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IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No.58/2017

THE KING

VS

MUSA ZIBUNYWANA NKOMO
MDUDUZI SONYBOY MAMBA

Neutral citation

*The King v Musa Zibunywana Nkomo and Another
(58/2017) [2020] SZHC 155*

Coram

M. Dlamini J

Heard

11th December, 2020

Delivered

17th September, 2021

Charges

- [1] Both accused persons stand arraigned on a murder charge of Bongumusa Tsabedze. A charge of assault of Bongumusa Tsabedze against the 2nd accused was withdrawn. However, the same charge against 2nd accused of assaulting Nelly Busisiwe Bhembe remained.

Indictment

- [2] Two counts read in respect of both accused persons:

Count 1

Accused 1 and 2 are guilty of the crime of murder.

*In that upon or about the 4th October 2015 at or near Lusoti Village in the Lubombo Region, the said accused persons acting jointly in furtherance of a common purpose did unlawfully and intentionally kill one **BONGUMUS'A TS'ABEDZE**.*

Count 3

*Accused 2 is guilty of **ASSAULT COMMON**.*

*In that upon or about 4th October 2015 at or near Lusoti Village, the said accused person did unlawfully and intentionally assault one **NELLY BUSISIWE BHEMBE** and did thereby commit the said crime.*

- [3] **Pleas**

The two accused's pleas could be summarised as follows:

Accused No. 1

Count 1 - Murder charge Not guilty

Accused No. 2

Count 1- Murder charge	Not guilty
Count 3 - Assault	Not guilty

Evidence admitted by consent

[4] From the onset after the pleas of not guilty were entered, the Crown applied that the post mortem report be admitted by consent. The defence confirmed the consent. The court admitted the post mortem report and marked it as Exhibit "A".

Crown's witnesses

[5] The crown led the evidence of four witnesses. These were two witnesses who testified that they were present during the commission of the offences and one forensic expert and the investigation officer.

PWI : Nelly Busisiwe Bhembe

[6] She is complainant in Count 3 and a lover of the deceased in Count 1. She hails from Shoba.

[7] Her evidence was briefly that on 4th October 2015 she visited Simunye where the deceased's brother resided. At about midnight, in the company of her friends and the deceased, they proceeded to Mgico bar to continue imbibing in liquor. Melusi, who was part of the company, noted that his girlfriend Nothando was inside the bar which was by then closed. As they were waiting, hoping to be allowed into the bar, a boy emerged and touched her buttocks. An altercation ensued although short lived. They decided to go home. Melusi followed them behind with his girlfriend, Nothando.

[8] Upon reaching home, while inside the house they heard some noise. Deceased left to ascertain the cause. She heard him shouting, "It is Melusi." They all responded by rushing outside. She noted five gentlemen assaulting Melusi. Deceased enquired as to why they were assaulting Melusi. Accused No.2 responded by assaulting deceased. Deceased retaliated. Accused No. 2 also assaulted her, PW1, with an open hand. She fell on the ground and became unconscious.

[9] She woke up and heard some people enquiring, "Why assault him with a stone?" She looked to ascertain who was being assaulted with a stone. She noticed that it was deceased who then fell on the ground, facing up. At that time the four people were kicking him. He did not know the other three except for Accused 2 who was part of the four gentlemen. She tried to wake the deceased up calling at his name but in vain. Police were called. The police delayed. They arranged for a motor-vehicle to convey the deceased to Simunye clinic. Deceased was certified dead.

PW2: Zinhle Maswane Dvuba

[10] Like PW1, she testified under oath. Her home area is kaLanga, Siteki.

[11] On the 4th October, 2015, she was inside Mgico bar. She saw deceased and PW1 together outside the bar. There was an altercation that died down shortly. She then left for home in the company of others. Deceased and PW1 were nowhere to be seen by then. Along the way she saw four gentlemen. They spoke to Melusi who was in the

company of Nothando. They enquired from Melusi why he was walking

with Nothando. They suddenly pounced on Melusi. One of the four was A2. Melusi flee away. Someone in her company ran into the house to call the deceased.

- [12) Deceased came out with PW1, his girlfriend. PW1 asked what was happening. A2 assaulted PW1 with an open hand and she fell down. She fainted. Deceased approached to assist PW1. Deceased was also assaulted. When PW1 woke up from being unconscious, she tried to wake up deceased. By then deceased had died. His body was conveyed to hospital.

