

IN THE HIGH COURT OF ESWATINI

**RULING ON SECTION 174(4) OF THE CRIMINAL
PROCEDURE AND EVIDENCE ACT, 1938**

HELD AT MBABANE

CASE NO: 44/2018

In the matter between:

REX

Versus

DUMISANI MFANA MKHONTA

Neutral Citation: *The King and Dumsani Mfana Mkhonta [44/18] [2022]*

SZHC 170 (10 August 2022)

Coram: LANGWENYA J

Heard: 4, 5, 6 July 2022; 10 August 2022

Delivered: 10 August 2022

Summary: *Application for discharge in terms of section 174(4) of the Criminal Procedure and Evidence Act (CP&E Act), 1938- the test to be applied at this stage of the proceedings- test is not proof beyond reasonable doubt- but proof of whether the court is of the opinion that there is no evidence that the accused committed the offence in the charge or any other offences of which the accused may be convicted on the charge- the principle applied is whether the Crown proved a prima facie case- in the present matter. The evidence of the Crown shows that the accused acted in private defence as he was under serious attack from the deceased when he fired a shot which resulted in the death of the deceased- in the result, the application for discharge in terms of section 174(4) of the CP&E Act, 1938 is allowed.*

RULING ON SECTION 174(4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT 1938

Introduction

- [1] In this proceeding, the accused has been indicted for the murder of Bhekithemba Khanyile (the deceased). The Crown has led its evidence and closed its case. The accused applied for a discharge in terms of section 174(4) of the Criminal Procedure and Evidence Act¹ (CP&E).
- [2] When the accused was asked to plead to the charge, he tendered a plea of not guilty.
- [3] The Crown led the evidence of eight witnesses. The postmortem report, the ballistic report as well as the album of pictures taken by police officers from the scene of crime were all admitted as evidence tendered on behalf of the

¹ 1938 as amended.

Crown. The statement recorded by the police on RSP 218 and the statement recorded by the accused person before a judicial officer was admitted as evidence before the Crown closed its case. REPS 88 being the medical report of the accused was also entered as evidence at this stage of the proceeding and was marked as exhibit 'D.'

- [4] At the close of the Crown's case, Mr Bhembe on behalf of the accused person applied for the discharge of the accused in terms of section 174(4) of the CP&E Act. Mr Bhembe submitted that the Crown had not made a *prima facie* case to put the accused on his defence. He also submitted that the evidence led on behalf of the Crown at this stage is not one on which a reasonable court acting reasonably and judiciously can convict.
- [5] The application was opposed by Mr Gama for the Crown.
- [6] Written and oral submissions were made by both Counsel. I must thank both Counsel for the on-point and detailed submissions which I found to be helpful.

Brief Background

- [7] The Crown led evidence from the family members of the deceased person; from police officers who were first responders to the incident and from investigating officers. The post-mortem report was submitted as Crown evidence. The Court was also furnished with a report compiled on behalf of the medical practitioner who treated the accused person while he was admitted in the hospital following injuries that were supposedly inflicted on him by the deceased person.
- [8] At the time of the incident in 2018, the accused person was an adult LiSwati man who was sixty-nine years of age. He was in a romantic relationship with

Nokulunga Khanyile-one of the daughters of the deceased person. At the time of the incident, Nokulunga was nineteen years old². The court heard that the accused person had not been formally introduced to the Khanyile family as Nokulunga's lover at the time of the death of the deceased person. During the trial, the court heard that Mr Mkhonta and Nokulunga are now husband and wife. Nokulunga's mother testified that she was not formally notified about the marriage and that she played no part in it. It would appear however that before he died, the deceased had heard a different version: that the accused person had romantic liaisons with Nokulunga and with Nomsa Khanyile-the daughter and wife of the deceased. This is probably what infuriated the deceased when he arrived in the evening hours at his home and found Mr Mkhonta there. This background is important because it sets the tone of how the confrontation between the accused and the deceased unfolded resulting in the death of the deceased.

