IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal No. 24/12

In the matter between

BHUTANA PAULSON GUMBI **Appellant**

and

REX **Respondent**

Neutral citation:	Bhutana Paulson Gumbi *v Rex (24*/2012) [2012] SZSC 32 (30 November 2012)
Coram:	RAMODIBEDI CJ, M.C.B. MAPHALALA JA, and OTA JA
Heard:	**7 NOVEMBER 2012**
Delivered:	**30 NOVEMBER 2012**

Summary: **Criminal law – Murder charge - Appellant convicted of culpable homicide and sentenced to 9 years imprisonment – Appeal against conviction and sentence – The appeal upheld - Both conviction and sentence set aside.**

RAMODIBEDI CJ

[1] The appellant in this matter was arraigned before the High Court (Mabuza J) on a single count of murder. It was alleged in the indictment that upon or about 27 November 2008, and at or near Lavumisa in the Shiselweni Region, he unlawfully, and with intent to kill, inflicted injuries upon one Joyce Dlamini ("the deceased") from which she died on 12 December 2008.

[2] The High Court acquitted the appellant of murder but found him guilty of culpable homicide. It sentenced him to 9 years imprisonment and ordered that 31 days which he had spent in custody before being released on bail must be deducted from the sentence. He has appealed to this Court against both conviction and sentence.

[3] The appellant and the deceased were husband and wife. They had married according to Swazi law and custom. Perhaps with some justification, the learned Judge *a quo* characterised the case as a "domestic violence case". Pointedly, she said the following in paragraph [30] of her judgment:-

"[30] This is a domestic violence case. There is evidence that the couple herein usually drank alcohol and would quarrel afterwards. The night on which the deceased was stabbed was hardly different."

[4] The relevant basic facts giving rise to this appeal are hardly in dispute. I observe at once that the learned Judge *a quo* analysed the situation well in paragraph [34] of her judgment when she said this:-

"[34] Nobody knows precisely what happened between [the accused and the deceased] in the house. The court has only the version told it by the accused. None of the witnesses saw how the deceased was stabbed."

[5] The appellant's version of the events of 27 November 2008 was contained both in his confession statement which was handed in by consent at the trial and in his evidence at the trial. In both instances he was very consistent. In outline, his evidence was the following. He was employed by the Ministry of Health at Lavumisa Health Clinic. On 27 November 2008, he left work at 5.30 pm. On the way home he met one Majika Mamba. They both proceeded to the appellant's house. Upon arrival at the house, the appellant immediately proceeded to cook meat and a "porridge mix". In the

meantime, they sat outside under a tree. They watched a movie on TV, which they conveniently placed at the doorway. When the movie finished at about 10:00 pm, Mamba left. The appellant and one Ayanda began to eat the meal which the appellant had cooked..

[6] The appellant says that the deceased "suddenly" approached them from behind where they were sitting. She went into the house. She was "noisy and cursing saying she would fix the people who take people's husbands." She was drunk. Meanwhile, the appellant entered the house in order to pour himself some soup. He was carrying a plate and a kitchen knife which PW2, the son of the appellant and the deceased, described as a "kitchen knife" used for cooking. He had been using it to cut the meat. The appellant says that just as he was about to pour the soup, the deceased grabbed him by the neck and "throttled" him, pulling him towards a wall. In cross-examination, he explained that "the grip was tight." He tried to disengage but in vain. He tried to push her away still holding the knife but failed. As a matter of overwhelming probabilities, she must have sustained the injury at that stage. Indeed, in his confession statement he was more precise. He said this, "I tried to shove her away from me and in that process the knife I was carrying stabbed her on her abdomen on the left side." Importantly, he fully demonstrated to the trial Court how this happened but such demonstration did not attract any adverse finding from

the Court. The deceased had grabbed him by the T-shirt he was wearing. She eventually tripped on the base of the bed. This gave him a chance to escape. He heard her scream but assumed that it was just a "trap." As can be seen, the appellant raised a combination of self-defence and accident.

[7] Importantly, the appellant was unchallenged in his evidence that the deceased was much bigger and stronger than him. This was indeed confirmed by Austin Michael Mngometulu (PW4). The appellant testified that during the several fights he had with her, the deceased always overpowered him. This version has not been controverted. It must, therefore, be accepted as correct.

[8] The appellant further testified that, with the help of PW4, they investigated the reason why the deceased was heard crying. They observed that she had sustained a cut on the stomach.

[9] It is not disputed that the appellant solicited PW4's help to call the police. The latter, however, did not turn up. The two men then arranged with one Mathenjwa to provide transport. The latter took the deceased to Matsanjeni Health Centre. The appellant reported himself to the police at 10.30 pm on the same night in the presence of PW4.

