



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 91/2011

In the matter between

REX

Applicant

VS

MANGALISO FANA DLAMINI

Respondent

Neutral Citation: *Rex Vs Mangaliso Fana Dlamini (91/2011) [2018]*
SZHC 182 (6th August 2018)

Coram:

Hlophe J.

For the Applicant:

Mr B. Magagula

For the Respondent:

Mr M.N. Dlamini

Date Heard:

6/03/17;7/03/17;
5/04/17;6/04/17;18/04/17;19/06
/17;20/06/17;31/07/17;1/08/17;
4/10/17;5/10/17;28/11/17;29/11
/17;12/2/2008;13/02/18;5/04/18
;10/04/18;9/07/18;10/07/18;26/
07/18.

Date Judgement Delivered:

06 August 2018

Summary

Criminal Law –Murder –What does murder consist of in Law –Deceased and accused quarrel where after accused informs deceased, who accosted him that he would be returning to him with his ‘thing’ he was to fetch to ‘show’ him –After about two hours and whilst buying at a nearby spaza shop, the accused taps deceased by the shoulder who upon turning towards him he stabs once on the left handside of the chest resulting in his ultimate death –Wound found to have pierced through the chest wall, the heart sack into the heart itself –Nature of wound found by expert witness to be indicative of direct and heavy force used to stab the deceased –Accused contending that the stab wound was accidental and was a result of the two of them struggling over the knife which then stabs the deceased – Expert rules defendants defence out –Whether accused’s defence sustainable from the evidence from the evidence, it is clear that the act and conduct of the accused an intention to kill the deceased is established–Court convinced evidence establishes murder of the deceased – Accused found guilty of murder therefore.

JUDGMENT

[1] The accused pleaded not guilty to a charge of murder preferred against him by the Crown which alleged that he, on the 3rd October 2010, and at or near Mhlaleni area in the Manzini District, unlawfully and intentionally killed one Mncedisi Makhanya.

[2] Although he pleaded not guilty to the charge in question, it was never in dispute that the deceased died of a stab wound, in the infliction of which the accused had a hand. The thrust of the inquiry therefore became the reason why the accused had inflicted the wound in question and how it had been so inflicted.

[3] Whereas the crown points a picture of a senseless deliberate and intentional killing of the deceased by the accused after he had referred to the deceased 'sicashi' prompting the latter to indirectly challenge him to a fight by crushing a bottle on the ground to apparently use in the proposed fight. He had further been angered by the accused's having involved himself in an incident where he was beating his brother's girlfriend for her having taken his girlfriend to a popular shebeen in the area, known as KaMshayazafe. The accused wants to paint a picture of the deceased having attacked him for no apparent reason at a certain spaza shop situated nearby at KaNdlunganye or Mhlaleni area. He alleges this was after he ran there from an alleged earlier assault by the deceased after he had defended the girl referred to above. He avers the girl concerned was being attacked for being in the company of a certain boy, yet they knew her to be one of their brother's girlfriend. Otherwise he says when the girl was assaulted, the deceased was

in the company of a group of young men with whom they leased a flat or flats at a nearby Nkambule homestead.

[4] Otherwise the crown called four witnesses to prove its case whilst the defence called only one witness who happened to be the accused himself. Those witnesses called by the Crown were Richard Roy Bennet, PW1; Nkhululeko Lusekwane Makhanya PW2; Dr Komma Reddy PW3 and 3548 Det,Sergeant Simon Mduduzi Mavuso PW4. As indicated above the only defence witness called was the accused himself.

[5] The main questions for determination in the matter are whether or not it can be said from the facts of the matter that there was any justification for the killing of the deceased including whether such killing resulted from a deliberate act by the accused so as to establish an intention in law or it was an accident resultant from the deceased and the accused struggling over the knife used as the accused wants to contend. It is a fact as well that the knife used is also part of the inquiry since the crown witnesses suggest that the long-bladed scary looking home made knife was the one used whilst the accused wants to say it was an ordinary okapi knife.

