



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane

Case No. 286/20

In the matter between:

REX

V

MDUDUZI MOTSA AND 2 OTHERS

Neutral citation: *Rex vs Mduzuzi Motsa & 2 Others [286/20] [2022] SZHC 03*
(31st January, 2022)

Coram: FAKUDZE, J

Heard: 3/11/21; 4/11/21; 19/11/21; 22/11/21

Delivered: 31st January, 2022

JUDGMENT

[1] The accused persons, namely Mduzuzi Motsa, Mxolisi Khumalo and Andile Khumalo have been charged with the crime of Murder in that upon or about the 5th October, 2019 and at or near kaKhoza, Mhobodleni area in the Manzini Region, the accused persons each or all of them acting jointly in furtherance of a common purpose did unlawfully and intentionally kill one Mandla Dlamini and thereby did commit the crime of Murder.

[2] When the accused persons were called upon to enter a Plea, they all pleaded not guilty.

THE CROWN'S CASE

[3] In its quest to prove its case, the Crown paraded six (6) witnesses. PW 1, Menzi Siyabonga Lukhele stated that on the 5th October, 2019, he and the deceased went to kaKhoza where the deceased stayed. At about 2100 hours, they were drinking and suddenly, accused 1, 2 and 3 entered accused 1's flat and accused 1 came to the deceased's flat and wanted to buy cigarettes. The deceased said he did not have the cigarettes. Later accused 1, 2 and 3 came to the deceased's place and accused 2 insisted that the deceased sell them the cigarettes. Later accused 2's brother came and insisted that he wanted to talk to the deceased. Accused 2's brother is Andile accused 3. Accused 2 and 3 had a conversation whilst sitting at the deceased door.

[4] Accused 2's brother talked to the deceased for a long time. Later accused 1 left his flat and came to us. He stood between PW 1 and accused 3. Accused 2 struck the deceased with fists, and he fell to the ground, accused 3 kicked him and accused 1 kicked him all over the body. PW 1 tried to stop them but to no avail. At that moment accused 3 used a ringforce to hit the deceased on the head. Accused 2 and 3 were pulling him on the ground. Accused 1 went to his flat and took an axe and hit the deceased on the head. PW 1 raised an alarm and later he came to where the deceased was only to find that he was dead. The police were called and the deceased was taken to hospital.

[5] It was put to PW 1 that this witness never asked for what the deceased and the witness were drinking. He only asked for cigarettes. It was

further put to the witness that the accused persons never kicked the deceased and punched him with fists. Further, accused 3 established that the conversation between him and the deceased led to the fight because the deceased made an accusation against accused 3 that he was in the company of the accused 1 for the purpose of dealing with the deceased. It was put to PW 1 that the deceased was the first one to hit accused 3 with an iron rod and the response was that PW 1 saw the rod in accused 3's hand. It was put to PW 1 that accused 2 took the rod from the deceased and used it to hit the deceased. It was finally put to the witness that all the accused were drunk and the witness agreed.

PW 2 – AYANDA PRECIOUS LUKHELE

- [6] This witness stated that she pipped through the window of her flat which was not far from the scene of the incident. She saw three men pulling someone on the ground. Before that, this person had been beaten and had raised an alarm and was heard saying, king let us talk. This was at about 2300 hours. The one who was raising the alarm was the deceased. PW 2 stated that she saw what was happening because there was sufficient light coming from the neighbourhood where there was a party. The party finished and some people from there saw the deceased's body lying in the middle of the road. They were driving a car and they saw the body using the car lights.
- [7] On cross examination, the witness was asked how she knows that reference to king meant the accused 1. She responded by saying that this is the nickname that he was called by in the community. It was put to the

witness that the place where the incident took place was dark. Therefore she did not properly see what was happening.

PW 3 – SAMKELISO SIBIYA

[8] This witness assisted in the pointing out of the rod and the axe that was used in committing the offence. On cross examination it was put to this witness that accused 2 was under duress when he pointed out the weapons.

PW 4 THULISILE GOODNESS DLAMINI

[9] This witness stated that on the day of the incident, there was a party at her neighbour's place. She fetched her children and locked them inside the bedroom. At about 11.00 pm she saw some three men dragging another man. The man who was being dragged was crying for help and pleading with the three men not to kill him. One of the men hit the deceased three times and a car approached and all the three men ran away. The man lying on the ground dead was identified as the deceased. The witness's house was not far from where the event was taking place.

[10] On cross examination, it was established that the witness did not see who the three men who were dragging the deceased were. It was also put to her that the light where the incident happened was not sufficient because it was already at night.

PW 5 – CONSTABLE SANELE MALINDZISA

[11] This witness was the Scenes of Crime Officer. He described how he took photos of the scene and prepared an album which he presented to court as part of his evidence.

