

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 147/2013

In the matter between:

REX

And

JOHANNES MAHLASELA ZWANE Accused No.1

EPHRAEM MAGANINJOBOWANE Accused No.2

CHRISTOPHER MANYEVA TSELA Accused No.3

Neutral Citation: *Rex v. Johannes M. Zwane & Two others (147/13) [2019]*

SZHC 173(31st July 2019)

Coram : Magagula J

Dates Heard : 13/6/18;14/6/18;

26/9/18; 27/9/18;20-21/3/19;

27-28/3/19 and 3-4/7/19

Delivered : 31/7/19

[1] In this matter the accused persons are charged with the crime of murder and the crown alleges that:

“Upon or about the 7th October 2012 and it or near Tjebovu area in the Manzini Region, the said accused persons jointly or severally acting in furtherance of a common purpose did unlawfully and intentionally kill one DUNGUZELA MBERENI DLAMINI and did thereby commit the crime of MURDER.”

[2] At the commencement of the trial, the Public Prosecutor Mr K. Mngomezulu informed the court that accused No.2, EPHRAIM MAGANINJOBOWANE has since passed away. The crown was now proceeding against the two remaining accused persons. The death certificate for accused No.2 was duly filed.

[3] Upon arraignment both accused No.1 and accused No.3 who were duly represented by legal counsel, pleaded not guilty to the charges preferred against them.

THE EVIDENCE

[4] The crown then proceeded to call its first witness Pw1 – MTHUNZI GAMA. This witness told the court that sometime in October 2012 there was a cleansing ceremony at a Zwane homestead at Tjebovu area in the Manzini region. This was pursuant to the death of a certain “ Make Nkosi” of the same homestead. He was on his way to see his girl friend when he heard some noise. The noise was below Tjebovu school. He then went to the place where the noise was. Upon his arrival at this place he found accused No.1

Mahlasela Zwane, Christopher Tsela, accused No.3 and Maganinjobo Zwane.

The three were accosting a man he did not know. Accused No.1 was carrying a knobkerrie and accused No.3 was carrying a stick.

[5] In his evidence in chief this witness told the court that after he had seen these four people he left. In cross –examination however he conceded that he did record a statement with the police and that in his evidence he left out quite a number of things he had told to the police. His explanation was that he had forgotten some of these things since they happened a long time ago. I could however discern that some things he left out because he thought they would be self-incrimination. For instance in cross – examination he conceded that he also was part, of the people who chased after the deceased before he was killed. He however maintained that when he left the scene the status of this unknown man was normal.

[6] When it was put to him in cross – examination that accused No.3 was not part of the people who chased after the deceased he maintained that he was.

[7] Pw2 – Doctor (Makhiziyane) Mavimbela told the court that after attending the cleansing ceremony at the Zwane homestead, he left with accused No.3, Christopher M. Tsela to a funeral. On their way to the funeral he heard noise of people quarrelling. He eventually established that the noise was just below Tjebovu school and indeed there were, people quarrelling there. These people were accused No.1 Mahlasela Zwane, Mthunzi Gama (Pw1) and a person he did not know. This witness was told to go and seek for assistance. He obliged and left accused No.3, Christopher Tsela, who had now joined in the quarrel, there. These people were quarrelling but not

fighting. This witness went to accused No.1's mother to report the quarrel. She said it was dark and declined to attend to the quarrel.

[8] This witness came back, reported the old lady's response and left for church. When he came to report the response by the old lady the people were still quarrelling but not fighting. It is this witness's evidence that accused No.1 was carrying a knobkerrie and accused No.3 was carrying a stick which had no head. In cross – examination by Mr Dlamini, this witness acknowledged that Ephraem Maganinjobo Zwane. (Accused No. 2 now deceased), was also amongst the people who were quarrelling. The witness also revealed in cross – examination that he thinks the time was around 8:00 pm when he found the people quarrelling. The witness was further asked if accused No.2 was carrying anything. His response was that he did not notice if he was carrying anything. He was adamant however that he saw accused No.1 carrying a knobkerrie and accused No.3 carrying a stick.

[9] Again in cross - examination this witness conceded that he returned to the spot where he left the people quarrelling on the following day. He then found a group of people there. He was requested by accused No.1 to go and buy airtime so that he could report the death of a man to the police. He further revealed that when he proceeded to the funeral he left accused No.3 at the spot where the quarrel was. Further this witness revealed in cross – examination that when he returned the following morning he found that the man he did not know had died.

