

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 328/2014

In the matter between

Rex

V

Mduduzi Mxolisi Shabangu

Neutral citation: *Rex v Mduduzi Mxolisi Shabangu (328/14) [2021} SZH - 69 [2021} (28April 2021).*

Coram :Tshabalala J

Heard :06/07/2020

Delivered : 28/04/2021

Summary: criminal law: The Accused brutally killed his sickly bedridden father in the middle of the night in a feat of unprovoked violence that shocked his family, neighbours and police that attended the scene of crime. The Accused, reputed to be 17 years old at the time of the offence was thereafter diagnosed with unspecified 'major mental illness' and put on regular treatment and medication for indefinite period.

*Evidence: Background information gathered and used by the psychiatric specialist who evaluated the Accused contradicted proven facts by eye witnesses in material respects e.g., on the events at the scene before the fatal attack and nature of the attack on the deceased, and led to the court's finding that the basis of the expert's opinion that the Accused " ... **understood the consequences of his actions by the time he committed the offence**" was flawed and open to doubt that the expert would have reached the same conclusion if she knew that the Accused's account of the incident was fabricated.*

Held: Evidence of eye witnesses, Accused's evidence and parts of the Psychiatry Medical Specialist's report, left no doubt in the mind of the court that the Accused was insane at the time that he killed the deceased, and therefore the court invoked the provisions of section 165 (1) and returned a special finding to that effect.

Held further: In terms of subsection (2) of the said section 165, the court directed that the Accused shall be kept in appropriate custody as a criminal lunatic pending a report to the Attorney-General/Director of Public Prosecutions for the information of His Majesty.

JUDGMENT

[1] The Accused person pleaded not guilty to a charge of Murder of his sickly bedridden father, Dumisani Shabangu, alleged to have been committed on the 01 May 2013 at his parental home at Sihhohweni in Manzini district.

[2] The Crown paraded four witnesses, the Accused's sister, PW1, Celiwe Shabangu, PW2, Phuma Hlanze Shabangu, PW3, No. 6551 Constable T.

Mdluli and PW4 No. 5529 Detective Constable Samkeliso Dlamini both officers stationed at Matsapha Police station.

[3] With consent of the defence, a post mortem report compiled by Dr RM Reddy was handed in and admitted in evidence in terms of Section 222 of the Criminal Procedure and Evidence Act/1938.¹

[4] PW I Celiwe Shabangu, the elder sister of the Accused, testified that on the 01 May 2013, the family of five, that is, their father,² the Accused, two younger sisters³ and herself, retired for the night and went to bed around 20:00 hours. The family lived in a two-roomed house, the kitchen served as a bedroom for PW! and younger sisters while the Accused and their father⁴ shared the only bedroom. At about 23:00 hours PW! heard the Accused shouting that he wanted to cut off deceased's testicles. The deceased raised an alarm. She went in the bedroom and saw the deceased holding a lmife. She had not heard any prior conversation between them. PW! and her sisters talked the Accused out of his threats and calmed him down, after which the Accused and everyone else went back to sleep. After 10 minutes the Accused was up again threatening to kill the deceased. PW! and her sisters managed to remove the Accused from the house and locked him outside.

[5] The Accused became more violent, smashed windows and re-entered the house. The deceased had been whisked out of the house but the Accused followed him there. PW! and the sisters tried to fight the Accused off but he overpowered them. The Accused fetched a metal object and used it to brutally assault the deceased until he collapsed. Accused covered the deceased with something, and thereafter entered the house where he lit several candles and started praying. PW!

¹ Exhibit "A."

² The deceased.

³ Nokulunga and Zakithi , respectively.

⁴ The deceased,

phoned the police who came and took the deceased and the Accused away. She and two sisters recorded statements with the police.

[6] The defence through cross examination of PW1 elicited revelations that brought the mental state of the Accused into question. PW1 told the court under cross examination that she and the Accused who was 17 years old at the time had a good relationship and that it was the same at the time of her testimony. Asked on the relationship between the Accused and the deceased prior to the attack, she mentioned that some time back the deceased fell sick at the time that she was not living at home and that in the absence of their mother who worked and lived at Matsapha, the Accused single-handedly nursed and cared for the deceased. PW1 later returned to stay with them and the relationship between father and son had been very good until the fateful night.

