



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 62/17

In the matter between:

REX

Versus

CATHERINE THULI HLATSHWAKO

Neutral Citation: *Rex vs Catherine Thuli Hlatshwako [62/17] [2020SZHC 276 (7 December 2020)*

Coram: M. S. LANGWENYA J

Heard: 12 August 2020; 13 August 2020; 3 November 2020; 25 November 2020;
1 December 2020; 7 December 2020

Delivered: 7 December 2020

Summary: *Criminal law-evidence-confession made by accused before judicial officer-admissibility thereof as per section 221(1) of the Criminal Procedure and Evidence Act 1938-Crown bears onus to establish admissibility thereof-Test of such proof is proof beyond reasonable doubt.*

Criminal law and Procedure-accused stabbed deceased-deceased died as a result of injuries inflicted by accused-Crown relies on circumstantial evidence-Court should only convict on circumstantial evidence if inference sought to be drawn is consistent with proved facts and the proved facts exclude every reasonable inference from them save the one sought to be drawn-accused found guilty of murder.

JUDGMENT

[1]The accused is charged with murder it being alleged by the Crown that on or about 13 January 2015 and at or near Logoba area in the Manzini district, the accused did unlawfully and intentionally kill Dumsani Bhusha Kunene.

[2]The accused pleaded not guilty to the crime charged.

[3]The Crown led the evidence of nine witnesses during the main trial and four witnesses during the trial within a trial.

[4]The accused led evidence in her defence and did not call witnesses.

The Crown's Case

[5]The accused is forty-eight years as she was born in January 1972. The accused and deceased were lovers. Their love relationship was barely two months old when the deceased met his death. They shared a rented flat at Logoba, a distance away from Grace Masuku's shebeen. Grace Masuku is a tenant at Mkhosi Dlamini's premises. On 13 January 2015, the accused and deceased were at Grace Masuku's shebeen where they had alcoholic beverages.

[6]The deceased was last seen alive by Mkhosi Dlamini and Sibongile Nhlengethwa in the company of his girlfriend in the evening of 13 January 2015.

[7]It was the evidence of PW1 Mkhosi Dlamini that on the said evening, deceased had approached Dlamini and asked for E2 to buy cigarettes. On the following morning, the deceased was found dead outside Grace Masuku's shebeen. He lay motionless and was facing upwards and his body had gruesome injuries. The police were called and they arrived, attended to the scene of crime and later took deceased's body away.

[8]Pw4 Gcinile Kunene testified that on the day in question, she walked past the couple's flat and found them having an argument. Pw4 says she enquired from the accused what she was doing to the deceased but got no response. The couple was inside their flat when they had the argument with their door ajar. PW4 did not go inside the couple's flat. PW4 heard the deceased saying *LaHlatshwako ungentani?*- Ms Hlatshwako what are you doing to me? The accused was heard shouting back and asking what they were going to use to buy food. It was then that deceased responded by saying he had still not been paid. PW4 was unshaken during cross examination in her evidence that she heard the couple arguing inside their flat. It was during cross examination that PW4 said she saw the accused fighting the deceased inside their rented flat.

[9]The defence did not dispute that the couple were heard arguing by PW4; they only disputed what the couple was arguing about.

[10]On the day the accused was arrested by police, PW5-Lungile Dlamini (Lungile) found her at a bar in Malkerns. Accused sat next to a verandah of the bar. They exchanged pleasantries and the accused enquired about her former boyfriend George Silindza from PW5. Lungile told the accused she thought Silindza was at ka LaGwebu's shebeen. Accused offered PW5 a smoke. The accused went to Ka

LaGwebu's shebeen where she was found and arrested by the police. The police were with Chillies Mbundisi when they arrested the accused.

Trial within a Trial

[11]During the trial, the Crown sought to lead evidence about a purported confession by the accused. The defence raised objections and the basis for the objections were (a) that the accused was forced to make the confession by Inspector Stanley Skhindi Maseko- the principal investigating officer in this matter; (b) that the accused was forced to repeat before the magistrate what is contained in the confession; and (c) that the accused was assaulted, suffocated and threatened with more violence if she did not make confession.

[12]In order to prove that the statement made by the accused was admissible, the Crown led the evidence of the judicial officer who recorded the statement- Mthokozisi Dlamini, the Court interpreter Nomcebo Mhoni and one of the arresting and investigating officers-6758 Detective Constable Jabulile Dlamini.