[10] In cross – examination by Mr Mthethwa this witness clarified that whilst proceeding to the funeral with accused No.3 he found accused No.1, accused No.2, Mthunzi Gama (Pw1) and the man he did not know quarrelling, and they were just below Tjebovu school. This witness denied

ever seeing the deceased tied with tree barks or being assaulted at this point in time. He denies ever hearing accused No.3 warning the others not to assault the deceased. It was further put to this witness that upon his arrival at the place where there was a quarrel he was sent to accused No.1's mother to report that accused No.2 had assaulted the deceased and that this witness actually saw accused No.2 assaulting the deceased with a knobkerrie. This witness flatly denied ever seeing accused No.2 assaulting the deceased. He also denied that he was sent to report that accused No.2 had assaulted the deceased. He maintained that he was only sent to report a squabble and not a fight or assault.

[11] PW3 – GALINA DLAMINI

This witness told the court that she is a resident of Tjebovu area and she was born there. She also stated that she knew the accused persons very well and they are residents of the same area having been born there.

[12] The witness told the court, that it was a Sunday when she met police officers who were going to look for her at her home. She met them near Tjebovu School. They asked her to come and assist them with what had happened next to the school. Upon arrival next to the school she found a dead man. She observed that the deceased had two fractures on one leg and was also wounded on his right cheek.

[13] This witness also told the court that the police enquired what had killed the man. The accused persons confessed that they had killed him. The people who confessed were Mahlasela Zwane (accused No.1), and Manyeva Tsela (accused No.3).

[14] The police then enquired from the three as to what did they use to kill the man. It is this witness's evidence that the accused persons then pointed out at weapons they used to kill the deceased. Mahlasela Zwane led them to a house within the school premises where he personally took out a knobkerrie which was used to assault the deceased. This was in a teacher's house which was no longer used. The witness further described the knobkerries as one which was carved and which had a big head.

Maganinjobo Zwane led them to a place outside the school fence where he pointed out to a knobkerrie and tree barks which had been used to tie the deceased. The knobkerrie was small and had a broken handle.

[15] They then proceeded to Mahlasela Zwane 's homestead where (Manyeva Tsela accused No.3) pointed out a stick which was used in assaulting the deceased. The stick was under some sleeping mats where some old women were sitting and had to stand up for the stick to be retrieved. The stick did not have any head and its handle was about three (3) centimetres in diameter.

[16] In cross – examination by Mr Dlamini this witness became shaky in some aspects of her evidence saying that maybe she did not recall some of the events well since they happened a long time ago and that she is also advanced in years. She struck me as a person who came not aware that she would be cross – examined on what she says in chief. However when cross – examined by Mr. Mthethwa on a subsequent day she was firm on what she witnessed, namely that all accused persons confessed to the police that they assaulted and killed the deceased and that each of them pointed out the weapon he used in assaulting the deceased. She was also asked in re – examination by Mr Mngomezulu.

Q. “ *Did each accused person state why they were pointing out the weapons?*”

A. “ *They said they had used the weapons to assault the deceased each saying this is what he used to assault him.*”

PW4 – DUMSANI ZWANE

[17] This witness first told the court that he is a resident of Tjebovu and that the accused persons were known to him. He mentioned that he grew up with them in the same area.

[18] He went on to tell the court that in the morning of the 7th October, 2013 at around 7:30 a.m an alarm was raised that an unknown man was found dead by the school gate. He went to the scene. He found the deceased and other members of the community. The accused persons were also there including one Maganinjobo Zwane who has since passed away.

[19] This witness went on to tell the court that police were called and they arrived around mid day , that is, between 12:00 noon and 1:00pm. After recording statements the police then requested him and other members of the community to accompany them with the accused persons who were going to point out weapons they had used to assault the deceased. Johannes Zwane (accused No.1) showed them a knobkerrie which he used when carrying out his security duties at the school. The knobkerrie was about the size of this witness’s hands when put together. He said he had used the knobkerrie to assault the deceased.

[20] This witness further said that Christopher Tsela (accused No.3) showed them a stick at a Zwane homestead. The stick was about one metre in length and about two to three centimetres in diameter.

Maganinjobo Zwane (accused No.2) retrieved a short knobkerrie and some tree barks. As the accused were pointing out these weapons they were actually confessing to the police that they had used them in assaulting the deceased. This witness also identified the two knobkerries and showed them to the court. He stated that the smaller one was for Maganinjobo Zwane and the big one for Johannes Zwane. He stated that he did not see before court the weapon for Christopher Tsela.

