



IN THE HIGH COURT OF ESWATINI

RULING

Held at Mbabane

Case No. 221/18

In the matter between:

REX

AND

MAJAHONKE MYENI

Neutral citation: *Rex vs Majahonke & 2 Others [221/18] [2021] SZHC 200 (25 October, 2021)*

Coram: FAKUDZE, J

Heard: 11th October, 2021

Delivered: 25th October, 2021

**RULING ON SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND
EVIDENCE ACT, 1938**

[1] The accused persons are charged with the crime of murder, in that on the 1st May, 2016 and at or near Mziki area, in the Shiselweni Region, the accused acting together and in furtherance of a common purpose, did unlawfully and intentionally kill Mfanawemphi Boy Ndzinisa and did thereby commit the crime of Murder.

- [2] The Crown led nine (9) witnesses and at the close of the Crown's case the accused applied for acquittal and discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938. The Crown opposed the application. Section 174 (4) states that **“if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.”**

THE ACCUSED'S CASE

1ST AND 3RD ACCUSED

- [3] Counsel for 1st and 3rd accused states that PW 1 gave evidence of the events leading to the deceased suffering injury at the tavern. Accused 3 pushed him after the deceased refused to give accused no. 3 the E1.00 he was asking for. This witness was also intoxicated and he cannot recall some of the events. It is also the 1st and 3rd accused's case that the police never attempted to get samples from the tavern to determine if indeed that blood belonged to the deceased.
- [4] PW 6 (Dr. Komma Reddy) testified that the deceased had a wound in his skull of about 2.5 cm deep. PW 9, the Investigating Officer, stated that upon examining the wounds on the victim, he could not tell of its nature because the deceased was already at the mortuary.
- [5] PW 1 and PW 3 gave evidence that accused no. 2 and 3 assisted in loading the deceased into the police van when transporting him to hospital. They also off loaded him on arrival there. The deceased had blood although the source could not be identified. It is not clear as to how the blood on the accused's clothes came to be there. It is possible that it was as a result of the

injury suffered by the deceased when he fell at the tavern. It is also possible that same was as a result of the on loading of the deceased when same was taken to hospital. It is also possible that it came from the offloading of the deceased at hospital. The clothes that were taken for forensic evidence were taken following the scenario at the tavern and the transportation of the deceased to hospital.

- [6] The prosecution relies on circumstantial evidence. Since there is more than one possibility as to how the murder might have occurred, including that the deceased might have been knocked down by the car that was found on the road prior to the deceased being taken to hospital, and that there was no thorough investigation of the accident, the only reasonable thing to do is to acquit and discharge accused 1 and 3. There is also doubt on what really happened because there is a possibility that the deceased fell on his own since he was drunk.

2ND ACCUSED

- [7] 2nd accused's counsel states that none of the nine (9) witnesses implicated 2nd accused and that he colluded or acted with others in furtherance of a common purpose as per the indictment. The court is obliged to make an inquiry as to whether the evidence adduced by the Crown does in anyway connect the 2nd accused to the commission of the offence. There should be minimum evidence upon which the accused may be convicted at the end of the trial.
- [8] When analysing the evidence of all the witnesses, it becomes apparent that the Crown relies on circumstantial evidence in that the blood obtained from

the clothing of the accused links him to the murder. This cannot hold for the following reasons:

(a) The deceased was injured inside the bar and blood came out. It was wiped out by PW 1. All the accused persons were inside the bar when this happened and it was at night;

(b) When the deceased was found by the road, it was the 2nd accused person who lifted him up and put him in a vehicle together with the police. The deceased was bleeding. The same thing happened when the deceased arrived in hospital.

[9] Carrying an injured man whilst the accused was drunk exposed the accused to being stained by the blood of the deceased. Therefore the circumstantial evidence sought to be relied on by the Crown cannot hold since circumstantial evidence relies on inferences. The inference sought to be drawn must be consistent with all proven facts and that the proven facts should be such that they exclude every reasonable inference drawn from them save for the one sought to be drawn.

[10] Accused no. 2 finally submits that the Crown has dismally failed to bring any tangible evidence that will require the accused to present his defence. There is no evidence that shows that it was the accused who assaulted the deceased and caused his death. The 2nd accused is therefore entitled to be acquitted and discharged at this stage of the trial.