[13]The effect of both the magistrate and the court interpreter's evidence is that the accused was brought before the magistrate at about 932am on 16 January 2015 and was duly warned by the magistrate in terms of the Judges' rules in the presence of the interpreter. Except for the magistrate, the interpreter and the accused, no one else was present in the magistrate's office before and during the recording of the confession. The magistrate testified that the accused's disposition, physical appearance, posture and comfort did not suggest he had been coerced and induced to record the statement.

[14]The accused's first words to the magistrate were that she had come to tell the truth. She told the magistrate that she had not been coerced to make a statement.

The magistrate testified that the accused was calm and composed when she made the statement. The magistrate did not observe any injuries on the accused nor did accused reveal to the magistrate that she had been assaulted by anyone. All she said was that she had, on a previous occasion been assaulted by the deceased.

[15]The court was informed that Inspector Stanley Maseko is now deceased.

[16]Officer 6758 Detective constable Jabulile Dlamini is one of the arresting officers and investigating officers in this matter. She is also one of the witnesses implicated by the accused as having assaulted and tortured her with a view to extract a confession. Officer Jabulile Dlamini denied in her evidence that she maltreated the accused. She denied also that the principal investigator Inspector Maseko assaulted and or suffocated the accused. Officer Jabulile Dlamini more pertinently denied in her evidence that the accused was stripped bare to her tights as police beat a confession out of her. She denied police told the accused that if she did not confess to the magistrate, she will be further assaulted and suffocated.

[17]I have alluded to the evidence of the magistrate to the effect that the accused never informed him of such assault or torture. In the pro forma question 11 asks if the accused was assaulted and her response is in the negative. During the trial, the accused stated that she told the magistrate she was never assaulted. She testified that she had no option but to tell lies as being suffocated is painful.

[18]According to the evidence of the accused and that of 6758 Detective constable Jabulile Dlamini, the accused was arrested on 13 January 2015 at around 11am at Malkerns. She was taken to Malkerns police station before she was conveyed to Matsapha police station.

[19]The accused person was taken to the magistrate's court to make a confession by 7482 Constable Cebile Mwelase. Officer Mwelase was not part of the investigating team. The police testified that the accused was not compelled to make the statement before the magistrate.

[20]The accused testified that she was assaulted, suffocated and forced to make a confession by officer Sikhindi. It was her evidence that it was threats, assault and the suffocation that induced her to go to the magistrate and record the statement in question. Differently put, the accused says the statement was not freely and voluntarily made by her.

[21]I must say that the evidence of the accused was lacking in material respects. She says she was assaulted but does not say who assaulted her, when the assault happened, where the assaulted took place nor does she say if she suffered any injuries as a result of the alleged assault. All she says is that she was suffocated by officer Skhindi. Even with the suffocation she does not give details of how and where it took place and when. The accused did say, however that she was assaulted and stripped of her clothes at the scene of crime by officer Jabulile Dlamini. The accused also stated that the said officer Jabulile Dlamini was not present at the scene of crime. In this regard, the accused clearly contradicted her instructions to her attorney who said officer Jabulile Dlamini was present at the scene during the pointing out and stripped the accused of her clothes.

[22]It was put to officer Jabulile Dlamini that Inspector Maseko forced the accused to record a statement to the effect that she committed the offence. This was denied by officer Jabulile Dlamini. What is curious though is that the accused does not say what exactly she was ordered by the police to say except that she committed the offence. Her response that she came to tell the truth; that she chose the option to

tell magistrate the truth and that she was not coerced or induced by way of promise to make the statement do not show how her responses could be imputed to the police. How, for instance could the police have known that accused was assaulted by the deceased sometime back? How could the police have known that the accused made a statement to Lungile, her friend at Malkerns? Clearly, these are some responses that are in the exclusive knowledge of the accused and cannot, in my view be imputed to the police.

[23]The evidence of the accused left out crucial details: she did not tell the court about the time and contents of alleged statement she was ordered to tell the magistrate; the details of the confession accused was allegedly ordered to make before the magistrate was also not put to the Crown witnesses. For the reasons set out herein, the version of the accused is rejected as false and the confession statement is allowed into evidence.

[24]The Crown witnesses and their evidence came across as credible and that they had no reason to falsely implicate the accused. I therefore do not think that even a reasonable possibility exists that they might have been untruthful. To the contrary, the accused clearly concocted her story of duress.

