

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Criminal Case No.103/2017

THE KING

VS

SIFISO GABHAZI VILAKATI

Neutral citation : ***The King versus Sifiso Gabhazi Vilakati (103/2017)
[2020] SZHC 224 (30th October, 2020)***

Coram : **M. Dlamini J**

Heard : **14th October, 2020**

Delivered : **30th October, 2020**

Summary: The accused is arraigned for murder of **Tondza Simphiwe Ndzima**.
He pleaded not guilty.

Indictment

- [1] The Director of Public Prosecution indicted the accused person **Sifiso Gabhazi Vilakati** as follows:

*“The Director of Public Prosecutions presents and informs the Honourable Court that the above mentioned person (hereinafter referred to as the accused) is guilty of the crime of **Murder.***

*In that upon or about the 5th day of February 2017 and at or near Gebeni area in the Manzini Region, the said accused did unlawfully and intentionally kill one **Tondza Simphiwe Ndzima.***

Testimonies

- [2] The first witness was **Dr. Komma Reddy**, the pathologist. His evidence was not contested. I shall capture it later.
- [3] PW2 was **Alfred Doctor Shakes Shaka Vilakati**. He testified on oath that he was at her parental home on the fateful day of 5th February, 2017. A group of boys arrived at about 1700 to 1800 hours. One of them **Mpopo Maphalala** approached and enquired if they could buy marula brew and whether it was available. He directed him to his sister-in-law.

[4] The group purchased the marula brew from his sister-in-law and began to drink it while seated under a tree within his home compound. As they were enjoying their home brew, he decided to approach them and advised them that since it was somehow late, they should leave his parental home. The group obliged. It converged outside the main entrance. One of them, **Njabulo Maphalala** remained behind. While he was seated with **Njabulo, Tondza**, the deceased who had also stayed behind while the group left, came closer and joined them. **Njabulo** told them that he intended to proceed to where the larger group had assembled by the main entrance and spill the liquor following that it was purchased with his money. **PW2** persuaded him not to do that as the group appeared somehow rowdy.

[5] **Gabhazi**, the accused who was all along with the group outside, returned. He went straight to deceased and said that he wanted to speak to him. Deceased replied saying that in terms of his sixth senses, he was reluctant to oblige. The accused responded by saying that he only wanted to tell him what the group by the main entrance was discussing about him. It is then that the deceased agreed to speak with the accused. He stood up and drew closer to accused. The deceased stretched out his right hand towards accused who held it. They moved a short distance holding hands as if strolling together.

[6] Suddenly, they heard deceased lamenting, “*Why are you now stabbing me?*” **PW2** lifted up his face to look, at the same time standing up and running towards the duo. He noticed accused pulling

out a knife from deceased's chest. Accused then bolted away taking the direction of the main entrance where the group was. The deceased retreated and also ran away. **PW2** told deceased to wait so as to examine the extent of his injury. As he said so, there was heavy thunder as the clouds had already begun to darken. He ran into the house to take cover from the lightning.

- [7] When the thunder had subdued, he together with other members of his family decided to go to deceased's homestead to ascertain if he was at his parental homestead following his stab injury. They learnt that deceased had not reach his homestead. They embarked on a search. They tried his cell phone, calling it. It rang unanswered. They eventually located deceased lying dead by the fence at **PW2's** parental homestead where he had been stabbed.

Accused version

- [8] The defence came first under cross-examination of **PW2**. Accused denied ever requesting the deceased to speak to him. His instruction to his attorney was that having realised while outside **PW2's** compound that he had left his hat behind, he returned to fetch it. On his return, he was confronted by the deceased who had a record of a violent character. The deceased violent behaviour was evident in that when he met his death, he was out on a charge of murder, having stabbed someone to death. He had also assaulted another member of the community with a stone until he bled on his face.

[9] **PW2** confirmed that deceased was known for violence and that he was out on bail on a murder indictment. He denied the assault of a resident by a stone. Asked if accused was drunk on that day following that he had been drinking at various homesteads, **PW2** responded that in as much as he was tipsy, he was able to follow events. **PW2** stood his ground however, on accused returning to request to speak to deceased about what the group outside the gate was discussing about him. He denied that accused returned to retrieve his hat.

Common cause

[10] It is common cause that deceased and accused formed part of the group that arrived at **PW2's** homestead to purchase marula brew. They arrived late afternoon. They sat to drink for a while and left to assemble by **PW2's** gate. Deceased did not leave. Accused returned. Accused inflicted the fatal injury.

Issue

[11] Under what circumstances did accused inflict the fatal wound upon the deceased?

