



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 202/10

In the matter between:

REX

VS

NHLANHLA LUCKY DLUDLU

Neutral citation: *Rex vs Nhlanhla Lucky Dlodlu (202/2010) [2012] SZHC236 (2012)*

CORAM

MCB MAPHALALA, J

Summary

Criminal law – accused charged with murder – pleads intoxication as a defence – no evidence established of the defence alleged – no extenuating circumstances found – aggravating factors established – accused convicted and sentenced to twenty eight years imprisonment.

Judgment
28th September 2012

[1] The accused was charged with the murder of his biological mother, and, it was alleged by the Crown that upon the 7th March 2009 at Siphocosini area in the Hhohho region, he unlawfully and intentionally killed Makhosazana Sylvia Dlamini. He pleaded not guilty to the charge.

[2] A statement of admitted facts signed by the parties was admitted in evidence by consent and marked exhibit 1.

“The accused admits the following facts:

- 1. That the injuries on the deceased were inflicted by him using an axe he retrieved from a room PW2 (Sihle Dlamini) and PW3 (Thokozani Bhembe) were sleeping.**
- 2. That after committing the crime he fled out of the country to South Africa where he was finally arrested by PW7 D/Inspector Saretlo of Vereeniging Police Station.**
- 3. That the arrest was as a result of an extradition duly and properly carried out after due process of the law was followed. The arrest was on the 29th April 2009.**
- 4. That the accused was finally handed over to the Royal Swaziland Police on the 20th May 2010 at about 1300 hours. The accused spent 12 months in custody in South Africa. The handing over of the accused was in accordance with an order by the Minister of Justice of South Africa dated 5th February 2010. The handing over was done by Police Officer Pillay from Interpol. The accused was handed over to Supt Dlamini of the Royal Swaziland Police at the Oshoek Border Post.**
- 5. That the order be handed in by consent.**
- 6. That the pathologist’s post mortem report is handed over to court by consent. The report indicates that there were five cut wounds on the deceased and she died “due to cranio-cerebral injury” as opined by the pathologist.**

- 7. That the photographs showing the injuries on the deceased be handed in by consent. The photographs were taken by PW8 4419 Constable Nkosinathi Thusi as reflected in additional summary of evidence.**
- 8. That the evidence of 5023 Nkosinathi Makhubula who is the police officer who took first action is not disputed. He received an axe from PW2 Sihle Dlamini and handed it over to 3997 Gabriel Tumaletse.**
- 9. The accused tenders a plea of guilty to a lesser crime of culpable homicide but the Crown does not accept the plea tendered.**
- 10. The only element that the Crown has to prove is the “intention”.**

[3] The Extradition Order was also admitted in evidence by consent and marked Exhibit 2. The Order was issued by the South African Minister of Justice and Constitutional Development in terms of Section 11 (a) of the Extradition Act No. 67 of 1962. The accused was arrested on the 29th April 2009 by D/Inspector Saretlo of Vereeniging Police Station in South Africa and the Extradition Order was signed on the 5th February 2010; and, it was effected by Warrant Officer Pillay of Interpol South Africa who handed the accused over to Supt. Dlamini, free of any injuries at Oshoek Border Post on the 20th May 2010 at 1300 hours.

[4] The Post-mortem report was further admitted in evidence by consent and marked exhibit 3. The pathologist Dr. Reddy opined that the cause of death was “due to the cranio-cerebral injury”. There were bloodstains over the scalp, face, trunk, left upper limbs and right hand. Four deep cuts were noted: firstly, on the right forehead to behind the ear, deep into the brain; secondly, over the scalp parietal, occipital with skull fracture draining out a portion of the brain; thirdly, over the right shoulder going deep into the muscles; fourthly, over the right hand deep into the muscles. There were blood clots in the ear as well.

