



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**CRIMINAL CASE NO. 282/13**

In the matter between:

**THE KING**

**AND**

**MOHSIN MUHAMMED**

**SYED DILSHAD HUSSAN SHAH**

**Neutral Citation:** *The King vs Mohsin Muhammed and Another (282/13) [2020] SZHC (22) 27<sup>th</sup> February 2020*

**Coram:** MLANGENI J.

**Last Heard:** 11<sup>th</sup> February 2020

**Delivered:** 27<sup>th</sup> February 2020

*Summary: Criminal law and procedure – application for acquittal and discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 1938.*

*At the close of the Crown case it had led the evidence of three eye witnesses. The evidence of all these witnesses was to the effect that the accused was under severe attack, and none of them saw him assault or stab the deceased.*

*Test to be applied is objective, question to be asked is whether there was evidence upon which a court, acting reasonably, might or may convict. There must be prima facie evidence in respect of all the elements of the crime.*

*Crown case circumstantial, and the evidence so tenuous that a court, acting reasonably, cannot convict on the basis of such evidence. In particular, there is no evidence of actus reus, and in the absence of actus reus intention does not arise for consideration.*

*Accused acquitted and discharged.*

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**RULING ON APPLICATION IN TERMS OF SECTION 174 (4) OF THE  
CRIMINAL PROCEDURE AND EVIDENCE ACT 1938**

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[1] The accused who is before me is Mohsin Muhammed. His co-accused, Syed Dilshad Hussan Shah, apparently skipped the country. According to the indictment the two, acting in furtherance of a common purpose **“did wrongfully, unlawfully and intentionally assaulted and stab one Goon Raza twice on his front body to death and thereby commit the said offence of murder”**. However, at the commencement of trial counsel for the Crown, Mr I. Magagula, informed the court that the charge against Shah was being withdrawn in terms of Section 6 of the CP& E.

[2] From the evidence of the Crown witnesses it is clear that there was a dispute between two Pakistani Nationals involving money. According to PW1, Sakhile Primrose Mdluli who was an employee of the accused at the time and was on duty on the day of the alleged murder, at about 14:00 hours she saw a group of **“white people”** in the company of her boss, talking in a manner that suggested that there was misunderstanding among them. There was another group of **“white people”** who were next to a pharmacy nearby who intervened and took the accused inside Ideal Blankets shop. The witness further stated that the shop was busy as it was month end. She then saw pots falling off display stands and realised that there was physical conflict. The accused’s friend had been assaulted and was bleeding from the neck. She continued to say the following.

**“There was one man wearing a red sweater who was strangling my boss. Others were assaulting my boss with planks and pressing him down next to a fence. I then saw the deceased falling down with blood coming out of his mouth.”**

The witness’ boss at the time was the accused.

[3] Thereafter, the accused went back inside the shop and wiped blood from his friend who had been injured in the scuffle.

[4] PW2 was Tholakele Philile Mncina who, at the time, was also an employee of the accused person, working as a shop assistant at Ideal Blankets. She stated that while she was sitting at the shop she saw some **“Asians”** who came to the accused and Shah. They included one who was wearing a red sweater and they spoke **“in their**

**language. We could see that the discussion was unhappy.”** She then saw pots falling from display stands and noticed that the Asian who was wearing a red sweater was on top of the accused. The other one, Shah, came inside the shop, bleeding. She subsequently saw one Asian bleeding from the mouth and he fell down. Then the accused came inside the shop, he was also bleeding and limping. She further stated that she did not see the details of what had happened and did not see the weapon that injured the deceased or who injured him.

- [5] PW3 was Musa Hlatjwako. Before the deadly confrontation he saw five Pakistani men passing by a shop under construction, took planks that were there and proceeded towards the shop of the accused. His evidence proceeded in this manner:-

**“I then saw the five assaulting accused and his friend ..... I did not notice who exactly they were fighting. I then saw one of the five falling down. Mabuza came and made peace, and the one who died was taken to hospital. The five were assaulting the accused with the planks.”**

He further stated that the time between when the five took the planks and when the confrontation ensued was very short. The witness identified several pieces of planks, of varying lengths, some of which were joined together using nails. Some of the nails were protruding dangerously.

