



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 485/2010

In the matter between

REX

Versus

BONGANI ANGEL CAPPER LUKEHELE

ACCUSED

Neutral citation: *Rex v Bongani Angel Capper Lukhele (485/2010)*
[2014] SZHC 337 (26 September 2014)

Coram: **OTA J**

Trial Commenced: **17 February 2014**

Trial Concluded: **24 September 2014**

Delivered: **26 September 2014**

Summary: **Criminal procedure: charge of Murder; self defence; principles thereof; *dolus eventualis* found; Accused convicted as charged.**

Judgment

OTA J

- [1] The Accused is charged on one count of the Murder of one Menelisi Dlamini. The Crown alleged that on or about 27 November, 2010, at or near Logoba area in the Manzini Region, the Accused unlawfully and intentionally killed the said Menelisi Dlamini. When the charge was put to the Accused, he pleaded not guilty. This plea was confirmed by learned Defence Counsel, Mr S. B. Motsa.
- [2] Thereafter, a full blown trial ensued, wherein the Crown led the evidence of four (4) witnesses in proof of its case.
- [3] As the close of the Crown case, the Accused testified in his own defence and called no witnesses.
- [4] The facts of this case are substantially common cause. It is convenient for me to detail the common cause evidence at this nascent stage. They are as follow:-

1. On or about 27 November 2014, the Accused, PW3 Bongani Hadzebe, the deceased Menelisi Dlamini and others, were drinking at a shebeen belonging to PW2, Donald Mshuza Hlophe, which is located at Logoba.
2. There were some problems between the Accused and some of the patrons at the shebeen. PW2 intervened to maintain some order.
3. Subsequently, PW2 left the shebeen to go and buy supplies.
4. Soon thereafter, a fight broke out between the Accused and the deceased.
5. In the process of the fight, the Accused stabbed the deceased on the chest with a spear head, (Exhibit B).
6. The deceased sustained injuries and was taken to the Raleigh Fitkin Memorial Hospital (R.F.M.), where he was confirmed dead.
7. A post-mortem was performed on the body of the deceased by Dr Komma Reddy.
8. The report of the post-mortem examination was tendered by consent as exhibit C and it shows the following antemortem injuries present.

- “1. Contusions of 1 x ½ cm, 1 ½ cm and 1 x 1 cm present on the nose.**
 - 2. Contusions of 4 x 1cm and 2 x ½ cm present on the upper lip.**
 - 3. Contusion of 3 x 1cm present at the left angle of mouth.**
 - 4. A stab injury of 2 x 1cm, with sharp margins present in the front and middle portion of the chest, in the midline, which is 23cms from and above the umbilicus.**
 - 5. A linear cut injury, of 5cms length, skin deep, present on the right side of the abdomen, which is 9cms, from the midline and 13cms from and above the umbilicus.”**
9. The post-mortem report also detailed the cause of death as due to stab wound to the chest.
 10. PW4, 1462 Detective Constable Bongani Magagula together with 3135 Detective Sergeant Langa, investigated this offence.
 11. Their investigations led to the arrest of the Accused from his home on 28 of November 2010.

12. The Accused led PW4 and Sergeant Langa, next to some avocado trees in his premises and pointed out to them the spear head which was used in the commission of the crime.
- [5] From the above stated facts, it is thus an established fact that the Accused stabbed the deceased on the chest with a spear head and that the deceased died as a result of the injuries sustained from the stabbing.
- [6] The question for determination, is, whether the Crown has proved that the Accused intentionally killed the deceased?
- [7] I say this, because, to establish the offence of Murder the Crown is required to prove the intention to kill, whether direct intention – *dolus directus* or indirect intention – *dolus eventualis*.
- [8] This is the position of our law, as aptly recounted by **Tebbutt JA**, in the case of **Thandi Tiki Sihlongonyane v R, Appeal Case No. 40/97**, as follows:-

“Dolus can, of course, take two forms

- (i) *dolus directus* where the Accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill and**

(ii) *dolus eventualis* where the Accused foresees the possibility of his act resulting in death yet he persists in it reckless whether death ensues or not.”

[9] The Crown claims that the evidence led reveals an indirect intention to kill. The Accused on the other hand contends that he had no such intention, whether direct or indirect.

[10] The Crown relied on the evidence of PW1, PW2 and PW3 in proof of this fact.

