



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD IN MBABANE

CASE NO. 305/14

In the matter between:

REX

Versus

HENRY MCOLISI JAVAS MAX

~~Neutral Citation: *Rex v Henry Mcolisi Jvas Max* [305/2014] [2020] SZHC 148~~

(5 August 2020)

Heard: 3 March 2020; 23 March 2020; 17 June 2020; 18 June 2020; 14 July 2020; 5 August 2020.

Delivered: 5 August 2020

Summary: Criminal law-Criminal Procedure-charge of murder-accused pleads not guilty-Circumstantial evidence-requirements thereof-accused pleads private defence-features of self-defence-Crown has proved case beyond reasonable doubt-verdict is one of guilty.

JUDGMENT

- [1] The accused is charged with murder, it being alleged by the Crown that on 14 June 2014, and at or near Nkwalini area in the district of Hhohho, the accused unlawfully and intentionally killed Nolwethu Buthelezi. The accused pleaded not guilty to the offence charged.
- [2] The Crown led the evidence of five witnesses to prove its case. The accused led evidence in his defence and did not call witnesses.
- [3] In 2014, the accused was a tenant at the parental home of Ayanda Cindzi and Mbongeni Cindzi at Nkwalini Zone 2. The accused and the deceased were lovers. During their stay at the Cindzi homestead, and on a regular basis, the couple would engage in acts of domestic violence as they would fight frequently. This culminated in the death of the deceased on 14 June 2014.

[4] **The Case for the Crown**

PW1 is Ayanda Emily Cindzi. She testified that on the night of 14 June 2014 and at about 11pm she was in bed already when she was woken by noise of someone crying and raising an alarm, asking to be rescued. Ayanda went to investigate. The noise came from the room rented by the accused and it was Nolwethu who was raising an alarm. At the time, Ayanda was standing at the door of the accused person's room. Ayanda called out the accused and told him to stop assaulting Nolwethu. Ayanda threatened the accused with eviction if he continued with his violent behaviour towards Nolwethu.

- [5] When the accused was admonished by Ayanda to stop assaulting Nolwethu, the accused retorted and said Ayanda should stay out of his affairs and should

- not involve herself with matters that do not concern her. It was at this time that Nolwethu shouted from inside the room and told Ayanda to flee. Ayanda fled the scene when Nolwethu said so; she also fled the scene because she did not know what the accused had in his hands. Soon after she fled from the accused, Ayanda heard the accused say he was now going to kill Nolwethu.
- [6] When Ayanda heard accused threatening to kill Nolwethu, she tried to call the police but found that her cell phone battery was flat. She then went to Mbongeni Cindzi's house and asked to use his phone. Ayanda called her father and told him about the incident. Ayanda's father said he could not help because he was far away where he was conducting a Passover ceremony.
- [7] It was Ayanda's evidence that after a while, Nolwethu stopped crying. Ayanda thought the couple had resolved their differences and reconciled.
- [8] ~~In the next morning, Ayanda woke up and sat next to the door of her house.~~ Her house is adjacent to the room of the accused. She saw the accused leave his room and return to his room. Soon after, Ayanda's father arrived and was followed by Nontsikelelo Dlamini. Ayanda's father gave the accused person an ultimatum of three hours within which to vacate his premises because of his violent disposition towards Nolwethu. The accused said he would comply with the eviction order by Ayanda's father.
- [9] The accused then asked Nontsikelelo Dlamini if she had seen Nolwethu. Nontsikelelo's response was in the negative. Nontsikelelo stated that the accused ought to know where Nolwethu is as he was assaulting her the whole night. It was accused's response that if Nolwethu was not given refuge by Ayanda, she must have fled. This evidence was not disputed by the accused.

[10] Ayanda then went to work in the morning. During the mid-morning hours, Ayanda was called by her sister. Through her sister's phone she spoke to the police. The police asked her to return home urgently. When she arrived at home she found a lot of people and police cars. She recorded a statement with the police. She entered the room belonging to the accused and found Nolwethu lying on the bed under a blanket, dead.

[11] Ayanda was unshaken during cross examination when she insisted that she heard the accused say he was going to kill Nolwethu. It was put to Ayanda that the deceased did not leave accused's room during the fight because she had an upper hand in the fight; her response was that, Nolwethu could not leave accused's room because she was dead at the time. It is a mystery though why, if the deceased had the upper hand in the fight, why the accused returned to the room after chasing after PW1 during the night.

