



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CASE NO. 145/14

HELD AT MBABANE

In the matter between:

REX

VERSUS

SIBUSISO SIZWE HLOPHE

Neutral Citation: *Rex vs Sibusiso Sizwe Hlophe [145/14] [2020] SZHC 48 (24 March 2020)*

Coram: **LANGWENYA J.**

Heard: 18 February 2020; 26 February 2020; 3 March 2020.

Delivered: 24 March 2020

Summary: *Criminal law-charge of murder-plea of self defence-self defence defined-Onus of negating self defence lies on the Crown-Accused to satisfy certain legal requirements: that there was an unlawful attack; upon a legal interest; which had commenced*

or was imminent and that the attack was directed against the attacker and was necessary to avert the attack and that the means he used were reasonable to avert the attack.

Attack on accused was unlawful-accused averted attack-deceased died-accused attempted to help deceased.

That death resulted is not ipso facto that the accused intended to kill the deceased-mens rea not proved-Crown has not proved case beyond reasonable doubt-accused acquitted and discharged.

JUDGMENT

- [1] The charge against the accused is one of murder. The Crown alleges that the accused unlawfully and intentionally killed Gidagida Hlophe at Mantambe on 7 February 2014.
- [2] The accused pleaded not guilty to the charge. He pleads self defence.
- [3] PW1 Christina Hlophe is the wife of the deceased and the mother of the accused and PW2. It is her evidence that on 7 February 2014 the deceased returned home in the early evening hours and was drunk. The deceased was belligerent and engaged in an altercation with the accused. The deceased

was heard hurling insults and accusing the accused person and PW1 of stealing and selling his cow. It later transpired that the cow was next to deceased's homestead. The deceased threw stones at the roof of the house where PW1 was.

[4] PW1 came out of the house and advised the accused to leave his father and go to sleep. PW1 returned to the house. The accused did not leave. Subsequently, PW1 heard noise of the accused and the deceased running outside her house. She then heard the accused asking the deceased why he was stabbing him. Soon after the noise subsided outside PW1's house, she heard accused's voice pleading with the deceased to wake up. At the time the accused was performing *kwelula* practice.

[5] PW1 came out of the house and asked the accused what he had done to the deceased. With the aid of her cell phone, she shone the light at the deceased and examined him. She found that the deceased was dead. She raised an alarm and also called the police.

[6] PW2 is Chamukile Siso Hlophe. She saw the accused and the deceased in the family yard engaged in an altercation. The deceased advanced towards the accused in a threatening manner and the accused tried to avoid being hit by the deceased. The deceased was shouting at the accused. PW2 got into PW1's house and while inside the house the noise from the duo continued

outside. The accused was heard asking the deceased why he was stabbing him. PW2's evidence corroborates the evidence of PW1 in material respects.

[7] The police arrived and found the deceased's lifeless body lying on the family yard. The police examined the body of the deceased and found that it had an injury on the head and other injuries which were consistent with being assaulted with a stick.

[8] The post mortem report reflected that the deceased died as a result of injury to the head. The deceased presented with lacerated wound on top of the head as well as contusions on the lateral side of the lower portion of the left side of the chest. The parietal bones of the frontal bone were fractured; ribs of the deceased were fractured.

[9] PW3 is Detective Constable Thulani Israel Gama and a scenes of crime officer. He went to the home of the deceased to attend to the scenes of crime. In addition to taking photographs of the scene of crime, he examined the body of the deceased and confiscated a 1.5metre log which he found in the family yard as an exhibit in this matter.

[10] On 10 February 2014 the accused handed himself over to the police and was cautioned in terms of the Judges rules by 5113 Detective Constable Lukhele after he had introduced himself and the other police officers and informed

him that they were investigating a case of murder of Gidagida Hlophe. The accused freely and voluntarily led the police to his parental homestead where he retrieved a knife on the top of a door frame of a thatched house. The accused showed the police a scratch on the left back of his shoulder as stated that he was stabbed by the deceased on the fateful evening. The police arrested and charged the accused for the offence of murder.

