



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 05/10

In the matter between

REX

Versus

SICELO BAFANABONKHE SIHLONGONYANE

ACCUSED

Neutral citation: *Rex v Sicelo Bafanabonkhe Sihlongonyane (05/10)*
[2014]SZHC 357 (8 October 2014)

Coram: M. S. SIMELANE J

Heard: 7 July 2014, 17 July 2014, 6 August 2014,
7 August 2014 and 1 October 2014

Delivered: 8 October 2014

Summary: **Criminal Procedure – Murder – self defence – Provocation -
Convicted on a charge of Murder.**

Judgment

SIMELANE J

- [1] Sicelo Bafanabonkhe Sihlongonyane a Swazi male adult has been indicted for the Murder of Jotham Mjoko Sihlongonyane. The Crown contends that upon or about 10 August 2008 and at or near Mvundleni area, in the Shiselweni region, the said Accused person did unlawfully and intentionally kill Jotham Mjoko Sihlongonyane and did thereby commit the crime of Murder.
- [2] When the indictment was read to the Accused he pleaded not guilty. The Crown led six witnesses to prove its case.
- [3] It is apposite for me at this juncture to have regard to the salient features of the evidence led *in casu* for a proper determination of the case.
- [4] PW1 was Zodwa Thandi Sihlongonyane, a daughter to the deceased and a cousin to the Accused. She told the Court that on 10 August 2008 her father came home from attending a funeral and asked her to

prepare some water for him to take a bath. It is her evidence that the Accused arrived at her parental homestead and had an argument with the deceased. The Accused then hacked the deceased with a cane cutter's bush knife several times. She further told the Court that the deceased shouted for help and tried to disarm the Accused of the bush knife but failed as the Accused proceeded with hacking him. She also stated that she then ran away to raise an alarm and on her return she found the deceased lying in a pool of blood showing no sign of life. It is her evidence that the police were later called and the Accused had long disappeared from the scene of crime upon the arrival of the police.

[5] Under cross-examination, it was suggested by the Accused that there was animosity between the deceased and the Accused. This was however denied by PW1. It was further put to PW1 that the deceased quarrelled with the Accused on the day in issue over some money that one Ngabisa, a daughter to the deceased gave to the Accused. It was further suggested to PW 1 that the deceased was infuriated by this. This was vehemently denied by PW1.

[6] Another daughter to the deceased, PW2, Vamsile Yvonne Sihlongonyane, told the Court that on the day in issue she accompanied Ngabisa and Hlengiwe to the bus station as they were going to Manzini. She told the Court that on her way back home she came across the Accused who was carrying a bush knife which was blood stained. It was her evidence that upon arrival at home, she found her father already dead. She further told the Court that she was

familiar with the bush knife that the Accused was carrying as he used to carry it.

[7] It was put to PW2 that there was animosity between the Accused and the deceased but this was denied by PW2.

[8] It is pertinent for me to note that it is not disputed that the deceased is one Jotham Mjoko Sihlongonyane. According to PW 3, Doctor R.M. Reddy a police pathologist who compiled an autopsy report, the deceased died due to multiple injuries. He further stated that on examination the following antemortem injuries were found.

“Blood stains over scalp, neck, trunk, upper limbs present

- 1. Cut wound over occipital region, parital region 3 x 1cms, 5.1 x 1cms bone deep with subdural haemorrhage over brain about 40 ml.**
- 2. Multiple intermingled cuts wound extending from right ear to cheek, neck right shoulder involved muscles, blood vessels, nerves, cheek bones, vertebra, right shoulder joint 26 x 19 cms area.**
- 3. Cut wound lower region neck right to left shoulder joint 14 x 3.7 cms bone deep and shoulder to chest 12 x 9 cms area involved muscles, blood vessels, nerves bones.”**