The Crown's evidence

- [9] The Crown led the evidence of Kwanele Khanyile and that of Mrs Nomsa Khanyile; a daughter and wife of the deceased respectively. Kwanele testified that on the evening of the incident she was at home when the accused person arrived driving his car. The accused parked his car at the Khanyile homestead yard. No sooner had the accused parked his car than the deceased arrived on foot and entered through the gate. The deceased person was carrying groceries. The deceased went to Mr Mkhonta who was in the car. He asked him what he was doing at his home. At the time the accused was seated in the driver's seat of his car. Mr Mkhonta then alighted from his

² PW2, Nokulunga's mother told the court that Nokulunga was born on 11 December 1998. In January 2018, when the incident happened, Nokulunga was nineteen years and one month old.

car on the front passenger seat and was carrying a firearm. Kwanele stated that the firearm slipped from Mr Mkhonta's hand and she heard her father say, 'you are carrying a firearm to shoot me in my home?' Kwanele testified that the firearm accidentally discharged and her father was shot next to the breast and in the heart as well as in the abdomen. Soon after, Mr Mkhonta fled the scene while Mrs Nomsa Khanyile was raising an alarm.

- [10] Before the deceased was shot, Kwanele testified that her father assaulted Mr Mkhonta on the head with an iron rod. Mr Mkhonta was bleeding from his injuries.
- [11] Kwanele testified that when her father began to assault the accused, she was far away and it was dark already. Kwanele testified that she heard the firearm go off three times. It is Kwanele's evidence that her father continued to assault the accused person even after the accused person had fired a warning shot in the air. It is Kwanele's evidence that she could not deny that the accused fired a warning shot in the air to try and scare the deceased and stop him from attacking the accused person.
- [12] PW2 Mrs Nomsa Khanyile is the wife of the deceased. She testified that on the night of the incident herein, her husband was not at home when the accused arrived at her home driving a car which he parked on her yard. She went to greet Mr Mkhonta while he was in his car. While she was talking to Mr Mkhonta, her husband arrived on foot and entered through the gate. The deceased asked what the accused was doing at his home at that time of the night. The accused person apologized and stated that he was not there to fight. The deceased would hear none of it. He grabbed an iron rod measuring plus-minus seventy centimetres to a metre in length and went to Mr Mkhonta's car. He asked Mr Mkhonta to leave his home. Mr Mkhonta did

not leave. Mrs Khanyile urged Mr Mkhonta to flee from her husband. Mr Khanyile used the iron rod to poke at Mr Mkhonta on the side below the arm. Mr Mkhonta left the driver seat where he was seated and sat on the front passenger seat of the car. Mr Mkhonta then exited through the front passenger door.

- [13] Mr Mkhonta was carrying a firearm when he came out of the motor vehicle. Mr Mkhonta is said to have apologized to Mr Khanyile; he asked that they settle the matter peaceably as he had not come there to fight. At the time, the duo was facing each other and shoving each other.
- [14] PW2 testified that she heard her husband tell Mr Mkhonta to fire at him since he had pulled a firearm. PW2 heard Mr Mkhonta say he was not going to fire at Mr Khanyile. At the time PW2 says she was in front of the duo and was calling for help when she suddenly saw her husband with gun-shot wounds on the breast. At the time, she did not see where Mr Mkhonta was. It is the evidence of Mrs Khanyile that her husband was shot by the accused person.
- [15] During cross examination of PW2, the court heard that the deceased had been fed untrue information by a certain member of the extended family about alleged romantic escapades Mr Mkhonta had with PW2 and with Nokulunga Khanyile. The matter of the false accusations was reported to the police and to the traditional structures.
- [16] The evidence of Andile Ndabezitha corroborates the evidence of PW1 and PW2 regarding the assault of the accused person by the deceased before the latter was shot and died on the night in question. Andile was hiding behind the house when she heard a gunshot being fired.