PW3: 4103 Detective Sergeant Nhlanhla Nkomonde

- [13) He is the investigating officer. He received a report that a 1nan had been assaulted and rushed to the clinic. He conducted his investigation and an-ested the two accused persons. He cautioned them according to the Judges rules. Both accused persons led him to the scene of crime. They pointed a stone to him. He picked it up and handed san1e to court. It was marked Exhibit "1" by consent of the defence Counsel. He asked the accused persons to hand over the lathes they were wearing on the clay of the incident, they obliged. He prepared the clothes to be taken to the forensic laboratory in Pretoria, Republic of South Africa.

- [14) He also went to the Magistrate Comt and obtained an order authorising him to remove blood samples from both accused persons. Their blood samples were drawn from them at Good Shepherd

Hospital. The blood sample for A1 was marked SN1 and A2, SN2. The clothes won1 by

both accused were marked. SN3 and SN4 were a hat and trouser respectively retrieved from accused No. 1. A black canvass talkies, all star, was marked SNS from accused No. 1. From Accused No.2, a black trouser was marked SN6 and a black shirt referred as SN7. A black T shirt was labelled SNS and blue tekkies, all star, marked SN9. The stone was marked SN10. All those exhibits were taken to the forensic laboratory in Pretoria for analysis.

PW4: Surprise Mnisi

- [15] He is a warrant officer in the South African Police Service. He is based in the biology section in the forensic service laboratory in Pretoria. He has been in the biotechnology profession since 11th March 2013. His expertise are in DNA analysis.
- [16] He received the exhibits referred to by PW3. He conducted a DNA analysis on them. No blood could be detected from exhibits SN3, SN4, SN6, SN7 and SNS. He could not detect any DNA in SNS. With regard to SN3, DNA was insufficient for analysis. The exhibit SN9 (blue tekkies) matched the blood sample extracted from accused No.2. Exhibit JDL 4 matched with the blood sample 10D3ABS732XX.
- [17] Blood sample 10D3AB509XX. For A2 and blood sample 10D3AB8734XX for accused No.1. Blood sample 10D3ABB8732XX was not identified in his report and prosecution did not lead ^{hi111} on whose blood sample that was. The report further matches another blood sample with GN10 the stone. This is blood sample 10D3AB8732EB.

The report is silent on whose blood sample that was as the blood sample for Accused

No. 1 although bears the same first ten numbers, ends differently with XX and not EB.

(18] PW3 did not testify that he marked some of the exhibits as **JDL**. He testified that he marked all the exhibits transferred to Pretoria as SN. Now the evidence that exhibit **JDL** 4 matches with the blood sample of accused No. 1 cannot be accepted by reason that the court is not aware of JDL exhibits. Similarly, the evidence that the stone exhibit SN10 matches the blood sample 10D3AB8732EB is immaterial as far as the present proceedings are concerned as blood sample 10D3AB8732EB is unknown. In the result the evidence of PW4 was of no assistance by reason of prosecution's sloth.

Analysis of the evidence and determination

(19] PW1's evidence was briefly that having left the Mgico bar and upon the instructions of Gagashi, they returned home. While inside the house, they heard some noise. Deceased, on account that his brother Melusi had been left behind, decided to go and pry on what the noise was for. PW1 suddenly heard deceased shouted saying, "It is Melusi." She was attracted to the scene by those words. She noticed five boys assaulting Melusi. Accused No.2 assaulted the deceased. The deceased retaliated by hitting back. She enquired why he was assaulting the deceased. She received a slap on her right ear. She fell down and fainted. On her awakening, she heard voices asking, "*rWhy are you assaulting him with a stone.* " She looked to see. She realised that it was deceased who was down. She crawled to wake him up but in vain.

- [20] PW2 gave a detailed account of how the altercation that led to the deceased death transpired. She testified that Melusi was standing with his girlfriend Nothando. Four gentlemen confronted him. Melusi flee. PW1 came in the company of deceased. She enquired on what was happening. Accused No. 2 assaulted her with an open hand and she fell down. Deceased approached to assist her. He was also assaulted.
- [21] She felt a stone passing her ear. She turned to look, she noticed accused No. 1 behind her. Accused No. 1 picked up a second stone and threw it towards deceased. Deceased fell down. PW1 woke up and approached deceased who was on the ground. He tried to wake him up but deceased was no longer breathing. The evidence of PW1 and PW2 corroborates each other on what led to the death of the deceased. It was the stone thrown at him.
- [22] The post mortem report points out that the deceased died as a result of a head injury. His skull was fractured and he had a haemorrhage over his brain of about 140ml. The evidence of both witnesses was that the four or five gentlemen assaulted Melusi. However, Melusi ran away. Accused 2 assaulted deceased. Deceased fought back. However, when deceased was assaulted with the stone, he fell clown.
- [23] In other words, no fatal injuries were inflicted by accused No.2 as deceased fought back. The fatal injury came from a stone thrown by who? The evidence of PW2 shows that it was tlu·own by accused No.1. In the above accused No.2 stands to be acquitted on the murder charge.

