified that the accused was angry with the deceased regarding the latter's involvement in the fight between the accused and Sajomba. He testified though that most of the conversation between the accused and the deceased happened outside the bar. PW2 also testified that it was Malumane (PW7) who came into the bar carrying a shovel. This was, however, denied by PW7.

[14] PW2 testified that whilst inside the bar; PW1 came and reported that the accused was killing the deceased outside. He, together with other patrons inside the bar went out to observe what was happening. He found or saw the deceased lying on the ground and the accused standing or hovering over him armed with a shovel. He saw the accused hit the deceased with the shovel once on the head. The accused then ran away and disappeared into the darkness of the night.

[15] PW2 then went and reported the matter to PW6 who later came to the scene before the body of the deceased was loaded onto Mr. Pato's motor vehicle and conveyed to Good Shepherd hospital. PW2 also confirmed that he together with Pato set at the back of the motor vehicle with the body of the deceased on their way to the hospital. He confirmed further that no one was hurt or injured when their motor vehicle collided with a cow on their way to hospital and in particular this collision had no effect whatsoever on the condition of the body of the deceased as it lay on the motor vehicle. He confirmed further that when the body of the deceased was loaded onto Mr. Pato's vehicle, it was lifeless or motionless and part of his brains or brain matter had been on the ground where he was picked up.

[16] It was suggested to PW2 under cross-examination that the reason why the deceased ordered the accused to leave the bar was because the accused was bleeding from the nose after being hurt by Sajomba and was according to the deceased dirtying the floor. He denied this.

[17] It is also significant to refer to the evidence of Lucky Mbowane herein who was otherwise also referred to as Malumane. He gave evidence as PW7. He told the court that on the evening in question he went to the bar to watch a soccer match on television.



[18] PW7 told the court about two fights between the accused and Sajomba that night or evening. The first fight was won by Sajomba and it took place in the bar. The second fight was in the toilets, within the bar premises. When the deceased came and separated the two, the accused ran to a nearby fireplace and armed himself with a shovel. He returned to the deceased and struck him with the shovel. The two then fought for possession of the shovel. They fell on the ground and rolled towards the road nearby. The accused won possession of the shovel and struck the deceased several times with it as he lay on the ground. The accused then ran away with the shovel.

[19] It is common cause that the accused was arrested on 3 August 2012 and charged with the death of the deceased. Subsequent to his arrest, he freely and voluntarily pointed out the spade or shovel he used to injure the deceased to the police.

[20] In his defence, the accused confirmed the altercation he had with Sajomba. He, however, fell short of referring to it as a fight. He said he was assaulted by Sajomba after a misunderstanding the two had over beer that had been purchased by Sajomba on instructions by and with money from the accused.

[21] The accused testified that Sajomba had assaulted him whilst in the bar and this caused him to bleed from his nostrils. Sajomba had then immediately gone out of the bar and left after briefly speaking to the deceased outside the bar. The deceased then came to the accused and told him that he should get out of the bar because the blood from his nostrils was dirtying the floor. The accused said that he refused to get out of the bar because he was afraid of Sajomba who had just gone out of the bar. The deceased would, however, not hear of this. He pulled him out and they both stood on the steps of the bar. There, the deceased ordered him to leave the premises. Again, the accused refused. The deceased went to a nearby structure and returned to him armed with a spade. He jabbed or poked the accused with it three times on his abdomen or ribs and ordered him to leave the premises. Once more, the accused resisted. The deceased then struck him with the spade on his right shoulder. The accused then ran away and hid behind some buildings or structure neighbouring the bar.

[22] The deceased approached him with the spade raised. The accused says he then panicked, got up from his hiding spot, grabbed the spade held by the deceased and the two wrestled over it. They both fell to the ground and

all the time the deceased kept on saying that the accused was being stubborn and insolent.

