



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No. 226/2009

In the matter between:

REX

Applicant

VS

SABELO ELIAS DLAMINI

Respondent

Neutral citation:

Rex vs Sabelo Elias Dlamini (226/2009) [2016] SZHC
93 (09 June 2016)

CORAM

MAMBA J

HEARD:

28, 30 October, 2014

10, 11 December 2014

23 February 2015

2nd July 2015

DELIVERED:

09 June, 2016

[1] *Criminal Law and Procedure – charge of murder – crown bears onus to prove its case beyond reasonable doubt. Where accused gives a version or story that may in the circumstances of the case be reasonably possibly be true, he must be accorded the benefit of the doubt and be acquitted. A story that has been shown to be false beyond any doubt cannot reasonably possibly be true.*

[2] *Criminal Law – murder – intention. Where an accused realises that his unlawful action may cause the death of his victim but acts with recklessness not caring whether*

such death results or not, he is guilty of murder on the basis of indirect intention to kill, ie dolus eventualis.

[3] *Criminal law – murder – requisite mens rea. Even a single stab wound to the chest with a knife – may be sufficient to establish or ground such intent.*

JUDGMENT

[1] Mr Dlamini herein stands charged with the crime of murder. It is alleged that on or about 12 July 2009 and at or near Nkiliji in the Manzini Region, he unlawfully and intentionally killed one Mbhekeni Mabazo by stabbing him with a knife on his chest or upper body.

[2] Mr Dlamini has admitted that he stabbed the deceased and that the latter died as a result of the stab wound he inflicted on him. Mr Dlamini, however, states that he stabbed the deceased in private defence and is therefore not criminally liable for his death.

[3] In terms of the postmortem examination report that was compiled by Dr R.M. Reddy, the police pathologist on 16 July 2009, the deceased died as a result of ‘Haemorrhage as a result of penetrating injury to the heart.’ On examination of the body of the deceased, the pathologist observed the following ante-mortem injuries on it:

- ‘1. Penetrating injury over front of chest on left side obliquely placed 4.7 cm medial to nipple 4 x 1 cm heart deep. It involved muscles 5 space inter costal structures, pluro-pericardium, 4 left ventricle through and through in lower region (3 x 0.8 cm, 1 x 0.4 cm) edges clean cut angle sharp front to backwards. Thoracle cavity contained about 1200ml blood.
2. Abrasion over left fore-arm 3 x 0.3 cm.’

From the above facts, which are common cause, it is therefore proved beyond a reasonable doubt that the deceased died as a result of the stab wound that was inflicted on him by Mr Dlamini on the relevant date. The postmortem report was handed in by consent and marked as exhibit A. I now examine the circumstances under which the stabbing took place. I shall further examine whether on the proven or established facts, Mr Dlamini is criminally liable or not for the death of the deceased and if so criminally liable, of what crime or offence.

- [4] The first witness for the crown was Sibonginkosi Mabaso. He was 34 years old when he testified and the deceased was his brother. When the deceased died he was 23 years old. Sibonginkosi testified that on the day in question, ie 12 July 2009, he and the deceased stopped working at their home at about 5pm. They then went to look for their cattle in the grazing

area. Whilst near one of the fields in the area, they came across Mr Dlamini who was, apparently drunk singing and talking to himself. On seeing them, Mr Dlamini, for no apparent reason, insulted them both and told them that they were just troublesome and insolent like their parents. He insulted them by their mother's private parts and told them to 'voetsek' – which is a rude or crude way of referring to someone as a dog. Sibonginkosi was armed with a bushknife and a stick. The deceased was not armed.

[5] In response to Mr Dlamini's verbal tirade, Sibonginkosi told him that they were not happy with what he was saying to them and were not scared of him either as they were grown-ups as well. They continued on their search for their cattle and after walking together with Mr Dlamini for about 100 metres from where they had the verbal confrontation with Mr Dlamini, they stopped at a store. Not very far from the store was a Maphalala homestead where Thandukwazi Maphalala was. The deceased stopped and spoke to Thandukwazi enquiring about the whereabouts of their cattle. Sibonginkosi stood about ten (10) metres away from the deceased whilst Macocoma Dlamini stood at the door to the store.

