



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 350/19

In the matter between:

THE KING

AND

MDUDUZI DOUGLAS NHLEKO

Neutral citation: *The King and Mduduzi Douglas Nhleko [350/19] [2020] SZHC*
219 (28 October, 2020)

Coram: FAKUDZE, J

Heard: 6/10/2020; 7/10/2020 and 8/10/2020

Delivered: 28/10/2020

Summary: *Criminal Law – accused charged with Murder and Theft -
Confession and pointing out evidence not contested by
accused. Accused raises issue that he did not kill deceased but left*

her
– Theft

*weak – Intention in the form of Dolus Eventualis proven
also proven – Accused guilty as charged.*

JUDGMENT

[1] The accused is before court charged with Two (2) counts. On count 1, he is charged with the crime of murder in that upon or about 19th October, 2017, and at or near Maseyisini area in the Shiselweni Region, the accused person did unlawfully and intentionally kill Gcinile Dlamini. On count 2, the accused person is charged with the crime of Housebreaking with Intent to Steal and Theft, in that upon or about 19th October, 2017 and at or near Maseyisini area in the Shiselweni Region the accused did unlawfully and intentionally break and enter a shop situate there belonging to Patrick Mamba and did steal the following items, the property of or in the lawful possession of Patrick Mamba which are (a) a black mint cellphone valued at E200.00 (b) 45x E5 airtime vouchers valued at E225.00; (c) money in cash amounting to E1402.00. The total value of the items is E1827.00.

[2] When the charges were put to the accused he entered a Plea of not guilty on both counts.

CROWN’S EVIDENCE

[3] In a bid to prove its case, the Crown paraded eight (8) witnesses.

PW 1 – PATRICK MAMBA

This witness stated that he was the owner of the shop where the deceased worked. On the 19th October, 2017 he received a phone call from a community police informing him that his shop had not opened. He then rushed to his shop at Maseyisini and on arrival there he found many people and the police. The police had cordoned the place. Somebody told him that Gcinile Dlamini had been found dead in one of the rented rooms behind the shop.

- [4] PW 1 later called his wife to come to the shop. PW 1 together with his wife and one Nkosinathi Dlamini went to Gcinile's home to encourage the family members. Before that the police had given him the keys to the shop. They entered the shop and everything seemed normal until they realised that the black mint cellphone which they used to load airtime vouchers and money in cash amounting to E1402.00 were missing. 45 x E5 airtime vouchers were also missing. They reported the issue of the missing items to the Nhlngano Police Station. During the cross examination it was put to this witness that he did not witness the murder.

PW2 – 4131 DETECTIVE/SERGEANT TSABEDZE

- [5] This witness stated that he was the scenes of crime officer who went to the scene of the murder. He took photos of the scene and submitted them to court. Same were marked as "Exhibit 1." During cross examination, it was put to him that he could not identify the perpetrator.

PW 3 – 6887 CONSTABLE MAGAGULA

- [6] This witness is also a scenes of crime officer. He took photos of the pointing out of the thick stick that was used to beat the deceased. The

pointing out took place at Maseyisini. The stick was on top of the corrugated iron of the shop where the deceased worked. Later, this witness took photographs of the scene of pointing out that took place in Big Bend after the accused had led the police there. The photographs were presented and accordingly marked as “Exhibit 2.” During cross examination it was put to this witness that he did not caution the accused before the pointing out. He responded by saying that he did caution the accused before the pointing out.

PW 4 NQOBILE DLAMINI

[7] This witness is an elder sister to the deceased. She stated that on the 18th October, 2017, after knocking off at work she went to her parental home and did house chores. She stated that around 2000 hours, her sister, the deceased arrived home from work and prepared food for her 1 year old son. The deceased then received a call on her cellphone although she did not know who was calling the deceased. She overheard her sister saying “yini ngatsi uyatsetsa” (meaning that how come it sounds as if you are shouting at me) and the deceased thereafter went outside. She continued with the conversation. That was the last time she heard of her. On the following day and whilst work, she received a phone call to come home and when she arrived there, she was told of her sister’s demise. On the 25th October, 2017, she was called by the Nhlngano police where she identified her sister’s cellphone. It was a black tablet and it was amongst three (3) other tablets. During cross examination, the witness was asked if she knew the father of the only child the deceased had. Her response was in the affirmative and the name of the father is Sabulelwa Mthimkhulu.

