



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 421/16

In the matter between:

REX

AND

NTOKOZO KENNETH SIMELANE

Neutral citation: *Rex vs Ntokozo Kenneth Simelane* [421/16] [2019] SZHC 198

(24th October, 2019)

Coram: FAKUDZE, J

Heard: 8/11/2017; 9/11/2017; 14/11/2017; 27/03/2018; 5/7/2018;
23/4/2019 and 25/7/2019

Delivered: 24th October, 2019

JUDGMENT

- [1] The accused was indicted on the count of murder in that upon and or about 6th October, 2014 and at or near Siphocosini area in the Hhohho Region, the said accused person did unlawfully and intentionally kill one Albert Vikinduku Simelane. The accused pleaded not guilty to this charge. He was further indicted on the count of Theft in that upon or about the 30th September, 2014 and at or near Checkers Car Wash in the Hhohho Region, the said accused did unlawfully and intentionally steal a 9mm Pistol, it being the property or in the lawful possession of Sabelo Dlamini. The accused pleaded not guilty to the second count.

The Crown's case

- [2] In its quest to establish its case, the Crown paraded eleven (11) witnesses.

PW1 – Sabelo Dlamini

- [3] This witness stated that he brought his car to Checkers Car Wash and this was on the 30th September, 2014. He left his 9mm Norinco Pistol serial No. 49110416 which he had placed under the car seat. The accused washed the witness's car. When the witness later went to his car, he discovered that the pistol had been stolen from it. The accused person had disappeared. The pistol was loaded with live rounds of ammunition. He reported the matter to the police. The pistol was exhibited in court and marked as "Exhibit 1." There was no cross examination by the defence.

PW 2 – Maswazi Sphepho Dlamini

- [4] This witness stated that he knew the accused because they were both from Siphocosini area. He further stated that the accused was washing a black mercedes benz on the 30th September, 2014. The police came to the scene looking for the accused in connection with a stolen pistol. The witness had wanted to wash the car but the accused insisted that he (accused) will wash it. He later led the police to the accused's homestead at Siphocosini. The cross examination only established that the one who washed the car was not responsible for vacuum cleaning it. It was put to the witness that he did not see who stole the pistol to which he responded in the affirmative.

PW 3 – Austin Mmeli Simelane

- [5] This witness is the deceased's father. On the 6th October, 2014 around 1700 hours the deceased went to look for missing cattle. This witness later learnt that the deceased had been shot dead. He proceeded to the scene where he found the deceased's body lying on the ground. The police were called. He further pointed out that there had been a quarrel between the deceased and the accused over the accused's occupation of a room that the accused was allegedly given to him by the deceased's wife who happened to be the accused mother. The witness took the accused out of the deceased's house. The cross examination established that the incident of the accused being taken out of the house never occurred. The witness confirmed that it did occur.

PW 4 – Nomvula Matsebula

- [6] The witness stated that whilst at her homestead, she heard two gun shots. She inspected the area where the gun shots came from and found the deceased lying on the ground. The police were then called. Her children said that they saw a person running away but could not identify him.

PW5 – Vusumuzi Happyguy Matsebula

- [7] This witness stated that he was from Siphocosini area. On the 6th October, 2014 the witness met the accused around 1850 hours going to the bus station. The witness greeted him and they had a chat. The witness proceeded with his journey and when he was about to reach PW4's place, PW4 asked him to help her see what was happening behind her house because she had heard some gunshots coming from that direction. They then went to the scene where the deceased's body was lying down. He called Obed Simelane who was a brother to the deceased. When asked to estimate the distance between where the witness met the accused and where the deceased was lying, it was less than a kilometre. The witness stated that he knew Ntokozo by sight particularly when Ntokozo was still a bus conductor. On cross examination it was put to the witness that on the 6th October, 2014, the accused was no longer staying at Siphocosini. It was further put to him that he did not see the accused because it was already dark. The witness insisted that he saw him. On re-examination the witness stated that the accused passed by him at a very close range.

