

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 228/2018

In the matter between

REX

V

BHEKI BRIAN SIMELANE

Neutral citation: *Rex v Bheki Brian Simelane (228/18) [2023] SZHC 104 [2023]*
(26 April 2023).

Coram : Tshabalala J

Heard :22/04/21;31/05/21;07/02/23;09/02/23;28/03/23;18/04/23

Delivered :26/04/23

Summary: Criminal law and procedure: The accused pleaded not guilty to murder. The crown led evidence which showed from the onset that he assaulted the deceased together with another person who was separately charged and convicted for the offence. The crown waited until the start of defence case to seek amendment of the indictment to allege common purpose. The application for amendment was opposed on the basis of prejudice arising from the need to recall crown witnesses for further cross examination on the new aspect of alleged common purpose.

Held: The law allows amendments to the charge at any stage of trial before judgment, subject to considerations of prejudice to the accused. The nature of

prejudice in this case was not so much to the accused defence per se, but the need to recall crown witnesses, resulting in unduly prolonged trial. The accused had been in custody, awaiting trial since 2018, and the trial had dragged long up to the defence case.

Criminal law: The evidence is clear that both the accused and the deceased stoned the deceased, inflicting the injuries that led to his death. The cause of death according to the pathologist was due to multiple of injuries. The accused was therefore liable for his part in the commission of the offence.

JUDGEMENT

- [1] The Accused pleaded not guilty to an indictment framed in the following terms:

“In that upon or about the 7th August 2010 and at or near Nhlanguano area in the Shiselweni Region, the said Accused person, did unlawfully and intentionally kill one SIZWE NGWENYA by assaulting him with stones kicks and fists several times on the body and head and thus committed the crime of Murder”

- [2] The death of the deceased Sizwe Ngwenya was proved by means of a post-mortem examination Report, compiled by police Pathologist, Dr. Komma Reddy, at Mbabane on the 11 August 2010. The report was admitted by consent as Exhibit “A”, without the need to call oral evidence.

[3] According to the report, the cause of death was "*due to multiple injuries.*"

[3.1] In terms of pathological findings the following anti-mortem injuries were present:

1. *Lacerated wound 2x1cm on left parietal eminence of head.*
2. *Lacerated wound of 3x3cms on middle of back of the head.*
3. *Lacerated wound of 5x3cms and contusions of 3x2cm, 3x3cms on right cheek.*
4. *Abrasion of 3x2cms on the right thumb.*
5. *Abrasion of 4x1cm on the thumb of left thumb.*
6. *Contusions of 12x7cms and 11x5cms on the abdomen.*

[3.2] The pathological findings also noted *fractured left parietal and occipital bones; extra-dural, sub-arachnoid and intra cerebral haemorrhage; ruptured thyroid; +300ml blood present in left and right plural cavities; ruptured left upper lung lobe, rupture spleen, among others.*

[4] When trial commenced on the 22nd April 2021 the Crown led two eye witnesses to the assault of the deceased, namely PW1 Thokozani Mdluli and PW2 Nkosinathi Hlatshwayo. Both witnesses testified that the deceased was fighting with two men who pelted him with stones. Both witnesses testified that the fight ended when the two men threw an unidentified object at the deceased after which the deceased fell and the two assailants disappeared into the night.

[5] The trial was subject to two formal interlocutory applications before the close of the defence case. Firstly, the defence applied for discharge of the

Accused at the close of the Crown case in terms of Section 174 (4) of the Criminal Procedure and Evidence Act / 1938 as amended (CP&EA). The application was opposed by the Crown.

[6] The application for discharge of the Accused was dismissed, the court having found that the Accused had a case to answer on the basis of the evidence led.

[7] Subsequently, before the defence opened its case the Crown applied for amendment of the indictment in terms of Section 154 of the Criminal Procedure and Evidence Act. The proposed amendment sought to insert the phrase that "*The Accused together with one Simanga Mabaso, acting jointly and in furtherance of a common purpose...*"

[7.1] The application for amendment was opposed and the court was furnished with written heads of argument. The application was dismissed based on the prejudice that it would visit to the Accused. Thereafter the defence closed its case without leading any evidence. The effect of this is that the court should decide the matter based solely on the evidence led by the Crown, in chief and as elicited under cross examination.

Crown case

[8] PW1's evidence was that the two men who engaged in throwing stones with the deceased were the accused and one Simanga Mabaso, both of who were well-known to the witness. PW2 on the other hand identified the three people as Simanga Mabaso, the third person whose identity he could not ascertain. There is no dispute that the Accused as identified by PW1 was the third person involved in the fracas. What the Accused appears to dispute

is his role, as revealed during cross examination of PW3, Detective Constable Simphiwe Ndlangamandla of Nhlangano police station. It was put for the first time to this witness that the Accused would tell the court that it was Simanga Mabaso who committed the offence and not the Accused. It was further put to PW3 that the Accused would tell the court in his defence that his role on the day had only been to broker peace between the deceased and the said Simanga. Accused version put to this witness was that the deceased was the one who started the fight against Simanga and the Accused tried to broker peace. Notably this version was only put to PW3. The same was not suggested to the eye witnesses, PW1 and PW2. It is necessary to set out the evidence of PW1 and PW2, in chief and under cross examination.