PW 5 SIPHILILE MAMBA

[8] This witness corroborated the evidence of PW1 and she further identified the black mint cellphone that was stolen from her shop. During cross examination it was put to this witness that she never saw the person who stole the cellphone and the person who killed the deceased and she confirmed that.

PW 6 GCEBILE NGWENYA

[9] This witness stated that she has a child fathered by the accused. She stated that on the 19th October, 2017 she received a phone call at around 0300 hours from the accused who requested to visit her at Big Bend and she agreed. At or around 0500 hours the accused phoned her again asking if she would get transport from Manzini to Big Bend at that time and she informed him that there were buses and kombis that he will be able to find.

[10] She further stated that around 1600 hours, the accused phoned her and she informed her that he was at Matata and she directed him where he should alight. He came there carrying with him a big black bag and small school bags. She stated that she asked him if he was not returning to Nhlangano as he was carrying so many bags and he informed her that he had problems but he did not elaborate and that she asked him what had happened at Nhlangano and the accused informed her that the story was in the Times of Swaziland but they did not mention his name. She recalled that she had seen him reading a newspaper and that when she got inside the house, the accused hid the newspaper.

[11] She stated further that on a certain day when the accused was not in the house she decided to search the accused's bags and she found a red lace bikini under wear and was surprised. She searched for the newspaper and found it wherein there was on the front page a story of a murder that had occurred at Maseyisini where accused stayed. She stated that the accused then informed her that he had injured somebody at Maseyisini. She stated that whilst at work she received a phone call and it was the police informing her that they had arrested the accused and they thereafter brought to her, her house keys. On cross examination she was asked who she was with when the accused told her that he had injured somebody and she stated that she was with her child.

PW 7 ROMAN NDLOVU

[12] This witness stated that he was called by police officers as an independent witness in a pointing out. He stated that he agreed and was introduced to the accused and they proceeded to the homestead of Richard Matsenjwa who has flats that are rented out. He stated that in that rented flat, the accused gave the police two cell phones and some clothing. During cross examination this witness was asked if the police did caution the accused and this witness stated that the accused was asked to point at what was his and he did just that. However, this witness was not asked whether or not he knew what a caution is in terms of the Judges' Rules.

PW 8 4033 BHUNDA MHLANGA

[13] This witness is the investigator of this case. He stated how he conducted his investigation which led to the arrest of the accused. He also handed in

exhibits of this case which included a stick, two cellphones, airtime vouchers valued at E140.00 and cash amounting to E19.00.

CONFESSION

- [14] The Crown submitted a confession made by the accused to His Worship Magistrate Peter Simelane. It was made on the 24th October, 2017. The Defence consented to the submission of the confession and the court admitted it. Same was marked as “Exhibit 3.” The confession was freely and voluntarily made by the accused.
- [15] In the confession the accused person stated that the deceased was his girlfriend and would call each other every day. He stated that on the 18th October 2017, at about 2000 hours, he phoned the deceased and requested her to help him by paying a visit at his rented flat which was behind the shop where the deceased worked. The deceased agreed and he went and met her on her way from the parental home. They greeted and hugged each other. It was during the hug that he felt something in her pockets and the deceased informed him that it was a packet of sweet aid.
- [16] He stated that on arrival at the accused’s house, he asked her to cook food and she obliged. After having their meal, the deceased took a bath and laid on the bed and that he also took a bath. When he was about to join the deceased in bed, he stepped on condoms. He stated he became upset and started assaulting the deceased all over the body using his belt and the deceased grabbed the belt. He then took a stick that was under his bed and hit the deceased all over the body including the head and she bled.