[10] Dr Masimba Jingure (PW3) who was stationed at Matsanjeni Health Centre testified that he attended to the deceased at the Health Centre. She had sustained only one (1) penetrating stab wound on the left side of the chest, just below the breast. She had difficulty breathing and was groaning. According to the doctor's assessment of the deceased, she needed immediate referral to Hlathikhulu Hospital for appropriate help and that was done.

[11] According to the prosecution evidence the deceased died on 12 December 2008, at Mbabane Government Hospital. The post-mortem report conducted by Dr Komma Reddy (PW1) shows that the cause of death was due to Septicaemia which in plain language means infection of the blood stream by "micro organisms from the focus of the infection." The infection started when the deceased was operated upon and sutured in order to fix her injured intestines. The doctor explained that during the period between 27 November 2008 and 12 December 2008, the infection "went on increasing and increasing" until the deceased succumbed to it. It is the unfortunate feature of this case that the deceased was moved from one hospital to another without any real help. The question whether she might or might not have survived had she received proper medical care does not, however, arise in this case.

[12] In its approach to the matter, the court *a quo* expressed itself in its judgment in three critical paragraphs. These are paragraphs [33] – [35] which bear quotation in full:-

> "*[33] When he (the accused) gave evidence in chief he testified that while he was dishing up soup, the deceased held him by the neck and strangled him. He shoved her off and she was accidentally stabbed in the abdomen. He gave a demonstration of how he was strangled and how he shoved her off himself.*
>
> *[34] Nobody knows precisely what happened between them in the house. The court has only the version told it by the Accused. None of the witnesses saw how the deceased was stabbed. I have to reluctantly accept that the Accused acted in self-defence. In doing so I must hold which I do that he exceeded the bounds of self-defence. The deceased's hold on his neck was not life threatening more so because she was drunk. I think that the Accused stabbed her intentionally but because nobody else knows the true story I have a lingering doubt in my mind. The law states that if I have a lingering doubt I should exercise such doubt in the Accused's favour.*

[35] In the circumstances the Accused is acquitted of the offence of murder and is found guilty of the crime of culpable homicide."

[13] With respect, there are several flaws, in my view, in the court *a quo's* approach to self-defence in the matter. Such flaws in my judgment amount to a misdirection in the circumstances of the case. At least three such flaws deserve special mention:-

Firstly, while in paragraph [33] of her judgment the Judge *a quo* refers to the appellant's unchallenged explanation, made on oath, that the deceased "strangled" him, she omits to mention this crucial aspect of the case in paragraph [34]. She merely mentions the deceased's "hold on his neck", thus inexplicably and unfairly minimising the grave danger that the appellant faced as a result of his throttling or strangling by the deceased. Similarly, her finding that the deceased's attack on the appellant was not "life threatening" is not supported by any evidence, medical or otherwise. I shall return to this aspect of the case in paragraph [14] below.

Secondly, whilst correctly holding that the appellant acted in self-defence, the court *a quo* inexplicably came to the conclusion that the appellant exceeded the bounds of self-defence. The court did not say in what manner the appellant did so, seeing that the deceased had sustained only one stab

wound. Indeed, the court did not venture any reasons at all why it came to the conclusion that it did. This, in circumstances where the appellant was, on the court's own admission, acting in self-defence, a fact which was confirmed by PW4 who testified that the appellant's T-shirt was torn from the neck to the chest after the attack by the deceased. It was not torn when the appellant went inside the house. The witness was indeed emphatic that this was proof of the fact that "something had grabbed" the appellant.

[14] In a substantially similar case in the Bostwana Court of Appeal in **Tetuka Tetuka v the State CLCGB – 039 – 12**, the deceased had throttled the appellant, causing the latter to stab him with a knife six times until the deceased let go of him. Out of the six stab wounds, there was only one penetrating wound, which supported the appellant's explanation, as a reasonable possibility, that this was inflicted last. Hence, the fact that the deceased finally let go of him. Writing a unanimous decision of the Court in that case, I had occasion to make the following apposite remarks which bear repeating in this jurisdiction:-

> *"[11] In its assessment of the evidence relating to the actual fight between the appellant and the deceased, the court a quo expressed itself in two paragraphs only, namely:-*

'11 While PW1 went back to give Motswana some tobacco the deceased asked the accused to wait for him. The accused stopped by the gate where the deceased came and pinned him against the fence and started assaulting him with fists saying that the accused should repeat the rubbish that he earlier said while they were at Mmamoyo's shebeen. The accused then produced a knife and stabbed the deceased several times hoping that the deceased would stop punching him but the deceased did not relent, hence the several injuries.

