IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CRIMINAL APPEAL CASE NO. 12/2017**

In the matter between:

MACHAWE NKOSINATHI DLAMINI **Appellant**

And

REX **Respondent**

Neutral Citation: Machawe Nkosinathi Dlamini vs Rex [12/2017] [2019] SZSC 45 (09 October 2019)

Coram: S.P DLAMINI JA, R. J. CLOETE JA, AND J. M. MAVUSO, AJA

Heard: 22 August, 2019

Delivered: 09 October, 2019

Summary: *Criminal Appeal – murder – Appellant convicted of murder with extenuating circumstances and sentenced to 16 years imprisonment without an option to pay a fine – appeal against conviction on basis that evidence led did not establish any form of intention to commit murder – held that there was an intention to commit murder – appeal dismissed and sentence confirmed.*

JUDGMENT

J. M. Mavuso, AJA

[1] Appellant was convicted, in the Court *a quo*, of murder with extenuating circumstances. He was sentenced to 16 years imprisonment, without an option to pay a fine.

[2] On or about May 2017, Appellant noted an appeal to this Court, appealing on sentence only. Later he filed an amended notice of appeal, appealing conviction only. Indeed when the appeal was heard, he formally withdrew his appeal on sentence. The effect of the aforegoing, is that this Court is enjoined to hear his appeal on conviction only.

[3] Respondent did not object to the amendment of Appellant's grounds of appeal. When the appeal came up for hearing, Respondent was ready to proceed. He placed reliance on his supplementary Heads of Arguments which addressed both the appeal on conviction and sentence.

[4] In the Court *a quo*, Appellant stood accused of murder, it being alleged that:

> *"Upon or about the 17th February 2011 and at or near Mhlaleni area in the Manzini Region, the said accused did unlawfully and intentionally kill one Nkosibone Nontsikelelo Mavuso"*

[5] The facts of this case have been well set out by the Court *a quo* and are supported by the record of the proceedings of that Court.

[6] At paragraph 5 of the court *a quo's* judgment, the court noted that:

(i) **"At different times prior to her death the deceased and the accused intermittently lived together and apart. They had a child together, and it is the death of this child that caused a major rift between the two because the accused felt that the deceased was the cause of the death. As a result, they agreed to live apart indefinitely, subject to mutually arranged visits. Whilst they were living apart, the deceased kept a key to the accused's residence, which was part of a residential compound at Mhlaleni area in the Manzini Region."**

(ii) At paragraph 6 of its judgment, the court *a quo* noted that;

"One Sunday morning the deceased is said to have come to the accused's residence unannounced and got inside the room whose door was not securely closed. At that point in time the accused was lying on the bed, tired and sleepy as he had been to a night vigil. She demanded his attention but he insisted that he needed to have a rest. After a brief but strained engagement accused fell asleep while the deceased was still in the room. After a while the accused woke up and realized that the deceased has left. He later discovered that some of his personal belongings were missing, being bank cards, cell phone, National Identity Card, Drivers Licence and E1000.00 in cash. Accused later went to Matsapha Police Station to report a case of theft but nothing came out of it until the deceased met her tragic death. On the 17th February 2011 the day the deceased died, she came to the accused's residence and was met by the accused a short distance away. A physical conflict ensued, resulting in the deceased dying through four stab wounds that were inflicted by the accused using a knife…"

[7] In proof of the offence, the Respondent led the evidence of seven (7) witnesses, after which the Appellant was sworn in and gave evidence in his defence.

[8] At the conclusion of the trial, the Court *a quo* rejected Appellant's defence of self-defence and in the process, the Court found that the crown had proved it case beyond reasonable doubt and thus found him guilty of murder with extenuating circumstances.

