



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Held at Mbabane

Case No. 68/12

In the matter between:

**REX**

**AND**

**SHADRACK MELUSI MKHONTA**

**Neutral citation:** *Rex vs Shadrack Melusi Mkhonta [68/12] [2021] SZHC 172*  
(5<sup>th</sup> October, 2021)

**Coram:** FAKUDZE, J

**Heard:** 12/05/2017; 09/08/2017; 06/08/2018; 07/07/2021; 12/07/2021;  
05/08/2021; 16/09/2021

**Delivered:** 5<sup>th</sup> October, 2021

**JUDGMENT**

[1] The accused is charged with the offence of murder in that on or about the 17<sup>th</sup> February 2012 and at or near Sithobela area in the Lubombo Region, the said accused did unlawfully and intentionally kill one Nozipho Mngometulu and did thereby commit the said crime.

[2] When the charge was read to the accused person, he pleaded guilty to culpable homicide which was not accepted by the Crown. The Crown then led evidence of five (5) witnesses. Their evidence is as follows:

**PW 1 – TENGETILE MKHONTA**

[3] This witness is one of the daughters of the accused. She stated that around the year 2012, the family was in the house at Sithobelweni where the deceased worked and they were watching television. The accused arrived and asked the deceased whether she had airtime on her cellphone or not. The deceased responded by saying that she did not have it. The accused then went to a nearby shop to buy the airtime. PW 1 and her siblings went to the bedroom to sleep and they left the accused in the sitting room doing some work on his computer.

[4] Later, she heard someone raising an alarm (inyandzaleyo) in the middle of the night and the witness woke up. Her mother was the one who was raising the alarm. There was power failure in the house and therefore no electricity. PW 1 heard the accused moving up and down in the house. Later the accused went to the witness's bedroom, called her and told her that he had caused harm to her mother.

[5] Cross examination established that if the witness heard the mother raise an alarm, why did she not go help her and the response was that the witness was afraid and confused. It was put to PW 1 that no alarm was ever raised the deceased.

## **PW 2 – NTOMBIKAYISE DLAMINI**

[6] This witness stated that in 2012, she was stationed at Sithobela. On the 17<sup>th</sup> February and at night she heard someone knocking at her door and it was the accused. The accused told her that he had killed the deceased and PW 2 should accompany him to the police station to report the incident. PW 2's cousin at the work station accompanied her to the police station together with Mkhonta. On arrival there Mkhonta narrated how he killed the deceased. The police accompanied them to the deceased's house and on arrival there, they found that the deceased had died. The accused was then arrested and kept in the police van whilst the police were waiting for the scenes of crime officer from Siphofaneni.

[7] Cross examination established that the deceased once went to Durban to buy material for making clothes. From Siphofaneni to Sithobela she was driven by a certain Mr. Dlamini who was working for SPTC.

## **PW 3 – AARON ZENZILE DLAMINI**

[8] This witness entered the deceased's house in the company of the police. He noticed that the deceased was lying on a sheet that had blood. The deceased showed this witness and the police the knife the accused used to kill the deceased. He was there when the accused pointed out the knife. It was in the kitchen. There was no cross examination of this witness.

## **PW 4 – CONSTABLE BHEKI MABUZA**

[9] This witness is the Investigating Officer in this matter. Whilst at Siphofaneni, his work station, he received a call informing him about a

murder case in Sithobelweni. He and three other police officers proceeded to Sithobelweni. On arrival there, they found Constable Sindane Dlamini and Constable Mdluli already there. The witness and his team were shown the corpse. He checked the pulse and there was none. There was no electricity.

[10] The scene was cordoned and preserved till morning as the electricity never came back. When the body was inspected. There were three wounds present on the body. One was on the left breast, one on the chest and one on the upper shoulder. There was a pool of blood on the bed. After taking photos of the scene the body was taken to the Sithobelwni Mortuary after being certified dead.

