



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 30/2023

In Matter between:

REX

And

SENZO MZULU NTJANGASE

Neutral citation: *REX v SENZO MZULU NTJANGASE (30/23)*
SZHC 307 [2023] (31.10.2023)

CORUM: A. Makhanya J

Dates heard: 21.07.23, 16.08.23, 18.08.2023, 08.09.2023, 14.09.2023
and 19.10.2023

Date delivered: 31.10.2023

Summary: Accused charged with murder. Accused raises two defences – provocation – Self Defence – requirements of self defence considered – test for dolus eventualis - guilty

JUDGEMENT

- [1] The accused stands charged with the crime of murder. It is alleged that on the 18th November, 2022, at Ngwane Park in the Manzini region, the accused did unlawfully and intentionally kill Sandile Mdluli.
- [2] When the charge was put to the accused, he pleaded not guilty. The plea was confirmed by his legal representative. The Crown led evidence of five witnesses to prove its case.
- [3] The first witness that was led by the Crown is Sibongile Vilakati who is a community police at ka Springle a place in Ngwane Park in Manzini. She is also a vendor.
- [4] The evidence by this witness established that both deceased and accused were well known to her. They both did not have places to stay. They sometimes stayed in the bushes. Sometimes, they would request food from them.
- [5] She testified that on the 18th November, 2022, she was asleep in her house when she was woken up by a knock at her door.
- [6] The witness enquired that who was knocking the accused responded, she opened the door. She saw accused seated at her door and the deceased was standing, they were together.
- [7] Pw1 further told the court that she enquired as to what was the problem. The accused told her that he had come to report that if he dies, she will be able to tell the police where they will find his dead body. Accused told her that deceased wanted to kill him.
- [8] The witness wanted to know from accused what had he done to deceased such that he wanted to kill him. In response, he told her that he had done nothing. She enquired from deceased. Deceased

told her that he wants to know from accused what he was looking for at e-7 which is the dust-bin where he keeps his properties.

- [9] Pw1 further testified that both deceased and accused exchanged heated arguments. Deceased was pacing up and down shouting. She then decided to call her neighbour, Thembe Shongwe (Pw2). Both witnesses tried to broker peace between deceased and accused.
- [10] They told accused and deceased to leave and that they should come back in the morning since deceased was drunk. They told them that they will resolve their problem in the morning.
- [11] Both accused and deceased refused to leave. Accused requested Pw1 and Pw2 to go and sleep and that they will deal with the matter in the morning. Pw1 and Pw2 left deceased and accused and they went to sleep. Accused was still seated at the door, deceased standing at that time.
- [12] Pw1, further told the court that she was woken up by a banging sound which happened three times and was followed by a voice which said, "I will hit you like a snake" She opened the door, when she looked outside, she saw accused hitting deceased with a log at the back of his head. Deceased was kneeling in a praying position.
- [13] The witness then called her neighbour (Pw2). She wrestled with accused trying to dispossess off him of the log. She eventually dispossed him. Pw2 arrived at the time when Pw1 and accused were wrestling over the log.
- [14] Pw1 raised an alarm, community members came to the scene. When they touched deceased, he was motionless. He had been injured on the back of his head. The witness stated that she told accused that he had committed a crime, accused told her that he had been patient enough and got tired.
- [15] The witness called the manzini police who then arrived after sometime. At the time when the police arrived, deceased showed no sign of life. The witness handed the log to the police which was used by accused to hit deceased.
- [16] Other police officers arrived at the scene and recorded statements from witnesses. They also took photographs of the scene. Accused

was arrested. The deceased was taken by the police to RFM hospital where he was certified dead by a doctor. He was then taken to Dups funeral parlour.

- [17] Defence counsel put to Pw1 that deceased was the aggressor. In response the witness stated that she can agree because when they tried to broker peace, deceased was shouting.
- [18] It was further put to this witness that the quarrel of the 18th November, 2022 was not for the first time between accused and deceased. Deceased who was in a company of his friend assaulted accused on the 9th November, 2022. The witness agreed but she said she did not witness it. Accused reported the incident and she gave him money to go to hospital.
- [19] Mr Ngwenya further put to Pw1 that she did not see accused hitting deceased with the log. Pw1 was not shaken. She maintained that she saw him hit deceased once on the back of his head.
- [20] The evidence of Pw1 revealed that the source of light was a pole light. She was able to see clearly when deceased was hit with the log.
- [21] Pw1 stated that both deceased and accused were violent but deceased was more violent when he was drunk. Her evidence was corroborated by Pw2. The witnesses told the court that deceased and accused would sometimes quarrel, they would say they were joking and share alcohol.
- [22] It was further put to Pw1 that deceased had an Okapi knife which he intended to stab accused with it. Pw1 stated that she never saw any knife and no one mentioned any knife to her.
- [23] Pw1 stated that the log that was used by accused in inflicting the injuries on deceased was approximately 1.2m length and 7 cm big.
- [24] She further told the court that accused told her that he was asleep, and was woken up by deceased who wanted to pick a fight with him.
- [25] The Crown led the evidence of Pw2 Thembe E. Shongwe. Her evidence corroborated the evidence of Pw1 in material respects. When she was called by Pw1 on the first occasion when they tried to broker peace, accused person, requested them to go and sleep that the matter will be settled in the morning.

