

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 162/23

In the matter between:

REX

Versus

DUMSANI MBHOLOFIDI GININDZA

Neutral Citation: *Rex vs Dumsani Mbholfidi Ginindza [162/23] [2023]*
 SZHC 239 (23 August 2023)

Coram: LANGWENYA J

Heard: 9, 23 August 2023

Delivered: 23 August 2023

Summary: *Criminal law-Criminal Procedure-Evidence-Failure by the accused to testify-Accused not under obligation to testify in his defence-Crown led direct evidence incriminating the accused-Not appropriate for accused to opt to exercise his right to remain silent-Crown evidence calling for an answer-Failure to answer in the face of the weight of uncontradicted evidence-Evidence sufficient to warrant conviction-Accused convicted of murder with dolus eventualis.*

JUDGMENT

Introduction

- [1] The accused is charged with murder. The particulars of the offence are that on 1 August 2022 and at Antioch in the district of Manzini, the accused unlawfully and intentionally killed Mshugu Ginindza.
- [2] At the commencement of the trial, the accused pleaded not guilty to the charge. He puts the Crown to prove all the elements of the offence.
- [3] The Crown called four witnesses to prove its case. The Crown further submitted the post mortem report and the photo album prepared by the scene of crime officers. The accused opted to exercise his right to silence and closed his case without calling witnesses.

Background of the case

- [4] The accused and the deceased are husband and wife. PW1 Nonhlanhla Ginindza is a daughter of the couple. On the weekend preceding 1 August 2022 there was a function of *kuphahla* at the Ginindza homestead. Nonhlanhla's daughter had been *tekaed* by her in laws. Nonhlanhla was sent to present a certain meat to her parental home. The meat signified that her

daughter had been married through customary law. Indeed, Nonhlanhla went to her parental home at Antioch and presented the meat to her mother. The meat in question was cooked and eaten by Nonhlanhla's mother with malume Mukele. The family discussed about the *lobola* cattle while they were in the house. The family then moved to a make-shift kitchen and continued to discuss the issue about the cattle around the fire. The accused told all and sundry that all the *lobola* cattle will come to him. Nonhlanhla enquired from the accused if he meant even the *insulamnyembeti*¹ should be given to him; the accused responded in the affirmative. The deceased was surprised when he heard the accused say he would take even the *insulamnyembeti*. The accused began to dance. It was while the accused danced that he took a burning firewood and placed it on the deceased person's legs. Nonhlanhla enquired from the accused what he was doing to the deceased. Nonhlanhla had to leave the make-shift kitchen to answer a phone call outside. When she returned to the make-shift kitchen, she found her parents fighting and they were both carrying firewood. Nonhlanhla pulled the accused away from her mother. The accused assaulted Nonhlanhla and her mother. Njengabani intervened and stopped the assault.

- [5] The accused left the make-shift kitchen and went to the house. He returned to the make-shift kitchen armed with a bush-knife and *imbora*-a stick that has an iron head. The accused assaulted the deceased with *imbora* on the arm. Njengabani intervened and disarmed the accused. It was while the accused was being disarmed that he fell face up and lost control of *imbora* which fell to the ground. The deceased got hold of *imbora* and assaulted the accused with it on the forehead.

¹ The word *insulamnyembeti* literally means to 'wipe away the tears.' It is a cow that is given to the mother of the bride when *lobola* cattle is presented to the bride's family.

- [6] Nonhlanhla sat on top of the accused and tried to diffuse the situation. Nonhlanhla wiped the blood from her father's forehead and assured him that she loved him. It was while Nonhlanhla held the accused with his right hand that the accused produced a knife from his pocket and opened it. When the accused produced the knife, the deceased person was next to the accused person. The deceased moved towards Nonhlanhla with the knife and Nonhlanhla fled the scene and went to raise an alarm at a neighbour's home. Nonhlanhla returned home in the company of other community members.
- [7] The accused went inside the kitchen where the deceased had been locked up by Njengabani for security reasons. The accused told the deceased to explain to the members of the community present there how he had been injured on the forehead. The deceased collapsed and died. Arrangements were made to take her to hospital where she was certified dead.
- [8] The *kuphahla* ceremony was held at Antioch, at the accused person's home from Friday until Monday 1 August 2022. The accused and the deceased were drunk because they had been drinking traditional home brew from Friday until Monday, 1 August 2022.
- [9] During cross examination, Nonhlanhla testified that the accused took a burning log and put it on his wife's leg. It was put to Nonhlanhla that she joined forces with her mother as her mother assaulted the accused. Nonhlanhla testified that she did not take sides but that she tried to intervene and stop the fight between her parents.
- [10] Nonhlanhla told the court that the accused was in the habit of starting fights with his wife when he returned from drinking sprees. Nonhlanhla testified that on previous occasions her mother would flee her homestead and go seek

refuge at neighbours' homes when the accused became aggressive and started fights with her.

