



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CASE NO. 397/14

HELD AT MBABANE

In the matter between:

REX

Versus

MELUSI 'THONE' MKHWANAZI

Neutral Citation: *Rex Vs Melusi 'Thone' Mkhwanazi [397/14] [2020] SZHC 51*
(26 March, 2020)

Coram: **M. LANGWENYA J**

Heard: 9 March 2020; 10 March 2020; 17 March 2020

Delivered: 26 March 2020

Summary: *Criminal Law-accused charged with murder-pleads private defence-accused asserts right to silence-effect of failure to testify-charge of murder-subjective foresight-Crown proved case beyond reasonable doubt.*

JUDGMENT

- [1] The accused is arraigned before me on a charge of murder. The Crown alleges that on or about 25 October 2014 and at or near Trelawney Park in the district of Manzini, he unlawfully and intentionally killed Mussagi Horaimo Sergio.
- [2] The accused pleaded not guilty to the charge. He pleads private defence.
- [3] The Crown led the evidence of six witnesses. The accused did not give evidence, he asserted his right to silence.
- [4] The scene of crime is House Number 43 Trelawney Park in Manzini. PW1 Lemmy Muntu Bongani Mpungose was at home at house number 43 Trelawney Park with other family members where they had a small family ceremony on 25 October 2014. Present also was PW4 and the deceased. It was at around 3pm on the said day when two boys came to PW1's home and asked to see Bangingi Matsebula. Bangingi was not at home when the two boys arrived. Bangingi Matsebula is a cousin of PW1 and a daughter of PW4. The two boys were disrespectful, recalcitrant and rude in their behaviour and utterances towards the members of the family when they were told that Bangingi was not at home.

- [5] The family members ordered the boys to leave. They left but returned between 10pm and 11pm spoiling for a fight. They made a lot of noise at the gate and demanded to be attended to. At that time the family had retired to bed. The deceased was the first to go and attend to the rowdy people at the gate. A few minutes later the deceased returned to the house crying and saying that he had been stabbed. PW1 went outside the house to assist the deceased and he was attacked by the rowdy group and he fell on the ground. Their attackers were vocal in saying they were back and were spoiling for a fight as a result of how the family had treated them earlier in the day.
- [6] It was as the deceased lay on the ground that he heard him go silent. The attackers fled the scene. PW1 raised an alarm and took the deceased to the RFM hospital where he was certified dead. PW1 was cross examined about the state of visibility when the fight ensued; his response was that there was light coming from the lights outside the house. PW1 did not see who stabbed the deceased.
- [7] PW2 is Mlandvo Stella Malaza. On the fateful day he was with Boy Boy (PW3) on a social trip as they drove around Manzini in the latter's car. The car developed mechanical problems as it was over heating. Boy Boy suffered burns after he tried to fix the radiator of the car which was overheating. The burns were on his arm. Boy Boy suggested that they went to Banningi's home at Trelawney Park to get water to cool the car engine. When they arrived at Banningi's home they found family members seated

inside the garage. They greeted the people they found in the garage and PW3 enquired where Banningi was. One of the ladies in the garage said something and there was a heated exchange of words between Boy Boy and the lady in question. Boy Boy made utterances to the effect that the lady had no reason to be arrogant as she was unknown to the duo; they only knew Banningi.

[8] At that time, a man emerged from the house and asked how Boy Boy was addressing his wife. One of the men advanced towards PW2 and attempted to assault him but PW2 evaded the assault. Boy Boy was not lucky as he was assaulted by the man who asked how he was addressing his wife. All hell broke loose as all the other family members joined the fray and even threatened to stone the car in which PW2 and PW3 were travelling in. It was during the fight within the family yard that Boy Boy's phone fell. PW3 only realized when he wanted to call his mother to ask to be taken to hospital for the burns that he did not have a phone. At that time they were at Fairview.

[9] PW2 and PW3 then drove to Siyabonga Bottle Store where they found Sibusiso, Aphelele, Siphon and Melusi. The group of friends enquired from PW3 how he had sustained the burns. PW3 then informed them that his phone fell and was left at the house at Trelawney Park following a fight with family members at Banningi's home. The four boys said PW3's phone must be collected. They set out to collect PW3's phone aboard PW3's motor vehicle. Along the way they came across a police road block. They changed course and then went to another Bar at Fairview instead. They fled from the

police road block because they were all drunk and this includes the driver. In PW3's motor vehicle were Melusi, Siphon, Sibusiso and Phelele.

[10] Later that night they went to Banningi's home at Trelawney Park and PW2 and PW3 entered the family yard as the gate was not locked. PW2 knocked at the main house. The rest of the group came along except for Phelele who was too intoxicated and remained at the gate. One of the occupants of the house came with PW3's cell phone while another occupant attended to the group. The group informed the people they found at Banningi's home that they had come to collect the phone. The man who had the phone was polite and gave the phone to the group after admonishing them not to be disrespectful again.