THE CROWN'S CASE

- [11] The Crown submits that for a court to acquit and discharge at the close of the Crown's case, there must be no evidence in which a reasonable man acting carefully might or may convict. In other words, if the Crown has failed to establish a *prima facie* case against the accused, then the accused is entitled to an acquittal.
- [12] PW 1 stated how accused 2 pushed the deceased who fell and hit the window seal and bled. This witness wiped the blood from the floor. The deceased left the tavern and all the accused persons disappeared. When they came back later, the witness was outside the tavern. The witness saw blood on accused no. 2's T. shirt. He asked the accused as to what had happened and the 2nd accused responded by saying that they were fighting among themselves. The witness also noticed that there was blood on the hands of accused no. 1. When the witness left for home in the company of a friend, they found the deceased lying in the middle of the road. There was a car with lights on not far from where the deceased was lying. At that moment came accused 1 and 3. PW 1 asked accused 1 as to what had happened and accused 1 said he knew nothing.
- [13] PW 2 stated that he was a watchman at the tavern. On the day of the incident, he reported for duty and he heard someone talking about blood inside the tavern. This witness proceeded to where the person who was talking was. He saw three boys Majaha, Maguya and another boy whose name was unknown to this witness PW 1 was asking these boys about the blood on their clothes. They told PW 1 that they were fighting among themselves. This witness then asked the boys who was injured and there was no answer provided. He then called the police.

[14] PW 3 stated that he was a traffic officer based at Hluthi. He received a call to attend to an accident at kaMziki. When he arrived at the scene, there was a car which had stopped a few metres away from the deceased. He inspected the car to see if it had knocked the person down and came to the conclusion that it had not. He, together with accused 2 and 3, took the accused to hospital. He noticed blood on 2nd accused's T. shirt. The deceased was still breathing at that time. The witness asked the accused persons about the blood on accused 2's T. shirt and accused 2 and 3 answered at the same time. When they came from the hospital, the witness handed over the accused persons to PW 4 for further investigations.

[15] PW 4 stated how he proceeded to hospital to see the deceased since he was investigating a case of assault GBH. He then proceeded to arrest accused 1 and handed him over to the criminal investigation department. PW 5 Dr. Komma Reddy carried out the post mortem. He stated that the cause of death was a result of blunt force object being inflicted on the deceased's head. PW 6 examined and treated injuries sustained by the deceased. He stated that the injuries could be as a result of a trauma assault or that the deceased fell down and hit himself. PW 7 was the investigating officer. He told the court that he received a call from PW 3 who briefed him about this case. The witness proceeded to Matsanjeni Health Centre where the deceased was admitted. He carried out an investigation by interviewing the three suspects. He took the clothes the accused were wearing and also applied at Nhlangano Magistrate Court to draw blood from the suspects for purposes of forensic analysis.

- [16] PW 8 is a forensic and reporting officer. He works for South African Police Service. He analysed blood samples and exhibits that were brought to his office for purposes of DNA analysis. He told the court that his findings were that the DNA results from the T. shirt, (RSPEL-21855), T. shirt (RSPFSL-21852) and a pair of trousers (RSPFSL-21820) matched the DNA result from the reference sample.
- [17] PW 9 is the scenes of crime officer. He took pictures of the scene. The Crown alleged that it has proven its case. Accused 2 foresaw the death of the deceased when he fell on the window seal. Accused 1, 2 and 3 later disappeared after the deceased had left. They later resurfaced and accused 2's T. shirt had blood stains and accused 1's trouser and one of his takkies had blood. PW 8 told the court that the blood samples matched the clothes that were submitted for DNA analysis. The evidence of PW 1 was corroborated by that of PW 2.
- [18] On the issue of common purpose, the Crown submits that when the deceased left, the three accused persons followed the deceased and came back later. Accused 1 had hand full of blood and accused's 2's T. shirt had blood as well. The 174 (4) application should therefore be dismissed.

COURT'S ANALYSIS AND CONCLUSION

[19] The Section 174 (4) application is dismissed by this court. The Crown has established a *prima facie* case. The accused's persons are called upon to clarify the following by way of evidence:

- (a) After the deceased had left the tavern, PW 1 stated that all the accused disappeared and when they came back, accused 1 and 2's clothes had some blood. Although there was no blood on accused 3 he associated with the accused 1 and 2 by disappearing and later re-surfacing with them. The blood was seen after the 3 disappeared and before they went to the accident scene;
- (b) The Forensic evidence established a link between the blood found on the 2nd accused's T. shirt and the 1st accused's trousers and takkies;
- (c) PW 2 heard a conversation at the entrance to the tavern that had to do with blood. When PW 2 enquired about the issue of the blood on accused 2's T. shirt, accused 1 responded by saying that they were fighting among themselves and when he further enquired who among them was hurt, there was no answer; and
- (d) PW 7 also found blood stains on the clothes. Exhibits 2 (Clothes belonging to accused 1) and Exhibit 3 (clothes belonging to accused 2) had blood stains.

[20] Based on the above, I am inclined to refuse the application and the accused persons are called upon to state their case if they so wish.

FAKUDZE
JUDGE OF THE HIGH COURT

Rex: S. Mdluli
Accused 1and 3: N. Hlophe
Accused 2: O Nzima