[11] The witness proceeded to the van where the suspect was kept. He introduced himself and cautioned the suspect according to the Judges' Rules. He further cautioned the accused who later pointed out the knife he used to kill the deceased. The accused did so in the presence of Aaron Dlamini and Dumsane Mziyako (now deceased).

#### **PW 5 – CONSTABLE SINDANE DLAMINI**

[12] This witness gave evidence on how the accused was received at the police station on the night of the incident. His evidence corroborated that of PW 2.

#### **Consent**

[13] The evidence of the identifying witness was noted and entered by consent between the parties. The medical report was also entered and marked

“Exhibit A.” The photographs of the scenes of crime were also entered by consent and marked “Exhibit B.” The Crown then closed its case.

## **THE DEFENCE**

[14] The defence only led one witness in the person of the accused. The accused stated that he was the husband to the deceased. He stated that he was a teacher by profession but was now on suspension following him being charged.

[15] When asked how this marriage with the deceased was, he said at first it was rosy and at a later stage it became sour. The sourness started in 2007 following that his wife had refused to go to the fields. This was after the accused had established a sewing business for her. At some point in time the accused received a call from her cousin telling him that the deceased wanted to commit suicide following the accused’s insistence that she should work on the fields before going to her business.

[16] The issue of the suicide troubled the accused and a meeting with the in laws was called. He did not participate in that meeting because the Chief negotiator who was the Team leader, suggested that. After the meeting, the accused was not told what transpired in the meeting. In 2008, whilst the accused and the deceased were at home in Nhlangano area, the accused heard the deceased talking to someone on the phone saying yes love, yes love. This bothered the accused because this happened at night.

[17] In 2009 the accused asked the deceased to accompany him to a church service at Pongola, South Africa, and this was during Easter time. The

deceased refused and later surfaced at Pongola. The accused did not know how she got there. This made him suspicious that she must be having a love relationship with someone else. In 2011 his wife was employed at Sithobelweni and the accused was teaching at Nkwene. One Friday the accused went home to Nhlangano and the deceased did not come with the children. The deceased did not give any reason for not coming. She came the following days. He tried to resolve this one as well to no avail.

[18] At a later date, the deceased told him about a workshop at Mpangeni for a period of 3 days. It was work related. A man called the accused in the morning asking the accused to help the deceased carry her suitcase to the Siphofaneni where there was a bus to take them to the workshop. She went and came back from Mpangeni. The accused did not ask her about the love relationship she had developed with a certain Dlamini who was working at Siphofaneni SPTC.

[19] Towards the end of 2011, schools were closed and the accused was at home in Nhlangano preparing for his examination at the University. The deceased was in Manzini with their children. The deceased called to say that her mother had sent her to Phuzumoya. The children were left at her mother's place. He later tried to call her and the deceased did not pick up her phone until about 0200 hours the following day. This worried the accused once more.

[20] Sometime in January, 2012, the accused and the deceased were at home in Nhlangano. They were about to sleep when suddenly the accused fell asleep and when he woke up the deceased was not in bed and not in the house. She

was outside talking to someone on the phone. The accused asked her what she was doing there and she replied and said she was enjoying fresh air. Later that very same month, the deceased asked for permission to go to Durban to buy material for her business. She said that a certain make Zwane was going with her. She promised that they would leave in the morning and come back in the evening. She did not come until 0200 hours having earlier called at 2100 hours to say she was at Lavumisa Border. The excuse she gave for coming home so late was that the car she got a lift from had a break down.

[21] In February, 2012 at Sithobelweni the accused was doing his homework using his computer. The children and the deceased were watching television and it was around 2000 hours. Later, the accused went to the bedroom and heard the deceased's phone ringing loud and she picked it up and told the caller to call the following day. The accused asked her about the conversation and she did not answer. He then clapped her and that is when the deceased opened up and said a Mhlanga police officer who initially was at Nhlngano but now at Siteki was the one calling. She used to be her tailor. On the following day, the accused went to the University. On that afternoon he received a call from a police officer based at Siphofaneni asking the accused to come there because his wife was there. When the accused arrived at Siphofaneni, the wife had already left. Later, she came back and the police officer talked to both of us with a view to reconciling our differences.

