IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case **No.: 17/23**

HELD AT MBABANE

In the matter between:

THANDOKUHLE BANELE MABUZA **Appellant**

Versus

REX **Respondent**

Neutral Citation: *Thandokuhle Banele Mabuza vs Rex (17/23) [2024] SZSC 83 (30/05/2024)*

Coram: **J.P. Annandale JA;**
S.J.K Matsebula JA; and
N.J. Hlophe JA

Date Heard: 20th February 2024.

Date Delivered: 30th May 2024.

SUMMARY: **Criminal law – Convicted of murder – Appeal against conviction and sentence – Argued defences of involuntary act, provocation, accidental stabbing and lack of intention to kill – Pleads sentence unduly harsh.**

Circumstances and actions of the Appellants do not support the defences proffered.

Held: Appellant was conscious of his actions and knew what he was doing.

Held: It is the Appellant who actually provoked the deceased and not vice versa as an aggressor.

Held: The Appellant had the necessary intention to kill the deceased in the form of dolus eventualis.

Held: The defence of accident that is involuntary, unintentionally or that it caused unforeseeable consequences not satisfied or the requirements thereof.

Held: The sentence imposed is below the range of sentences in similar cases, but for absence of counter-appeal, conviction and sentence confirmed.

JUDGMENT

S.J.K MATSEBULA, JA:

[1] This is an appeal from the judgment of D.V. Khumalo, the then Acting Justice of the High Court, dated 22nd June, 2023. The Appellant was convicted of the murder of Mduduzi Dlamini by stabbing him with a knife. He was sentenced to 14 (fourteen) years with no option of a fine. The low sentence was because the court *a quo* held that the deceased was the aggressor (extenuating circumstance), the deceased provoked the Appellant and finally the Appellant had consumed intoxicating liquor and the blade of the knife was loose (involuntary and accident defences) on the day of killing. Not satisfied with his conviction and sentence he has appealed to this Court.

Background

[2] The background facts are gathered from the papers filed before this Court, which include the record of proceedings, the judgment of the court *a quo*, the litigants' heads of argument and from submissions made by the litigants' attorneys before this Court (the Appellant and the Crown).

[3] It is important to outline the sequence of the events on the day as testified to by the witnesses, but the sequence is more from the Appellant himself:

(a) The Appellant and friends imbibed intoxicating drinks (beers) earlier on the day.

(b) On their way from the drinking mission, they met the deceased along the way. He was in the company of another gentleman.

(c) The Appellant greeted the deceased and the other gentleman but in doing so, he referred to the deceased as "Mkhaya", which is said to mean "Home-boy", this term according to the Appellant is used to refer to unknown people by the Appellant and his workmates in the workplace around Matsapha Industrial Town.

(d) The term "Home-boy" seems to be derogatory if used towards strangers, but otherwise it would refer to someone you know and who comes from your home region. It would be someone one knows or is familiar with, but here it was used to address someone unknown to the Appellant, denoting that that person is a stranger, or more probably in contrasting between a person coming from a rural area and a city-dweller. In such a case the former would be presumed to be not smart but with the latter quite smart and well versed with the modern world. Whatever the imputation, the deceased was not happy with the salutation. *In casu*, the Appellant knew the other man, Mdavu, and greeted him by name. Since he did not know the deceased, he called him "Home-boy" and this reference provoked and angered the deceased. Hence there was a heated argument between the Appellant and the deceased.

(e) According to the Appellant, a knife fell on the ground out of nowhere, probably from heaven, and as the Appellant bent down to pick it up, it is then when the deceased hit him on the head or face with a bottle.

(f) PW1 Mfanukhona Matsenjwa, who witnessed the encounter, said that the Appellant produced the knife which he used to stab the deceased. Under cross-examination, the Appellant made it known and it was

"alleged that the accused picked up the knife from the ground and when he then rose after taking it, the deceased hit him with a bottle on the head and later he ran away" This is the testimony of the Appellant. The Appellant was therefore hit on the head whilst he was holding the knife in his hand or alternatively that after he had picked it up from the ground, where it had fallen.

(g) After being hit with the bottle, the Appellant, still held the knife in his hand and stabbed the deceased.

(h) The deceased, before he could die, ran away and the Appellant chased him with the knife still in his hand. One witness told the Appellant to stop chasing the deceased because he was already hurt. The Appellant then stopped the chase. Soon thereafter the deceased collapsed and died.

