



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CASE NO. 322/14

HELD AT MBABANE

In the matter between:

REX

Versus

SENZO BHEKITHEMBA DLAMINI

Neutral Citation: *Rex vs Senzo Bhekithemba Dlamini [322/14] [2020] SZHC 105*
(2 June 2020)

Coram: M. LANGWENYA J

Heard: 9 March 2020; 10 March 2020; 18 March 2020; 24 March 2020

Delivered: 2 June 2020

Summary: *Criminal law-Criminal Procedure-accused charged with
murder-Crown fails to prove requisite intention-accused
found guilty of culpable homicide*

*Sentence-principle of the triad referred to-accused sentenced to
seven years imprisonment without an option of a fine-two years*

not sentence to pre-trial suspended for one year on condition that the accused is convicted of a crime of which assault is an element- take into account period spent by the accused in incarceration.

JUDGMENT

- [1] The accused is arraigned before me on a charge of murder. The Crown alleges that on or about 29 June 2014 and at or near Malkerns area in the district of Manzini, he unlawfully and intentionally killed Siboniso Papa Mavuso.
- [2] The accused pleaded not guilty to the charge.
- [3] The Crown led the evidence of five witnesses. The accused gave evidence in support of his case but called no other witnesses.
- [4] The scene of crime is a rented house at Mr. Hasi's homestead at eNjingeni in the Malkerns area. The accused, the deceased, PW3, Sicelo Shabangu and Sibusiso Dlamini all lived in the same compound. The accused and the deceased were employed in a construction company.

[5] On the day of 26 June 2014 the accused, the deceased, PW1 Doctor Mabuza, PW3 Zwelithini Malinga, Njabuliso Khumalo and other people were out drinking at the juvenile school staff canteen, in Malkerns. The accused left the group drinking and returned to their rented rooms at Hasi's place. The group followed the accused 'home' later that evening. Although PW1 and PW3 lived in the same compound with the accused and the deceased, they did not share the same room with them.

[6] In the night of 26 June 2014 and at Hasi's homestead in the room the accused shared with the deceased, there was PW1 Doctor Mabuza and PW3 Zwelithini Malinga, Sicelo Shabangu and Sibusiso Dlamini. PW1 was seated on Sibusiso's bunk-bed when the accused dragged Sibusiso's bunk bed and PW1 fell off the bed. While the accused dragged Sibusiso's bed, PW3 Zwelithini Malinga dragged deceased's bed. Prior to PW3 and accused dragging the said bunk-beds, PW3 came to the accused's room with food in a pot and shared the food with the group of friends. After they had finished eating the food, PW3 spun the pot on the floor and made noise. PW1 warned PW3 not to make noise and an altercation ensued. The deceased made utterances to the effect that once PW3 and his friends were drunk, they became a nuisance. PW3's response was that once the deceased got drunk he assaulted PW3. The deceased left the room and went outside. He returned carrying an electric cable otherwise known as a 'guy-gripper' and assaulted PW3. The accused got into the fray, grabbed a pick-axe which was inside the room and assaulted the deceased with it on the abdomen. The accused fled out of the room with the deceased in hot pursuit. The accused outpaced the

deceased. The deceased returned to his room and showed PW1 his injury and was unable to speak as he was weak. The deceased was taken to hospital where he was admitted.

- [7] The accused left Hasi's homestead that night and never returned.
- [8] PW2 is 3147 Detective Assistant Inspector Justice Motsa and an investigating officer of this matter. On 29 June 2014 he went to eNjingeni with a team of police officers to locate the accused. The accused, his investigation revealed, was an employee in the construction company at eNjingeni. The accused was not found at eNjingeni.
- [9] The accused was arrested on 5 August 2014 at eLuhlendlweni at a certain homestead. PW2 introduced himself and a team of police officers to the accused. He explained their mission to the accused and cautioned him in terms of the Judges' rules and told him that he was investigating a case of murder which took place at eNjingeni in June 2014. The accused was arrested after he had said something and conveyed to Malkerns police station where he was formally charged.
- [10] PW2 showed and handed the electric cable and the pick-axe as exhibits in this matter. The pick-axe and the electric cable were marked exhibits 'SD2' and 'SD3' respectively.

