



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 200/17**

In the matter between:

**REX**

Versus

**MLUNGISI TERRENCE DLAMINI**

**Neutral Citation:**        *Rex vs Mlungisi Terence Dlamini [200/17] [2022]*  
   *SZHC 35 (17 March 2022)*

**Coram:**                        **LANGWENYA J**

**Heard:**                         **8-9 March 2022; 17 March 2022**

**Delivered:**                   **17 March 2022**

**Summary:**                   *Criminal Procedure-accused charged with murder-pleads not guilty-raises partial defence of provocation-defence of intoxication.*

*Criminal Law-Provocation-Relevant provisions of Homicide Act restated-for partial defence of provocation*

*to hold-there must have been provocation, loss of self-control (both actual and reasonable); retaliation must be proportionate to the provocation-.Criminal Law-accused fought with deceased, left the scene of the fight- returned a few minutes later-armed with a knife-stabbed the deceased from the back-deceased was unarmed at the time and was not facing accused.*

*Criminal law-accused stated he was intoxicated and so was deceased-the drinking buddies appear to have been drinking from the previous day without getting any sleep-it was argued that accused's intoxication played some role in the commission of the offence-however, no evidence was led as to the extent thereof.*

*Held; the evidence herein far from suggesting any provocation or any loss of self-control indicated that the accused embarked on a course of action which was dispassionate and deliberate not in the heat of passion upon a sudden provocation.*

*Held; Accused acted with the required intent and criminal responsibility when he stabbed the deceased. In the absence of evidence showing otherwise, it is not possible to find that the accused acted with diminished responsibility at the time.*

*Held; accused guilty of murder.*

## **JUDGMENT**

### **Introduction**

- [1] The accused is charged with the offence of murder. It being alleged by the Crown that on or about 25 June 2017 and at or near Siphofaneni in the Lubombo district, the said accused did unlawfully and intentionally kill Sigwili Sanele Dlamini.
- [2] When the charged was put to the accused, he pleaded not guilty. Accused's plea was confirmed by defence Counsel, Mr Motsamai.
- [3] The Crown called six witnesses to prove its case.
- [4] The accused gave evidence and called no witness in his defence.

### **Case for the Crown**

- [5] PW1 is Thembela Sikhumbuzo Khoza. He testified that on 25 June 2017 he was at Kalamazoo bar at Siphofaneni where he was drinking alcoholic beverage with his mates. He was having drinks with the accused, the deceased, Bongani Dlamini, Sifiso Vilane, and Thembela Mkhathshwa. It is PW1's evidence that he found his drinking mates at the bar in the morning hours. The deceased then confronted Thembela (PW1) about money that was due to him from a sale of five litres of dagga. Thembela (PW1) says he informed the deceased that the money was taken by Boniface who was, at the time in Durban. Deceased would hear none of the explanation. Deceased became physical with PW1. Sifiso Vilane intervened.
- [6] The accused assaulted the deceased with an open hand. Deceased went to the police station and reported the assault by the accused. On return from the police station, the deceased told all and sundry that he had reported the

accused to the police for assaulting him. That a report of the assault was made to the police by the deceased person is confirmed by the accused who adds however that he and deceased subsequently smoked the peace pipe and continued to have drinks at the bar.

- [7] It was while the group of friends continued to have drinks at the bar when the deceased person provoked and started another fight with Dambuza Dlamini. The duo was separated by the patrons in the bar. Deceased then let go of Dambuza but picked another fight with Thembele Mkhathshwa. The patrons in the bar advised Thembele to report the deceased to the police. Thembele chose not to.
- [8] PW1 later saw the accused and the deceased fighting. The accused took a bottle and hit the deceased with it on the face. The accused then left the bar. The accused was not gone for long. He returned to the bar and stabbed the deceased. The deceased was stabbed by the accused at the back. The accused further hit the deceased on the head. PW1 and other patrons tried to administer first aid to the deceased but were unable to save his life. PW1 and Thembele Mkhathshwa were taken by the police to the police station.
- [9] The accused hit the deceased with an open hand earlier but the deceased did not retaliate. PW1 testified that he later heard that the accused was stabbed in the neck.
- [10] It was the evidence of PW1 that the deceased was picking fights with a lot of people in the bar because he was drunk and had not slept the previous night. Deceased and the group of friends had been drinking alcoholic beverages from the previous night and had not slept. It was PW1's evidence during cross examination that the deceased provoked the accused. During re-

examination by Crown Counsel, PW1 stated that when the deceased was assaulted by the accused person he was not picking fights with the accused but other patrons.

