IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 15/2016

In the matter between:

ELLIOT MAMBA **Appellant**

And

REX **Respondent**

Neutral citation: *Elliot Mamba V Rex (*15/2016) [2017] *SZSC 59* (17 November 2017)

Coram: **DR. BJ ODOKI JA, SP DLAMINI JA AND RJ CLOETE JA**

Heard: **13 November 2017**

Delivered: **17 November 2017**

Summary: Appeal against conviction for murder and sentence – alleges intention not proved – alleges acted in self-defence – evidence proves exceeded the bounds of self-defence – excessive force – no real danger present – Dolus Eventualis discussed – murder conviction

upheld – sentence of 15 years confirmed but special circumstances exist – reduced by 3 years.

<u>JUDGMENT</u>

<u>RJ CLOETE JA</u>

<u>FACTS</u>

[1] This matter is sad tale of an unfortunate and unnecessary family squabble which resulted in the loss of a young life. It appears as if there had been bad blood between the Appellant, the Uncle of the deceased nephew, Sidwell Methula.

[2] The facts as alleged by both the Crown and the defence were set out in great detail in the Judgment of the Court *a quo* which is being appealed against. The evidence of each of the five Crown witnesses and the Appellant were recorded in detail and analysed by the learned Judge.

[3] For purposes of this appeal only the salient features of the matter need to be dealt with and it is accordingly not necessary to regurgitate all of the evidence and analysis. The matter can best be summarised as set out hereunder.

[4] On 08 January 2009 at or near Mpofu area in the Hhohho Region, the deceased, who was by all accounts intoxicated, seemingly disrespected the

Appellant by calling the older man, the Appellant, by name and directing abusive and insulting language towards him coupled with an instruction that the Appellant remove his cattle from a certain Bothma homestead while the Appellant was apparently hiding in his own homestead.

[5] According to the Appellant's own evidence under oath in the Court *a quo*, the Appellant, about an hour after the initial incident, met up with the deceased and altercation took place. Again in the evidence of the Appellant, the deceased allegedly hit him with a knobkerrie and with a fist and in the end result the Appellant stabbed the deceased who subsequently passed away. There was further evidence to the effect that the Appellant chased the deceased after the stabbing incident and finished the deceased off while he was lying on the ground pleading for his life after the initial stabbing. Appellant admits chasing after the deceased but denies having stabbed the deceased while he was on the ground.

[6] The medical report filed and the evidence of the medical practitioner confirmed that the deceased was stabbed twice and this was not disputed by the Appellant.

[7] The Court *a quo* convicted the Appellant for murder and sentenced to fifteen (15) years imprisonment and it is that Judgment which is being appealed against in this Court.

[8] For the sake of completeness I set out the full grounds of appeal lodged by the Appellant, despite that it will become apparent in the Judgment below that the grounds of appeal are in fact narrowed down;

"1. The Court *a quo* erred both in fact and in law by finding the Appellant guilty for murder, disregarding the evidence on record that the Appellant was defending himself after the deceased had attacked and assaulted him with a knobkerrie.

2. The Court *a quo* misdirected itself in law by finding that there had been proof beyond reasonable doubt that the Appellant committed the offence when even in its Judgment the Court acknowledged that the evidence of the key Crown witnesses was contradictory on material aspects.

3. The Court *a quo* misdirected itself in law by accepting the evidence of PW3, without having exercised due caution, PW3 being a minor at the time and whose presence at the scene was disputed by the Crowns own evidence and whose evidence was not corroborated. It being mentioned by PW3 that she was with

deceased and a third person, who was not called by the Crown to corroborate this witness.