- [17] He stated that he continued assaulting her until she became weak. He stated that the deceased requested him to call an ambulance; sensing danger he asked her if he could get her tablets and she did not reply. He then stated that he took keys to the shop from the deceased's jacket pockets. He went to the shop and took tablets. He also stole money in cash, a black mint cell phone and a number of E5.00 airtime vouchers. He went to his flat and caused the deceased to drink the tablets and waited for the ambulance.
- [18] He stated that he called the mother of his child who stayed at Big Bend and requested to visit her and that he also called Pastor Sihle Masuku and asked him to go to his flat but did not tell him exactly what had happened. He then boarded a kombi and arrived at Hlathikhulu at around 0500 hours and proceeded to Manzini; he eventually arrived at Big Bend. He stated that the mother of his child asked him what the problem was as he was carrying so many bags and he eventually told her that he had injured somebody back at Nhlanguano and that the story appeared in the Times of Swaziland.

THE POST MORTEM REPORT

- [19] The post mortem report was read and handed in by consent of both the Crown and the Defence. Same was marked as "Exhibit 4." On examination of the body of the deceased, the pathologist stated that the cause of death was due to multiple injuries. The external appearance of the body showed blood stains over the body, clots on the mouth with a swollen face and lower limbs.
- [20] Ante mortem injuries that were seen were as follows:

1. Contused abrasions over the forehead face 12.3 cm area. Laceration on upper lip 2 cm x 1cm lip deep, effusion blood in soft tissues of face and eye lids;
2. Scalp contusion right temporal region 4.1cm left temporal region 4.7 cm, frontal region 3.2 cm with sub dural haemorrhage over brain about 70 ml;
3. Abrasions over front of neck left side 6 cm x 0.3 cm;
4. Contused abrasion over front trunk lower region left 10.2 cm area;
5. Intermingled contused abrasions over back and trunk, buttocks, back of thighs, outer aspect front of legs, right shoulder top, upper limbs 0.2cm, 49 cm x 46 cm, 16 cm x 5.7 cm, 3cm x 1.2 cm area with effusion blood in soft tissues.
6. Contusion of left inter costal structures upper 6 spaces.

[21] The pathologist also noted that the deceased was about six (6) months pregnant with a female foetus.

[22] The Crown closed its case and the Defence elected to remain silent. The Defence's case was closed as well.

THE PARTIES' SUBMISSIONS

[23] The Crown submits that it has proved that the accused person did commit the crime of murder in the form of *Dolus eventualis*. The accused had the subjective foresight of the possibility of his conduct causing death to the deceased. The accused assaulted the deceased with a belt and stick. He used the stick to assault the deceased all over the body including the head such that the scalp had subdural haemorrhage over the brain of about 70 ml.

Notwithstanding the foresight, the accused caused injury to the deceased without caring whether death ensued or not. The deceased was six (6) months pregnant and subjecting her to this assault was brutal.

[24] The Crown further submits that the confession recorded before the Magistrate by the accused was admitted as part of the Crown's case and the contents thereof is not controverted. In his confession the accused stated that he called for an ambulance to come and assist but it did not arrive. The assault on the deceased was brutal and chances of her surviving were minimal when looking at the photographs presented by PW 2.

[25] PW 6 stated that she received a phone call from the accused at 0300 hours requesting to visit her and that by 0500 hours, he called again asking whether he would find transport to Big Bend from Manzini. The Crown submits that when the accused called PW 6 the deceased had already passed away; that is why the accused packed all his bags and ran away from Maseyisini. The accused also called his pastor long after he had left the area and thereafter switched off his cellphone without mentioning about the deceased.

[26] The accused stated in his confession that he assaulted the deceased because she was in possession of condoms yet they did not use them. Clearly it is not understandable why would a person be assaulted to death for just carrying condoms; unfortunately, the deceased is no longer here to state why she was assaulted.

[27] On the issue of the theft, PW 1 stated that after receiving the news of the deceased's death, he proceeded to his shop where the deceased was employed. He was in the company of PW 5. They discovered that money in cash amounting to E1400.00, airtime vouchers valued at E222.00 and a black mint cellphone had been stolen. The Crown concedes that the charge of housebreaking was not proved. The one proven was that of theft.

