

## **IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 327/2015**

In the matter between:

**REX**

vs

**ZWELITHINI SIBANDZE (FIRST ACCUSED)**

**MELUSI SIBANDZE (SECOND ACCUSED)**

**SANDILE SIBANDZE (THIRD ACCUSED)**

**SIKHUMBUZO SIBANDZE (FOURTH ACCUSED)**

Neutral citation : *Rex v Zwelithini Sibandze & 3 Others (327/2015)*  
*[2023] SZCH 320 (13/11/2023)*

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

**DATE HEARD:** 22 September 2023

**DATE DELIVERED** 13<sup>th</sup> November 2023.

***Summary:***

*Criminal proceedings-Accused persons charged with the offences of Murder and Assault. All accused persons pleading not guilty to the charges. At the end of the Crown's case, accused persons moving for an acquittal in terms of Section 174 (4) of the Criminal Procedure & Evidence Act.*

***Held;***

*The evidence led by the Crown is sufficient to require the accused persons to defend themselves. The evidence of nine witnesses including the confessions made by Accused persons before a Judicial Officer requires that the accused persons should defend themselves against the charges of murder and assault. The Court dismisses the application in terms of Section 174 (4).*

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**JUDGMENT**

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## **INTRODUCTION.**

[1] At the close of the Crown's case, the accused persons moved an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938. The basis of this application, according to the accused persons, is that the Crown's evidence did not make a *prima facie* case which could require each one of them to take the witness stand and present their own defence against the said charges.

[2] The accused persons were charged with the offence of murder in that on or around the 4<sup>th</sup> July 2015, at or near Mahlalini area in the Shiselweni Region, the said accused persons, acting jointly and in furtherance of a common purpose, unlawfully and intentionally killed one Sigwili Sibandze by assaulting him with fists and kicks all over the body and further stabbed him with an unknown object, thus committing the crime of murder. The accused persons also face a charge of assault with intent to cause grievous bodily harm for allegedly assaulting one Nelson Mabuza whom they are said to have assaulted with fists and kicks all over the body.

[3] The accused persons entered pleas of not guilty when the charges were read to them and their legal representative duly confirmed their plea to the said charges.

[4] This being an application for acquittal at the close of the crown's case, it is imperative to briefly assess the evidence presented by the Crown's witnesses in order to ascertain the legal correctness or otherwise of the application by accused persons for purposes of the remedy availed in terms of Section 174 (4) of the Act.

#### **CROWN'S CASE**

[5] There were nine (9) witnesses called by the Crown in support of the case against the accused persons. The first witness for the Crown, one Thula Sibandze, in a nutshell stated that after the death of Sigwili Sibandze, he was called by his father, Milton Sibandze who requested that this witness should accommodate the accused persons in his house as they (accused persons) needed to go to the police station the following day to hand themselves over in relation to the death of Sigwili Sibandze.

- [6] According to PW1, the accused persons indeed arrived at his house in the evening and they later all went to sleep. In the morning, one Babe Mkhetsfwa and Babe Kay arrived at this witness's house and they all went to the police station to hand over the accused persons. According to PW1, he had extended his sympathy to the accused persons for their involvement in the killing of the said Sigwili Sibandze.
- [7] PW2, Zacharia Zaga Sibandze's testimony was that on the 2<sup>nd</sup> July 2015, there was a funeral for one Mjoco Sibandze who was a brother to Sigwili Sibandze ("the deceased"). This witness and others had just finished digging the grave of the said Mjoco Sibandze and the witness and others decided to go back to their respective homes nearby. The witness was in the company of DT Sibandze.
- [8] DT Sibandze suggested to PW2 that they go via his home as he had a 5 litre of alcohol. The witness went to DT's home which was the home where the death of Mjoco Sibandze had occurred. As the witness and DT Sibandze were sitting and enjoying the alcohol beverage, a group of boys came and started shouting at them, accusing them of sitting at home with no one to guard the gravesite. The boys then took one Mantongomane who was one of the elderly people at

the Sibandze homestead. According to PW2, he did not clearly see the identity of the boys except for Sikhumbuzo Sibandze.

