

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 458/2021

THE KING

VS

MBONGENI WAKHILE MSIBI

Neutral citation : *The King v Mbongeni Wakhile Msibi [458/2021] (2024) SZHC 269 (25th October, 2024)*

Coram : **M. Dlamini J**

Heard : **20th May, 2024**

Delivered : **25th October, 2024**

Indictment and Plea

[1] The accused stands arraigned for the charge of murder in that upon or about 30th October, 2021 at or near Dvudvusini area, Region of Manzini, the said accused person did unlawfully and intentionally kill Petros Dlamini.

[2] The accused pleaded not guilty. The Crown led four witnesses.

Oral evidence by the Crown

[3] PW1 Sikhumbuzo Samukelo Mlotsa on oath testified that he knew accused as a person who was running a shop business at Msibi homestead which was accused person's homestead. He was at Dvudvusini on 29th October, 2021. He was at home with Mr. Shongwe who worked as a driver of a tractor. They received a call from accused requesting Mr. Shongwe to report at accused's homestead. They both obliged. They found deceased, accused, Sikhumbuzo Shongwe and an unknown gentleman. They were all imbibing in liquor. They spent about twenty minutes when accused stood up and approached deceased. He slapped him with an open hand. While they were wondering as to what was happening, accused removed handcuffs from his pocket and handcuffed the deceased. He lifted him up while enquiring from deceased as to where his speakers were. He asked further as what caused him to open his motor- vehicle without his permission.

[4] Accused reached an electric pole and removed the handcuffs from deceased only to handcuff him again around the electric pole. He then assaulted accused using a baton. He assaulted him for quite some time. As accused person continued to assault deceased, PW1 requested Shongwe whom he had come with that they should leave. They left while accused continued to assault deceased.

[5] PW1 reached home. He tried to sleep but could not from the shock of accused's action of assaulting deceased. He decided to wake up Malindi and narrated deceased's ordeal. Malindi suggested that they proceed to accused's

homestead to see what was happening. They obliged. They found accused still assaulting deceased. They were helpless. They returned home. At about 0100 hours, the following morning, he woke up to observe a motor-vehicle moving out of accused's homestead.

- [6] PW1 was cross-examined. It was put that deceased and accused were very close friends. He responded that he knew them in his short period of time as friends. It was said that accused had hired deceased to fix his motor-vehicle two days prior to the incident. However, deceased returned to break into accused's car and stole a radio and its speakers. PW1 said that he heard about the speakers when accused asked him after handcuffing him. It was said that accused had asked deceased about the items before assaulting him on the day in question. PW1 disputed that saying accused first assaulted and handcuffed deceased before asking about his speakers. It was further said that the handcuffs were malfunctioning as they could not close. PW1 insisted that deceased was handcuffed. Accused when handcuffing deceased against the electric pole, caused deceased to embrace the pole before handcuffing him again.
- [7] It was said that after assaulting deceased, accused then prepared water to sooth the pain from deceased. He also went and sought permission to convey deceased to Mankayane police. PW1 said he never saw such.
- [8] PW1 disputed accused's version that he only assaulted deceased on thighs in an endeavor to avoid any fatal injuries. PW1 disputed the same and pointed out that the deceased was assaulted by accused all over the body.