[28] In the confession the accused admitted that he stole the said properties in question. The Crown therefore submits that if indeed the court finds that the Crown did not succeed in proving house breaking as per the indictment may the court find the accused guilty of Theft.

[29] The Crown therefore submits that the accused be found guilty of Murder and Theft.

The Defence

[30] The accused admits that he assaulted one Gcinile Dlamini who was his girlfriend. There were visible injuries in the body of the said Gcinile Dlamini. After the assault, the accused tried to get medication for the deceased. Due to the seriousness of the injuries the accused decided to flee the scene leaving the deceased still alive. He called Sihle Masuku to attend to the deceased and to possibly take her to hospital. When Sihle came, the deceased had already died.

[31] The evidence led before court by the Crown witnesses never stated as to who committed the act of killing the deceased. All the witnesses arrived at the

scene only after the death had occurred. There is therefore no sufficient evidence that links the accused to the killing of the deceased.

[32] The investigating officer himself tendered no evidence of any weapon that was used to kill the deceased. The stick that was brought to court had no blood on it. It was also not taken for forensic determination and therefore no link was established between the alleged blood on the stick and the blood of the accused. Furthermore, the Investigating officer failed to gather evidence of finger prints at the scene to prove that no one came to the scene after the accused had left. The possibility that someone else came to the scene and killed the deceased cannot be ruled out.

[33] The medical doctor who examined the body of the deceased submitted to court that the deceased died of multiple injuries. Therefore it is not clear which of the injuries was the fatal one.

[34] The accused also confessed to the Magistrate. According to this confession, the accused admitted that he assaulted the deceased but left her alive. As regards the intention to kill, the Crown failed to prove it. The accused confessed to assaulting the deceased with a stick. When the accused used the stick to assault the deceased he did not foresee any possibility that death would occur. Even in his confession he mentioned that he left the deceased alive and further tried to have people get her to hospital.

[35] The accused is alleged to have made a statement to witnesses especially the police during the pointing out. There is no evidence that the statements were made voluntarily. The statements were made under fear and duress because

the accused was afraid of being tortured by the police. PW 1, PW 4 and PW 5 only identified the items.

APPLICABLE LAW

[36] In the case of **Dlamini Vusi Roy V Rex, Criminal Appeal No. 3 of 1999, SZSC**, Her Lordship Van Den Heever, J.A. stated as follows in page 5:

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

[37] Likewise in the case of **Khekhe Simelane and Four Others V Rex, Criminal Appeal Case No. 96 of 2000**, His Lordship Leon, JP buttressed the principle of weighing evidence when he said:-

“The trial Judge will weigh his evidence and consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are some shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.....”

[38] Finally in the case of the **Director of Public Prosecutions Gauteng V Oscar Pretorius, Criminal Appeal No. 96/2015**, His Lordship Leach J.A. stated as follows:

“It is thus trite that a trial judge must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved. As Nugert J stated in Vander Meyden a passage often cited with approval in this court: The proper test is that the accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be

acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found unreliable; but none of it maybe simply ignored.”

ANALYSIS AND CONCLUSION

[39] The Crown’s case is that the accused’s guilt has been proved beyond reasonable doubt. The confession made by the accused to the Magistrate says it all.

[40] The confession was admitted by consent between the two parties and its content was never challenged. Evidence aliunde was further adduced by the Crown in that the accused was the last person who was in the company of the deceased; they went to the accused flat; the accused assaulted her with a belt and later with a thick stick that was under his bed; the assault caused her to be weak and the accused tried to organise tablets for her and further called for an ambulance to take her to hospital and the ambulance did not arrive; the accused left his flat at about 0300 hours for Big Bend where the mother of his child was; he left the deceased in a critical state; the accused called Pastor Zulu around 0300 hours asking him to go and see what happened in the accused’s flat; the accused told the mother of his child that he had injured somebody at Nhlangano and that the story appeared in the Times of Swaziland; the reason why the accused allegedly assaulted the deceased was

that there were condoms in the deceased's possession; the accused confessed that he took out a key from the deceased's pocket which he used to open the store and took some items from there. The stolen items were identified by PW 1 Patrick Mamba and PW 5, Siphilile Mamba. Both of these witnesses were the owners of the shop where the items were stolen.

