



**IN THE HIGH COURT OF SWAZILAND**

Criminal case No: 406/2009

In the matter between:

**REX**

**VS**

**BONGANI MATSENJWA**

Neutral citation: *Rex vs Bongani Matsenjwa (406/2009) [2014] SZHC 404*  
(02 December 2014)

**Coram:**

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

**Summary**

Criminal Law – murder – accused charged with murder and pleaded not guilty – requirements of *mens rea* in the form of *dolus eventualis* considered – held that the accused foresaw the possibility of the death of the deceased but was reckless whether or not death ensued – accused accordingly convicted of murder.

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**JUDGMENT**  
**02 DECEMBER 2014**

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- [1] The accused was charged with murder, and, the Crown alleges that on the 10<sup>th</sup> December 2009 at Mhlaleni area in the Manzini region, he unlawfully and intentionally killed Gabsile Gamedze. He pleaded not guilty to the charge.
- [2] The post-mortem report was admitted by consent and marked exhibit 1. The cause of death was due to multiple injuries. There was an infected lacerated wound of 6x3 cm with pus, artemortem in nature present on the middle portion of the front side of the left thigh in its middle 1/3 portion and the left thigh swollen. There was extra-dural and intra-cerebral haemorrhage present in the brain meninges and cerebral vasculature. The chest bone, 6<sup>th</sup> left side rib and 3<sup>rd</sup> right side rib were fractured and the spleen and left lung ruptured. There was also a petechial haemorrhage present on the heart.
- [3] PW1 Zandile Methula has a child with the accused aged six years. She fell in love with the accused in 2004. They are not married to each other, and, they do not reside together. PW1 resides at her parental home at Matsanjani area in the Shiselweni region with the minor child. At the time of commission of this offence, the accused was residing at Mhlaleni Township in Matsapha, and, he was working for Inyatsi Construction (Pty) Ltd.

[4] PW1 visited the accused on the 9<sup>th</sup> December 2009 at his rented apartment at Mhlaleni Township. On the following day the accused left in the morning and went to his place of employment. PW1 found a photograph of the accused's girlfriend in the house; her name was Hlobsile Simelane. PW1 had been told by a neighbour that the accused and Hlobsile Simelane were in love with each other. PW1 had asked the accused in the morning about his relationship with Hlobsile Simelane, and, he had denied knowledge of the relationship.

[5] PW1 phoned the accused and told him that she had found the photograph of his girlfriend Hlobsile Simelane in the house. She further told him that she had decided to go back to her parental home pursuant to this discovery which had infuriated her. She telephoned her brother Sibongiseni Ndlangamandla and asked him to accompany her to the bus station at Mhlaleni. Her brother arrived with a friend named "Jazi". Gabsile Gamedze also came and they all accompanied PW1 to the bus station.

[6] A motor vehicle driven by the accused arrived at the scene and stopped next to PW1 and those accompanying her. He was in the company of PW2. The motor vehicle belonged to his employer, Inyatsi Construction (Pty Ltd. PW2 called PW1 at the instance of the accused. However, PW1 was reluctant to talk to the accused. After parking the motor vehicle, they

followed PW1 and her companions from behind; Gabsile Gamedze, the deceased, was walking in front of PW1, Sibongiseni and Jazi. They were a short distance away from Mhlaleni bus station.

[7] The accused walked back to the motor vehicle when seeing that PW1 was not prepared to talk to him. He drove the motor vehicle at a very high speed towards PW1 and her companions. Members of the public were shouting to PW1 and her companions to run away from the motor vehicle. They were walking on the pavement; and, the motor vehicle climbed on the pavement and knocked down the deceased who fell over the cliff across the pavement. The motor vehicle also fell over the cliff. The police were called and the deceased was rushed to hospital.

[8] PW1 was able to run away from the speeding motor vehicle; however, Sibongiseni Ndlangamandla and Jazi sustained minor bruises. Meanwhile PW2 was standing and watching in disbelief as the accused knocked down the deceased, Sibongiseni and Jazi. Thereafter, the accused came out of the motor vehicle and boarded a kombi. PW1 testified in court that she is no longer in love with accused since the incident.