[11] The accused told the Court that his relationship with his father was a good and healthy one. On the day the deceased died he had gone to the mountains to look for the cow which deceased alleged had been stolen and sold by PW1 and the accused and did not find it. When he reported to the deceased that he had not found the cow, the deceased insulted the accused and said PW1 and the accused had stolen and sold his cow.

[12] The deceased charged at the accused and the latter fled from the deceased. The deceased caught up with the accused and scratched accused' back with a knife. The accused ran around his parent's house trying to avoid the deceased. It was while he was running away from the deceased that he came across a stick on the yard. The accused grabbed the stick and used it to ward off the attack from the deceased by hitting the deceased who was, at the time trying to stab the accused for the second time. The accused hit the deceased with the stick on the head. The accused became hysterical when the deceased fell on the ground after he hit him with the stick. The accused performed *kumelula* practice to no avail.

[13] The accused stated that the deceased accidentally got injured and when he performed *kumelula* he was hoping that the deceased was unconscious and would regain consciousness. The accused says he failed to outpace the deceased because it was dark and he could not see his way clearly out of the situation as the family yard is littered with stones.

The Law

[14] Synman says ‘a person acts in private defence and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack¹.’

[15] It is trite that where an accused person 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 *mens rea*. 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*².

[16] It is also trite 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

¹ Synman *Criminal Law* 6th edition page 102.

² Hoffmann, H & Zeffert, D.T. in: *The South African Law of Evidence* 4th edition, page 497.

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 the attack³.

[17] In the present case, the evidence has shown that there was an attack that had commenced when the deceased stabbed the accused with a knife. The attack was unlawful in so far as it imputed, without legal basis, criminality on the person of the accused. The accused fled from the deceased and when he thought the deceased was fast catching up with him, he got hold of a stick which lay on the yard and used it to ward off the attack from the deceased. There was real danger towards the person of the accused which he had to avert. The accused, while fleeing the deceased grabbed a stick-not a gun or a machete-which was lying outside the family yard and hit the deceased with it. That cannot, in my view be said to be disproportionate to the assailant's attack on the accused.

[18] The evidence before Court is to the effect that the accused could not outpace the deceased because it was dark and the family yard was littered with stones. The Court had sight of the stones referred to herein from the photographs of the family yard that were taken by the scenes of crime officers.

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

[19] Schreiner JA in *R v Krull*⁴ says the following concerning the law and the plea of self defence:

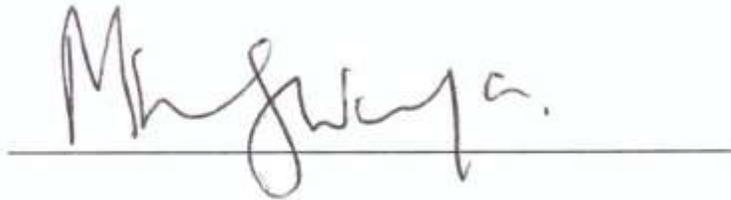
‘If you kill intentionally within the limits of self defence, you are not guilty. If you exceed those limits moderately you are guilty of culpable homicide; if immoderately, you are guilty of murder. No greater precision is possible as a matter of law.’

[20] To my mind the intention to kill has not been proved beyond reasonable doubt. There is no doubt that there was an altercation and chasing of each other but that death resulted is not *ipso facto* that the accused intended to kill the deceased. *Mens rea* is an important element which must be present and that cannot be inferred from say the accused’s cry and asking why the deceased was stabbing him; least of all from his act of fleeing from deceased and of crying and asking the deceased to wake up and attempting *kumelula* when accused had hit the deceased with the stick.

[21] What happened in this case is very unfortunate. The altercation was unfortunate; so also is the death of the deceased as a result.

⁴ 1959(3) SA 392 at 399

[22] On a conspectus of all issues herein, I am of the view that the Crown has failed to prove its case beyond a reasonable doubt and that the accused is not guilty of murder. The accused is accordingly acquitted and discharged.

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

M. LANGWENYA J.

For the Crown: Mr. M. Nxumalo

For the Defence: Mr. B.J. Simelane.