

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE WO. S.290/84

In the matter of:

THE QUEEN

VS.

JOHN VELAPHI MASUKU

CORAM: J. A. HASSAWALI

FDR THE CROWN: M. NSIBANDZE

FOR THE DEFENCE: P. FLYNN

CHARGE: MURDER

JUDGMENT

(Delivered on 27/09/1985)

HASSANALI, J

The accused is charged with the murder of Beatrice Kunene. He pleaded not guilty.

It is not in dispute that the deceased died as a result of the injuries she had sustained. The only real issue raised by the evidence is whether the accused inflicted all those injuries on her.

Before I come to the evidence in this case, it is well nigh to mention at this stage that the deceased married the accused in 1971 and had three children by him. Earlier she was married to one Kenneth Magagula, by whom she had two children. She also had another by one David Gamedze. All these children were with her at the time of this incident. After 1982 the relationship between the accused and the deceased became strained due to persistent quarrelling and harassment by the accused and as a

2

result the deceased instituted divorce proceedings against him on the grounds of adultery or alternatively for malicious desertion. Subsequently by a Deed of Settlement dated 13/7/84, the accused consented to a divorce and withdrew his defence on 17/8/84. However divorce proceedings could not be concluded due to the death of the deceased.

During the course of the trial, Mr. Nsibandze, Counsel for the Crown, applied to Court to lead evidence of similar acts committed by the accused at a period preceeding the commission of the alleged offence. He said that on two previous occasions the accused had assaulted the deceased and threatened to kill her. He referred me to R vs. Mpanza 1915 AD 348. Mr Flynn for the accused opposed the application.

As I felt that Mr. Nsibandze was trying to establish a systematic course of conduct and thereby negative a suggestion by the accused of accident or mistake, I allowed the application.

The Crown called in five witnesses two of whom were eye witnesses to the events of that night, the eye witnesses being Bongie Magagula and Thokozane Ernest Gumedze, children of the deceased by her former husbands.

When Bongie Magagula gave evidence, it emerged that on the day in question (24/8/84) the deceased and the accused were not living together as they had separated three months earlier. That evening at about 5.30p.m. the accused came to their home and gave chips to the younger children. He asked her younger brother as to the whereabouts of their mother, and he said that she had not returned from work. The accused then asked him as to whether a white van had come to take their mother to which

3

she replied in the negative. She said that only her father's vehicle had come to take her sister to the University. Accused then left them but came back at about 7p.m. and asked her younger brother if he had heard any sound of two vehicles chasing each other. When he said that he hadn't heard anything, accused told him that one of the vehicles referred to belonged to him and the other to his mother's lover and that he was going to chop them.

He returned again at about 8p.m. and knocked at the door. As there was no answer he started knocking on her mother's bedroom window saying that he had come to kill her. She (witness) then told the accused that she was not going to open the door because of his threat to her mother. While they were arguing, she heard her mother's voice and ran to the kitchen to open the door. Suddenly she heard children screaming and when she looked through the window, she found her mother lying on the ground with accused kicking her viciously on the head. Peter / Ginindza a friend of the accused who was with him at that time then tried to stop him but the accused did not pay any heed to him and continued with his assault. Accused then ordered the deceased to get up and walk into the house but she couldn't do so. She however tried to crawl. At that he kicked her again ordering her to get on her feet and walk. She managed to crawl up to the wall and holding on to it, walked inside. When the accused asked her the reasons for coming late, her mother said that she had been to her parent's home. Accusing her of lying, and threatening to kill her, he gave her a hard blow on her head with his fists. She (witness) then rushed out to get help and when she returned she found her mother crying loudly. The

4

accused was continuing to hit her and bashing her head against the wall. In order to stop the accused from assaulting her mother further, she (witness) got hold of the accused's own child and sent her to the deceased with the story that she was having a headache. But the accused chased the child away. She (witness) then went to the Fire station and telephoned her grandfather Rev. Kunene to come immediately. On their arrival they found that the deceased had already been taken to the hospital. Continuing her evidence she said that prior to 24/8/84 the a accused had on two previous occasions, threatened to kill the deceased. On one occasion, he had tried to throttle her, as a result of which she was hospitalised for two days. These two incidents happened about six months prior to this one.