[7] PW1 conceded to defence counsel's assertion that the Accused was not in a good mental state but said she did not know what was wrong with him. It was put to PW1 that Accused's mental disturbance occurred after he had a dream during his sleep that night. PW1 said they were shocked by his abnormal behaviour from knowing him as a good respecting person. In addition to the violent conduct the Accused uttered gibberish statements and words they did not understand.

[8] In response to defence counsel's question whether the Accused had a history of mental instability prior to the incident, PW1 said vaguely that, *"he was well."* PW1 did not think that the Accused realised that he had killed their father because when PW1 and others asked him about it the following day at the police station, the Accused said he did not know what happened. It was PW1's evidence under cross examination that the Accused maintains to date that he did not know what happened concerning the killing of his father. This is in stark contrast to what the Psychiatrist who examined him in February 2020 told this court that the same

Accused had a good recollection of the incident and lucidly related to her what happened on that fateful night. It however, turned out that Accused's account of events to the medical expert was incorrect in material respects, in comparison to the credible evidence of PW!.

[9] PW!'s testimony under cross examination was further that a few days after the incident, while at the police station with her mother, police informed them that the Accused had been taken for psychiatrist or mental evaluation. PW! was informed a few days later that Accused's mental condition was not good.

[10] PW2, Puma Hlanze Shabangu was a relative and neighbour to the deceased. His evidence was that in May 2013 PW! together with her two sisters came to his home at Mbekelweni around 0200 hours. They reported to him that the Accused had killed their father. He went to the scene and found many candles burning inside the house. Deceased's body lay covered outside the house. Shocked, PW2 asked the Accused why he killed his father, to which the Accused answered that he did it because the deceased wanted to eat his heart. It was PW2's evidence that he used to visit the deceased who was sickly. PW2 confirmed what was said by PW! that the Accused took care of the deceased.

[11] PW2 testified under cross examination that the situation at the scene was abnormal. The Accused was shouting, singing, wide-eyed, talking in strange tongues and pacing up and down. He subsequently heard that the Accused was referred for mental examination.

[12] PW3, Constable Thobile Mdluli from Matsapha police station, attended to the scene of the crime. He found the Accused in the house, praying in strange tongues, shouting and banging windows. Deceased's bloody body was taken to RFM hospital where deceased was certified dead and then to the mortuary. The

Accused

appeared to PW3 to be out of his mind. She took the murder weapon⁵ from the scene and kept it as exhibit.

[13] PW4, Detective Constable Samkeliso Dlamini, now stationed at Police Academy, was on the 02 May 2013, the Scenes of Crime Officer at Matsapha Police Station. He took photographs at the scene which included deceased's body lying outside in a pool of blood, with serious wounds on the head and body. He also took photograph of the murder weapon, a long metal object.

[14] At the end of PW4's evidence the crown signalled that it was closing its case. The court inquired and was informed that neither the prosecution nor the defence was in possession of or aware of any report pertaining to mental examination of the Accused person in this matter.

[15] On the 25 September 2019, before it could open its case the defence sought and obtained a postponement to the 05 December 2019 in order to secure any report on mental investigation of the Accused that may have been carried out after his arrest. To facilitate this the court issued an order for the release by any doctor who may have examined the Accused person following his arrest, a report of the findings for the purpose of this trial. Alternatively, that if no such examination of the Accused was carried out, that the Accused be examined to determine and report on his mental state at the time of alleged commission of the offence on the 01 May 2013, to assist the court in the determination of whether he was capable of an intention to commit murder.

[16] It took several postponements before a report⁶ from National Psychiatrist Referral Hospital (NPRH) was secured and presented to the court by the Accused

⁵ Iron rod.