[6] Sibonginkosi told the court that as the deceased was busy talking to Thandukwazi, who was a distance away from him, Mr Dlamini

approached, went past the deceased and suddenly produced a knife, turned back and stabbed the deceased in the chest as the deceased was looking the other way talking to Thandukwazi Maphalala. Deceased moved a short distance and fell to the ground. Mr Dlamini first ran in the direction of the shop but when Macocoma called out for help, Mr Dlamini changed direction and ran into a Mkhabela homestead nearby. A group of boys who had been playing soccer came by and assisted Sibonginkosi to have the deceased conveyed to hospital. After about 2 minutes, the doctor who attended to the deceased, informed Sibonginkosi and his companions that the deceased had died. The police were accordingly informed.

- [7] Sibonginkosi testified that at all material time, visibility was clear and, that all this occurred before sunset. He stated that when Mr Dlamini stabbed the deceased, he, Sibonginkosi was about 10 metres away from them. He described and identified the knife that was used by Mr Dlamini in stabbing the deceased. Again, by consent this knife was handed in as exhibit 1. It has a wooden light brown handle and its double edged or dagger-like blade is about 15cm. It tapers to one end and is about 3cm wide nearest the handle.

- [8] It is common cause in this case that there had been a long standing feud between Mr Dlamini and the Mabaso family. Some of these misunderstandings or feuding had been reported to the local Chief's kraal and the Manzini Police Station. Again, some of the disputes or confrontations had been directly between Mr Dlamini and Sibonginkhosi.
- [9] Under cross examination, Sibonginkhosi was steadfast and adamant in his testimony that the deceased was not armed at the material time. It was put to him that the deceased was armed with a bushknife with which he attacked Mr. Dlamini. This was repeated by Mr Dlamini in his evidence in his defence. This was, however, denied by the crown witnesses.
- [10] The evidence of the second crown witness, Macocoma Mandla Dlamini is materially the same as that of Sibonginkhosi. He told the court that he was at the material time running or operating the store where the incident took place. He testified that whilst inside the shop he heard voices of people from outside. He overheard one of the persons saying "you people cannot do anything to me". This prompted him to go out of the store. First, he stood at the door to the shop but later went out and stood at the corner of the said shop or store. Macocoma stated that Sibonginkhosi went past the shop followed closely by the deceased who then stood about 6 metres from him and spoke to Thandukwazi

Maphalala about the former's cattle. Macocoma testified further that as the deceased was speaking to Thandukwazi, Mr Dlamini approached, went past him and suddenly advanced towards him and stabbed him in the chest, leaving the knife stuck to his chest. He quickly removed the knife and ran towards the shop and when he saw Macocoma there he changed course and ran away from the shop. Macocoma also corroborated the evidence of Sibonginkhosi that the deceased did not attack Mr Dlamini and he was also not armed with any weapon when Mr Dlamini stabbed him. He denied that he got to the scene after the deceased had been stabbed. He insisted that when the deceased was stabbed he was standing at one of the corners of the shop and not inside the store room as suggested to him by the defence.

- [11] Police officer 4808 Sukoluhle Masuku gave evidence as PW3. Nothing of any significance in his evidence would appear to me to be in issue. The same is true of his colleague 2277 Methula who testified as PW4. Mr Methula stated though that the point where the deceased was allegedly stabbed was about 25 paces or 15-20 metres from the nearest point of the shop building. He testified that this point was pointed out to him by both Macocoma and Mr Dlamini. This distance, the defence argued, is at variance with the 6 metres referred to by Macocoma. In the circumstances of this case, I do not think that anything turns on this point.

Whether Macocoma stood 6 metres or 15 metres away from the point at which the deceased was stabbed, is in my view, less than significant. He would, at either of those distances, have been able to observe the events he testified on. But more importantly, these are all estimates. Neither Macocoma nor Methula took actual or exact measurements of the distances in question.