PW 6 – DETECTIVE CONSTABLE EPHRAIM VILAKATI

[12] He investigated the case. This witness received a report of the incident and it was at about 0400 hours. Later during the day, he went to accused 1's flat at kaKhoza where he found accused 1's girlfriend. He later apprehended all accused person in Mbabane. This was after he cautioned them. They were taken to Manzini Police Station via accused 2's residence at New Village where there was a pointing out of a ringforce and an axe that were used in committing the offence. The witness had also cautioned them. After investigation, the accused persons were charged with murder. Later, accused 1 and 2 were brought to the Magistrate to make a confession. The weapons that were collected at New Village were handed in as exhibits by this witness.

[13] On cross examination, it was established that the accused persons had been tortured prior to the confession by them. Therefore the confession was obtained through duress. It was also put to this witness that he was an incredible witness. An inspection in loco was done and its findings were read into the court record. The confession made by accused 1 and 2 were admitted by consent and were read into the court record. The same applies to the medical record.

[14] The Crown then closed its case.

THE DEFENCE'S CASE

ACCUSED 2 – MXOLISI KHUMALO

[15] This witness stated that accused 1 is his friend and accused 3 is his brother. He said that on the 5th October, 2019 he together with accused 1 and 3 were

at Mangiphilile Bar in Manzini. They were drinking almost the whole day. Someone wanted to fight accused 1 and all the accused persons decided to go to accused 1's place at kaKhoza. They continued drinking there whilst the deceased and another Lukhele man were also seated outside having drinks as well. They later went to the Bus Station Bottle Store where they bought more drinks and when they came back the deceased was sitting outside with another man. The other man was a Lukhele. Accused 2 approached the deceased and asked him to sell the accused some cigarettes and the deceased said there was none. The remaining ones were to be sold the following day.

[16] Later, Accused 3 joined accused 2, the deceased and the Lukhele man. Accused 3 asked for dagga. The deceased and accused 3 went to some place away from where accused 3 was and they had a chat there. Accused 2 heard accused 3 say why are you assaulting me. Accused 2 did not see the weapon that was used in assaulting accused 3 because it was dark. When accused 2 wanted to find out why the deceased was assaulting accused 3, the deceased assaulted accused 2. As accused 2 was trying to help accused 3, accused 1 came by. Accused 2 tried to help accused 3 by holding the hand of the deceased who was carrying a ringforce.

[17] Accused 2 assisted because the deceased person was known in the area for stabbing people and he thought he would stab accused 3. Whilst fighting over the ringforce, accused 2 and the deceased fell on the ground. Accused 1 hit the deceased on the head with something. Accused 2 hit the deceased with a ringforce on the ribs. Accused 3 was standing whilst accused 2 was hitting him with the ringforce. Accused 3 never intervened or did anything. He did not stand between accused 1 and the deceased as alleged

by PW 1. All these happened whilst it was dark. Accused 2 disputed the evidence of PW 4 that there was sufficient light.

[18] On cross examination, it was put to accused 2 that he never challenged the confession. It was further put to this witness that the place was dark yet he saw the deceased assault accused 3. Accused 2 responded by saying that he only heard accused 3 saying why are you beating me. It was put to this witness that he used the ringforce to assault the deceased on a delicate part of the body and that he never administered any form of first aid on him.

ACCUSED 3

[19] The evidence of accused 3 is materially the same as that of accused 2. He stated that he went to the deceased's place where there was the deceased seated together with PW 1. He asked for dagga. Later they had a talk with the deceased a few metres away from where PW 1 was. Accused 2 says that the deceased accused him of befriending accused 1 and that accused 1 would use accused 3 to fight accused 1's battles. The deceased later hit him with a ring force.

[20] On cross examination, it was established that accused 3 also had a hand in the kicking and the dragging of the deceased and he denied that. It was further put to accused 3 that there was no mark or sign that he was assaulted.

ACCUSED 1

[21] Accused 1 also confirmed accused 2 and 3's version. He stated that when he heard accused 3 raise an alarm the effect was that the deceased was assaulting accused 3, accused 1 went to his flat, got hold of the axe and hit

deceased using the back of it. He did this to defend and rescue accused 3.

[22] On cross examination, it was established that in the confession the accused made, he never mentioned that the deceased was the aggressor. The accused responded by saying that he heard accused 3 raising an alarm and he responded to that. The Defence closed its case. The Post Mortem report and the confession by accused persons were admitted by consent between the parties.

THE APPLICABLE LAW

[23] Murder is defined as the unlawful and intentional killing of another person. In **Malungisa Bataria V Rex, Criminal Appeal Case No. 6/2014** at paragraph 46 the 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 purpose 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.”

[24] On the issue of *mens rea*, the court stated in **Elliot Mamba V Rex (2016) [2017] SZSC 59** at page 16, paragraph 26 as follows:

“In determining mens rea in the form of intention the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous weapon, the only inference to be drawn is that he intended to kill the deceased.”