PW6 – Obed Simelane

[8] This witness stated that he was a brother to the deceased. At some point in time the deceased instructed the witness to go and take the accused out of the deceased's house because the accused had allocated himself a room there. He took the accused out and after they had travelled for about 10 meters, the accused stabbed the witness using a knife. He was stabbed on the head. He was later arrested and after he had come back, PW3 chased him away. Whilst staying at the homestead, the deceased used to take care of the accused's need. On cross examination, it transpired that it was explained to the accused that the deceased was not his biological father. It was further established that the accused voluntarily left and that a stone was used instead of a knife. It was finally put to this witness that the accused could not kill the deceased because the deceased was responsible for caring for the accused.

PW7 – Dr. R.M. Reddy

[9] This witness conducted the post-mortem. He stated that injury one, which was caused by a firearm, was fatal. He then handed in a medical report which was marked as "Exhibit 2."

PW 8 – Sergeant Patrick Mhlanga – 3444

[10] The witness is a scenes of crime officer. He visited the scene and took photographs and collected exhibits which he handed over for further investigations. He then handed in "Exhibits 3" (photos of the scene of

crime) Exhibit 4 (which is the pistol which had been handed in earlier as Exhibit 1”) and “Exhibit 5” which are empty cartridges.

PW9 – Marvin Mbingo

[11] This witness is a Forensic Science Ballistic expert having trained for 3 years in this area in Pretoria. He explained that he received sealed exhibit bags from the case bag administrator. He opened the first bag when there was the pistol and one live magazine. He marked them. In the second one there was a calibre fired cartridge case and same was marked. He then tested the serviceability of the pistol. He found that it was serviceable. His findings were handed in as “Exhibit 6.”

PW 10 – Sergeant Themba Dlamini

[12] He stated that he was the investigating officer in this case. He was commissioned to investigate the theft of the pistol and the murder of Vinkinduku Simelane. After being told that Ntokozo Simelane was the suspect because he was not in good terms with the accused, he proceeded to Mayflower, South Africa, having been informed that the accused had relatives there. The witness did not find the accused but informed the relatives to inform him that he was wanted by the police in connection with the theft of a pistol and the murder of the deceased. He also informed the police at Mayflower. After a couple of days, the police called him and informed him that the accused had been arrested. The accused was extradited through the Ngwenya border. The witness cautioned him

according to the Judges' Rules. He did so at the border and at the Mbabane Police Station when the accused was being charged. In both instances the accused opted to remain silent. On cross examination, it was put to this witness that the accused will testify and inform the court that on the day he was arrested, the firearm was in the possession of Sabelo and Stimela. It was further put to the witness that no one knows whether Sabelo and Stimela did come to Swaziland, committed the offence and went back to South Africa. On re-examination, it was mentioned that the accused did not make mention of Sabelo and Stimela during the investigations. The witness's response was in the affirmative

PW 11 – Sipho Alfred Mthembu

[13] This witness stated that he was a police officer based in Mayflower, South Africa. He further stated that on the 11th October, 2014 at about 0700 hours, they received a tip off that there was someone who was in possession of a firearm at Goba Mayflower. They went to a homestead, introduced themselves as police officers and the person they introduced themselves to informed them that he was Ntokozo Simelane. When they questioned him about the firearm, he told them that he knows about it. He was alone at this homestead. The witness stated that the accused told them that he can take them to where it is. They did not say anything before the accused said this. The accused then led them to the house and showed them a bag where the pistol was. It had live round ammunition. It was a NORICO, black in colour. When we asked him for a licence to possess the pistol, he told us that he did not have it. He was then arrested and taken to the police station where

he was told of his rights. Later, he was handed over to the Swazi police. On cross examination, the defence put it to the witness that the bag carrying the gun was handed to the police by another lady. The lady's name was Hlelele Jele. It was further put to the witness that the pistol had been used by Stimela and Sabelo who were terrorising the whole community and that the police found the accused by a shop and not at a homestead.

[14] The Crown then closed its case.

The Defence's case

[15] The accused stated that the deceased was his Senior Uncle. The two had a friendly and cordial relationship. After he left the deceased's home, he went to stay in Nhlangano. At the time of the deceased's death the accused was staying in Mbabane. When asked how he was involved in the murder and theft case, he stated that he was arrested in South Africa. The police took him to a police station where he was questioned about the possession of a gun. He told them that he does not have a gun and they are free to search his house.

