



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CRIMINAL CASE NO. 329/14

In the matter between:

REX

And

THANDEKA MSITSINI

Neutral Citation: *Rex vs Thandeka Msitsini [329/14] [2020] SZHC 122 (9 July 2020)*

Coram: M. LANGWENYA J.

Heard: 22 June 2020; 23 June 2020; 9 July 2020

Delivered: 9 July 2020

Summary: *Criminal law-Criminal Procedure-accused charged with murder-accused pleads guilty to assault common-Crown accepts plea-Section 155 of the Criminal Procedure and Evidence Act 1938 invoked-statement of agreed facts tendered in court-accused convicted on basis of her own plea and on content of statement of agreed facts-Mitigating factors*

evaluated in light of 'triad' principle-accused sentenced to a fine of two thousand Emalangeni or in default of payment imprisonment for a period of twelve months which is wholly suspended for a period of three years on condition that the accused person is not convicted of assault within the period of suspension-sentence to take into account the period the accused spent in pre-trial incarceration.

JUDGMENT

- [1] The accused was charged with the offence of murder. In that upon or about 29 August 2014 and at or near Buhleni in the Hhohho district, the accused unlawfully and intentionally killed Pholani Mdluli.
- [2] When the accused was arraigned she pleaded not guilty to murder. The Crown led the evidence of PW1, PW2 and PW3 who is Dr. R.M. Reddy, Sikhumbuzo Percy Dlamini and Zuzile Dlamini respectively.
- [3] It was the evidence of Dr. Reddy that the deceased died due to head injury which was caused by blunt force. Dr. Reddy also detailed the injuries he observed on the body of the deceased before he conducted a post mortem examination on it. He then handed in the post mortem report and it was marked exhibit 'A'.

[4] PW2-Sikhumbuzo Percy Dlamini stated that on 29 August 2014 he was at Mbutfweni Bar where he had been having alcohol drinks until 1130pm. He left the bar at around 1130pm when the bar was about to close. It was when he came out of the bar and when he was looking for his companions next to the car he was using that he saw two people-a male and a female pulling each other. The female person hit the male person on the face with a bottle and the male fell in a bad way to the ground. PW2 got close and noticed that the male person who fell was the deceased. The deceased was bleeding from the mouth. PW2 sought first aid and wanted to call an ambulance and the police only to find that his cellphone battery was dead. He then went inside the bar to ask for help. When he came out of the Bar he found that the deceased had been taken to the hospital by other people.

[5] The deceased told the Court that he knows the deceased; that he had been drinking alcoholic beverages with the deceased earlier in the bar. PW2 told the court that the accused person is unknown to him. PW2 stated that he does not know what finally became of the woman who had been involved in a scuffle with the deceased. When the deceased and the woman in question were pulling each other outside the bar, PW2 stated that the state of visibility was not very good outside the bar even though there was light. It was his evidence that on the body of the deceased he did not see any weapon after he had fallen to the ground.

- [6] During cross examination it was put to PW2 that the deceased was the aggressor who pulled the accused with the intention to rape her. PW2 stated that he does not know about that. It was put to PW2 that the accused was defending herself from the deceased and even had her top torn which resulted in her being half naked. PW2's response is that he did not see the accused after the deceased fell to the ground.
- [7] PW3 is Zuzile Dlamini. She told the court that the accused is her friend. At the time of the incident, PW3 was self-employed and would braai meat and sell it at Mbutfweni bar. This witness stated that she knew the deceased. The deceased was a kombi driver of a kombi that serviced Zibonele, Matsamo and Piggs Peak route.
- [8] On the day of the incident, PW3 called the accused and asked her to visit her at her workplace. The accused came and was introduced by PW3 to Busi Madolo. The accused and Busi Madolo went inside the bar and had drinks while this witness was busy serving her customers. It was at about 10pm that Shophane Magagula-accused's boyfriend- came to fetch her. It was during the night time that Shophane called PW3 and informed her that the accused had assaulted someone. PW3 was surprised when she heard about the assault but she then retired in bed for the night.
- [9] On the following morning, the accused called PW3 and informed her that she had assaulted Pholani when PW3 and the accused parted the previous

night at Mbutfweni bar. PW3 reported the matter to the police station where she found Zulu and the accused. The accused told PW3 that Pholani had died.

[10] On 23 June 2020 when the matter was due to continue, Mr. A. Matsenjwa for the Crown informed the Court that the accused was now offering a plea of guilty to assault common. He submitted that the Crown accepted the plea tendered by the accused. According to the Crown, Mr. Matsenjwa submitted, the death of the deceased was as a result of his skull fracturing when he fell to the ground. Mr. Matsenjwa submitted that the deceased was the aggressor. According to PW2's evidence, the injury inflicted on the deceased by his assailant was on the face which resulted in deceased bleeding. Mr. Matsenjwa submitted that the accused was repelling the attack from the deceased when the latter fell and broke his skull. Mr. Jele for the accused confirmed the submissions made by the Crown to be in accordance with his instructions.

[11] In light of the change of plea of not guilty to murder to guilty to assault common-a competent verdict of murder, the court was duty bound to invoke and apply section 155 of the Criminal Procedure and Evidence Act, 1938 which states as follows:

'That the accused may plead that he is guilty of the offence charged, or with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons.'

[12] The Court accepted the accused's plea and proceeded on a charge of assault common.

[13] The Crown submitted a statement of agreed facts signed by the accused and by both counsel for the Crown and the Defence. The statement of agreed facts was read out into the court record by the Crown and its contents were confirmed by the accused and defence counsel.