[21] This witness was questioned by both defence counsel in cross – examination and he stood firm on what he had told the court in his evidence in chief. He actually struck me as a very credible witness who was testifying only to what he saw and heard. He would not hesitate to state what he did not see or hear as well as what he did see and hear.

[22] After leading these four witnesses the prosecutor sought to introduce confessions made by the accused persons before separate judicial officers. The defence objected to these confessions. The crown then sought to lead evidence to prove that such confessions were made. A trial within a trial then had to be conducted. During this trial the crown paraded five witnesses to prove that the accused persons did make the said confessions and that such confessions were admissible in court. The witnesses led were the two judicial officers who recorded the confessions and their interpreters as well as the investigating officer. Having heard these witnesses as well as the evidence of accused No.3 I came to the conclusion that the accused persons did make the said confessions and I duly admitted them. My reasons for the ruling in this regard are annexed to this judgment.

[23] Accused No.1 Johannes Mahlasela Zwane made a statement before magistrate Sebenzile Ndlela on the 8th October 2012. This statement is not

comprehensible in some parts. I will try to paraphrase some parts of it as I understand them.

[24] Accused No.1 I told the judicial officer that on the 6th October 2012 there was a cleansing ceremony at this homestead. The ceremony was in respect of his wife who had passed away. His brother Jotham Zwane came with a person whom he introduced as Dlamini. Accused No.1 then asked for a lift for his brother Jotham Dlamini and the Dlamini man. However his brother (presumably Jotham) hit the Dlamini man with an elbow and told him to alight from the motor vehicle saying they would take a mini bus.

[25] They continued to drink liquor sitting under a tree. As they were sitting this Dlamini man (the deceased) then cried out and said he was thinking.

“ He then said, as he is a traditional healer(his) container (sigubhu) told him that he had to fetch someone from my home.....who was lost. (this lost person)had to be found by another person. We were perplexed as we did not know where Dlamini’s mother was. We then chased after the man as we wanted him to explain his story. We cot out (caught up) within him as he was running away.

I used a knobkerrie to hit his knees and he was cot (caught). We asked him what he had in his pocket and he took out his cigarette (tobacco) snuff. We found another container andmuti wrapped in a plastic bag. We told him to eat it and he said it was not harmful. We forced him to eat it, forced it into his mouth. One container had a red concoction (substance).

I was working as a security guard at the school where we caught him. I then left him lying on the ground. I went into the school and when I came back to the gate people came and found him and he was dead on the ground and children ran away. I went home and reported the matter, community police came and saw him lying dead on the ground, and he was covered with a plastic bag.

In the evening Icalled my brother Jotham who came with the said Dlamini (deceased). I told him to come and fetch him and he cut the line. We could not communicate with him. We then called the police in the morning.

I asked a relative to give me Jotham's wife (number) so (that) I could call her. I then called her and she was surprised (when) I told her (that) Dlamini is dead..... I was with Zwane (presumably Maganinjobo), Christopher Tsela and one Gama boy. We were assaulted (arrested) after that.”

[26] The statement recorded by accused No.3 before Principal Magistrate David Khumalo is in SiSwati. I interpret it as follows:

“ An old lady got lost in our area and the police came to us enquiring about this matter. We searched for the old lady for a very long time but we never found her. The chief's kraal issued an order that there should be no ploughing of fields until the old lady is found. This old lady was a Mrs Zwane born Fakudze.

The deceased then said he heard the old lady speaking in a calabash (sigujana) this shocked us as we had searched for

the old lady for a long time. The deceased said this calabash belonged to a child of the old lady who was a traditional healer. Members of the Zwane family then assaulted the deceased. They assaulted him with a knobkerrie on the legs and broke his legs. I had also beaten him once with a stick on his back. The members of the Zwane family who were assaulting him are Maganinjobo Zwane and Mahlasela Zwane.

I then went home leaving the deceased sitting down since his legs were broken. I left him with the two who had assaulted him. He was still alive when I left him. I was going to report at the Zwane homestead that the man who was talking about the old lady saying that she was talking in a calabash has been assaulted.

Mahlasela Zwane also arrived at the Zwane homestead and reported that he found the man they had assaulted dead and his brother Maganinjobo Zwane had left the scene. I do not know how the deceased died since he was alive when I left him. We then proceeded to the scene and we indeed found him dead.

I do not know the name or surname of this person because he is not from our area.

That is all I can say in this matter.”

