



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Criminal Appeal No. 7/2014

In the matter between

THULANI PETER DLAMINI

Appellant

And

REX

Respondent

Neutral citation: *Thulani Peter Dlamini v Rex (7/2014) [2014] SZSC 09 (30 May 2014)*

Coram: RAMODIBEDI CJ, EBRAHIM JA, and DR TWUM JA

Heard: **6 MAY 2014**

Delivered: **30 MAY 2014**

Summary:

Criminal law – Murder – Appellant convicted of murder with extenuating circumstances – Sentenced to 15 years imprisonment, less 4 years and 19 days spent in custody prior to his release on bail – Appeal against both conviction and sentence dismissed.

JUDGMENT

RAMODIBEDI CJ

[1] The appellant was convicted by the High Court of the murder of one Jabulani Mahlambi (“the deceased”) which was alleged to have occurred on 10 September 2005 at or near Nkomonye area in the Shiselweni region. He was sentenced to 15 years imprisonment, less 4 years and 19 days, being the period which he had spent in custody prior to his release on bail. He has appealed to this Court against both conviction and sentence.

[2] At the hearing of the matter in this Court Ms. Langwenya, counsel for the appellant, argued in the forefront of her submissions that the record was incomplete to the extent that it

excluded the appellant's evidence both in chief and under cross-examination. She accordingly sought to urge the Court to allow the appeal on this ground only. We are unable to agree with this submission in the particular circumstances of this case as will become apparent shortly.

[3] It is of course true that where a record of proceedings is incomplete and cannot be sufficiently reconstructed to make a just hearing of an appeal possible the effect is to prejudice the appellant. In a proper case this might result in a failure of justice. A similar situation arose in the Botswana Court of Appeal in **Tsabang v The State [2002] 1 BLR 102 (CA); Ncube v The State [2008] 1 BLR 327 (CA)**. In both cases the convictions and sentences appealed against were set aside on the ground that the appellants, through no fault of theirs, could not have their appeals properly heard and adjudicated upon.

[4] In this jurisdiction, in **Celani Maponi Ngubane and Others v Rex, Criminal Appeal No. 6/06** this Court, following its earlier

decision in **Benedict Sibandze v Rex, Appeal Case No. 10/2002**, expressed itself on the question of incomplete records in the following apposite remarks which bear repeating:-

“The mere fact that a record is defective does not ipso facto have to result in the acquittal of the appellant. It depends on the extent of the defects and whether or not it is reasonable to rely on the record as it stands to warrant a finding that it provides sufficient evidence on which to base a verdict one way or the other.”

[5] Similarly, it is undisputed that in the present matter, the record as it stands contains substantial amount of evidence which incriminates the appellant in the offence charged. Indeed, counsel for the appellant who admittedly appeared in the Court below was unable to point to any material evidence which was missing from the record and which she would have liked to rely upon. We are not surprised. The record as it stands is sufficient

to enable the Court to make a just determination of the appeal.

The question of prejudice does not arise.

- [6] Briefly stated, the facts show that on the fateful day in question one Pat Richard Dlamini (PW1) held a ceremonial feast at his homestead to welcome the bride, otherwise referred to as the makoti, into the family. Alcoholic beverages flowed freely throughout the day. The appellant and the deceased drank alcohol from 10.00 o'clock in the morning until 16:00 hours in the afternoon when PW1 ended the feast and retired to bed as he was feeling exhausted at that stage. Later in the evening, the appellant knocked at the door. PW1 heard that there were people quarreling outside. It turned out it was the appellant and the deceased. PW1 heard the deceased cry out "oh you are killing me." The deceased fell down, never to rise again. Using his cellphone for light, PW1 says that he was able to observe two stab wounds on the deceased's chest.

[7] It is important to record at this stage that according to PW1's unchallenged evidence, when he confronted the appellant on why he stabbed the deceased, the latter did not raise any self-defence. He merely said that the deceased "knew what the quarrel was about."

[8] Celumisa Dlamini (PW2) gave damning evidence against the appellant. He testified that he actually witnessed the fight between the appellant and the deceased. Importantly, they were "fighting with fists." He heard the deceased cry "oh you have stabbed me Thulani." He testified that the deceased "lied down under a mango tree." The appellant simply left without rendering him any assistance.

[9] Constable Mpumelelo Manyatsi (PW3) testified that on the same night the appellant reported to him at his house that he had "accidentally" killed the deceased by stabbing him with a knife. He handed over the knife which was covered in blood. The appellant was "not very drunk." He was "slightly drunk."

[10] Constable Bafana Kunene (PW4) in turn testified that he attended the scene of crime on the night in question in the company of Constable Mpendulo Dlamini. They found the deceased “lying helplessly next to a house with his T – shirt full of blood.” It had two holes. The witness observed two wounds on the dead body of the deceased. One wound was on the abdomen and the other one was on the left front shoulder.