[12] The Crown then called the evidence of PW2 Mbongeni Cindzi. He testified that in June 2014 he was out drinking with the accused and Nolwethu at Lucky's bar. They hired a taxi and left the bar when it was about to close. They all went home. As soon as Mbongeni got home he went to his house to sleep. The accused and Nolwethu went to the room that was rented by the accused within the vicinity of PW2's house. When they parted ways, PW2 testified, all was well.

[13] No sooner had he retired to bed than he heard noise of an altercation and a fight coming from the room of the accused. Mbongeni went to enquire what was going on. He mediated in the dispute between accused and deceased. When he left the couple, they seemed to have reconciled. Mbongeni retired to bed. It was a while later and he was woken by Ayanda who asked to use his

phone to make a call as accused and Nolwethu were at it again. Mbongeni said he gave his phone to Ayanda to make a call but was too drunk and sleepy to intervene in the matter the second time.

[14] It was only in the morning when police arrived at his homestead that he realised that the fight between the accused and Nolwethu had resulted in her death.

[15] During cross examination, Mbongeni stated that he learnt that the fight between the couple had to do with a phone call that was received by Nolwethu. Nolwethu is alleged to have said the call she received was from her mother. The accused is alleged to have asked to see if the call was indeed from Nolwethu's mother because, as he put it, he knew Nolwethu's mother's phone number.

~~[16] Mbongeni confirmed that the couple fought on various occasions and at different times when the accused was a tenant at his parental homestead. Mbongeni stated that he did not know if the fights had to do with Nolwethu's infidelity nor did he confirm if Nolwethu had been caught by accused in a compromising position with another man at Lucky's bar.~~

[17] PW5 is 4774 Constable Mduduzi Themba and is one of the investigating officers who was first to arrive at the scene of crime. On 15 June 2020 he was on duty at Mbabane police station when he received a report of murder at Zone 2. He acted on the matter. The accused was brought to the police by a parent. He introduced himself to the accused person and explained his mission to him. He cautioned the accused in terms of the Judges rules. The accused led the police to his rented flat at Nkwalini where he opened the door. Inside the room was a person who had no pulse and was cold. PW5 called the scenes of crime

officer. He cautioned the accused in terms of the Judges' rules and informed him he was not obliged to point out anything. The accused handed over to PW5 an iron rod which was less than a metre long. The iron rod was silver in colour and made of aluminium; it had dents on one end. Specifically, the iron rod was less than one metre long and plus-minus 2/4cms wide.

[18] PW3 is 5492 Detective Constable Colile Dlamini who is also a scenes of crime officer. She testified that on 15 June 2014 and at about 1300 hours, she attended a murder case at Nkwalini Zone 2. At the scene she found the deceased lying on a bed and facing up. She was motionless and cold. PW3 took photographs of the scene. There was blood inside the room where the deceased lay dead. The body of the deceased was taken to the mortuary inside a body bag. PW3 handed in court the photo album she compiled following her attendance to the scene of crime. PW3 observed multiple injuries on the body of the deceased. She noted injuries on the head, hips, back of the knees and on her shoulder to mention a few areas of the body.

[19] During cross examination, it was put to PW3 that some of the injuries she observed on the deceased were old and not fresh. This was denied by PW3 who stated, conversely that the injuries she observed on the deceased's body were fresh and still bleeding.

[20] PW4 is 5490 Detective Constable Mxolisi Dlamini and an investigating officer of this matter. In 2014 he was based at Mbabane police station when on 16 June 2014 he received a docket of murder. The murder was alleged to have been committed at Nkwalini. The victim of the murder was Nolwethu Buthelezi. The accused was in police cells.

[21] The investigating officer was in the company of 2415 Detective Inspector Percy Dlamini and 3401 Detective Sergeant Themba Dlamini and 4362 Detective Constable Dumsile Manyatsi when he went to the police cells where the accused was kept. He introduced himself and the team of police officer he was with to the accused. He explained their mission to the accused. He cautioned the accused in terms of the Judges rules. The accused said something and recorded a statement. The accused later made a statement before a judicial officer.