- [11] The court heard that the accused used a knife to stab the deceased.
- [12] The Crown led the evidence of PW2 Thembela Ndabenhle Mkhathshwa. His evidence confirms the evidence of PW1 in some respects. He was at Kalamazoo bar with other patrons when he saw the accused and the deceased have an altercation. The deceased also pushed PW2 over iron rails at the bar. Crucially he was not at the scene when the stabbing of the deceased took place. He left Kalamazoo briefly to go to *emadladleni* where his mother was selling clothes. His intention was to ask his mother for money so he could go home. It was when he returned to the bar that he found deceased lying on the floor and PW1 and Dambuza were trying to administer first aid to him to no avail as Sigwili died at the scene.
- [13] PW3 is 3737 Detective Sergeant Dumsani Nkonyane. He is a police officer and was stationed at Matsapha police station in 2017. His home is at Siphofaneni. On 25 June 2017 he was off duty and set out with his homeboys to go and have some drinks at Kalamazoo bar. He was with Felix Khoza and Siboniso Matsenjwa among others. On arrival at Kalamazoo he saw a tall man bleeding from the neck and he tried to help him. PW3 enquired from the bleeding man what the matter was but got no response. He called the Siphofaneni police station after calling 999 and getting no response.
- [14] When he called Siphofaneni police station, he spoke to the Desk officer Inspector Langa. Inspector Langa informed PW3 that the police were on

their way to the scene as they had received the report. It was while PW3 was making the calls that the accused went back inside Kalamazoo with some of PW3's homeboys who had gone inside the bar to buy drinks. The accused was not five minutes inside the bar when he came out and appeared to be fleeing the scene. Sibongo Matsenjwa, one of PW3's homeboys came and reported that the accused had stabbed someone inside the bar.

[15] PW3 used his motor vehicle to pursue the accused. Accused fled towards the bus rank and did not respond when PW3 called him. The accused was bleeding. The police van written Sithobela Police Post arrived. Constable Malindzisa was driving the police car while Constable Bhembe was a passenger.

[16] The accused looked confused when he crossed the road and walked past the bus rank. Officers Malindzisa and Bhembe arrested the accused. PW3 showed the accused to the police officers who then arrested him. Accused was put at the back of the police van. The police went inside the crime scene and left the accused in the police car. While the police were attending to the crime scene, PW3 saw the accused throw a knife out of the police van. The knife was silver in colour. PW3 called one of the police officers and alerted them of the knife. The knife was taken by police and used as an exhibit. PW3 then recorded RSP 83.

[17] During cross examination PW3 testified that he does not think that the accused would have stabbed the deceased if the police had responded to the call he made to 999 earlier. It was PW3's view that he thinks the accused realized he had been stabbed and was annoyed and angered about that; he returned to the bar and stabbed the deceased person. It is his view that the accused was drunk and looked confused and was bleeding. According to

PW3, the accused did not spend two minutes outside the bar before he went back inside and stabbed the deceased.

[18] The Crown led the evidence of the Scenes of Crime officer 6628 Detective Constable Hlelizwe Dlamini (PW4). After informing the court about his qualifications, he testified that he attended to the scene of crime at Kalamazoo and found the deceased lying in a pool of blood facing down and motionless. He carried out his investigations, and took photographs of the scene. He compiled the photographs in an album which was presented to court as exhibit 'A.' PW4 was not cross examined on behalf of the accused.

