



dismissed-where *prima facie* case not established, accused must be acquitted and discharged.

Criminal law-test for upholding application in terms of section 174(4) of the Criminal Procedure and Evidence Act 67/1938 is satisfied if there is no evidence upon which a reasonable court acting judiciously may convict.

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### **RULING ON APPLICATION AT CLOSE OF THE CROWN'S CASE**

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- [1] The accused, Mr Peter Mfanawempi Dlamini is charged with murder. He pleaded not guilty to the charge.
- [2] The Crown led the evidence of five witnesses in support of its case. At the close of the case for the Crown, the accused applied for his discharge and acquittal stating that there is no evidence implicating him on the charge. This is an application in terms of section 174(4) of the Criminal Procedure and Evidence Act 67/1938 (the Act).
- [3] The application was opposed by Mr Matsenjwa for the Crown. The Crown submitted that there is enough evidence implicating the accused in the commission of the offence charged and alternatively on competent verdicts of murder.
- [4] It is imperative that I restate the wording of section 174(4) of the Act; it reads as follows:

**‘If at the close for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’**

- [5] In various cases<sup>1</sup> it has been said that section 174(4) of the Act permits a trial court to return a verdict of not guilty at the close of the case for the prosecution if in the opinion of the court there is no evidence (meaning evidence upon which a reasonable court might convict) that an accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge. It is only after a proper evaluation of the evidence presented to court at the close of the case of the Crown that the court can hold that there is or that there is no evidence that an accused has committed the offence charged or an offence which a competent verdict on that charge.
- [6] The Crown led the evidence of Dr R. M. Reddy, a police pathologist. It was his evidence that on 19 November 2014, at Mbabane government hospital mortuary he examined the body of the deceased and observed the following injuries: (1) contusion scalp on reflection 6.2cm area; (2) abrasions over back of trunk upper region 21cms area 0.3cm to 2.9cm area effusion blood in soft tissues; (3) sutured wound over front of abdomen midline 22cm length on dissection fracture lower left ribs torn intercostal structures, contusion lower lobe lung 5.7cm area and repair of linear laceration of liver pancreas, mesentery, intestine repair seen with contused area in mesentery blood clots 9.1cm area; (4) abrasion over left elbow outer aspect 2.1cm; (5) lacerated injury back of right ankle upper region 3.2cm x 2cm muscle deep; (6) contused abrasion above the lacerated injury observed in injury (5).

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<sup>1</sup> *S v Lubaxa* 2001 (4) SA 1251(SCA); *S v Khanyapa* 1979 (1) SA 824(A) at 838F-G; *R v Matsenjwa* (174/2017) [2019] SZHC 07 (04 February 2020).

- [7] Dr Reddy determined the cause of death was due to complications consequent to multiple injuries. According to the oral evidence of Dr Reddy, the fatal injury was the sutured wound over front abdomen midline stated as injury number 3 of the post mortem report. The post mortem report was handed in as exhibit 'A'.
- [8] During cross examination, Dr Reddy stated that according to the covering letter at his disposal, the deceased died on 18 November 2014. It was his evidence that according to the fatal injury stated in injury (5) above, certain repairs were made to the lacerations observed in the liver, pancreas and intestine; somebody sutured the deceased. When the suturing was done and for what purpose as well as who may have sutured the deceased the court was not told. Dr Reddy estimated that the deceased was in hospital for a period of three to four days before he met his death. The deceased was admitted to hospital on or about 15 November 2014 and died on 18 November 2014. The admission to hospital and the death of the deceased took place a month after he was allegedly assaulted by the accused.
- [9] Dr Pascal Nzanhingirwu was called as PW5 and he testified that the deceased was brought to him at Sithobela Health Centre on 16 October 2014. He examined the deceased and stated his findings in RSP88. It was PW5's evidence that the patient was brought to the health centre by a police officer. The patient stated that he had been assaulted. It was about 10am when the patient was brought to the Health Centre. The patient is Thembinkosi Mbingo, a male whose estimated age was forty years old. The patient was stable but complained of pain on the face, chest and on the abdomen. On examination, the patient was conscious. He observed that the patient had a 3cm x 1cm deep laceration on the left eye. PW5 noted nothing

special on the abdominal area. PW5 ordered a chest X-Ray for the patient and it showed nothing abnormal on the chest. PW5's diagnosis was that the patient had a soft tissue injury and musculo-skeletal pain (muscle and bone pain). PW5 treated and sutured wound on left eye and gave him medication. The patient was observed for a few hours and discharged. PW5 handed in RSP88 and it was marked exhibit 'B'.