- [11] During cross examination it was suggested that the accused will tell the court that he does not recall events of that fateful day because he was too drunk. Notably, the accused person did not testify because he asserted his right to silence. Nonhlanhla discounted this suggestion and stated that a person who is too drunk would not know to produce a knife.
- [12] PW2-Dumsani Njengabani Nkambule is a neighbour of the Ginindzas. The court heard that Njengabani was invited to participate in the *kuphahla* ceremony at the Ginindza home but he could not do so because he had to go somewhere on the weekend. He only joined in the festivities on the Monday-the day the deceased was stabbed. It is PW2's evidence that when he got to the accused person's home at around 10am on Monday, he found the accused and the deceased were drunk already.
- [13] Njengabani saw the accused stab the deceased with the three star knife which was produced in court as an exhibit. Njengabani testified that the accused stabbed the deceased underneath her breast. Njengabani took the deceased to the kitchen and locked her there because he feared that she could again be stabbed by the accused.
- [14] Njengabani testified that he saw the accused produce a knife from the pocket of his coat. Njengabani was concerned that he was not going to be able to get to the accused in time to dispossess him of the knife. Nonhlanhla shouted to the deceased that the accused had produced a knife and told the deceased to flee. The accused stabbed the deceased with the knife and chased after Nonhlanhla. Njengabani took the deceased to the kitchen and locked her

there. The deceased opened the kitchen door and tried to follow Njengabani. Njengabani again took the deceased back to the kitchen and shut the door. The accused returned from chasing Nonhlanhla and emerged at the corner of the kitchen and Njengabani fled as he was pursued by the accused. Njengabani fled towards the fields.

- [15] When the accused returned from pursuing Nonhlanhla he found that the deceased had opened the kitchen door. The accused took the deceased by her hand and led her to a group of community members all the while telling the deceased to go and explain to the community what they were fighting over. The deceased collapsed and fell to the ground.
- [16] Njengabani testified that the accused and the deceased would at times shout at each other but that he had never seen them fight.
- [17] The accused was arrested by the police at his home at Antioch on the day of the incident. When he was arrested he was cautioned in terms of the Judges rules before he was searched and a knife was found in his pocket. The knife had traces of blood. The knife was taken by the police as an exhibit in this matter. The accused was arrested and detained at Mliba police station because he was drunk. On the next day, the police introduced themselves to the accused and explained their mission to him. The accused was cautioned in terms of the Judges' rules and was formally charged with murder. The knife was handed in court and marked as exhibit 1.
- [18] It was put to the investigating officer that the accused does not recall stabbing the deceased with a knife. The investigating officer testified that at the make-shift kitchen he only found *tigici* and no objects which could have caused the deceased person's injuries. It was put to the investigating officer

that the accused denies stabbing the deceased; that the accused only pushed the deceased and she fell on tiles in front of the make-shift kitchen. The investigating officer testified that inside the make-shift kitchen there were no sharp objects.

[19] The post-mortem report was handed in by consent. It was marked exhibit A. The police pathologist determined the cause of death was due to a stab injury to the abdomen. He detailed the injuries he noted on the deceased. The Crown further tendered the photo album prepared by scenes of crime officers and it was marked exhibit B.

[20] The Crown closed its case.

[21] At the conclusion of the Crown's case the accused elected to remain silent and had no witnesses to call.

Evaluation of evidence

[22] It is common cause that Nonhlanhla and Njengabani were present at the accused person's home and they witnessed the accused assault the deceased with a burning log of firewood and with *imbora*. Njengabani witnessed the accused stab the deceased with a knife and he separated them and locked the deceased in the kitchen for her own safety and protection from further assault by the accused. Evidence before court is that at some point the couple fought and were separated by Nonhlanhla as well as Njengabani. The accused was assaulted on the forehead by the deceased with *imbora* which had fallen from the accused person's hand when he was assaulting the deceased with it.

[23] It was bilatedly disputed that the accused stabbed the deceased with a knife. The case that was put to Crown witnesses is that the accused does not recall

stabbing his wife because he was too drunk. To the investigating officer defence Counsel suggested that the accused denies ever stabbing the deceased and states that the accused only pushed the deceased and she fell on tiles in the make-shift kitchen. The investigating officer stated that inside the make-shift kitchen there were no sharp objects. The defences marshalled by the accused are, in my view, mutually ruinous. On the one hand the accused does not recall stabbing his wife because he was too drunk; on the other hand the accused recalls pushing his wife and that she fell on tiles in the make-shift kitchen. The latter defence was not put to Crown witnesses who were present when the stabbing of the deceased took place. The accused's latter defence is an afterthought.

The right of the accused to remain silent in criminal proceeding

- [24] The accused exercised his Constitutional right and elected to remain silent at the close of the Crown case.
- [25] The right to remain silent has always been acknowledged by the courts even more so under our (not so) new constitutional dispensation². However, although an accused person has the right to remain silent during the trial, the decision to do so, depending on the circumstances of the case, may not be without consequences.
- [26] The law regarding the accused's assertion of his right to silence during a criminal trial is trite and was set out by Langa DP in *S v Boesak*³ when he stated as follows:

² Section 21(9) of the Constitution Act 1/2005 states: 'A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.'