[19] PW5 6010 Detective Constable Sindane Phinda Dlamini is one of the investigating officers of this matter. On 25 June 2017 he was in his house at the police camp when he reported to the charge office after an alarm rang. At the charge office he found 6563 Constable Bhembe from Sithobela Police Post. Officer Bhembe reported to PW6 that someone had been stabbed to death with a sharp object at Kalamazoo bar. The suspect had been arrested and was in the police vehicle. PW5 attended to the suspect inside the police van. The suspect was bleeding from the neck. Paramedics were called and they took the suspect to RFM hospital where he was treated and discharged to the custody of the police on the same day. PW5 and other police officers brought RSP 88 (police medical form) and gave it to the doctor to fill after treating the suspect.

[20] After the doctor finished treating the accused, he was discharged into the custody of the police. PW5 introduced himself to the accused and cautioned him in terms of the Judges' rules. The accused said something. The accused said something on the basis of which the police arrested him, put him in the police vehicle and transported him to Siphofaneni police station. At the

police station, the accused was again cautioned in terms of the Judges' Rules and he pointed out the clothes he was wearing during the commission of the offence. PW5 received the knife which is an exhibit in this matter from officer Bhembe.

- [21] The accused was taken to Big-Bend Magistrate court on 27 June 2017 and was remanded. PW5 handed in the exhibits in the case, to wit: stripped BVD, Levis shirt, Levis jeans, Sneakers with inscription 'Suprega' and a silver knife. The knife was marked exhibit '1.' The description of the knife is that it has a plus minus ten centimetres sharp blade with a silver handle.
- [22] PW6 is Siboniso Nkululeko Matsenjwa. He went to Kalamazoo on 25 June 2017 in the company of PW3 officer Nkonyane. His evidence corroborates that of PW3 in material respects. Outside Kalamazoo he saw the accused injured and bleeding. When he enquired what the matter was, the accused did not respond. He walked a short distance and retrieved a knife from his sock. The knife was short and silver grey. He followed the accused. The accused went back inside the bar and stabbed another boy who was next to the DJ. PW6 went outside and reported the incident to PW3. Police were called. PW6 saw the accused stab the deceased inside the bar. The accused stabbed the deceased and fled the scene.
- [23] During cross examination PW6 testified that if the accused had used a bottle to stab the deceased that must have happened prior to his arrival at the scene. He testified that he did not see the deceased assault the accused with a beer bottle.



- [24] The Crown handed into court RSP 88 which was compiled by a medical practitioner after the accused was treated at RFM hospital. Accused's medical report was marked exhibit 'C.' The report states that the accused was attended to at RFM hospital. The doctor observed that on arrival at the hospital his general state of health was that he was in a fair condition but his clothes were bloody. He had no bruises and abrasions. He had a plus-minus five centimetres laceration on the left side of the neck.
- [25] The post mortem report was handed in by consent of the parties and was marked exhibit 'B.' According to Dr Komma Reddy the police pathologist who carried out the post mortem examination, the deceased died due to multiple injuries. The details of the injuries are as follows:
- (i) a lacerated wound of 3x1cm present on the middle portion of the top of the head, between parietal eminences;
  - (ii) a cut wound of 3x1cm present at the lateral end of the right eye; and
  - (iii) a stab wound of 2x1cm, present on the middle portion of the mid back, slightly on the left side, which is 3cms from the mid line and 136cms from the heel of the left foot. It was the pathologist's observation that the right temporal bone, parietal bones and occipital bone was fractured; the chest bone and left side of the ribs were fractured and that there was a stab wound of 2cms length present in the middle lobe of the left lung.
- [26] The contents of the post mortem report were read into the court record. The Crown closed its case.