[11] The other occupant, a male charged towards PW2 and said *nisijwayela kabi*. PW2 assaulted the man who came charging at him with an open hand on the right side of the face. Both men chased after PW2 and the group that came with PW2 joined the fray and a fight ensued. Sibusiso, Siphon, PW3 and Melusi joined the fight. PW3 was assaulted and he retaliated. PW2 later called out to his charges and asked them to leave the place. They obeyed the call. It was when they were in the motor vehicle getting ready to leave the scene that they saw one of the men from the home manhandling Melusi. Melusi and the man were both lying on the ground when PW2 called out to the accused and asked him to come with the group. PW2 says he saw the two lying and fighting on the ground because there were lights on outside

the house. PW3 stopped the car and Melusi joined them inside the car. When Melusi got inside the car they drove off.

[12] The group went to other bottle stores to have more drinks. It was when they were in the first bottle store that PW2 noticed that accused's T-shirt was torn. When asked what happened, the accused told PW2 that it was when he was manhandled at Trelawney Park that he took out a knife and stabbed the man who held him. The accused said he did not inflict a fatal wound on the man he stabbed. PW2 saw the knife when the accused produced it at the bar. It was an okapi knife. Accused told PW2 he stabbed the man slightly.

[13] The evidence of PW3 Sibusiso Boy Boy Juab Tsabedze corroborates that of PW2 in material respects. It is his evidence that when they got to Banningi's home they were met by a rude woman who addressed them in a bad way when they asked if Banningi was home. A certain man emerged from the house and asked PW3 how he was addressing his girlfriend. The man assaulted PW3 and a fight ensued. The man who assaulted PW3 is not the deceased.

[14] It was during the fight in the afternoon that PW3 dropped his phone at Trelawney Park when they fled. He enlisted the help of a group of boys from Ticantfwini who later came with him to collect his phone at Banningi's home. This happened not before they had had one too many at different bars during the day. He got back his phone after they had fought with two men who had

emerged from the house at Trelawney Park. The group of boys he came with helped in fighting the occupants of the house where they had gone to collect his phone. This witness was not cross examined on behalf of the accused.

[15] PW4 is Joana Masilela. She was home with Mable, Mseshi and Martin when certain boys arrived at her home at Trelawney park drunk and shouted angrily saying they wanted Bangingi. Mable admonished them stating that in the state they were in they couldn't be asking to see Bangingi from her mother. The boys left but returned still rowdy and asked for water. Mseshi and Martin were infuriated and chased the boys away. Mseshi was later stabbed outside the gate at night of the fateful day.

[16] PW5 is 6297 Detective Constable Mduduzi Shongwe and the investigating officer in this matter. On 26 October 2014 he received a docket of murder and went to Ticantfwini where he arrested one of the suspects Sibusiso Shongwe at a Shongwe homestead. Before he arrested the suspect he had introduced himself as a police officer investigating a murder case. He cautioned the suspect in accordance with Judges' rules. The suspect led PW5 to the homes of the other suspects at Ticantfwini.

[17] The accused person was found at his home on 26 October 2014. PW5 introduced himself and explained his mission to the accused. He cautioned the accused in terms of the Judges' rules. The accused led PW5-who was in the company of independent witnesses to his home where he retrieved or

pointed out a three star okapi knife which he said was used in the commission of the offence. PW5 completed RSP 218 with the accused at the police station after cautioning him. PW5 handed in the okapi knife as part of his evidence. During cross examination, PW5 denied assaulting, pressuring the accused to produce or point out the knife. The accused was charged with the offence of murder.

[18] PW6 is Siphon Shongwe. His evidence corroborates the evidence of PW2 and PW3 regarding the fight the group had at Trelawney park where they had gone to help PW3 get his phone. He was present when the accused pointed out a knife to the police. He stated that the group was arrested and charged with assault. They were admitted to bail and later paid a fine for the assault.

[19] The post mortem report states that death was due to stab wound on the back side of the chest. On the right lung there is a stab wound of 1cm length present in the middle lobe and stab wound of 2cms length present in the lower lobe. There was also petechial haemorrhage present on the heart and the peri-cardial sac was ruptured.

[20] A statement made by the accused before a judicial officer was handed in by consent. It is in the statement before the judicial officer that the accused details the fight he was involved in at Trelawney Park. He participated in the assault of the man who, he had been told had assaulted PW3. The fight was with fists and kicks. The accused states in the statement made before a

judicial officer that when his companions fled the scene, he was held by one of the men by his clothes. He states that he took out his knife and stabbed the deceased at the back between his shoulder blades.

[21] The Crown closed its case.

[22] The accused asserted his right to silence and closed his case without giving evidence.

