



**IN THE HIGH  
COURT OF ESWATINI  
JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 493/19**

In the matter between:

**REX**

Versus

**THANDOKUHLE SYDNEY SIGODVO MTHEMBU**

**Neutral Citation:** *Rex vs Thandokuhle Sydney Sigodvo Bhembe [493/19] [2021]*  
*SZHC 60 (29 April 2021)*

**Coram:** LANGWENYA J

**Heard:** 16 March 2021; 17 March 2021; 29 April 2021

**Delivered:** 29 April 2021

**Summary:** *Criminal law-Criminal Procedure-accused charged with murder- pleads not guilty.*

*Defence-provocation-private-defence-requirement of private defence-accused was intoxicated when he stabbed*

*deceased-no  
perception of accused-  
dolus eventualis.*

*evidence of effect of intoxication on  
accused found guilty of murder with*

## **JUDGMENT**

### **Background**

- [1] The accused is charged with murder, it being alleged by the Crown that on or about 25 February 2017 and at or near Mphembekati area in the district of Manzini, the accused did unlawfully and intentionally kill Mpendulo Matsenjwa.
- [2] The accused pleaded not guilty to the charge.
- [3] The Crown led the evidence of seven witnesses in support of its case.
- [4] The accused testified on his own behalf and did not call witnesses.

### **The Crown's Case**

- [5] The accused and the deceased are cousins. The accused was raised at deceased's parents' home. On 25 February 2017, the accused and the deceased were in the company of friends namely: Mandlenkhosi Africa Shongwe (PW1), Samkelo Sukati and Hhukwana Thabiso. They spent the day enjoying marula drinks. They started drinking marula beverage early in the day next to a shop at Mphembekati. As the day wore on and it started raining, the group of friends relocated to deceased's house where they continued to drink marula alcoholic beverage until the wee hours of the following morning. The mood was jovial while they all sat chatting and

enjoying the drinks. There was no quarrel or altercation between the accused and the deceased before the former left the house to go outside.

- [6] At about 1am, the accused left the house in which the group was drinking and went outside and called the deceased to come outside. The deceased obliged and went outside. It was not long before they heard deceased knock on the door stating that he had been stabbed by the accused. When the door was opened, the deceased collapsed at the door. PW1 held the deceased and saw blood ooze out from the neck area. PW1, Samkelo and Thabiso went outside to look for the accused but did not find him. PW1 remained with the deceased while the other members of the group went to accused's home to look for him. PW1 called the police and an ambulance. PW1 also went inside the deceased's house and woke the other guys they had been drinking with who were now asleep. The men who slept in deceased's house were Sandiso and Hhokwane.
- [7] Police finally arrived an hour after they were called. The accused was not found at his homestead. Deceased was dead already when police arrived at the scene. PW1 recorded a statement with the police.
- [8] During cross examination, it was put to PW1 that prior to accused leaving the house and being followed by deceased, the two had quarreled. PW1 stated that he heard of no quarrel and saw none between the accused and deceased.
- [9] PW2 is Thabiso Nkhosingivile Maseko. His evidence corroborates that of PW1 concerning the drinking of marula drink at kaNyoni store and later at deceased's house. He states that their drinking buddies were Sibonginkosi

Matsenjwa, Samkelo Sukati, Ntokozo Matsebula, Thando, Mpendulo, Mduduzi Dlamini and Mandla Shongwe. He states that at Mpendulo's house, he sat by the door while they enjoyed their marula brew. Accused and deceased went out of the house and after a while Mpendulo knocked on the door and said 'open the door Thando has stabbed me.' When the door was opened, deceased fell on the ground. The group unsuccessfully tried to get transport for the deceased to be conveyed to hospital. The police arrived and PW2 left the scene and went home where he slept.

- [10] PW2 observed no quarrel between the accused and the deceased as the group sat chatting and drinking marula brew.
- [11] PW3 is Sibonginkhosi Menzi Matsenjwa. His evidence corroborates the evidence of PW1 and PW2 in material respects. He testified that he received a report from Zweli Lukhele who came in the middle of the night and reported that the accused had stabbed the deceased. He went to the scene and found the deceased injured and dead. He returned home and prepared to sleep. The accused arrived in the morning. This witness asked the accused why he had stabbed the deceased; accused did not immediately respond to the question only insisting that he wanted his money and then stated that the deceased *umjwayela kabi*. When the accused came to see this witness he was still drunk.
- [12] PW4 is 6830 Constable Khethani Masuku. He is based at Manzini police station. On 25 February 2017 he was working at the shift department. On the morning of 26 February 2017 he was carrying out his duties at Salukazi area in the outskirts of Manzini when he got a report through the police radio of a murder that had been committed at Mphembekati. Between 3am and 4am he

returned to Manzini police station where he found people from Mphembekati had recorded statement of a murder case. He was ordered by the shift officer, Mr Ngwenya to drive deceased's relatives back to Mphembekati.