Accused No.1's defence

Defence of drunkenness

[24] In cross-examination, the defence put it across all the witnesses that on the fateful night they were all heavily drunk. They had drunk for the entire day and night.

[25] The evidence of drinking for prolonged hours was admitted by PW1 and PW2. However, they disputed that they were heavily drunk such that they could not appreciate what they were doing. Accused No.1 in his defence gave a similar narrative of the events of the fateful night as PW1 and PW2. In the light of this evidence therefore the court finds that the defence of drunkenness such that the accused could not appreciate what they were doing stands to fall.

Self-defence

[26] A further defence was that the two accused retaliated attacks from the witnesses and the deceased, thereby raising self-defence. Was this a case of self-defence?

[27] The sequence of events were testified to by PW2. PW2 testified that he felt a stone passing through his ears. She turned to look. She noticed accused No. 1 picking up a second stone. He threw it at deceased. Upon the stone hitting deceased, deceased fell down.

[28] The court accepts this evidence that the deceased died as a result of a stone. PW1 corroborated PW2's evidence as she testified that while she was lying down unconsciously, she was awoken by voices

shouting,

"Why assault him with a stone?" She awoken from her slumber and saw a stone hitting deceased who fell clown thereafter. It is obvious this was the second stone testified to by PW2. The injtiries attested to by the pathologist report, corroborates the oral evidence of **PWI** and PW2.

[29] PW2 who was there from the start to the end of the incident and did not faint in the process, testified that accused No. 1 threw the fatal stone to the deceased. The deceased was at a distance from his assailant as can be inferred from the evidence of PWI and PW2. In other words, accused No. I cannot claim that when he threw the fatal stone to the deceased his life was in imminent danger. The defence raised at the instance of Acet1sed No. 1, namely self-defence, therefore cannot sustain.

[30] In his testimony, Accused No. I admitted throwing the stone to the deceased. This stone hit him and he fell down. He testified that the reason he threw the stone was because deceased threw bottles at his group. Under cross-examination of PWI it was put:

Counsel I. du-Pont:

"I put it to you that Accused 2 whilst you attacked him with bottles you came to him and assaulted him with a slap. "

PWI

"1"vo tt.1ue. "

Counsel I. du-Pont:

"Accused 2 retaliated to your assault. "

PW1 *"Not true. I did not assault A2 with a stone. "*

Counsel I. du-Pont: *"I put it to you that Accused 1 also retaliated to your assault and you slapped him. "*

PW1 *"Not true. "*

[31] From the above cross-examination, it is clear that at one point in time, the accused were at close proximity with the deceased, otherwise they would not have attacked him with their hands if they were at a distance. It is clear from the evidence as a whole that when the fatal stone was thrown against the deceased, Accused No.1 was no longer in danger as he was at a distance. The question then is, why attack him with a stone? Of note, this is the same question PW1 awoke to find.

[32] Cross-examination of PW2 centred on the assault of Melusi and the four boys. This was a waste of time as the charges faced by the accused were for crimes against the deceased and not Melusi. PW2 was briefly cross-examined on the deceased. She maintained her evidence in chief on Accused No.1 throwing a stone that hit the deceased. She admitted retaliation with regard to complainant in Count 3, i.e. assault of PW1. In the result, I find that Accused No.1 is guilty of the offence of murder.

Assault charge against Accused No. 2

[33] PW1, the complainant testified that he enquired on what was

happening. Instead of a reply, Accused No.2 assaulted him with an

open hand. She fell down and became unconscious. PW2 was cross examined on this evidence:

Counsel Du-Pont : *"When PW1 and deceased came to the scene they were assaulting or assaulted Accused 2 with a bottle. "*

PW2 : *"I saw it'nat. "*

Counsel I. Du-Pont: *"Both of them?"*

PW2 : *"It was Busisiwe.*

"

Counsel Du-Pont : *"This was before Busisiwe was assaulted with an open hand by Accused 2. "*

PW2 : *":Yes"*

Counsel Du-Pont : *"It is Busisiwe who attacked Accused 2 first. "*

PTV2 : *"No, Busisiwe enquired what happened. "*

Counsel Du-Pont : *"Then ,what happened?"*

PW2 : *"That is when Busisiwe took a bottle and hit Accused 2"*

[34] From the above, it is clear that the evidence of PW1 on her assault by Accused No.2 falls far too short of corroboration. The cross examination of PW 2 on the events of the fateful night as

demonstrated above shows that when Accused No.2 slapped PW1, he was retaliating

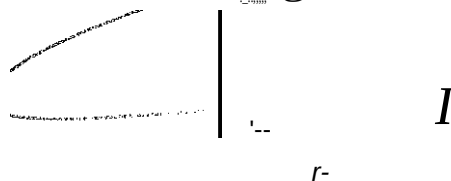
from an assault first inflicted by PW1 by means of a beer bottle. In other words, PW1 was the aggressor. She attacked Accused No. 2 with a bottle whose potential is lethal. The retaliation with an open hand, although it resulted in PW1 being unconscious, was reasonable in the circumstances.

