



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 487/2015

In the matter between

REX

V

SIBUSISO DUNN

Neutral citation: *Rex v Sibusiso Dunn (487/15) [2023] SZHC 17 [2023]*
(16th February 2023).

Coram : Tshabalala J

Heard : 04/06/2020

Delivered : 16/02/2023

Summary: Criminal law murder – criminal law – defence of self defence.

The Accused is charged with murder wherein he pleaded not guilty, and raised self-defence.

Held: Defence of self-defence is established and upheld. Accused is accordingly acquitted and discharged.

JUDGMENT

- [1] The Accused stands charged with murder it being alleged that on or about the 14th November 2015 at or near Ludzeludze in Manzini region, he unlawfully and intentionally killed Wandile Carlos Ngwenya.
- [2] The Accused pleaded not guilty to the charge. The Crown led evidence of four witnesses. The Accused does not dispute stabbing the deceased but says acted in self-defence against attack with a bottle by the deceased.
- [3] PW1 Mandlenkhosi Gcina Mdluli said that he was in the company of the deceased Wandile together with Bongani and two other friends drinking alcoholic beverages at a Msane homestead, where alcohol was sold. One Sjabu who was deceased's girlfriend came to the bar in the company of Accused, and proceeded to the deceased and hugged him, and then left. One of PW1's friends Bongani went out of the bar and returned crying. He told them that the Accused slapped him. PW1 and friends went out to investigate whereupon Accused threatened to beat them up, but was dissuaded by one Phinda. Thereafter Accused and Sjabu left the premises.
- [4] The Accused returned within 10 minutes and found PW1 and friends sitting outside. PW1's evidence is that Accused went straight to the deceased and pushed him. Deceased cried out and said Accused had stabbed him. Deceased fell and was bleeding from the abdomen. The Accused fled the scene. PW1 and others conveyed deceased to the police station and subsequently to hospital. PW1 denied under cross examination that deceased attacked Accused with a bottle before he was stabbed. He denied that Accused returned to the drinking joint to fetch his cellphones and said he came to attack deceased, since he went straight to him. It was PW1's

evidence under cross examination that before Accused left with Sjabu Accused had threatened deceased with assault. He denied that he and friends encircled Accused on his return when he went to Phinda to fetch his phones.

- [5] PW2 Banele John Dlamini stated that he was at Msane's on the 14th November 2015 around 01:00 hours drinking together with PW1, deceased, Wandile Soko, Sicelo and Bongani. The Accused came with Sjabu and the latter proceeded to deceased, hugged and kissed him. Deceased pushed Sjabu away. Accused went out with Sjabu followed by Bongani. Bongani returned crying, said Accused assaulted him for asking him why he took deceased's girlfriend. PW2 and others (except PW1) including deceased went out and found Accused seated with Sjabu. Deceased asked Accused why he assaulted Bongani. Accused got angry and wanted to fight the group of friends but was stopped by Phinda. Thereafter Accused and Sjabu left Msane's homestead.
- [6] About 10minutes later Accused returned whereupon PW2 and friends stood up to leave on the advice of deceased. They were intercepted on their way by Accused, who started a quarrel with deceased. He accused the group of disrespect, pushed the deceased causing him to fall on top of car bonnet. PW2 heard deceased with words that "*he had stabbed me.*" Thereafter Accused fled the scene. Deceased was bleeding from stomach.
- [7] It was put to PW2 under cross examination that Bongnai started the conflict by accusing Accused of taking deceased's girl, and that the accusation triggered the trouble that followed. PW2 denied under cross examination that Accused did not see Sjabu hugging or kissing deceased. PW2 denied this and asserted the hugs / kiss was the cause of Accused's anger.

- [8] PW2 denied under cross examination that deceased hit Accused with whiskey bottle on the head. He denied that on Accused's return Bongani threatened Accused and that the group encircled him. PW2 said they were scared of Accused hence they rose to leave when he returned but he walked through them or in between them.
- [9] PW3 Sicelo Soko was part of the group that was drinking with PW1 and PW2 at Msane's. PW3 reiterated previous two witnesses' testimony that Accused came with deceased's girlfriend and the latter hugged or kissed deceased. Bongani told them that Accused of slapped him outside the bar. The friends including deceased and PW1 went to inquire from Accused why he slapped Bongani. Accused reacted with anger and wanted to assault them. Phinda calmed the situation, and Accused left with Sjabu only to return alone a few minutes later.
- [10] It is PW3's evidence that on his return Accused found the group seated outside, and started throwing threats. There was a verbal showdown between Accused and the group. PW3 saw Accused pushing deceased after which deceased cried that Accused had stabbed him. Deceased was bleeding from stomach. Accused left the scene. Phinda was not close by when deceased was stabbed.
- [11] It was put to PW3 that the barman Clifford Shabangu will say that while collecting bottles he saw Accused being hit with a bottle, after which he heard utterance by another that he had been stabbed. PW3 said he never saw Clifford collecting bottles. PW3 denied that Accused returned to fetch cellphone from Phinda because he went straight to PW3 and company. PW3 confirmed there was verbal exchange between Accused and the group before deceased was stabbed. PW3 denied under cross examination that Bongani

(Mhlanga) uttered threats against the Accused. In the exchange between Accused and the group was, according to PW3 that the Accused told the group that he was not afraid of them because they were young and few in number. The group responded that they were not scared of the Accused either.