⁶ Dated 04 February 2020.

person himself on the 19 March 2020. By this date the erstwhile attorney representing the Accused, Mr V Dlamini had been in default of attendance on several occasions. A new *pro deo* legal representative, Ms N. Mabuza took over to represent the Accused. Dr Violet Mwanjali of NPRH who issued the Report was called to clarify and expand on her report, in particular, the opinion that the Accused "... understood the consequences of his actions by the time he committed the offense. "

[17] The psychiatric Report on letterheads of the National Psychiatrist Referral Hospital is addressed to High Court of Eswatini, and reads thus:

RE: MDUDUZI MCOLISI SHABANGU, HOSP. FILE NO. MOI7060695-1.

"At your request dated 25th September 2019, that I received on 13th January 2020, with case No.328/14, I performed the psychiatric evaluation of the aforementioned defendant at the National Psychiatric Referral Hospital. The purpose of the examination is to assess competent (sic) to stand trial in the Court of Law and criminal responsibility. I explained that my findings would be released to you, and any other part if necessary. The defendant allowed me to examine him and release my findings to you.

Present Symptoms, Physical History and Medications

The defendant is known to our institution with a diagnosis of major mental illness, currently well controlled with medications. [Underlining and emphasis supplied]

Observation and Examination

The following are my observations regarding this defendant. The defendant dressed appropriate for age and culture. Behaviour and speech is well organized and able to express himself clearly. He understands the charges against him,

murder of his biological father. He claims that he had misunderstandings with his father and realized that his father wanted to stab him, he then stabbed him for self defence. He is very remorseful for his actions. Mental status evaluation revealed that defendant is mentally stable. [Underlining and emphasis supplied].

Conclusion and Recommendations

*Based upon this evaluation I conclude that the defendant is **currently** of sound mind. He understands basic Court proceedings and is able to think clearly, make decision and put thoughts into meaningful words. It is my opinion that the defendant is competent to stand trial in the Court of Law and understood the consequences of his actions **by the time he committed the offense***

I reserve the right to reappraise my findings anytime I receive additional information. Please provide the needed support. Thank you.

Signed: Dr Violet Mwanjali

Medical Specialist: Psychiatry and Mental Health"

[18] Dr Violet Mwanjali was a witness called by the court after the prosecution closed its case. This was in the face of revelations under cross examination of crown witnesses, particularly PW1, which suggested that the Accused could have been mentally disturbed. The Doctor as a witness called by the court was accessible for examination by both sides.

[19] Dr Mwanjali told the court that she was Medical Specialist: Psychiatry and Mental Health at the NPRH, that she was the only medical mental specialist in the country. After her medical degree she pursued and obtained a Master's degree in Mental Health which she completed in 2010. She worked in Tanzania, her home country, before she came to Eswatini 7 years ago, where she has been employed by the Ministry of Health at NPRH.

(20) Her evidence was that she examined the Accused in February 2020 in relation to a crime committed in 2013. She was able to get information from him concerning the offence. The Accused was currently stabilized and gave a clear conversation and understanding. According to the Dr when she examined him, the Accused clearly remembered and explained what happened at the scene. He told her that they had misunderstanding with his father and both of them got angry. He decided to end his father's life in self-defence. He was afraid that his father who was also armed would stab him. From this the Dr said she concluded that the Accused understood the consequences of his actions.

(21] The Dr stated that she wanted to clarify that being mentally ill did not protect one from being responsible for committing offences, that one cannot be exempted. She also explained that there are times when a mentally ill person is stable and times when he relapses.

(22) It was put to Dr Mwanjily by Defence counsel that the Accused's examination in February 2020 was not performed by the witness but another health professional. The witness responded that another doctor may have examined the Accused for other purpose like provision of medication, for instance. However, compilation of psychiatric report was a responsibility performed solely by her. To compile the report, she must first personally evaluate the patient. The witness ruled out the possibility suggested by defence that narration of the incident that she said the Accused made to her was information the Accused gathered from family members. The Dr stated that the evaluation was usually conducted after waiting until the patient regained stability. The crown had no questions for the witness.

(23) The defence counsel initially closed defence case without leading any evidence. The matter was adjourned for both counsels to file their respective written closing submissions, with clear time lines, as when each counsel should

file. The crown filed but the defence did not. After reminders the defence filed what turned out to be an application for discharge of the Accused made in terms of section 174 (4) of the Criminal Procedure and Evidence Act/1938. The court called the parties to appear in court. The defence then changed course and applied to reopen defence case to allow the Accused to testify in his defence. The crown initially opposed the application on procedural grounds but later conceded. The court in consideration of the interests of justice and the Accused whose legal representation was clearly wavering, allowed the application.