[35] In this regard, I find that the defence of self-defence raised on behalf of Accused No.2 must succeed. Accused No.2 is acquitted of the charge of assault against **Nelly Busisiwe Bhembe**. In the result I enter as follows:

35.1 Accused No.1 is found guilty of count 1 i.e. murder.

35.2 Accused No.2 is acquitted on count No. 1 i.e. murder.

35.3 Accused No.2 is acquitted on count No.3 i.e. assault.

A handwritten signature in black ink, appearing to read 'M. DLAMINI, J.', is written over a horizontal line. The signature is somewhat stylized and includes a vertical line that extends upwards from the horizontal line.

M. DLAMINI, J

For Crown

For the defendant

C. Masango from the Director of Public Prosecutions

I. Du-Pont from Zonke Magagula & Compay

SENTENCING

Heard 20th September, 2021

Delivered 24th September, 2021

Mitigation

Defence submissions

[36] The Crown submitted that the accused person did not have any previous conviction. On that note, the defence impressed upon the court that the accused had no brush with the law before. He was a first offender.

[37] The accused was at the time of the offence twenty five (25) years old. He was currently thirty (30) years old. He has two minor children, namely, a five (5) year old and two (2) year old. Although he was not in gainful employment, he was a seasonal worker as a sugar cane cutter both in kaShewula and Simunye.

[38] Turning to the fateful events of the night, the defence implored the court to consider the evidence of the investigating officer, Nkomonde, that the accused cooperated with the police in their investigation. Further, the court should accept the evidence of the accused that after the incident, he proceeded to check on the deceased at Simunye Clinic.

Shepherd Hospital. The court should not lose sight of the evidence both at the instance of the Crown's witnesses and the accused that everyone had drunk for prolonged hours on that day. In as much as intoxication is no longer a defence in our law, the court should take into account that the accused was drunk on that day.

Crown's submission

[39] Counsel for the Crown submitted that the court should not deviate from its duty to issue an appropriate sentence that would deter would be offenders. I should not lose sight of the fact that a life was lost for good. The deceased's family members and the society at large were thereby deprived of deceased's financial assistance, physical power and presence. The Crown urged the court to take a leaf from decided cases on the range of sentences in murder cases. At the same time, the court should be flexible to consider each case according to its circumstances in meting out the appropriate sentence.

Ad Sentence

[40] The triad principle is at the backdrop of my mind as I consider the appropriate sentence in this matter. On the first principle (the personal circumstances of the accused), it is common cause as submitted by the defence that the accused was of youthful age during the commission of the offence. He had set out on a drinking spree in the company of other youth on the fatefcil day. He therefore succumbed to peer pressure as it

were. I have already found that despite his prolonged hours of imbibing in liquor, he appreciated what was happening. This was inferred from his evidence adduced in his defence. He did not say that he could not remember a thing. Instead, his evidence corroborated in some material respects that of the Crown's witnesses. That as it may, does not detract from the circumstance that his state of sobriety on that fateful night should be considered in his favour in sentencing.

[41] The court accepts that the accused has two minor children who are depended on him for a living. He is not in full employment. This is not his choice. He however, makes ends meet by working as a seasonal sugar cane cutter. From this given set of circumstances, he is a good citizen of this country in as much as the court was not informed that he was a married man. He is a first offender. This evidence also has a bearing on the second aspect of the triad principle as it concerns the position of the accused with society.

[42] Turning to the case at hand, it was pointed out on behalf of the accused that he paid a visit to the Simunye Clinic with the hope to check on the health status of the accused. This piece of evidence demonstrates that no sooner had the accused inflicted the fatal injury and left the deceased to be attended by PW1, he did have a change of mind albeit, later. In other words, the accused became remorseful as he later appreciated the consequences of his action. This is credit to accused in valuation of the appropriate sentence. The evidence that he was cooperative with the

police during investigation was confirmed by 4103 Detective Sergeant Nhlanhla Nkoroncle.