## Defence Case

- [27] The accused was twenty-two years old in 2017. He is twenty-seven years old now. He is not married but has a minor child who is four years of age. He is unemployed but earns a living through selling cigarettes. His parental home is at Phuzumoya. His mother is alive. He was arrested on 25 June 2017 and admitted to bail on 14 July 2017 but could only be released on 11 November 2017 when he was able to pay bail.
- [28] On 25 June 2017 he was at Kalamazoo where he was enjoying alcoholic drinks with Sigwili Dlamini, Thembela and Dambuza. He had been drinking the whole night and during the next day with his friends and they had not slept a wink. At Kalamazoo bar, the mood was a happy one as they all continued to drink. The deceased was the person who kept picking fights with patrons at the bar. He told the deceased that he should go home and sleep as he appeared to be too drunk. Deceased retorted and said he would do nothing of the sort. The accused and the other patrons decided not to give the deceased drinks because he was too drunk and was quarrelling with patrons in the bar.
- [29] It is the evidence of the accused that he was standing next to Thembela close to the DJ inside the bar. Sigwili went outside the bar with a broken bottle and returned to the bar and stabbed the accused. The accused testified that after he was stabbed by the deceased, he went outside the bar while the patrons reprimanded and assaulted the deceased for stabbing the accused. The accused testified that while outside, he retrieved a knife from his pocket, returned to the bar and stabbed the deceased once on the back. Accused says he then left the scene to go to the clinic but was apprehended by the police before he could get to the clinic.

- [30] In my view, the accused's actions before and after the killing of the deceased are not reflective of someone who was overcome by rage and lost perspective and control of his emotions when he realized he was bleeding from the injury supposedly inflicted on him by the deceased. His evidence far from suggesting any provocation or any loss of self-control indicates that the accused embarked on a course of action which was dispassionate and deliberate and certainly not in the heat of passion upon sudden provocation.
- [31] The accused says he was taken to the police station and while there he was attended by paramedics who administered drips on him before they rushed him to RFM hospital. At RFM he says he was sutured on the neck. While at RFM, police from Siphofaneni arrived and informed him that he was being arrested because Sigwili had died.
- [32] He states that prior to the misunderstanding with deceased on 25 June 2017, he considered the deceased to be his brother as they shared the same surname. The duo had on previous occasions shared alcoholic drinks together without any problems. It is the evidence of the accused that the deceased became violent towards him and to other patrons when they refused to give him alcoholic drinks because he was too drunk at the time.
- [33] During cross examination the accused testified that deceased was quarrelsome inside the bar as he assaulted other patrons and even pushed Thembela off the rails and drank other patrons' drinks without permission. The accused testified that the deceased stabbed him.
- [34] The accused conceded that he had assaulted the deceased with an open hand earlier on 25 June 2017 and that the deceased reported the matter to the police. Deceased returned to the bar and continued to have drinks with the

accused after they had reconciled. Accused testified he slapped the deceased with an open hand after the deceased person had been arguing with PW1 next to the cigarettes that the accused was selling and the cigarettes fell. The accused conceded that he had not told the court about this incident during his examination in chief. I might add, nor was this version put to PW1 during cross examination. The accused denied that he provoked the deceased arguing instead that it was the deceased who provoked him by tipping over the stall where his cigarettes were.

[35] PW1's version that the accused assaulted the deceased with a bottle on the head after the deceased had been quarreling with Dambuza; that accused slapped the deceased with an open hand because deceased had tampered with cigarettes accused was selling; that after the deceased allegedly stabbed the accused in the neck region, other patrons attacked the deceased when accused left the bar; are matters that the court only got to hear of when the accused was leading his evidence. It is, in my view not uninteresting that this version was not put to any of the Crown witnesses.

[36] The accused denied PW1's evidence that accused hit the deceased with a bottle above the eye. Photo 10 of the album presented by the scenes of crime officer reflects an injury above the eye of the deceased. The accused insisted that the injury suffered by the deceased was a result of the instant justice mob meting out instant justice on the deceased after deceased had stabbed the accused. The evidence of the accused in this regard became more tortured during cross examination when he stated that the deceased *wawadvwa* (which means to be shouted at by a lot of people). The accused ascribed *ku wawadvwa* to mean the deceased was assaulted by a mob inside the bar.