4. **The Court *a quo* misdirected itself by finding the Appellant guilty of murder, the Court having applied the principles of circumstantial evidence, failed to appreciate that there were other reasonable inferences that could be drawn from the set of facts before the Court.**

5. **The Court *a quo* misdirected itself in law by holding that the Appellant was guilty on the basis of *dolus eventualis* when the evidence before Court did not allow such a finding**

Alternatively

6. **The Court *a quo* when analysing the evidence and the undisputed fact that the deceased had insulted and provoked the Appellant, therefore the Appellant ought to have been at the least convicted for Culpable Homicide.**

7. **In dealing with *triad*, the Court *a quo* misdirected itself in law by not engaging in an exercise or an inquiry to properly investigate the competing aspects of the *triad*.**

8. The Court *a quo* misdirected itself in law when meting out the sentence it did by failing to consider that the Appellant committed the offence while in the process defending itself and having been insulted and provoked by the deceased, evidence before Court being that there was a fight between the Appellant and the deceased.

9. The Court *a quo* misdirected itself in law by failing to consider that the deceased was the first one to strike at the Appellant and as such the initial aggressor, a fact which a reasonable inference may be drawn that had it no occurred the Appellant would not have stabbed him as well.

10. The Court *a quo* ought to have taken into consideration that the deceased himself was carrying a knobkerrie, which knobkerrie he was using during the fight with the Appellant.

11. The Court *a quo* misdirected itself in law by failing to consider that though such cases are prevalent in the Kingdom the present one stood on a different footing from those flooding the Court *a quo*.

12. The Court *a quo* misdirected itself in law by failing to consider that the Appellant was related to the deceased as he was the son to his sister, the death having long term effects on the Appellant.

13. **The Court *a quo* misdirected itself by holding that the weapon used was a lethal weapon. The knife not being before Court and evidence is that it was a man made knife.**

14. **The Court *a quo* misdirected itself in law and employed and a lengthy custodial sentence when the Court a quo had found that there were extenuating circumstances and no aggravating factors. The sentence itself showing that the Court a quo did not consider the mitigating factors but merely paid lip service in that regard.”**

[9] Both sides filed Heads of Argument.

ARGUMENT FOR THE APPELLANT

[10] Counsel for the Appellant relied on his Heads of Argument and then confined himself to the fact that the Appellant should not have been convicted of the crime of murder but should have been convicted of the crime of Culpable Homicide, mainly for the following reasons:

1. Provocation; In that regard he alleged that the deceased had provoked the Appellant by referring to an older person by name and had hurled abuse at the Appellant while he was hiding in his own homestead.

2. Self-defence; In that regard he alleged that since the Appellant had been attacked by the deceased who was wielding a knobkerrie and once that had dropped to the ground, the deceased had attacked him by punching him and as such the Appellant was entitled to defend himself by using the knife he had on him.

3. Intention or *mens rea;* In that regard Counsel was adamant that the Crown had not proved that the Appellant had the intention to kill the deceased.

4. Contradiction of evidence; he alleged material contradictions in the evidence of PW1 and PW3. Essentially he stated that since PW3 had not given evidence that the deceased was intoxicated and that he had not carried a knobkerrie with him, her evidence should not have been accepted by the Court *a quo*.

[11] He referred the Court to various case law but specifically relied on **Thandi Tiki Sihlongonyane vs Rex Swaziland Court of Appeal Case No. 40/97** wherein a death caused by a knife in a drunken brawl was considered by the Court to be Culpable Homicide and not murder. In that matter this Court unpacked the difference between *dolus directus* and *dolus eventualis* in which **Tebbut JA** stated:

"…the Court should guard against proceeding to readily from ought to "have foreseen" to "must have foreseen" and thence to "by necessary inference in fact foresaw" the possible consequences of the conduct being enquired into."

[12] He also relied on **Rex vs Buthelezi 1924 AD 160** which dealt with the issue of provocation. Whilst quoting a lengthy passage at Page 162 of that Judgment, it is interesting to note that the learned Judge in that matter, **Solomon JA,** in fact stated the following, which with respect, operates against the Appellant:

"…on the question of what provocation would be sufficient to justify a Court in coming to the conclusion that there was no intention to kill, no hard and fast rule can be laid down. The question is one of fact to be deduced from the circumstances of the particular case under investigation…provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived the power of self-control by the provocation which is received: and in deciding the question whether this was or not the case, regard must be heard to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which causes death, to offender's conduct during the interval, and to all other circumstances tending to show the state of his mind…." (my underlining)

[13] He stated that the correct decision should have been that the Appellant was guilty of Culpable Homicide and that the sentence should have been much lower than that actually imposed.