- [9] The doctor was not cross-examined. The postmortem report was formally handed to Court as evidence and was duly admitted and marked Exhibit A.
- [10] PW4 was Daniel Mawa Sihlongonyane. He told the Court that on 10 August 2008, he responded to an alarm that was raised by PW1 that the Accused was hacking her father. This witness is a cousin to PW1 and PW 2. The deceased was his uncle. It was his evidence that he called the police. He further told the Court that after the deceased had been taken to the mortuary by the police, a family meeting was convened. It transpired in that meeting according to this witness that the Accused who was staying at deceased homestead had impregnated Hlengiwe a daughter to the deceased.
- [11] This witness further testified that on the following day the police came to the deceased homestead in the company of the Accused. It was also his evidence that the Accused then led the police to a river bank where he pointed out a gun and handed it over to the police.
- [12] It was put to PW4 that the deceased ill treated the Accused at his homestead. This was denied by the witness. It was further put to this witness that the deceased had threatened to shoot the Accused with a gun. This was also denied by the witness.
- [13] PW5 was Constable Gamedze. This witness told the Court that after the murder case had been reported to the Hluthi police where he was based, he proceeded to the scene of crime. It was his evidence that on

arrival he found the deceased lying down already dead. The deceased according to PW5 had several injuries on the body. It was further his evidence that he then took the body of the deceased to the mortuary and later on the 13 August 2008 he took the dead body to the police pathologist for examination. This witness was not cross examined.

[14] PW6 was 3993 Detective Sergeant Sibandze. He told the Court that he is a police officer based at Hluthi police station and that he is the investigating officer for this case. He related to Court about his investigations and further told the Court that the Accused surrendered himself to the police. He also told the Court how he effected an arrest on the Accused after he had duly cautioned him in terms of the Judges Rules. The Accused was eventually charged with the crime of Murder. He further told the Court that the Accused then gave him a cane cutter's bush knife which was used in the commission of the offence. The said Exhibit according to PW6 got lost at the police station when the police at Hluthi police station moved from the old police station to the new police station. This witness was not cross examined.

[15] At the close of the Crown's case I was of the considered view that the crown had established a *prima facie* case and the accused was accordingly called to his defence. I shall now turn to consider the defence put forward by the accused who, elected to give evidence under oath. His evidence was in a nutshell as follows:-

- [16] He stated that on the day in issue he was assaulted by the deceased with a bath stone, known in siSwati as “licopho” on his left shoulder after an argument over money that was given to the Accused by one Ngabisa, a daughter to the deceased.
- [17] It was further the Accused’s evidence that there had been a long standing animosity between the Accused and the deceased. The Accused further submitted that he feared that the deceased might attack him since the deceased had previously threatened to kill him. He submitted that, on the day in issue the deceased provoked him by verbally attacking him and throwing the stone on his shoulder.
- [18] When he was cross-examined he stated that he forgot to put it to the Crown witnesses that he was called by the deceased on his return home and the deceased started verbally to assault him. He further conceded that he did not tell the Court that he sustained the alleged injuries when he was assaulted by the deceased with a bath stone.
- [19] It was also put to the Accused that he killed the deceased because he had impregnated the deceased’s daughter and the deceased did not approve of this relationship. The Accused denied this. Thereafter the defence closed its case.
- [20] Learned Crown Counsel Ms. E. Matsebula and Ms. N. Mazibuko both filed comprehensive Heads of argument in closing submissions, for which I am grateful.

[21] I have carefully considered the totality of the evidence led and submissions by both Counsel, and the question for determination at this juncture is, has the Crown proved the offence of Murder beyond reasonable doubt or has the Crown proved that the Accused had the necessary intention or *mens rea* whether direct or indirect to kill the deceased on the day in issue?

[22] The Accused alleges self defence and provocation. Did the Accused act in self defence or was he provoked? These are the questions to be answered.

[23] On the question of provocation Section 2 of the Homicide Act reads as follows:-

“(1) A person who –

(a) unlawfully kills another person 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 this passion to cool;

Shall be guilty of culpable homicide.

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

[24] In Section 3 (1), **“provocation”** is defined as meaning and including any wrongful act or insult of 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 or in 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 proffered.

[25] **In R V Sandile Mbongeni Mtsetfwa Criminal trial No. 81/10 paragraphs 55 and 56** the Court held as follows in discussing **“reasonable relationship to the provocation”**

“This relationship may be considered in my view, at two different levels. First is the time lapse, if any, between the provocation and the act which causes death...

The second, it would appear to me, is the relationship between the nature of the provocation and the reaction of the accused thereto which brings about the deceased’s death. In this regard, there must be some element of proportionality between the two. As to the issue of whether there is proportionality this is a question of fact that has to be decided by the court in light of all the evidence before it. In this regard there would be no proportionality in cases where the provocation is slight but the reaction is severe and completely out of touch therewith.”