- [6] For purposes of the present stage of the proceedings I make reference to the evidence of one other eye witness, 3165 Assistant Inspector

Friday Mabuza who testified as PW7. He is a Police Officer. On the date of the alleged murder he was in Nhlanguano town and the time was **“after lunch”**. He had just parked his motor vehicle when he heard whistling and noise suggesting that there was a fight. It turned out that the fight was next to the accused’s shop, Ideal Blankets. He stated that **“those who were fighting were using planks which had nails on them. I ran there and found deceased assaulting accused with a plank and accused was restricted to a fence next to his shop. Accused was being assaulted together with his friend whose name is Shah. I came between them and separated them. As I finished separating them the deceased fell down, facing upward and bleeding through the nosethrills”**. The witness continued to state that thereafter when he enquired he was told that prior to the confrontation the accused had a knife in his pocket. He personally did not see the knife.

[7] At this stage I observe that a knife was also mentioned by PW1 Sakhile Primrose Mdluli, in her evidence in chief. She testified as follows:-

**“As my boss was wiping his friend he was not holding anything. Before the fight he had a knife on the back pocket of his trouser. I cannot describe the knife well. It was black.”**

[8] Under cross-examination this witness confirmed that the deceased and others were on top of the accused, assaulting him with planks, and that the assault was brutal and random, and that the injuries sustained by the accused were scary as the nails had penetrated his flesh. Of more significance, however, is that she said that she merely suspected that what she had seen in accused’s pocket was a knife, she was not sure - **“a small part appeared”**, she said.

[9] In his evidence the pathologist, Dr. Komma Reddy, stated that the fatal injuries on the deceased were inflicted by a sharp object, like a knife.

[10] When the Crown closed its case it had not led any direct evidence to show who injured the deceased or the weapon used. Mr Magagula for the Crown rightly pointed out that the case of the Crown is circumstantial.

[11] It is against this background that when the Crown closed its case the defence applied for the acquittal and discharge of the accused in terms of Section 174(4) of the CP&E. The import of this section has been the subject of numerous judgments in this jurisdiction<sup>1</sup>. It is settled that it is at the discretion<sup>2</sup> of the court whether or not to acquit and discharge an accused at this stage of the proceedings. It is equally settled that the discretion has to be exercised judicially. The test to be applied is objective, the question to be asked being the following: Is there evidence on which a reasonable man, acting carefully, might or may convict?<sup>3</sup> This, of course, has to be considered in regard to all the elements or legal requirements of the particular offence. In this case the elements are:-

- i) Killing of a human being.
- ii) Unlawfulness.
- iii) Criminal intent, whether direct or indirect.

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<sup>1</sup> Rex v Govu Dladla & 3 Others, Criminal Case No. 168/1998, per Masuku J., The King v Duncan Magagula & 10 Others, Criminal Case No. 43/96, per Dunn J, Rex v Mitesh Valop and 3 Others, Criminal Case No. 188/04, per Annandale ACJ as he then was and The King v Mduduzi Elliot Nkambule (142/14) [2016] SZHC 160.

<sup>2</sup> Rex v Mitesh Valop and Others, supra, at page 4.

<sup>3</sup> Mduduzi Elliot Nkambule , supra, para 6.

There must be *prima facie* evidence in respect of all the elements of the crime.

