



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 109/11

In the matter between:

**REX**

**VS**

**SIPHAMANDLA HENSON DLAMINI**

Neutral citation: *Rex vs Siphamandla Henson Dlamini (109/2011) [2012] SZHC182 (2013)15 August 2013*

**CORAM**

**MCB MAPHALALA, J**

**Summary**

Criminal law – accused charged with murder and pleads self-defence – held that the force used by the accused was excessive and not commensurate with the attack – held further that the intoxication by the accused and provocation by the deceased constitute extenuating circumstances – accused found guilty of murder with extenuating circumstances – accused sentenced to fifteen years.

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**Judgment - Sentence**  
**15 August 2013**

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- [1] The accused is charged with murder, it being alleged by the Crown that on the 13<sup>th</sup> March 2011, at Mathendele Township in the Shiselweni region, the accused unlawfully and intentionally killed Thulasizwe Msibi. He pleaded not guilty to the charge.
- [2] Certain formal admissions were made in terms of section 272 of the Criminal Procedure and Evidence Act No. 67 of 1938: Firstly, the Post Mortem Report was admitted in evidence by consent, and, it was marked Exhibit 1. The cause of death was due to ‘Haemorrhage as a result of penetrating injury to the left lung’. There was a penetrating injury over the front chest, 2.1 cm from midline to left and 1.8 cm lung deep; it involves muscles intercostals structures. Furthermore, pleura, upper lobe of lung 1 x 0.7 cm; edges cut angle sharp, slight transversely placed front to back pleural cavity contained about 1400 ml blood.
- [3] The second formal admission was the statement made to the Judicial Officer which was admitted in evidence by consent and marked Exhibit 2. According to the Statement, the accused was arrested on the 14<sup>th</sup> March 2011 after he had surrendered himself to the police. Nothing was said or done to induce him to make the Statement; no promise or threats were made to induce him to make the statement. He was not assaulted by the police during his detention, and, he did not incur any injuries.

[4] The statement made by the accused is as follows:

**“STATEMENT MADE BY SIPHAMANDLA HENSON DLAMINI**

**“It was on Friday afternoon when I left home at Gege and went to Nhlanguano, Mathendele to attend my brother-in-law’s funeral. I arrived at Mathendele at around 6pm and all the relatives of the deceased had gathered together.**

**On Saturday night at around 2 am, as I was busy with others preparing some logs for the grave, my sister Nelisiwe Matse came to report to me that there were some people who had blocked the way for Thokozani Dladla, my cousin at the gate. I then went to enquire as to what was the matter. On arrival, I pulled my cousin away so that we could go back into the home yard where there was light.**

**As I pulled him, the group of boys who were wielding some knives advanced toward us so they could block us from moving towards a spot which had a little light. I also had a knife with me and as I tried to force my way pulling my cousin out of the group and to rescue him from imminent danger, they blocked us. As I tried to open the way, one of them was accidentally stabbed in the chest and we then ran away. I do not know what happened next.**

**I ran for dear life and could not even bury my brother-in-law. Later that day, I learnt that the boy died as a result. In fact I walked home to Gege by foot that very same time I fled from the funeral. I was afraid that the boys may pursue and kill me, hence I crossed over to Phongola in the Republic of South Africa at my relative's place.**

**At around 16.30 on the same Saturday, I was phoned by Mr. Fakudze who requested me to return straight to the Police Station. I told him that I had no money and would try and get it so that I may come on Monday or Tuesday the following week. He phoned to meet me whenever I may be in Swaziland. I told him that I am afraid of the friends of the deceased because I did not know them. I finally surrendered myself at Nhlanguano Police Station.”**

- [5] PW1 Thokozani Cyprian Dladla, a cousin to the accused, testified that on the 12<sup>th</sup> March 2011, they attended a funeral service of a relative at Mathendele Township in Nhlanguano. PW1 was assisting in cutting logs to be used inside the grave when a group of boys came and insulted them. It was during dawn on the day of the funeral. One of the boys pulled PW1 to a dark corner. PW1's cousin Nelisiwe Matse then called the accused to intervene and assist him against the attack. The accused arrived and stabbed the deceased in the chest.

[6] The accused and PW1 were advised by relatives to leave the homestead for fear of vengeance from friends of the deceased. They left for the parental homestead of the accused at Gege area where they reported the incident to the accused's father; later in the evening, they heard that the police were looking for them. PW1's father was previously working in the Police Service. PW1 recorded a Statement with the police on the next day.

[7] Under cross-examination, PW1 conceded that they were drunk with the accused when the offence was committed; and, that the group of attackers was also drunk. He further conceded that he was pulled into a dark corner by one of the boys; hence, he could not deny as alleged by the defence that the group of boys was armed with a bushknife. He further conceded that both the accused and himself were afraid of the group of boys and anticipated physical harm. Similarly, he conceded that if the accused did not rescue him by pulling him from the dark corner, he could not have escaped from the assailants; and, that they had no way to escape except going through the group of boys.