[9] Under cross-examination PW1 denied that the death of the deceased was an accident. She maintained her evidence that the accused had driven the

motor vehicle at a high speed towards them, climbing over the pavement and deliberately knocking down the deceased. Her brother and his friend Jazi sustained minor injuries. PW1 reiterated her evidence that she had run away from the motor vehicle when she heard members of the public shouting at them to run away. She maintained her evidence that the accused was infuriated when she refused to talk to him; and, by refusing to give him the photograph of Hlobisile Simelane. She further denied that the accused was disturbed by oncoming traffic going from Mhlaleni bus station to Nhlanguano. According to PW1 there was no traffic on the accused's lane. She reiterated her evidence that the accused intended to kill them.

[10] PW2 Manqoba Nhleko was employed by Inyatsi Construction (Pty) Ltd in 2009 together with the accused. He testified that on the 10<sup>th</sup> December 2009, he was given a lift by the accused at Mahhala Shopping Complex; both of them were going to work. The accused was driving an Isuzu van belonging to the company. The accused drove back to Mhlaleni bus station, and, he told him that he was looking for PW1.

[11] The accused saw PW1 in the company of other people. They were walking on the pavement towards Mhlaleni bus station. The accused stopped the motor vehicle on the side of the road. Both PW2 and the accused came out

of the motor vehicle; and, the accused sent him to call PW1. The accused asked PW1 to give him a photograph and she refused. Meanwhile PW2 was standing about three metres away from the accused and PW1; however, he was able to hear their conversation.

[12] PW1 left the accused and joined the other three people who were walking with her on the pavement. The accused rushed to the motor vehicle leaving PW2 standing on the pavement. The accused told PW2 that he would return to fetch him. He drove the motor vehicle at a high speed over the pavement towards PW1 and her three colleagues; he knocked them down with the motor vehicle. There was no oncoming traffic on the side of the accused that had disturbed him to cause the accident. After knocking PW1's companions, the motor vehicle rolled down and fell over a cliff.

[13] The accused emerged from the cliff carrying an empty beer bottle. He walked towards Mhlaleni bus station. PW2 called the accused but he did not respond. Two of the people knocked down by the motor vehicle emerged from the cliff. Community police, members of the general public as well as the police immediately arrived on the scene. PW2 told the police what had happened; and, that the accused had since boarded a kombi going to Matsapha. The police followed the kombi and came back with the accused. PW2 maintained his evidence under cross-examination and

further reiterated his evidence that the accused was not disturbed by oncoming traffic when knocking down the deceased and her companions. PW2 told the police that the accused drove the motor vehicle above the pavement at a high speed and deliberately knocked down the deceased and her companions. He explained that the accused was infuriated by PW1 who had refused to give him a photograph of Hlobsile Simelane.

[14] PW3 Mfanufikile Mhlanga testified that in December 2009, he was residing at Mahlabatsini Township next to Mhlaleni Township. He knows PW1 and Siboniseni Ndlangamandla from Lavumisa. PW1 had told him that she wanted to confront the accused's new girlfriend Hlobsile Simelane in Matsapha after she found her photograph in the accused's apartment; however, he dissuaded her from doing so and suggested that she should go to her parental homestead. She told him that the accused was cheating on her. PW3 further told the Court that on the 10<sup>th</sup> December 2009, he was walking with PW1, Zandile Methula, Siboniseni Ndlangamandla as well as Gabsile Gamedze, the deceased. They were accompanying PW1 who wanted to board public transport at Mhlaleni bus station; she was going back to her parental homestead at Matsanjeni in the Shiselweni region.

[15] PW3 further told the Court that the accused arrived at the scene driving an Isuzu bakkie; and, he parked it on the pavement. The accused and PW1

started arguing over the photograph of Hlobisile Simelane. The accused was demanding the return of the photograph from PW1; and, she was refusing to give him the photograph. PW1 left the accused and joined her companions. The accused drove the motor vehicle at a fast speed over the pavement where PW1 and her companions were walking. PW3 was knocked by the motor vehicle, and, he fell on the ground. He saw the deceased on the other side of the pavement; she was seriously injured.