[12] PW4 Dr Reddy was the police pathologist stationed at police Headquarters in Mbabane. He concluded post mortem examination on deceased's body and made a findings that death was caused by stab wound to the trunk. He explained that this particular injury induced complications that led to deceased's death. He noted the following antenortem wounds:

1. Infected wounds with pus on the front and middle of portion of left side of chest.
2. Healing sutured wound in the epigastric region extending to the chest.
3. Healing sutured wound on the abdomen in the midline.

[13] PW4 noted that the deceased was operated, but still the complications occurred. The post mortem report was handed in with no objection from the defence and was marked Exhibit "A". It was PW4's evidence in chief and under cross examination that had the infection not occurred possibly death would not have occurred. He also said without the stab wound there would have been no complications or the need to operate on the deceased.

Defence case

[14] The Accused testified in his defence as DW1. On the night of the incident he arrived at Msane's in the company of his girlfriend Jabu Zikalala and a lady friend of Jabu. At Msane's he joined Wandile Dlamini (who had earlier called on the phone) in the forecourt where they sat and chatted. Accused

left Wandile with Jabu and went to meet Phinda Nkambule who he found with Phinda Dlamini. Accused moved further away from where Wandile Dlamini and Phinda Nkambule were sitting.

- [15] Accused then saw deceased arriving with his friends – Sicelo Soko, Bongani, and others, about eight of them. Accused went to sit with Phinda Nkambule. She Simphiwe who was drunk came and told Accused that something was happening to Jabu. Accused who was by that time also drunk directed Simphiwe to fetch Jabu, which he did. In response to Accused inquiry Jabu said nothing happened to her. After a while Jabu left Accused and went to join her friend on the other side.
- [16] Simphiwe came and again reported to Accused that something was happening to Jabu. Accused went to where Jabu was. Accused found Bongani Bhembe with group of friends standing outside the gate. Accused asked what happened or what was happening. Bongani responded that he was not scared of the Accused, even though he was a weight lifter, and a heated argument ensued between the two. Bongani pushed Accused on the chest who responded by touching his cheek. Bongani's friends came and told Accused that they were not scared of him. A verbal confrontation ensued between Accused and the group with Accused getting angry Phinda Nkambule calmed them down.
- [17] Accused never saw deceased and Jabu hugging. After the row had calmed down Accused left Msane's drinking joint for his home with Jabu. As they left the group hurled insults at them.
- [18] Accused left Jabu in the house and told her that he was going to Msane's to get his phones from Phinda Nkambule.

[19] At ka-Msane's Accused came upon Phinda Nkambule conversing with Sicelo Soko. The group was across the road from Msane's gate. Accused heard voices saying "*there he comes...*" or words to that effect. He also heard voices ridiculing him for lifting weights. Bongani Bhembe stood in front of the Accused and demanded that he must do to him what he did earlier. Bongani and Accused then engaged in an argument. The group of about eight came and encircled Accused. Deceased came straight to the Accused and asked him what he wanted to do. Before Accused could respond, deceased hit him with a bottle, causing him to lose balance and fall. The entire group charged towards Accused. Deceased hit the Accused with a whiskey bottle on the head causing him to bleed. When Accused tried to rise they all hit him with bottles, mostly on the arm that he used to block the blows. The Accused then took out his knife and stabbed the deceased. Upon being stabbed deceased moved away from the Accused. Accused left for his home. He woke up his grandmother and told her he had injured a person. He phoned his mother and told her the same. Back at his house he demanded answers from Jabu why his own village boys attacked him.

[20] Fearing that he might be attacked Accused left Ludzeludze and went to spend the night at his mother's residence at Mbekelweni. He sought treatment for swollen arm from traditional healer. His brother shaved off hair from his head injury, after which he and decided that he did not need hospital treatment.

[21] The Accused testified he did not run away from the mob attack because he was drunk and his attackers were many in number. He did not take out or use the knife at the first instance of attack, he only used it to defend himself, and deceased was the closest to him at the time. His attackers only stopped

assaulting him when deceased announced that he had been stabbed. The Accused stabbed deceased only once with the result that he was able to escape.