[5] Two sets of photographs of the deceased were admitted in evidence by consent. The first set of seven photographs written A, B, C, D, E, F, and G shows the house of the deceased as well as the deceased lying on the bed where she was brutally

murdered; it was marked collectively as Exhibit 4. A portion of the deceased's brain is on the floor of the deceased's bedroom.

[6] The second set of photographs written H, I, J, K, L, M, N and O shows the brutal injuries sustained by the deceased on her head; it further shows the deceased being examined by the pathologist Dr. Reddy during the post-mortem examination. This set was admitted in evidence and marked exhibit 5.

[7] PW1 Sihle Dlamini testified that the deceased was her aunt and that the accused is his cousin. He told the court that on the 7th March 2009, on a Saturday, they were at his parental home at Gundvwini together with his family. The deceased who was part of the family was also present to attend a family ceremony; she was working in Pretoria, South Africa, at the Swaziland Embassy. She was accompanied by her driver.

[8] Since both the deceased and her driver were drinking liquor at the homestead, she requested PW1 and Thokozani Bhembe to drive them back to her workplace in Pretoria. They left his parental homestead and Thokozani Bhembe was driving the deceased's motor vehicle.

[9] Along the way the deceased told them that she had just received a phone call from her daughter Nompumelelo Dlodlu that there was a serious conflict between her and the accused. They found her in Mbabane, and, together they went to the Mbabane Police Station. The deceased asked the police to go with them to her homestead at Siphocosini area to intervene in the conflict between her children.

[10] Since the police had no available motor vehicle, they took the police along with them in their motor vehicle. On arrival at the deceased's homestead, they found the house locked; the police shouted for the accused to open the door. It took the accused a while before he opened the door; and, they entered the house and sat on the lounge suit.

[11] The accused told the deceased that he was being abused and enslaved at the homestead because his contribution in looking after the homestead was not being appreciated. In response the deceased wondered why the accused was complaining because she was supporting him financially since he was unemployed and that he was taking care of all his needs including giving him pocket money as well as buying him a lot of cigarettes. The accused arrogantly left for his room but PW1 persuaded him to return and resolve the dispute amicably with the deceased.

[12] The accused returned to the sitting room. It was at that stage that it transpired that the conflict between the accused and his sister was caused by the disappearance of a cellphone belonging to Nompumelelo Dlodlu which had been sold by the accused. The deceased asked the accused why he had sold his sister's cellphone. In response the accused kept on saying that he was being undermined and abused at home; and, he didn't answer the question asked by the deceased.

[13] Seeing the arrogant behavior exhibited by the accused, the police suggested to the deceased that they should take the accused with them to the police station so that they could talk to him; however, the deceased refused and said she had forgiven the accused. The police asked the deceased and accused to stand up and hug each other as a sign that the dispute had been resolved amicably between them. The accused complied but it was clear that he was still harbouring some grudges against the deceased. He hugged the deceased reluctantly. Nompumelelo Dlodlu didn't take part in the discussions.

[14] The deceased then told PW1 and Thokozani Bhembe to transport the two police officers back to the police station. The accused, the deceased and her driver were left behind the homestead. The deceased intended to leave for Pretoria that night; hence, PW1 and Thokozani Bhembe returned promptly. However, on their return they discovered that they were already late for the border gate and that they would not be able to arrive there before the closing time. It was then decided that they would leave in the morning.

[15] On their return they found the accused, the deceased and her driver drinking liquor together in the sitting room. They left with Thokozani Bhembe to sleep leaving them still drinking liquor. The accused entered the room in which they were sleeping and thanked PW1 for helping him in resolving the dispute with his mother amicably because he would have been arrested if PW1 did not persuade him to engage his mother. He went out of the room and came back asking them if they were sleeping comfortably; they did not answer him.