[43] There is another aspect which operates in favour of the accused herein. It is that during the trial, the accused, together with his accomplice were out on bail. They both attended court faithfully and timeously. Unlike in most cases of this magnitude where the accused are out on bail, the accused herein complied with the orders of this court in terms of elates and time frame attendance. No postponement was occasioned by them by reason of their failure to appear on due elates. On finalisation of their trial, the accused persons were ordered to play by the ear on the elate of the judgment. The Clerk of court called prosecution and the defence on the eve of the judgment to attend court on the following date. The investigating officer was also ordered to summon the accused to appear for judgment the following day. Notably, it was the present accused person who turned up in comt despite sh01t notice. The investigating officer, prosecution and the defence all repo1ted that they could not locate accused's co-accused. The matter was then postponed to Monday following that the comt could not deliver its judgment on Friday due to the absence of his co-accused. On Monday, accused's accomplice was present in comt. The comt was informed that it was the present accused who searched and found his accomplice. He is the one who relayed the court's order to his accomplice. In fact, the cornt was informed that it was this accused person who ensured his co accused's attendance. In other words, he succeeded in what the court's officials could not

accomplish. This conduct at the instance of the

accused surely deserves justice's applause. The court's applause must manifestly be seen in his sentencing.

[44] However, I do not lose sight of the evidence that the accused picked up the first stone which missed the deceased. He then picked up a second stone to throw at the deceased. He did this despite shouts from the gathered crowd discouraging him not to assault the deceased with a stone following the shouts, "Why assault him with a stone?" These words fell on deaf ears. It is this stone that inflicted the fatal injury by crushing his skull thereby causing a haemorrhage over his brain. In the same vein, I appreciate that the deceased did not die as a result of multiple injuries at the instance of the deceased.

[45] In looking at the range of sentences previously meted out by our courts, I refer to **Samukeliso Madati Tsela v Res (20/10) [2011] SZSC 13 (13 May 2012)** where their Lordships stated at para. 5 page 5:

"But after applying the principle contained in the so-called triad - a consideration of the offence, the offender, and the public interest - a sentence must seek to achieve an acceptable measure of uniformity by pitching the penal award within the prevailing range which is current within the jurisdiction at the time when the sentence is passed. "

[46] Espousing, however, that the rule on "*prevailing range*" is not cast in stone as well submitted by Crown Counsel Masango, the court stated:

"Nevertheless, ll fitting sentence must be founded upon the several relevant [llctual bases and circu111stances upon which a proper sentence must necessarily be premised. " [my emphasis]

[47] The court continued to point out at guidelines for the trier of fact. It pointed out that murder cases must be classified. It is best to ask if the murder falls within a class described as a heinous killing, a well premeditated act or one which occurred in a sudden fight. The prior was defined as a first degree or a high range murder. The latter was viewed by the court as a lower degree murder.

[48] No doubt the murder conviction facing accused herein could easily be described as one falling within the lower degree. The accused used an object which was at his disposal, i.e. the stone thrown at the deceased. This court found that a fight ensued where PW1 was the aggressor. The deceased joined the wagon on the side of PW1, his friend.

[49] From the range of sentencing highlighted by their Lordships in **Tsela** 's case (*supra*), the minimum sentence imposed on murder conviction was five years. I have no reason not to impose a similar sentence. Without demonstration of pity from my side and owing to the appropriate

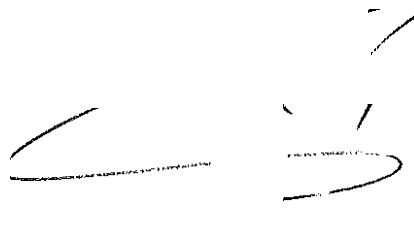
behaviour of the accused throughout his trial and his conduct of coming

behaviour of the accused throughout his trial and his conduct of coming to rescue the course of justice as highlighted in paragraph 43 above, together with the totality of the mitigation factors guided by the triad principle as discussed above, I am duty bound to suspend the entire sentence. I am alive that a suspension of sentence in murder cases should be done only in exceptional cases. From the above circumstances of this case, this is one of the rare cases warranting suspension.

[50] In the result, I enter as follows:

[50.1] Accused is sentenced to 5 years imprisonment;

[50.2] His five year imprisonment sentence is wholly suspended for a period of five years on condition that he is not found within the period of suspension to have committed an offence involving violence against another.



A handwritten signature in black ink, appearing to be 'M. Dlamini', written over a horizontal dashed line. The signature is stylized with a large initial 'M' and a long horizontal stroke.

M.DLAMINI

For Crown **C. Masango from the Director of Public Prosecutions'
Chambers**

For Defence: **I. du-Pont from Zonke Magagula and Company**