- [10] During cross examination, PW5 stated that he does not know how the deceased got to Hlathikhulu government hospital and later to Mbabane government hospital.
- [11] The assault on the deceased happened on 15 October 2014 and he died on 18 November 2014.
- [12] PW2 is Simo Simphiwe Dlamini and he testified that in the evening of 15 October 2014 he was at PW3's shebeen with the accused and the deceased where they enjoyed alcoholic beverages. The accused fell asleep at the shebeen. It was about 7pm when the shebeen was about to close that an altercation between the accused and the deceased took place. When PW2 woke the accused person and told him the shebeen was about to close and that they needed to get ready to go home, the deceased interjected and asked the accused if the shebeen was now accused person's place of abode. Soon after making those utterances, the deceased assaulted the accused and a fight between them ensued. During the fight, both accused and deceased fell on a barbed wire which was close to where they were fighting. The accused was first to rise from the ground and he kicked the deceased around the waist; PW2 did not count how many times accused kicked the deceased. The

accused was wearing sandals. PW3 intervened and told the accused and deceased to stop the fight. They both listened to her and stopped fighting.

[13] PW2 testified that the deceased was kicked by the accused next to the buttocks around the waist. The accused and PW2 left the scene and went home. The following morning PW2 was called by PW3 and told to inform the accused that police were looking for him. The accused came to PW3's place and both the accused and the deceased were taken by the police.

[14] During cross examination, PW2 testified that at the shebeen accused was asleep when he woke him up. Accused thanked PW2 for waking him. When accused woke from his sleep, he asked PW2 who deceased was; and that is when the deceased retorted and said the accused cannot ask him that question as the shebeen was not accused's place. The deceased then assaulted the accused; the accused and deceased then wrestled and fell on the barbed wire. The place where they were fighting and fell had stones. It was put to PW2 that the accused kicked the deceased twice before Fihliwe came out and told him to stop. PW2 did not deny that deceased was twice kicked by the accused.

[15] PW3 is Fihliwe Zwane and earns a living by selling home brew to her customers at Mbabala area in the Lubombo region. On the evening of 15 October 2014 she closed the shebeen at around 630pm and retired to bed. She left her customers drinking outside within her homestead. The customers who were still drinking were PW2, the accused, the deceased, Wanteza, Topela and Gwaneza. It was while PW3 was asleep that she heard noise coming from outside and went to enquire. She found the accused and the deceased fighting. She asked the accused not to assault the deceased and

the accused stopped assaulting the deceased. The accused said the deceased is insolent.

- [16] It is PW3's evidence that when she got out of her house, she saw the accused kick the deceased twice before he was stopped by PW3 who admonished him to stop the assault. The deceased was lying on the ground facing downwards when he was kicked by the accused. The following morning, PW3 found the deceased lying across the road close to PW3's homestead. The deceased complained of chest pain. A community police called the police. The police came and took the deceased with them.
- [17] During cross examination, PW3 testified that the place where the accused and deceased fought had no stones, only the barbed wire. Both accused and deceased were injured as a result of the fight. The deceased had a minor scratch on the forehead. The deceased was able to walk unaided when he boarded the police van and left with them.
- [18] PW4 is 6136 Constable Ntokozo Mamba and was based at St Phillips Police post in the year 2014. On 15 October 2014 he was deployed in the General Duty department and was on duty when he received a 999 report of an assault case at Mbabala area. He, in the company of Sergeant 4477 CJ Hlophe went to Mbabala area to investigate the matter. The time was at about 6am when they arrived at Mbabala area where they found a man crying and screaming of pain in the chest; PW4 observed that the man also had minor wounds on the head. The man was taken to Sithobela Health Centre where he was admitted. I note that the medical officer who attended the deceased at Sithobela Health Centre testified that the deceased was treated and observed before he was discharged on the same day.