[14] The common cause factors are that on 29 August 2014 the accused was at Mbutweni Wine and Malt enjoying alcoholic beverages with her boyfriend Bheki Magagula. It was about midnight when the bar was about to close when the accused went to buy the last beers. Along the way the accused met the deceased who blocked her way. The deceased called the accused to come to him. The accused avoided the deceased and went to get her bag from Zuzile. Zuzile promised to give the accused her bag on the following day since, as she put it, the bag was locked in her eatery shack.

[15] The accused left Zuzile and on her way to her boyfriend, the deceased came and accosted the accused. The deceased held the accused by her clothes and on both her hands resulting in accused's T-shirt and waist belt getting torn in the process. In one of her hands, the accused held two beer bottles. The accused tried to reason with the deceased not to hold her and deceased would hear none of it as he pulled the accused away to a place behind the shacks situated outside the bar. The accused was able to free one of her

hands and hit the deceased with a beer bottle on the face and on the mouth. The accused was aiming to hit the deceased on the chest.

[16] The deceased let go of the accused when he was hit with the beer bottle and the accused fled the scene to where her boyfriend was waiting for her.

[17] Both parties agree that the deceased and the accused were drunk when the assault of the deceased happened. The parties agree that after the deceased was assaulted with the beer bottle he fell and hit hard on the ground with his head and this resulted in the injury that caused his death according to the pathologist's evidence.

[18] In particular, the accused admits that while aiming to hit deceased on the chest in order to escape from his clutches, the deceased was hit on the mouth. The parties agree further that the deceased was the initial aggressor and his death was a result of him falling hard on the ground which had stones. It is agreed further that the assault inflicted by the accused on the deceased was disproportionate and unnecessary but that it was a result of drunkenness of the accused and the deceased. It is agreed also that the assault inflicted on the deceased by the accused had no connection with the injury on the deceased's head, which injury, according to the evidence of the pathologist resulted in the death of the deceased.

[19] The statement of agreed facts was signed by the accused and her legal representative Mr. S.M. Jele and by Mr. A. Matsenjwa on behalf of the Crown and it is dated 23 June 2020. The statement of agreed facts was tendered as part of evidence in this matter.

[20] I am satisfied that the Crown has proved the commission of the offence of assault common beyond reasonable doubt. This I say based on the evidence before court and on the plea of guilty tendered by the accused. The accused is found guilty of the offence of assault common.

[21] The Crown submitted that the accused does not have previous convictions.

Mitigation of Sentence

[22] In mitigation of sentence, it was submitted on behalf of the accused that: the accused is a first offender; that she is remorseful and that by pleading guilty she did not waste the court's time; that she co-operated with the police when the matter was being investigated; that the deceased was the aggressor; that the court should be lenient when passing sentence and give her a suspended sentence. The Court was told that the accused is not married and that she has two minor children who are dependent on her. She is self-employed as she owns a hair salon and rears chickens. From the businesses she operates she makes a monthly earning of one thousand, five hundred Emalangeni. At the time of the incident the accused was twenty-three years old. Youth, Mr Jele

submitted is a mitigating factor. The accused was taken into custody on 30 August 2014 when she surrendered herself to the police; she spent a week in custody. The death of the deceased, the Court was told, is on accused's conscience as her community has still not forgiven her for it and that is a sentence on its own.

[23] The Crown declined to address the court on sentence.

Sentence

[24] In determining an appropriate sentence in this matter, I am mindful of the foundational sentencing principle that 'punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy¹. In addition to that the court must also consider the main purposes of punishment, which are deterrent, preventative, reformatory and retributive².

[25] The interest of society demands that the accused be punished for the commission of the offence she has been found guilty of. This will be done to discourage people who are minded to resort to violence while drunk that courts will not look kindly upon such behavior.

¹ Per Holmes JA in *S v Rabie* 1975 (4) SA 855(A) at 862G-H

² *R v Swanepoel* 1945 AD 444 at 445.

- [26] In assessing sentence, the court has taken into account the mitigating factors highlighted by the defence. The accused is a first offender. She was twenty-three years of age at the time of the commission of the offence; she is now twenty-nine years of age. She has been a law abiding citizen for much of her life. As much as possible, such people should be kept out of jail.
- [27] She is unmarried and has two minor children who all look up to her for maintenance and support. Any period of incarceration will inevitably result in much hardship to such dependents. The accused spent a week in pre-trial incarceration.
- [28] The accused is self-employed as she owns a hairdressing salon and chicken rearing businesses. Jail time will undoubtedly cost her her business and means of livelihood.
- [29] The circumstances surrounding the commission of the crime are also clear from the evidence before the court. They include: that the accused and the deceased are from the same community; that the accused will have to live with the stigma of the death of the deceased which will probably haunt her for the rest of her life. There was no premeditation or planning in the commission of the crime. It happened on the spur of the moment in an effort to ward off the deceased who was the aggressor. The accused had gone to the bar to enjoy herself in the company of her friends and not to look for trouble.

[30] The crime was committed in 2014. The trial was concluded in 2020. It was a long six year wait. The accused lived with anxiety and anguish for such a long time awaiting her fate.

[31] Given the manner the whole incident panned out, I do not think a custodial sentence will make the accused appreciate that jail is the only form of retribution or recompense or rehabilitation for the error of her ways.

[32] Accordingly, the accused is sentenced to a fine of two thousand Emalangeni (E2,000.00), or in default of payment, twelve (12) months imprisonment which is wholly suspended for a period of three (3) years on condition that the accused person is not convicted of assault within the period of suspension. The sentence will take into account the time the week the accused spent in pre-trial incarceration. The bail amount of E2000.00 paid by the accused should be used as the fine herein.

M LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Mr. A. Matsenjwa

For the Defence:

Mr. S. M. Jele