The Law

[25]The admissibility or otherwise of a statement made by an accused before a magistrate has to be tested against section 226 (1) of the Criminal Procedure and Evidence Act. It must be proved by the Crown that the confession has been freely and voluntarily made by the deponent in her sound and sober senses and without having been unduly influenced in making the statement. Where the statement is

made before a magistrate, it must be established by the Crown that the accused was duly warned before she made such a statement¹.

[26]For the reasons set out above, I have ruled that the Crown has proved beyond reasonable doubt that the statement was freely and voluntarily made by the accused in her sound and sober senses and was not unduly influenced to do so. The confession is therefore ruled admissible.

Main trial

[27]The Crown led the evidence of Magistrate Mthokozisi Dlamini who confirmed his evidence led at the trial within a trial stage. He further related to court what the accused told him in the course of recording her statement. The statement was subsequently read into the court record. For completeness, I restate the contents of the confession hereunder:

‘Statement taken on 16/01/15 at Manzini at 9:32am’

‘It was a Tuesday on the 13th January 2015. I have a boyfriend that I reside with at Logoba next to a shop called Ncence. I normally sell weeding hoes within the compound of Logoba. On the above date, I returned from my normal selling business around 3:00pm. I found the deceased at our rented flat. He then requested me to go and buy paraffin at Ncence shops. I went and bought the paraffin and returned. He then suggested that we should go and have drinks at Grace’s place. Grace is a local shebeen area where we normally go and have drinks. Upon arrival there we bought our drinks and sat down and drank. We sought a fruit beer (grape fruit) and also enjoyed mankanjane (Dontonto). I suggested to the deceased that we should go as I have to drink my tablets at 7:00pm hence have to go. He was against the idea of leaving instead he insisted that we must stop and continue to enjoy drinks. An argument ensued however, I eventually relented and we finished drinking the brew we had already ordered.

¹ See Section 226(1) of the Criminal Procedure and Evidence Act, 1938 the third proviso which states as follows: ‘Provided that also that if such confession has been made on a preparatory examination before any magistrate, such person must previously, according to law, have been cautioned by such magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.’

We left eventually and upon arrival at our flat I drank my tablets. He then suggested that we should sleep and he wanted to have sex. I objected and suggested that we should go back to Grace's place to enjoy more brew. We went back to Grace's place. Along the way to Grace's place there was an argument between myself and the deceased. We were just before the gate. I held him with his clothes on the chest and picked up a stone on the ground and assaulted him on the forehead and I ran back to our rented flat and took a bottle, a beer bottle and first hit it on the ground and it broke, exposing sharp cuts in the process and pushed back to him and stabbed him on the right side and the left side of the stomach. He then fell on the ground. I noticed that his eyes were behaving strangely like a drowning person. I took off the skirt I was wearing and took off the T-shirt I was wearing. I left the skirt next to his body and the T-shirt I left it at our rented flat and I hiked for lifts at the highway. A lift arrived and the motorist wanted money in return to giving the lift. I informed him that I do not have money. He then suggested that I should give what I have. I agreed to have sex with him in the car. We had sex in the car and he gave me a lift to Nix bar at Malkerns and he drove off. I sat at the entrance of the bar and I then met my friend Lungile. I then told her the story that the man I live with is dead. She suggested that we should go to her house however, I refused. She then left and went to her house and left me sitting there at the entrance of the bar. A certain man arrived by the surname of Nkosi. I went to sleep at his place that day. I woke up early in the morning around 4am and went to a shebeen at Malkerns at Gogo Sukati's shebeen and I started sweeping outside. Lungile came at the shebeen and asked me why I was there. I told her that I do not feel well. We sat there for a couple of hours and suddenly I saw a police motor vehicle coming. They stated that they were looking for me. They were in the company of a certain gentleman that knew me. They then interviewed Lungile who confirmed what I had narrated to her and further recorded her statement. They then collected me and took me to Sigodweni police station or Matsapha police station. I was detained on that day and I was informed that the weapons I used I will fetch them tomorrow because at Malkerns I had already drunk. The following day we went to fetch the items I used to assault the deceased. It was a stone and a broken bottle. I showed them the exact spot where the assault took place. I told them I did not mean to kill him. That is all.'

Signed by the accused

Signed by the magistrate as well as the court interpreter.

