



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane

Case No. 24/2017

In the matter between:

REX

AND

MUZI SIBUSISO JIKA MTSETFWA

Neutral citation: *The King vs Muzi Sibusiso Jika Mtsetfwa [64/2017] [2021]*

SZHC 68 (29 April, 2021)

Coram: FAKUDZE, J

Heard: 12/04/2021; 13/04/2021; 15/04/2021; and 22/04/2021

Delivered: 29 April, 2021

JUDGMENT

[1] The accused is charged with the offence of murder, in that upon or about the 3rd September, 2016 and at or near Nhlababa area in the Shiselweni Region, the accused person did unlawfully and intentionally kill one Themba Mdluli.

- [2] The accused pleaded not guilty to Murder but pleaded guilty to Culpable Homicide. The Crown rejected the lesser Plea and then led seven (7) witnesses to establish its case.

THE CROWN'S EVIDENCE

PW 1 THOBILE NHLABATSI

- [3] This witness stated that on the 3rd September, 2016 and at about 1600 hours, the accused met the deceased and they had a conversation. She did not hear what they were talking about because she was busy with other things. The accused hit the deceased with fists. He shouted at the accused to stop hitting the old man. The accused continued. The deceased fell on the ground and the accused stamped on him and continued to hit him with fits.
- [4] The accused then went to pick up a brick and hit the deceased on the face. He took the broken pieces and hit him again. PW 1 was about 500 metres away from the scene. She then shouted for help and some people came from the mountain. She showed them the accused who was already running away. They chased him and caught him. The deceased was lying down already dead.
- [5] Under cross examination, PW 1 admitted that she did not see how the fight started. She admitted that the deceased was carrying a knob kerrie and when it was put to her that the deceased was the first one to assault the accused with the knob kerrie, she could not deny that.

PW 2 – NCAMISO DLAMINI

- [6] This witness corroborated PW 1 that upon arriving at the scene, they found the deceased lying down dead. He was with Ayanda. They saw the accused

running away and they chased after him, caught him and brought him back to the scene. The accused was drunk on this day. Nothing much came out of the cross examination.

PW 3 – SOMHLOLO MDLULI

[7] The witness was an independent witness present during the pointing out by the accused of the knob kerrie and the pieces of brick. He stated that the accused pointed out the knob kerrie on his own and did it freely and voluntarily.

PW 4 – CONSTABLE MANDLA MOTSA

[8] He was the scene of crime officer. He testified and thereafter handed in 2 photo albums of the scene of crime. He also handed in photos of the knob kerrie and the broken pieces of brick. The pieces and the knob kerrie were handed in and marked as “Exhibit 1.” The album was marked as “Exhibit B.” The post mortem report was handed in by consent between the parties and marked as “Exhibit A.”

PW 5 – DUDU MDLULI

[9] This witness stated that she heard PW 1 shouting and saying “what are you doing? Leave the old man alone. PW 1 raised an alarm and PW 5 and her brothers went out of the house to see what was happening. She saw a young man hitting an old man. The young man took a brick and hit the old man and the old man fell on the ground. The young man continued assaulting him with fists whilst the old man was on the ground.

[10] Under cross examination, she confirmed that she did not see how the fight started because she was in the house. She further stated that the old man was hit with the brick when he was standing.

PW6 – SERGEANT MPHIWA DLAMINI

[11] This witness stated that he was part of the Investigating Team. He was told of the incident and he proceeded to its scene. He gathered evidence from various persons which led to the arrest of the accused who was cautioned at every stage of the investigation. Statements were recorded from witnesses. There was no cross of this witness by the defence.

PW7 – CONSTABLE SIZWE MTHEMBU

[12] The witness is the Desk Officer at Nhlngano Police Station. He testified as one of the investigators. He told the court about the accused's arrest and the pointing out of the knob kerrie by the accused.

[13] After PW 7 had given evidence, the Crown closed its case.

THE ACCUSED'S EVIDENCE

[14] The accused told the court that in the morning of the 3rd September, 2016, he left the home where they were building a house to go and drink at a nearby shebeen. He had been drinking the previous day. He left the home at around 0700 hours. He drank alcohol until 1500 hours when PW 2 came to tell him that the other workers were about to leave. He said by that time he was drunk.

