IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Criminal Appeal Case No. 23/2013

In the matter between

SIPHAMANDLA HENSON DLAMINI **Appellant**

And

REX **Respondent**

Neutral citation: Siphamandla Henson Dlamini *v Rex (23/2013)* [2014] SZSC 63 (3 December 2014)

Coram: RAMODIBEDI CJ, MOORE JA and DR ODOKI JA

Heard: 4 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary: Criminal law – Murder – Plea of self-defence rejected – Appellant found guilty of murder with extenuating circumstances and sentenced to 15 years imprisonment – Appeal dismissed – Both conviction and sentence recorded by the High Court confirmed.

JUDGMENT

RAMODIBEDI CJ

[1] On 15 August 2013, the Appellant was convicted by the High Court of the murder of one Thulasizwe Msibi which was alleged to have occurred on 12 March 2011 and at or near Mathendele Location in the Shiselweni Region. Extenuating circumstances having been found to exist in his favour, the appellant was sentenced to fifteen (15) years imprisonment. The trial court ordered that a period of three weeks that the appellant had spent in custody prior to his trial be taken into account in computing the term of imprisonment.

[2] Thereafter, the appellant's appeal in the matter took bizarre twists and turns on whether he was challenging the conviction or sentence. He filed two mutually destructive notices of appeal as follows:-

(1) On 5 September 2013, the appellant's attorneys appealed against both conviction and sentence. As regards the former, he sought to rely on self-defence.

(2) On 9 October 2013, the appellant, acting in person, appealed against sentence only. Because of its unequivocal nature in this regard, the notice of appeal is hereby reproduced in full:-

"*The Registrar*
The Supreme Court of Swaziland
P.O. Box 19
Mbabane

Dear Sir/Madam

RE: APPLICATION FOR APPEAL CASE NO. 109/11, GOAL (sic) NO. 892/13 SIPHAMANDLA HENSON DLAMINI

I hereby humbly appeal for reduction of seven (7) years of my fifteen (15) years sentence that was imposed on me by Justice Bheki Maphalala at the High Court on the 16th August 2013 for a murder offence. I also appeal for this sentence of mine to be fully backdated to the day of my arrest with the exception of the time I spent out of custody when I was out on bail.

I humbly accept my conviction on the offences in question but only appeal against the harshness and serity of my fifteen (15) year sentence is too harsh and severe for me to bear. It includes a sense of shock and trauma. I due course I will submit to the Supreme Court the heads of arguments for my appeal.

Please acknowledge receipt of this appeal at your earliest convenience.

Yours Faithfully

SIPHAMANDLA HENSON DLAMINI" (Emphasis supplied.)

[3] Predictably, at the hearing of the appeal Mr S. Jele for the appellant had considerable difficulty to explain the apparent conflict in the two notices of appeal in the matter. It was simply pathetic. There was no attempt to amend the notice of appeal in terms of Rule 12 of the Rules of this Court. Although counsel did say that the notice was amended in July 2014, this is not borne out by the record. He could not produce any copy to that effect. Nor did counsel pay any attention to Rule 7 which provides as follows:-

"7. The Appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."

[4] In light of the foregoing confusion on whether the appeal was directed against conviction or sentence, and having regard to the fact that this Court is the ultimate court of appeal, the Court could no longer be certain in the circumstances that an injustice would not be caused by closing the door on the appellant one way or the other. Accordingly, the Court granted the appellant leave to argue his appeal against conviction after all. We emphasise, however, that this should not be taken as precedent for this type of remissness in the future. Each case will be decided on its own particular facts.

[5] The facts show that on the fateful day of 12 March 2011, the appellant attended a night vigil for the funeral of his brother-in-law at a Ntshalintshali homestead at Mathendele Location in the Shiselweni Region.

[6] The trial court relied mainly on the evidence of an eyewitness Thokozani Cyprian Dladla. Crucially, he was appellant's own cousin who could hardly be expected to falsely implicate him. He testified that he, too, attended the night vigil. At about dawn, one of a group of boys who were at the night vigil pulled him towards a dark corner. PW1's cousin, Nelisiwe Matse, called the appellant to come and intervene. Upon his arrival his stabbed the deceased with a knife in the chest.

