



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane

Case No. 221/18

In the matter between:

REX

V

MAJAHONKE MYENI AND TWO OTHERS

Neutral citation: *Rex vs Majahonke Myeni & 2 Others [221/18] [2022] SZHC 09*
(31st January, 2022)

Coram: FAKUDZE, J

Heard: 2/08/2021, 3/08/2021, 4/8/2021, 21/9/2021, 22/9/2021,
18/10/2021, 25/10/2021, 26/10/2021, 25/11/2021 and
1/12/2021

Delivered: 31st January, 2022

JUDGMENT

[1] The accused persons are charged with the crime of murder in that on the 1st May, 2016 and at or near Mziki area in the Shiselweni Region, the accused persons acting together and in furtherance of a common purpose, did unlawfully and intentionally kill Mfanawemphi Boy Ndzinisa and did

thereby commit the crime of Murder. When the charge was put to the accused persons, they pleaded not guilty.

CROWN

[2] In its quest to prove its case, the Crown paraded nine (9) witnesses. At the close of the Crown's case, the accused persons applied for a discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938. The Application was dismissed. The evidence of the Crown has been captured in the application for discharge. It now suffices to summarise it as follows:

PW1 – MANCOBA MYENI

[3] This witness stated that he saw accused 3 push the deceased who fell, hit the window seal and bled. This witness wiped the blood from the floor. The deceased left the tavern and all the accused persons disappeared. They came back later, and this witness was outside the tavern. The witness saw blood on accused 2's T shirt. He asked the accused as to what had happened and accused 2 responded by saying that they were fighting among themselves. The witness also noticed that there was blood on the hands of accused 1. When the witness left for home in the company of a friend, they found the deceased lying in the middle of the road. There was a car with lights on not far from where the deceased was lying. At that moment came accused 1 and 3. PW 1 asked accused 1 as to what had happened and accused 1 said he knew nothing.

PW 2 – GABEZA MZIKAYISE DVUBA

[4] This witness was the security guard at Tavern where the accused persons and the deceased were drinking. He heard the accused persons and PW 1 conversing about blood on the clothes of the accused persons. They told PW 1 that they were fighting among each other themselves. He asked the accused persons who was injured and there was no response.

PW 3 – CONSTABLE GCINA HADEBE

[5] This witness is a police officer based at Hluthi Police Station under the Traffic Department. He received a call about an accident that had happened at kaMziki area where a motor vehicle had stopped a few metres from a person who was lying in the middle of the road.

PW 4 – CONSTABLE M. KUNENE

[6] This witness stated how he proceeded to hospital since he was investigating the case. He then proceeded to arrest accused 1 and handed him over to the Criminal Investigation Department.

PW 5 – DR. KOMMA REDDY

[7] This witness carried out the post mortem. He stated that the cause of death was as a result of blunt force object being inflicted on the deceased's head.

PW6 – DR. I LUNGA TSHAKAYA

[8] This witness examined and treated the wounds on the deceased's body. He stated that the injuries could be as a result of a trauma assault or that the deceased fell down and hit himself.

PW 7 – DETECTIVE CONSTABLE ERNEST SIBIYA

[9] This witness received a report from PW 3 about the incident. He carried out his investigation by interviewing the three suspects. He took the clothes the suspects were wearing and also applied at Nhlangano Magistrate Court to draw blood from the suspects for purposes of forensic analysis.

PW 8 WARRANT OFFICER MOTJILE ODUETSE CHRISWELL

MAKAPAN

[10] PW 8 is a forensic officer. He works for the South African Police Service. He analysed blood samples and exhibits that were brought to his office for purposes of DNA analysis. He told the court that his findings were that the DNA results from the T. shirt, (RSPEL – 21855), T. shirt (RSPFSL – 21852) and a pair of trousers (ESPFSL – 21820) matched the DNA results from the reference sample. The T. shirt that had blood stain belonged to accused 2, Siphon Mandla Dlamini and the other T. shirt and trouser belonged to the deceased.

PW 9 – DETECTIVE SERGEANT ENOCK TSABEDZE

[11] This witness is a scenes of crime officer. He took photos of the scene and compiled an album. He handed same to court after taking the court through it.

[12] The Crown then closed its case.

DEFENCE

ACCUSED 1 AND 3

[13] Accused 1 and 3 decided not to lead any evidence. They then closed their case.