[12] In his defence, Mr Dlamini related to court the long history of enmity or strife between him and the Mabaso family since his arrival in the area in 1997. That rivalry between the families is common cause. He told the court that on the day in question, he had been assigned work to prepare meat at a lobola function in the area. He had had a lot of alcoholic drinks in the form of Savannah dry; he drank 12 of these. He began drinking at about 1 pm and stopped at 4pm to concentrate on the task he had been assigned to carry out at the function or ceremony. He then left that homestead for his home at around 5.30pm. He had exhibit 1 with him which he had been using in preparing or cutting the meat at the said function.

[13] It was the evidence of Mr Dlamini that as he walked home, he saw from a distance, two people seated on certain boulders or rocks along the path that he was taking home. Before he reached where they were, they advanced

towards him. These were Sibonginkhosi and the deceased. He was walking on a very narrow footpath. These persons separated and stood on either side of the path causing him to walk in between them. When he asked the deceased to move onto the side where Sibonginkhosi was, the deceased refused. Sibonginkhosi was armed with a stick and a bushknife whilst the deceased was not armed at all. Sibonginkhosi then told him that they were going to empty his stomach of the mcombotsi he had consumed and that Mr Dlamini's police officers from Manzini would find him dead. Mr Dlamini told the court that on hearing these threats, he then telephoned Maphindela Dlundlu, the community police, and told him that the Mabaso boys were attacking him and he should come and help him. Unfortunately the telephone call was terminated before Maphindela could respond to his plea.

- [14] Mr Dlamini told the court that they proceeded walking towards the shop and Sibonginkhosi hit him with the bushknife and the deceased told Sibonginkhosi not to do so as they were taking Mr Dlamini to their home where they would deal with him as a family. Sibonginkhosi told Mr Dlamini that he had tortured them for a long time and today they were ready to bring this to an end. Near the store, Mr Dlamini stood leaning against a rock or stone and Sibonginkhosi told him not to stand there as they were taking or escorting him to their home. He responded that he

was not going there and that Sibonginkhosi and his brother would not do anything to him.

[15] Mr Dlamini testified further that at the shop, there were the following persons; Sipiwo Mkhabela, Sisekelo Mkhabela, Njabulo, Kwazi (Thandukwazi, I suppose) and Mgcini Dlamini. He denied that Macocoma was also there.

[16] Mr Dlamini further testified that when he resisted to go to the Mabaso homestead, the deceased told him that he could kill him on the spot as he advanced towards him and simultaneously drew a bushknife from his person. He said he could not run away and he held his knife in his hand. The deceased struck him with the bushknife on top of his head and it was at that moment that he, Mr Dlamini, stabbed the deceased with his knife. He stated that Sibonginkhosi was standing about 6-7 metres away from him when this occurred. Mr Dlamini told the court that the deceased hit or chopped him with the sharp part of the bushknife. He said he bled as a result of this injury and his clothes were covered or soaked in his own blood. He said he did not go to hospital as a result of this but still has a scar on his head as a result of this assault by the deceased.

[17] After stabbing the deceased, Mr Dlamini left the scene intending to meet with the Community police. He said it was only at that stage that Macocoma came to the scene. He reported the incident to Maphindela, Bhekithemba Shongwe and a certain Mr Nkwanyana.

[18] Maphindela Dlodlu gave evidence for the defence. He confirmed the long standing enmity between the two families and also the telephone report made to him by Mr Dlamini on that day. He also specifically stated that Mr Dlamini had reported to him that the Mabaso boys were blocking or impeding his movements and wanted to comandieer him to their home. Maphindela told the court that he was able to see the three men as he spoke to Dlamini on his mobile telephone. However, he could not hear all the conversation between them as they were in a stream or low area. He said they were walking one after the other. Sibonginkhosi was in front, followed by the deceased and Mr Dlamini followed from behind. He testified that after the trio disappeared beyond a certain hillock, he went to fetch a stick from his home in order to arm himself so that he could intervene in the altercation between the two warring parties. However, when he got to his home, he found Mr Dlamini and other members of the Community police already there. Mr Dlamini reported to him that he had already stabbed one of the Mabaso boys; the deceased.