[16] He went out of the room and came back after a while; he took an axe under the bed in which PW1 and Thokozani Bhembe were sleeping. He was heard saying: “let me commit murder once and for all”. He went out of the room, and, thereafter PW1 heard noise in succession for three times. He woke up Thokozani Bhembe and they went to the deceased’s bedroom; PW1 took the axe from the accused when he was about to chop the deceased for the fourth time with the axe.

[17] The deceased’s driver who was asleep on the lounge suit in the sitting room was woken up by the noise; and he asked what was happening, and they told him that the accused had hacked her mother to death with the axe. The deceased died instantly on her bed pursuant to her injuries.

[18] PW1 and Thokozani Bhembe came out of the house and raised an alarm; thereafter, they ran away, but the accused followed them asking them to stop. They didn’t stop, and, the accused shouted at them saying “I told you I would do what I wanted to do”. After this the accused stopped following them. They found two people walking along the road and they asked to use their cellphone to phone PW1’s aunt who stayed at Kashali area in Manzini; she inturn reported the incident to the police. When the incident occurred Nompumelelo Dlodlu was asleep in her bedroom.

[19] The police subsequently arrived; and PW1 and Thokozani Bhembe returned to the deceased’s homestead when seeing the arrival of the police. PW1 then gave the

axe to the police. Other police officers arrived and conducted investigations of the Scene of Crime.

[20] Under cross-examination PW1 denied the allegations that in 2008 the accused had suffered from a mental disorder and was treated at the Psychiatric Centre. He further denied that when they arrived at the deceased's homestead, the accused was drunk. He told the court that the accused was sober and sleeping. PW1 told the court that they found the accused asleep, and, they had to knock at the door for a long time before he could open the door.

[21] PW1 further told the court that the accused thought they were asleep when he came to collect the axe from underneath their bed because they didn't respond when he was talking to them. He disputed as false the allegation by the accused that he could not recall what happened that day when he committed the offence. The accused turned around and took the blame for what had happened; he said he was remorseful and could not explain why he committed the offence.

[22] The Crown disputed the allegation by the accused that he was remorseful for committing the offence on the basis that he never apologized to any member of the family. PW1 told the court that he had previously met the accused on two occasions after he had been granted bail and they spoke to each other; however, he never showed any remorse for the offence that he had committed.

[23] PW2 Detective Constable Tumaletse, the police investigator in the case, testified that on the 8th March 2009, he was given a docket with other police officers from the Special Police Unit Ukhozi with regard to this matter. During his investigations, he was given an axe by another police officer who attended the Scene of Crime. He further discovered that the accused had fled the country soon after committing the offence. They obtained a warrant of arrest and began looking for the accused.

[24] Subsequently, they sought the assistance of the South African Police through Interpol. The accused was finally arrested by the South African Police at Vereeniging in South Africa on the 28th March 2010; thereafter, the Extradition process began which culminated in the handing over of the accused by the South African Police to the Swazi Police at the Oshoek Border Post on the 20th May 2010. Superintendent Sonyezane Dlamini received the accused at the bordergate; PW3 and other police officers accompanied him.

[25] The accused was handed over to the Swazi Police by Detective Captain Mabaso and Warrant Officer Pillay of the South African Police. The accused was in good health when he was brought by the South African Police. PW2 introduced himself to the accused as the investigator in the case and he further cautioned him that he was not obliged to say anything but whatever he would say would be recorded in writing and used as evidence during the trial.

[26] At the police station the accused was again cautioned according to the Judges' Rules; and his rights to legal representation as well as to remain silent were explained to him. Thereafter, he formally charged the accused with murder. During the trial, PW2 handed the axe to court as an Exhibit and it was marked exhibit A.

[27] Under cross-examination PW2 denied that the accused was granted bail unopposed because he co-operated with the police. PW2 told the court that when the prosecution consulted him for instructions on the bail application, he had told them that the police were opposing bail because the accused was a flight-risk.