[22] PW4 testified that as an investigating officer, he was given an iron pipe measuring plus-minus ninety centimetres long and plus-minus 3cms wide. The iron pipe is made of chrome and is rusty now; it is bent, showing it was damaged. The iron pipe is heavy. The iron pipe was handed in as evidence and marked exhibit 1. PW4 testified that the iron pipe was taken for forensic examination and the results came back negative. The negative report meant that the iron pipe did not have blood stains found on it when it was subjected to forensic examination.

[23]. Dr Komma Reddy determined the cause of death to be due to multiple injuries and throttling. The police pathologist detailed the injuries he found on deceased's body. It was his finding, among others, that there was bruising present in the deeper structures of the neck and that the hyoid bone was fractured. The chest bone and three right side ribs were fractured. The left temporal bone, parietal bones and frontal bones were fractured; and that there was extra-dural, sub-dural and intra-cerebral bleeding present. The post-mortem report was handed in as part of the Crown's evidence.

[24] Both parties consented that a statement made by the accused before a judicial officer be handed in court by the Crown. The statement was marked annexure B. The statement was read into the court record. In the statement, the accused admits assaulting the deceased with a water pipe on the head. He says he stopped assaulting the deceased when she apologized. This statement brings to sharp contrast accused's version that the deceased had an upper hand in the fight. Why Nolwethu would have apologized if she had an upper hand in the fight is difficult to understand. What is probable is that she apologized because the accused was assaulting her; when she did apologize, the accused stopped assaulting her. The deceased informed the accused that she was bleeding from the head. The accused told the deceased to put something to stop her blood dirtying the bed. It is telling that the accused was more concerned that the bed was not bloodied than he was about the pain, extent of injuries and bleeding Nolwethu complained of.

[25] In the statement before a magistrate, the accused states that during the night, the deceased would frequently wake up in pain and ask for water. The accused says he gave Nolwethu water and she would be better thereafter. It is recorded in the statement that throughout the night, Nolwethu asked for water.

[26] **Defence Case**

The accused gave evidence on his behalf as DW1. He testified that on Saturday 14 June 2014 he knocked off early from work and went to town where he had alcoholic drinks at Moonlight bar and later at Lucky's bar. He used to work at Zepps as a mechanic in the welding department. On 14 June 2014 he called Nolwethu, his girlfriend and asked her to visit him. Nolwethu arrived and found the accused at Lucky's bar. They had alcoholic beverages

until late. Accused testified that their drinking was 'deep'. When Nolwethu arrived, the accused said he noticed that she had injuries as if she had been assaulted. When he asked Nolwethu what the matter was, she said she was alright.

[27] It was while the couple was having their drinks that Nolwethu and a certain man went out of the bar and stood in a corner. Someone alerted the accused that a certain man was fraternizing with his girlfriend outside. The accused went outside and indeed found Nolwethu in a compromising position with the man who is unknown to the accused. The accused asked Nolwethu what was going on. Nolwethu was shocked and replied that nothing was going on between her and the man in question. The man did not respond to accused's enquiry but simply left the scene. The accused returned with Nolwethu inside the bar and they continued to have alcoholic drinks.

[28] Before the accused went outside the bar to confront Nolwethu with the unknown man, he had asked a mutual friend Kayise Dlamini to look after their drinks.

[29] Later, the accused, Nolwethu and Mbongeni took a taxi home. It was while the accused and Nolwethu were inside accused's rented room and they were preparing to sleep that Nolwethu fidgeted with her cell phone. When the accused enquired what she was doing with her phone, her response was that she was playing games. Immediately thereafter her phone rang and a woman's voice was on the other end. The woman's voice was that of Kayise Dlamini. Kayise said here is the person who wants to speak to you. The person who then spoke was a male. Nolwethu did not respond to the male voice but simply

dropped the call. The accused asked why Nolwethu was dropping the call because he also wanted to hear what the conversation was about.

[30] Immediately thereafter an altercation between the accused and Nolwethu ensued and quickly descended into a physical fight. The accused testified that he hit Nolwethu with an open hand and she retaliated and they fought. It was the accused's evidence that Nolwethu told him the male caller was Siphon Dlamini from Logoba. According to the accused, Nolwethu promised to end her relationship with Siphon and said she was serious about her relationship with the accused.

[31] The accused testified that he loved Nolwethu and wanted to marry her. It is indeed an uncanny way to show love to someone-by assaulting her.

[32] It is the evidence of the accused that when they fought, they were both drunk.

