



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 205/14

In the matter between:

SIFISO DLAMINI

Versus

MAKHOSONKE MATSEBULA

Neutral Citation: *Sifiso Dlamini vs Makhosonke Matsebula [205/14] [2020]*
SZHC 301 (16 December 2020)

Coram: M. S. LANGWENYA J.

Heard: 1 April 2020; 20 July 2020; 28 July 2020; 8 September 2020; 4
November 2020; 8 December 2020.

Delivered: 16 December 2020

Summary: *Criminal Law-Criminal Procedure-accused charged with murder-deceased was the aggressor-accused threw beer bottle at deceased and fled scene-deceased fell on ground-deceased's brother left deceased to raise alarm-on return to scene deceased had moved from place where he had been prior to his brother going to raise an alarm and call for help-unclear how*

accused sustained stab wound on neck-accused threw a bottle at deceased-no evidence accused stabbed deceased-Crown conceded it has not proved beyond reasonable doubt that accused caused death of deceased-accused acquitted and discharged.

JUDGMENT

- [1] At the commencement of the trial, and before the charge was put to the accused persons, the Crown withdrew the charge against the second accused and informed the Court that he was now an accomplice witness. Mr. Madzinane who represented the second accused confirmed the Crown's submission.
- [2] The accused was charged with the offence of murder. In that upon or about 28 January 2013 and at or near ka Geza area in the Hhohho district, the accused did unlawfully and intentionally cause the death of Mfanimpela Vilakati.
- [3] When the accused was arraigned, he pleaded not guilty to the crime charged.
- [4] The Crown called seven witnesses to prove its case. The accused asserted his right to silence and did not lead any witness in support of his case.

The Case for the Crown

- [5] The prosecution led evidence from witnesses which may be summarized as follows: On 8 February 2013, Dr. Komma Reddy, a police pathologist carried out a post-mortem examination on the body of Mfanimpela Vilakati whose reputed age was twenty-two years at the time. The pathologist

determined that the deceased died due to stab wound on the neck. He further detailed other injuries he noted on the body of the deceased. The post mortem report was handed in as exhibit A.

[6] PW1 is Makhosonkhe Matsebula and an accomplice witness. PW1 was warned in terms of section 234 of the Criminal Procedure and Evidence Act 1938. I have also warned myself of the dangers of the evidence of an accomplice witness.

[7] PW1 told the Court that his home is at eBulandzeni. On the evening of 28 January 2013, he was in the company of his girlfriend who was driving a car they were travelling in when, along the way they came across the accused who asked for a ride. They offered the accused a lift. The accused had three bottles of beers in his hands. As they continued with their journey, they came across two young men. One of the men was short and the other tall. The short man carried a back pack while the taller one carried a container of marula brew. The two young men asked the driver why the lights of the car were bright. They were in a fighting mood as they held onto the car. The accused stated that he knew the young men and asked to go and reason with them. The car stopped and the accused got off in order to reason with the two men. It turns out the short man was the deceased while the taller man was PW3-Bheki Vilakati.

[8] Soon after the accused met with PW3 and the deceased, a fight ensued. PW1 went to the warring parties and tried to intervene. One of the young men attempted to assault PW1. The accused was assaulted by the deceased and he retaliated by throwing a bottle at the deceased. The deceased assaulted PW1 and was carrying something that looked like a firearm. The accused fled the

scene. PW3 tried to take the car keys of the vehicle the accused and PW1 were travelling in but failed as the accused returned and helped PW1 to kick start the car and they drove off. PW3 asked PW1 and the accused to take the deceased to hospital. They left the scene because they feared for their lives as PW3 called out to some people and asked for reinforcement.

- [9] The accused was at a distance of between two and three meters from the deceased when he threw a bottle at him. When the deceased was hit by the bottle, he fell to the ground. PW1 called the police at Buhleni. The police arrived and informed PW1 that the deceased was dead.
- [10] PW2 is 4086 Detective Sergeant Patrick Du Pont. In 2013 he was stationed at Buhleni police post. He arrived at the scene of crime and found the body of the deceased covered in blood. He had injuries on the neck area. Deceased was motionless and dead. He cordoned off the scene until the scene of crime officers arrived and attended to the scene. At the scene there were broken pieces of bottles.
- [11] He subsequently arrested the accused. He warned him in terms of the Judges rules and charged him with the crime of murder. The body of the deceased was taken to Mkhuzweni health center where he was certified dead by a doctor.
- [12] PW3-Bheki Vilakati and the deceased were said to have been carrying a firearm on the fateful evening. The duo lived at Fana Mdziniso's homestead. Fana Mdziniso was found in possession of a firearm when the police conducted a search at his homestead.