[13] It was while he was driving to Mphembekati with the relatives of the deceased when, near Manzini Central and on the road leading to Ticantfwini he was told by one of the relatives of the deceased who was sitting at the front passenger seat of the motor vehicle to stop the car as the person who had committed the crime was walking along the road outside. The accused wore a green jacket and a hat and was of medium build. PW4 stopped the vehicle and went to introduce himself to the accused and explained his mission to the accused. The accused said something to PW4. After due caution, the accused produced a knife whose blade was about fifteen centimetres and had a blue handle. PW4 took the knife and drove back to Manzini police station with the relatives of the deceased and the accused. The accused was charged with murder and PW4 handed the knife as an exhibit to the Occurrence Book (OB) keeper.

[14] During cross examination, PW4 was asked about the accused person's state of sobriety and his response was that the accused was sober because when he spoke to him, the accused was coherent and answered his questions; according to PW4 the accused was aware of what was happening around him. The accused did not resist handing the knife over to PW4. The accused cooperated and complied with PW4's order to hand the knife over to him.

[14] PW5 is 5828 Constable Sifiso Vilakati. In 2017 he was stationed at Manzini police station when he received a report of a murder at Mphembekati on the

morning of 26 February 2017. In the company of Constable Gama he went to Mphembekati and found the scene of crime was at a Matsenjwa homestead. They found the deceased lying dead and unresponsive next to a door of a house. They called the scenes of crime department to attend to the scene. When they turned the deceased over, they noticed that he had a stab wound at his back and lay in a pool of blood. They searched deceased's body and found nothing. After the scenes of crime officers arrived, they took photographs of the scene. The deceased was later taken to RFM hospital where he was certified dead by a medical practitioner. His body was later taken to Dups mortuary.

- [15] PW6 is 3400 Detective Sergeant Patrick Bheki Dlamini and a scenes of crime officer. He told the court his qualifications and duties as a scenes of crime officer. He testified that in the morning of 26 February 2017 he was instructed to go to Mphembekati where a murder had allegedly been committed. He went to Mphembekati and on arrival there he found Sergeant Horton and Constable Madlopha and he went to see the victim of the crime. The deceased had a stab wound on the neck and at the back by the shoulder.
- [16] PW6 took photographs which, however did not come out because it was dark and the camera he was using could not capture the scene of crime. It was his evidence that the police do not have lighting equipment to enable the taking of photographs when it is dark. He later took photographs at the hospital. He took photographs when the post mortem report was conducted on 2 March 2017 at RFM hospital mortuary. PW6 handed in the photo album he compiled as a result of his investigation. The photo album was marked exhibit 'A.'

- [17] The Crown led the evidence of PW7 5748 Detective Constable Allen Madlopha. He testified that he is based at Manzini police station in the Criminal Investigation Department (CID). On 26 February 2017 he was on duty when he was assigned a murder docket to investigate. The deceased was Mpendulo Matsenjwa and the suspect in the matter was Thando Mthembu. The suspect was in the police cells already and the exhibit allegedly used in the commission of the offence was in police custody already. The suspect, now accused, was arrested in the morning of the commission of the offence and statements from witnesses had been recorded already.
- [18] PW7 went to see the accused in the police cells. He introduced himself to the accused and explained his mission. He cautioned the accused in terms of Judges' rules. The accused said something about his involvement without compulsion. PW7 cautioned the accused in connection with the weapon used and the accused said something. After further due caution, the accused elected to record a statement before a Judicial officer at the Manzini Magistrate Court.
- [19] PW7 further interviewed potential witnesses in the matter at Mphembekati. He visited the scene of crime at a Matsenjwa home. The scene was at the door of a house made of sticks and mud. Next to the door was blood.
- [20] The accused was again cautioned and asked about the clothes he was wearing on the night of the incident. The accused gave PW7 a green jacket.
- [21] On a later day, after due caution, blood samples were taken from the accused. The blood samples and the green jacket were taken for forensic

examination. The forensic results were however never received by the police.

[22] During cross examination, PW7 stated that the accused had a small injury on his left hand when he took over the case. According to PW7, the injury of the accused did not require medical attention because the cut was minor.