ARGUMENT OF THE CROWN

[14] Counsel for the Crown also stood by the Heads of Argument filed by her and confined herself to the main issues raised by the Appellant and specifically relating to the purported self-defence and the issue relating to *dolus eventualis*.

[15] As regards the issue of self-defence she pointed out that the Appellant had not passed the test in respect of the three (3) available grounds of self-defence (which were espoused in **Siphamandla Henson Dlamini V Rex Criminal Appeal No. 23/2013** in which this Court found that:

"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:-

(a) 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;

(b) The means he used in defending himself were not excessive in relation to the danger;

(c) The means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger."

[16] She then argued that since none of the criteria had been met, the killing was unlawful since there was no good reason for the killing and as such the conviction was completely justified.

[17] She further pointed out that the Court had dealt extensively with the issue of *dolus eventualis* and had been correct in finding the Appellant guilty. Mainly that by using a knife to stab the deceased on a delicate part of the body, namely the chest cavity, the Appellant would have foreseen that death

would ensue and further relied on the matter of **Malungisa Antonia Bataria vs Rex Criminal Appeal No. 06/2014** wherein it was held that;

“A person intends to kill if he deliberately does an act which he is in fact appreciates might result in the death of another and he acts reckless as to whether such death results or not.”

[18] She also argued that the Court *a quo* had also dealt extensively with the perceived contradictions in the evidence between PW1 and PW3 and that the Court was correct in finding that the contradictions were not material and that the Court had to look at all the evidence in totality.

[19] Whilst conceding that sentencing was entirely within the discretion of the Court *a quo* she nevertheless referred the Court to the decision in **Elvis Mandlenkosi Dlamini vs Rex Criminal Appeal No. 30/11** wherein the Court found that:

"The Court has been consistent with sentences imposed on convictions of Murder with extenuating circumstances, they range from fifteen to twenty years depending on the circumstances of each case."

FINDINGS

[20] The Court *a quo* dealt extensively with all of the grounds supporting the murder conviction.

[21] It quoted, with my approval the dictum by **Leach JA** in the matter of **The Director of Public Prosecutions, Gauteng V Oscar Pistorius Criminal Appeal No. 96/2015**:

"It is thus trite that a trial Judge must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved… (my underlining) **…what must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found unreliable; but none of it may be simply ignored."**

[22] When evaluating the totality of the evidence before it, the Court correctly found that, despite there being some contradictions between the evidence given by PW1 and that given by PW3, the totality of the evidence pointed towards the unlawful actions of the Appellant in stabbing the deceased to death.

[23] The Court further fully dealt with the allegations of self-defence by reference to **Henson Mandlenkosi Dlamini** (*supra*) and in my view correctly found that the evidence did not support the claim of the Appellant that he was defending himself against an attack and that he had no other alternative.

[24] As regards the issue of *dolus eventualis*, the Court *a quo* again dealt extensively with the issue by reference to **Oscar Pistorius** where the learned Judge stated that:

"*Dolus eventualis* on the other hand, although a relatively straight forward concept, is somewhat different. In contrast to *dolus directus*, in

a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom it is directed."

[25] The learned Judge also referred to **Sihlongonyane** *supra* where it was said by **Tebbutt JA**:

"In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i. e. if it can be said from all the circumstances that the accused <u>must</u> have known that his conduct could cause death, it can be inferred that he actually foresaw it. It is here that the trial Court must be particularly careful. It must no confuse "<u>must</u> have known," with "ought to have known." The latter is the test for culpa. It is an objective one. In our law it is whether a reasonable person in the

position of the accused ought to have foreseen the consequences of his conduct."