[27] PW5 – DETECTIVE CONSTABLE SINIKIWE THWALA

This witness is the Chief Investigating officer in the matter. She narrated to the court how she received a report on the death of a person near Tjebovu School on the 7th October 2012 at about 6:00 am. She and other officers proceeded to the scene of crime where they found a group of community members, the three accused persons and the deceased body. She told the court that when she questioned the accused persons, after cautioning them in accordance with the judges rules, they made statements which she considered to be confessions. They further proceeded to point out the weapons they had used in assaulting the deceased. The pointing out was done in the presence of some community members and in particular Pw3 and Pw4.

[28] Thereafter she arrested them and took them to the Mankayane Police Station where she further interviewed them separately. Realising that their statements amounted to confessions she then advised them to go and make the statements before a judicial officer. Indeed on the 8th October 2012, they proceeded to make confessions before separate judicial officers as already indicated above.

[29] After leading all these witnesses the crown then handed in exhibits as follows:

Exhibit “C” photographs taken at the scene of crime.

Exhibit “D” The post – mortem report prepared by Dr Komma Reddy. (Police Pathologist).

The crown then closed its case.

[30] The defence opened its case with accused No.1, Johannes Mahlasela Zwane taking to the stand and making a sworn statement. In a nutshell the evidence of accused No.1 is in line with that of the crown witnesses. He confirms the cleansing ceremony at his homestead, the arrival of the deceased and his utterances about the lost old lady being in a calabash and that this man was eventually assaulted by the school gate and he died. Accused No.1 however denies he and accused No.3 ever taking part in assaulting this man. He maintains that the man died as a result of being assaulted by accused No.2, Maganinjobo Zwane with a knobkerrie. He actually makes it appear as if accused No.2 inflicted one blow on this man where after he, accused No.1, dispossessed accused No.2 of the knobkerrie and went to put it at the school where he normally kept his jackets since he was a security guard at the school.

[31] Accused No.3, Christopher Tsela also gave his testimony. Mr Tsela gave evidence in line with that of accused No.1 as regards the cleansing ceremony, the unknown man being assaulted by Maganinjobo Zwane with a knobkerrie and eventually dying. Mr Tsela stated however that the man had been severely assaulted by Maganinjobo Zwane. He also stated that accused No.1 dispossessed Maganinjobo of the knobkerrie and left with it. He denied ever assaulting the deceased. He further stated that it was only after he had been asked by the police about his stick that he went to retrieve it at the Zwane homestead.

ANALYSIS OF THE EVIDENCE

[32] The evidence of Pw1 and PW2 is to the effect that they witnessed a squabble in which all three accused persons were accosting a man they did not know next to Tjebovu school gate. It is common cause that this unknown man is

the deceased. These witnesses deny ever seeing the accused being assaulted in any manner.

[33] The evidence of Pw3 and Pw4 relates to the pointing out of weapons used in assaulting the deceased by all accused persons. As I have already pointed out above, Pw3 was rather shaky in cross – examination by Mr Dlamini although she again became firm when cross – examined by Mr Mthethwa on a subsequent date. Pw4 was very impressive and he came out unscathed in cross – examination by both counsel. This witness stated categorically that all accused persons stated as they pointed out the weapons that these were weapons they had used in assaulting the deceased. In fact they were confessing to the police that they had assaulted the deceased.

I have no doubt about the authenticity of this evidence. It corroborated the evidence of Pw5, the investigating officer, who testified that the accused persons freely and voluntarily pointed out weapons they had used in assaulting the deceased. She further pointed out the accused persons were actually confessing their assaulting the deceased.

[34] The evidence of Pw3, Pw4 and Pw5 further finds support in the statements made by the accused persons before separate judicial officers. In their statements recorded before the judicial officers, both accused No.1 and accused No.3 confessed that they did inflict blows on the deceased using the same weapons that they pointed out. It is true that they tried to play down their participation in assaulting the deceased when they appeared before the magistrates each saying that he inflicted only one blow. This however goes against the evidence of Dr Reddy in the post – mortem report which was submitted by consent. This report reveals several severe injuries inflicted on the body of the deceased. The report reveals at least seven (7) contusions ,

two lacerated wounds on the legs, two fractured bones on the legs and eight fractured ribs. This shows that the assaults were much more severe than the accused persons try to portray them. Indeed the doctor concluded that the deceased died due to these multiple injuries.

[35] The evidence of Pw5, the investigating officer is in line with the evidence of the four independent witnesses. I have no doubt as to its correctness and I accept it as such.