[23] Finally, the accused said, he won possession of the spade, stood up and when he tried to run away, the deceased held him by one of his legs. He, the accused, hit out at the deceased with the spade, in an attempt to free himself from his grip. The deceased would not let go of his foot. He hit out for the second time and this time the deceased let go and the accused ran away with the spade. He threw or hid the spade somewhere along the way to the home of Colani Simelane. There he reported to Colani that he had accidentally injured the deceased and he would report the incident to the police. He was arrested that morning by the police before he went to report the matter to them. He denied that he was preparing to escape to Mocambique or the Republic of South Africa.

[24] The accused told the court that there was no light where he and the deceased fought over the possession of the spade. He told the court further that after hacking or striking the deceased twice with the spade, he ran away from the scene because he was afraid that some of the bar patrons could turn against him and assault him for what he had done to the deceased. He denied the evidence of PW7. Finally, he said he had, immediately after his arrest, told the police and later a judicial officer of

what had occurred at the bar leading to the death of the deceased herein. He said his statement in court was exactly the same as those two statements referred to above.

[25] It was argued by counsel for the defence that there was a real possibility or even a probability that the collision with the cow experienced by PW1 when transporting the deceased to hospital caused the death of the deceased or at the very least, aggravated or exacerbated his injuries. It was argued that this was a new and intervening cause (**novus causa interveniens**). From the outset, I must say that I cannot agree with this submission. There is simply no evidence to support it. On the contrary, the evidence is that the said collision did not affect any of the occupants of the motor vehicle in question. Besides, when this collision occurred, the deceased's body was limp and lifeless. There was no pulse or breathing at all. The doctor who examined his injuries conclusively said that the injuries sustained by the deceased, particularly injury Number 2 was fatal and death would have been instant or would have occurred within 3-5 minutes. Again the available evidence which was not in any way disputed is that the deceased died on the spot. When he was taken into Mr. Pato's vehicle, he was already dead. Therefore, it cannot, in my judgment, be said that it may reasonably possibly be true that the said

collision was the cause of the death of the deceased. This submission must therefore fail and is hereby rejected.

[26] Whilst there are several contradictions between the evidence of the Crown witnesses, in particular PW1, PW2 and PW7 on what actually took place between the accused and Sajomba and the accused and the deceased leading to the assault and injury of the deceased by the accused, the witnesses testified that the accused and the deceased fought over the possession of the spade and accused won that battle. The accused then stood up and hit the deceased, who was on the ground, with the spade and then ran away from the scene. This crucial evidence is confirmed by the accused himself. Taking this evidence and the expert evidence of the pathologist, it is clear to me; beyond any reasonable doubt, that the deceased died as a result of the injuries inflicted on him by the accused. This conclusion is inevitable, inescapable and irresistible.

[27] I now examine the issue or question whether or not the accused was legally justified in acting as he did in assaulting the deceased. For purposes of this judgment, I do not find it necessary for me to determine or decide who between the accused and the deceased brought in or introduced the spade or shovel into the fight or equation. There was also a suggestion that PW7 was seen carrying it inside the bar. The central or

crucial point for determination in this case is the point at which that tool or weapon was used by the accused to inflict the injuries on the deceased. This is the case because it is plain or indeed common ground herein that there was a struggle between the accused and deceased for the possession of the spade before this tool was actually used. I say it is common cause because this has been confirmed by the accused in his own evidence.

[28] PW1 and PW7 and to some extent PW6 were, contrary to the version given by the accused, adamant that there was sufficient lighting at the very spot where the deceased was hacked or struck with the spade by the accused. PW6 on arrival just after 10pm, found the deceased lying there and there was blood and brain matter on the ground. PW7 (Malumane) described vividly and in detail how the accused and deceased fought over the spade and how eventually the accused won that battle and ultimately started assaulting the deceased. He told the court that when assaulted, the deceased was lying on the ground although from his description, he was not lying completely flat as he used one of his elbows to balance himself or gain leverage on the ground. He used his other arm or hand to try and block or ward off the blows directed or aimed at him by the accused. I accept this evidence, entirely.