- [26] She also stated that she tried to find out from both deceased and accused the cause of the argument, she could not get a clear answer. She and Pw1 complied with accused's request that they should go and sleep.
- [27] She (Pw2), further testified that when she was called by Pw1 for the second occasion, she found her wrestling with accused over possession of the log. She found that deceased was already injured, blood was dripping on deceased's eyes which were open and could not close. She realised that he was dead.
- [28] Pw2 corroborated Pw1 that there was no other weapon they saw except the log. She also stated that she did not see any injuries sustained by the accused.
- [29] It was put to Pw2 that on the 9th November, 2022, accused and deceased were at her place drinking traditional beer, deceased kicked accused. She agreed that she saw him kicking accused when she came out of her house but she did not know the cause of the fight. She further stated that she does not recall if deceased provoked accused.
- [30] Pw2 further stated that it was usual for accused and deceased to quarrel and there after share alcohol.
- [31] The Crown led the evidence of the pathologist Dr Swapnika Enugala (Pw3), she stated her qualifications and that she obtained them in India Health Sciences. She also told the court about her experience.
- [32] She examined the body of the deceased and opined that the cause of death was due to "Head injury"
- [33] The pathologist observed the following injuries:
1. *Laceration of 1 cmx0.25cm, scalp deep on inner end of left eyebrow.*
 2. *Superficial laceration of 1cmx0.2cm, scalp deep surrounded by an abraded contusion of 4cmx2cm of middle and right side of forehead.*
 3. *Abrasion of 1cmx1cm on dorsum of nose.*
 4. *Abrasion of 1cmx1cm on right of nose.*

5. *Laceration of 5cmx0.5cm scalp deep on left parietal region.*
6. *Laceration of 6cmx0.5cm scalp deep on posterior parietal region.*
7. *Laceration of 10cmx0.5cm x bone deep on left, middle occipital regional.*
8. *On reflection of scalp, contusions of middle and left frontal region, contusion on left pariests – occipital, mid occipital region.*
9. *Linear fracture of left occipital bone.*
10. *Subdural haemorrhage all over the brain, subarachnoid haemorrhage on bacterial frontal lobes, cerebellum.*

- [34] The witness stated that injury numbers, 8,9 and 10 are the internal injuries. Injury no.7 is the fatal injury that caused the death. It also corresponded to injury no.9. She also testified that injuries number 5 and 6 were very serious. She stated that it is highly unlikely injury number 5,6 and 7 were caused by a single blow. She told the court that a single blow cannot cause three (3) injuries.
- [35] She further testified that injury number 5 is the top of the head. Injury number 6 is the back of the head and injury number 7 is the lower back of the head. She told the court that the injuries were caused by blunt force. The report by the pathologist was marked exhibit "A"
- [36] The Crown further led evidence of two police officers. Pw5 took the first action and she arrived at the scene of crime. She then called other police officers who included the scene of crime officer and the investigator. Accused person was subsequently arrested and charged.
- [37] The deceased was conveyed to the RFM hospital by the police. He was certified dead by a doctor. He was then conveyed to Dups mortuary. Pw5 handed to court the log as an exhibit 1. The photo album was handed to court by consent and marked exhibit "B"
- [38] Defence counsel put to Pw5 that the accused enquired from him the whereabouts of the knife. The witness denied that accused person did enquire.

- [39] It was further put to him that deceased person was an aggressor. He told the court that he heard that information.
- [40] The accused person gave evidence under oath. He testified that on the 9th November 2022, he was at Ka-Thabsile Shongwe where he was drinking traditional beer and the deceased was also present. He was kicked on the forehead by deceased without any provocation.
- [41] He left the place and decided to go to Nozi's place. While at Nozi's place, accused and his friend came and assaulted him. He was injured and he reported the assaulted to Pw1 who on the following day gave him food and money to go to hospital for treatment.
- [42] Accused further told the court that on the 18th November, 2022, he was sleeping on a bench in the veranda at Christina's place. He then heard a voice as if he was dreaming calling his name. he woke up and discovered that it was deceased who then assaulted him with a fist on his face.
- [43] He further stated that he tried to run away, deceased blocked him and produced an Okapi knife. He then ran to Pw1's house to report him. He stated that deceased pursued him.
- [44] He told the court that at Pw1's house, he knocked at the door, Pw1 came out and he reported that deceased wanted to kill him. He further told the court that Pw1 wanted to know the cause of the quarrel, he told her that deceased accused him of having been at e.7 where he keeps his properties. He denied that he visited that place.
- [45] The accused further told the court that after Pw2 had arrived, they talked to them. They were told to leave and come back in the morning but they did not leave. He sat on an empty 20L plastic container which was by the door of Pw1's house.
- [46] According to accused, deceased moved away from the door of Pw1's house. He saw him coming to him, attacking him with a log which he got from the yard. He tried to assault him with the log but he was able to ward off the attack using the 20L plastic container.
- [47] Accused further stated that he got hold of the log and wrestled over its possession with deceased, and he was able to disarm.