[16] Sibongiseni Ndlangamandla and Zandile Methula emerged from the other side of the pavement. Similarly, the accused also emerged from the cliff and boarded a kombi. Members of the public came to the scene to witness what was happening. When the accused knocked down PW1's companions, he had not been disturbed by traffic as his lane was clear without oncoming traffic; PW3 told the Court that the accused intended to kill them after the argument he had with Zandile Methula. The police subsequently arrived at the scene and took the injured to hospital. PW3 maintained his evidence under cross-examination.

[17] PW4 Sibongiseni Ndlangamandla is related to PW1 Zandile Methula. He testified that on the 10<sup>th</sup> December 2009, they were accompanying Zandile Methula to Mhlaleni bus station together with PW3 Mfanufikile Mhlanga



and Gabsile Gamedze, the deceased. PW1 wanted to board a bus to her parental homestead at Matsanjeni area in the Shiselweni region.

[18] The accused arrived at the scene in the company of PW2, Manqoba Nhleko, and parked the motor vehicle on the pavement. The accused called the complainant and they talked to each other; however, he didn't hear what they were saying. PW1 subsequently joined them on the pavement. Suddenly they saw the accused driving the motor vehicle at a high speed towards them over the pavement. The deceased was knocked down by the motor vehicle and she was seriously injured. After knocking them the motor vehicle fell over the cliff across the pavement, and, it rolled down the valley. The accused came out of the motor vehicle and walked away. PW4 denied that the accused was disturbed by oncoming traffic, and, he confirmed that there was no other motor vehicle on the accused's lane.

[19] PW4 maintained his evidence during cross-examination and further reiterated that if they did not run away from the accused's motor vehicle, they would have all died. He insisted that the accused's conduct was deliberate, and, that there was no doubt that the accused intended to kill them.

[20] PW4 further disclosed that Zandile Methula told them that the accused was cheating on her, and, that she wanted to confront his new girlfriend, Hlobisile Simelane. However, he had dissuaded her from having a confrontation with the other girlfriend and advised her to return to her parental homestead.

[21] PW5 Sgt Bongani Nxumalo is a police officer who is also trained as a Motor Vehicle Examiner. He testified that on the 10<sup>th</sup> December 2009, he examined an Isuzu white van registered SD 886 FN. The motor vehicle was parked at the Matsapha Police station, and, it was involved in the incident in which the deceased was killed. Upon his investigation, he found that the brakes, handbrake, hooter and steering system were serviceable and in good condition. He produced a certificate of roadworthiness, which was admitted in evidence and marked Exhibit 1. The defence did not cross-examine PW5.

[22] PW6 Constable Ndumiso Vincent Dlamini testified that on the 10<sup>th</sup> December 2009, he attended a road traffic accident at Mhlaleni bus station. He was in the company of Constable Madlopha. They were driving a police motor vehicle registered SG 211 PO. They found many people gathered at the scene of crime. There was a young woman who was lying on the pavement and visibly in pain. An Isuzu white van was lying on the

other side of the pavement. The people at the scene were shouting to the police telling them that the driver of the motor vehicle had boarded a kombi and left the scene. Constable Mngometulu arrived at the scene driving a police motor cycle; and, he guarded the scene whilst the other two police officers followed the kombi. They further asked Constable Mngometulu to phone the Fire and Emergency Department to come and transport the injured to hospital.

[23] They chased after the kombi; and, they were able to identify the accused and brought him back to the scene. The personnel from the Fire and Emergency Services also arrived at the scene. The three pedestrians were also injured in addition to the woman who was lying on the ground in pain. All the four injured persons were taken to hospital; the three who were slightly injured, were treated and discharged. The woman who was seriously injured was admitted in hospital; however, she died on the 15<sup>th</sup> December 2009.

[24] The accused was taken to the Matsapha Police Station where he was charged with attempted murder; however, after the death of the deceased, the accused was charged with murder. It also transpired from the evidence of PW6 that the accused did not have a driver's licence at the time of the commission of the offence. The motor vehicle which was driven by the

accused was damaged, and, it was towed and parked at the Matsapha Police Station. A Motor Vehicle Examiner was subsequently brought to the police station to examine the motor vehicle and to establish if it was roadworthy at the time of the incident. The defence did not cross-examine PW6.