[28]The Crown led the evidence of Grace Masuku. She testified that she runs a shebeen at Logoba area. She was at her shebeen on 15 January 2015 when police arrived with the accused in the late morning hours. The police stood outside the gate and requested to talk to the owner of the shebeen. She informed the police she had last seen the accused on the previous day and she was in the company of her boyfriend. The accused went to the grass and retrieved a brick stone and said she

used it to assault the deceased. The accused also pointed out a broken green bottle which she admitted using to stab deceased. Accused stated that she was alone when she assaulted the accused. The police and the accused then left the scene. The accused was not handcuffed when she was with the police. She was alright and would sometimes laugh.

[29]During cross examination Grace Masuku told the court that when the police came and took pictures of the deceased's body she was present at the scene and when the police came to the scene with the accused. She testified that she was not present when the body of the deceased was found outside her gate but arrived soon thereafter.

[30]The evidence of Grace Masuku was not challenged concerning what accused pointed out as well as what her observation of accused's demenour when she pointed out exhibits to the police at the scene of crime. The cross examination centred on the fact that Grace was not present when the police arrived outside her shebeen with the accused. This was denied by the witness.

[31]The Crown led the evidence of 3848 Inspector Ntfuba Dlamini. He is one of the police officers who responded to a report of a case of murder of the deceased at Logoba on 14 January 2015 at 5.30am. At the scene of crime he called the desk officer, the late Assistant Inspector Skhindi. Inspector Skhindi arrived at the scene with the scene of crime officers.

[32]Prior to the arrival of officer Skhindi at the scene of crime, Inspector Ntfuba Dlamini saw a skirt not far from the body of the deceased. The skirt was soaked in blood. They determined that a female person was involved in the murder of the deceased. The police went to deceased's rented flat after they were given the name

and directions by people they found at the scene of crime. They went to deceased's flat with Mduduzi Kunene a member of the community police at Logoba. The door at deceased's place was slightly open. Inside the flat, they retrieved a medical report card of the accused with a phone number of her next of kin. Officer Skhindi called the number of the next of kin reflected on accused's medical card and enquired about accused's whereabouts. The response he got was that the accused was at Malkerns. The police took the jean skirt they found at the scene of crime as of evidence. Officer Ntfuba Dlamini was not cross examined by the defence. His evidence was uncontroverted.

[33]The next Crown witness was 6261 constable Sithembile Ndlovu. She was on duty on 16 January 2015 when she was assigned by Inspector Maseko to go with him and the accused to the latter's rented flat. Accused had said she wanted to collect her belongings from the flat. At the accused person's flat, she was cautioned by Inspector Maseko in terms of the Judges' rules before the accused gave the police certain exhibits- a white bed sheet; 2 T-Shirts (one orange and the other black and white); a white bra and shoes. The exhibits were taken by the police and they returned to the police station with the accused. Officer Ndlovu denied that the accused was forced to point out the exhibits that were retrieved from the rented flat she shared with the deceased.

[34]The post mortem report was handed in by consent. It detailed the injuries found on the deceased. The pathologist determined the cause of death to be due to multiple injuries. The album reflecting the body of the deceased and the nature of injuries he suffered was also handed in by consent. The injuries reflected in the photos in the album were commensurate with the contents of the post mortem

report as well as with accused's graphic description of how deceased incurred the said injuries.

[35]The Crown closed its case.

Defence Case

[36]The accused person's evidence was terse. She testified that she was arrested by police at Malkerns and informed that she had killed the deceased. She was arrested and locked up for one night at Matsapha police station before she was subjected to torture by way of suffocation and assault by the police. She stated that as a result of the torture she admitted to the police to killing the deceased. She testified further that she was ordered by the police to lead them to the scene of crime where she was further told to pick a stone and pieces of a bottle.

[37]The accused stated that she requested the police to let her collect her belongings from the rented flat she shared with the deceased and was taken there. She said she was later taken to the magistrate where she was made to confess to the crime. She said she confessed because she feared the police would continue to assault and suffocate her.

[38]She was last with the deceased on the evening of 13 January 2015 at around 6pm. She left to go to Malkerns because she had a misunderstanding with the deceased. She arrived at Malkerns at around 7pm on the same evening. When she left the deceased, he was alive.

[39]During cross examination, the accused stated that she went to Malkerns because the deceased assaulted her with a beer bottle at the shebeen. The accused stated that on a previous occasion the deceased had assaulted her with a bottle. Grace, the shebeen queen advised her not to lay a charge against the deceased. It

must be noted that Grace testified before court but this aspect of accused's evidence was not put to her.

[40]During cross examination, the accused denied that the skirt that was found by the police next to the deceased's body belonged to her. When officer Ntfuba Dlamini testified about the skirt, he was not cross examined about his evidence in general and about the skirt in particular.

