

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 178/2021

In the matter between:

REX

VS

MNCEDISI JOHNSON

Neutral citation : *Rex v Mncedisi Johnson (178/2021) [2023]*
SZHC 255 (26/09/2023)

CORAM: **B.S. DLAMINI J**

DATE HEARD: 16 August 2023

DATE DELIVERED 26 September 2023

Summary:

Criminal Trial-Accused person charged with the offence Murder- Crown leading the evidence of five witnesses to prove commission of the offence. Accused person electing not to give evidence in rebuttal of the evidence presented by the Crown.

Held;

The Crown has proved commission of the offence murder by the Accused person and he is accordingly found guilty as charged.

JUDGMENT

INTRODUCTION.

- [1] The Accused person is facing a charge of murder. The crown alleges that on or around February 2021, at or near Ngwane Park area in the Manzini Region, the said accused did unlawfully and intentionally kill one Peter Chiviti and did thereby commit the crime of murder.
- [2] The accused person pleaded not guilty when the charge was read to him and this plea was confirmed by his legal representative.

- [3] The parties chose not to make opening statements but instead opted to directly lead evidence in seeking to substantiate or dispute the charge against the accused person.

CROWN'S CASE

- [4] The first witness for the Crown ("PW1") was Thubelakhe Sabela who testified that he stays at Ngwane Park in the Manzini Region. PW1 stated that he knows the accused person from the community at Ngwane Park. The witness informed the Court that on the 17th February 2021 they were coming from Big Bend where there had been a family function which was a cleansing ceremony for his late father. The witness and his other family members arrived at Ngwane Park at around 7:00 pm. The witness had travelled to Big Bend with his mother, one Dumsile Dlamini.
- [5] PW1 stated that when they arrived home at Ngwane Park, they found the accused person sitting with other people including one Make Mantjeni, Bigman and his girlfriend whose name is unknown to the witness.

- [6] The evidence by PW1 was that the accused and the people he was sitting with were seated outside their house and drinking marula brew. The witness and his mother greeted all the people and went inside their house. Later the witness and his mother came out of the house and went to sit with the people they found drinking outside their house.
- [7] PW1's testimony was that the accused person started proposing love to his mother and even began touching his mother inappropriately. According to PW1, his mother got angry at the conduct of the accused person and decided to go back inside the house. Before going into her house, PW1's mother talked to one Bigman (hereinafter referred to as the deceased) and asked him to caution or warn the accused of the unacceptable conduct he was engaging in. Indeed Bigman warned the accused person against his wayward behavior and further told him to leave as it was already late.
- [8] The evidence by PW1 was that an altercation ensued between Bigman and the accused person. The accused person asked Bigman if he wanted a fight with him. The two, according to PW1, started fighting.

According to PW1, Bigman held the accused person by his dreadlocks and pinned him on the ground.

[9] Bigman left the accused person and went to stand by a tree. The accused, according to PW1, got up and went to confront the deceased. PW1's evidence was that the accused wanted to stab the deceased but the latter kept running around the tree and using it as a shield against the attack by the accused person. The deceased then ran across the road and stood by the roadside. The accused followed the deceased and pretended as if he wanted to beat him with his fists and yet had a knife hidden in his hand. According to PW1, when the deceased tried to block a blow from the accused, the latter stabbed him on the chest with the knife he was carrying.

[10] Upon stabbing the deceased, the accused retreated and PW1 heard the deceased saying 'the dog has stabbed me'. The accused went to where he had been sitting and took his bag and left. PW1 went to the house to report to his mother on what he had just witnessed. PW1's mother came out of the house and went to where the deceased was lying down. The deceased was bleeding from the chest injury. Make Mantjeni stood up and left the place. PW1 informed the Court that

they called for help on the emergency line but were informed that there were no cars at that moment. The deceased's girlfriend went to call one Buhle who was a cousin to the witness. Buhle arrived at the scene and immediately suggested that police be called to the scene. According to PW1, police arrived shortly after being called.

[11] When the police arrived at PW1's homestead, they took pictures and proceeded to place the deceased in a body bag since they found him already dead. The police then took statements from the people they found at the homestead. PW1 told the Court that he could see everything that was taking place because there is a street light next to his house.

[12] In cross-examination, it was put to PW1 that the accused person was only trying to defend himself against the deceased given that the latter was bigger than him. The accused person's representative put it to PW1 that the accused person was provoked by the manner in which he had been held by his dreadlocks and pinned down on the ground by the deceased.