[25] PW7 Detective Sgt Mcebo Langa testified that on the 23<sup>rd</sup> December 2009, he received a docket of a Road Traffic Accident from Constable Vincent Dlamini. After reading the docket, he decided to charge the accused with murder. The accused was initially arrested on the 10<sup>th</sup> December 2009 on a charge of attempted murder; at the time, the deceased had not died but was seriously injured and admitted in hospital. After the death of the deceased, the accused was charged with murder. The accused who was at the time out on bail was arrested at his new place of employment at Santos Trucking Company in Matsapha.

[26] PW7 went to the accused's place of employment in the company of two police officers. They introduced themselves to the accused and further explained the purpose of their visit. They also cautioned the accused as to his right to legal representation as well as his right to silence. He was subsequently arrested and charged with the murder of Gabsile Gamedze. During trial the defence did not cross-examine PW7; and, the Crown subsequently closed its case.

[27] The accused gave evidence in his defence. He testified that PW1 Zandile Methula visited him at his apartment in Matsapha on the 9<sup>th</sup> December 2009. In the evening she accused him of cheating on her with other girls in the neighbourhood. In the morning he went to work leaving PW1 in the apartment. He had given her money for busfare since she was going back home that day. He also gave her maintenance money for the minor child.

[28] When he was at work that morning, he received a telephone call from PW1 telling him that she had found a photograph of Hlobisile Simelane, one of the accused's alleged girlfriends. She told him that they needed to talk about this issue. He asked for permission from his workplace to attend to PW1 at the apartment; however, he didn't find her at the apartment. He tried to phone her but PW1 was not taking his telephone calls. He decided to go back to work. Along the way he came across a fellow worker, PW2 Manqoba Nhleko, and, they drove together in the company motor vehicle.

[29] When they were at Mahhala Shopping Complex, just before reaching their place of work, PW1 phoned and told him that she was on her way to board public transport at Mhlaleni bus station. They found PW1 walking on a pavement towards the bus station, and, they parked the motor vehicle on the side of the road. The accused sent PW2 to call PW1. She accused him of cheating on her and making her a fool. He asked her to give him the

photograph of Hlobsile Simelane but she refused. She left him and joined her companions who were walking with her to the bus station; the accused was infuriated by PW1's conduct. He told the Court that he decided to drive back to his workplace in order to avoid any confrontation. He drove off from the scene and forgot to take PW2. He was disturbed by two kombis which were overtaking each other and knocked down PW1's companions before the motor vehicle overturned and landed on the cliff.

[30] The accused told the court that he came out of the motor vehicle after breaking the window. He alleged that he was at the time confused; and, he conceded that he boarded a kombi to Matsapha without rendering assistance to the injured people. The police later stopped the kombi and identified him because he was bleeding. They took him back to the scene of crime. Members of the public who were gathered at the scene were shouting that he should be killed for causing the incident. Gabsile Gamedze was lying helplessly on the ground and seriously injured; she couldn't rise up. She was taken to hospital together with the others in a motor vehicle from the Fire and Emergency Services. The police arrested him after a caution to his rights of silence and legal representation. He learnt after five days that Gabsile Gamedze had died.

[31] Under cross-examination the accused admitted that when he parked the motor vehicle at the scene, PW1 and her three companions were walking on the pavement towards Mhlaleni bus station. Contrary to his evidence in-chief that he became angry when PW1 refused to give him the photograph of Hlobisile Simelane; however, under cross-examination he denied that he was angry and alleged that he was merely confused.

[32] The accused admitted that there was animosity, tension and confrontation between PW1 and himself on the night preceding the incident. PW1 had accused him of cheating with Hlobisile Simelane, and, he had denied the accusation. However, it is common cause that PW1 subsequently found the photograph of Hlobisile Simelane in the accused's apartment as proof of the relationship between the accused and Hlobisile. It is apparent that when PW1 refused to give the photograph to the accused, the accused became very angry. When PW1 left with the photograph, the accused ran to the motor vehicle, and, drove it at a high speed over the pavement where PW1 and her companions were walking. PW2 testified that when he asked the accused why he was leaving him behind, he told him that he would come back and fetch him, meaning that he was not leaving the scene at that time.