[9] As stated above, Appellant's appeal is on conviction only and his ground of appeal is that:

> **"The Court a quo erred both in fact and in law by convicting the Appellant of the offence of murder when the <u>evidence led did not establish any form of intention to commit the said offence</u> and as such appellant ought to be acquitted and discharged or at the very least be found guilty of culpable homicide."**

[10] From the onset, it is important to point out the following:-

(i) Appellant recorded a statement before a judicial officer and allowed it to be handed into Court, by consent. During the trial he did not challenge it in anyway whatsoever. In his statement he specifically states that:-

> **"…After that I received a call from Matsapha Police Station and they said she was there and crying, I stood up and saw her coming to my room, when she saw me, she hid by the grass and put something on the grass, I went to the house and took a knife and I went to her on the**

road, she said she would not give me my items, she went to take something on the grass looking me, she held me and I fell when we were fighting for the knife, I rose and <u>then stabbed her on the back left side and her right side next to the stomach and I went to the Police Station (Matsapha)</u> I told them what happened and that I left her standing there, she did not fall, I do not know what happened after that…"

(ii) By his own confession, freely and voluntarily made, Appellant stabbed the deceased at least once before going to the Matsapha Police Station to report what had happened.

(iii) After the stabbing, by his own admission, Appellant left the deceased at the scene. It is not part of his evidence that before going to report at the Police Station, he made an attempt to save the deceased's life in anyway whatsoever.

[11] (i) The evidence of the police pathologist who conducted a post mortem on the body of the deceased at the Raleigh Fitkin Memorial Hospital was handed into Court by consent between the parties.

(ii) The pathologist observed the hereunder listed *ante mortem* injuries, on deceased corpse.

(a) 1 x stab wound of 4 x 1 cm, present on the middle portion of the backside of the head.

(b) A stab wound of 2 x 1 cm muscle deep present on the middle portion of the back side of the neck.

(c) A stab wound of 3 x 1 cm, present on the right and front side of the chest, in the lower ¼ portion, below the right nipple, 17cm, from the midline and 130 cms from heel of right foot.

(d) A stab wound of 3 x 1 cm present on the left and front portion of the chest in the lower 1/5th portion, which is 20 cms, from midline.

(e) A slash wound of 12 x 3 cm, present on the front side of the left upper arm in the upper 1/4th portion.

(f) Multiple stab wounds of 3 x 1 cm, 4 x 1 cm, 3 x 1 ½ and 2 x 1 cm present on the right side of the middle portion of the back.

(g) Multiple stab wounds of 3 x 1 cm, 4 x1 cm 3 x ½ and 2 x 1 cm present on the right side of the middle of the back.

(h) A stab wound of 2 x1 cm, muscle deep, present on the top of the left shoulder.

(i) Under the heading cause of death, the Pathologist, writes:

"Due to multiple injuries"

[12] Appellant pointed out and handed over to the police the knife used in the commission of the offence.

[13] Appellant raised the defence of self-defence, arguing that he was attacked by the deceased. This defence was correctly rejected by the Court *a quo,* it having found that the deceased;

" could not have waged a conflict using a cell phone and bank card holder."

And went further to state that;

"Even if she had been armed and did attack first, the accused still needed to show that his response of four stab wounds was appropriate to the attack, for his defence to succeed."

In *casu*, the Court rightly found that if ever there was an act of aggression by the deceased towards Appellant, his response was not reasonably justifiable and proportionate in the circumstances.

[14] The Court *a quo* rightly found that Appellant did intend to commit the offence.

See **William Mceli Shongwe v Rex** Criminal Appeal Case No, 24/2011 at paragraph 46;

With regards to *mens rea* in the form of intention, the Court stated as follows;

"In considering *mens rea* in the form of intention, the Courts would 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 were 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 lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased.

See also the case of **Elvis Mandlenkhosi Dlamini v Rex** Case No. 20/2011 Supreme Court judgement at paragraph 15.

Further, on the aspect of intention, the Court *a quo* stated as follows, at paragraph 31 of the judgment;

"…In *casu* the Crown has sought to establish direct intent. The accused was obviously unhappy with the deceased, apparently for a number of reasons, the latest being the alleged theft of his personal goods. When he saw her approach, his anger got the better of him. I have already observed that there were no two men escorting the deceased as alleged. Accused went to his room to fetch a kitchen knife. He went to the deceased with the intention to use the knife on her. If there had been two men, and he succeeded in scaring them away as he claims, then there was no more use for the knife. He should then have engaged the deceased more constructively."