[13] The second witness for the Crown was Dumsile Dlamini (PW2) and is the mother to PW1. The witness confirmed that on the 17th February 2021, they were coming from a cleansing ceremony in Big Bend with PW1. When they got to Ngwane Park, they found people drinking next to her house. The witness and PW1 later joined the group of people who were drinking at her homestead.

[14] PW2's evidence was that as they were seated and drinking, the accused person started to touch her inappropriately. The accused, according to PW2, told her that her husband had died and left her for him (accused) to take over. According to PW2, the accused first touched her buttocks and then gently stepped on her feet. PW2 informed the Court that he reprimanded the accused person for doing this and decided to leave the group and to go back to her house. According to PW2, after sometime as she lay on her bed, PW1 came running into her room and reported that the accused person had stabbed the deceased.

[15] The evidence by PW2 was that at first she thought it was a minor scuffle but when she went out to check on the deceased, she found the

deceased lying on the ground next to a tree. The deceased, according to PW2, had a big wound on the left side of the chest. PW2's testimony was that when the deceased was trying to breathe out, bubbles of blood would gush out of the wound. By that time, the accused, according to PW2, had run away.

[16] PW2 stated that when she tried to call the accused person's girlfriend to come and assist, the latter refused and left the scene. PW2 tried to call the 977 emergency line but they could not assist them but instead advised them to place a cloth on the wound to prevent excessive blood loss. The deceased, according to PW2, later stopped moving and was no longer breathing. They then placed a blanket around his body and waited for police to arrive. The deceased's girlfriend called for help and neighbours arrived at the scene. It was determined that the deceased had died.

[17] The evidence by PW2 was that when police arrived, they were told to move away from the body. The police took pictures of the deceased and later put him in a body bag. The witnesses and the others were made to record statements.

[18] In cross-examination, it was put to the witness that the accused did not molest her in any way and that the accused did not propose love to her. The witness maintained her evidence as to what sparked the conflict between the parties on the night in question.

[19] PW3, Buhle Hlophe was one of the people who was called to come and witness the incident. This witness was called by the deceased's girlfriend to come and assist them. When this witness got to the scene, she found the deceased already covered in a blanket. PW3 assisted in calling 999 and was present when the police eventually arrived at the scene. The police, according to PW3, performed their duties and later took the deceased away.

[20] The fourth witness called in by the Crown was Samkelo Magagula (PW4). This witness informed the Court that for some time during the months of February 2021 up to February 2022, police came to him looking for a knife which had been used by the accused person in stabbing the deceased. PW4 informed the Court that the only knife he knew was a knife used by Samkelo Nxumalo who is a friend to the

accused. This knife, according to PW4, had been used by Samkelo Nxumalo to open a 5 litre container of marula but he did not know what happened to it after being used.

[21] PW4 stated that at some point he received a call from the police to report at the Manzini Police Station. The witness, together with Samkelo Nxumalo went to Manzini Police Station. On arrival at the police station, the police told them to hand over the knife used by the accused person in the commission of the offence and PW4 told them that he did not know anything about the knife. Samkelo Nxumalo however gave the police a knife which was not similar to the one they had used in opening the marula container.

[22] PW5 was 8029 Detective Constable Mfanyana Sibandze who works in the Criminal Investigation Department (C.I.D) within the police service. PW5 was the main investigator in the matter. This witness detailed the role of the police from receiving a report to attending the scene, taking photographs of the scene, recording statements, interviewing witnesses up to the time of arresting the accused person after explaining his legal rights and cautioning him in accordance with

the Judges' Rules. The witness handed in Court an okapi knife (marked as exhibit "1") and also a purple t-shirt and khakhi pants worn by the accused person during commission of the offence. These clothes were marked collectively as exhibit "2".

[23] In closing its case, the Crown handed in Court a photo album taken at the scene (marked as exhibit "3") and also the post-mortem report (marked as exhibit "4").

ANALYSIS AND FINDINGS

[24] The accused person opted to exercise his constitutional right to remain silent against the evidence presented by the five state witnesses. PW1 saw the accused person stab the deceased on the chest and heard the deceased saying 'the dog has stabbed me'. This was after the duo were seen by PW1 engaged in a fight after the deceased had reprimanded the accused person for indecently engaging PW2. This evidence was not disputed by the accused person.

[25] When the deceased ran away from the accused and went to stand by the roadside, the accused followed him with the knife in hand. This is

important because the defence seemed to suggest that it is the deceased who attacked the accused and that the latter was acting in self-defence or in retaliation against an attack by the deceased.