[22] Later, the accused met make Zwane who had gone to Durban with her wife. The accused wanted to thank her for this gesture. He asked make Zwane

what time they arrived at the border and make Zwane said around 1900 hours and they arrived at Siphofaneni around 2100 hours. A certain man who was driving in a SPTC car took her. The accused said this surprised him and he suspected that his wife had an extra marital affair.

[23] On the day of the sad incident, the accused went to the bathroom to bath. When he entered the bed room, his wife was there. She asked the accused to bring a knife so as to use it to cut the candle into two and give one piece to the children. The accused placed the knife on the table next to the bed. He then made sexual advances to the deceased who resisted his moves. The accused then decided to confront her about what make Zwane had told him about in relation to the Durban trip. The deceased did not respond. The accused also asked her about a meeting he had proposed between his family and that of the deceased. He was seeking the deceased's family response and instead of responding, the deceased spat on his face and the accused got angry and slapped the deceased on the face. The deceased later took a knife and wanted to stab the accused and he managed to avoid it. He then took the knife and stabbed the deceased three times. He was acting in self-defence. He later informed the first born child that he had killed the deceased. After a few days after the funeral, the accused's family went to apologise to the deceased's family.

[24] Cross examination established that the accused had piled up in his mind and heart the misdeeds of his wife dating way back to 2008. That is why on the night of the incident, he reflected on these past events. When asked about the SPTC man, it was put to the accused that an explanation had been offered that he was the deceased's customer and the accused was not



satisfied with this explanation. It was further put to the accused that he had deep seated anger against the deceased. The accused further confirmed that the wife's misdeeds were causing a lot of havoc to the accused's life. It was finally put to the accused that his wife never spat on his face and that the accused did not put the issue of the spitting to the Crown witnesses. It was therefore a fabrication. Same applies to the issue of the knife that the accused brought to the bedroom.

[25] The defence then closed its case.

## **SUBMISSIONS**

### **The Crown**

[26] The Crown submits that it has successfully established a strong case of murder against the accused. There is no dispute that the accused unlawfully killed the deceased. What remains to be proven is that there was the necessary intention.

[27] The Crown contends that the intention was in the form of *dolus directus*. The accused had been bearing a grudge against the deceased following her sexual relations with the SPTC man. On the night of the incident, the accused stated in evidence in chief that when the wife refused to have sex with him, the recordings of her past deeds began to cloud his mind including the Durban issue.

[28] In the event the court come to the conclusion that the murder was not premeditated, the Crown submits that it has established intention in the form of *dolus eventualis*. On this issue the Crown submits that the lethal weapon

used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted, should be taken into account. If the injuries are severe such that the deceased could not have been expected to survive the attack and were inflicted on a delicate part of the body, using a dangerous weapon, the only reasonable inference to be drawn is that he intended to kill the deceased.

[29] The accused stabbed the deceased three (3) times, one on the left side of the chest, one on the left side of the left nipple and one on the upper portion of the left shoulder. Stab wound one and two were fatal, according to the doctor's report.

[30] On the issue of the knife being brought into the bedroom by the accused on the request of the deceased, the Crown submits that this should be rejected as an afterthought as this version was never put to the Crown witnesses. The same applies to the issue that the deceased spat on the accused's face, thus leading to the accused slapping the deceased on the face.

[31] The reason advanced by the accused for stabbing the deceased is that the deceased had wanted to stab him. He then snatched the knife and stabbed the deceased in self-defence. The Crown argues even if that is the case, the accused overstepped the grounds for self-defence. The accused had other alternatives to avert the danger.