[33] The accused then described in meticulous detail how the fight ensued. He testified that the deceased throttled him and pressed him down on the floor. Accused says he then wiggled his way out of Nolwethu's grip, grabbed a copper pipe and hit Nolwethu with it. The couple then reconciled and slept.

[34] During the night, the deceased asked for water. In the morning Nolwethu was alive because they had a conversation. Nolwethu was concerned about what her family will say when they see her injuries.

[35] The accused testified that the injuries he inflicted on Nolwethu were as a result of her infidelity; he said he was serious with Nolwethu while she was busy engaging in love affairs with other men. In my view there is no clearer example of a narcissist. The accused was concerned about self-interest and did not care, about the person he professed to love. The accused asked

Nolwethu to go to the hospital to have her injuries attended to. The accused did not offer to help take Nolwethu to the hospital-that is if his version is to be believed- that in the morning Nolwethu was still alive.

[36] The accused tells the court that Nolwethu refused to go to the hospital because, she said, she would not be treated at the hospital before getting a form from the police explaining the nature of her injuries. According to the accused, Nolwethu was protecting him from being arrested by the police for her injuries. It is apparent that the deceased suffered mortal injuries and the accused did not. How then the deceased had the upper hand in the fight is unclear. What is clear though is that the deceased had fresh injuries inflicted by the accused; what is also clear is that the last person to have been with the deceased when violence was visited on the deceased was the accused.

[37] ~~There is the small matter of the accused enquiring from Nontsikelelo where~~ Nolwethu was in the morning after the assault in the night. The accused was here pretending he did not know where Nolwethu was at the time. If the deceased was in accused's room and they had been discussing the issue of going to the hospital-when then, does Nolwethu disappear from accused's room in the morning? Why did the accused pretend Nolwethu was no longer in his room in the morning if she was alive? The accused was heard by Ayanda saying, Nolwethu's disappearance can be attributed to Ayanda who may have given her refuge. In my view this was a red herring-it was a ruse that the accused was pulling over Crown witnesses. He was deflecting their attention from the real issue-that the Nolwethu was dead in accused's room. Accused gave the impression that the deceased had disappeared from his house, when he knew all along that the deceased was dead in his room. The plot thickens. The accused testified that in the morning he prepared hot water for Nolwethu

to bath so she could go to the hospital. The accused says he went outside to smoke cigarettes and when he returned to his room, he found Nolwethu motionless. When then could Nolwethu have fled the room to take refuge with Ayanda?

[38] The accused said he poured water on Nolwethu because he thought she had fainted. She did not wake up. Accused says he was shaken. He called his mother. His mother took him to the police station where he was arrested.

[39] During cross examination, the accused conceded that PW2 mediated during his misunderstanding with the deceased.

[40] During cross examination, the accused denied that the iron rod produced in court was the weapon he used to assault Nolwethu. His evidence is that he used a copper pipe whose width was as small as his little finger with a 1cm diameter to assault Nolwethu. The accused confirmed that prior to the incident resulting in the death of the deceased, they fought with the deceased.

[41] **Application of the Law to the Facts**

The assault of the deceased occurred at night in the rented room of the accused. Present inside the room of the accused at the time of the assault of the deceased was the accused and the deceased. PW1 and PW2 were within the same vicinity but not inside the accused room when the offence charged was committed. In that sense, there was no eye witness.

[42] In this regard, the Crown relies on circumstantial evidence which requires inferential reasoning by the Court. In order to be applied, circumstantial evidence must be credible, cogent as well as irresistibly point to the guilt of only the accused.

- [43] In evaluating circumstantial evidence, the court is guided by the cardinal rules of logic set out by Watermeyer JA in *R v Blom*¹ where the court stated that there are two cardinal rules of logic that cannot be ignored when inferential reasoning is resorted to namely that: (i) the inference sought to be drawn must be consistent with all proved facts, if it is not, then the inference cannot be drawn; (ii) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.
- [44] As can be seen from the case of *R v Mthembu*² and that of *R v De Villiers*³ the rules of inferential reasoning as set out in *Blom*'s case have been adhered to and applied by the courts almost as if they were statutory enactments. The rules set out in the above cases stipulate that the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.
- [45] It was argued on behalf of the accused that the Crown did not lead evidence proving that the deceased was throttled by the accused. It is accused's contention that on the day in question, Nolwazi had arrived with visible injuries as if she had been assaulted. I will dispose of this argument in two ways: first, there is evidence that Nolwethu was alive and well when she and the accused retired to bed; her hyoid bone was not fractured. It was only after the assault by the accused and when the post-mortem was conducted that she is

¹ 1939 AD 188 at 202-203

² 1950 (1) SA 670(A)

³ 1994 AD 493, 508-509

found to have suffered a fracture of the neck bone. Second, the scene of crime officer testified that she observed the body of Nolwethu and found she had suffered fresh injuries some of which were still bleeding. She discounted the evidence that the deceased had old injuries when she was discovered dead.