[24] The Accused took to the witness stand under oath and told the court that he was 26 years old, He claimed he was not aware that he was charged with murder committed on the 01 May 2013. He did not recall anything concerning what happened on the said date. Despite that he was in court throughout testimonies of crown witnesses the Accused claimed that he did not hear PW1 testify that he killed their father. Neither did he hear her evidence that the Accused shouted at night that he wanted to cut deceased's testicles. The Accused stated that he loved his sick father and would never have wanted to hurt him. He looked after his father, took him to the toilet and cooked for him, among other things.

[25] He recalled being in police cells at Matsapha without his top clothes and feeling cold. He did not know and no one told him why he was detained. He could not recall where he was on the 01 May 2013 due to the long passage of time. He believed on that day he should have been at the vocational centre where he was doing a panel beating course. From police detention he was subsequently taken to the juvenile centre. He last saw his father a long time ago. Under cross examination he said last saw him in April 2013 when both of them returned from Nazarine hospital where he donated blood to his father. He was told that he died but did not know where he met his death.

[26] He did not recall any of the acts he was observed by crown witnesses to have engaged in on the night of the 0!May 2013, such as assaulting his father with an iron rod; assaulting his siblings who tried to control him; covering the deceased after assaulting him; lighting candles in the house and praying in tongues, pacing up and down; telling PW2 that he killed the deceased because the deceased wanted to eat his heart and so on. He denied knowledge of any of that.

[27] It was Accused's evidence that from police custody he recalled being taken to psychiatric centre where he was admitted for treatment for duration he could not recall. He was still taking medication at the time of his testimony. He was never on such medication prior. He was subsequently taken before a magistrate where he was ordered and referred to attend a correctional facility juvenile school. He was enrolled in Form I and has since completed Form 5 at the correctional school. Before his arrest he was attending vocational training in metal works and panel beating at MITC in Manzini.

[28] The Accused testified that Dr Mwanjali was one of the doctors who attended , . o him and prescribed his medication since late 2015. The first doctor he encountered at the hospital was a liSwati female. He disputed the doctor's evidence that the Accused had misunderstanding with his father, maintaining that he had a strong bond with his father. Asked whether he told the doctor what she said, the Accused blamed incorrect interpretation of what he said by the officers who interp1"eted between him and Dr Mwanjali who did not speak or understand siSwati.

[29] The Accused did not fare very well in some of his evidence under cross examination. For instance, he said in chief that he was taken from police custody to the psychiatric hospital, but under cross examination he claimed that he found himself at the hospital. Asked by the court to clarify whether or not he recalled

being moved from police station to the hospital, he said he did not know how to

answer that question. In relation to the date the offence is alleged to have been committed, he said he last saw the deceased in April 2013 on a day they both returned from Nazarene hospital where the Accused had donated blood to the deceased. His normal daily routine entailed getting up in the morning, going to vocational school, returning home in the evening, and fetching firewood for cooking the evening meal.

[30] The Accused disclosed under cross examination that he had epilepsy sickness, with the result that at times he had a problem recalling things and hearing properly. In answer to the court's inquiry, he said he suffered from epilepsy since 2012 and still suffers occasional attacks to date, the latest being in January 2021 following Form 5 results. He used to get regular treatment at Nazarene hospital. He has never been involved in epilepsy induced violence. He described his experience of epilepsy episodes as follows: it starts with convulsions, stiffened body, diminished vision followed by a fall. Upon waking up his body feels numb on the side. Attacks are usually triggered by being upset or heartbroken. He did not think that the treatment he was receiving for mental imbalance at the psychiatric centre catered for epilepsy because he still got attacks despite medication.

[31] Despite that he was in court throughout the testimonies of crown witnesses the Accused claimed that he did not hear PW1 testify that he killed their father. Neither did he hear her evidence that the Accused shouted at night that he wanted to cut deceased's testicles. The Accused stated that he loved his sickly father and would never have wanted to harm him. He looked after his father, took him to the toilet and cooked for him, among other things.