- [9] PW2, 8482 Detective Constable Nomfundo Millicent Dlamini who testified on oath that on 30th October, 2021 at about 0530 hours she was on duty at Mankayane police station as a scenes of crime officer. She was instructed to attend to the scenes of crime at Dvudvusini area. She proceeded there.
- [10] At the scene of crime, she cordoned it so as to be in charge. It was outside the kitchen shack. She observed an electric pole. She observed struggling marks and the pole had scratched marks. There was a white cap next to it. She entered the kitchen and found a pair of handcuffs hanging against the wall. She also found a box. In the box she retrieved a black baton, a pair of Nike push-in shoes which were red and black, a pair of blue jeans which was muddy and turned inside out. She photographed the scene and took the exhibits to the police station.
- [11] On the 4th November, 2021, she went to Manzini Nazarene mortuary where she photographed the body of the deceased. She compiled a photo album and handed it to court as exhibit B with consent of the defence. She was not cross-examined.
- [12] PW3 was 7028, Detective Constable Zweli Nhlanhla Dlamini. He was stationed at Mankayane Police station during the incident. He was on duty on 30th October, 2021 and about 0530 hours they received from Constable Bhembe two males who were driving a black SUV X-Tray motor-vehicle registered USD 542 CH. The two men were accused and Chocolate Shabangu. PW3 cautioned the two males as Petros Dlamini, the victim of assault had been certified dead upon arrival at Mankayane hospital.

- [13] They were led to Dvudvusini at a Msibi homestead. He cautioned them not to point out anything failing which the pointed out items would be used in court as evidence. They led him to a shack where he was shown the items used in the commission of the offence. He was led to the electric pole where he was shown an item worn by the deceased. He observed the struggle marks by the electric pole. They invited the scenes of crime officer, PW2. PW2 took the items retrieved.
- [14] He then charged deceased for the crime of murder. He did inspect the body of deceased and noted several marks of a blunt object. PW3 handed to court each of the items mentioned by PW2. The clothing items were said to belong to the deceased. He also pointed at the accused as the person he charged.
- [15] He was cross-examined. He said that the distance between Msibi's homestead (scene of crime) and Mankayane police station was three kilometers. PW3 pointed out that accused and Chocolate had just arrived at the police at about 0530 hours. He confirmed that from his investigation he found out that the deceased and accused were close friends and that accused did attempt to assuage deceased's pain as he was so told. He also confirmed that accused was co-operative with the investigation. PW3 also testified that the handcuffs were functioning and serviceable. They could lock. He demonstrated their serviceability before court.
- [16] PW4 was Dr. RM Reddy who testified on the injuries and pointed at the fatal injury as injury number 8 which caused hemorrhage due to the rupture of the tissue vessels.

Defence's case

- [17] On the close of the crown's case, the accused took the witness stand and testified under oath. He testified that his parental home was at Dvudvusini area. He knew deceased as they were best friends from childhood. On 29th October, 2021, he left deceased at his home to paint his motor-vehicle which was a van. On his return from work, he found the windows of his house opened. He found the keys to the house on the floor. His wife said she had left them hanging by the wall. He went to inspect the van and found that deceased had done a good job. He proceeded to another car and found it opened. His wife said she had locked it and kept the keys by the wall in the kitchen. He noticed that the car's battery, speakers and flash drive were missing. PW3 moved around the house and found a wire with a knot. He took it to his wife. She said the knot was similar to the one tied by the deceased when they asked him to open the door of a car when their child had locked himself.
- [18] On the following day, a Friday, he went to work. On that day deceased did not ask for a lift even though he would do so before. He concluded from this conduct that it was deceased who had stolen his items.
- [19] While at work he instructed his house mate to give deceased meat and mealie meal to cook as it was month end. He purchased 5 litre wine so as to party with deceased as they would do so every month end.
- [20] He reached home. Deceased and Mlotsa arrived. They began to drink. While drinking he remembered that his items were missing. This was before 30 minutes upon their arrival. He went to the shop and took his baton and

handcuffs. He then went to the deceased and instructed him jokingly to bring his hands out as he was under arrest. He obliged. He handcuffed him and went with him to the electric pole. He handcuffed him against the pole. PW1 and Mlotsa left.

[21] He asked deceased what he was looking for in his house and his motor-vehicle. He then assaulted him for about 5-7 Minutes. Deceased was facing him during the assault. Deceased then fell. He took him back to the braai area where they were before. On this day, it was raining. That is why his clothes were wet. They continued drinking but deceased did not finish his tumbler. Deceased said; "*My friend you assaulted me severely.*" He instructed Chocolate to heat water. He went to the house and told his wife to bring salt. He removed his trousers and soaked his thighs and arm.