[6] In their testimony the Crown witnesses testified in the manner that follows. PW1 who introduced himself as an original neighbour to the deceased at their home area, although they later shared some leased flats together with the latter's brothers called Bhekie Makhanya and Nkhululeko Makhanya, at a Nkambule homestead at Mhlaleni or Ndlunganye area, testified that he had been away to his home that weekend. When he returned late that evening around 1630hrs he had found the deceased and his aforesaid brothers sitting at the home where they had the rented flat or flats. He was to learn from them that sometime earlier on that late afternoon there had broken out a misunderstanding between the deceased and the accused who were allegedly fighting over Bhekie's girlfriend who was being beaten by the deceased. The deceased had allegedly passed by and made derogatory remarks of them as 'tenants' who were making noise. When the deceased reacted by challenging the accused for a fight by inter alia crushing a beer bottle on the ground, the accused had issued threats to him, saying he was fetching his 'thing' and was going to 'show' him as he was not a 'tenant' but one born and bred in Matsapha or in that area. He however could not elaborate more on what he was told but went straight into what he himself

knew. It is worth clarifying that he mentioned much of what he was told under cross examination by Defence Counsel.

[7] Otherwise this witness, PW1, told the Court that given that they needed to buy relish in the form of a half chicken at the spaza shop that evening, he and the deceased had proceeded there. It was around 1930hrs, and whilst they were under light provided by electric lamps at the shop and whilst awaiting their turn to purchase at that busy shop, that he saw the accused whom he knew very well, tapping the deceased around the left shoulder in an apparent attempt to draw his attention. Upon the deceased turning towards him in response, the accused, pulled out a long knife and stabbed him once around the left handside of the chest.

[8] Upon being stabbed the deceased ran away for some twenty metres or so before he fell down. On the other hand he saw the accused running away towards some old pit latrine or toilet where he threw into the knife he had used. He together with the others who were there quickly arranged a car to ferry their stabbed friend to the Raleigh Fitkin Memorial Hospital in Manzini. At the said hospital they were blocked by the entrance with only

the deceased being taken in. He was later informed by an employee of the hospital that the deceased had died.

[9] Although the cross examination of this witness was wide to the extent it solicited hearsay evidence, this witness was clearly not shaken in what he had observed. namely that he had seen the accused tap the deceased by the shoulder, who upon turning towards him he stabbed him once on the left handside of the chest with a long spear shaped knife. He vehemently denied that the stabbing of the deceased had been accidental arising from their struggling over an Okapi knife. He denied that it was them who had found the accused at the shop upon which the deceased had assaulted the accused, as put to him by defence counsel. He instisted it was the other way round.

[10] PW2, Nkhululeko Lusekwane Makhanya when called by the crown testified that a group of people had gathered at a spot just above the homestead where he and his brothers were renting a flat or flats. Among the people there present were his brothers who included Mncedisi Makhanya (his deceased brother) and Bheki Makhanya. The deceased had beaten a certain girl called Samo whom he accused of having, during his absence, taken his girlfriend

with her to a notorious Matsapha shebeen called Kamshayazafe. A large noise had apparently ensued from that incident. When the accused approached, he shouted at them, and enquired in a derogatory manner why they were making noise there as tenants (ticashi). He in fact allegedly said “ Yeyi nine tichashi, nibangelani umsindvo la?” – which means, “ Hey you tenants, why are you making noise here?”.

[11] The story may not be very clear on what happened leading to the incident. It is however not in dispute that the deceased took offence. He engaged on a heated exchange of words with the accused. He crushed a beer bottle on the ground, clearly fashioning out as a weapon. He challenged the accused to a fight.

[12] The accused reacted thereto by uttering words that were an apparent threat. He allegedly said he was leaving to fetch his “thing” and was going to come back later to “show” the deceased. He also claimed that he was not a tenant as he was born and bred in Matsapha. He then left the group there standing. The group later dispersed and went back to their rooms or to the homestead where they were renting some flats. That is where they were joined by PW1

Roy Bennet. Later on that evening PW1 and the deceased left to buy relish at the nearby shop.

[13] After these two had left, this witness says he saw the accused who went past the homestead where they were renting a flat or flats, apparently looking for the deceased when considering his earlier threat he was to go and look for or fetch his “thing” and would be returning later to “show” the deceased. This witness said that upon seeing the accused take the path that had been taken by the deceased and PW1, he decided to follow him, taking the same route. He was still on that route when he said he met the deceased who came running claiming to have been stabbed by the accused. He was among those who arranged for a motor vehicle to transport the deceased to the Raleigh Fitkin Memorial Hospital in Manzini.