(i) The Appellant left the scene, with the knife still in his possession until it was recovered from him by the police at his place of abode some 12 days or so later. It is not explained why he kept the knife at his place of abode if it did not belong to him.

The Appellants Case

[4] The Appellant's case is as follows:

(a) he did not produce the knife but he picked it up from the ground and that he does not know where it fell from;

(b) he was provoked by the deceased who hit him with a bottle, while he already was holding the knife in his hands after he had picked it up from the ground;

(c) he does not recall stabbing the deceased and further chasing after him because he was dizzy after being hit with the bottle;

(d) he further submits that the stabbing was involuntary, probably because of the dizziness caused by the impact of the bottle or because he had consumed some intoxicating liquor; and lastly

(e) the stabbing was an accident, that is, by accident or *per incuriam*, with no intention to stab or kill the deceased but possibly as a result of a struggle between the Appellant and the deceased which struggle was denied by the prosecution witnesses. This includes the police pathologist, after examination of the wounds on the deceased. Also accidental because the "blade of the knife was loose". (The pathologist's report states that the wounds were that of stabbing, pulling and dragging of a knife).

[5] It is common cause that the Appellant was found guilty of murder by the court *a quo* with extenuating circumstances. He was then sentenced to 14 years imprisonment without the option of a fine. The Appellant has appealed to this Court.

[6] Appellant's grounds of appeal against conviction and sentence:

"1. That the court *a quo* erred in fact and in law in not finding that the conduct of the Appellant in stabbing the deceased was not voluntary.

2. That the court *a quo* erred in fact and in law in finding that there was no reasonable relationship between the provocation act and Appellant's act of stabling that led to the deceased's death.

3. That the court *a quo* erred in fact and in law in finding that the act of the Appellant in stabbing the deceased was not accidental.

4. That the court *a quo* erred in fact and in law in finding that the Appellant had necessary intention to kill.

5. That the sentence imposed by the court *a quo* was in the circumstances harsh

Respondents Submissions

[7] The Crown/Respondent disagrees and disputes all the grounds of appeal. From the onset it submits that this is a classic case of murder as supported by uncontroverted evidence "On the fateful day the Appellant approached the deceased at Mathengeni area and forcefully greeted him which provoked the deceased since he did not know the Appellant". And it maintains that the Appellant was the provoker or aggressor and that he did not apologise when the deceased protested the Appellant's salutation, hence a verbal show-down ensued. According to his own submission, holds that a knife fell out of nowhere, and that he then picked it up. While he rose from the ground, the deceased hit him with a bottle on the head and the Appellant then stabbed the deceased in turn. Evidence by two witnesses shows that the knife did not fall from the blue sky and according to PW1 the knife was produced by the Appellant during the verbal show-down, not that it was picked up from the ground. Having stabbed the deceased who then ran away, the Appellant gave chase in order to inflict further injuries, but was stopped from further chasing the deceased by PW1 who informed him that the deceased was already injured. A reasonable conclusion from the further chasing was that the Appellant was intending to inflict further injury or injuries through further

stabbing, thus the sole object or purpose of chasing the deceased with an open knife was to further injure the deceased with it.

[8] The Appellant kept the knife used for the stabbing of the deceased at his residence until he handed it over to the police after a week or so. Although the Appellant denied producing the knife and ownership of the knife, he was nonetheless able to show it to the police inside the house he resided in on the day of pointing it out.

[9] The Crown submits that the Appellant was convicted on *dulus eventualis*, the requisites of which were satisfied in the present case. Multiple injuries on the deceased, (though there were only two) cumulatively were foreseeable to cause death but the Appellant persisted with his action, reckless whether death occurred or not. The death was foreseeable, it was no accident but intentional.

[10] At this juncture and in passing, it must be pointed out that when Counsel prepares Heads of Argument, great care to detail should be ensured as such failure could render one's arguments misleading to the court. For example, in paragraph 12 of the Respondent's Heads there is a reference to the effect that when the deceased was assaulted to death <u>he had been tied</u>. This is not true. There is so mush carelessness on the part of Crown Counsel as he sometimes refers to a sentence of 18 years instead of 14 years and makes, at times, wrong citations and irrelevant excepts, see pages 10, 11, 12 and 14 of the Heads of Argument. Heads of Argument are important court documents and must be

factually precise and correct and if not factually and legally correct they have the potential to mislead the Court. Justice could be compromised.