[7] According to the evidence of PW2, Detective Sgt Busisiwe Shabangu, the appellant subsequently led the police to the murder weapon which had blood stains for that matter.

[8] Since the appellant relies on self-defence, it is necessary to reproduce the statement which he freely and voluntarily made to a judicial officer. He said the following:-

"***STATEMENT MADE BY SIPHAMANDLA HENSON DLAMINI***

"It was on Friday afternoon when I left home at Gege and went to Nhlangano, Mathendele to attend my brother-in-law's funeral. I arrived at Mathendele at around 6pm and all the relatives of the deceased had gathered together.

On Saturday night at around 2 am, as I was busy with others preparing some logs for the grave, my sister Nelisiwe Matse came to report to me that there were some people who had blocked the way for Thokozani Dladla, my cousin at the gate. I then went to enquire as to what was the matter. On arrival, I pulled my cousin away so that we could go back into the home yard where there was light.

As I pulled him, the group of boys who were wielding some knives advanced toward us so they could block us from moving towards a spot which had a little light. I also had a knife with me and as I tried to force my way pulling my cousin out of the group and to rescue him from imminent danger, they blocked us. As I tried to open the way, one of them was accidentally stabbed in the chest and we then ran away. I do not know what happened next.

I ran for dear life and could not even bury my brother-in-law. Later that day, I learnt that the boy died as a result. In fact I walked home to Gege by foot that very same time I fled from the funeral. I was afraid that the boys may pursue and kill me, hence I crossed over to Phongola in the Republic of South Africa at my relative's place.

At around 16.30 on the same Saturday, I was phoned by Mr. Fakudze who requested me to return straight to the Police Station. I told him that I had no money and would try and get it so that I may come on Monday or Tuesday the following week. He phoned to meet me wherever I may be in Swaziland. I told him that I am afraid of the friends of the deceased because I did not know them. I finally surrendered myself at Nhlangano Police Station."

[9] In paragraph [12] of his judgment, the learned Judge *a quo* made the following crucial findings which are not challenged on appeal:-

(1) that according to the appellant's own concession the group of boys in question did not assault him. Similarly, they did not assault PW1;

(2) that neither the appellant nor PW1 was hurt during the confrontation;

(3) that the appellant could not dispute PW1's evidence to the effect that the group of boys in question was not armed;

(4) that the appellant himself conceded stabbing the deceased in the chest resulting in his death.

[10] Now, the principles governing self-defence are well – settled in this jurisdiction. See, for example, such cases as **Bhutana Paulos Gumbi v Rex, Criminal Appeal No. 24/12; Thulani Peter Dlamini v Rex, Criminal Appeal No. 7/2014.**

The underlying principles from these authorities is 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)**.

[11] Applying each one of these principles to the facts in the present matter, including the appellant's own statement referred to in paragraph [8] above, there can be no doubt in my mind that self-defence does not arise as a reasonable possibility in the matter. In this regard I am unable to find any fault in the trial court's findings in its judgment to the effect that the appellant used excessive force which was not commensurate with the so-called apprehended danger. The facts show that the appellant must have foreseen the possibility of resultant death arising from his use of excessive force but was reckless whether it ensued or not. See, for example, **S v Ntuli 1975 (1) SA 429 (A)** at 437.

[12] In these circumstances I am satisfied that the trial court correctly rejected the appellant's plea of self-defence. Similarly, the appellant was correctly found guilty of murder with extenuating circumstances.

[13] It remains for me to record that Mr S. Jele did not pursue the appeal against sentence. Counsel was properly advised as the appeal is completely devoid of merit. In paragraph [23] of its judgment, the trial court properly took into consideration the triad consisting of the personal circumstances of the

accused, the offence and the interests of society. No misdirection has been shown to exist in the matter.

[14] It follows from these considerations that the appeal fails. It is accordingly dismissed. Both conviction and sentence recorded by the High Court are confirmed.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

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S.A. MOORE

JUSTICE OF APPEAL

I agree

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DR. B.J. ODOKI

JUSTICE OF APPEAL

For Appellant : Mr S. Jele

For Respondent : Ms L. Hlophe