- [37] The accused testified that when he returned to Kalamazoo bar after he was injured on the neck, he found the deceased seated on the floor. He stabbed the deceased at the back. The deceased was seated in front of the DJ with his back to the accused. The deceased was unarmed.
- [38] It was put to the accused that he was injured on the neck during the scuffle he had with the deceased. This was denied by the accused who reiterated his version that the deceased stabbed him on the neck, accused went outside the bar, returned to the bar and stabbed the deceased. Accused denied the evidence of PW1 that the accused fought with the deceased. Un-meritoriously, this denial was not put to PW1 during cross examination.
- [39] The accused stated during cross examination that when he returned to the bar after he had been stabbed, the deceased was not carrying any weapon. When the accused was asked why he stabbed an unarmed Sigwili from the back, his response is telling. The accused testified that he was angry that he was stabbed and was bleeding so he armed himself with a knife, went back inside the bar and stabbed the deceased. The accused said he did not intend to kill the deceased. He states that he stabbed the deceased because he (accused) was bleeding and he was becoming weak. When the Crown posited that the accused says he was weak but gained strength to return to the bar and stab the deceased, the accused told the court he used his last ounce of strength to stab the deceased.
- [40] It was during re-examination that the accused stated that the mob inside the bar attacked the deceased for five minutes while the accused was outside the bar. When the accused was asked if the mob were using weapons to assault the deceased, the accused was evasive. He insisted that he could tell through the noise inside the bar that the deceased was being assaulted. The accused

further stated that he could tell that the deceased was being assaulted because he was bleeding when the accused returned inside the bar to stab the deceased.

## **The Law**

[41] It is not in dispute that on 25 June 2017 the accused stabbed the deceased with a knife. The accused pleads provocation and intoxication.

[42] The defence of provocation is regulated by the Homicide Act<sup>1</sup> which states as follows:

**‘2(1) a person who:**

**(a) Unlawfully kills another under circumstances which but for this section would constitute murder; and**

**(b) Does the act which causes death in the heat of passion caused by sudden provocation as defined in Section 3 and before there is time for his passion to cool;**

**Shall only be guilty of culpable homicide.**

**2(2) This Section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to provocation.’**

[43] In Section 3 of the Act provocation is defined as follows:

**‘3(1) Subject to this Section ‘provocation’ means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.**

**3(2) In this Section ‘an ordinary person’ means an ordinary person of the class of the community to which the accused person belongs.’**

[44] Devlin J defines provocation in the following terms:

**‘Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control rendering the**

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<sup>1</sup> 44/1959

**accused so subject to passion as to make him or her for the moment not master of his mind<sup>2</sup>.**

- [45] From the above authorities the following can be distilled: If a person kills another as a result of reacting to sudden provocation and therefore kills in the heat of passion and before there is time for his passion to cool, that person is guilty of culpable homicide.
- [46] In order for the defence of provocation to prevail the accused person must have been provoked; he must have lost his self-control (both actual and reasonable) and his retaliation must be proportionate to the provocation.
- [47] It is not for the accused to make out a *prima facie* case of provocation in as much as it is for the Crown to prove that the killing was unprovoked.
- [48] In our jurisdiction, the law about the partial defence of provocation is settled and the cases are legion<sup>3</sup>. The partial defence of provocation avails an accused person in the ‘heat of passion’ killings. It reduces the crime of murder to one of culpable homicide. The partial defence of provocation allows an accused person who has killed another person to argue that in a fit of rage, completely losing perspective and control of his emotions he caused the death of another.
- [49] In the matter of *William Valindzawo Ndlandla v Rex*<sup>4</sup> the Court articulated the partial defence of provocation in light of the provisions of the Homicide Act. The Court further provided a test of when the partial defence of provocation will hold in the following terms:

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<sup>2</sup> Quoted in Zambia Court of Appeal case *People v Phiri and Another* (HJ 6 of 2011) [2012] ZMHC 75.

<sup>3</sup> *Tony Zola Mamba v Rex* (02/2017) [2018] SZSC 12 (9 May 2018); *William Valindzawo Ndlandla v Rex* Criminal appeal No. 19/2015; *Annah Lokudzinga Mathenjwa v Rex* 1976 SLR 25; *Rex v Paulos Nkambule* 1989-1995 (1) SLR 405; and *Rex v Aaron Fanyana Dlamini* 1979-1981 SLR 30; *Nhlanhla Mdaka Motsa v Rex* (27/2014) [2016] SZSC 28 (30 June 2016).