The Court went on further to state that,

"Four stabs would on different parts of the body cannot be accidental."

"This is especially so when on the receiving end there is only one party, the one who was unarmed. According to the postmortem report two stab wounds were on the chest area and two were on the backside of the neck, clearly suggesting that at some point in time the deceased was running away from danger without success. Annexures "A" and "B" show the deceased holding a cell phone on one hand and a bank card holder on the other. Those two things cannot hurt a fly."

[15](i) As stated in the cases of **William Mcedi Shongwe and Elvis Mandlenkhosi Dlamini** (Supra), on the aspect of determining the present of *mens rea*, it is clear

that in this case, Appellant intended to kill the deceased, he stabbed her many times on different parts of the body and left her to die.

(ii) The Court *a quo* was correct in finding that the Appellant had the necessary *mens rea* (dolus) taking into account the act, conduct and the deadly weapon (the knife) he used.

[16] With the Court having found dolus in Appellant's commission of the crime, there is no way legally possible, for the Court to have found Appellant, guilty of culpable homicide which required culpa as the requisite legal element; see

Thandi Tiki Sihlongonyane v Rex Court of Appeal Case Number 40/97.

[17] (i) At paragraph 39 of the judgment of the court *a quo*, before making a finding on the existence or otherwise of extenuating circumstances the court began with a definition of extenuating circumstances.

(ii) It defined extenuating circumstances as follows,

> **"any factors that morally though not legally, serve to attenuate the moral blame worthiness of the accused person in committing the crime that he did:".**

(iii) In making a finding on extenuating circumstances, after convicting the accused of murder, the court made the following observation.

> **"I am satisfied that at the time of this ghastly incident the relationship between the two love birds was far from pleasant. Only the two know why none of them took firm steps to terminate it. Of immediate relevance is that the accused's evidence regarding what could be described as the last straw – the theft of his personal goods by the deceased is largely unchallenged. I may have reservations about the accused's credibility, but there is nothing of note to gainsay this version. Some of the belongings that were taken are used on a daily basis, eg the bank cards, and the driver's licence. Evidence is that the accused works as a driver and the experience on the roads is that it can be demanded by traffic police literally at any turn. Undoubtedly the accused was placed in a frustrating situation, exacerbated by the deceased's unfulfilled promises to return same. The average person may have lost their cool upon seeing the deceased, but the fact remains that this particular reaction can not be justified in the circumstances of the case."**

The court went on to state that;

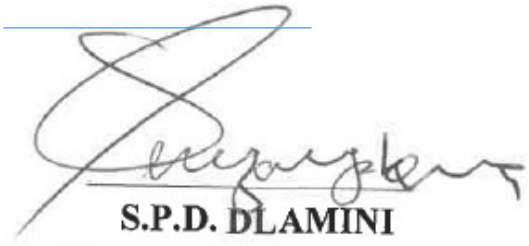
> **"the accused person endured a certain degree of provocation. To totally disregard this aspect would burden the accused with more than he legally should carry."**

[18] In *casu*, this court finds that Appellant was lawfully convicted of murder with extenuating circumstances.

[19] The appeal is accordingly dismissed.

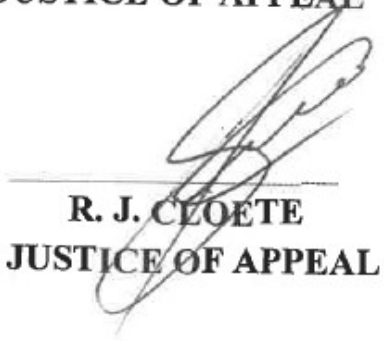
J.M. MAVUSO
ACTING JUSTICE OF APPEAL

I concur



S.P.D. DLAMINI
JUSTICE OF APPEAL

I concur



R. J. CLOETE
JUSTICE OF APPEAL

For the Appellant : L. Dlamini

For the Respondent : S. Mdluli