[11] The evidence of the Crown establishes the following;-

11.1 there was a dispute between two Pakistanis over money, and other Pakistanis joined the fray on either side;

11.2 in the afternoon of the 26<sup>th</sup> July 2013 a physical confrontation occurred between five Pakistani men and the accused who was in the company of one Shah, his associate;

11.3 just before the confrontation occurred, the five Pakistani men were seen picking up waste planks from a construction site and proceeding towards the accused's shop known as Ideal Blankets;

11.4 the planks were various sizes and length, with protruding nails;

11.5 the group of five Pakistani men, who included the deceased, were seen attacking and assaulting the accused and his companion Shah; No witness saw the accused or Shah assaulting any one of the five attackers;

11.6 both the accused and Shah were bleeding from the injuries that they sustained;

11.7 the deceased was seen on top of the accused, assaulting him, while the accused was cornered at a nearby fence;

11.8 none of the eyewitnesses saw who injured the deceased or what weapon was used;

11.9 earlier on in the day PW1 saw what she believed to be a knife protruding from the accused's pocket, she could not describe it

adequately, and under cross-examination she admitted that she is not sure whether it was a knife or not.

11.10 the Pathologist's evidence is that the deceased was stabbed with a sharp object.

[12] Assuming that the deceased was fatally injured by either Shah or the accused, exactly which of the two? It is for the Crown to establish that it is the accused who stabbed the deceased and it has led no iota of evidence to that effect, and given that it is the evidence of the Crown that the accused and his associate Shah were under attack, it cannot in my view invoke the doctrine of common purpose against them, Since they were the victims of the violent attack.

[13] In opposing the application the Crown submits that the accused is linked with a knife, and the deceased probably died through a knife, hence the accused must be put to his defence. As mentioned earlier, the case of the Crown is based on circumstantial evidence. The evidence, circumstantial or otherwise, must establish a *prima facie* case. It must be such that a reasonable man, acting carefully, might or may convict. There is no direct evidence that the accused assaulted the deceased, and the circumstantial evidence is so tenuous that no one, acting reasonably, can convict on it.

[14] I mention, needlessly, that the onus is upon the Crown to prove all the elements of the offence, which includes the identification of the person who inflicted the fatal injury or injuries. The Crown case falls short of this. Mr I. Magagula for the Crown referred the court to the celebrated



case of **R v BLOM**<sup>4</sup> and sought to persuade the court that in *casu* there is enough circumstantial evidence to put the accused to his defence. In other words, an inference can be drawn that it is the accused who stabbed the deceased. According to BLOM, the inference sought to be drawn must be consistent with all the proved facts, and secondly, the proved facts must be such that they exclude every reasonable inference from them save the one to be drawn. The Crown case fails this test. Assuming that the accused was injured by either the accused or Shah, both of these inferences are reasonably possible. There is therefore no one inference that excludes every other. If PW1 had not equivocated in respect of the knife, the result might be otherwise.

[15] The accused has a right against self-incrimination, and it is impermissible to put him to his defence in the hope that the Crown case might be reinforced during the defence case.

[16] To demonstrate the insuperable difficulty that the prosecution faces, in the event that the accused was to be put to his defence he might elect not to lead any evidence, in exercise of his right to remain silent. In that event, the court would be left with evidence that clearly shows that the accused was under severe attack, and that the deceased was injured by an unidentified person. Of course, there is no evidence upon which a court, acting reasonably, can convict and the accused is entitled to be discharged at this stage.

[17] As mentioned above, it is the evidence of the prosecution that the accused was under severe attack. Assuming that it is the accused who

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<sup>4</sup> 1939 AD 288.

stabbed the deceased, the Crown would need to demonstrate that he exceeded the bounds of self-defence. No evidence of that nature was led, and none could have been led because the Crown proceeded on the assumption that the accused was the attacker, but the evidence points towards the opposite. The Crown has missed the boat, and it cannot be allowed an opportunity to sneak such evidence in during the defence case. I rule that there will be no defence case.

[18] The accused is accordingly acquitted and discharged.

A handwritten signature in black ink, appearing to read 'T.M. Mlangeni', written in a cursive style.

**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**

**For the Crown: Mr I. Magagula**

**For the Accused: Mr B.J. Simelane**