In cross examination she said that when the accused came home for the second time, he had an axe with him which he showed to Thokozane Gumedze. The accused told them that he had seen their mother in the company of her lover and that he was going to chop them into mince meat. She said that Magagula, her father and the deceased had taken her sister to the University that day. She denied that the accused only slapped her mother. He had kicked her and hit her so viciously that her entire face was swollen. She further stated that she overheard the accused telling the deceased that her former husband had tried to kill him. To a question put to her she said that though Kenneth Magagula was her real father, she grew up in the accused's home and always considered him as her father.

I now turn to the evidence of Thokozane Enerst Gumedze whose evidence was basically similar to that of Bongie Magagula. He said that in the evening of 24/8/84, the accused came to

5

their home and gave chips to the younger children. when he enquired whether any vehicle used to come there, the children said that only the company vehicle came there bringing their mother from work. They also said that a vehicle belonging to Magagula, came there to take their sister to the University. The

accused then left but came back later carrying a small axe, and enquired whether their mother had returned, Witness was further questioned as to whether he had heard any noises of vehicles chasing each other. Accused said that he had seen their mother in Magagula's vehicle and that he was going to chop them into mince meat with his axe. He then left but came back again at about 7p.m. and knocked at the door. Bongie told the accused that she was not going to open the door because he threatened to kill their mother. At that he accused them of hiding her and broke her bedroom window to get inside. At this point their mother/ arrived. The accused then took cover behind the house. When she knocked at the kitchen door, the accused accosted her and started to assault her. Peter Ginindza who had come with the accused, on hearing the children's cries rushed out and tried to intervene. Whereupon the accused asked him to mind his own business and said that he was going to kill her anyway. The deceased was now lying on the ground and the accused was kicking her on her stomach. Accused ordered the deceased to get inside the house but as she was not able to walk she requested his assistance which was refused. She however managed to crawl up to the wall and holding on to it she made her way inside. The accused then asked her from where she had come to which she said that she went to her parents. He however did not believe her and continued to assault her. Peter Ginindza again

6

tried to intervene but failed. He then told accused that he had beaten her enough and asked him whether he was going to kill her. When the accused replied in the affirmative, Peter walked out. Bongie then sent their younger sister to stop him from assaulting their mother but accused chased her away. Meanwhile the accused continued to assault the deceased severely, kicking her on the head. When Peter came in later, he found the deceased lying motionless. Witness was then asked by the accused to bring some water and a towel. Accused cleaned up the deceased's face and took her to hospital.

In cross examination Gumedze said that as soon as their mother arrived, the accused assaulted her kicking her on the stomach and head. He denied that the accused beat her only twice on her face with open hands. He also denied that the deceased died as a result of her jumping off a chair.

Peter Ginindza, a Crown witness told the court that on 24/8/84 he accompanied the accused who went to visit his children. on reaching the house, the accused parked his vehicle and went inside. He stayed in the vehicle. A little later he saw a lady alight from a taxi and walk towards the house, Suddenly he heard children screaming and when he rushed there he found the deceased lying on the ground and the accused kicking her. He intervened and stopped the accused from assaulting her further. Accused and deceased then went inside the house. A little while later the children came running to him crying out that the accused was strangling their mother. he rushed into the house and again managed to stop the assault. When he was next called into the house he found the deceased lying on the ground and

7

breathing with difficulty. She was rushed to hospital but was certified dead on arrival.

In cross examination he admitted that the accused was in a furious temper when he assaulted the deceased and that he kicked her on her stomach. In reply to a question, he said that the deceased crawled into the house.

Edward Kunene another Crown witness testified that the deceased was his daughter. She was first married to one Kenneth Magagula and later to the accused. After their marriage the deceased and the accused lived with him for about ten (10) years. After the fifth year of their marriage, their life together was not too pleasant. On 24/8/84 he met with an accident and deceased came to see him. She (deceased) said that she had to rush back home to take her daughter to the University. That evening he received a report that the deceased was being assaulted. When he went to her place, he found that she had been taken to hospital.

