



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 327/10

In the matter between:

REX

VS

ZWELITHIN NJOVANE KHUMALO

Neutral citation: *Rex vs Zwelithini Njovane Khumalo (327/2010) [2012] SZHC166 (2012)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Law – accused charged with murder – the offence was premeditated – provocation and homicide Act invoked but not applicable in the case – no extenuating circumstances found – accused convicted of murder and sentenced to twenty five years imprisonment backdated to the date of his arrest.

JUDGMENT
17th JULY 2012

[1] The accused is charged with Murder it being alleged by the Crown that on the 6th March 2010 at Ngwabi Area in the Shiselwini region he unlawfully and intentionally killed Zandile Magagula. He pleaded guilty to the charge and the Court recorded a plea of not guilty.

[2] Certain formal admissions were made by the accused in terms of section 272 of the Criminal Procedure and Evidence Act No. 67 of 1938; firstly, the accused admitted that the deceased died as a result of injuries he inflicted upon her using an axe. Secondly, that after he had assaulted the deceased with the axe he informed Zephania Myeni that he had killed the deceased and inflicted seven fatal injuries upon her. Thirdly, the accused admitted that he used the window to gain entry into the deceased's room, and, that after hacking her with the axe, he used the same window to leave the room.

[3] A post-mortem report was admitted in evidence by consent and was marked Exhibit 1. The body of the deceased was identified by a police officer based at Nhlangano as well as Zandile Magagula who was her cousin. The cause of death was due to cranio-cerebral injury. There were blood stains over her face and chest. Seven cut wounds were found over the head, right ear, right cheek, neck, the shoulder, the chest as well as breast.

[4] The accused recorded a statement before a judicial officer, and, it was admitted in evidence by consent and marked Exhibit 2. The statement was recorded by Senior Magistrate Peter Simelane of the Nhlngano Magistrates Court. He told the Senior Magistrate that he was making the Statement freely and voluntarily and without undue influence, that nothing was said or done to induce him to make the statement, that he was not promised to be released from custody if he made the statement, that he was not assaulted after his arrest or incurred any injuries. He further told the Magistrate that no threats were made to induce him to make the statement.

[5] The statement reads as follows:

“In the year 2009 in the month of June, I was in love with one Zandile Magagula. I had been in love with her ever since the year 2004. We have two children between ourselves, a boy and a girl.

On a certain day in June 2009, I asked her for sex and she refused. I asked her what the problem was and she said that she no longer had any feelings for me. I then asked her what plan she had in mind for such a problem and she said that she had no idea what can be done. When I was due to collect my tablets at the Nhlngano Health Centre I

ask the nurses there how such a problem as my girlfriend had could be solved. They said they know of so solution for such a problem.

We were staying together at my place of work and so I went back and told her that I had asked for a solution in hospital for her problem and they had offered none. I then requested that we should go visit traditional healers or prophets to solve the problem. She told me that she doesn't consult traditional healers or prophets. I was very aggrieved by her refusal and I told her that she was telling lies that she was sick. I told her that she was refusing sex because she has another lover with whom she has sex when she goes to visit her home. She said she wasn't in love with anyone. I asked her to come out clear if she no longer loved me. She replied that she still loved me.

From June 2009, we never had sex for seven (7) months that followed. I then told her that I had been patient for too long and that I didn't think that she loved me any longer. She was attending family planning sessions and was being injected at the Health Centre from time to time. I then told her that those sessions she was undergoing were useless because we were not having sexual intercourse with each other.

In January 2010, I lost my job at Meyer's Farm and I then left the compound where workers were residing. I took my personal belongings to my home and came back again to fetch those which had remained behind. When I returned for the second load of goods which was on another day, I phoned her and asked her to come so that she could collect her goods which were in the house.

Before I lost my job we had once quarrelled with my girlfriend. From when we quarrelled she's not come to our house at the farm on weekends, she would go to visit her friend at Ngwabi. I was aggrieved by that action and I requested her mother's cousin who worked at the daily section at Meyer's Farm to go and ask her to come back at our house so that we could discuss about our differences.

Indeed she came but refused to come inside the house. We stood by the gate and discussed there. Her mother's cousin asked to be excused and stated that our misunderstanding involved only the two of us. We held out discussions and resolved our differences but she never afforded me sex, even though we were again living together. This was before I lost my job. So we removed our belongings from the farm quarters where we stayed together.