[26] In the case of **S v Dube (CC03/22) ZAMPMBHC 28; 2023 (1) SACR 513 (MM) (3 MAY 2022)** the High Court of South Africa (Mpumalanga Division) explained in detail the main distinction between *dolus eventualis* and *dolus directus* in murder cases. The Court referred to the case of **S v Pistorius 2016 (1) SACR 431 (SCA)** in which the Court held;

“In cases of murder, there are principally two forms of *dolus* which arise; *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the aim and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and

purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

[27] The Court in the Dube case (referred to above) further stated;

“[19] In *Francis & Others v The State* (866/2018) ZASCA 177 (2 December 2019), the accused savagely assaulted the deceased. It does not appear from the judgment of the Supreme Court of Appeal that it was proven by the State that the accused had a direct intention i.e *dolus directus*, or that they premeditated to murder the deceased. After considering the evidence, the trial court convicted the accused of murder in terms of the provisions of section 51 (1) [of] the Minimum Sentences Act. The Supreme Court of Appeal considered the totality of the evidence regarding the assault and the injuries caused by the assault. It then confirmed the accused’s conviction under section 51 (1) of the Minimum Sentences Act on the basis of intention in the form of *dolus eventualis*.

[20] How then is premeditated murder reconciled with intention in the form of *dolus eventualis*? In my view, it is not the death that had to be premeditated or planned but rather the aim of the criminal act. The aim that is planned for, namely

the causing of bodily harm to another person should take prominence. If a person perpetrator carries through with his plan, to cause another person bodily harm which ultimately results in that person's death, where the death was foreseen by the perpetrator, premeditated murder is established. Therefore if A, premeditates an assault upon B, carries out the assault while foreseeing that the assault may cause B's death, B's murder is premeditated despite that the original plan was only an assault."

[28] In the case of **Siboniso Casper Masuku v Rex [35/2014} SZSC 16 [2017]** the Supreme Court of Eswatini had this to say as regards legal intention in murder cases;

"[26] **Cohen ACJ in Beale v Rex [1982-1986 SLR 377 (CA) at 380]** defines legal intention or *mens rea* in the form of *dolus eventualis* as follows;

"Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not. The requirements according to the learned authors are (i) subjective foresight of (ii) possibility and (iii) recklessness. In so far as subjective

foresight is concerned, they emphasize that intention is invariably judged subjectively. The subjective test...takes account only of the state of mind of the accused, the issue being whether the accused himself foresaw the consequences of his act...if the accused foresaw the possibility of the consequences in question and was reckless as to whether or not they did result, he intended them in the legal sense."

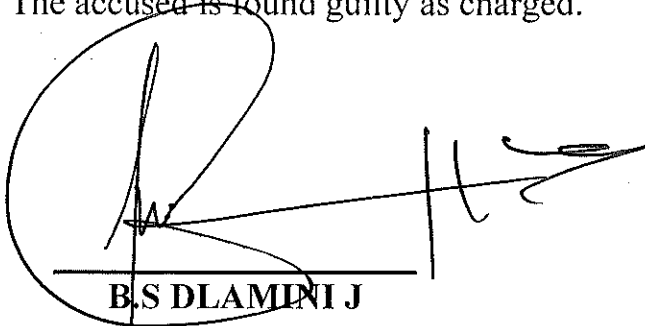
[29] The accused person in this matter used a knife to stab the deceased on the left side of the chest. The post-mortem report reveals that the fatal stab wound was **"6 x 2 ½ cm on the front and middle portion of the left side of the chest, which is 9 cm from the midline and 21 cm from the umbilicus."**

[30] The accused person inflicted a seriously deep wound on the body of the deceased. It cannot be in doubt that the accused person subjectively foresaw death occurring from his forceful thrust of the knife deep into the vital and sensitive organs of the deceased.

[31] The Court rejects without hesitation the notion that the accused person was provoked by the deceased into acting in the manner he did. The evidence shows that it is the accused person who indecently touched

PW2 and further made inappropriate moves on this witness. The deceased warned the accused person to desist from his wayward behavior only to be challenged by the accused to a fight. Even when the deceased attempted to run away, the accused followed him to the roadside where he completed his mission of taking the life of the deceased.

[32] The Court comes to the conclusion that the Crown has proved commission of the offence of murder beyond reasonable doubt by the accused person. The accused is found guilty as charged.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For the Crown: *Miss N. Ngubeni (D.P.P's Chambers)*

For the Accused: *Mr. P. Dlamini (c/o T.L Dlamini Attorneys)*