In cross examination he said that Thokozane Gumedze's father was one David Gumedze who was now dead. He denied Kenneth Magagula came to his home when the accused and deceased was living there

with him.

Peter Dunseith, another witness for the Crown stated that he was the Attorney representing Beatrice Kunene, the deceased in the divorce proceedings instituted against John Masuku, the accused, the main ground for divorce being accused's adultery with one Sima Simelane. In the alternative she had asked for the restitution of conjugal rights on the ground of malicious desertion arising from the allegation that since April, 1982 he

8

had habitually absented himself from home and persistently quarrelled with her. He also stated that on 13/7/84 the parties signed a Deed of Settlement in which the accused consented to a divorce and as a result on 17/8/84, accused withdrew his defence.

Before considering the evidence of these witnesses in more detail it is convenient to summarise what the accused said in his evidence.

The evidence of the accused as to what happened that day is at complete variance with that given by the two eye witnesses. According to him he married the deceased in 1971 and had three children. At the time of her death she was living apart from him with the children. He said that he was attached to his children especially to his youngest one. He had seen them just once since his separation and the second visit was on the day of this incident. He said that he went there on this occasion because his wife telephone saying that the children were crying for him and she also wanted him to go through their school reports. He told her that that he would visit her either on Thursday or Friday. He saw the children on Friday and gave them chips. The younger one was crying. He asked for the deceased and Bongie said that she had not returned from work. He then asked his own daughter Furti and she said that her mother had gone with same person in a white van. He then left to look for her and on the way he met with Kenneth Magagula. He parked his vehicle at a homestead and while walking towards them, Magagula drove straight into him, as a result he landed on the bonnet and fell on the road side. He was slightly hurt and reported this incident to the police. Later he drove to the Mozambique Restaurant, picked up Peter Ginindza and went to deceased's home but the house was in darkness. He

9

knocked at the door but Bongie refused to open it. Just then he saw a white taxi arrive and the deceased alighting from it. She walked towards the kitchen door. He accosted her and asked her from where she was coming and why She and Kenneth had tried to kill him. Since she did not reply, he slapped her with his open hand. He slapped her again and at this stage Peter intervened. The deceased tried to escape but fell down. He then kicked her on her buttocks. Peter asked them to go inside and talk it out. He denied that she crawled into the house, and that he kicked her on the head. Inside the house, he slapped her twice and kicked her once on the ribs. Peter interceded again. When he (accused) questioned her as to where she went leaving the children she said that she had been to her parents' home. Ace used further stated that when she realised that he was aware of her relationship with Kenneth, she stood on the sofa and jumped in an attempt to run away. As a result she fell down and knocked her head on the floor. He noticed then that she was bleeding from her nose. He took her to hospital where she was declared dead by the doctor. He denied that he carried an axe with him, and had at any time threatened to chop the deceased and Kenneth. He also denied strangling her. He said that he never assaulted the deceased with an axe nor did he attempt to strangle her on a previous occasion. He still considered her his wife in spite of the Deed of Settlement signed on 5/7/84. The accused also stated that on an earlier occasion, the deceased came home late and when he questioned her about it, she said that she had been at a birthday party. He had then hit her with his belt and she had run and fallen into a ditch. Later he was called by the Police because she had complained that ' she had been chopped with an axe. To

10

a question as to whether he had said that wife killers were not sentenced to death, he replied that he had

never been to court before and as such he did not know anything about such matters.

In cross examination Mr. Nsibandze sought to produce accused's record of previous convictions to prove that he was not speaking the truth when he said that he had never been to court before. Mr. Flynn objected to the admissibility of this evidence. I overruled the objection and allowed the Crown to question the accused on his previous appearances in court. Accused then admitted that it was possible that he had been in court before. He maintained that the deceased's death was due to the fall from the chair. Continuing he said that in all, he assaulted her four times with open hands and kicked her twice, but the injuries on her head and throat were the results of the fall from the chair. He said that though he had consented to a divorce he was angry with her for being in love with Kenneth. He denied that he was living with Sima Simelane but admitted that one Thandeka Gamedze was his girlfriend since 1981.