³ 2001 (1) SA 912

‘Where the accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.’ What is stated above is consistent with the remarks of Madala J, writing for the Court in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.’

[27] I agree and endorse the legal principles expounded in the cases cited herein.

Defence of intoxication and self defence

[28] The accused pleads intoxication and self defence.

[29] The defence of intoxication is regulated by The Criminal Liability of Intoxicated Persons Act⁴ (the Act). Section 2 of the Act states as follows:

‘Intoxication as a defence to a criminal charge

2 (1) Subject to this section, intoxication shall not constitute a defence to any criminal charge.

(2) Notwithstanding subsection 1 intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or,

(b) he was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) If a defence under subsection (2) is established, the accused shall be discharged if the case falls under subsection (2)(a) and if the case falls

⁴ 68/1938, section 2.

under subsection (2)(b) section 165 of the Criminal Procedure and Evidence Act, No. 67 of 1938 shall apply.

- (4) Intoxication shall however be taken into account for the purpose of determining whether an accused person had formerly any intention, specific or otherwise, in the absence of which he would not be guilty of the offence charged.

(5)...

[30] In terms of the evidence before court, the defence of intoxication does not avail the accused. This, I say because although the accused was drunk on the fateful day, he knew what he was doing when he stabbed his wife with a knife. The accused first assaulted Nonhlanhla and the deceased until Njengabani intervened and stopped the assault. The accused left the make-shift kitchen and went to the house where he armed himself with a bushknife and *imbora*. The accused assaulted the deceased on the arm with *imbora*. The deceased was angry that the deceased assaulted him on the forehead with the *imbora*.

[31] The accused was thinking clearly on the fateful day. He accused Nonhlanhla and the deceased of ganging up against him. He pursued Nonhlanhla and Njengabani while wielding a knife. When he was outpaced by the two Crown witnesses he stabbed the deceased. This is not conduct of a person who had lost his mind and did not know what he was doing. He was intentional in his conduct; when he failed to assault his wife with the bushknife and with *imbora* he resorted to the use of a knife and was successful.

[32] When the accused was dispossessed of his weapons, he stabbed the deceased with a knife. After an alarm was raised and members of the community came to the Ginindza homestead, the accused was coherent when he egged the deceased to explain to the community members what the couple was fighting

over and how he, the accused got injured on the forehead. Although the accused was drunk on the fateful day, it cannot be said he was so drunk he did not know what he was doing. It cannot be said also that the accused was insane when he committed the crime charged because on the day in question he was anything but disoriented.

[33] The accused voluntarily imbibed in alcohol as a result of the festivities at his home on that day and on days preceding the day the deceased died.

[34] From the cross examination of the Crown witnesses by defence Counsel, it appears that the accused was conscious and aware of what happened on that fateful day. The accused suggested to Crown witnesses that he did not recall events of the day his wife was stabbed but also suggested to the investigating officer that he pushed his wife and she fell on some sharp object. The accused was conscious of what was happening on the day his wife was stabbed. For all these reasons, the defence of intoxication does not avail the accused.

[35] The accused argues further that the deceased and Nonhlanhla ganged up against him and that he acted in private defence in the circumstances. I am of the view that private defence does not avail the accused because at the time he stabbed the deceased, she was unarmed and therefore the bodily integrity of the deceased was not in danger at the time.

Defence of provocation

[36] It was argued on behalf of the accused that he was provoked by the deceased. In order for the defence of provocation to avail the accused, the court must be satisfied that the accused committed the unlawful act of killing in the heat of passion as a result of sudden provocation. He must have acted

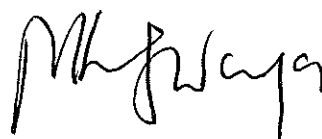
before he had time for his passion to cool. In other words, there must have been a reasonable relationship between the provocation and the accused person's act causing death. It must also be shown that the offender did not overreact in response to the provocation. The response must be commensurate to the provocative act. In my view, the partial defence of provocation does not avail the accused. After the deceased hit the accused with imbora on the forehead, Njengabani dispossessed her of the imbora while the accused was being calmed down by Nonhlanhla who wiped the blood from his forehead. The accused took out a knife and stabbed the deceased after he had been outpaced by Nonhlanhla. The deceased did not act on the spur of the moment after he had been hit with imbora.

[37] From the evidence the deceased did not provoke the accused. The deceased used imbora after she had been assaulted with it by the accused. It is unclear why the accused initiated the fight with his wife. The deceased was entitled in my view to use force to defend herself from the unlawful attack by her husband. Even if I am wrong in so holding, it is trite that it is not every provocation that entitles an accused person to use a severe form of violence against his provocateur⁵. The accused used disproportionate force in the circumstances.

[38] For the above reasons, the Crown has proved its case beyond reasonable doubt.

⁵ Rex v Bhekumusa Mapholoba Mamba Case No. 127/2007

[39] The accused is accordingly found guilty of murder with indirect intention.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown: Mr Alison Mkhaliphi

For the Defence: Mr Professor Dlamini