[11] PW1, Lungisani Vilakati, was initially not at the shebeen but in his homestead which is nearby the shebeen. He told the Court that he was attracted to the scene by some noise coming from the shebeen. He proceeded there and he saw the Accused pushing another guy and he could see that they were quarrelling.

[12] The Accused tried to hit the other man with an iron rod which he was carrying but missed and the iron rod fell. Thereafter, the duo started fighting and that was when, in a twinkle of an eye, the Accused took out a spear and stabbed the other man in the chest. The man fell and was rushed to the Nazarene hospital where he was pronounced dead. PW1 told the Court that he knew the Accused prior to this incident but he did not know the deceased.

[13] PW2 for his part did not witness the fight or the stabbing. His evidence is to the effect that he got a report from one Babe Magagula

Dlamini and PW1, Lungisani Vilakati, that they were having some problems with the Accused. He said he decided to talk to the Accused whom he alleged was violent and disruptive. PW1 catalogued the disruptive behaviour as that the Accused was breaking beer bottles and cutting his hands and then sucking the blood. The Accused was also dancing to some music and would jump over the fence from side to side. PW 2 told the Court that since the Accused was far away, though still within the homestead, he felt that the situation was under control, so he left to buy supplies for the shebeen. That he had driven for just a distance of about 2km's from his homestead, when he received a phone call and was informed that the deceased had been stabbed by the Accused.

[14] PW3 in his own evidence in chief told the Court that when he arrived at the shebeen he found the Accused in a boastful manner. The Accused forcefully took his drink from him and his friends told him that the Accused had been in that state since morning. That the Accused was dancing to the music and he could see that the Accused did not sleep the previous day. He told the Court that himself and the Accused had engaged in heavy drinking the previous day at another bar.

[15] PW3 further told the Court that when the deceased arrived at the shebeen and was approaching him and his friend, the Accused was bossy to the deceased and was harassing him. This led to the Accused and the deceased fighting. That the deceased defeated the Accused. Thereafter, the Accused left for his homestead which is about half a

kilometer away from the shebeen. He came back and hid next to a tap and whilst the deceased was coming out of the shebeen, the Accused pounced on him and they fought again. It was whilst they were fighting that the Accused took out a spear head and stabbed the deceased.

[16] Under cross-examination, PW3 agreed that he did not witness the actual stabbing but was informed by one Sikhumbuzo, that the deceased was stabbed by the Accused. This latter testimony tallies with the statement which PW3 gave to the police on the day of the incident. In the statement, (Exhibit A), PW3 stated as follows:-

“

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I do recall very well that on 27/11/2010 at about 1800hrs while I was in a beer spot known as kamshuza, one Angel Caper was a caose. First of all, he was harassing everybody in the spot.

4

It then happened that when I was with my uncle Mnelisi Dlamini at a pool, Angel came and hit Mnelisi with his head on the forehead. Then Mnelisi fought back. Angel was defeated and ran away.

5

When Angel was at the gate, he then began throwing stones to everyone in the bar. He then went away. As this Angel was not seen I went back inside the drinking house.

In the time of about 10 minutes I was told by Sikhumbuzo that Mnelisi has been stabbed by a spear. I then rushed out and found Mnelisi lying down full of blood and bleeding on his chest. I did not see the person who stabbed him but I was told that he was stabbed.”

- [17] As is clear from the above analogy, PW3 did not witness the stabbing incident. It is also a fact, as conceded by learned Crown Counsel Mr Dlamini, that PW3's evidence to the effect that the Accused went home to get the spear head prior to the stabbing, is a mere assumption. PW3 admitted under cross-examination that he did not see the Accused go home to get the spear head.
- [18] In his defence, the Accused told the Court that when he went to the shebeen to drink on the day in question, he met up with PW3. That he accosted PW3 to pay him the sum of E150-00 which he owed him. He alleged that he had used this money to pay for the muti which was administered to PW3 when he was sick. PW3 told him that he would go home and get his relatives to pay him the money. PW3 left and later came back with other people including the deceased. That he again approached PW3 for payment. That whilst PW3 was trying to pay him the sum of E50-00, the deceased intervened to prevent PW3.
- [19] That the deceased then punched him with his fist and he lost two of his front teeth and the third finger on his left hand. That he did not retaliate but went to PW2 to complain about deceased's treatment of him. He was then bleeding heavily. PW2 told him to wait because he

was on his way out to buy supplies for the shebeen. He waited for PW2 for about 10 minutes at the door of the shebeen. Then the deceased came and kicked him and told him that their situation was going to be akin to the fight between Brandon Lee and Jackie Chan. He tried to escape, but the deceased, together with other people inclusive of PW3, surrounded him and put him in a circle. He still managed to escape and they followed him in hot pursuit.