On this day I had asked her to come and pick up her goods she came and conveyed them to her friend's place at Ngwabi. I took mine to a neighbouring farm at a Phakathi homestead. At the Phakathi homestead I ended up getting a temporary job of cutting logs and conveying them to Rijkenberg's Sawmill. I was staying at that Phakathi homestead. I then disclosed to my uncle that the reason why I quarrelled with the mother of my children was that she was not affording me sex ever since June 2009. Whilst living at the Phakathi homestead I started having dreams of Zandile Magagula. I dreamt of her not being at the homestead where she was staying at Ngwabi. I had dreamt of seeing her arriving and it would appear that she was from seeing another man.

I disclosed this to those at the homestead where I was staying. They interpreted the dream by saying that she was committed to another man. I however dismissed it as being jealousy on my part. I dreamt this dream for the second time and this time I was confronting her whilst in the company of my uncle. This time I asked her where she had been and she said she was from one Sifiso. When I asked her who was Sifiso, she looked down and never gave a reply. I then woke up from the dream. I then dreamt that she was pregnant. I called her and

told her that I had had such a dream and asked her if she was pregnant, indeed she told me she was not pregnant, I apologised to her.

I then left the Phakathi homestead and went to stay at Zephaniah Myeni's home as I was hoping to find another job. I didn't find a job with one Spheshula Mtsetfwa who is in the timber cutting business. I then visited the mother of my children and requested her to take me to where our children were so that I could see them as I was then employed. I further told her that I could even go to my home in Big Bend and find a job there so I needed to see them. She told me that I could go to see the children on my own because I am the one that wanted to see the children. The children were staying at her grandmother's place.

We didn't agree to go to see the children with each other. She said I must go there on my own and that I could take the children and leave with them. I asked her if we were still lovers, and she said she still loved me. She said I can go and see the children and then leave without sleeping there. On the 5th March 2010 she came at her friend's place and I went to her and asked her if she would come back on the following day she said she didn't know whether she would come back or not.

I then left for the place where I stayed to cook some food. The time was around 2000 hours. At around 2200 hours when I was serving my food, a thought came to me. I asked myself why Zandile had come back on the Friday when I had expected her to come on the following day. This was more so because even her friend with whom she stayed was not there. I then went to the house where she stayed. It was around 2200 hours. I peeped through the door and saw that there were two people lying on a sponge mattress and they were making movements and it was clear to me that they were having sex, I saw a trouser lying by the side and a panty.

I stood quiet watching and then went towards the window. I found that there were curtains I could not see anything. I went towards the door and knocked there. They stopped what they were doing. The boy stood up, put on his under-trouser and pair of trousers, he gave the panty to the female. They stood up went towards the passage towards the kitchen. I also proceeded towards that direction and tried to peep but saw no one. I then went round back towards the bedroom where I knocked in another door which was opposite the door of the room where they had been.

The girl asked who was it and I said I was Zweli. She asked two times and I told her it was me. The man who I didn't see who it was must have gotten out through the kitchen door and escaped. When I returned to the kitchen door I found it locked already. I then returned to the door of the other room of the girl who attended me in the other bedroom. I was still outside. I told her that what was happening inside the room was bad because Zandile was having sex with another man. The lady said there was no man inside the house. She in fact said she had not seen any man inside there.

In fact it is this lady that had asked who was it when I knocked at the other bedroom door. When I remarked that what was happening there was bad Zandile replied and said that there was no man there.

I told her what I had seen from when they were having sex with each other up to when the man stood up, dressed and gave her a panty and she escorted him out. Zandile said it was fine because I had seen what I had wanted to see. I told her that what she was doing had been very unfair and that I could not control myself because ever since June 2009 she had said she was sick and I respected that fact and never had sex with her yet she was telling lies and having sex with another man.

I told her that she would remember me one day. She said by what can she remember me as I was of no help to her. I told her that I was then leaving and told her to call back her boyfriend so that they could continue having sex. I left, but back at my house I could not sleep because of the pain I was feeling.

At 4.30 am I woke up and went to the station to board the truck which we use to go to work. Zandile appeared too and I asked her to come to her friend's house in the afternoon so that we could discuss concerning our children. She said she wasn't promising that she would come back.

I went to Meyer's farm where I related the whole incident to my uncle. At around 1900 hours on Saturday this past Saturday, I went to the house where Zandile stays. I found her in the kitchen with her friend. I greeted them but Zandile never responded. I had gone to fetch my change as I had earlier on bought some biscuits. I then went to my house after getting the change. Back at my house, replay of what I had seen Zandile doing at her friend's house came on my mind. I could not withstand the replay in my mind of what I had seen.

I then took the weapon which was an axe. When I was at the gate of the house where they had been, a door opened and two girls came out

and went to another house where they were going to watch television. Zandile was left on her own. Just as I was going into this house where Zandile was one of the girls who had come out came back shouting. She spoke with another girl and gave her a cellphone. She then went back to the house where they had initially gone with her friend.