[19] Significantly, Maphindela under cross examination stated that Mr Dlamini told him that he stabbed the deceased whilst the latter tried to hack him with a bushknife. He also told the court that he did not observe any injury on Mr Dlamini. He also did not see any blood stains on his clothes. It has to be remembered that Mr. Dlamini told the court that his blood stained clothes were taken from him by his wife on the following day at the police station, after his arrest. Maphindela also told the court that Mr Dlamini did not report to him that the deceased had hacked him with a bushknife.

[20] I have already stated above that the two families herein were at loggerheads. That may well explain the altercation that took place on the fateful day. It, however, does not necessarily justify, excuse or legalise those events and the eventual stabbing and killing of the deceased by Mr Dlamini. I accept, fully, the evidence that there was indeed an altercation or quarrel between the two Mabaso boys and Mr Dlamini prior to the stabbing of the deceased by Mr Dlamini. The crux of the matter though is under what circumstances was the deceased stabbed? That, in my judgment is the critical or crucial question that must be answered by this court in its quest to determine the guilt or otherwise of Mr Dlamini. Both Sibonginkhosi and Macocoma Dlamini testified that the deceased was stabbed whilst he was talking to Thandukwazi Mkhabela. He was not

armed and was not at all a threat to Mr Dlamini. Macocoma was not involved in the altercation or quarrel herein. He was a dispassionate and independent bye-stander. He also corroborated the evidence of Sibonginkhosi that at the relevant time, the deceased was not armed. He, the deceased was not attacking or threatening to attack Mr Dlamini. Both Macocoma and Sibonginkhosi were in my judgment truthful and reliable witnesses. When the stabbing incident occurred, they were both close by. Visibility was clear and there was nothing that interfered with their observation as to what took place at that crucial moment or immediately prior thereto.

[21] The evidence of Maphindela is also clear. He again, like Macocoma was a disinterested witness. He, contrary to the assertion by Mr Dlamini, did not witness any injury on the latter. Nor indeed did he see any blood stains on Mr Dlamini. He saw only a blood stained knife; exhibit 1.

[22] I do bear in mind that the onus to proving the case beyond any reasonable doubt rests on the crown and I need not even believe the version or story by the accused in order for me to acquit him. As long as he tells the court a story or version that may reasonably, possibly be true, I have to give him the benefit of the doubt and find him not guilty. In *S v Van der Meyden 1999 (1) SACR 447 (W) at 449* Nugent J summed up the position

regarding establishing the accused's guilt at the end of the case in the following language:

'The onus of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see example *R v Difford* 1937 AD at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility and an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so too does not look at exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

See ***R v Ndwandwe Fannie* 2000-2005 (1) SLR110 at 123, *R v Siteo, Romao*, 2000-2005 (1) SLR 123 at 132.**

However, in the particular circumstances of this case, the version given by Mr Dlamini has been shown, beyond any reasonable doubt, that it is patently false. It cannot be reasonably possibly be true. It is an afterthought or fabrication by him in an attempt to escape the legal consequences of his action. I reject it as entirely false.

[23] I accept that Mr Dlamini had at the relevant time taken 12 x 340 ml Savannah ciders. He was, however, not drunk as not to know or appreciate what he was doing or the consequences of his actions. On his own showing or version, he was able to appreciate everything. He was also able to remember and relate vividly what took place at the relevant time. He had the presence of mind to call the Community police during the confrontation with the Mabaso boys, to run away from the scene after the stabbing and also to hand himself and the knife over to the community police after the incident. He was further able to relate to Maphindela what had occurred and also point out certain key points at the scene of crime. Lastly, the weapon used was a sharp and lethal weapon. Mr Dlamini ought to have realized that, even under that state of sobriety he was in. He did, realize it. He inflicted a stab wound on the chest of the deceased. That again, Mr Dlamini must have realized, is a sensitive part of the body of any human being. Although, I cannot say that he directly or positively desired to kill the deceased, he undoubtedly realized that his

action may result in such death. He, however, acted recklessly, and did not care whether such death occurred or not.

[24] From the above facts and analysis of the issues involved, both factual and legal, I hold that Mr Dlamini is guilty of the murder of the deceased on the basis of *dolus indirectus* or *eventualis*. He is thus found guilty as charged.

MAMBA J

For the Crown:

Mr. H. Magongo

For the Defence:

Mr. M. Dlamini