### **The Defence**

[32] The Defence states that the issue of the wife asking the accused to bring the knife to the bedroom was an affair question and none of the Crown witness

had spoken on this issue. Legally speaking an accused has no obligation at law to tell Crown witnesses what its defence is. The rule can only be utilised where there is need to contrast the versions and on what the accused had said in evidence. In the case before court, none of the witnesses gave an account of how the knife ended up in the bedroom. There was therefore no need to cross examine the witnesses on this issue and profer what accused's evidence will be. The accused therefore submits that the rule is only applicable on what the particular witness says and which ought to be challenged but has not been challenged. A party should only put so much of his case or defence to a witness, as concerns the evidence of that particular witness.

[33] On the issue of whether the accused should be found guilty of murder or culpable homicide, the accused states that the deceased spat on the accused before she threatened his life with a knife. The spitting amounts to provocation in terms of the Homicide Act. It later escalated into the deceased using a knife to attack the accused and the accused disarmed the deceased and stabbed her. The court must also bear in mind that the accused remains the only witness on what occurred in the bedroom on the day the incident occurred. The spitting occurred whilst the deceased was being questioned on her affair with the SPTC man.

[34] It is the defence's case that there is no onus resting on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is

improbable but that beyond doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to an acquittal.

[35] On the issue of the evidence by PW 1 that she heard the deceased raise an alarm twice, this should be rejected by the court. At the age of 17 she could have come to the rescue of her mother by going to see what was happening there or even calling neighbours. The version by this witness should be rejected as it is incredible.

### **COURT'S CONCLUSION**

[36] Having heard the arguments by the Crown and the accused, I have come to the conclusion that the accused is guilty of murder. The Crown has successfully established intention in the form of *dolus eventualis*. The Crown was insisting that the accused had time to reflect on the infidelity of the accused on the day of the incident and therefore the stabbing of the deceased was pre-planned by the accused. The accused should therefore be found guilty of murder and the intention should be in the form of *dolus directus*. The courts's finding is that the evidence brought before it established intention in the form of *dolus eventualis*. The accused foresaw that death would occur as a result of the stab wounds and notwithstanding the foresight he went ahead to stab the deceased. The accused had already dispossessed the deceased of the knife and there was no reason why he then stabbed her three times and two of the stab wounds were fatal. Even if the accused had been provoked by the deceased's act of spitting on him, the provocation was not proportionate to the harm caused by the accused. In **R V Muzie Petros Khumalo [32/18] [2021] SZHC 93 (14 June, 2021)** in paragraph 30, the court observed as follows:

*“[30] We have already seen in **Rex V Mthethwa** (Supra) that there must be proportionality between the provocation and the accused’s response. If the provocation is slight and the response thereto is severe and out of reach, then there is no proportionality.”*

[37] The defence also raised the issue that the accused has no obligation at law to tell the Crown what his defence is especially if none of the witnesses had spoken about it. I disagree. I am inclined to follow the reasoning in **Rex V Dominic Mngomezulu and Others, Criminal Case No. 94/1990**, where Hannah C.J. stated as follows:


*“..... failure by counsel to cross examine on important aspects of a prosecution’s witness testimony may place the defence at a risk of adverse comments made and adverse inference drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period.*

*It is important that counsel should put the defence’s case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused’s story.”*

[38] In the present case, the accused failed to put to any witness the version of the accused bringing a knife to the bedroom at the instance of the deceased. He further failed to put the issue of the deceased attempting to stab him with the

knife and him acting in self-defence. The accused did not put to any witness the issue of the deceased's act of spitting on him. The court is therefore inclined to conclude that all this is just an afterthought.

[39] The court is therefore making a pronouncement that the accused is found guilty as charged.



FAKUDZE J.  
JUDGE OF THE HIGH COURT

REX: S. GAMA

ACCUSED: B.J. SIMELANE