FINDINGS

[36] There is no doubt in my mind that the deceased died as a result of being assaulted by the accused persons. The crown has therefore succeeded in establishing the element of *actus reus*. I now proceed to consider if the accused persons had *dolus* in any form when they assaulted and kicked the deceased.

[37] The crown did not lead any evidence to establish that there was any pre – meditation or prior plan to kill the deceased by the accused persons. To the contrary most of the evidence show that the assault on the deceased was prompted by something which he said concerning a matter which was painful to the whole community of Tjebovu. It seems that had he not made these utterances, there would have been no reason to assault him. I accordingly find that this was not a premeditated murder and therefore there is no *dolus* directors.

[38] Regarding whether or not there was *dolus eventualis*, I am guided by the injuries inflicted upon the deceased as per the post mortem report. I have already outlined most of these injuries above and the report reveals even more, such as the fracture of the chest bone and rupture of the right lung.

From the nature of the injuries it is clear that the assaults were aimed at killing the deceased. At the very least the accused persons did not care whether he died or not when they inflicted the injuries upon his person. I accordingly find that the accused persons had intention in the form of *dolus eventualis*.

Verdict

[39] I find accused No.1 and No.3 guilty of murder as charged.

SENTENCE

[40] The accused persons have been found guilty of murder and I now must consider the sentence to be imposed. It is now trite that in sentencing convicts the court must consider three things namely; the nature and seriousness of the offence, the interests of society and the circumstances of the accused.

[41] Murder is a very serious offence and the sanctity of life cannot be overemphasized. The right to life is protected in our constitution and in the Universal Declaration of Human Rights. It ranks at the top of most serious offences.

[42] The killing of a human being runs against the vein of any civil society. It is in the interests of any society that the people who kill others should be permanently removed from society. Society should be excused of such elements.

[43] Having made these observations I now turn to consider the circumstances under which the offence was committed to see if there are any extenuating

circumstances. Firstly I note as I have already observed that the accused persons did not plan or set out to kill the deceased. They had no pre – meditation to kill him. Secondly I note that the deceased said something which infuriated the accused persons. An old lady had disappeared a long time ago and she was part of the Tjebovu community. The whole community was stressed about the disappearance of this old lady to the extent that the chief’s kraal ordered that no fields shall be ploughed until she is found. The community conducted a search of the lady together with the police but never found the lady. More than ten years after disappearance of this lady, the deceased then uttered words to the effect that he knew where the old lady was. The deceased said the old lady was in a calabash (sigujana) suggesting that she had been trafficked for witchcraft purposes.

[44] In my view the accused persons, being members of the community were justifiably infuriated by the deceased’s utterance. I accordingly find this to be an extenuating factor. Also as Mr. Mthethwa submitted, the accused persons obviously believed that a person can be kept in a small calabash and this is a sign that they believe in witchcraft which is another extenuating factor. I also note that the whole incident arose during a drinking spree in which everyone involved was drinking alcohol. It is only fair to consider and take into account the possibility that the accused persons were not in their sober senses when they committed the offence.

I accordingly find that there are extenuating factors in this case.

[45] As regards the circumstances of the accused, firstly I note that they are elderly persons with no record of any previous convictions. The court was informed that they are both sixty (60) years of age. Secondly they appear to be remorseful about what they did. The investigating officer told the court that


they co-operated with her all the way and they proceeded to make confessions before judicial officers. The court was also informed that they both have young children some of whom are still attending school.

[46] Mr Mngomezulu who appeared for the crown however implored the court to consider that the deceased died a very painful death. He also contended that the accused persons did not act in a manner befitting them as adults. Rather than assault the deceased they should have apprehended him and handed him over to the authorities of the area or the police. He further argued that there was no proof that accused were drunk or that their state of sobriety contributed to the commission of the offence. He further contended that the provocative statement was not necessarily directed to them. He however conceded that the belief in witchcraft could be an extenuating factor. He then implored the court to sentence the accused persons to lengthy custodial sentences.

[47] Having considered all the circumstances of the case and submissions by all counsel the court makes the following order:

47.1 Both accused No.1 and accused No.3 are sentenced to fifteen years imprisonment.

47.2 Any period spent in custody shall be taken into account in computing the sentence of each of the accused persons.



J.S MAGAGULA J

For the Crown: K. Mngomezulu

For Accused No.1: S.K Dlamini

For Accused No.3: X. Mthethwa