When Henry Mkhathshwa gave evidence for the accused, Mr. Nsibandze objected to his evidence on the ground that it was a personal attack on his (Nsibandze's) character. He asked that this evidence be expunged. Having heard the submissions, I upheld the objection. Mr. Flynn conceded that this evidence was not admissible.

On this evidence then I am asked by the Crown to state that the accused is guilty of murder of Beatrice Kunene on 24/8/84.

It must be remembered that the burden of proving beyond doubt that it was the accused who intentionally killed the deceased

11

rests squarely on the Crown.

I will first of all deal with what has been conclusively proved; that Beatrice Kunene died as a result of multiple injuries sustained by her. Dr. Hhare, the Pathologist who did the post-mortem on the body of the deceased has since died and his Report dated 28/8/84 was handed in by consent. According to his Report the deceased had died of intracranial haemorrhage and had received the following-

- a) extensive bruising of the scalp which became more apparent on its reflection
- b) extensive bruising of the soft tissues of throat around the larynx, though the skin itself was free from bruises.
- c) laceration of the upper lip
- d) extensive subdural and subarachnoid haemorrhage covering brain
- e) fracture of the thyroid cartilage with small laceration of tracheal mucosa underneath

Both Crown witnesses, Bongie and Thokozane maintained that the accused severely assaulted the deceased both on her head and face. So much so that she could not walk upright into the house. The accused however denied this. Bongie further maintained that she saw the accused strangling the deceased, though this too was denied by him. However, I find that the evidence of these two witnesses is consistent with the injuries described by the Pathologist in his Report. There is also the evidence of Peter and that of the accused himself that the deceased was certified as dead on reaching the hospital. Therefore I am quite satisfied that all these injuries were sustained as the result of the brutal attack on her. These two witnesses gave their evidence in

12

an easy straight forward and convincing manner and I have ... no doubts that they gave a truthful account of events as they saw there that night. The accused on the other hand took up the position that he only

slapped her four times and kicked her twice, once on the buttocks and once on the ribs. I cannot believe him considering the extent of her injuries. Brute force must have been applied to cause those injuries. The accused also submitted that the injuries on her neck and head were the result of her fall from a sofa. According to the evidence the sofa was only about three feet in height and the floor was carpeted. Therefore it is highly improbable that the deceased could have sustained such severe bruising of the scalp and fracture of the thyroid cartilage by a fall of such nature. In my opinion the fracture of the thyroid cartilage and bruising of the throat tissues could have only been caused by strangulation. I therefore reject his suggestion as unrealistic and accept the evidence of Bongie and Thokozane. I find myself driven irresistibly by the evidence to one conclusion only, namely, that the accused without any doubt inflicted those injuries on the deceased, as a result of which she died.

The accused also took up the point that he went to the homestead of the deceased at her request that he should look through his children's reports. Having gone there why had he not done so. It is very unlikely that she would have asked him to go to her place in view of the strained relationship that existed between them as a result of the divorce proceedings. Therefore his suggestion that she herself invited him to her place is a calculated lie made to justify his presence that night at her place.

13

On another point he maintained that deceased and Kenneth Magagula had attempted to kill him by running him down. I consider this an invention of the accused, designed perhaps to lend some kind of justification for his ultimate action. Had this incident actually taken place why didn't he get the Police to give evidence on his behalf, especially as he says that he had complained to them about it.

In addition, I was not impressed by the demeanour of the accused in the witness box and I got the distinct impression that when he spoke of facts which were already in evidence he relaxed and spoke with confidence but that when matters which were crucial were touched upon he became wary and his answers did not carry the ring of truth. Frankly, I formed the opinion that he was not speaking the full truth.

Therefore on the evidence, no question of self defence arises, nor does provocation or intoxication or any defence which would reduce the causing of the death to a lesser offence than murder.

Considering the evidence as a whole, there is no doubt in my mind that when he inflicted these injuries on the deceased, the accused was aware that his act was likely to result in the latter's death. He assaulted and throttled her reckless of whether death occurred or not. That being so, it must be accepted that the accused had the requisite subjective legal intention to kill, and I accordingly find him guilty of murder.

J. A. HASSAIMALI

JUDGE