ACCUSED 2

DW 1 – SIPHAMANDLA DLAMINI

[14] This witness stated that they went to Mnotfweni Tavern on the day of the incident. It was around 2000 hours and the three accused were getting ready to leave. They then left and just a few metres from the Tavern, they found Mancoba's car parked a few metres from where the deceased was lying; This was at the centre of the road. The headlight of Mancoba's car shone on the deceased. The police were called to the scene. They arrived and asked the accused persons to help them take the deceased to hospital. They assisted and on the way from hospital the police did not drop them but took them to the police station where they were detained and later investigated. The police later told accused 2 that he had assaulted the deceased and this witness denied that. The witness explained that the blood stain that was found on his T. shirt resulted from their carrying of the deceased to the hospital. He might have been stained during that process. Later they were taken to the Nhlangano Magistrate's Court and remanded in custody pending their appearance at the High Court to apply for bail.

[15] On cross examination, it was put to this witness that had come there was no blood in his hands if it is true that might he have been stained when they were asked to carry the deceased into the car that took him to hospital. On the issue of their disappearance after leaving the tavern as narrated by PW 1, this witness responded by saying he does not know that. On the issue of the

blood stains being seen before the police asked them to help load the deceased, the witness stated that it was first seen after they had come back from hospital.

[16] Accused 2 then closed his case.

THE PARTIES' SUBMISSION

The Crown

[17] It states that PW 1 stated how accused 3 pushed the deceased who fell and hit the window seal and bled. PW 1 wiped the blood from the floor. The deceased left the tavern and all the accused persons disappeared. When they came back at a later time, PW 1 noticed blood on accused 2's T-shirt. He asked the accused as to what had happened. Accused 2 responded by saying that they were fighting each other. PW 1 also says that he noticed that there was blood in the hands of accused 1.

[18] When PW 1 left for home, he found the deceased lying in the middle of the road and there was a car with its lights on not far from where the deceased was lying.

[19] PW 2 was on duty at the Tavern. He heard someone talking about blood inside the Tavern. He proceeded to where the talking was coming from and he saw the three accused persons. PW 1 was asking the accused persons about the blood on the clothes of accused 1 and 2. They told PW 1 that they were fighting among themselves. He further asked who was injured and there was no answer provided.

- [20] The Crown submits that it has proved a case against the accused persons. The accused foresaw the possibility of death resulting from their action. Accused 3 pushed the deceased whilst inside the Tavern and the deceased was injured on the head after falling on a concrete window seal. There is also evidence that after the deceased left the Tavern, the accused persons followed him. PW 8, who is a Forensic Analyst, told the court that the blood samples matched the clothes that were submitted for DNA analysis particularly the blood on the T. shirt worn by accused 2. It matched that of the deceased. The Crown then submits that the blood that was found on the accused's clothing was not as a result of accused 2 and 3 having assisted the police to lift the deceased to the police motor vehicle.
- [21] The accused had the intention to murder in the form of *dolus eventualis* in that they foresaw the possibility of the death of the deceased and notwithstanding such foresight, went ahead and killed the deceased.
- [22] The Crown submits that the accused persons committed the crime in furtherance of a common purpose which is defined as instances where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise and then each will be held responsible for the specific criminal conduct of one of their members which falls within their common design.
- [23] The Crown finally submits that the evidence before court is not circumstantial. In the event the court concludes that it is circumstantial, the inference to be drawn is that the facts or evidence excludes any other

reasonable inference other than that the accused persons caused the death of the deceased.

THE ACCUSED'S CASE

1ST AND 3RD ACCUSED

[24] Counsel for accused 1 and 3 states that PW 1 gave evidence of the events leading to the deceased suffering injury at the tavern. Accused 3 pushed him after the deceased refused to give accused no. 3 the E1.00 he was asking for. This witness was also intoxicated and he cannot recall some of the events. It is also the 1st and 3rd accused's case that the police never attempted to get samples from the tavern to determine if indeed that blood belonged to the deceased.

[25] PW 6 (Dr. Komma Reddy) testified that the deceased had a wound in his skull of about 2.5 cm deep. PW 9, the Investigating Officer, stated that upon examining the wounds on the victim, he could not tell of its nature because the deceased was already at the mortuary.