[9] A brother to the person who was to be buried, according to PW2, was one Sigwili Sibandze. He (Sigwili) was all along sitting with his sisters nearby in a rondavel. The said Sigwili came out from the rondavel and went to ascertain what was happening at the gravesite after the group of boys had taken Mantongomane with them. DT Sibandze later informed PW2 to go to the gravesite to also check what was happening. On arrival at the gravesite, PW2 found that there was a person who was lying face-down next to the grave. The witness discovered in the morning that the person who was lying face down next to the grave was Sigwili Sibandze and that he had died by that time. PW2 found no one at the gravesite except for the person lying face-down near the newly dug grave.

[10] PW3, Angelina Sindanda Sibandze confirmed that on the night of the vigil which was in preparation for the burial of Mjoco Sibandze, they were seated in a rondavel as a family. They then heard DT Sibandze shouting for Sigwili to come out to assist as some group of boys had come to forcefully take Mantongomane with them. This witness and

others decided to go to the police to report about the violent conduct of the group of boys.

[11] At the police station, PW3 and her family members were told by the police that a certain young man had come to report to them they had beaten someone at the gravesite. PW3 stated that as family, they requested the police to accompany them to the gravesite as they were scared of the group of boys who had violently taken Mantongomane with them. PW3 stated that they were also requesting the police to intervene and call the group of boys to order.

[12] As PW3 and her family members were talking to the police, a group of about five boys entered the police station and also requested to talk to the police. PW3 only identified Sikhumbuzo Sibandze as one of the boys who had come to the police station. As the police were refusing to accompany PW3 and her family members to the gravesite, they gave up and left the police station. The family decided to go back home and upon reaching the family compounds, they shouted Sigwili's name in the hope that he would respond. Those inside the home responded by telling them that Sigwili was not within the family compound.

- [13] PW3 and the others decided to go to the graveyard. Upon arrival at the gravesite, they noticed a flame of fire near the graveyard. They shouted Sigwili's name but there was no response. They then noticed a person lying face-down and when they touched him, the person was motionless. When PW3 and other family members turned the person around, they saw that it was Sigwili Sibandze and that he was already cold.
- [14] Police were called to the scene and upon their arrival they posed certain questions to the family members. The Police officers later called paramedics who, upon arrival, did some checks on the body of the deceased and confirmed that he was dead. The body of the deceased was loaded to a motor vehicle and taken away. PW3 cleared the blood on the ground where the deceased had been lying.
- [15] PW4 was Nkululeko Sibandze. This witness testified that on the 3<sup>rd</sup> July 2015 he was at home at Mahlalini in the Shiselweni Region. The witness had gone home to attend to a funeral of his grandfather Mjoco Sibandze. PW4 stated that at some point after the incident involving the death of Sigwili Sibandze, he met Zwelithini, Prince, Sikhumbuzo

and Sanele, all Sibandze's at Mahlalini. The four people that PW4 met were the same people who were charged as Accused No: 1 to Accused No: 4. The accused persons informed PW4 that they had accidentally injured someone. PW4 sympathized with them and advised his relatives to hand themselves over to the police.

[16] According to PW4, he suggested to the accused persons that they should go to the nearby police station to report about the incident. Indeed all the parties proceeded to the police station which was nearby. On arrival at the police station, PW4 and Sikhumbuzo Sibandze went inside the police station and the others remained behind. Once inside the police station, the witness and Sikhumbuzo Sibandze found the police attending to a certain young man who had been injured. The police told them that they would be attended to once the injured young man had received police assistance. The group decided to go back home whereupon arrival, they reported to one Make Ntshakala that accused persons had injured someone at the gravesite.

[17] Nelson Mshengu Mabuza was called by the Crown as PW5. This witness was also at home at Mahlalini where the family was preparing

for the burial of Mjoco Sibandze. The witness arrived at the gravesite when digging of the grave had just been finished. This was late in the night according to PW5. The witness was in the company of Mongameli Shongwe.