I then went to the room where Zandile was. I felt the doors and they were all locked. I went by the window and peeped through and saw Zandile naked applying ointment on her body.

I then went to the room where Zandile had been having sex with the man. The window of that room had no burglar bar and a glass was broken. I inserted my hand, opened the window and came inside. I walked to where Zandile was inside the room.

When I came towards the door she saw me and advanced towards me as she had stood up from the bed where she had been seated. I chopped her with the axe, she held me and the axe fell down. I pushed her away. I picked the axe from the floor.

I hacked Zandile with it on the head as she had knelt down on the floor. I hacked her four times I think the fourth blow was on her neck.

I then took her cellphone and threw it over the sponge mattress where she had been having sex with the man and I left the house I took my axe with me.

When I left I saw other people above the house standing looking towards the house as I was leaving. It appeared like they heard the commotion. I went to Zephaniah Myeni where I stayed and told him that I had killed the mother of my children and that I was then going to surrender myself to the police.

I indeed locked the room where I stayed and proceeded to the police station. At Meyer's Farm I washed the blood on my hands as well as the axe on the cattle drinking troughs. I had set myself to surrender to the police and not run away for what I had done because I had been too angry when I committed this offence.

When I reported to the police I didn't know what had happened to Zandile but when I departed the scene she was too weak. I didn't know as I don't know even now what her condition is. I never meant to do what I did. I had been so patient with Zandile and we had promised to marry each other but she then did what she did which

made me so angry. I found myself worthless in the world and acted uncontrollably.”

[6] Five photographs taken by the Scenes of Crime Officer Detective Constable Mabuza were admitted in evidence by consent. The photograph showing the house where the offence was committed was marked Exhibit 3. The photograph showing the deceased's injury above the ear was marked exhibit 4. The photograph showing the injury on the forehead between the eyes was marked Exhibit 5. The photograph showing the injury between the neck and left shoulder was marked exhibit 6. The deep cut behind the head was marked exhibit 7.

[7] PW1 Phetsile Dlamini testified that on the 6th March 2010 she was at a Mavuso homestead at Ngwabi area plaiting her hair. Her phone rang and she went outside and saw a person jumping over a window from the house. She didn't know how the person had gained entry into the house. She went towards the window. The deceased and a young child of the deceased's friend were in the house; her friend was away and had left the child with the deceased. She shouted the deceased's name but there was no response. She stood by the window of the room where the deceased was living and again called her name. She could see her lying on the floor of the passage.

[8] The three year old child was inside the house PW1 was later joined by Nosipho Mavuso, Freddy Hlatshwako, Lungelo Mavuso and the Community police. She phoned the police and they came and they opened the door. A boy went through the window to open the door since the door was locked from inside the house.

[9] When the incident happened PW1 and the other people at the homestead had gone to another house for plaiting her hair and watching television. The deceased had remained behind saying she was tired since she was from her work place. She had locked the door and they had told her that they would buzz her when they returned.

[10] When the door was opened they discovered that the deceased was dead and blood was flowing to the other rooms; she was naked. She maintained her evidence under cross-examination.

[11] PW2 Detective Sergeant Sithembiso Dlamini testified that on Saturday, the 6th March 2010 at about 2035 hours, he received a report that a person had been killed at Ngwabi area in a Mavuso homestead. Together with Sgt. Shabangu and Scene of Crime Officer Constable Mavuso, they entered a house where they found the deceased in another room. She was lying facing downwards. She was half-naked and wearing only a panty. She had two deep wounds at the back of the

head. Another deep wound was on the forehead in between the eyes; and a deep cut on the chin as well as a deep cut above the ear. The injuries showed that a sharp instrument had been used. There was a lot of blood on the floor. The body was subsequently taken to the mortuary. Family members present at the scene included Nosipho and Hloniphile Mavuso

[12] Back at the Police Station, they found the accused; and, the time was 2100 hours He introduced himself to the accused as the investigating officer in the death of the deceased. After cautioning him, the accused produced an axe and gave it to PW2; he admitted that he used the axe in committing the offence. The axe had already been washed and there was no blood; however, there was smelling of blood. His green jacket had blood as well as his pair of trouser.

[13] The exhibits in the case were admitted in evidence. The axe was marked exhibit A; the brown trouser was marked exhibit B; the green jacket was marked exhibit C; the bloodied panty which was worn by the deceased was marked exhibit D; a cream white blanket which had blood was marked exhibit E; a duvet with blood was marked Exhibit F; a Nokia cellphone which had blood was marked Exhibit G.