[14] They secured a motor vehicle belonging to a certain Mhlanga which transported the deceased to the aforesaid hospital. He was later called in after they were initially ordered to remain by the entrance to the hospital, and informed that his brother, the deceased, had passed on.

[15] PW2 further testified that a certain woman known as Make Thwala had found the knife used to stab the deceased from a derelict pit latrine or toilet next to the place where they were renting their flat or flats. She had given the knife in question to PW2 among others who took it to the Sigodvweni Police Station in Matsapha.

[16] According to PW3, Doctor Komma Reddy, he was the Pathologist who conducted the post mortem of the deceased. It is not in dispute that this is an experienced pathologist of over 10 years, who mentioned his qualifications in Court. He testified that the cause of death was a stab wound inflicted on the deceased's left handside of the chest. He said that the wound had apparently been inflicted directly and with the use of heavy force when looking at the fact that it had penetrated the chest wall, the sack that contains the organs and entered the heart by some two centimeters. Under cross examination, he ruled out the possibility of the deceased having been stabbed accidentally as a result of a struggle over the knife. He answered that the wound, when looking at the extent of its reach, had been inflicted directly and with the use of heavy force. He had filled in a report which he handed into Court and was marked Exhibit A.

[17] The investigating officer in the matter was one 3458 Detective Sergeant, Simon Mavuso who testified that he was handed the docket in the matter to investigate a case of murder. He had commenced on that exercise and had gone to the suspects place to look for him, when he received a phone call from a colleague of his based at Lobamba Police Station who told him that the accused had handed himself over to the Lobamba Police in the company of his father for the same matter he was investigating. This was on the 4th October 2010.

[18] This witness and his colleague proceeded to Lobamba Police Station whereat the accused was handed over to them by his father. He said he cautioned him in terms of the Judge's rules, telling him why they were there and that he was not obliged to tell them anything as whatever he said would be recorded down and could be used in Court against him. He was eventually taken to Matsapha Police Station whereat he was kept in the cells until the next day.

[19] On the 5th October 2010, the accused led the Police to an old pit latrine toilet which was no longer used, next to his home where he claimed to have thrown the knife he had used in stabbing the deceased. This was after he had been allegedly cautioned in terms of the Judge's Rules and told that he was not obliged to show the Police anything and that if he did so such could be used in evidence against him. Although the accused led them to the toilet concerned claiming to have thrown the knife he had used in stabbing the deceased, same could not be found at that particular toilet. They were to learn later that the knife had been found by a certain woman who was referred to as Make Zwane, who had allegedly caused it to be taken to the Matsapha Police Station.

[20] Upon their arrival at the Police Station, they found the knife confirmed to be the one used by the accused there. The knife was the one handed into court as Exhibit 1. From what I saw, it was a knife in the shape of a spear, whose blade was estimated to be around 30 centimetres or so in length. This blade was welded to an iron handle. It was marked Exhibit 1.

[21] It was put to the Police Officer concerned that the accused was not well at the time of his arrest and that he had some injuries on one of his arms resulting from a stabbing he had suffered some time back. This witness was however unequivocal that the accused had no such injuries. He also denied that the accused had his right hand hung on a sling. This was denied as well. It was equally denied that the knife pointed out as having been used in the stabbing of the deceased was not the one displayed in court but an Okapi knife. The witness clarified he had made a mistake to refer to the knife in question as a sharp opened Okapi knife in his statement.

[22] The accused gave evidence as the only defence witness and he was referred to as DW1. He recited the events of the 3rd October 2010, saying that after deciding to go to the shops nearby, he noted just above his homestead, a group of people that was standing there around a certain girl. They were allegedly involved in an argument with raised voices. He then says he got to them and asked them after having greeted them and enquired what was happening. He said he was told that they had found their brother's girlfriend walking with a stranger as they referred to a guy who was standing there with them. The guy allegedly explained himself saying he was merely

conveying a message from her parents that she should come back home as they had not seen her for a long time.