[18] The evidence by PW5 was that as they sat in the gravesite opposite a group of men who were seated next to a fire drinking alcoholic beverages, they were confronted by the men who enquired who they (witness and his colleague) were and where they were coming from. PW5 explained how he was related to the deceased in that his cousin had a child with one of the daughters within the Sibandze family. Amongst the group of men was Zwelithini Sibandze whom PW5 knew from participation in soccer tournament.

[19] The men who confronted PW5 and Mongameli Shongwe did not accept the explanation given by PW5. The witness and his colleague were told by the men to leave the gravesite. As the witness was preparing to leave the gravesite, he was hit with something that he did not see on the face as it was dark. The witness was thereafter beaten with fists and kicks all over the body by the men who had earlier been sitting

next to a fire. PW5's colleague was able to disappear in the thick of night and ran away from the attack.

[20] PW5 went to report the assault to the nearby police station. The police took PW5 to hospital where he was placed under an x-ray scanner. The x-ray revealed that one of his rib bone had cracked. The witness also had a swollen face and other parts of the body were swollen. PW5 informed the Court that he had not provoked the group of men nor was he resisting their order that they should leave the place.

[21] PW6 and PW7 were police officers who were involved in the matter in terms of receiving reports to investigation and finally arresting the accused persons before Court. PW8 was His Worship Mr. Peter. Simelane who recorded the confession statements from all the accused persons. The witness explained in a nutshell that after all the rights of the accused persons were read to them, the accused persons freely and voluntarily recorded statements in which they confessed to participating in the assault which led to the death of deceased (Sigwili Sibandze).

### **ACCUSED PERSONS' SUBMISSIONS**

[22] In support of the application for acquittal in terms of section 174 (4) of the **Criminal Procedure and Evidence Act 67 of 1938**, the Accused persons have submitted that;

**“4.2 First and foremost, all the witnesses who testified against the Accused persons tendered hearsay evidence, hearsay evidence is inadmissible. All nine (9) witnesses’ evidence should only have served to corroborate that of the central witness. The practice is to call central witnesses and other witnesses to corroborate. Regrettably the case would have to suffer the unsavoury but appropriate fate of being an acquittal. Based on fairness such error should be acknowledged and the accused be let off, anything less would be a miscarriage of justice.**

**4.2.1 During cross examination of all the witnesses, they all conceded that they never witnessed anything all they were relying upon was just hearsay. PW7 the investigator in his evidence in chief mentioned that there people who witnessed**

but during cross-examination he conceded that those people have not testified because they were all deceased. This is supported by the fact that form [from] the indictment which contains the list of witnesses, only less than half of those listed witnesses testified. PW7 is not the Principal Investigator but he only at some pointed assisted the late Principal Investigator. In essence the core witness had not taken oath, in court evidence is not given by proxy, subject to lawful exceptions, which is not the case herein. Technically, there are no witnesses in this matter and by extension, therefore can be no prosecution and or conviction.”

- [23] It was further submitted on behalf of the accused persons that the evidence presented in Court does not meet the required standard being that a conviction should only be based on evidence ‘**beyond reasonable doubt.**’ In reference to the evidence by PW4, it was submitted that the evidence of this witness does not link the accused persons to the offence of murder in that this witness only informed the Court that the accused persons told him that they had ‘injured’

someone at the grave site. In this regard, the Court was urged to consider that the act of 'injuring' another person does not or should not be equated to an act of 'unlawfully and intentionally killing another human being.'

[24] On the second count of assault, it was submitted on behalf of the accused persons that PW5 (Nelson Mshengu Mabuza) failed to identify his attackers on the night in question. In that regard, it was submitted on behalf of the accused persons that this witness only testified about being assaulted but did not know the identity of his attackers except for accused no.1 whom he knew from soccer tournaments.