[14] Under cross-examination the defence asked PW2 if the death of the deceased was not caused by her infidelity; PW2 replied that the deceased was not

married to the accused even though they had children. PW2 further told the court that during investigations he discovered that at the time of commission of the offence, they were no longer in good terms; similarly, they were no longer staying together as they used to do. He also found that subsequent to the breakdown of the relationship, the deceased was refusing to have sexual intercourse with the accused. In re-examination PW2 told the court that his investigations further disclosed that the accused had attacked the deceased and hacked her with an axe repeatedly until she died.

[15] During closing arguments, the Crown submitted that the *actus reus* was not in dispute; and that there was *mens rea* on the basis that the accused set out from his residence armed with an axe to kill the deceased. He argued that the axe is a lethal weapon, that the deceased was brutally hacked with the axe on the head several times and, that the injuries inflicted on the deceased were fatal.

[16] It is apparent from the evidence that the deceased and accused were no longer in good terms and that the deceased was refusing to have sexual intercourse with the accused because of the breakdown of their love relationship. The deceased was now in love with another man; and, when the accused found them having sexual intercourse with the man, he became very jealous.

[17] However, he returned to his residence and did not take any action until the evening of the next day; hence, the defence of provocation cannot avail the accused because he did not act on the spur of the moment but had allowed himself to cool down.

[18] The nature of the weapon used, the area of her body where the injuries were inflicted as well as the extent of the injuries clearly show *mens rea* on the part of the accused. The photographs of the deceased taken from the scene as well as the post-mortem report show the brutal, vicious and gruesome nature of the injuries inflicted upon the deceased by the accused using his full might. The accused set out from his residence armed with the axe with the intention of chopping and killing the deceased.

[19] When he arrived at the Mavuso homestead, he peeped through the window and saw the deceased inside naked; he entered through a window and without saying a word to the deceased, he proceeded to hack and chop her viciously and brutally. The deceased was not armed and was in fact defenceless. Evidence has been led that her blood covered the passage and adjacent rooms; this shows the extent of the injuries inflicted upon the deceased.

[20] I was referred to the Homicide Act No. 44 of 1959. Sections 2 and 3 of the Act provides the following:

- “2. (1) A person who-**
- (a) unlawfully kills another under circumstances which but for this section would constitute murder; and**
 - (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;**

Shall be guilty of culpable homicide.

- (2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable to the provocation.**

- 3. (1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.”**

[21] It is apparent from the evidence that the defence of provocation cannot in the circumstances avail the accused for the following reasons: firstly, the relationship between the deceased and the accused had broken down for some time; and, the intimacy and sexual relationship between them had ceased to exist. Secondly, even if their relationship was still intact, provocation would not have availed the accused because he did not act in the heat of passion when he found the deceased and her new lover having sexual intercourse; after speaking with the deceased from outside the house, he left home and only came to attack the

deceased on the evening of the following day when there had been time for his passion to cool.

[22] In the absence of proof that the accused was provoked as alleged or that the Homicide Act was applicable in the circumstances of the case, the alleged provocation cannot even constitute an extenuating circumstances. The accused is accordingly convicted of murder without extenuating circumstances.

[23] In mitigation of sentence the defence argued that the accused was a first offender with two minor children with the deceased to support. In addition he has two other minor children to support from another relationship. The accused is thirty eight years of age with no formal education and a rural based background. He was brought by a single mother, and the defence argued that children born the hard way have a tendency of being violent and aggressive. The accused surrendered himself to the police after committing the offence; he had been in custody since the date of arrest on the 6th March 2010.

[24] The Crown argued for the aggravation of sentence in light of the gruesome and brutal nature of the offence upon a defenceless woman. The Crown reminded the Court that the right to life was specially entrenched by section 246 (2) (c) of the Constitution; and, that the accused had no right to take away the deceased's life without due process of law as he did.

[25] Section 15 (2) of the Constitution provides that the death penalty shall not be mandatory where an accused is convicted of murder without extenuating circumstances. As I pass the appropriate sentence, the law obliges that I taken into account the triad, that is, the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. Indeed it is a truism that offences of this nature where defenceless women are killed by their spouses and/or lovers because of the breakdown of their relationship are escalating; and this Court has a Constitutional duty to protect women from extinction.

[26] The brutal and gruesome nature of the offence committed by the accused is beyond any imagination, and, it is an indictment upon this Court to issue a sentence that is proportionate to the offence committed in terms of deterency. Society expects the Court to impose appropriate deterrent sentences which would not only reduce but curb the killing of defenceless women.

[27] Accordingly, the accused is sentenced to twenty five years imprisonment backdated to the date of his arrest on the 6th March 2010.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Crown
For Defence

Attorney S. Fakudze
Attorney S.C. Simelane