- [9] PW1 Thokozani Mdluli, testified that on the material day around 22:30 hours, he and the deceased were together with one Nkosinathi Hlatshwayo, at Phoenix bar in Nhlangano. The deceased got involved in a fight with the Accused's brother one Simanga. PW1 intervened and separated the two and pulled Simanga away from the bar across the road.
- [10] While standing next to Nkosinathi's car PW1 heard sound of a stone hitting the car. The stone was thrown by Simanga directed to the deceased. Deceased left PW1 and took the direction towards the police station. Simanga and the Accused chased after the deceased, throwing stones at him. The stones also hit passing motor vehicles. PW1 followed closely behind deceased's assailants at a distance of about 14-15 metres.
- [11] When the deceased reached the police station gate, the deceased turned and moved towards his assailants. Before the deceased reached them, they threw something at the deceased and he fell to the ground. Accused and Simanga came to the deceased and both proceeded to kick him all over the body and

the head. Thereafter they fled the scene. PW1 went to make a report at the police station. He and the police conveyed the injured deceased to Nhlangano Health Centre. PW1 learnt from the police the following day that the deceased had died.

[12] PW1 testified that he was able to observe the events clearly with help of light from the nearby filling station. He knew Simanga way back from school, and the Accused from Mathendele.

[13] PW1 said under cross examination that he did not know what object was thrown at deceased that caused him to fall. He did not know exactly between the Accused and Simanga, who threw the object.

[14] PW2 Nkosinathi Hlatshwayo was a resident of Nhlangano, self employed as a taxi operator. His version of the incident is that on the day in question, at around 22:00 hours he had parked his car next to Phoenix bar. He was sitting in the car with PW1 when he heard something hit his car. He got out to check, and saw three people fighting. They were Simanga, deceased and another person he did not know. He saw Simanga assaulting the deceased. The fight spiralled into throwing of stones at each other. Ultimately, as the fight proceeded, he saw deceased chasing after Simanga and the unidentified person, towards Puma Filling station.

[15] PW2 saw deceased fall down after being hit with a stone. Deceased fell down on the road by the bus stop, next to the filling station. PW2 saw Simanga and the unidentified companion get close to the fallen deceased, but did not see what they did to him. They then left the deceased. PW2 made the observations from where he was at Phoenix bar, at estimated distance of about 100 metres. The view was clear with illumination from the Filling

station. Thereafter, both PW2 and PW1 went to the police station. The former reported about the damage to his car and the latter about the deceased. PW2 recorded a statement to the police concerning what he saw. He recorded a second statement concerning deceased injuries the following day. He related to the police the same version he was telling the court in evidence.

[16] PW2 checked on the deceased the next day and noted an injury to his eye. He learnt from police that afternoon that the deceased died. He knew deceased from school in Nhlanguano, they also played soccer together. He knew Simanga from Nhlanguano where he sold plastic bags outside Builders Supermarket. PW2's testimony under cross examination became somewhat hazy as he gave affirmative answers to all questions and suggestions, such as, that he was with PW1, and that he did not see who went to the fallen deceased.

[17] PW3, Detective Constable Simphiwe Ndlanguamandla testified that following the death of the deceased his assailants were not immediately apprehended. Accused and one Simanga Mabaso were implicated for the assault of the deceased. First to be apprehended, tried convicted and sentenced for the offence was Simanga Mabaso in 2012, while a warrant of arrest was still pending against the Accused.

[18] The Accused was eventually arrested in 2018 in Manzini, transferred to Nhlanguano police station where he was charged with murder of the deceased.

[19] It was put to PW3 under cross examination that both eye witnesses PW1 and PW2 did not know who inflicted the fatal blow on the deceased, to which he responded that the accused and Simanga acted jointly in common purpose in the assault of the deceased. It was also put to this witness that the Accused

denied killing the deceased. That he would tell the court that it was Simanga who killed the deceased and that the Accused's role was to broker peace between the deceased who was the aggressor and Simanga.

Defence case

[20] The Accused gave no evidence nor led witnesses in his defence. Defence case was articulated in closing submissions made on his behalf, the thrust of which seems to be that none of the eye witnesses testified on whether it was Simanga Mabaso or the Accused who inflicted the fatal blow, and the lack of allegation of common purpose in the indictment. This is against the backdrop that Simanga Mabaso was charged and convicted and is serving sentence in respect of the killing of the deceased. This is per the evidence of PW3 above. The defence argues that witnesses did not state that the Accused was the one who killed the deceased, nor did the witnesses state precisely who between the Accused and Simanga hit the deceased.

[21] The defence submits that in the absence of allegation of common purpose between the Accused and Simanga, the Crown has failed to prove the guilt of the Accused, more so given that Simanga has been convicted on the offence.