[25] The accused persons, through their legal representative, further submitted that the confessions made by them before PW8 were inadmissible in a Court of law. It was submitted on behalf of the accused persons that;

**"First and foremost, all the confessions were not properly made, this is because the accused persons were not lawfully and or properly warned as per the Judges' Rules. It is clear that from the**

evidence of PW7 that he only warned the accused that “they are not obliged to say anything unless they wish” and ended there. Such warning is incomplete according to law...PW7, during cross-examination testified that he could not hear everything that was said between the late Principal Investigator and the accused persons but was in the same interrogation room...In addition, there is nowhere from all the confessions whereby the accused persons agree to the killing of the deceased.”

#### **CROWN’S SUBMISSIONS**

[26] According to the Crown, the evidence led in Court through the evidence of nine witnesses is sufficient to require that the accused persons be put to their defence. Through its written submissions, the Crown states that;

“PW2, PW3 P.W4 and PW5 were present at the scene where deceased was discovered dead and they all testified to that effect. Exhibit “A” is a photo album of the scene where deceased was discovered injured and dead. The said album was compiled by Detective Constable Thulani Gama, a Crime Scenes Investigator, Draughtsman and Photographer. He attached his report to the

photo album. The post mortem examination report detailing the injuries sustained by the deceased ante mortem and the cause of his death was compiled by Doctor R.M Reddy, a police pathologist and marked exhibit "E". Both exhibits "A" and "E" were handed and accepted as evidence. It is therefore reiterated that the evidence of the Crown does prove the death of deceased on *prima facie* basis."

[27] On the issue of confessions made by the accused persons before PW8, the Crown has stated that;

"6. It is further submitted that there is evidence of Exhibits "B", "C" and "D" (being confessions made by each of the Applicants). The Court is perfectly entitled to convict Applicants on the basis of the confessions as provided for in Section 226 (1) of the Criminal Procedure and Evidence Act. The said section provides;

"226 (1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible

in evidence against such person; provided that such confession is proved to have been freely and voluntarily made by such person is his sound and sober senses and without have been unduly influenced thereto...

*Provided also that if such confession has been made on a preparatory examination before any magistrate, such person must previously, according to law, have been cautioned by such magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he says may be used in evidence against him."*

#### ANALYSIS AND CONCLUSION

- [28] The main attack against the confessions made by the accused persons was that the accused persons were not properly warned on the legal consequences of making a confession by the main investigator in the matter [underlined for emphasis]. It is argued on behalf of the accused persons that PW7 only partly warned the accused persons. PW7, according to the accused person's legal representative, informed the Court that the accused persons were properly warned by the main investigator in the matter who is, unfortunately now deceased. This means it cannot be verified that the accused persons were properly cautioned prior to recording the confessions.

[29] The requirement to properly caution an accused person or persons before a confession is made in terms of Section 226 (1) of the Act depends on the circumstances under which the confession is made. The accused person's legal representative failed to draw a distinction between a caution administered by police officers upon arrest and a caution administered by a judicial officer on a judicial examination or preparatory examination. Both types of caution can take place under Section 226 (1) of the Criminal Procedure and Evidence Act. For purposes of conducting an investigation in the matter, police officers are required by law to properly caution suspects in accordance with the Judges' Rules on arrest or in seeking any information from the arrested suspect or suspects.

[30] For purposes of conducting a preparatory examination, in other words, in preparing for trial, a confession can still be made under Section 226 (1) of the Act. Any challenge to a confession must have in mind that a confession can be made to police officers, fellow prisoners, judicial officers, under section 226 or any other person. A challenge to any such confession must therefore be properly directed given the circumstances under which it was made. Upon arrest of a suspect for

instance, judicial officers are not there and therefore it cannot be expected that they should have cautioned the suspect in accordance with the Judges' Rules.

[31] In this case, the evidence by PW7 was that the accused persons indicated to the investigating officers after arrest, that they wanted to confess to their crimes. The accused persons were asked by police if they would be willing to make such confessions before a judicial officer to which they responded to the affirmative. In terms of the *proviso* to Section 226, it was the judicial officer or magistrate who recorded the confessions who was legally mandated to caution the accused persons fully before taking or recording their confessions.