[26] The Court further referred to the **High Court Case of Rex V Sabelo Kunene Case No. 445/2011** where **Maphalala MCB J,** as he was then, observed:

"46 In determining *mens rea* in the form of intention the Court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous weapon, the only reasonable inference to be drawn is that he intended to kill the deceased. See also the cases of Ntokozo Adams V Rex Criminal Appeal No. 16/2010 and Xolani Zinhle Nyandeni V Rex Criminal Appeal No. 29/2008."

[27] The Court *a quo* at Paragraph 55 of its Judgment applied the principles set out above to the facts in the current matter and found that the element of *dolus eventualis* had been proven for the following reasons:

1. Notwithstanding the fact that the Appellant had inflicted wounds on the deceased, he still pursued the deceased whilst the deceased was trying to run away.

2. That the weapon the accused used was lethal whether it was a man made knife or not.

3. That even if the Appellant was purportedly acting in self-defence, the force used was excessive.

[28] In my view the Court *a quo* cannot be faulted in anyway and my own analysis of the undisputed evidence before the Court *a quo*, in its totality, clearly showed that:

1. The deceased was intoxicated.

2. The deceased did verbally abuse the Appellant but by his own evidence, the Appellant stated that **"After that we came out from our hiding place and went back home. <u>After that, after about an hour later, we had forgotten about what happened…"</u>**. Accordingly the victim in **Buthelezi** *supra* is apposite in that the immediate passion had disappeared and it could not be said that the Appellant was no longer in control of his emotions.

3. Even, as the Court did, if it were believed that the deceased attacked the Appellant with the knobkerrie, there is no evidence before the Court that he suffered any injuries at all, let alone a serious injury.

4. The telling bit of evidence given by the Appellant himself is as follows:

<u>"A fight ensured between me and the deceased until the knobkerrie fell away. After the knobkerrie had fallen, he then punched me. That is when I ended up stabbing the deceased. He was stabbed on the shoulder and below the ribcage. After that he jumped up and started running. I then chased him. As he was</u>

<u>running away, he feel on the ground".</u> Accordingly the danger, if any, of the knobkerrie had gone away and as such the danger had receded significantly and now the only danger remaining was being punched by a thoroughly intoxicated young man. Accordingly there was absolutely no reason to stab the deceased in the fashion which the Appellant did.

5. Furthermore he then chased the mortally wounded deceased and did not retreat or run away to avoid any further danger. He in fact had carried out the threat that he had muttered that he wanted to teach the deceased a lesson.

6. He clearly exceeded the force necessary to avert any danger and his Counsel conceded that at the hearing.

[29] Accordingly the Appellant was correctly convicted of the murder of the deceased.

[30] As regards sentence, the Court *a quo* did consider the triad and the Counsel for the Crown relied on **Elvis Mandlenkosi Dlamini** *supra* for the

supposition that the Appellant was given a sentence in the lower range set out in that case but she also, correctly in my view, conceded that the deceased had played a part in this tragedy in that he had clearly, in his drunken state, abused his Uncle.

[31] I do believe that the sentence of fifteen (15) years for the crime of murder was justified by the Court *a quo* so as to consistently hand down sentences within the range prescribed by **Elvis Mandlenkosi Dlamini** *supra* and other decisions of this Court.

[32] However, given the tragic circumstances of the matter in that the Appellant will have the death of his nephew on his conscience forever, that there is no doubt general family grief arising out of the murder, that the Crown conceded that the deceased did play an active part in the event (without wishing to condone the extreme and unnecessary violence perpetrated by the Appellant), the relatively old age of the Appellant and his lack of formal education all militate that this Court should consider some form of mercy under the circumstances. Accordingly the Court reduces the sentence by a period of three (3) years.

[33] In the event the Judgment of this Court is as follows:

1. That the appeal of the Appellant against the murder conviction is dismissed and the finding by the Court *a quo* is upheld.

2. That the appeal against sentence partially succeeds in that the sentence of fifteen (15) years handed down by the Court *a quo* is reduced by a period of three (3) years.

RJ CLOETE JA

I agree

DR. BJ ODOKI JA

I agree

SP DLAMINI JA

For the Appellant	**:**	Mr. S. Jele
For the Respondent	**:**	Ms. E. Matsebula