Analysis of the Facts and Applicable Law

[11] The Appellant argues that the stabbing of the deceased was involuntary. This Court rejects such argument for the following reasons:

The Appellant's action were voluntary from the beginning to the end and he was very much conscious of what he was doing. First, he provokes the deceased by calling him a "home-boy" or *umkhaya,* a derogatory expression in the area. When the deceased protests against such name-calling and confronts the Appellant as evidenced by a heated verbal exchange which ensued, in the heat of that verbal argument the Appellant produces a knife and for no good purpose. No good cause or explanation is offered by the Appellant. The knife which fortuitously falls from the blue is a figment of his imagination. The deceased then finds an opportunity to hit the Appellant on the head with a bottle to repel the intended knife attack. In retaliation or in furtherance of his intended purpose, the Appellant stabs the deceased. According to the *post-mortem* report, the Appellant stabbed, pulled and dragged the knife to cause maximum danger or injury on the deceased.

[12] The intention to hurt the deceased manifest as from the time the Appellant pulls out a knife on the deceased, before he is hit with a bottle. The act of name-calling, failure to apologise when such act is protested to by the deceased and the pulling out of a knife on the deceased is consistent with the

actions of a bully, an aggressor and a provoker. The intention, *mens rea* and the physical action element (*actus reus*) are present and in company of each other. At first, it was to bully but then also to hurt the deceased in case of protest and resistance. When this happened, the Appellant completed the action by stabbing the deceased. The stabbing was unlawful. This narrative cuts across all the defences and fails to support any of the various defences. The rejection of involuntary stabbing is further buttressed under paragraphs 13, 15 and 16 below. The transaction and sequence of events speaks for itself.

[13] This Court is more than adequately convinced by the facts before it that the defence of provocation is not available to the Appellant. Not even an iota of it lingers in my mind. Notwithstanding that the court *a quo* seemed to have concluded that there was some semblance of provocation, it came with a rider or proviso that it was not in itself a complete defence. We fail to see how the deceased could be said to have provoked the Appellant. It's a far-fetched defence for the Appellant. Instead it was the Appellant who provoked the deceased by uttering disrespectful and derogatory words to him, derogatory words as understood in that area of Matsapha Industrial Town. The deceased protests and the Appellant does not apologise or withdraw the insulting words but instead he produces a knife, typical of a bully. The knife falls down and he bends down to pick it up to fulfill his objective for which he had produced the knife. The deceased sees an opportunity to ward off the imminent attack or danger and hits the Appellant with a bottle, which action could correctly be viewed as self-defence against a knife welding attacker. However, the attacker strikes with his knife and the deceased meets his death. It can't be said that the deceased's protestation is a provocative act. The deceased had

his own personal safety to protect just like all human beings do. Secondly, the hitting or striking with a bottle of an attacker or person already holding a knife against you cannot by any stretch of imagination be viewed as a provocative act. In conclusion the Appellant was not provoked but he was both the provoker and aggressor.

[14] This Court further rejects the argument that the stabbing was accidental. During the heated verbal argument between the Appellant and the deceased, the Appellant voluntary and by his own volition produces a knife for no other reason than to hurt the deceased, and he did so fatally. The Appellant has offered no explanation why the knife was in his hand before he was hit with a bottle or even why heavens offered it to him if he did not produce it himself. At that moment, there was no business that required or necessitated the use of a knife by the Appellant. The intention is unmistakably clear, it was to hurt the deceased. The Appellant has failed to tell the Court why he produced the knife when he did while there was a heated verbal exchange in progress. Even when the knife fell down he still pursued it and picked it up for no other reason than to continue his intended goal, otherwise he could have kicked it away and by so doing none could have been hurt by it. Ignoring or kicking away the knife could have defeated the Appellant's initial mission or intention to use the knife on the deceased by hurting and thus killing him. Whether the blade of the knife was loose or not, that did not render in non-functional. The part of the body that was wounded by this sharp knife is a life-threatening part of the body of any human being, strong or weak. The pulling and dragging of the knife on the wound makes it a gruesome killing. The pictures taken of the wounds have not been disputed and any person with a faint heart or even a

reasonable man could lose some sleep over it. The court *a quo* correctly found that the stabbing and killing was not accidental.

[15] After stabbing the deceased, the Appellant chased after him. The intention could not be that he wanted to assist the deceased because as soon as he was told by PW1 that the deed was already done, that is, the deceased was already stabbed, hurt or injured, only then did the Appellant stop the chase. These actions of the Appellant dispel the argument of accidental stabbing.