[20] That during this pursuit, he saw a dustbin and reached into it and picked out an object which he discovered was a spear head. The group caught up with him and he again managed to escape and went back to the shebeen to get his shirt. The group caught up with him again at the shebeen and he engaged in another round of fighting with the deceased. It was during the course of this fight, whilst the two were struggling for the spear head, that he accidentally stabbed the deceased when he fell on top of him with the spear head which was pointed in his direction. The Accused told the Court that he had no intention of killing the deceased.

[21] The take home message from the defence is that Accused did not intentionally procure a weapon to stab and kill the deceased. He chanced upon the spear head in the process of the fracas between him and the deceased and accidentally stabbed the deceased during the fight.

[22] I am inclined to agree that the Accused chanced upon the spear head during the course of the fight. The prosecution dismally failed to prove otherwise. I have already demonstrated the evidence of PW1,

PW2 and PW3 and it is clear that none of them knew how the Accused came to be in possession of the spear head. I thus accept the Accused's testimony that he got hold of the spear head during the cause of the fight. Whether or not he got it from the dustbin or picked it up at the scene is immaterial.

[23] What remains is the Crown's call for the Court to find *dolus eventualis*.

[24] It appears to me that to disprove indirect intention, the Accused tried dismally to set up evidence of self defence. This is borne out of his allegation that he was the innocent one and the deceased the aggressor, who together with his compatriots attacked him for no just cause. This story cannot stand in the face of the overwhelming evidence of PW1, PW2 and PW3, that the Accused was the aggressor in this unfortunate event. I believe especially the evidence of PW2, the owner of the shebeen, who is also a community police in that area. I see him as a responsible member of the society. He gave a vivid account of the Accused's disruptive behavior leading up to this incident. PW1 who witnessed the actual stabbing told the Court that upon his arrival at the scene, he saw the Accused pushing the deceased and attempting to assault him with an iron rod but missed him and the iron rod fell. That was when the Accused took out the spear head and stabbed the deceased.

[25] The Accused did not tell the Court why PW1 and PW2 would fabricate this sort of story against him and implicate him in the crime.

The sudden contention in his defence that PW2 had a long standing grouse against him for bringing his rowdy friends to the shebeen, is unsustainable. I view it as an afterthought. This is due to the fact that the Accused failed to put it to PW2 under cross-examination to test its veracity.

[26] Then there is the evidence of PW3, which corroborates the evidence of PW2 on the Accused's bossy, boastful and disruptive behavior. Even though I have found PW3's evidence untruthful on the question of the actual stabbing, I still view him as a credible witness on the Accused's conduct. His evidence in Court in this regard is consistent with his statement to the police as contained in Exhibit A, which I have set forth in extensor in para [16] above. There is nothing stopping me from accepting this portion of his evidence. This is because a Court is quite entitled, while rejecting one portion of the sworn testimony of a witness to accept another portion.

[27] More to the above, is that even though the Accused alleged that the punch which the deceased threw at him resulted in the loss of his two front teeth, he has produced no medical evidence in proof of this fact. He cannot also be availed of the contention that whilst still bleeding from the injury to his teeth, he approached PW2 to lay a complaint of the alleged assault. PW2 vehemently denied this allegation, and in the absence of a medical report attesting to the alleged injury, I am minded to accept the evidence of PW2.

[28] As the case lies, I find as a fact that the Accused was the aggressor all through. He was the one who harassed the deceased until he engaged in the fight. He was also the one who procured a weapon and not the deceased. The evidence shows that the deceased was not armed with any kind of weapon whatsoever. This being so, I see no basis for the allegation of self defence. There was no reasonable apprehension of any grievous harm being inflicted on him that would propel him to stab the deceased with a sharp and lethal object like the spear head. There is also no evidence to show that the Accused feared for his life by reason of the attacks from the deceased which compelled him to retaliate with the degree of force employed which caused the injury that led to the death of the deceased.