[23] He said that the explanations by the guy were apparently not acceptable to Mncedisi and the others because they were drunk. He claimed to have managed to pull the guy away from them and advised him to leave as his accusers were drunk and could never agree with him. He allegedly did all this whilst he had one arm hung in a sling following that it had been injured as a result of an alleged stabbing he suffered in 2009. He said after he had pulled the boy away from the crowd he saw the girl being beaten in turns by the group. He said he warned against that advising them that they would be arrested. Instead of heeding his advice, the deceased allegedly hit the bottle on the ground, breaking it in the process and thereafter went for him where he allegedly slapped him on the face. He said he ran away towards the spaza shops, with the deceased chasing him from behind. Otherwise all the others stood there making it clear that they feared, the deceased who was much stronger and an apparent bully.

[24] He was allegedly standing at the spaza shop when he saw the deceased approaching with an Okapi knife. Although there were many people standing against the walls of the spaza shop, he said he saw the deceased coming for him brandishing an Okapi knife. As one who had been stabbed before, he said he somehow generated strength grabbed the deceased's hand resulting in the two of them struggling over the knife. It was from that struggle that the deceased got stabbed with the knife which ended up with him. After the deceased had allegedly pulled away from him, he managed to escape, ran towards a certain old out of use toilet where at he threw the said knife.

[25] He said he thereafter called his father who worked at Ezulwini Royal Swazi Sun Hotel, and informed him about what had befallen him. His father called him to come to him, which he heeded. It was after reaching him that he took him to the Lobamba Police to surrender himself the next day given that on the same day he had found him to be too busy at work where there was a function he was attending. Upon arrival at the Matsapha Police Station's CID Offices, they allegedly found Lusekwane Makhanya seated there to handover a certain bush knife as he referred to Exhibit 1. He said that Lusekwane Makhanya explained his presence there by saying that he was

there to handover the knife allegedly used by him (the accused) when he allegedly stabbed the deceased.

[26] Given that he had allegedly denied knowledge of the said knife, the police had asked him to lead them to where the knife used in the injury sustained by the deceased had been thrown. He said he led them into the toilet where he had thrown the knife into. They however could not find it there as they were told that the deceased's uncles had been seen next to that toilet. He was thereafter taken back to the Police Station whereafter he was charged with the murder of Mncedisi Makhanya.

[27] He claimed to have been abused at the Police Station as he was from time to time assaulted by Police Officers he could no longer identify as it is a long time since the incident occurred. Otherwise after being produced in Court, he was taken to the correctional institution where he could not be accepted but was released to go and fetch his medicines because it was clear he was still sick. When allegedly stabbed in 2009, he had owing to the seriousness of his stab wounds spent a total of 9 months in hospital, 6 in Manzini and 3 in Mbabane. He was allegedly being treated for a stab wound, that had

complicated, the very one that he said had resulted in his hand being kept in a sling as at the time of the incident forming the subject of these proceedings.

[28] The accused person is charged with murder. This means that out of the lengthy story told by him and the lengthy cross-examination, the most crucial part is how the alleged stabbing of the deceased occurred, together with whether or not it can be construed from the facts that there was any intention on the part of the accused in the stabbing of the deceased.

[29] I accept the version of the crown witnesses on how the stabbing of the deceased occurred including what led to it. I accept this version because of the forthright manner with which it was told together with what in my view was the apparent credit worthiness of the crown witnesses who advanced that version. Furthermore, the crown's version was in my view both consistent and corroborated. Firstly the testimony by PW2 that as a result of the quarrel between the deceased and the accused, the latter, responding to the apparent challenge to a fight by the deceased, had threatened the latter

saying he was going to fetch his “thing” and would come back to “show” him as he had been born and bred in Matsapa, is consistent with the stabbing that occurred at the spaza shop later. We are told the stabbing of the deceased occurred after some two hours or so later. By its unusual and scary nature, the knife qualifies to have been the “thing” that was being fetched to “show” the deceased. Furtherstill, that this knife was the thing is corroborated firstly by the evidence of the pathologist on the sharp object used and secondly by the attempt to point same out by the accused who only finds that same had already been taken to the Police Station. This version only corroborates what was seen by PW1 during the stabbing of the deceased by the accused.