[16] The Appellant's Counsel also argued that the Appellant must have been dizzy after being hit with the bottle and could therefore have been temporarily insane. This temporal insanity could have been caused by anger or by being hit with the bottle. This is all speculation and conjecture as no evidence whatsoever was disclosed to this Court, medical or otherwise. The undisputed facts are that the Appellant produced the knife, it fell, he consciously saw where it had fallen and picked it up, and stabbed the deceased on the most dangerous part of the body, the upper left side of the chest. When the deceased ran off, he chased after him. He heard when PW1 told him to stop chasing after the deceased because he had already been injured. He complied because his senses were with him and the deed was already done. He was alive to all that was taking place around him. There is no evidence at all to even remotely substantiate temporary insanity, as a result of a blow on the head.

[17] "Automatism" was defined by Marcis J. in *S v Trickett 1973 (3) SA 526 (T)* as–

> *"Connoting the state of a person who, though capable of action, is not conscious of what he is doing... it means unconscious involuntary action, and it is defence because the mind does not go with what is being done"*, and also as-
>
> *"Action without any knowledge of acting or action with no consciousness of doing what is being done."*

In that case there is found a helpful Headnote-

> *"In order effectively "to raise the defence" of sane automatism there must, firstly, be evidence sufficiently cogent to raise a reasonable doubt as to the voluntary nature of the actus reus alleged in the indictment, and secondly, medical or other expert evidence to show that the involuntary or unconscious nature of the actus reus was quite possibly due to causes other than mental illness or disorder. If at the end of the day there is uncertainty as to whether the act was voluntary, or involuntary, the doubt must redound to the benefit of the accused"* (underlining for emphasis).

In casu we only have the word of the Appellant who says that he does not remember stabbing the deceased. This Court holds that such defence must be proven by evidence such as medical or other means of expert evidence that he would have suffered from automatism when he stabbed and killed the deceased. An after-thought would certainly not suffice. This defence has therefore not been raised sufficiently to be of value to the Appellant hence it cannot stand. Uncontroverted facts are that he provoked and stabbed the

deceased, but in between the provocation and stabbing, he was hit with a bottle by the deceased. He then stabbed the deceased on a most delicate part of the body, and not only that, but he also dragged the knife across the wound in order to inflict maximum injury, a fatal one. He thereafter chased the deceased who ran away and he was quite able to hear PW1 when he said he must not chase the deceased any further as the deceased was already injured. Our carefully considered conclusion is that the Appellant was all throughout this episode/transaction conscious of what he was doing and not deprived of his senses, nor were his actions involuntary.

[18] While it is accepted that the prosecution must prove all the elements of a crime and to also prove that the act was voluntary, it is entitled to rely on the presumption that every person has sufficient capacity to be responsible for his or her actions or crimes. If the defence wishes to displace that presumption it must give some evidence from which the contrary may reasonably be inferred *(as per or attributed to Lord Denning in S v Trickett (supra))*. The simple allegation that one's actions were involuntary without further ado shall not suffice. *In casu,* nothing except the bare submission that the Appellant's actions were involuntary, nothing was presented to further demonstrate that indeed his actions were involuntary. He did everything with precision and, if not precision, he did everything a person with a set goal would do.

[19] It was also argued on behalf of the Appellant that he did not have the necessary intention to kill the deceased. He was convicted on *dolus enventualis* which in Latin means the awareness of the probable outcome of an action. *Dolus*

eventualis is where the accused foresees the possibility of his act resulting in death, yet persists in it reckless whether death ensues or not. *Mens rea* in whichever form remains an essential element of the guilt of an accused person. As per the judgment of Van Blerk JA in R.V. Harn 1958 (3) SA 457 (AD) at 466 F-H-

> *"It is clear that in the case of* dolus eventualis *intent to kill will be present where the wrongdoer pursued the act with reckless as to whether or not his act is fulfilled in death. The natural concomitant of this reckless is that the wrongdoer must in fact have (not ought to have) preconceived death as a result; for it would be impossible for him to be reckless as to whether death ensues or not if he never actually appreciated death was a possible result. The appreciation of death as a possible result is a fact which cannot be proved by an objective test. However difficult may be for the Crown this must be proved as an actual fact by inference from all the circumstances."* (My underlining).