[11] The post-mortem report revealed that the deceased’s death was due to stab wounds to the chest. There were two such wounds, something that rules out self-defence on its own in the particular circumstances of this case. More about this aspect of the case later in this judgment.

[12] The evidence of Hhlah Nhlabatsi (DW1) who was called by the appellant showed that he was a community policeman in the area. He testified that he intervened when the appellant and the deceased started fighting in an earlier incident on the fateful day in question. The deceased left but came back again, calling the

appellant to come and fight as he wanted to assault him. He called the appellant a “livezandlebe” which means an illegitimate child and is regarded as an insult. PW1 further testified that the appellant was so “annoyed and irritated” by the insult that he wanted to confront the deceased there and then.

[13] It is important to record at this stage, however, that PW1 conceded under cross-examination that he was not present during the actual fight between the appellant and the deceased. He was thus not in a position to assist the appellant on the question of self-defence.

[14] The record of proceedings has the following entry on page 76:-

“ENTIRE EVIDENCE OF THE ACCUSED AND CROSS EXAMINATION OF THE ACCUSED IS NOT AUDIBLE.”

Now, it is this entry that obviously gave the appellant’s counsel much hope that she could attack both the conviction and sentence

on that score alone. As I have pointed out previously, counsel is clearly wrong. There is ample evidence incriminating the appellant as fully set out above. Crucially, in paragraph 4 of her heads of argument in the *court a quo*, counsel herself conceded the evidence that the appellant stabbed the deceased with a knife. We know from the record that he stabbed him twice in a vital part of his body for that matter. In any event, the *court a quo* recited the appellant's evidence in full at paragraphs [13] – [20] of its judgment.

[15] In a nutshell, the appellant testified that he attended the ceremonial feast at PW1's homestead on the fateful day in question. The deceased taunted and insulted him. He was spoiling for a fight. PW1 intervened and the appellant left the place. He testified that he returned to the place later in the evening. He then heard the deceased shouting to the effect that people should leave him alone to kill the dog. He apparently felt that this was in reference to him. The deceased then proceeded to kick him all over the body whilst he was still seated. He testified

that as he was rolling on the grounded he saw a shiny object. He grabbed it and, as recorded in the judgment, “he tried to defend himself, and in the process, he heard the deceased saying that the accused had stabbed him.”

[16] But before going further, it is necessary to deal briefly with the principles relating to self-defence as this was the appellant’s next basis for challenging the conviction in the matter. In this regard, it will suffice merely to repeat my own remarks in this Court in **Gumbi v Rex, Criminal Appeal No. 24/12** at para [15], also available on **SWAZILII [2012] SZSC 32**), namely:-

“[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; and

(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 at 204; R v Attwood 1946 AD 331; Motsa, Sipatji v R 2000 – 2005 SLR 79 (CA).**”*

[17] It is also well-established in law that the Crown bears the onus to negative self-defence beyond reasonable doubt. It is very important to bear that in mind as I do in the present matter.

[18] Applying these principles to the present case, it seems to me that self-defence in the instant matter is doomed to fail for at least the following reasons:-

- (1) It was never put to any of the Crown witnesses, especially PW2 who was an eyewitness.
- (2) Evidence established beyond reasonable doubt that the appellant and the deceased were fighting with “fists.” There was, therefore, no justification for the appellant to resort to a lethal weapon such as knife in the circumstances.
- (3) As a matter of logic and common sense, the fact that the appellant stabbed the deceased in the chest means that he was in a standing position and not rolling down on the ground as he alleged in his evidence.
- (4) On the appellant’s own version, self-defence did not arise since he either disarmed the deceased of the knife in question or the knife fortuitously fell to the ground as he suggested. Once the knife was in his possession, the appellant had no justification to stab the deceased with it,

twice for that matter. His action in the circumstances fails to qualify under any of the principles set out in paragraph [15] of **Gumbi's** case supra.

[19] In all the circumstances of the case I have come to the conclusion that the Crown succeeded in proving its case beyond reasonable doubt. The appellant was properly convicted of murder with extenuating circumstances.

[20] Turning now to sentence, this Court has stated often enough that the imposition of sentence is discretionary. It lies pre-eminently within the discretion of the trial court. Ordinarily, an appellate court will not interfere with sentence in the absence of a material misdirection resulting in a failure or miscarriage of justice. Authorities are legion in this jurisdiction. It shall suffice merely to refer, for example, to **Vusumuzi Lucky Sigudla v Rex, Criminal Appeal No. 01/2011.**

[21] In sentencing the appellant, the *court a quo* meticulously took into account the triad consisting of the offence, the offender and the interests of society. I am unable to find any misdirection in his approach.

[22] In light of these considerations, the appeal is dismissed. Both conviction and sentence recorded by the *court a quo* are confirmed.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

A. M. EBRAHIM
JUSTICE OF APPEAL

I agree

DR S. TWUM
JUSTICE OF APPEAL

For Appellant : **Ms. M. Langwenya**

For Respondent : **Ms Q. Zwane**