[15] Whilst drinking at a certain shebeen, he accidentally stepped on a dog where upon the deceased was also drinking. The deceased insulted him for

stepping on the dog. As the accused was going back to the home where he was working, he met the deceased and told the deceased that the accused was not happy that the deceased insulted him earlier. The accused stated that the deceased insulted him again and also hit him with the knob kerrie the deceased was carrying. The accused blocked the knob kerrie and in the process got injured on his elbow. He then hit the deceased and the deceased fell down. The accused then picked up a brick and hit the deceased once on the face. After realising what he had done, ran away from the scene because he was shocked. He was chased after, caught and brought back to the scene of the crime. He was later arrested by the police.

[16] Under cross examination, it was put to the accused that a brick was a dangerous weapon that could result in death if smashed on the face of a person. The accused foresaw that death might occur as a result of his act. It was further put to the accused that after the deceased had been hit with the brick, the accused continued to hit him with the pieces. He denied that. It was further put to the accused that after realising that he had killed the deceased, he ran away from the scene.

APPLICABLE LAW

[17] In **Malungisa Bartaria v Rex Criminal Appeal Case No. 6/2014** at paragraph 46, the Appeal Court stated as follows:

“A person intends to kill if he deliberately does an act which he infact appreciates might result in the death of another and he acts reckless as to whether such death results or not. For purposes of emphasis, it is apparent that the accused must have appreciated, due regard being had to the sensitive and delicate part of the body

where he was delivering the forceful blows with the axe, which are parts of the body susceptible to deadly harm, that it might lead to the deceased's demise. Herein lies his intention."

[18] On the issue of provocation it was stated in **Rex v Mthethwa 81/10 [2010] SZHC** that:

"It would appear to me, is the relationship between the nature of the provocation and the reaction of the accused thereto bringing about the deceased's death. In this regard, there must be some element of proportionality between the two. As to the issue of whether there is proportionality, this is a question of fact that has to be decided by the court in light of the evidence before it. In this regard, there would be no proportionality in cases where the provocation is slight but the reaction is severe and completely out of touch therewith."

[19] On the issue of self-defence, it was stated in **Malungisa Antonia Bataria v Rex (Supra)** at paragraph 26 as follows:

"An accused who raises this defence (self-defence) must elicit evidence to establish it. What must be established is now judicially settled as the following:

(a) that he was unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of the attacker.

(b) the means he used in defending himself were not excessive in relation to the danger.

(c) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.”

[20] Finally, the court has made a clear distinction between *dolus eventualis* and negligence when the court said in **Thandi Tiki Sihlongonyane (40/97) 1997 SZHC 35 (24 September 1997)**:

“It will be appreciated that cardinal to the whole concept of dolus eventualis is the element of foresight in the case of dolus eventualis it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it. It is here, however, that the trial court must be particularly careful. It must not confuse “must have known” with “ought to have known.” The latter is the test for culpa. It is an objective one.”

THE PARTIES’ SUBMISSIONS

The Crown

[21] The Crown submitted that voluntarily intoxication and provocation are not exculpatory but are considered by courts as extenuating. It is submitted that evidence led by the Crown did not suggest that the accused was so drunk as to act without full appreciation of his unlawful conduct, nor was he in shock

after committing the offence. He manifested this by fleeing from the scene after inflicting the fatal injury on the deceased until members of the community chased after him and brought him back to the scene of crime.

- [22] The Crown further submitted that there was no proportionality from the alleged common insults and the harm that was caused by the accused. The accused stated in his evidence that the deceased was also consuming liquor. The deceased also assaulted him with a knob kerrie and the accused reacted by assaulting the deceased with fists even while the deceased was helplessly lying on the ground and not fighting back. He later got hold of a concrete brick and used it to assault the deceased. It is therefore the Crown's submission that the accused must have appreciated, due regard being had to the sensitive and delicate part of the body where he was delivering the blows with the brick and fists, that it might lead to the deceased's death. The Crown has therefore established the necessary intention. The Crown has therefore led evidence to prove beyond doubt that the accused foresaw the prospect of harm but was nonetheless reckless as to whether death did or did not occur.

The accused

- [23] The accused submitted that the issue for determination is whether or not the Crown has proven beyond doubt that the accused person intentionally killed the deceased person. It is the Accused's case that the Crown has failed to prove intention to kill the deceased by the Accused, either direct intention or legal intention (*dolus eventualis*). From the evidence before court, it cannot be said that the Accused person desired the death of the deceased or that he

set out to kill the deceased on the 3rd September, 2016. The killing of the deceased happened in the spur of the moment.