[32] In his wide-ranging evidence, the Accused painted a picture that he was the pillar and breadwinner for his family. He put food on the table with money from

doing piece and odd jobs at construction project sites, motor workshops, cutting

grass and the like. He juggled this with attending a panel beating course in Manzini. Their mother who had quarrelled with their father never came home, as a result he assumed all the responsibilities. PW1 did not help with household chores as she was in and out of their home and spent time at their mother's place. His younger siblings could not cook properly, they were unhappy about their mother's absence and refused to do household chores, leaving the Accused to do all the tasks.

[33] In its closing submissions the crown stated that it had discharged the onus and proved the guilt of the Accused for murder as charged, beyond a reasonable doubt. The prosecution is of the view that all elements of the offence, have been proved in particular *mens rea* in the form of *do/us eventualis*. According to the crown, Doctor Mwanjali's evidence dissipated any doubt on whether the Accused had the *necessary mens rea* to commit the offence. The Doctor's conclusion that the Accused appreciated the consequences of his actions when he assaulted and killed the deceased was sufficient prove on the issue of intention. _

[34] Regarding the Accused's evidence in his defence the crown submits that it was an afterthought that the Accused claims not to recall anything related to the 01 May 2013. The crown submits that if the Accused relies on insanity as a defence, the onus lies on him to prove it. That in this case the Accused has failed to establish the defence of insanity.

[35] Defence contention on the other hand is that the guilt of the Accused has not been proved in that there is no sufficient evidence that the Accused had the mental capacity to form the intention to commit murder. Defence counsel dares to venture into the unfamiliar realm of spiritual possession which he suggests the Accused was labouring under when, according to the witnesses he shouted and prayed in a strange language after battering the deceased to

death.

(36) According to defence counsel the abnormal behaviour of the Accused at the scene as described by crown witnesses showed that he was of unsound mind. The defence submitted, correctly so, in my view, that discrepancies between the report of the Medical Specialist, Dr Mwanjali and PW1, the eye witness at the scene, on what transpired, render it unreliable.

Analysis and findings

[37] The evidence of PW1 as supported by other witnesses namely, PW2, 3 and 4, on the abnormal behaviour of the Accused, at the scene. It is undisputed that the Accused brutally assaulted the deceased with Exhibit "1" a metal object, approximately 1.5111 long staff with a rectangular flat base on one end. This was a formidable instrument that the Accused used to smash into the head and body of the deceased, resulting in grievous injuries that caused his death.

(38) Exhibit "A," a report of Post Mortem Examination of deceased's body compiled by Dr RM Reddy records the cause of death as due to head injury. It also lists the following antemortem injuries:

- *incised wound over forehead bone deep exposed cut;*
 - *fracture skull base and over temporal region;*
 - *mixed intracranial haemorrhage over brain about 160ml;*
 - *right eye bulged out; Laceration left top ear top gape;*
 - *laceration over right ear and above, ear deep with contusion scalp, temporalis muscle area;*
 - *left temporal region contusion; Laceration outer right eye with skin deep extension and abrasion;*
 - *laceration inner lower lip; contused abrasion over left buttock, lower region trunk area, outer aspect of right hip area;*

- *abrasion over left knee front area.*

[39] The crown bears the onus to prove Accused's guilt beyond a reasonable doubt. As crown witnesses⁷ told the court that the Accused's conduct and behaviour raised questions about his mental state, it became clear from cross examination of these witnesses that the Accused's defence was lack of capacity due to some mental disturbance. However, the actual defence of the Accused was not specified at any stage. The only instance when the defence touched on the possible defence of mental incapacity was with the question to PW1, "*Is it correct that at that time the Accused was not in a proper mental state?*" to which the witness answered in the affirmative. This was in reference PW1 's evidence that after the Accused threatened to attack the deceased with a knife, she calmed him down, but he was up again in 10 minutes time, threatening the deceased the second time, and wreaking havoc.