[33] There is evidence by PW1, PW2, PW3 and PW4 that the accused's lane was clear with no other motor vehicle. The witnesses further denied that

there were other motor vehicles which disturbed the accused resulting in the incident. Furthermore, PW5 testified that he tested the motor vehicle and found that it was serviceable and roadworthy. The brakes, handbrake, hooter and steering system were serviceable; hence, he issued the Certificate of Road Worthiness in respect of the motor vehicle. This evidence was not disputed by the defence.

[34] The Crown witnesses corroborate each other that the accused drove the motor vehicle over the pavement and deliberately knocked down PW1's companions who were walking on the pavement. The accused was angry that PW1 was refusing to give him the photograph of Hlobisile Simelane. When he came out of the motor vehicle, he did not assist the injured people or even observe the extent of the injuries sustained. He ignored the injured people and boarded a kombi. When he was called by PW2, he did not respond. This shows that his conduct was deliberate, and, that it was prompted by a desire to revenge against PW1 who had taken his girlfriend's photograph. During the trial, the accused was not remorseful but defensive.

[35] The evidence by the accused that he drove the motor vehicle at a high speed from the scene because he was rushing to work cannot be true, and, it is accordingly rejected on the basis that in his evidence in-chief, he



testified that he had been given permission by his foreman to go and meet PW1; hence, there was no need to hurry back to work. Similarly, his contention that he couldn't assist the injured after the incident because he was in a hurry to return to work is false on the basis that he had damaged the company's motor vehicle and had to attend to the incident before returning to work.

[36] PW3 Mfanufikile Mhlanga testified that when he was hit by the motor vehicle, he fell on the accused's lane, and, the others fell across the pavement. If the accused had been disturbed by two kombis on his lane as alleged, the kombis would have run over PW3. The evidence of PW3 was not disputed. Similarly, PW1 testified that when the accused sped the motor vehicle towards them, members of the public within the vicinity shouted that they should run away because the motor vehicle was driving towards them; and, this evidence was not disputed by the defence. The accused's colleague, PW2, testified that he was shocked by the conduct of the accused in driving the motor vehicle over PW1 and her companions. There is no evidence that the accused was disturbed by oncoming traffic. The totality of the evidence points to an intention by the accused of killing PW1 and her companions.

[37] It is apparent from the evidence that the accused had *mens rea* in the form of *dolus eventualis* when committing the offence. He foresaw the possibility of his act resulting in death yet he persisted reckless whether or not death ensued. It is trite law that the test of foresight which the accused must have in order to constitute *dolus enventualis* is subjective. See the Court of Appeal case of *Annah Lokudzinga Matsenjwa v. Rex* 1970-1976 SLR 25 at 26.

[38] *Troughton ACJ* in the case of *Rex v. Jabulane Philemon Mngomezulu* SLR 6 (HC) at 7 quoted with approval the decision of *Williamson JA* in *S. v. Mini* 1963 (3) SA 188 (A) at p.92 where he said this:

**“a person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts reckless as to whether such death result or not.”**

[39] *Troughton ACJ* in *Rex v. Jabulane Philemon Mngomezulu* (supra) at p.7 further quoted with approval the decision of *Kotze JA* in *Rex v. Jolly and Others* 1923 AD 176 at p.187 where his Lordship said the following:

**“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.”**

[40] Tebbutt JA in *Thandi T.K. Sihlonganyane v. Rex* Criminal Appeal No. 40/97 quoted with approval the decision of *Holmes JA* in *S. v. De Bruyn and Another* 1968 (4) SA 498 AD at 510 where the requirements of *dolus eventualis* are enumerated as follows: firstly, subjective foresight of the possibility of the accused's unlawful conduct causing death to another. Secondly, persistence in such conduct, despite such foresight. Thirdly, the conscious taking of the risk of resultant death, not caring whether it ensues or not. Fourthly, the absence of actual intent to kill.

[41] Accordingly, I find the accused guilty of murder as charged.

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

For Crown  
For Defence

Senior Crown Counsel Absalom Makhanya  
Attorney Justice Mzizi