12. The accused's version of how the stabbing took place suggests that the deceased was a masochist who was so resilient and stoic that he continued punching the accused without flinching from the stabs with the knife by the accused, until he was fatally injured.'

It is evident from these paragraphs that the court a quo did not address the appellant's version that he was actually throttled by the neck during the stabbings in question. The "punching" which the court refers to only happened once. This was when the deceased first attacked the appellant. It is hardly necessary to add for that matter that throttling is more life threatening than a

mere punching with a fist. It's effect is to close the windpipe altogether, resulting in sure death if sustained for a few minutes. Accordingly, it follows that the court misdirected itself in a material respect. This in turn led to the court's failure to appreciate the appellant's plea of self-defence.

[13] Similarly, the court a quo's dismissal of the appellant's version simply on the basis that the deceased would have had to be a masochist to endure the stabbings in question ignores the fact that out of the six stab wounds in question there was only one "penetrating stab wound" recorded as pointed out earlier. It is in my view reasonably possible that this was inflicted last as suggested by the appellant thus causing the deceased to finally let go of him. Indeed, a similar situation arose in ***RAMATEBELE v THE STATE [2007] 1 BLR 396 (CA)*** *where, as here, the deceased had throttled the appellant causing the latter to stab him with a knife four times until he let go of him. This Court upheld the appellant's plea of self-defence."*

See also a scholarly judgment of my Brother Moore in the Court of Appeal of Botswana in the case of **Cecilia Neo Senao v The State, Criminal Appeal No. CRAPP – 031 – 05**.

I regret to observe that the trial court fell into the same error in the present case. Moreover, it must be stressed that the court inexplicably ignored the fact that there was only one stab wound, in circumstances where the appellant was being throttled by the deceased.

[15] 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, such cases as **R v Molife 1940 AD 202** at 204; **R v Attwood 1946 AD 331; Motsa, Sipatji v R 2000 – 2005 SLR 79 (CA).**

[16] It cannot seriously be disputed that these requirements were met in the present matter. The appellant was unlawfully attacked and throttled in an apparently life-threatening manner. The means he used in defending himself cannot be described as excessive in the circumstances. Indeed, his evidence was uncontroverted that he did not have "any space to run to when she (the deceased) throttled me." Finally, it was not disputed that the knife in question was the only or least dangerous means whereby he could have avoided the danger in the circumstances. He was unchallenged in his version that he had "no suspicion that she (the deceased) would attack me." Such sudden attack occurred at the time he was holding the knife he used to cut the meat. Once again, it bears repeating what I said in the **Tetuka Tetuka** case (supra), namely:-

> *"[16] Furthermore, this Court has repeatedly cautioned against an armchair approach in determining self-defence, that is to say, being wise after the event without due regard to the particular circumstances of the case. On the contrary, the court must endeavour to place itself in the position of the accused at the time of the attack upon him or her."*

[17] Faced with these difficulties, Mr Nxumalo who appeared for the respondent urged this Court to apply the Homicide Act 1959 on provocation.

Counsel's submission is untenable. The Homicide Act is not applicable in this case since the issue of provocation does not arise.

[18] Mr Nxumalo then called in aid the following classical remarks of Lord Morris of Borth-y-Gest in **Palmer v R 1971 (55) Criminal Appeal Reports 223** at 242; also reported in **[1971] AC 814 (PC)** at 832 namely:-

> *"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. …It may in some cases be only sensible and clearly possible to take some avoiding action. Some attacks may be serious and dangerous. Others may not be. --- If there has been attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action."*

In my view, those remarks support the appellant's case of self-defence. They do not support the Crown's case.

[19] Finally, I should mention that the trial court overlooked the basic principle that the onus burdens the Crown to negative self-defence beyond reasonable doubt. See **R v Molife**, supra; **Motsa, Sipatji v R**, supra. Similarly, the accused does not bear the onus to convince the court of the truth of any explanation he gives. If any authority be needed for this proposition I am mainly attracted by the following remarks articulated by Watermeyer AJA in **R v Difford 1937 AD 370** at 373:-

> *"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."*

[20] In light of these considerations I come to the inescapable conclusion that the appellant's explanation of self-defence may reasonably possibly be true in the circumstances of the case. It follows in my view that the Crown failed to prove its case beyond reasonable doubt. Put differently, it failed to discharge the onus which rested on it of negativing self-defene beyond

reasonable doubt. Once this conclusion is reached, as it must, the appellant is entitled to the benefit of doubt.

[21] In the result, the appeal is upheld. Both conviction and sentence recorded by the court *a quo* are set aside.

_____

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

I agree

_____

E.A. OTA

JUSTICE OF APPEAL

For Appellant : **Mr. M.S. Dlamini**

For Respondent : **Mr D. M. Nxumalo**