- [11] PW4 is 5169 Detective Sergeant Ntombikayise Hlophe. She is one of the investigating officers of this matter. On 2 July 2014 she went to the scene of crime and was given and was given exhibits 'SD2' and 'SD3' by Sibusiso Dlamini, Sicelo Shabangu and Innocent Mabuza. PW4 handed the said exhibits in court.
- [12] PW5 is 6950 Constable Donadina Ncamiso Maziya. He went to the RFM mortuary on 3 July 2014 and took photographs of the deceased after the body of the deceased had been identified by Lesia Mbingo. Lesia Mbingo identified herself as the deceased's grandmother. PW5 compiled a photo album which he handed in court. The photo album was marked exhibit 'SD4'.
- [13] According to the post-mortem report which was handed in and marked exhibit 'D1', the deceased died due to stab wound to the abdomen. It was the pathologist's observation that the deceased had: (1) a stab wound of 7x3cms, with sharp margins, present in the middle portion of the upper abdomen, which is 15cms from the umbilicus and 10cms, from and below left nipple; (2) abraded contusion of 5x2cms, present on the lateral and left side of the chest.
- [14] The Crown then closed its case.

Defence Case

[15] On 29 June 2014 the accused was with the deceased, PW1 and PW3 among others when they went on a drinking spree at eZulwini, Lobamba and at the juvenile school staff canteen. It was while the group of friends was at Lobamba filling station that the deceased assaulted PW3 by kicking him. At the juvenile school staff canteen, the deceased started a fight with the accused and fought him. After the fight, the accused left the drinking place at about 7pm and it was dark. The accused was drunk when he left the place where he had been drinking. He returned to his room at eNjingeni and slept on the floor. Notably, that the accused slept on the floor- was never put to any of the Crown witnesses.

[16] The accused told the court that he did not have a healthy relationship with the deceased. The bone of contention, the court was told, was work-related. The accused told the Court he had been commended by his employer for doing a good job at work much to the chagrin of the deceased. The accused says he reported the enmity to his supervisor/*indvuna*.

[17] On the fateful night, the deceased, Mncedisi Mabuza and PW3 returned to the room at about 9pm and they were drunk, rowdy and unruly.

[18] It is the case for the accused that he was woken by PW3 who told him they wanted to assault the accused. When PW3 made those utterances, he was by

the door of accused's room and was about to engage in a fight with someone whose identity the accused did not recall. The accused went back to sleep but was once again woken by PW3 who insisted that the accused was not going to sleep as PW3 was spoiling for a fight with him. This aspect of the accused person's evidence was also not put to PW3 or any of the Crown witnesses.

[19] The accused told the court further that the deceased left the room and returned carrying an electric cable which he used to assault everyone he came across in the room. In order to ward off the attack by the deceased, the accused grabbed a pick-axe which was at the far corner of the room and threw it at the deceased. The deceased was injured on the abdominal area. The accused fled out of the room with the deceased in hot pursuit. The deceased was outpaced by the accused. The accused asked Mncedisi Mabuza to collect his personal effects as he was now scared that the deceased will assault him further. When the accused got his property, he left eNjingeni that night.

[20] It was the evidence of the accused that he had no intention to kill the deceased. His life was threatened by the cable and a knife that the deceased was carrying inside the room the accused was in. It was the evidence of the accused that although he did not see the accused carrying and wielding the knife on the night in question, he knew that the deceased always carried a knife in his possession. The accused stated further that he was assaulted by

the deceased with the electric cable while he-accused-lay on the floor. The accused says he got up while the deceased was being restrained by other people who were inside the room. When the people realised they could not stop the deceased from assaulting the accused, they fled the scene. It was at this stage that the accused grabbed the pick-axe and threw it at the deceased.

[21] When the deceased tried to dive in order to avoid being hit by the pick-axe, the accused got a chance to flee the scene.

[22] During cross examination it was put to the accused that he could have pushed the deceased aside and avoided hitting him with the pick-axe; his response was that he could not because he was drunk and staggering-he could have tripped and fallen if he tried doing so.

[23] The accused told the court he is twenty-eight years old and is unmarried and has no children. The accused has never been to school. Both his parents died when he was very young and he was raised by Rebecca Sihlongonyane. The accused has three siblings. His parental home is at Maphalaleni. He currently lives at Sigangeni where he does piece jobs.