Application of the Law to the Facts

[23] There is no doubt that the deceased is dead, and that he died of a single stab wound inflicted by the accused on the back side of the chest. In inflicting the stab wound the accused subjectively foresaw the possibility of his act causing death and was reckless of such result¹. The accused stabbed the deceased with a lethal weapon in the nature of an okapi knife in the vital chest area albeit at the back of the chest. He struck the chest area of the deceased with sufficient force to inflict injuries in the middle lobe and lower lobe of the right lung; at the very least this shows a recklessness on the part of the accused as to whether the victim dies or not even if there is no positive intention to kill. In my view, no person could credibly deny that he knew that such a stabbing was likely to cause death.

¹ *S v Sigwhla* 1967 (4) SA 566(A) at 570B-C; *S v Bisset* 1990(1) SACR 285 (ZS) at 290E-F

[24] While the accused had been drinking on that fateful day and night, there is no suggestion that he was so drunk as not to be conscious of what he was doing.

Right to Silence

[25] The accused asserted his right to silence. It is settled law that failure to testify may, depending on the circumstances, be taken into account against an accused person. A Court will find it difficult to come to a conclusion favourable to the accused concerning his state of mind unless he has himself given evidence on the subject².

[26] Where the state of mind of the accused is in issue as it is in this case: the accused himself was in the best position to testify on the amount of liquor he had ingested, what effect such consumption usually has on him, or had on the particular day, and had on his state of mind at the time of committing the offence and, if innocent of the crime of murder, to explain his actions which might otherwise unavoidably lead to a conclusion that he committed the murder³. In the case at hand, the Court is none the wiser about the state of mind of the accused at the time he committed the offence.

[27] That said, the ultimate requirement is still proof of guilt beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that the accused did not give evidence⁴.

² *R v Deetlefs* 1953 (1) SA 418.

³ *R v Saaiman* 1967 (4) SA 440(A)

⁴ *S v Snyman* 1968 (2) SA 582(A) at 588H

- [28] It remains to consider whether the accused acted in self defence in stabbing the deceased. I am of the view that if this was so, the accused was the person to adduce those facts in evidence. He did not do so. There is no other basis for such a finding and this possibility must therefore be excluded.
- [29] It is in any event distinctly improbable that the deceased who had retired to bed on the night the accused and his drinking buddies invaded deceased's home would have attacked or even provoked the accused and his rowdy friends. In fact there is evidence that PW2 and PW3 were the initial aggressors which led to a fight where the accused and the rest of his ilk joined in. The fight was with fists and kicks. The use of a knife against the deceased was therefore an excessive use of force by the accused.
- [30] Apart from the possible effect of alcohol on accused's cognitive faculties there was nothing in the circumstances of or giving rise to the stabbing which could in any way have impaired or clouded accused's faculties of perception or evaluation. In the absence of any explanation from the accused, there is nothing standing in the way of the inference that the attack was a vicious, deliberate and unprovoked one by the accused in the company of five young men. The only reasonable inference one is left with on the evidence is that the accused with his companions had deliberately embarked on a sortie of violence that night.

[31] Into this factual matrix must be introduced the effect (if any) which accused's consumption of alcohol had on his ability to foresee the consequences of his stabbing the deceased in the way he did. There is evidence that after stabbing the deceased, the accused simply ran to the car where his friends were.

[32] Because the accused did not testify on the merits there is no way of determining how much liquor he had consumed or what effect it had on his powers of perception and foresight.

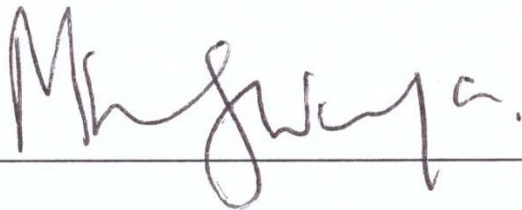
Subjective Foresight

[33] The question is whether, on all the facts, it has as a matter of inference been established beyond reasonable doubt that the accused at any stage of the stabbing actually subjectively thought that there was a reasonable possibility that the deceased might die of the stabbing? That he was reckless of the consequences of the assault is clear, as evidenced by his part in driving off leaving the deceased with a stab wound and without seeking attention for him.

[34] The above questions, in my view must be answered in the affirmative. The following features must as a fact have given the accused a clearer opportunity to appreciate, and to concentrate his mind on, the possible consequences of the stabbing. The accused and his lot were the aggressors from the beginning. The motive for the fight was formulated in advance of the assault when the plan to collect PW3's phone was hatched.

[35] All this evidence leads, as a matter of inference beyond reasonable doubt to the conclusion that the accused did in fact realize that there was a reasonable possibility that the deceased might die in consequence of the stabbing but was reckless as to this result. Accused's intention to kill in the form of *dolus eventualis* was accordingly properly proved.

[36] Accordingly, and for the above reasons the accused is found guilty of murder.

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

M. LANGWENYA J.

For the Crown: Ms. N. Masuku

For the Defence: Mr. L. Dlamini