[46] When each little piece of evidence, like that the accused was physically abusive towards the deceased and they fought often; that the accused was enraged by a phone call to Nolwethu just when the couple was retiring to bed; that a fight ensued thereafter but was diffused by PW2; that Nolwethu was later heard raising an alarm as she was assaulted by the accused; that the accused was heard by PW1 threatening to kill Nolwethu; that the accused was angry and told PW1 where to get off when she tried to intervene; and that the accused admits assaulting the deceased with a copper pipe on the head-is put in its place, every other reasonable inference is excluded leaving the inference that the deceased was murdered by the accused.

[47] The accused was incensed by the fact that Nolwethu received a phone call from Sipho Dlamini from Logoba who, the accused says was another boyfriend of Nolwethu. Why the accused could not walk away from a relationship where, in his view, deceased was unfaithful is difficult to understand. There was no justification in law for the accused to kill a lover who had multiple lovers or who no longer had feelings for him. The sooner people learn that their partners are not chattels devoid of the freedom to choose who they want to be with at any given time, the more peaceful life will be in the homes.

[48] The accused testified that the deceased had an upper hand in the fight and overpowered him because he was too drunk than the deceased was. He argues

that he wiggled out of Nolwethu grip, grabbed a small water pipe and assaulted Nolwethu on the head with it. The court was shown an iron pipe which was said to have been accused's weapon of choice on the night in question. No reason was advanced why the police would testify that the accused pointed out an iron pipe and not a water pipe as the weapon he used to assault the deceased.

[49] *Self-Defence*

It is settled that where an accused pleads self defence to a charge of murder, the Crown bears the onus to prove that he unlawfully and intentionally killed the deceased with the requisite intention. If at the end of the trial, the court is left in doubt about whether he had acted in self defence the Crown will have failed to discharge that *onus*⁴.

[50] It is trite, also that in order to succeed in his plea of self defence, the accused has to satisfy certain legal requirements namely that: there was an unlawful attack; upon a legal interest; which had commenced or was imminent and that the defence had been directed against the attacker and was necessary to avert an attack⁵.

[51] In the present case, it is the accused that first drew blood by assaulting Nolwethu with an open hand. The accused was under no attack when he first assaulted Nolwethu. Nolwethu was entitled to retaliate, if she ever did, and ward off an unlawful attack by the accused. I reject the evidence of the accused that he was overpowered by the deceased as not only improbable but false. It is Nolwethu who was crying and raising an alarm when PW2 went to

⁴ Hoffman, H & Zeffert, D.T. in: *The South African Law of Evidence* 4th edition, page 497.

⁵ Burchell, J.M: *South African Criminal Law and Procedure Vol 1; General Principles of Criminal Law* 3rd edition pp. 73-79.

accused's room to investigate; it was Nolwethu who suffered fatal injuries at the hands of the accused on that fateful night; it was the accused who came charging at PW1 when she sought to intervene in the assault of Nolwethu. The accused told PW1 not to get involved in his private matters and further threatened to kill Nolwethu. There is no evidence the accused suffered any injuries as a result of the fight. For these reasons, the version of the accused is not only improbable but false in the circumstances.

[52] The evidence of the Crown witnesses was cogent, credible and worthy of belief.

[53] Conversely, the accused appeared to be making his case as he went along. He was evasive in his response to pertinent questions under cross examination and his memory was fraught with selective amnesia on crucial parts of his evidence. His evidence was marred by untruths and is therefore not worthy of being believed.

[54] The evidence against the accused was overwhelming and in my respectful view, the Crown has proved beyond reasonable doubt that the accused committed the murder of the deceased.

[55] In the result the accused is found guilty of murder.



M. LANGWENYA
JUDGE OF THE HIGH COURT

For the Crown: Mr C. Ngwenya
For the Defence: Mr S. M. Jele