Evidence by the Crown

[12] **PW2** stated:

*“Gabhazi Sifiso Vilakati approached us from the group. He went to **Tondza Simphiwe Ndzima** saying he wanted to speak to him. **Tondza** said, ‘My spirit does not agree that I should*

come and speak with you.’ Responding on this, **Sifiso** said he wanted to tell **Tondza** what the group was saying about him as it was speaking ill of him. It is then that **Tondza** agreed and stood up to go to **Sifiso**.”

[13] **PW2** proceeded:

“**Tondza** held out his right hand. **Sifiso** extended his left and held **Tondza** as if they were strolling.”

[14] He continued:

“They moved a distance and suddenly we heard **Tondza** saying ‘Why are you stabbing me?’ I lifted my face to look and I saw **Sifiso** pulling out a knife from **Tondza**’s chest.”

[15] The crown also led the evidence of **PW3, Nomkhosi Precious Vilakati**. She corroborated the arrival of the group and their purchasing of marula from her. She testified that the group left at the instance of **PW2** but waited outside the homestead. She then testified:

“They (the group) left to the gate. When they reached the gate, **Sifiso** returned and went to the tree where **Shakes** and **Tondza** had remained behind. He spoke to them. He asked to speak to **Tondza**. I could not hear their further conversation. But

*further heard **Tondza** saying ‘Esh why are you stabbing me?’
I did not see anything except for hearing the voice.’*

[16] She proceeded:

*“They separated, **Sifiso** went to the gate while **Tondza** ran pass the house.”*

[17] She testified that there was serious thunder and they all ran into the house. Thereafter, her husband, **Shakes** and her mother-in-law decided to go to **Tondza’s** homestead as a follow up. They returned with **Tondza’s** mother and brother. They searched for **Tondza** who was found lying dead by the homestead’s boundary.

Evidence by the Defence

[18] **Accused**, on oath, narrating the events of the 5th February 2017, testified that he left home at about 1030 hours to drink. He went to the **Motsa** homestead and found a group of boys who were drinking. He had brought with him a two litre bottle of marula brew. In the afternoon they left the **Motsa** homestead to a **Vilakati** homestead. They found the deceased. They asked for liquor. They were told that it was finished. They left as a group to **PW2’s** homestead where liquor was sold to them. Deceased had joined the group. They sat under a tree to drink the liquor, starting with the one for testing and ending with the purchased liquor. They drank for about fifty minutes

and suddenly the weather changed, threatening to thunder and rain. They stood up and left.

[19] He returned to fetch his hat as he always wore one. He then testified:

*“When I got back for my hat, I saw **Tondza**. I went straight for my hat. I am known in that homestead and the kind of life I live. When I was approaching, knowing I was to collect my hat, **Tondza** came to me saying, ‘Utofunani la? Utofunani akusini labamcoshile? - What do you want here? What do you want? Are you not the one who has been chased away?’”*

[20] Accused proceeded:

*“Knowing that he (**Tondza**) had a murder case, I panic through fear as I knew what type of a person he was. As he was approaching me in a violent manner and I could not understand why he was closer to me as I do not trust him. It is when I thought I was scarring him and he got injured.”*

[21] He testified further:

“I drew out a knife saying, ‘Be careful.’ It is when he was injured.”

[22] He testified further that he was afraid because of the manner **Tondza** came to him naked. He was known for violence once he was naked on top. He denied ever requesting to speak to **Tondza** on the fateful day. He was drunk that day, having drunk the whole day. **Tondza** also was drunk. After stabbing him, he ran away, having noticed that he had injured **Tondza**. He could not notice if **Tondza** was carrying anything on that day when he approached him.

Analysis of the two contradictory versions

[23] From the Crown's witnesses' testimonies and that of the accused, it is clear that there are two mutually destructive versions. My duty is to determine which of the two contradictory versions is likely probable guided by both parties' evidence.

[24] When **PW2** and **PW3** were cross-examined, learned Counsel for the defence put it to them that accused had instructed him that when he returned to the homestead his intention was to get his hat. Both witnesses disputed that. They stood their ground that upon **accused's** return, he approached where **Tondza** was seated in the company of **PW2**.

[25] Accused requested to speak to the deceased who was at first reluctant to accede to his request. He eventually relented when accused undertook to divulge to him all the ills the group was discussing about him. **PW3** testified that about three minutes having moved away from where they were seated, he heard the voice of deceased lamenting,

“*Why are you stabbing me?*” Accused’s version is that he never intended to kill deceased. He merely intended to scare him off.

[26] I must state that the evidence that the deceased approached accused in a violent mood and asked him what he wanted as they had been chased out of **PW2’s** compound was never put to the Crown’s witnesses. Similarly, the evidence that accused inadvertently met his death in an attempt by accused to scare him away. It was never put to the Crown’s witnesses. This is fatal to accused’s version. His version must be taken as an afterthought. This is the first point that militates against the defence.