[19] The police subsequently arrested the accused and charged him with assault with intent to cause grievous bodily harm. The accused was arrested and cautioned in terms of the judges' rules after the police had introduced themselves to him. After due caution and being informed of his rights, the accused gave the police sandals. The accused was detained at Big-Bend correctional facility.

[20] The deceased was transferred to Hlathikhulu and later to Mbabane government hospitals. PW4 did not tell the court when the deceased was taken to Hlathikhulu government hospital. The deceased died at Mbabane government hospital while undergoing treatment. After due caution, the accused was subsequently charged with murder. The sandals were handed into court and marked exhibit '1'.

### ***Evaluation of the Crown's evidence***

[21] The decision to discharge an accused at the close of the Crown's case or whether to refuse to do so is a matter in respect of which I must exercise a judicial discretion. It behoves me to exercise judicial discretion in a judicious if proper manner as doing anything else is nothing more than abuse of such power. In exercising judicial power judiciously, I am required to take into account all the pertinent evidence before the court at this stage and use as bedrock the particular circumstances of this case<sup>2</sup>.

[22] I am enjoined by law to return a verdict of not guilty at the close of the prosecution case if I am of the view that there is no evidence upon which a

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<sup>2</sup> *Masondo in re: S v Mthembu & Others* (2010) 2 SACR 286 (GSI) [2011] ZAGPHC 22; (15 February 2011) at paragraph 37.



reasonable court might convict. Such evidence may relate to the offence charged or of an offence which is a competent verdict on the charge<sup>3</sup>.

- [23] The practical usefulness section 174(4) of the Criminal Procedure and Evidence Act 67/1938 (as amended) is to nip superfluous, problematic if frivolous and time-wasting prosecutions in the bud. It says, a person ought not to be prosecuted in the absence of minimum of evidence upon which he might be convicted in the hope that at some stage during the trial he might engage in self-incrimination gymnastics. Consequently, a prosecution that should not have been initiated for absence of evidence must just as soon be discontinued when the evidence falls below the legally prescribed threshold.
- [24] According to the Crown evidence, the deceased was the aggressor and agent provocateur. The law allows a person who is under unlawful attack to fight back within certain strictures. The accused and deceased fought using their hands and feet. When the accused was admonished to stop the assault, he complied. Clearly from the evidence of the Crown both the accused and deceased were drunk on the evening in question.
- [25] The deceased was examined by a medical officer on the following morning after the assault. He was examined and tests were done and nothing abnormal was observed in the abdominal and chest area. Deceased's wound on the left eye was sutured and a diagnosis of musculo-skeletal pain was given. After observing the patient for a few hours, he was allowed to go home.

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<sup>3</sup> *S v Khanyapa* 1979 (1) SA 824 (A) at 838F-G.

- [26] The deceased succumbed to death a month after the fight with the accused. There is no evidence to help the court understand what happened between the time deceased left Sithobela and the time he was admitted at Hlathikhulu and at Mbabane government hospital and the time he met his death. No explanation has been proffered by Crown witnesses. If the evidence of the pathologist that the deceased may have been admitted to hospital four days prior to his death is anything to go by , it begs the question what could have happened to him from the time he got treatment at Sithobela and when he met his death. The Crown evidence is silent and has not given answers to these questions. What reason and or basis are there to impute the injuries deceased suffered from on the accused has not been made clear by the Crown's evidence. It has also not been explained why no evidence from the health professionals who attended to the deceased after he was seen PW5 was not led.
- [27] The defence argued that there was a *novus actus interveniens*. This, has not been disproved by the Crown. The *lacuna* in the Crown's case brought about by the absence of evidence of what happened, if anything to the deceased in the period after he was treated at Sithobela and when he met his death might constitute a *novus actus* which the Crown must disprove. The Crown has failed to discount, *prima facie*, that no such *novus actus interveniens* exists.
- [28] For the above reasons, accused's application in terms of section 174(4) of the Criminal Procedure and Evidence Act 67/1938 for his discharge is granted and he is acquitted and discharged on the count of murder.

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**LANGWENYA**

**JUDGE OF THE HIGH COURT**

For the Crown:                    Mr A. Matsenjwa

For the Defence:                Mr B.J. Simelane