<sup>4</sup> Criminal Appeal No. 19/2015

**‘That key phrase lies in the underlined words: ‘but for.’ A person who otherwise would be convicted of murder, were it not for the saving grace of the statute and who kills in the heat of passion caused by sudden provocation before there is time for his passion to cool may avoid a conviction of murder. Most importantly, the Court must be satisfied that the act which causes death bears a reasonable relationship to the provocation. Also, that the act of provocation on which reliance is placed, must deprive the accused of the power of self-control and to induce him to assault the other<sup>5</sup>.’**

### **Analysis and application of the law**

- [50] The accused denies that there was a fight between himself and the deceased before he later stabbed the deceased with a knife. Again, accused’s denial was not put to the Crown witnesses especially PW1. The law in this regard is settled. Where an accused fails to put his case to Crown witnesses, the Court may assume that his version of events, which comes late in the day when he gives his evidence is nothing more than an afterthought.
- [51] Contrary to the evidence of Crown witnesses which I found to be credible and worthy to be believed, the accused appeared to make his case as he went along and failed to put crucial parts of his defence to the Crown witnesses.
- [52] The accused was injured on the neck and was bleeding when he walked out of the bar. It is my view that the accused was injured when he fought with the deceased. He says he went outside the bar, retrieved a knife from his pocket, returned to the bar and stabbed the deceased. The accused testified that when he returned to the bar carrying a knife, he found the deceased seated on the floor with his back towards the accused and he stabbed him with a knife at the back. The deceased was unarmed at the time. You were not under threat at the time. After the accused stabbed the deceased, he left

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<sup>5</sup> Paragraph 36 at page 21 of the judgment.



the bar ostensibly to go to the clinic to have his injuries attended to. He was apprehended by the police and taken into police custody.

- [54] From the evidence presented before court, it cannot, in my view be remotely said that the accused was acting in self-defence. In fact, any argument that the accused was acting in self-defence would be preposterous in the circumstances of this case. There is no explanation how the accused could have been acting in self-defence against the deceased whose back faced the accused person and was unarmed at the time he was stabbed by the accused.
- [55] There is evidence that the conduct of the deceased on the day was unbecoming as he is said to have been quarrelsome with most of the patrons at the bar. This, the court was told was as a result of the deceased being too drunk. There is evidence also, that the accused appeared to bully the deceased as he assaulted him with an open hand when the deceased was quarreling with someone else. The assault with an open hand was reported to the police by the deceased. The accused is said to have assaulted the deceased with a bottle on the face. Photo number ten of the photo album confirms an injury on the face of the deceased; so does the post-mortem report on injury two. The accused is said to have assaulted the deceased with a bottle thereafter. The duo then got into a fight with the result that the accused was injured on the neck.
- [56] The explanation that the injuries suffered by the deceased on the face and on the head were inflicted by an instant justice mob after he stabbed the accused is rejected as not reasonably possibly true. Again, this evidence was not put to the Crown witnesses.

[57] I am of the view that in this matter, the evidence far from suggesting any provocation or any loss of self-control indicated that the accused embarked on a course of action which was dispassionate and deliberate and certainly not in the heat of passion upon a sudden provocation. The killing was brutal, cruel and calculated. The deceased was, at the time he was stabbed a helpless, unarmed victim.

[58] I am satisfied that the Crown has proved that the killing was unprovoked.

[59] It was argued that intoxication played some role in the commission of the offence. Other than evidence that the accused, deceased and other patrons had been drinking throughout the night and on the following day, no evidence was led as to the extent of the intoxication. The court was not told how much drinks the accused had and how alcoholic drinks had an effect on his mind leading to him acting with diminished responsibility. Absent a full canvassing of the defence of intoxication in this regard, it must be accepted that the accused acted with the required intent and criminal responsibility when he stabbed the deceased. In the absence of evidence showing otherwise, it seems impossible to find that the accused acted with diminished responsibility at the time. I accordingly decline to do so.

[60] For these reasons, the accused is found guilty of murder.

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**LANGWENYA  
JUDGE OF THE HIGH COURT**

For the Crown:                      Mr B. Fakudze

For the Defence:                      Mr T. Motsamai