[32] Prior to the recording of the confessions before a judicial officer, the only complaint which the accused persons can lawfully raise is that they were forcefully taken to a magistrate against their will for confessions. This however, is not their complaint. The confessions were not being made before the arresting or investigating officers but were to be made to a judicial officer. How then could the investigating

officers in the matter have been required to caution the accused persons in accordance with the Judges' Rules?

[33] PW8 duly cautioned and warned the accused persons in accordance with the law. The standard form of confession to which all the accused persons were part of recorded the following;

**"I (magistrate) informed the said .....(name of accused person who must write his or her own name) that I am a Judicial Officer , that he was not obliged to say anything unless he wishes to do so but whatever he said (says) would be recorded in writing and might be used in evidence at his trial. I also told him that he had nothing to fear and he can speak openly and with complete frankness. I then asked him the following questions and recorded his replies thereto."**

[34] In one of the statement recorded by the accused persons which forms part of the confession, it is mentioned in paragraph [6] thereof that;

**"Sigwili [deceased] then pushed Zweli around and he fell to the ground. We stood up from around the fire and attacked Sigwili. We then went to Mahlalini Police Post leaving Sigwili there."**

**We reported that we'd [sic] beaten someone by the fire at the gravesite. The police advised us to return to the Police Station on the following morning. We went back to the Chief's kraal. Along the way back we heard people wailing at the gravesite. Zweli went there and later joined us. Later at the Chief's kraal where he told us that it seemed as if Sigwili had died from our beating."**

[35] The above statement of confession which was recorded by Melusi Sibandze who is the second accused person, establishes two things. He (Melusi) confesses that he and those he was with were responsible for assaulting the deceased (Sigwili Sibandze). It also establishes that the deceased died as a result of them assaulting the late Sigwili Sibandze. Each one of the accused persons made a similar confession to PW8.

[36] The confessions made by the accused persons is fortified by other independent evidence. PW4, whose evidence was not disputed by the accused persons, was that upon engaging with the accused persons when he met them at Mahlalini, he was informed by them (accused)

that they had injured someone at the gravesite. This witness advised the accused persons to report the incident to the nearby police station. PW4 and the accused persons, out of whom he only knew Zwelithini Sibandze, indeed proceeded to the police station to report about the incident in the company of this witness. Similarly on the assault charge, PW5 was able to identify the First Accused person (Zwelithini Sibandze) as being among his assailants. It is common cause that the first accused person was at all material times with his co-accused at the gravesite when they accosted this witness.

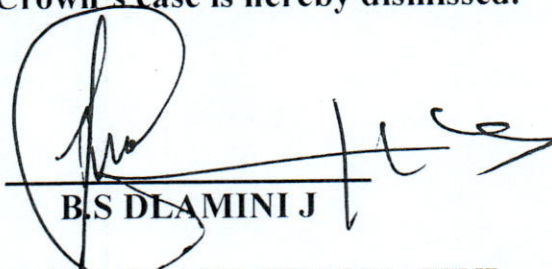
[37] In **Rex v Dlamini Mfanasibili 1987-1995 SLR (2) 269 at p.270 (g)** the Court stated as follows;

**“That interpretation of section 174 which I am obliged to follow in this case, places a considerable onus upon the prosecution and a heavy burden upon judges and magistrates. The court can seldom answer the question posed without an evaluation of the evidence before it including the assessment of the credibility of the Crown witnesses.”**

[38] In conclusion, it is the Court's considered view that the evidence presented by the Crown in this matter is sufficient to require that the accused persons be called upon to defend themselves against the two charges levelled against them.

[39] The Court accordingly orders that;

- (a) **The application by accused persons for a discharge at the close of the Crown's case is hereby dismissed.**

  
**B.S DLAMINI J**  
**THE HIGH COURT OF ESWATINI**

*For the Crown: Mr. M. Dlamini (D.P.P's Chambers)*

*For Accused Persons: Mr. T. Dlamini (Mabuza Johnson Attorneys)*