[29] As I observed in my decision in the **King v Khetha Mamba Criminal Case No. 198/11 para [49]** ,with reference to the dictum of **Dr Twum JA**, in the Botswana case of **Mmoletsi v The State (2007) 2 BLR 708**,

“Under the law of this country when a person is attacked and fears for his life or that he would suffer grievous bodily harm, he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should not be more than is reasonably necessary in the circumstances. The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious

injury or even death unless he took the action he did, the killing can hardly be described as self defence.”

[30] This is not such a case. Self defence cannot be sustained. Furthermore, the provocation requisite for the offence of Culpable Homicide instead of Murder, is also conspicuously lacking. The Accused provoked the deceased not the other way round.

[31] There is yet another proposition advanced by learned defence Counsel Mr Motsa, which deserves some comment before drawing the curtain on this judgment.

[32] In the Accused’s written submissions Counsel contended as follows:-

“In proving dolus eventualis, it must be established that the accused had foreseen the possibility of death.

The court is referred to the case of REX V MOMO MOSES SITHOLE criminal case No. 14/2002 (paragraph 14) where the court stated that ‘There is always a very thin line and sometimes a grey area between murder on the basis of dolus eventualis and culpable homicide. One must not lose sight that the onus lies squarely upon the crown to prove direct intention or dolus eventualis.’

The accused person stabbed the deceased during a fight, it was not disputed that he was also assaulted by the deceased. His attitude of reporting the matter to his mother and sleeping in his normal room indicates that he did not foresee that the stabbing would be fatal.

Further the stabbing was during a fight and it cannot be said that he aimed at the chest.

The Court is also referred to the case of REX VS MXOLISI SHONGWE criminal case No. 117/2012.

The Accused person has consumed large quantities of alcohol and that he had only inflicted a single stab wound. As such it was reasonable possible that he did not foresee the possibility of his act causing the death of the deceased. The court is referred to the case of BHEKI MALANGENI DLAMINI Appeal case No. 6/2002.

WHEREFORE, the accused person prays that he be acquitted and discharged on the charge of murder.”

[33] Implicit from the above submission by Mr Motsa is that the Accused negligently terminated the life of the deceased while in a drunken stupor.

[34] Let me say straightaway, here, that the established position of our law is that drunkenness is generally not a defence for murder. Even if I were to consider this factor as urged by Mr Motsa, the poser would be “what level of drunkenness is required to deprive a man of his sanity or self control to such an extent that the mental element requisite for Murder may not have been present?”

[35] There is no medical evidence of the Accused’s condition at the material time that this offence was committed. Can I reach such a

conclusion from the evidence of the Crown witnesses? My answer is an emphatic No.

[36] I say this because even though PW2 and PW3 gave a graphic account of the Accused's state at that material time, I am however unable to reach the conclusion that the alcohol consumed, had robbed the Accused of his self-control and senses to such an extent that the mental element requisite for murder may not have been present. This is due to the fact that the Accused himself has not said that he did not know what he was doing at that time. The mere fact that he has come to Court and has vividly described the events of that day and even disputed the evidence of the Crown witnesses, shows that he was in control and knew what he was doing. He cannot be availed of this defence. See **Rex v Nhlonipho Mpendulo Sithole Criminal Case No. 370/11 para [64]**.

[37] Similarly, the fact that the stabbing took place during a fight or that the Accused was also assaulted by the deceased, or that the Accused went back home to sleep in his normal room, cannot be urged as factors to negate *dolus eventualis*, within the peculiar context of this case.

[38] I have already found that the Accused knew what he was doing at this material point in time. It follows that the mere fact that he chose a sensitive and delicate part of the body like the chest to stab the deceased with a sharp and dangerous weapon such as the spear head, and inflicted the magnitude of injury demonstrated in Exhibit C, leads

me to the inexorable conclusion that the Accused should have foreseen the possibility of his action resulting in the death of the deceased but was reckless as to whether death occurred or not. In these circumstances, it is immaterial that only one stab wound was inflicted. It takes only one stabbing with a lethal weapon administered with a measure of force to a delicate part of a person's anatomy for death to occur.

[39] In the light of the totality of the foregoing, I find that the Accused had *mens rea* in the form of *dolus eventualis*. The Crown has proved its case beyond reasonable doubt. I find the Accused guilty of the offence of Murder as charged and convict him accordingly.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
-----DAY-----2014**

**OTA J.
JUDGE OF THE HIGH COURT**

For the Crown: S. Dlamini

For the Accused: S. B. Motsa