[26] Against the backdrop of the foregoing legal exposition, I hold the view that the defence of provocation is not sustainable. The allegation by the Accused is that he was provoked by the deceased who verbally

attacked him and hit him with a bath stone. PW1 an eye witness disputed that the Accused was provoked by the deceased in any manner.

[27] This witness was cross-examined extensively but she was consistent throughout her evidence. The Accused did not suggest any reason why PW1 would fabricate such serious allegation against him. I have no reason to disbelieve her evidence. PW1 appeared as a credible witness.

[28] In any case, even if I were to agree that the Accused was provoked by the deceased hitting him, obviously once with a bath stone, the degree of provocation was so slight as to warrant his loss of self control and elicit the severity of the Accused's action in hacking the deceased several times with a bush knife and causing him the multiple injuries that led to his demise.

[29] In this case, I find no proportionality between the alleged provocation by the deceased and the degree of force and violence used to repel same. It is completely out of touch therewith.

[30] On self defence, the **Constitution of Swaziland Act of 2005, Section 15 (4)** states as follows:-

“ **15 (4) without prejudice to any liability for a contravention of any law with respect to the use of force in such cases as are mentioned in this sub section, a person shall not be regarded as**

having been deprived of life in contravention of this section if death results from use of force to such extent as is reasonably justifiable and proportionate in the circumstances of the case

(a) for the defence of any person from violence or for the defence of property.”

[31] I conclude therefore that for self defence to lie, the use of force employed must be

“to such extent as is reasonably justifiable and proportionate in the circumstances of the case for the defence of any person from violence or for the defence of property.”

[32] Similarly in the very recent decision of Ota J in the case of **Rex V Bongani Angel Capper Lukhele Criminal Case No. 425/10**, her Ladyship when considering self defence, postulated as follows:-

“[29] As I observed in my decision in the King v Khetha Mamba Criminal Case No. 198/11 para [49] ,with reference to the dictum of Dr Twum JA, in the Botswana case of Mmoletsi v The State (2007) 2 BLR 708,

“Under the law of this country when a person is attacked and fears for his life or that he would suffer grievous bodily harm, he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should not be more than is reasonably

necessary in the circumstances. The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self defence.”

[33] If the Accused is to be believed that the totality of the attack on him was that the deceased threw the bathing stone on him, this, whilst still bathing, the established evidence is that the Accused then proceeded to hack the deceased several times with a cane cutters bush knife to the extent that the deceased sustained multiple injuries leading to his death. In my view, the degree of force used in repelling the alleged attack by the deceased was certainly disproportionate to the attack. It was not reasonably necessary in the circumstances. Furthermore, I see no emergency that faced the Accused in the circumstances of this case, out of which he could not avoid serious injury or death except he took the action that he took. Self defence cannot avail him in these premises.

[34] I also reject the Accused’s defence that there was animosity between himself and the deceased. It defies logic how the Accused continued staying at deceased homestead when there was such animosity. The Accused person’s parental homestead is in close proximity with the deceased’s homestead. He had been staying with the deceased for a very long time and had there been such animosity he would have returned to his parental homestead.

[35] The Accused person's intention to kill is demonstrated by the fact that he hacked the unarmed deceased with the bush knife several times. The autopsy report reflects that multiple injuries were inflicted on the deceased and I am convinced that the intention to kill was clearly formulated. This indicates an absolute reckless disregard of the inevitable consequences. The Accused decided to go for the maximum infliction of harm and overdid it as far as he could.

[36] I have given much thought and weight to all the evidence adduced before this Court, and I find that there was no legal justification for the Accused person's vicious and horrid attack on the deceased. The post mortem report exhibits that the deceased was slaughtered like an animal. I therefore find that the said killing was unlawful and intentional.

[37] As it was succinctly stated by His Lordship **Troughton ACJ** in the case of **R. v. Jabulane Philemon Mngomezulu 1970-1976 SLR 6 at 7 9HC):-**

“The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[38] In light of the foregoing, I come to the inevitable conclusion that the Crown has discharged the burden of proving beyond reasonable doubt

the guilt of the Accused. I find him guilty of Murder as charged and hereby convict him accordingly.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Crown: Ms E. Matsebula

For the Accused: Ms N. Mazibuko