[24] Finally, the accused submitted that the accused was drunk on the day of the incident having started drinking in the morning hours until around 3 pm when he was informed by the PW 2 that the other workers were about to leave. The accused further submitted that the accused was provoked when the deceased insulted and assaulted him using the knob kerrie. It was in the midst of the insults and the assault that the accused assaulted the deceased. He did not subjectively foresee that his actions will cause the death of the deceased. Therefore the actions of the accused that caused the death of the deceased amounted to Culpable Homicide.

COURT'S ANALYSIS AND CONCLUSION

[25] The issue for determination is whether the accused intentionally killed the deceased or not. If there was that intention, the accused is guilty of murder and if there was no intention, he is guilty of Culpable Homicide. In **SV Mini 1963 (3) SA 188 (A) at 191** Holmes J.A stated that "intention to kill is present where the Appellant did foresee the possibility even, slight, of death resulting from his conduct and proceeded reckless of the consequences."

[26] In my humble view, the Crown has successfully established that the accused unlawfully killed the deceased with the necessary intention to do so. The accused did foresee the possibility of death from his conduct and proceeded reckless of the consequences. This emanates from the fact that he hit the deceased with fists whilst the accused was standing and when he fell he continued hitting him with fists whilst the deceased was lying down helplessly. The accused also hit the deceased with a brick on the face. PW

1 told the court that the deceased was lying down when the accused hit him. He also took the broken pieces and hit him again. PW 5 says the deceased hit him whilst he was standing. The accused stated in his evidence in chief that he hit the deceased with a brick whilst the deceased was lying down. PW 1's version was corroborated by the accused's evidence that the deceased was assaulted with the brick whilst he was lying down. Whatever the case a brick was used to hit the deceased in a delicate place which is the face. Both witnesses testified that the accused continued hitting the deceased with fists whilst the deceased was lying down and helpless. PW 1 also stated that he warned the accused to cease assaulting the old man and the accused did not take heed to the warning. The medical report also bears record to the nature and form of the wounds that were inflicted on the deceased. These wounds do not suggest that the deceased was hit once as the accused wants this court to believe. The report states that the deceased died as a result of "injuries to the head." This means that there were several injuries. In page 2 injuries that are mentioned are (a) lacerated wound of 4 X 1½ cm present above the left eyebrow; (b) Lacerated wounds of 3 X 1½ cm and 2 X 2 cm and abraded contusion of 8 X 7cms, present in the left Temple region of the head; (c) Abraded contusions of 3 X 2 cm, present on the left side of the top of the head; Under the column dealing with the Head and neck, the report states that the front bone, left parietal bone and left temporal bone was fractured. Bones of the left orbit was fractured. The mediastinum and Thymes was also ruptured. These also proves that the intention in the form of foresight was there.

[27] On the issue of self-defence that has been raised by the accused arising from being hit by the deceased using a knobkerrie the court is of the view that the

self-defence was not proportional to the harm caused. The self-defence principles were stated in the Appeal Court case of **Siphamandla Henson Dlamini v Rex, Criminal Appeal No. 23/2013** at page 9 as follows:

“The underlying principle from these authorities is that self-defence is only available if those requirements are met namely, if it appears as a reasonable possibility on the evidence that:

(a) The accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;

(b) The means he used in defending himself were not excessive in relation to the danger;

(c) The means he used in defending himself were only or least dangerous means whereby he could have avoided the danger.”

[28] This court is convinced that the means used by the accused in defending himself were excessive in relative to the danger. On the issue of provocation, the means the accused used in thwarting it were disproportionate to it. See **S V Mthethwa** (Supra). On the issue of intoxication, it cannot be said that the accused was so intoxicated that he did not know what he was doing. First, it was the accused who revived the topic that had led to an earlier misunderstanding between the deceased and the accused. He remembered the event and then took it up with the deceased. Second, the accused persisted assaulting the deceased notwithstanding that PW 1 warned him not to continue assaulting the deceased. He was not so intoxicated that he did not know what he was doing.

[29] In totality of what has been said above, I have come to the conclusion that the accused is guilty of murder as charged.

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

FAKUDZE J.

JUDGE OF THE HIGH COURT

Rex: N. Mhlanga

Accused: S. Bhembe