[16] When he was arrested, he was next to a shop. His homestead was not far from the shop. After searching his homestead, they found nothing. They then asked him about the three boys he was with were from. He told them that they were from the neighbourhood. The police then went to search the boys' homestead. One of the boys came out running. He was the one the

accused was with when he was arrested. A certain neighbour shouted and said the police and the accused must come to her. The woman then sent children to get a bag from the house. She opened the bag and took out a gun. She told the police that the man who had run away was the owner of the gun. The police asked the accused if that was the gun they were looking for. He responded in the positive. He was then arrested and charged with unlawful possession of a firearm.

[17] As the case was continuing, one officer told the accused to plead guilty so as to receive a lighter sentence. He told the police that the people who committed the crime had not been arrested. The charges were withdrawn and he was told that the INTERPOL people were looking for him. The police advised that since he had to face a murder charge which might lead to a capital punishment, he had a choice to either stay in South Africa or go back to Swaziland. He opted to go back to Swaziland because he knew that he was innocent and that he had nowhere to stay in South Africa as he was renting the house in which he was staying.

[18] He reiterated that there was no tension between him and the deceased. On the issue that PW 5 saw him at a distance of 1 kilometer from the scene, the accused stated that it was more than 1 kilometer. He had also been cautioned never to set his foot at the Simelane homestead. The caution was sounded by some boys who came to him at the car wash to kill him on the instruction of the deceased.

[19] On cross examination, the accused stated that he was not the one who killed the deceased because his fingerprints were not found on the pistol. None of the witnesses testified that he or she saw the accused shooting the deceased. He further stated that he had not quarrelled with the deceased and that he was in South Africa when the deceased was killed. If it was true that he was found in possession of a firearm in South Africa, he would have been convicted there. He therefore voluntarily came to Swaziland. When asked to confirm that there was evidence that he was at the car wash on the 30th September 2014, and that a gun disappeared, he confirmed in the affirmative. When he was further asked to confirm that a witness says he saw the accused from a distance of 1 km from the scene of the murder, he confirmed in the affirmative. When asked if the pistol that was in his possession was the same as the pistol that was used to kill the deceased, he responded by saying that he does not know about that. It was put to him that there was concrete evidence that he committed the two crimes and his response was that he disagreed.

[20] The defence then closed its case.

The Applicable law

[21] The Crown rests its case on circumstantial evidence. In the Swaziland Court of Appeal case of **Sean Blignaut V King Criminal Appeal Case No. 1/2003**, the court observed as follows on circumstantial evidence:

*“It is trite that the cumulative effect of a number of incriminating probabilities may suffice to eliminate any reasonable possibility of innocence, even though each and every individual probability is on its own not strong enough to do so. But when reasoning by inference drawn from circumstantial evidence the touch stone remains the two cardinal rules of logic enunciated in the leading case of **Rex V Blom** 1939 A.D. 199. Those two rules are that the inference sought to be drawn must be consistent with all the proved facts: if it is inconsistent with any proved fact, it cannot be drawn. And the second rule is that it must be the only inference that can be drawn from the proven facts; if another one or more reasonably possible inference can be drawn from those facts one cannot know which the correct inference to be drawn is.”*

[22] In **State V Skhosana Case No. 20/2017**, High Court of South Africa, Gauteng Local Division, it was stated that :-

“The evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if admitted fanciful possibilities deflect the cause of justice.”

[23] In **Rex V De Villiers 1944 AD 493 at 508 Davis AJA** observed as follows:

“The court must not take each circumstance separately and give the accused the benefit of the doubt as to the inference to be drawn from one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

[24] The value of circumstantial evidence was described by Mokama CJ of Botswana in **S V Kalaletswe and 2 Others Criminal Trial 49/1992**, citing with approval Lord Hewitt C.J. in **Rex V Taylor and Others 1930 21 Criminal Appeal R 20** as follows:

“Circumstantial evidence is very often the best. It is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