- [22] Prior to the confrontation outside the gate that ended with stabbing of deceased, the latter had not at any time done anything to show claim over Jabu. Accused never quarrelled with deceased before the latter attacked him with a bottle.
- [23] Accused denied under cross examination that he targeted deceased for assault with the knife. He denied that he armed himself with a knife when he returned to Msane's. Accused maintained his evidence in chief that he first armed himself with the knife when he went to fetch Jabu from Boyane, 3 km away from his home, as protection from thugs. He said he anticipated that he would return home late.
- [24] DW2 Clifford Shabangu was a barman at ka-Msane Shebeen Ludzeludze in 2015. He was on duty on the night that the deceased was injured. This witness testified that on the night in question he saw the Accused surrounded by a group of boys arguing about something. The witness was about 15 metres away from the group, collecting empty bottles. He saw the deceased assaulting the Accused with a bottle on the head. Upon realising that trouble was brewing he then closed the tavern. The group of boys surrounding Accused were deceased's friends, each carrying beer bottles from which they had been drinking. DW2 denied under cross examination that he had been schooled by Accused on his evidence.
- [25] DW3 Phinda Nkambule testified that on the night in question he was together with Accused at Msane's. Accused was with his girlfriend. An

argument started between Accused and a young man who had prior relationship with Accused's girlfriend, a long time ago. Following the argument the DW3 advised the group against arguments after which Accused left for his home.

- [26] Later Accused returned to fetch his cellphones from DW3. Before Accused could reach DW3 the boys surrounded the Accused blocking his way to the witness. The group complained that the Accused called them boys. Deceased assaulted Accused with a whiskey bottle. DW3 later heard that deceased had been stabbed. He did not witness the stabbing. Accused was bleeding on the head as a result of assault with a bottle.

Analysis and Findings

- [27] The Accused has raised defence of self-defence for stabbing the deceased on the abdomen. It is also submitted on behalf of the Accused that there was *novus actus interveniens* which broke the causal connection (between stabbing and death), on the basis of which the court should find that the stabbing of deceased by Accused was not the cause of death, but the infection incurred during treatment in hospital was the cause of death. I will proceed to deal first with self-defence as a defence advanced by the Accused.
- [28] The evidence led by the Crown on circumstances under which the Accused stabbed the deceased are in stark contrast to the version and evidence presented by the Accused. According to the Crown the Accused returned to ka-Msane with the sole purpose of assaulting the deceased. That the deceased was a target of Accused's wrath for the reason that they shared a girlfriend Sjabu. The Accused denies this and states that he only returned to ka-Msane for the purpose of getting his cellphones from DW3 Phinda Nkambule.

[29] The Crown witnesses testified that the Accused went straight to deceased and pushed him after which deceased cried that Accused had stabbed him. This version is denied totally by the Accused who testified that when he returned to ka-Msane deceased and his group of friends were outside the gate and that they engaged in an argument with him. Accused states that DW3 was in the vicinity and when he tried to get to him deceased confronted him and attacked him with a bottle and that his friends encircled the Accused. Accused testified further that deceased and friends were armed with bottles. It is Accused's testimony that deceased struck him in the head with a bottle as a result of which he fell. Deceased's friends charged towards him, deceased hit him again with a bottle on the head from which injury Accused bled. Accused says he was attacked by deceased friends all at the same time. To defend himself he stabbed the deceased who was closest to him. It was after stabbing the deceased that deceased's friends paid attention to the deceased and Accused was able to escape from further attack.

[30] No onus rests on the Accused to convince the court of any explanation he gives. If he gives an explanation, even if the explanation is improbable... if there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal. This is the position of our law that has been adumbrated in many court decisions. See **The King v Velile Sibusi Mnisi**.

¹ See also **Bhutana Paulos Gumbi v Rex** ².

[31] The Accused's defence of self-defence will fail only if it can be shown beyond reasonable doubt that what the Accused did was not by way of self-defence. From the evidence led by both the Crown and the defence, there was rivalry between the Accused and the deceased both of who claimed

¹ 190/2008 [2012 SZHC] at paragraph [31]

² 24/2012 [2012] at para [19]

Sjabu as their girlfriend. It is in this context that it is difficult for the court to dismiss Accused's evidence which is supported by that of DW3 that deceased attacked Accused with a bottle, that the Accused was encircled by deceased's friends who also charged at him armed with bottles. In accepting defence explanation the court is mindful of trite law that one is entitled to use commensurate force toward off an unlawful attack. I find that the Crown has failed to discharge the onus that lies on it to disprove Accused's claim of self-defence.

[32] I am unable to find the Accused guilty of murder or any lesser offence. There is no need in the circumstances to consider the other defences raised, that of *actus interveniens*.

The Accused is acquitted and discharged.

A handwritten signature in black ink, appearing to read 'D Tshabalala', written over a horizontal dashed line.

D Tshabalala
Judge

For the Crown: K. Mngomezulu (DPP's Chambers)
For the Defence: N. Jele (Robinson & Bertram Attorneys)