[22] After a while, he groaned heavily saying it was painful. He called Sugar who did not respond. He asked Chocolate to assist him take deceased to the car in order to convey him to hospital. The time was 2300 hours.

[23] The car had difficulty climbing the steep road as it was raining. He first went to Mankayane police station. The time was 12 midnight. He explained to officer Bhembe that he had a misunderstanding with his friend and ended up assaulting him. Bhembe said he should first take the deceased to hospital after inspecting him. He should return to record a statement. He obliged. On his return he waited for a while and he was informed that the deceased had passed on. He was affected by his death. He asked his family to assist by buying the coffin. He did apologise to his family. He never intended to kill deceased.

Issue

[24] Is there an intention to kill?

Common cause

[25] It is not in issue that the accused handcuffed the deceased. However, accused did, under cross-examination try to evade the evidence of handcuffing deceased by putting it to PW1 that the handcuffs were malfunctioning. PW1 was adamant that deceased was handcuffed both while at the braai area and against the electric pole.

[26] It was never put to PW2 and PW3, the police officers who retrieved the handcuffs that the handcuffs were malfunctioning. However, the court did ask PW3 if they were malfunctioning. PW3 demonstrated to court that the handcuffs were functioning well. Accused in his evidence-in-chief did not testify that he handcuffed deceased with malfunctioning handcuffs. I guess accused decided to abandon this point. For that reason I will conclude that it is not in issue that accused handcuffed the deceased with fully functioning handcuffs. The result is that deceased was rendered defenseless by accused's conduct of handcuffing him more particularly against the electric pole.

[27] It is further common cause that accused assaulted the deceased, firstly, with open hands and later by the electric pole with a baton.

Question

[28] The question is for how long did accused assault the deceased? This question is critical in order to ascertain the intention in the circumstances of the case.

[29] It is common cause that accused then took the deceased to hospital via the police station. The question is when did he do so.

Determination

[30] The evidence as presented by PW1 is that deceased was assaulted for a long period commencing from 1900 hours. He testified that upon seeing deceased assaulted all over the body while tied embracing the electric pole, he and his friend could not intervene out of fear. They decided to leave. However, while at home, he could not fall asleep. He woke up Malindi who suggested that they go and investigate. They went and stood by the gate. They could still hear that deceased was being assaulted. The time was around midnight. It was only at about 0100 hours that they observed accused leaving. Malindi correctly concluded that accused was conveying deceased to hospital.

[31] The time frame was not disputed during cross-exam. The court heard for the first time in accused evidence-in-chief that deceased was only assaulted a few times for about five to seven minutes. Thus the court will consider it as an afterthought. For if it was correct, it would have been put to the Crown's witnesses.

[32] Is the evidence of a long duration assault with a baton by PW1 corroborated? This call for this court to turn to the post mortem report which was at the beginning of the trial admitted by consent but the court ordered that the pathologist be called.

[33] On the cause of death PW4 recorded: "*Due to multiple injuries*". The pathologist observed that the body of the deceased had no clothing. This was

corroborated by PW3 who testified that the clothes worn by the deceased on the fateful day were retrieved as a result of a pointing out from accused in a box. PW 4 observed from the external body of deceased the following:

- *“Mud stains, blood stain over body in few areas.*
- *No discharge at external orifices.*
- *Face pale.*
- *Swollen limbs appreciated, scab formed wound over right foot dorsum 3.2CMx2CM.”¹*

[34] The pathologist further observed the following injuries as obtained before death occurred (antemortem);