Assessment of evidence

[24] The evidence is that several young men-including the accused and the deceased- had been drinking alcoholic beverages on the fateful day until the evening hours. The young men in question shared living quarters. At the scene of crime, the young men were rowdy as a result of being drunk. The deceased armed himself with an electric cable and assaulted the rowdy lot, who included PW3 and the accused. Inside the room where the assault by the deceased took place were a number of pick-axes. The accused took a pick-axe from within the room and used it to assault the deceased. The post mortem report states that the deceased died due to stab wound to abdomen. The deceased did not die at the scene. The deceased died a few days after he was admitted in hospital.

[25] From the evidence, the assault of deceased's targets was instantaneous. It was on the spur of the moment. The deceased was drunk. The accused and PW3 were drunk also. There was no premeditation on the part of the accused. The accused did not have time to consider the consequences of his action and unfortunately, the deceased suffered injuries which resulted in his death. The accused stated that he did not intend to kill the deceased and that he could not flee from the deceased because he was drunk and staggering.

[26] On a conspectus of the evidence, it cannot be said that the accused foresaw the possible consequences of his conduct on that fateful night. The accused was under the influence of liquor; the deceased had picked a fight with the

accused at the place they had been drinking at Malkerns and the accused opted to leave the place to avoid the matter getting out of hand; the deceased was the aggressor; soon after throwing the pick-axe at the deceased, the accused fled the scene and outpaced the deceased who was in hot pursuit.

[27] From the evidence, I am not convinced the Crown has proved that the accused had the intention to kill the deceased.

[28] The Crown has, however proved that the deceased was unlawfully killed. The accused ought to have known as a reasonable person that the assault of the deceased with a pick-axe might possibly lead to his death. Accordingly, the accused is found guilty of culpable homicide and is convicted for same.

Sentence

[29] The Crown informed the court that the accused has no previous convictions. The accused is first offender.

[30] The accused gave evidence in mitigation of sentences. He told the court he is sorry and regrets what he did. He was kept in custody for one month before he was released on bail. He ekes a living by doing piece jobs. He

has three siblings who are all dependent on him. Two of his siblings are major, while one is a minor currently in Form 1.

[31] Mr. Dlamini submitted on behalf of the accused that he is a first offender on the verge of adulthood. He urged that the court should not so much as punish the accused as it should correct him for the unlawful killing of the deceased. It was submitted that the accused has never been to school and there is evidence on record that the accused's parents died when he was very young. The court was urged to temper its sentence with mercy by suspending part of the sentence.

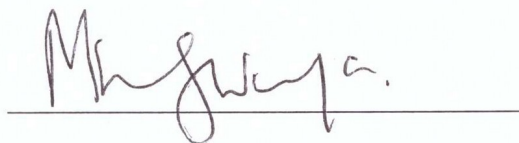
[32] Mr. Masango for the Crown submitted that the deceased is dead as a result of accused person's unlawful conduct. The court was urged by the crown to pass a sentence that will deter other would - be offenders. It was submitted that society faces an increased number of homicide and murder cases where alcohol is a factor. The courts should –as it were–come to the party and pass sentences that will deter young people from engaging in such crimes. I could not agree more.

[33] I shall take the accused's personal circumstances into account in sentencing him.

[34] That said, I also have to take into account the crime as well as the interests of society. The assault inflicted on deceased was unfortunate in as much as it was uncalled for. It was actuated by excessive drinking on the part of all concerned.

[35] Society expects the courts to punish offenders so that would-be offenders are deterred from breaking the law and committing similar offences. Excessive drinking of alcohol is rife in our society and leads to the commission of offences with impunity. In the case at hand, the crime is a result of a drunken brawl which happened on the spur of the moment and spiraled out of control.

[36] The accused is accordingly sentenced to seven (7) years imprisonment without an option of a fine, two years of which are suspended for one year on condition that the accused is not convicted of a crime of which assault is an element. The sentence will take into account the period of **one month** this being the period accused spent in pre-trial incarceration.

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

M. LANGWENYA J.

For the Crown: Mr. K. Masango

For the Defence: Mr. S. Dlamini

From the evidence before court it