The Parties’ Submissions

The Crown

[25] The Crown states that with respect to the offence of theft the accused is implicated by the evidence of the complainant, PW 1 Sabelo Dlamini, who told the court that he took his motor vehicle to Checkers Car Wash for washing. He placed his pistol under the driver's seat. He sat down and quickly remembered that he had left the pistol in the car. He then went to the car and the doors were opened and upon checking the pistol, it was no more in the car. The boy who was washing the car had disappeared. The evidence of PW2 Maswazi Dlamini pointed to the accused as the person who was washing the motor vehicle. The accused is then further implicated by the evidence of PW 9 Sipho Alfred Mthembu who related how he arrested the accused in South Africa with the very pistol stolen from Sabelo Dlamini. The accused disputed the evidence of this witness by saying the pistol was handed to the police by some woman. The Crown submits that this is a mere fabrication. It is the accused who stole the pistol and he has avoided the evidence on how he disappeared at the car wash on the day of the theft leaving the car he was washing unattended and the pistol missing. The cartridges received from the scene matches or shows that they were shot from the pistol.

[26] The Crown submits that this network of evidence implicates the accused in the commission of the offence.

[27] On the issue of the murder offence, the Crown submits that even though there was no witness who witnessed the shooting of the deceased, by the

accused, the nature of evidence before court implicates the accused in the murder. There is real evidence in the form of the murder weapon which was stolen and found with the accused and proved to have been used to kill the deceased. The accused's story in the matter before court is that the firearm was found in the possession of a certain lady. Even though no onus rests on the accused to convince the court of the truth of any explanation he gives, the Crown submits that the accused story is beyond a reasonable doubt, false. PW 11 Sipho Mthembu, was clear on how the firearm was recovered. The accused's version can never be true when one considers the other pieces of evidence that implicate the accused.

[28] On the issue of intention, the Crown submits that the intention of an accused person is to be ascertained from his acts and his conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is he intended killing the deceased (see **Paulos Ndlangamandla V The King Criminal Appeal No. 2/2003**). In the case before court the accused used a pistol to shoot at the deceased and he released two bullets. As such he intended killing the accused.

[29] On the issue of motive, the Crown submits that the evidence of PW 3 Anston Simelane and PW 6 Obed Simelane stated that the accused had a quarrel with the deceased over the occupation of a room in the deceased's house.

The Defence

[30] The Defence states that for this court to find the accused guilty, it must find that based on the evidence tendered in court, he stole the weapon. The court must find that the accused kept in his possession the firearm for a period of five days and on the sixth day, went looking for the deceased and then shot him. The court must find circumstantial evidence that has been tendered by the Crown which excludes the possibility of the deceased having been shot by another person. The Court must also find that the evidence excludes the possibility of the firearm having been stolen by someone else other than the accused person.

[31] The Defence's case is that the evidence that has been tendered in court does not exclude the possibility that the deceased may have been killed by someone else other than the deceased. The court must also take into account that the path or road where the deceased was found to have been shot was a busy path. Even if this Honourable court were to make a finding that the accused did travel that road on the day the deceased died, it has not been proven that it was only the deceased that walked on that road on that day or around that time. Happyguy Matsebula and Nomvula Matsebula both testified during cross examination that the path was commonly used by pedestrians and motorists.

[32] The accused further denied pointing out the firearm that was recovered. The Crown bears the burden of proof to establish that the pointing out was done by the accused. It could have called another witness to corroborate

Mthembu's version. There is a possibility that the firearm was in possession of the other two gentlemen the accused made mention of.

Court's Analysis and Conclusion

[33] On the issue of the theft of the pistol, the Crown links the accused to the theft in three ways. The accused was the one assigned to wash the car belonging to PW 1. After the pistol had disappeared the accused was nowhere to be found. He was the last person to be seen attending to the car. There is also the evidence of the cartridges that were found at the scene of the murder of the deceased. Evidence was led to prove that these cartridges were discharged from the pistol that was stolen from the car wash. There is also finally the evidence of the South African Police Officer who was allegedly shown the pistol by the accused. The accused by his own admission under cross examination confirmed that he was at the car wash on 30th September, 2014 and that a pistol disappeared.

[34] What the court has noted is that the only evidence that is being challenged by the Defence pertains to the evidence tendered by the South African Police regarding the pointing out of the pistol. The rest of the evidence remains unchallenged. It is this court's view that the Crown has successfully proven the accused guilty beyond reasonable doubt as far as the theft of the pistol is concerned. I therefore return a verdict of guilty on the count of theft.