[13] PW3 testified that on the evening in question he was in the company of the deceased who was his younger sibling. They left home in the morning to look for cattle. They later drank marula which they got from a Mndzebele homestead. In the early evening hours, they proceeded home. Along the way, deceased remained behind as he went to a homestead where his girlfriend resided. Along the way, PW3 met a vehicle whose lights were bright. Immediately thereafter, he heard deceased being insulted and assaulted with bottles. He saw the accused leave the scene. He asked accused to help take deceased to hospital. The accused refused to do so, instead he boarded the vehicle in question. PW3 approached the vehicle and tried to take the car key in an effort to stop the occupants thereof from leaving before the deceased was taken to hospital. PW3 raised an alarm and called Vusi who was a community police of the area.

[14] After deceased was hit with a bottle, PW3 went to PW5's home and raised an alarm. Deceased was badly injured and covered in blood. When PW3 left deceased at the scene, he lay on one spot next to the road. When PW3 returned to the scene, he found deceased had moved from the spot he left him and was at a sloppy area next to a fence belonging to a Tsabedze homestead. PW3 denied that deceased was carrying a firearm on the evening in question. He testified that deceased carried his backpack. After raising an alarm, PW3 returned to the scene with PW5 and that was before the police arrived.

[15] During cross examination, it was suggested to PW3 that while he was away raising an alarm, deceased may have been assaulted further by someone else,

and not by the accused. PW3 stated that he does not know if other people may have further assaulted the deceased.

[16] It was the evidence of PW5 Barnabas Dlakubi that on the evening of 28 January 2013 he was at home with his family when PW3 came and reported that there were people who were killing someone by the roadside. He told PW5 that he needed help. PW5 went to the scene with PW3 and with the help of lights from his car, they looked for the deceased at the place PW3 said he left him. They could not locate deceased there. Deceased was found at a different place next to the road and next to an electricity pole close to the fence of a Tsabedze homestead. He was dead. Soon after, PW3 left the scene and returned with his family members. Police came and attended to the matter.

[17] The Crown closed its case after the scenes of crime officer testified about his investigation and taking of photographs at the scene of crime.

Defence Case

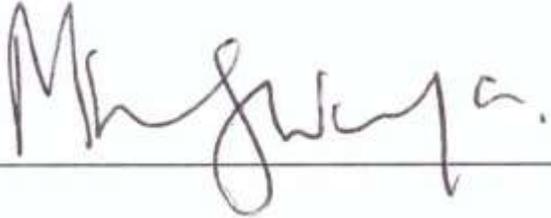
[18] The accused asserted his right to silence and did not lead evidence on his behalf. He also did not call witnesses.

Application of the Law to the Facts

[19] During submissions, the Crown conceded, correctly in my view that it had not proved that the accused stabbed deceased on the neck and thereby caused his death. The evidence before Court proved that the accused threw a bottle at the deceased and deceased fell to the ground. When deceased fell to the ground, the accused fled from the scene.

- [20] The Crown submitted that the accused should be found guilty of assault with intent to cause grievous bodily harm, this being one of the competent versions of murder. I disagree. The deceased was the aggressor. When the accused sought to reason with him, deceased and PW3 became violent towards PW1 and the accused. The accused used a bottle of beer which he held in his hand to defend himself from an unlawful attack perpetrated against him by the deceased.
- [21] It has not been shown that the assault inflicted by the accused on the deceased was disproportionate and unnecessary. It has been shown that the accused came out of the vehicle he was travelling in to reason with the deceased and with PW3 to no avail. The deceased and PW3 complained that the vehicle's lights were bright. The Court heard how when the accused sought to calm the situation he was attacked by the deceased. He threw a beer bottle he had in his hands at the deceased and fled the scene. There is no connection in my view of the assault stab wound on deceased's neck with injury sustained as a result of a bottle that was thrown at deceased.
- [22] There is no evidence that the accused stabbed the deceased with a bottle. There is a reasonable possibility anything could have happened when the deceased was left alone at the scene while PW3 went to seek assistance on his behalf. There was no blood found at the spot where the deceased fell when he was hit by a bottle thrown at him by the accused. There was, however a lot of blood at the area he was found dead when PW3 and PW5 arrived at the scene. There is no evidence how deceased got to the new spot where he was found nor is there evidence how he sustained the more gruesome injury which led to his death.

[23] For the above reasons, I am not satisfied the Crown proved its case beyond reasonable doubt. The accused is acquitted and discharged.



M. LANGWENYA J.

For the Crown: Ms. N. Mhlanga

For the Defence: Mr. S. Jeje