[41] On the issue of the intention, the Crown contends that the accused committed the crime of murder in the form of *Dolus eventualis*. There was subjective foresight of the possibility, however remote, of the accused's unlawful conduct causing death to the deceased. The accused persisted in his conduct, despite such foresight. The accused consciously took the risk of the resultant death, not caring whether it ensued or not. There was no actual intention to kill on the part of the accused. That is why the intention was in the form of *Dolus eventualis*.

[42] On the crime of theft, the Crown led enough evidence to establish it. The accused confession bears testimony to this. He did state in it what he took from the shop.

[43] The Defence case is simple and straight forward. No one witnessed the actual killing of the deceased. The accused does not deny that he hit the deceased with a belt and a stick. When the accused left the scene the deceased was still alive. Further, when he made the statements to the police he was fearful and only wanted to avoid being tortured. The pointing out was also not voluntary in the sense that fear was instilled in him. It is the Defence's submission that the medical report did not specify which of the injuries caused the death of the accused although it does state that multiple

injuries were inflicted on the body of the deceased. The Defence finally submits that there was no blood on the stick that was used by the accused to hit the deceased. There were also no fingerprints taken from the stick.

- [44] The court's view is that the Crown has proved its case of Murder and Theft beyond reasonable doubt. The confession made by the accused is a self incriminating statement made by the accused which can be relied upon provided there is also competent evidence other than the confession, which proves that the offence has been actually committed. This is provided for in Section 238 (2) of the Criminal Procedure and Evidence Act, 1938 which states that:-

“Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:

Provided that such offence has by competent evidence, other than such confession, been proved to have been actually committed.”

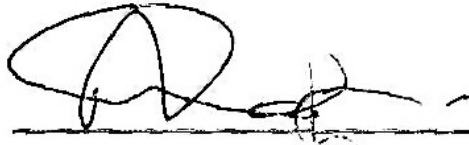
- [45] The evidence presented by the Crown other than the confession remains unchallenged. The only challenge by the Defence is that the accused only beat the deceased all over the body but did not kill her when he ran away. He said that it was not him who actually killed the deceased. It could be that the beatings were so severe that the deceased could not survive. The medical evidence shows that there were blood stains all over the body and clots on the mouth with a swollen face and lower limbs. The abrasions over the fore head face covered an area of about 12.3 cm. There were also

abrasions and lacerations over the parts of the body. When the accused flee the scene, there was blood on the floor and on the wall. These all shows that the deceased was badly injured. I guess that is why the accused wanted to take her to hospital. The wounds inflicted on the deceased were deadly in nature. That is why the intention in the form of *Dolus Eventualis* comes in. The accused foresaw the possibility of death occurring and notwithstanding the foresight, he continued beating the deceased. The deceased was six months pregnant, according to the medical report.

[46] On the issue of the pointing out, the Crown did establish that it was voluntary. At no point in time during the trial did the accused's attorney call for a trial within a trial so as to challenge the pointing out. The evidence tendered by the Crown on the pointing out remained unchallenged. The Defence also raised the issue of the fingerprints. It says that no fingerprints were taken from the stick that the accused used in beating the deceased. There was no need for the fingerprints to be taken because after all, it is the accused who pointed out where the stick was hidden. The issue of the stick without any blood is neither here nor there. The period between the commission of the offence and the trial was about three years. It is common cause that the blood dried up.

[47] On the issue of the Theft of goods at the shop, where the deceased was working, the Crown did prove that the goods were indeed stolen by the accused. The confession coupled with the evidence of PW 1 and PW 5 established the commission of this offence.

[48] In totality of the evidence, the accused is found guilty of Murder and Theft as charged.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a surname, written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Crown: N. Masuku

Accused: S. Mabila