[29] From the accused's own showing, he struck at the deceased with the spade two times whilst the latter was on the ground. He said he was trying to free himself from his grip on one of his legs or foot. The Crown witnesses have denied that the deceased was holding the accused when this occurred. But even if one were to accept the evidence of the accused on this point, I do not for a moment believe that the accused was, in law, justified in acting as he did. To strike or hack the deceased two times on the head with a vicious and lethal weapon as the spade depicted in exhibits LCN1- LCN5 herein was unlawful and extremely dangerous. The doctor testified that hard force must have been used or applied to achieve the nature and extent of those injuries he observed. This again was not challenged or disputed by the defence and I accept it.

[30] From the above, whilst I am unable to hold that the accused positively set out or intended to bring about the death of the deceased, I have no hesitation whatsoever that he must have realised that in striking him with the spade on the head as he did, the deceased might die as a result of those blows. Notwithstanding this realisation or foresight, the accused went ahead, regardless of the consequences of his actions, and assaulted the deceased. The deceased died as a result. Subjectively, the accused realised that he was not entitled to act as he did in this savage and cowardly manner.

[31] In **Maphikelela Dlamini v R 1979-1981 SLR 195 @198D-H** the Court of Appeal stated as follows:

**“The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R 1970 – 1976 SLR 25*. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah’s* case the law is stated as follows, at 30A: ‘If the doer of the unlawful act, the assault which causes the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not...he ought to have realised the risk, since he killed unlawfully.’**

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah’s* case to which I have referred the then President of this court, Mr. Justice Schreiner said: ‘It has been suggested that a finding that a person did in fact foresee or appreciate a risk is not the same as a finding that a person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have.’ In this statement of the law Caney JA on the same page concurred. Milner JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: ‘I should like first of all to associate myself very strongly with the learned President’s view that when it is correctly held that a person ‘must’ have appreciated that his act involved a risk to another’s life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk’. I thought it right to mention these matters because



for many years to my knowledge *Annah's* case has been followed in Swaziland and although I share the regret expressed by Mr. Justice Schreiner in *Annah's* case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p 29 of *Annah's* case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah's* case to which I have referred.”

Vide also *Vincent Sipho Mazibuko v R*, 1982-1986 SLR 377 @380C-E” where the court had this to say:

“The real question before this court, and the question to which Mr. Liebowitz devoted most of his submissions, is whether the only inference properly to be drawn from the evidence was that at the material time the appellant had the intent to kill the deceased. 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 *S v Mini* 1963 (3) SA 188(A) at 192 and *Annah Lokudzinga Mathenjwa v R* 1970-76 SLR 25 at 30. To apply continual pressure to the throat or neck for a period of about four minutes is obviously an inherently dangerous act which is likely to cause death. Even the most dull-witted person must realise this and the appellant is certainly not that. In the absence of explanation, and in the present case none which was satisfactorily or acceptable was forthcoming, in performing such an act the assailant must be taken either as realising or recklessly disregarding its probable consequences. Indeed, the immediate effect on the victim of such pressure must be plain to be seen. While I accept that there is

substance in Mr. Liebowitz’s submission that evidence of the appellant’s subsequent behaviour – evidence which I find it unnecessary to recite – indicates that he probably had no intent to kill in the sense of a positive desire on his part to bring about the death of the deceased, there can, in my view, be no doubt that he had what has been termed constructive intent to kill.”

See also **R v Zwane Zenke, 1987-1995(4) at 207** and the judgment of this court in **R v Ndumiso Muzi Maziya, Case No.137/2008** judgment delivered on 14 March 2013 and the cases therein cited.

[32] For the foregoing, I hold that the Crown has proven beyond a reasonable doubt that the accused had the requisite intention to kill the deceased in the form of indirect intention or constructive intent (**dolus eventualis**). He is accordingly found guilty of the murder of the deceased.

### **MAMBA J**

**For Crown:** Mr. A. Matsenjwa

**For Defence/Accused:** Mr. T. Fakudze