- [17] The police collected a live round of ammunition and one spent cartridge from the Khanyile homestead. The firearm used in the incident was later pointed out by the accused. Both the live round of ammunition and the spent cartridge as well as the firearm were sent for ballistic examination. The expert opinion is that the firearm in question is serviceable. The spent cartridge retrieved from deceased's homestead was found to have been fired from the firearm belonging to the accused person.
- [18] The post-mortem report states that the deceased died due to a fire-arm injury to the chest.
- [19] Exhibit D, is RSP 88 and a medical report compiled by the doctor who treated the accused person after the incident. It reflects that when the accused arrived in hospital he had multiple bruises and lacerations on the head; his left shoulder blade was fractured. The report states that significant blunt force was used resulting in the fracture of the left scapula.
- [20] The judicial officer who recorded the statement from the accused observed that the accused's left arm was supported by a brace on his appearance on 29 January 2018. The Magistrate observed further that the accused had visible scarring on the head.
- [21] In RSP 218, the accused recorded a statement to the police where he stated that he inadvertently shot at the deceased in private defence because the deceased was assaulting him with an iron rod. In this statement, the accused expressed his regret.

Applicable legal principles

[22] Section 174(4) of the CP&E Act states as follows:

‘If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.’

[23] Notably, the section uses words ‘it may acquit and discharge him.’ It does not direct or command the Court to acquit and discharge the accused but rather leaves it for the Court to exercise its own discretion to acquit and discharge or not to acquit and discharge the accused at this stage of the proceeding. This is an issue that requires the Court to exercise a judicial discretion whether or not at this stage of the proceeding to grant a discharge.

[24] It is also important to consider the implication of the concept of ‘no evidence’ stated in section 174(4) of the CP&E Act. Authority abounds in this and in other jurisdictions where the concept of ‘no evidence’ has been said not to mean no evidence at all, but rather no evidence on which a reasonable Court acting reasonably might convict³. The test is whether there is sufficient evidence upon which a reasonable Court can return a verdict of guilty.

[25] The decision to discharge an accused person at the close of the Crown’s case or whether to refuse to do so is not so much a matter of divination in as much as it is a matter in respect of which I must exercise a judicial discretion. The law in this regard is settled. The Court will refuse an application in terms of section 174(4) of the CP&E Act if there is evidence upon which a reasonable Court may convict. The Court will take into account all the evidence presented before it at this stage of the proceedings.

³ *R v Shein* 1925 AD 6; *S v Helder and Another* (2) 1964 (1) SA 524(W) at 541; *S v Mpetha and Others* 1983 (4) SA 262; *S v Lubaxa* 2001 (2) SACR 703 (SCA).

- [26] It remains to consider how the Courts have treated the question of credibility of Crown witnesses at this stage of the proceeding. In some authorities it is held that at the close of the case of the prosecution, the evidence before Court must not only be sufficient but must be credible as well; while in others, it is said that credibility at this stage of the proceeding is not an issue.
- [27] In general, the position appears to be that although credibility is a factor that can be considered at this stage, it plays a limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such a poor quality that it cannot, in the opinion of the trial Court, be accepted by any reasonable Court⁴.

Is there evidence on the basis of which this Court may convict?

- [28] I must consider if in this case, and at this stage of the proceeding, there is evidence upon which a reasonable Court may convict. I will answer this question by making reference to the evidence presented so far.
- [29] There is evidence that Mr Mkhonta was at Mr Khanyile's home at the time the latter was shot and killed. It has not been shown that the presence of Mr Mkhonta at Khanyile's home was without reason or unlawful. At best, the Crown's evidence explaining Mr Mkhonta's presence at the Khanyile's homestead on that fateful night is believable although it is contradicted by the evidence of Andile Khanyile. The Court heard that Mr Mkhonta was called by members of the Khanyile family to come and transport Nokulunga and Andile to a funeral. Andile denies that she was going to a funeral on that fateful night.

⁴ *S v Mpetha and others* 1983 (4) SA 262 (C) at 265.