Analysis and findings

[22] It is important to highlight that the pathologist's report makes no reference to a particular fatal blow or injury on the deceased. As indicated above the post mortem report states that the cause of death was due to multiple injuries, meaning that a combination of different injuries inflicted on the deceased, not just one blow, contributed cumulatively to the death of the deceased. It would therefore be a fallacy to suggest that absence of evidence specifying

the fatal blow constitutes a deficiency in the evidence on who killed the deceased between his two assailants.

[23] The court's finding is that crown evidence proved beyond a reasonable doubt that Simanga and the Accused ganged up against the deceased, chased after him, throwing stones at him. Even if the deceased had started a fight with Simanga, as suggested to PW3 under cross examination, it does not detract from the fact that the Accused actively, intentionally, pursued and assaulted the deceased at the time that he was fleeing from him and Simanga. The Accused assaulted the deceased with kicks and fists after he fell to the ground.

[24] The fact that Simanga was charged and convicted for his role in the assault of the deceased, in no way exonerates the Accused from criminal liability for his role in the assault of the deceased, for inflicting injuries that led to his death.

[25] The court accepts the evidence of the crown as detailed by PW1 and corroborated to some extent by that of PW2. PW1's evidence was clear and more detailed than that of PW2. The latter appeared to be reluctant to incriminate the Accused. He was more acquiescent to defence suggestions under cross examination. However, his scanty evidence can be explained by the fact that unlike PW1 who followed closely behind the Accused and Simanga as they chased after the deceased, PW2 on the other hand remained at the place where the fight started and observed the events from farther estimated distance of 100 metres away. Both witnesses testified that at some stage, which was after the deceased reached the police station gate, decided to confront the two assailants, who retreated towards the filling station. The evidence shows that upon turning the tables and chasing the assailants away,

they subsequently regrouped and threw an object or objects at him, causing him to fall, at which point they savagely kicked and punched him on the ground, before fleeing. The two were not arrested until several years later. first to be arrested was Simanga, and much later, the Accused person was apprehended.

[26] From careful consideration of the indictment and its particulars, juxtaposed to the evidence as summarized above, the lack of allegation in the charge that Simanga and Accused acted in common purpose is in my view, of no consequence. Independent liability of the Accused based on his direct role in the assault per the positive, unchallenged evidence of PW1, has been sufficiently established. The key factor is that no single blow caused the death of the deceased, but a combination of injuries inflicted by both the Accused and Simanga contributed to the death. The finding of the pathologist was not challenged by the defence. The court is satisfied with the finding which is consistent with the evidence of PW1 that the Accused and Simanga pelted the deceased with stones. The Accused, together with Simanga subsequently kicked and punched him after he fell to the ground. It is my view that nothing turns on the identity of the last object thrown at the deceased that felled him. Neither is it relevant who between the Accused and Simanga threw that object. This is because defence Counsel's reference to this final attack with unidentified object as the fatal injury is misconceived, for the reasons early stated on the cause of death determined by the pathologist.

[27] The court accept the clear, unambiguous and undisputed evidence of PW1, corroborated by that of PW2, as credible. This evidence, coupled with the findings contained in the pathologist's report, sufficiently establishes the guilt of the Accused in the commission of the crime charged. The Accused

has no duty to prove his innocence. It is the duty of the crown to prove its case beyond a reasonable doubt. The Accused elected to give no evidence in his defence, leaving the court to decide the matter on the evidence led by the crown. The court finds that the guilt of the Accused for murder has been proved beyond a reasonable doubt.

[28] It is not established that the Accused had a direct intention to murder the deceased. However, it is evident that he should have foreseen that his continued attack and assault on the deceased with stones, kicks and fists could lead to his death, but he nevertheless continued, indifferent whether death resulted or not. The Accused therefore had *mens rea* in the form of *dolus eventualis*. For *dolus eventualis* the inquiry is “whether the actual accused himself / herself foresaw the consequences of his or her act, not whether a person in the position of Accused ought to reasonably have foreseen them.” See **Tiki Sihlongonyane v Rex**.¹

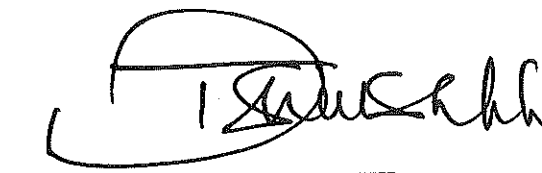
[29] In **Maphikelela Dlamini v. Rex** the court stated, per the judgment of Dendy Young JA ²:

“As I understand the law in Swaziland, the South African concept of dolus eventualis has been stated this way: if the assailant realises that the attack might cause death and he makes it not caring whether death occurs or not, that constitutes mens rea or the intention to kill. And the way this test has been applied is whether the assailant must have realised the danger to life.”

¹ Supreme Court Case No. 40/97.

² 1979-1981 SLR 195 (CA) at 197.

[30] The Accused is accordingly found guilty of murder of the deceased.

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

D Tshabalala
Judge

For the Crown: B. Ngwenya (DPP's Chambers)

For the Defence: S. Maseko (SM Maseko Attorneys)