[28] In his evidence in-chief the accused told the court that he was born in 1974 and attended school up to O'level; thereafter, he worked from 2000-2009 in a factory at Cadbury in Matsapha and later at the First National Bank in Mbabane. His parents were divorced when he was born and he grew up residing with his mother. He doesn't have a post-school tertiary education. He stopped working in 2001 and he then depended on the deceased for his livelihood.

[29] He told the court that on the 6th March 2009 he was in Mbabane socializing with his friends and drinking liquor for the whole day until the following morning. On the 7th March 2009, he continued drinking liquor; and, he attributed his heavy drinking to frustrations of not getting employment.

[30] Furthermore, he told the court that he could not recall what happened on the 7th March 2009 because he had taken liquor. In particular he told the court that he could not recall when the deceased and those with her arrived at home or why he quarreled with his sister Nompumelelo Dlodlu. Similarly, he told the court that he could not recall talking to PW1 and Thokozani Bhembe or even the manner the deceased died.

[31] He confirmed that he was mentally sound and not suffering from any mental disease. However, he told the court that he was once treated at the Manzini Psychiatric Centre in 2008 where he was given tablets and discharged.

[32] Under cross-examination he conceded that he didn't have documentary evidence that he was treated for a mentally-related disease in 2008. He failed to explain how he remembered that he was drinking heavily on the 6th and 7th March 2009 if he could not recall the events of the 7th March 2009 leading to the death of his mother. Similarly, he could not explain why he fled on the night of the commission of the offence if he couldn't recall that he had killed his mother. Subsequently, he changed the story and told the court that he fled the scene to South Africa because he remembered certain events of the day in question.

[33] Initially he told the court that he fled to South Africa using his passport which was kept in his jacket. When it was put to him by the Crown that he took the passport from the house after committing the offence in order to flee the country, he told the court that he could not recall how he got his passport. Similarly, the accused could not explain how he was able to retrieve the axe from underneath the bed and inflict fatal injuries upon the deceased if he was as drunk as he alleged.

[34] The accused could not explain as well why he uttered the words to the effect that he would commit murder once and for all if he didn't have a direct intention to kill the deceased. Furthermore, he could not explain why he told PW1 and Thokozani Bhembe that he had accomplished what he intended to do after killing the deceased, if he didn't intend to kill her. Both these utterances were not disputed or challenged by the defence.

[35] The parties signed a Statement of Admitted Facts from which it is apparent that the accused admitted the "*actus reus*", that he unlawfully killed the deceased. The Crown had to prove that the accused in committing the offence had *mens rea* in the form of intention. It is apparent from the evidence that the Crown has proved the commission of the offence beyond reasonable doubt. There is no evidence that the accused was dead drunk when he committed the offence such that he could not appreciate what he was doing; the evidence proves the contrary. Similarly, there is no evidence that that the accused was drinking the whole day on the 6th March 2009 until the next morning. In addition the evidence of PW1 has not been disputed that when they arrived at the homestead, they found the accused sleeping and sober; and, they had to knock several times before the accused could open the door.

[36] Initially the accused did not want to discuss the dispute with his mother and had to be persuaded by PW1 to engage the deceased for an amicable solution. The accused appreciated what was happening because after the discussion, he thanked PW1 for persuading him to engage with the deceased, otherwise he would have been arrested by then.

[37] When PW1 and Thokozani Bhembe were asleep in their bedroom, the accused came to their room and asked them if they were sleeping comfortably; they did not respond. He left the room and came back after some time, took the axe under the bed and went out to the deceased's bedroom. As he left the room, he was heard saying "let me commit murder once and for all". The accused went to the deceased's room and inflicted fatal injuries upon her with the axe. This conduct by the accused is not

consistent with a person who is so drunk that he could not appreciate what he was doing.

[38] When PW1 and Thembinkosi Bhembe left the homestead after the death of the deceased, the accused followed from behind asking them to stop, but, they ignored him and continued walking. He shouted and said “I have done what I had said I would do”. After the death of the deceased, the accused immediately took his passport and fled the country to South Africa. This shows that he appreciated that he had killed his mother. According to his evidence, he fled during the night and slept in a nearby forest; and, in the morning, he crossed the border to South Africa.