[27] There is another aspect of **accused’s** version which needs mention. It is that upon realising that deceased was injured, he ran away. Why? Why not assist him if the intention was not to end his life? From the reasonable man’s perspective, **accused’s** subsequent conduct *viz.*, of running away was because he knew he had accomplished his intended purpose which he was fully aware that it was unlawful. It is not surprising that after inflicting the fatal injury, he had to run away. His act of running away again supports the version by the Crown’s witnesses that accused pleaded with deceased to come to him despite deceased’s reluctance. He had to convince him to come to him when he learnt that deceased was reluctant at first.

[28] The part of the body where the fatal injury was seen and found by both **PW2** and **PW1, Dr. K. Reddy** also demonstrates the intention of

the person who inflicted it. The pathologist described the fatal wound as follows:

“Penetrating wound over front of left chest obliquely placed pre-sent measuring 12 centimeters above nipple 2.5 centimeters 0.5 centimeters aorta, lung left deep present. It involved muscles 2nd space intercostal structure pleura. Upper lobe of left lung margins through and through, aorta. Front to back with clean cut edges, angle sharp blood in chest cavity about 2000 ml.”¹

[29] The accused approached the deceased while in possession of a dangerous weapon in the form of the sharp blade knife that was presented before court. He testified that he merely wanted to scare off the deceased. However, when scarring off the deceased, he aimed straight to his upper body where the heart was. He, according to the unchallenged evidence of the pathologist pierced the lung to the aorta, i.e. large artery of the heart. What exacerbates his position is that he did not inflict just one injury. The pathologist referred to:

“Cut wound over left arm outer aspect 2cm x 0.9 cm muscle deep present.”

[30] This wound, obviously demonstrates that the deceased attempted to block the attack from the accused. In brief, deceased was attacked

¹ Exhibit A page 2

more than once, either before or after the fatal wound. However, the court was told that after accused pulled the knife off the chest of the deceased, he bolted away. I must mention that the pathologist observed a scratch again on the upper part of the body i.e. “*upper chest.*” In other words, the wounds testified upon by the pathologist together with the testimony of **PW2** to the effect that when accused pulled off the knife from the chest of the deceased, accused bolted away, demonstrate to the court that the fatal wound was inflicted last. The deceased had attempted to wade off the attack but his assailant persisted in his target. He only bolted after achieving his intention of inflicting the fatal wound.

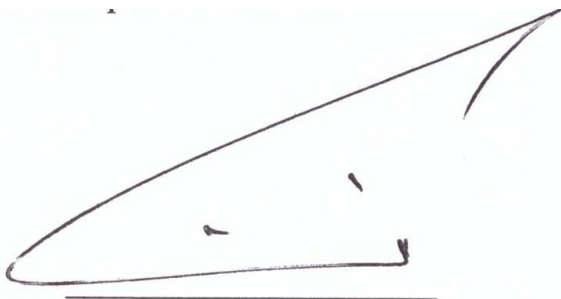
[31] The knife used was pointed out by accused. Two knives were found hidden in a bush. The question is why hid the knife if the death of deceased was by error? Again this act is consistent with a person who was hiding from the law due to unlawful conduct. I appreciate that the pointing out of the two knives was at the instance of accused. However, if indeed deceased’s death was never intended by accused, he would have at least surrendered or owned up to his conduct. He did not. He opted to wait at home, hoping the matter would die a natural death. In fact, accused justified his unlawful conduct by saying that deceased was facing a murder charge and was out on bail. This was not a justiciable reason for killing the deceased, I am afraid.

[32] Lastly, the accused testified that he was afraid of deceased who was known for his violence moreover as he was out on bail on a murder charge. What is of keen interest though is that the accused himself testified that he had been drinking with the deceased almost for the better part of that day. He met the deceased at the **Vilakati** homestead. They drank together until the liquor was finished in that homestead. It is then that as a group, they went together to **PW2's**, another **Vilakati's** homestead. It is not clear why all of a sudden the deceased is viewed as dangerous in society. The answer is obvious. Evidence from accused pointed out that most of the boys who were in the group were from the home area of the person alleged to have been murdered by the deceased. His main intention was to avenge the death of that person. He took the opportunity as the heavy cloud was gathering and becoming dark. His conduct of taking the law into his own hands cannot be countenance by law.

Verdict

[33] In the result, I must enter as follows:

33.1 Accused is found guilty of the crime of murder as indicted.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that tapers to a point on the right, with several smaller, less distinct strokes below it.

M. DLAMINI J