[40] In deciding whether the crown has proved the crime of murder, the court is called upon to consider whether the elements of the crime have been proved, namely, *intentional; unlawful; killing; of ¹ a human being; by another*. The last four elements have been proved. The identity of the Accused as the killer is established by the undisputed evidence of PW1 and PW2. The latter confronted the Accused asking him why he killed the deceased. The unlawfulness of the killing has also been proved in so far as there is no evidence of justification. According to the unchallenged testimony of PW1 the Accused threatened to kill the deceased without provocation and eventually carried out his threat. The salient question is whether there was intention to kill the deceased on the part of the Accused. The question requires scrutiny in the light of the behaviour of the Accused

⁷ PW1, PW2 and PW3.

at the scene at the material time, juxtaposed with the evidence of the doctor who examined him.⁸

[41] Dr Mwanjali stated that being mentally ill did not protect one from being responsible from committing offences or cannot be exempted. I do not understand the doctor to be saying that a mentally ill person who commits a crime during time of his relapse cannot be exempted from criminal liability. In *Rex v Jabulani Bongane Nhlabatsi*,⁹ expert witness Dr Ndlangamandla, having found that the accused person suffered from acute psychotic and confusional state at the time of commission of the offence, expressed opinion that the accused could not be held responsible for his actions at the time that he killed the deceased. Pointedly, the doctor also added, "*But we leave all the final judgment to the court of law.*"

[42] Dr Mwanjali states positively in her report that the Accused has been diagnosed with a major mental illness¹⁰ that is currently controlled with medication. The Report is silent on the period of the onset of the accused's illness, whether or not the Accused already had this affliction at the material time of commission of the offence. The expert evidence is not helpful regarding the mental state of the Accused at the time of the commission of the offence. The specialist's opinion that the Accused "**understood the consequences of his actions by the time he committed the offence**" appears to have been based on perceived recollection of events of the fateful night by the Accused. The Accused told the court in his evidence that he had no recollection of the events of that night nor how and where his father met his death. Indeed the account of events that the doctor said the Accused lucidly narrated differed materially from the credible evidence of crown witnesses. According to the doctor the Accused told her that he stabbed the

⁸ Both oral and the Report authored by the Doctor.

⁹ Case No. 30/97.

¹⁰ Albeit unspecified.

deceased with a knife which is in contrast with the evidence of PW1 that the Accused bludgeoned the deceased with Exhibit "I" the metal rod. The court must in the circumstances consider all the evidence led to determine whether the Accused had mental capacity to commit the offence charged. It is my considered opinion that the Accused killed the deceased but was insane at the time he did the act. This finding finds support in Section 165 of the Criminal Procedure and Evidence Act/1938 which provides thus:

"165

(1) *If an act either of commission or omission is charged against any person as an offence and it is given in evidence on the trial of such a person for such offence that he was insane so as not to be responsible according to law for his act at the time when it was done, and if it appears to the court before*

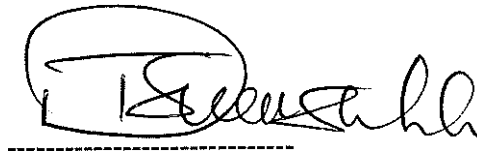
which such a person is tried that he did the act but was insane as aforesaid at the time when he did it, the court shall return a special finding to the effect that the accused did the act charged, but was insane as aforesaid when he did it.

(2) *If a special finding is returned the court shall report to the Attorney-General for the information of His Majesty and shall meanwhile order the accused to be kept in custody as a criminal lunatic in such place and in such manner as it directs."*

[43] The court therefore returns a special finding as aforesaid in terms of section 165 (1) (2) above quoted, that the Accused is guilty of killing the deceased but was insane at the time of committing the act.

Order

[44] The Registrar is directed to make the requisite report to the Attorney General/Director of Public Prosecutions for the information of His Majesty. In the meantime, the Accused shall be kept in custody as a criminal lunatic in terms of the said section 165 subsection (2) thereof.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line. The signature is cursive and somewhat stylized.

D Tshabalala
Judge

For the Crown: Mr. Kingsly Masango - DPP's Chambers

For the Defence: Mr. Mongi Nsibande - Mongi Nsibande & Partners.