- [48] He further told the court that deceased put his hand in his pocket, he took out something which he could not see what it was since it was dark.
- [49] According to accused, deceased then advanced to him, he then hit him with the log on his right arm. Deceased took a few steps backwards and fell on the rocks with the back of his head. He got injured and Pw1 came and dispossessed him off the log.
- [50] The accused testified that he did not intend to kill the deceased. He was deeply hurt when the police told him that the doctor certified deceased dead.
- [51] Counsel for the Crown cross-examined the accused. He put to the accused that he did not put to Pw1 that he told her to call the police when he knocked at her door. It was further put to accused that he did not put to the Crown witnesses that deceased attacked him with the log and he was able to disarm him and hit him on his right arm.
- [52] It was further put to accused that he did not put to Crown witnesses that deceased found him sleeping on the bench in the veranda at Christina Mabuza's house.
- [53] The defence closed its case without calling any witness. He did not even call Tebesutfu Ngcamphalala who he said she came out of Pw1's house. When Pw1 had gone to call Pw2 on the first occasion. Tebesutfu had warned them not to fight according to accused.
- [54] Both parties made written and oral submissions.
- [55] The evidence revealed that the cause of the quarrel was that deceased accused the accused of being at e-7 where he kept his properties but accused denied having been there. According to Pw1, deceased said accused wanted to steal his properties.
- [56] The evidence before court by Pw1 and Pw2 further revealed that both accused and deceased were violent persons most of the time but deceased was more violent when he was drunk.
- [57] Pw1 and Pw2 corroborated each other that accused and deceased would sometimes quarrel and when asked about the cause of the quarrel, they would say they are joking and would further share alcohol.

- [58] Defence Counsel submitted that the accused gave an explanation which is reasonably possible true. He referred to the case of *R v Difford* 1937 AD 370 at 373. He contended that the accused can only be found guilty of Culpable Homicide.
- [59] The version proffered by the Crown and the accused are diametrically opposed to each other as far as the injuries inflicted on the deceased are concerned.
- [60] Pw1's evidence is that she saw the accused hitting deceased with a log on the back of his head. On the other hand, accused contends that, he was attacked by deceased with the log, he disarmed him and hit him on his right hand, deceased moved backwards and fell on rocks.
- [61] The Crown is relying on the evidence of a single witness (Pw1) regarding the injuries on the deceased. Section 236 of the Criminal Procedure and Evidence Act no.67/1938 as amended states:

"The court by which any person prosecuted for any offence is tried, may convict him of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness..."

- [62] Before a court can place any reliance on the evidence of a single witness, the evidence of the single witness must be clear and satisfactory in every material respect. In other words, the evidence must not only be credible, but must also be reliable. See **R v Mokoena 1956 (3) SA 81 (A)**.
- [63] Pw1 was a credible witness. She was reliable, clear and she directly answered the questions put to her. There was no suggestion that there was bad blood between her and accused. She stated that inside her house she used a lamp but outside the house there was a pole light which was very clear. It was not disputed.
- [64] Where there are two conflicting versions, both of them cannot be true. Logic dictates that only one version can be true. Therefore, the other must be false. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witness, but also his reliability. See **S v Saban N'Ander 1992 (2) SACR 199(a) AT 203; to 204 A-B**.

[65] The accused's evidence revealed that he trusted Pw1. He went to report to her as a community police and he said Pw1 was the only one who was able to control deceased when he was violent. She gave him money and food to go to hospital on the 10th November, 2022. Her evidence was satisfactory in material respects.

[66] There was no motive for Pw1 to falsely incriminate the accused person. It was not even suggested that she was fabricating the evidence.

[67] The accused raised two defences, Provocation and self-defence.

PROVOCATION

[68] It was put to Pw1 that on the 18th November, 2022, deceased was carrying a knife. Accused ran to Pw1's house to report. Pw1 told the court that deceased never told her about a knife and she never saw it. Accused only said that deceased wanted to kill him.