[26] PW 1 and PW 3 gave evidence that accused no. 2 and 3 assisted in loading the deceased into the police van when transporting him to hospital. They also off loaded him on arrival there. The deceased had blood although the source could not be identified. Counsel submits that it is not clear as to how the blood on the accused's clothes came to be there. It is possible that it was as a result of the injury suffered by the deceased when he fell at the tavern. It

is also possible that same was as a result of the on loading of the deceased when same was taken to hospital. It is also possible that it came from the offloading of the deceased at hospital. The clothes that were taken for forensic evidence were taken following the scenario at the tavern and the transportation of the deceased to hospital.

[27] Counsel submits that the prosecution relies on circumstantial evidence. Since there is more than one possibility as to how the murder might have occurred, including that the deceased might have been knocked down by the car that was found on the road prior to the deceased being taken to hospital, and that there was no thorough investigation of the accident, the only reasonable thing to do is to acquit and discharge accused 1 and 3. There is also doubt on what really happened because there is a possibility that the deceased fell on his own since he was drunk.

2ND ACCUSED

[28] Accused 2's counsel states that none of the nine (9) witnesses implicated accused 2 and that he colluded or acted with others in furtherance of a common purpose as per the indictment. The court is obliged to make an inquiry as to whether the evidence adduced by the Crown does in anyway connect the accused 2 to the commission of the offence. There should be minimum evidence upon which the accused may be convicted at the end of the trial.

[29] Counsel further submits that when analysing the evidence of all the witnesses, it becomes apparent that the Crown relies on circumstantial evidence in that the blood obtained from the clothing of the accused links him to the murder. This cannot hold for the following reasons:

(a) The deceased was injured inside the bar and blood came out. It was wiped out by PW 1. All the accused persons were inside the bar when this happened and it was at night;

(b) When the deceased was found by the road, it was accused 2 who lifted him up and put him in a vehicle together with the police. The deceased was bleeding. The same thing happened when the deceased arrived in hospital.

[30] Finally, counsel for accused 2 submits that carrying an injured man whilst the accused was drunk exposed the accused to being stained by the blood of the deceased. Therefore the circumstantial evidence sought to be relied on by the Crown cannot hold since circumstantial evidence relies on inferences. The inference sought to be drawn must be consistent with all proven facts and that the proven facts should be such that they exclude every reasonable inference drawn from them save for the one sought to be drawn.

COURT'S CONCLUSION

[31] The court has come to the conclusion that the Crown has failed to make a case against accused 1 and 3. There is nothing that links them to the commission of the offence. The evidence of PW 1 establishes that it was accused 3 who pushed the deceased and the deceased hit the window seal

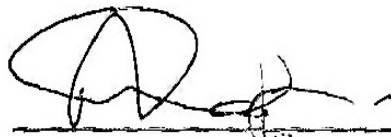
and was injured on his head. This took place at the Tavern. The witness continues to state that the accused then disappeared and later came back. The witness noticed blood on the T. shirt belonging to accused 2. The Crown, in its submission stated that the accused persons followed the deceased, hit him and later placed him in the middle of the road so as to create the impression that he had been bit by a car.

[32] PW 1 never said that the accused persons followed the deceased. He only said the accused persons disappeared and later resurfaced. The court is inclined to agree with counsel for 1st and 3rd accused that there was more than one possibility of the cause of death of the deceased. One possibility is that when he hit the window seal the damage to the head was too much. Dr. Komma confirms that the cause of the death was as a result of a blunt force object. No other injury to the body was found. There is also a possibility that he over bled and then fell on his own along the way home and died. After all the accused and the deceased were all drunk. There is also a possibility that the trouser and sneakers of accused 1 was smeared by blood inside the tavern. There are various explanations that can be offered and no inference can therefore be drawn from the facts to make a case for the Crown based on circumstantial evidence. The Crown cannot therefore rely on circumstantial evidence. To compound the case further, the DNA expert only took blood from accused 2's T. shirt and there was no blood taken from accused 1's trouser and takkies.

[33] It is this court's conclusion that accused 1 and 3 stand acquitted and discharged of murder.

[34] On the issue of accused 2, the court comes to the conclusion that he is acquitted and discharged of murder because there are various explanations that can be offered in relation to the T. Shirt being blood stained. The same explanations the court alluded to with respect to accused 1 and 3 apply with equal force with respect to accused 2.

[35] Accused 2 is accordingly acquitted and discharged of murder.

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

FAKUDZE J.

JUDGE OF THE HIGH COURT

Crown: Mr. Mdluli

Accused 1 & 3: Hlophe N.

Accused 2: Mr. Nzima