[23] Dr Komma Reddy is the police pathologist. He compiled a post mortem report after examining the body of the deceased on 2 March 2017. He detailed his observation and concluded that the deceased died due to stab wounds. In his examination of the body of the deceased, Dr Reddy observed the following antemortem injuries: (1) a stab wound of 3 x 2cms present on the front and middle portion of the neck and (2) a stab wound of 2 x 1cm present in the middle portion of the upper back, slightly on the right side, 1cm from the midline between shoulder bones or the scapulae.

[24] According to the pathologist's evidence, the blood vessels in the front and middle portion of the neck, thyroid and other neck structures were severed. The oesophagus and trachea were cut in the middle portion. There was also a stab wound of 1cm length present in the upper lobe of the right lung.

[25] The post mortem report was handed in as part of the evidence of the Crown and was marked exhibit 'B.'

[26] The Crown closed its case.

### **The Case of the Defence**

[27] The accused testified that he is twenty-five years of age. He is unmarried and has one minor child who was eighteen months when the accused was



arrested. He used to earn a living by working with his father in the construction industry.

- [28] The accused testified that on 25 February 2017 he was drinking marula home brew with a group of his friends including PW1, PW2 and the deceased. In his estimation, while they were seated next to the store, they finished drinking a twenty litres of the marula brew. The group used a knife to cut a two litre plastic bottle and used it as a container from which they drank the marula brew. Mpendulo got the knife which was used to cut the two litre plastic bottle from the store.
- [29] As the day wore on and due to inclement weather, the group relocated to the house of the deceased and continued to imbibe in the marula drink. Before they left the store, they had already finished the marula brew which was contained in the twenty litres container and had started drinking marula which was in a twenty-five litres container. At deceased's house, they continued drinking the marula brew. Deceased's house is at accused's aunt's home. The group was in a jovial mood as they chatted, sang and danced while they enjoyed their drinks.
- [30] The accused and deceased had a misunderstanding when deceased told the accused to *voetsek* as there's nothing he could do to the deceased. Specifically the accused says he was told by the deceased that '*fuseki wena ngeke ungente lutfu*'. The accused says the deceased was insolent toward him and he felt belittled by the deceased when he made the above-stated utterances. The cause of the misunderstanding was not put to the Crown witnesses who said they did not see nor hear of the quarrel between the accused and the deceased.

- [31] After the misunderstanding between himself and the deceased, the deceased left the house where they were all drinking and went outside. The accused followed the deceased outside and shut the door. There was a knife on the floor of the house in which they were drinking. There was candlelight in the house in which they had been drinking marula.
- [32] The accused testified that when he got to the door, the deceased pushed him. Accused says he could tell that the deceased was carrying something that appeared to be a knife which was on the floor of the house where they had been drinking the marula brew. The accused testified that he refused to go outside with the deceased to iron out the issues they had against each other because he was drunk. I pause to observe that this evidence was not put to the Crown witnesses whose version is that the accused was the first to leave the house and he called the deceased to follow him outside. It was also not put to the Crown witnesses that the deceased carried a knife when he left the house. In fact, the police who were first to get to the scene searched the body of the deceased and found no weapon in his possession and within the vicinity of the scene of crime.
- [33] Outside the house, it was dark and both the accused and deceased were drunk. The deceased tried to stab the accused and the accused grabbed the knife which the deceased had in his possession. The accused overpowered the deceased and accidentally injured him. The accused says he was drunk and did not see how badly deceased was injured.
- [34] It is the evidence of the accused that the deceased carried a knife which looked like a short rod-like spear. The accused says he disarmed the deceased of the weapon and does not know where it ended. The accused

testified that amid the fight he was able to hold on to the knife he had in his possession. He subsequently gave the knife he was carrying to the police.

[35] After the fight with deceased, accused went and slept at a place where there were jacaranda trees. He did not sleep at home. He later went to his cousin and asked for money which he owed him. At the time, he was still carrying the knife he used to stab the deceased. Accused was informed by his cousin that deceased had died. Accused informed his cousin that he was going to hand himself over to the police.

[36] On the same morning he was arrested by a Masuku police officer who locked him up in the police cells because he was too drunk. Accused says he slept in the police cells and woke up later and asked for food. When he was confronted by his brother in law-the father of the deceased- about the incident, he could not answer because he was not sure if indeed he had killed the deceased.

[37] The accused testified that he was injured on the left hand and was later taken to the hospital where his hand was cleaned and blood samples were taken from him. He subsequently made a statement before a judicial officer at the Manzini Magistrate Court.