[25] On the issue of common purpose, **Jonathan Burchell – South African Criminal Law and Procedure Volume 1, 3rd Edition**, states that:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their common purpose to commit the crime. If the participant committed conduct which casually contributed to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular offence or actively associated themselves with the commission of the crime by one of their number with the requisite mental element (mens rea). If this is established then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants. Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequences, provided that it is established that one of the group brought about this result.”

SUBMISSIONS

The Crown

[26] On the issue of intention, the Crown states that the accused had the necessary intention in the form of *dolus eventualis*. They foresaw the death of the accused and notwithstanding such foresight, they continued with the unlawful act. The court should also consider the weapon that was used to inflict the harm on the deceased. An iron rod was used and an axe. The doctor's evidence established that the deceased died due to chop wounds on the head. The accused persons inflicted the wounds on a very sensitive part of the body which is the head.

[27] On the issue of provocation, the Crown states that this an afterthought because when accused 1 and 2 were making their confession before a judicial officer the issue of the deceased hitting the 3rd accused with an iron rod never came up. It is therefore an afterthought.

[28] On the issue of common purpose, the Crown submits that the accused persons acted in common purpose. They were present at the scene of crime and all participated in the physical attack of the deceased. Not only did they assault him with the iron rod, they went further to assault him with an axe on the head and dragged him on the ground thereafter. PW 2 and PW 4 have established that.

The defence

[29] The defence submits that the Crown has failed to prove its case beyond reasonable doubt. No intention to kill has been proven. The accused persons were acting in self-defence because the deceased was the first one to

attack accused 3. The defence further submits that accused 3 never took part in assaulting the deceased and in the process of seeking to defend themselves, accused 1 and 2 assaulted the deceased. This happened in the spur of the moment and there was no intention to kill.

[30] The defence further submits that the event took place at night and there was no source of light. PW 4 could not identify the accused persons because there was no light. On the issue of going away with the weapons, DW 1 and DW 3 were scared that the deceased would wake up and assault them since he was known in the area as someone who was bully.

[31] Finally, the defence states that the accused persons were drunk on this day. They had started drinking at 0800 hours until midnight. The alcohol impaired the reasoning of the accused persons.

COURT'S CONCLUSION

[32] Having heard counsel for the Crown and the Defence, the court comes to the conclusion that all the accused persons are guilty as charged. PW 1 has related how accused 1 approached the deceased to buy cigarettes. This witness was in the company of the deceased. Whilst sitting at the deceased's door steps, all the accused persons came to them. Later accused 2 and 3 sat at the steps leading to the deceased's house and conversed. Later accused 3 talked to the deceased for a long time. Accused 1 joined and stood between PW 1 and the accused 3. Accused 1 then clapped the deceased and accused 1 and 3 kicked the deceased all over the body. Accused 3 used a ringforce to assault the deceased on the head and later accused 2 and 3 dragged the deceased on the ground. Accused 1 went to his house to fetch an axe which he used to inflict wounds on the deceased's head. PW 4 stated

how she pipped through the window and saw three men pulling someone who was on the ground. The man who was being pulled was pleading with them not to kill him.

[33] PW 2 stated that there was a party in the neighbourhood. Her children had gone there. She went to fetch them and it was at about 2300 hours when she saw the scene. A car approached and all the three men ran away. She saw three men pulling someone who was on the ground. It was around 2300 hours. Before being pulled, the person had raised an alarm earlier and it was the deceased. She managed to see that it was the deceased through the lights of a motor vehicle that was approaching from the party place. PW 4 and PW 2 corroborated PW 1's version.

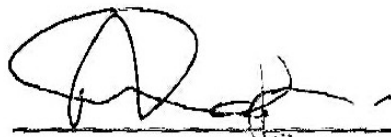
[34] Although accused 3 argues that the deceased was the first one to strike him with the iron rod and that the other accused persons were out to defend him, it is this court's observation that the alleged self-defence was excessive in the circumstances. The instruments used to inflict harm on the deceased and the parts of the body that were injured clearly indicate that the self-defence by the accused persons was excessive in the circumstances.

[35] On the issue of common purpose, evidence has been led by the Crown to show that all the accused persons had a hand in the killing of the deceased. Accused 1 hit the deceased on the head with an axe, accused, 1, 2 and 3 dragged the accused on the ground and accused 3 hit the accused with an iron rod. Each of them was responsible for the criminal conduct as they associated in engaging in it. There was a common purpose to commit the crime. (See **Burchell**, Supra). PW 2 and PW 4 stated how three men were seen dragging another man on the ground. There is sufficient evidence

implicating all of them. PW1 who was close to the scene identified the three men as the accused persons.

[36] On the issue of drunkenness, the court's view is that the accused persons appreciated what they were doing. It is true that they were drinking from morning to the late hours of the night. Notwithstanding that, the way the witnesses related the events suggests otherwise.

[37] In totality of all that has been said above, the court finds all the accused persons guilty as charged.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

CROWN: S. PHAKATHI

ACCUSED: N. DLAMINI – MLANGENI AND CO.