- [35] On the issue of the murder, the Crown asserts that even though there was no person who witnessed the shooting of the deceased the accused is implicated by real evidence in the form of the murder weapon which was stolen and found with the accused. This weapon was used to kill the deceased.
- [36] The accused contends that the court must find that the circumstantial evidence that has been tendered by the Crown exclude the possibility of the deceased having been shot by another person. The court must also find that the evidence exclude the possibility of the firearm having been stolen by someone else other than the accused person. It is humbly submitted on behalf of the accused person that the evidence tendered by the Crown does not exclude the possibility that someone else might have killed the deceased. The court should also consider that the deceased was killed on a road that was commonly used by pedestrians and motorists. The accused also denied pointing out the firearm that was recovered in Mayflower, South Africa. Before court it has not been proved that the accused person is lying that he did not point out to the police any firearm.
- [37] In **Dlamini Vusi Roy V Rex, Criminal Appeal No. 3 of 1999, SZSC**, Her Lordship Van Den Heever, JA. stated in page 5 that:

“The question in a criminal case is whether the evidence as a whole furnishes proof of guilt.”

In applying the test with respect to the present case, the court’s view is that the Crown has proven its case beyond reasonable doubt. The following evidence suffices to establish the accused’s guilt. First, he was the last person seen attending to the washing of PW 1’s car before the pistol

disappeared. The accused also disappeared from the car wash leaving the PW 1's car unattended. There is no evidence that someone else attended to the car after the accused had disappeared. Second there is evidence to the effect that the accused was seen by PW 5 about 1 kilometre from the scene of the murder. The witness also states that he and the accused had a chat as they were close to each other. The witness knew the accused from the days the accused was a bus conductor. The accused said in his evidence in chief, it was more than 1 kilometre. He does not deny that he was seen in the area where the deceased had been murdered, but only queries the distance. Much as the pathway was busy, no one else was seen by PW 5 using it. The only person he met was the accused. The accused was heading towards the bus station.

- [38] The third pointer to the accused's guilty is that evidence was led that he was seen not far from the scene of the murder. The accused states in his evidence in chief that he was in Mbabane when the accused was killed. Under cross examination the accused changed his story and stated that he was in South Africa when the incident happened. Further, under cross examination the Crown asked the accused to confirm that he was seen from a distance of kilometre, from the scene of the murder, the accused confirmed in the affirmative. The fourth pointer is that the accused's attorney made mention of Sabelo and Stimela as being the ones found in possession of the pistol when cross examining the Investigating officer. The accused did not make mention of this fact to the Investigating Officer during the investigation. The accused did not make mention of Sabelo and Stimela in his evidence in chief as being found in possession of the firearm. Instead,

he talked about a certain lady who took the police to the house where the pistol was.

[39] The fifth pointer to the accused's guilt is that the used cartridges that were found at the scene of the crime were proven to have been discharged from the pistol that was stolen at the car cash wash. There is also evidence that the lost pistol was found in the house in which the accused stayed in South Africa. It is this court's view that the Crown has satisfied the court that the evidence as a whole is beyond reasonable doubt inconsistent with the accused's innocence.

[40] On the issue of intention, the Crown submits that in **Malungisa Antonia Balaria V Rex (06/2014) [2014] SZSC 45**, the Supreme Court stated as follows:

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

The Crown has established by means of circumstantial evidence that the accused used a pistol to shoot and kill the deceased. He released two bullets and as such intended to kill the deceased. This court agrees with the Crown on the issue of the intention. The accused killed the deceased with the necessary intention.

[41] On the issue of motive, the Crown submits that it has established that the accused had a motive to kill the deceased. The evidence of PW 3 and PW 6 related how the accused had misunderstandings with the deceased over the accused's continued occupation of the deceased's house. The misunderstandings led to the accused being barred from the deceased's homestead. This court agrees with the Crown that the motive to kill the deceased has been established.

[42] In light of all that has been said above, it is this court's considered view that the Crown has proven its case beyond reasonable doubt. The accused is therefore guilty as charged.

A handwritten signature in black ink, appearing to read 'FAKUDZE J.', written over a horizontal line.

JUDGE OF THE HIGH COURT

Crown: E. Matsebula

Accused: S. Gumedze