- “1. Small abrasion over forehead 5.3CM area present. On reflection scalp frontal region contusion 2.1CM present.”*
- 2. Contused abrasion right chest front to upper abdomen 9.2CMx7.1CM area present with effusion blood in soft tissues on dissection.*
- 3. Contused abrasion left shoulder, arm, forearm, hand scattered present 56CMx6.4CM area (Vary in 1CM to 8CM breadth 1CM to 2.7CM) effusion blood in soft tissues present on dissection.*
- 4. Contused abrasions right forearm, arm, wrist 6CMx2.1CM, 4CM, 4.5CM, 1.2CM.*
- 5. Contused abrasion scattered back of trunk, buttocks, thigh, legs (Faint) with effusion blood in soft tissues on dissection.*

¹ Page 2 of Post-Mortem Report

6. *Pattern contusion over outer aspect of left thigh 3CMx1CM.*
7. *Contused abrasion epigastric region 4CMx0.5CM, 1.2CMx0.2CM linear present.*"²

[35] These injuries firstly show that deceased was assaulted all over the body. This confirms the evidence of PW1 that deceased was assaulted all over the body. It disproves the evidence of the accused that he only assaulted deceased on the thighs. Some of the injuries are on the upper part of the body, viz, the chest. The injuries so observed by PW4 are confirmed by the evidence of PW3 who compiled a photo shoot of deceased body while at the morgue as per exhibit B.

[36] In the result, the nature and extent of the injuries inflicted to the deceased by inference demonstrate an intention to kill. This must be considered in conjunction with the duration of the assault which was over a number of hours.

[37] There is another evidence demonstrating an intention to kill. This is found in the testimony of the accused himself. Accused testified that three days before the fatal injuries on deceased, he had instructed deceased to work on his motor-vehicle. When he returned home, he realized that his speakers, flash drive and radio were missing. He concluded that deceased had stolen the same.

[38] The question that boggles the mind is why did accused fail to report the matter to the police? This question was posed on behalf of the Crown to accused.

² Page 2 & 5 of the ante mortem report

Accused did not proffer a response. The crown was correct in challenging accused that accused took the law unto his own hands. This, I am afraid can never be a defence more particularly in murder indictment. It only points to one direction that accused intended the consequences of his conduct which is the intention to kill.

[39] Now accused testified that to show that he had no intention to kill, he soaked deceased's thighs into warm water after applying salt. The question that remains is, what did he do to the injuries at his chest and the rest of the body? The answer is none. PW4 observed the fatal wounds as some being the back of the trunk. He knew that he had assaulted the deceased all over the body but chose to assuage those injuries on the thighs. What was he hoping to gain? He was merely throwing dust to the law enforcement agencies. He however, failed. The intention to kill therefore remained.

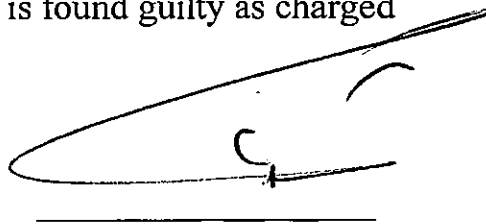
[40] Then there is the evidence by accused that he conveyed deceased to hospital and thus ought to be inferred that he had no intention to kill. The uncontroverted evidence is that accused left with the deceased at 0100 hours but only reached the police station at about 0530 hours. This was a distance of three kilometers away. Why such an inordinate delay? He explained that the road was slippery as it was raining. The court heard for the first time that it was raining and road was slippery. At any rate, even if we could assume for a second that it was rainy and slippery, if accused intended to have deceased attended to he could have called the toll free number of 977-emergency ambulance. He did not. To travel a distance of three kilometers for over four hours is not viable even if there were challenges along the way.

The short of it is that accused never intended for deceased to receive medical help. His travelling to hospital with accused was just a sham with due respect.

[41] In the result, I find that the Crown has established beyond reasonable doubt the intention to kill by the accused which was the only element under issue herein.

[45] I enter as follows:

[45.1] Accused is found guilty as charged

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller, more intricate flourish.

M. DLAMINI J

For the Crown : **M. K. Masango of the Director of Public Prosecutions
Chambers**

For the Defence : **N. Ndlangamandla of Mabila Attorneys In
Association With N. Ndlangamandla**