[20] *In casu*, the Appellant first provokes the deceased by calling him something he is not. Heated words are exchanged between the two. The Appellant produces a knife (though he claims it must have surfaced from nowhere, which we reject). The knife falls down and the Appellant bends down to pick it. The question which the Appellant does not answer is for what purpose was he picking it up for. Our conclusion or inference is that it was to stab the deceased. Were it not so, he could have safely left it alone or kicked it away or put it in his pocket. As he picked it up, the deceased hits him with a bottle which does not stop him from pursuing his act of stabbing the deceased. He stabs the deceased in a very dangerous and critical place on the body as afore mentioned. The knife is plunged in the body of the deceased and the Appellant pulls and drags the knife thus causing the maximum injury to the wound.

When one looks at the pictures, one's body shudders. The wound is unbelievably so huge that no ordinary person would have survived it. The knife used was very sharp. The sum totality of these events and actions satisfies the inference that the Appellant intended to kill the deceased and he killed him. The inference that the Appellant must have foreseen the resultant death of the deceased can safely be drawn from these facts and circumstances in this case. Since the inference must be the only one, what other inference could be drawn during a verbal exchange of heated words where one of the antagonists draws a knife. What other inference could be drawn from stabbing another person using a very sharp knife. What other inference could be drawn where one not only stabs but also pulls and drags a very sharp knife over the wound. What other inference could be drawn after one stabs another and still chases after the stabbed person with an open knife. None except an intention to kill that person, in which any reasonable man can foresee death as a result.

[21] The Appellant was sentenced to 14 years without an option of a fine for the crime of murder and he now tells this Court such sentence is harsh. We don't believe so but rather tend to agree with the Crown which submitted in their Heads of Argument on page 15-

> *"The court was in fact very lenient on the Appellant in giving him a sentence of fourteen years when taking into consideration the brutal and heinous conduct of the Appellant. The post-mortem report depicts a clear picture of the gruesome nature of the injuries suffered by the deceased."*

One would very well have expected the Crown to have made a counter-application: that the sentence be increased. The triad in sentencing requires the consideration of the accused, the crime and the sentiments of the society. Our courts seem to bend too much on the mercy side of the accused and probably being overly persuaded by principles of re-habilitation of the accused and paying less attention to the convulsion, distaste and rejection of murder by society. It has become almost omni present in its prevalence and the very lenient sentences so imposed by our courts are sconed by those who

remain behind. One is tempted to conclude that our scales of justice are askew or skewed in favour of the accused as if his life has more value than that of the deceased. Family members of the deceased and society's sentiments should also be weighed and factored, in sentencing, especially in wanton killings such as the present. The recent case of *Muzi Petros Khumalo v Rex (11/2022) [2023] SZSC 40 (October 2023)* should be instructive to the High Court when sentencing. The accused was sentenced to forty years (40) for murder. Before this case the range has been 20-30 and yet much earlier it was 7 to 20. There is no need to tabulate and analyze recent jurisprudence as found in the cases but a scroll of recent cases on Eswatinilii provides for trend in sentencing. Consistency in sentencing is part of the rule of law. Imposing lenient sentences is a cause for concern for Emaswati and such sentiments were expressed at the recently held Sibaya. In this case, the court *a quo* justified, wrongly or rightly, its decision on page 22 of the judgment-

> *"In this case the court has taken into account that as much as the case is serious, the blame worthiness of the accused is compromised and reduced by the fact that the deceased was the\aggressor and that the accused had consumed intoxicating liquor at the time of the incident."*

As stated above the Appellant was the aggressor, not the deceased and there is no evidence as to how much liquor the accused had consumed nor of the type or quantity. Such evidence is readily available in traffic offence cases where the consumption of alcohol is an issue. The police can provide it when so required to do. Coming from a liquor drinking spot does not necessarily lead to a conclusion of intoxication. The Appellant must thank his gods since the Crown, apart from its Heads of Argument, did not raise and file a counter-application to the appeal.

[22] Accordingly, the following order is made-

(1) The appeal is dismissed.

S.J.K. MATSEBULA

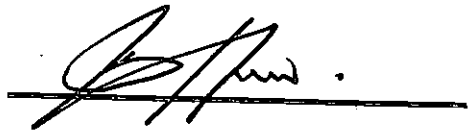
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE

JUSTICE OF APPEAL

I agree



N.J. HLOPHE

JUSTICE OF APPEAL

For the Appellant - **Mr. X. Mthethwa**

For the Respondent- **Mr. F. Mngomezulu**