[41]The accused testified that she was born in January 1972; that she has two children who are adults and have their own children. She earns a living by doing piece jobs like help cultivate and weed people's fields. She told the Court she was arrested in January 2015 and spent three years in custody before she was admitted to bail. The accused testified that she now drinks alcoholic beverage occasionally. She is currently single but lives with a boyfriend.

Application of law to the Facts

[42]I was at the time of my ruling and, I still am, of the opinion that the Crown has succeeded in establishing that the confession was made freely and voluntarily by the accused, while in her sound and sober senses and without having been unduly influenced thereto. I was of the opinion that the accused confessed, apparently reliably, that she murdered the deceased in the way alleged in the post mortem report which was admitted with the consent of the defence. I accordingly allowed the confession into evidence and as I was not swayed during further evidence and argument to come to a contrary conclusion, the interlocutory ruling to admit the confession became a final ruling and the confession will be assessed together with all the other evidence on the merits.

[43]The Crown's evidence is that the last person to be seen with the deceased alive was the accused. The couple was last seen at Grace Masuku's shebeen. The accused confirms the Crown evidence in this regard. In her confession, the accused gives a graphic narration of the events leading to the death of the deceased on the evening of 13 January 2015. In the confession statement, the accused stated that it was when they were at the gate of Grace's shebeen, coming from their rented flat, that an argument between herself and the deceased ensued. The accused held the deceased by his clothes on the chest, picked a stone and hit deceased on the forehead. The accused stated in the statement to the magistrate that she used a beer bottle which she broke, to stab the deceased. This evidence finds corroboration in exhibit CHB being the photo album compiled by the scenes of crime officers and handed into court by consent. The post mortem report also confirms the nature of injuries which led to deceased's death.

[44]In the confession, the accused states that she took off her skirt and left it next to the deceased. The police found a skirt not too far from where the body of the deceased lay. Their evidence was not disputed by the accused.

[45]After due caution, the accused led the police to the scene of crime where a brick stone and broken pieces of a bottle were retrieved after pointing out by the accused. Even though the accused says she was forced to point out the said exhibits, her evidence is rebutted by the evidence of Grace Masuku. Masuku says the accused informed the police that she used the brick stone to assault the deceased and a broken green bottle to stab the deceased. It is Masuku's evidence that the accused looked alright in the company of the police as she would sometimes laugh. Notably, Masuku's evidence about what she heard accused tell the police during the pointing out was not controverted.

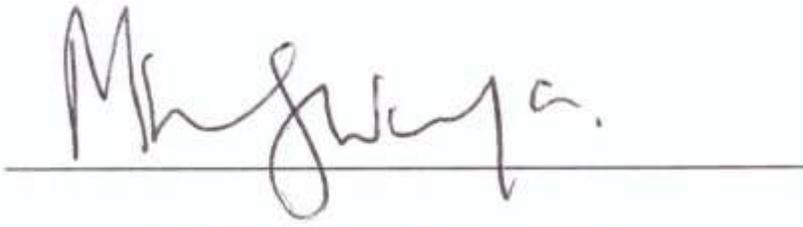
[46]The evidence of the Crown is based altogether on circumstantial evidence. It is settled law that a court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proved facts and the proved facts exclude every reasonable inference from them save the one sought to be drawn.

[47]The accused stated in her confession that she did not mean to kill the deceased. The couple had been having alcoholic beverages on the evening the deceased died. It was the evidence of the accused that she and deceased were drunk on the fateful day. I am satisfied that the assault inflicted on the deceased by the accused caused his death given the findings of the post mortem report. To have stabbed the deceased multiple times on the neck, left chest and left forearm, the accused foresaw that death would ensue. In fact, she states in her confession that after she stabbed the deceased, he fell on the ground and she noticed that his ‘eyes were behaving strangely, like a drowning person.’

[48]It is trite law that when dealing with circumstantial evidence, as in the present case, the court must consider every component in the evidence presented separately and individually to determine what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered whether the accused’s guilt has been proved beyond reasonable doubt².

[49]Having carefully considered the totality of the evidence presented, this court has no doubt that the accused is guilty of the offence of murder. He is accordingly convicted as charged.

² *S v Hadebe* 1988 (1) SACR 422 at 426E-G.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written above a solid horizontal line.

M. LANGWENYA J.

For the Crown: Ms. B. Fakudze

For the Defence: Mr. L. Dlamini.