[38] The accused stated that he spent two weeks in police custody before he was admitted to bail. The accused's family paid the funeral expenses of the deceased. His family apologized to the family of the deceased and the accused relocated to Siphofaneni.

[39] It was the evidence of the accused that he did not intend to kill the deceased. He testified that he was drunk and he does not know what happened.

## **Application of the Law to the Facts**

- [40] There is no doubt that the deceased is dead and that he died of stab wounds inflicted by the accused on the neck on the upper back on the right side between the scapulae. The stab wound on the neck severed the blood vessels in the front and middle portion of the neck. The question to be answered is whether in doing so, the accused subjectively foresaw the possibility of his act causing death of the deceased.
- [41] Evidence from Crown witnesses is that while accused, deceased and their friends were drinking marula brew, there was no misunderstanding between the accused and the deceased. The accused was the first to leave the venue where the liquor was being consumed and went outside. On his way out, the accused is said to have told the deceased to follow him outside-ostensibly so that they could sort out their differences. No sooner had the deceased followed the accused outside than he was heard screaming for help as he said the accused had stabbed him. The accused was nowhere in sight when their drinking buddies looked for him during the night.
- [42] The accused testified that the deceased was the first to leave the house in which they were drinking. When he was at the door, the deceased is alleged to have pushed the accused. Accused stated that he could tell that the deceased was carrying something which turned out to be a rod-like spear. I have pointed out that this evidence is an afterthought as it was never put to the Crown witnesses. I accordingly reject same as improbable and false

beyond reasonable doubt. The deceased's body and the vicinity of the scene of crime were searched by the police and no rod-like weapon was found.

[43] The accused pleads private defence and provocation. The law on private defence and provocation is settled. It is the accused who challenged the deceased to a duel outside the house where they had been drinking marula brew. The accused, armed with a knife was first to walk outside the house and was followed by the deceased. Outside, the accused stabbed the deceased and sauntered into the night. On a conspectus of the evidence, the accused was the aggressor; who used disproportionate force in stabbing and inflicting fatal injuries on the deceased who was drunk and unarmed.

[44] It has not been shown that the act of stabbing the deceased was done in the heat of passion caused by sudden provocation. Evidence before the Court is to the effect that the accused left the house and while outside called the deceased to come outside. The drinking buddies of the accused did not hear of any quarrel between the accused and the deceased. It is only the accused who testified that the deceased belittled him by saying voetsek there is nothing you can do to me! No one heard the deceased make those utterances except the accused. The accused did not say when the utterances were made and the circumstances under which they were made. On the same vein, the accused says the deceased was his age and he had never had a misunderstanding with him. For the reasons set out herein, the defence of provocation and self-defence are rejected as fanciful and improbable in the circumstances.

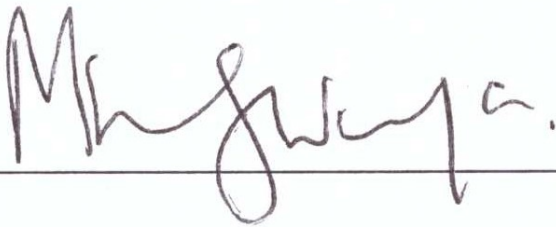
[45] Into this factual matrix must be introduced the effect (if any) which the accused's consumption of alcohol had on his ability to foresee the

consequences of his stabbing the deceased in the way he did. The accused testified that he had been drinking marula brew for a day and night with his homeboys. He did not say how much of the alcoholic beverage he personally consumed nor did he let the Court in on what effect it had on his powers of perception and foresight. While the accused had been drinking for the longest time that day and night, there is no suggestion he was so drunk as not to be conscious of what he was doing when he stabbed the deceased.

[46] It is my considered view that the Crown has proved beyond reasonable doubt that the accused subjectively foresaw that there was a reasonable possibility that the deceased might die as a result of the stabbing. The accused was reckless of the consequences of the assault as evidenced by his act of directing the assault at a delicate part of the human anatomy and using a lethal weapon to inflict maximum injury; sauntering into the night and not caring to administer first aid nor seek medical help on behalf of the deceased. The accused was the aggressor; the reason for the stabbing are in the exclusive purview of the accused as no else knows why the accused stabbed deceased to death.

[47] All the evidence points beyond reasonable doubt to the conclusion that the accused did in fact realize that there was a reasonable possibility that the accused 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* has accordingly been proved.

[48] 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 solid horizontal line.

**M. LANGWENYA J.**

For the Crown: Ms. Lomkhosi Dlamini

For the Defence: Mr. T. X. Masondo