[30] There is evidence that Mr Khanyile was the aggressor and attacked Mr Mkhonta with an iron rod. Mr Mkhonta apologized and asked that they settle the matter peaceably but Mr Khanyile would hear none of it. The accused tried to avoid the blows from the iron rod by moving from the driver's seat to the front passenger seat. Mr Khanyile's assault of the accused was unrelenting. Even after the accused had exited his car carrying a firearm, the deceased continued to assault him with the iron rod. The Court heard that the accused fired a warning shot in an effort to scare the deceased; this did not yield the desired result as it seemed to add fuel to the fire because deceased intensified his assault of the accused. I say the assault of the accused was intensified because the doctor's report states that the accused suffered significant blunt force trauma leading to the fracture of the left scapula. The accused suffered other injuries listed in exhibit D.

[31] The accused states that he shot Mr Khanyile in private defence.

[32] The law on private defence is settled. Private defence is available when three requirements are satisfied, 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; and (c) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger⁵.

[33] It has not, at this stage been disputed that these requirements were met in the present matter. It is the evidence of the Crown that the accused person was unlawfully attacked and assaulted with an iron rod all over the body. That

⁵ *R v Molife* 1940 AD 202 at 204; *R v Attwood* 1946 AD 331; *Motsa Sipatji v R* 2000-2005 SLR 79 (CA).

the accused was assaulted in an apparently life-threatening manner was not disputed by the Crown's evidence. It has not been suggested that the accused was found in a compromising position with wife of the deceased even though in the Crown's written submissions it appears that the Court is being invited to draw that inference. I will resist the invitation to do so. This I do because there is no evidence that shows that the deceased died as a result of a crime of passion.

- [34] The accused was cornered inside his motor vehicle by the deceased who assaulted him with an iron rod. When the accused attempted to flee out of his motor vehicle, the deceased persisted with the attack. The accused fired a warning shot; still the attack continued. The accused then used the only available and least dangerous means whereby he could have avoided the danger under the circumstances. The attack of the accused person was sudden and happened at the time he only had his licensed firearm inside his motor vehicle.
- [35] It has been stated that when it comes to private defence the Court must not become an armchair critic, being wise after the fact and fail to give due regard to the particular circumstances of the case at hand. I am therefore enjoined by law to place myself in the position of the accused person at the time of the attack upon him⁶.
- [36] It is important to add that in our country, the law on private defence also takes on a constitutional hue. In this regard, the Constitution of eSwatini⁷ provides:

⁶ *Tetuka Tetuka v The State* CLCGB-039-12 as quoted in *Gumbi v Rex* (24/12) [2012] SZSC (30 November 2012) at paragraph 14.

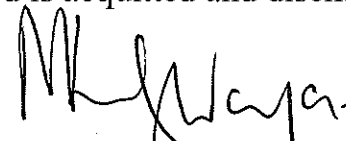
⁷ Section 15(4)

‘A person shall not be regarded as having been deprived of life in contravention of the said section if the person dies as a result of force to such an extent as is reasonably justified in the circumstances for the defence of any person from violence.’

[37] It is trite that the law of private defence in eSwatini allows a person who is attacked and fears for his life or that he might be badly harmed to defend himself to the extent necessary to avert the attack. Simply put, the attacked person is entitled to use force to resist an unlawful attack upon him. The caveat being that the degree of force used in repelling the attack should be no more than is reasonably necessary in the circumstances⁸.

[38] From an evaluation of the Crown’s evidence thus far, I am of the considered view that the accused acted in private defence in firing a shot at the deceased person. In my opinion, the evidence of the Crown has not so much negated Mr Mkhonta’s defence as it has buttressed it. For these reasons, there is therefore no sufficient evidence upon which a reasonable Court, acting reasonably in this matter can return a verdict of guilty. I therefore decline the invitation to put the accused person to his defence.

[39] In the result, the accused is acquitted and discharged.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Mr S. Gama

For the Accused:

Mr S. Bhembe

⁸ *The King v Sandile Mbongeni Mtsetfwa* Unreported Criminal Case No. 81/2010 per Masuku J quoting Twum JA.