[39] The evidence shows that the murder was premeditated and that the accused had *mens rea* in the form of *dolus directus*. It is apparent that he waited for everyone in the house to sleep, then he fetched his axe and butchered the deceased to death. The use of the lethal weapon, the sensitive part of the body where the injuries were inflicted as well as the extent of the injuries show that the offence was premeditated.

[40] *Troughton ACJ* in the case of *Rex v. Jabulani Philemon Mngomezulu* 1970-1976 SLR 6 at 7 (HC) stated the following:

“...The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[41] Where a person uses a lethal weapon against another person and inflicts fatal injuries upon him on sensitive parts of the body without legal justification, he should be presumed to have intended his death. I am convinced that in the present case the Crown has proved the commission of the offence beyond reasonable doubt.

[42] In the case of *S. v. Chretien* 1981 (1) SA 1097 at 1104 (AD), the Appellate Division held that there are two degrees of intoxication. It drew a distinction between

a person who is dead drunk and one who is slightly drunk; it held that someone who is dead drunk is not conscious of what he is doing and is not liable for his unlawful conduct because a muscular movement which is done in this condition is not a criminal act. The court further held that if a person does an act but is so drunk that he does not realize what he is doing or that he does not appreciate the unlawfulness of his act, he is not criminally responsible. The evidence in this case shows that the accused was slightly drunk and did appreciate what he was doing.

[43] The explanation given by the accused that he was so drunk that he could not appreciate what he was doing is not only improbable but beyond any reasonable doubt false. *Browde J.A.* in the case of *Celani Maponi Ngubane and two Others v. Rex* Criminal Appeal No. 6 of 2006 quoted with approval the judgment of *Greenberg JA* in the case of *Rex v. Difford* 1973 AD at 370 where he stated the following:

“No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation even if that explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal.”

[44] Accordingly, the accused is convicted of murder. The only ground advanced by the defence in respect of extenuating circumstances is that the accused was intoxicated. In light of the conclusion to which I have arrived that the accused was not drunk, intoxication cannot, in the present case constitute an extenuating circumstance. The accused is therefore convicted of murder without extenuating circumstances.

[45] In mitigation of sentence the accused testified under oath that he was a first offender, thirty eight years of age and single with no children; he further told the court that he was sorry for the death of his mother and apologises to everyone for the death

of his mother. He further told the court that all his relatives have forsaken him and that as part of his bail conditions he has not been at home since the commission of the offence. When granting bail, the court ordered, inter alia, that he should not interfere with Crown witnesses; hence, he was living at Logoba area in compliance with the bail conditions. He further told the court that the death of his mother would haunt him for the rest of his life, and, that this was punishment in itself.

[46] In aggravation of sentence the Crown submitted that the killing of the deceased was well-planned, brutal and pre-meditated; and, that there was no provocation. It further argued that the killing of the deceased has deprived the other siblings of their mother.

[47] In arriving at a proper sentence, I will take into account the triad, that is, the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. It is a trite principle of the law that a judicial officer should not approach punishment in a spirit of anger if he is to achieve the delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him; and that he should not strive after severity or surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of humane frailties and the pressures of society which contribute to criminality. See the case of *S. v. Rabie* 1975 (4) SA 855 (AD) at 866A.

[48] The aggravating factors far outweigh the personal circumstances of the accused; however, the accused as a first offender deserves to be given a second chance in life. I will invoke section 15 (2) of the Constitution which provides that the death penalty shall not be mandatory in circumstances where no extenuating circumstances exist. Accordingly the accused is sentenced to twenty eight years imprisonment, and, the fifteen months spent in custody would be taken into account in computing the period of imprisonment.

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

For Crown
For Defence

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