[30] That the accused deliberately and directly inflicted the fatal blow can be seen from the evidence of PW1 who said he saw the accused stab the deceased which was corroborated by the evidence of PW3 the Pathologist when he, contrary to the version by the accused, confirms that the injury or the wound concerned, was a result of a direct and deliberate stabbing, delivered with heavy force as the deceased was facing the accused after the latter had tapped him. This discounts directly the version by the accused whilst confirming that of the only eye witness. It should also not be

forgotten that the evidence shows the accused as having made a threat prior to the deceased saying he was fetching his “thing” with which he was going to “show” him. He was therefore clearly carrying out his threat in stabbing him.

[31] Otherwise the accused’s version on how the stabbing of the deceased occurred belongs to the realm of fantasy and cannot be real. It would indeed be amazing how he would, one handed, manage to cause a person who he himself described as big and bullish, to stab himself during their struggle. I do not lose sight of the fact that the accused, to this day could not demonstrate the struggle concerned and how the deceased was stabbed in the process.

[32] Even the build up to the stabbing itself is obviously attended by lies on the part of the accused when considering that he tries to make the beating of the girl, Samo, by the deceased to look as having happened very close to the stabbing of the deceased, when these two events had sometime in between them, which I accept was the two hours or so. I do so because that time sufficiently accounts for the arrival of Roy Bennet, PW1, at their rented

place as the evidence shows he found the quarrel between the deceased and the accused having occurred sometime earlier such that he was only told about it on his arrival. I therefore reject the version of the accused whilst I embrace that of the Crown witnesses.

[33] The position of our law is settled that whereas the accused person has no duty to prove his innocence as it is for the crown to prove his guilt beyond a reasonable doubt, he is obliged to give an explanation that is reasonable and probably true once a prima facie case has been made against him. Such an explanation should not be fanciful or apparently false. The cases of **Samukeliso Madati Tsela V Rex Criminal Appeal Case No.201/2010 [2010] SZCS 13** and that of **Rex Vs Tiki Sihlongonyane Criminal Appeal Case No.40/1997** are authority for this proposition. I have no doubt the explanation by the accused was for the reasons carried above fanciful and not reasonably possibly true, hence my rejecting it.

[34] This simply means that the accused cannot escape liability for the offence of murder. This is because murder consists of the unlawful and intentional killing of a human being. There can be no dispute from the facts of the

matter that the killing of the deceased was unlawful. With regards the question of the intention of the accused to kill the deceased; the position is settled in our law that whether or not there was in a given situation an intention to commit a certain crime is construed in terms of what was said by this court in **RV Jabulane Philemone Mngomezulu 1970-76 S.L.R. Page 7B-C** as was quoted in my judgement in **Rex Vs Thokozani Joseph Samson King Mngomezulu, Criminal Case No. 481/2010 at page 12, Paragraph 21** where the following excerpt was captured:

“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 recklessly as to whether such results or not.”

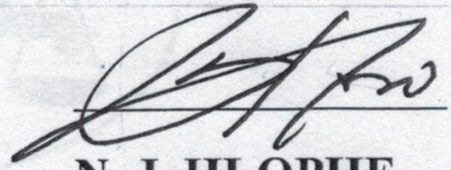
[35] I am also convinced that from the conduct and acts of the accused, he can not possibly escape being found to have intended the outcome of his actions. When he stabbed the deceased on the left handside of the chest with vicious force using a dreadful home made knife, I do not believe that his acts and conduct would suggest anything else. The following words were uttered by the court in **R V Jolly and Others 1923 AD 176 at 187** which again was

cited in my judgement in **Rex V Thokozani Joseph Samson King Mngomezulu (Supra)** at **paragraph 23** still addressing how intention is to be construed from a set of given facts:-

“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.”

[36] The accused tried to argue that the deceased was stabbed accidentally with his own knife but I have found that to be unsustainable from the facts which means that the accused intended to inflict the injury he did on the deceased which further means that he committed the crime of murder.

[37] For the foregoing reasons I have come to the conclusion that the accused cannot escape responsibility for the unlawful and intentional killing of the deceased, which is to say that he is hereby found guilty of the murder of Mncedisi Makhanya.

A handwritten signature in black ink, appearing to read 'N. J. Hlophe', is written over a horizontal line. The signature is stylized and cursive.

N. J. HLOPHE

JUDGE – HIGH COURT