[69] In terms of Section 2 (1) of the Homicide Act of 1959, an accused person who has caused the death of another person in order to qualify for Culpable Homicide, he/she must show that the act which caused the death of the deceased was done in the heat of passion before there is time for the accused to cool down.

[70] **The above Act provides: Killing on provocation.**

"2 (1) a person who:

- (a) Unlawfully kills another under circumstances which but for this section would constitute murder and*
- (b) does the act which causes the death in the heat of passion caused by sudden provocation as defined in Section 3 and before there is time for his passion to cool; shall only be guilty of Culpable Homicide*

(2) This section shall not apply unless the court is satisfied that the act which causes the death bears a reasonable relationship to the provocation.

Provocation defined

(3) (1) Subject to this section "provocation" means and includes any wrongful act or insult of such nature as to likely, when done or offered to an ordinary person or in

the presence of an ordinary person to another who is under immediate care or to whom he stands a conjugal or servant, to deprive him of the power of self – control and to induce him to assault the person by whom such act or insult is done as offered”

- [71] The accused, according to the evidence of Pw1, he came to report that the deceased wanted to kill him. He did not state with what weapon. The evidence of Pw1 and Pw2 corroborated each other that accused was seated at the door of Pw1 and Pw2 stated that they were released by accused person to go and sleep and that the matter was to be resolved in the morning.
- [72] Common sense dictates that when a person is in imminent danger of being killed or harmed, he/she will seek protection from any one. Accused released Pw1 and Pw2 to go and sleep. It cannot then be said that the heat of passion had not cooled, if indeed, he had been provoked.
- [73] Accused's actions of releasing Pw1 and Pw2 to go and sleep, the only reasonable inference is that everything was under control. If deceased had a knife, accused would not have told Pw1 and Pw2 to go and sleep would have asked her to call the police. The Defence of provocation stands to be rejected.

SELF DEFENCE

- [74] Accused also raised the defence of self defence. He testified under oath that he saw deceased in possession of a log and he attacked him. He was able to disarm him. Deceased took out something from his pocket, he then hit him on his right arm. Deceased fell on rocks and got injured.
- [75] In the case of **Bhutana Paulos Gumbi v Rex Criminal Appal case no.24/2012**, para [15], (the then Chief Justice) Ramodibedi stated as follows:

“It is admittedly axiomatic that self defence is only available if three requirements are met, namely, if it appears as a reasonable possibility on the evidence that:

1. *The accused had been unlawfully attacked and had reasonable grounds for thinking that he was in*

danger of death or serious injury at the hands of his attacker;

2. the means he used in defending himself were not excessive in relation to the danger, and

3. the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger. See, for example cases as R v Molife 1940 AD 202 at 204; R v Attwood 1946 AD 331; Motsa Sipatji v R 200-2005 SLR 79 (CA)”

[76] The question that this court has to ask itself is whether the requirements of self defence have been met by the accused. I find that the requirements were not by the accused.

[77] The accused did not put to Crown witnesses that deceased attacked him with a log and he disarmed him and hit him on his right arm and he fell on rocks.

[78] He further did not put to Crown witnesses that he was seated out a 20L plastic container when deceased attacked him and he used the container to ward off the attack. He did not put to Crown witnesses that deceased took out something from his pocket and he did not see what it was because it was dark.

[79] The law is settled that where a party fails to put so much of his case to his opponent's witnesses where necessary under cross – examination, the court will be entitled and justified to draw an adverse inference against such evidence as an afterthought. See **S v Dominic Mngomezulu and Nine Others Criminal Case no.94/90. S v P 1974 (1) SA 573.**

[80] The injuries inflicted on the head of the deceased were very serious. Injury no.5 measured 5cmx0.5cm, scalp deep on posterior parietal region. Injury no.6 laceration of 6 cm x 0.5cm scalp deep on posterietal region and injury 7 laceration of 10cm x 0.5cm borne deep on left middle occipital region.

[81] Accused told Pw1 that he had been patient enough and got tired. A voice was heard by Pw1 to the effect that, “I will hit you like a snake”. When a person hits a snake, he hits it to leave it dead. The only

reasonable inference is that it was accused who uttered those words and was found hitting deceased by Pw1.

[82] The accused had the intention to kill in the form of *dolus eventualis*. In our law, *dolus eventualis* in relation to murder is present where the accused, while subjectively foreseeing the death to another, nevertheless persists in the act while reconciling himself or herself with the outcome. See **Sibusiso Kukuza Dlamini v Rex Criminal appeal case no. 18/2019**, para, 11.

[83] I find that the Crown has proved its case beyond reasonable doubt.

[84] In the premises, the accused is found guilty as charged.



A. Makhanya

Acting Judge of the High Court

Appearances:

For the Crown – T.Dlamini

For the Defence – S.Ngwenya