[8] PW2 Detective Sgt. Busisiwe Shabangu, testified that on the 12<sup>th</sup> March 2011, she received a report of a murder case at Mathendele Township, at a Ntshalintshali homestead, where there was a night vigil. She went to the said homestead together with two other police officers to investigate the matter. On arrival they found many people who had come to attend the funeral, and the

deceased had already been transported to Nhlanguano Health Centre where he was certified dead upon arrival.

[9] On the 13<sup>th</sup> March 2013 PW2 was called to the Manzini Regional Police Headquarters where she found PW1 who was being surrendered to the police by this father. The interview with PW1 led to the arrest of the accused who had fled the country to South Africa; arrangements were made with him through the phone to return to the country. The accused subsequently surrendered himself to the police. The accused was cautioned that he was not obliged to say anything or point out anything but that whatever he says or point out would be used in evidence during the trial.

[10] The accused led the police to the bus which he had boarded to Nhlanguano, Phakama Bus Service, where a knife in an envelope was found. The knife had bloodstains. After further caution, the accused handed the knife to the police as an exhibit; he was formally charged with murder. The knife was admitted in evidence and was marked Exhibit "A". Under cross-examination, PW1 maintained his evidence. He further confirmed that the accused had surrendered himself to the police, and, that he was co-operative with police investigations. Thereafter, the Crown closed its case.

[11] The accused testified in his defence, and, he told the Court that on the 12<sup>th</sup> March 2011, he arrived at Mathendele Township at the Ntshalintshali

homestead for the funeral service; the deceased was his brother-in-law. Together with PW1 they assisted the bereaved family with funeral preparations. Whilst cutting logs to be used inside the grave, Nelisiwe Matse informed him that there was a group of boys who were assaulting PW1 next to the gate; he went to investigate and found PW1 surrounded by a group of boys. He pulled PW1, and, the group of boys confronted him violently, and one of them was carrying a bushknife. Behind them was a house-wall, and they had no other way to escape except going through the group of boys again. The accused took out a knife in his possession which he had allegedly brought to slaughter a cow at the homestead; he wanted to scare the group of boys away, and in the process the deceased was stabbed. The accused told the Court that he had no intention to kill the deceased; hence, he pleaded guilty to murder, and, the Court entered a plea of not guilty.

[12] Under cross-examination, the accused conceded that he did not slaughter any cow at the homestead; hence, it could not be said that the knife was for slaughtering a cow. He further conceded that the group of boys did not assault him or PW1, and, that they were not hurt during the confrontation. He further conceded that he stabbed the deceased on the chest which caused his death. He couldn't dispute the evidence of PW1 that the group was not armed, and, he insisted that he might have overreacted because he was drunk.

[13] The Crown has proved the commission of the offence beyond reasonable doubt. The ‘*actus reus*’ is not in dispute since the accused has admitted stabbing the deceased to death. However, he contends that he acted in self-defence; and, that he used the knife to scare the boys and pave a way to escape. However, the serious injuries reflected in the Post-Mortem Report contradicts this contention.

[14] It is apparent from the evidence that there was no imminent danger to the accused; neither the accused nor PW1 were assaulted by the boys. There is no evidence that the boys were armed with any weapon. *Nathan C.J.* in *Rex v. John Ndlovu* 1970-1976 SLR 389 at 390-391 said:

**“... a person may apply such force as is reasonably necessary in the circumstances to protect himself against unlawfully threatened attack. The test whether the accused acts reasonably in defence is objective. But the force used must be commensurate with the danger apprehended; and if excessive force is used, the plea of self-defence will not be upheld.”**

[15] Having regard to the evidence before me, it is my finding that the force used by the accused was in the circumstances excessive. A reasonable man in the position of the accused would not have stabbed the deceased to death. The force used by the accused was not commensurate with the danger apprehended; and, it was certainly excessive. I find the accused guilty of murder.



[18] Furthermore, it is the finding of this Court that extenuating circumstances exist in this matter. The accused's evidence is corroborated by the evidence of PW1 that they were both drunk at the time of the commission of the offence. In addition it is not in dispute that PW1 was confronted by the group of boys who dragged him into a dark corner. This led Nelisiwe Matse to seek the intervention of the accused. It is also not in dispute that behind the scene, there was a house-wall; the accused and PW1 could not flee the scene other than going through the group of boys again. As stated in the preceding paragraphs, the accused was entitled to defend himself; however, he used excessive force in the circumstances which was not commensurate with the attack.

[19] In the case of *Willam Mceli Shongwe v. Rex* Criminal Appeal No. 24/2011 at para 52, I had occasioned to state the following:

**“52. His Lordship Ramodibedi CJ in the case of *Bhekumusa Mapholoba Mamba v. Rex* Criminal Appeal no. 17/2010, quoted with approval the South African leading case of *S v. Letsolo* 1970 (3) SA 476 AD at 476 G-H where *Holmes JA* defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. The trial Court has to consider three factors: firstly, whether there are any facts which might be relevant to extenuating such as drug abuse, immaturity, intoxication or provocation; but the list is not exhaustive. Secondly, whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the**

**accused in doing what he did; in deciding this factor, the trial Court exercises a moral judgment.”**

[20] The intoxication of the accused as well as the provocation by the group of boys constitute extenuating circumstances. The accused is guilty of murder with extenuating circumstances.

[21] In mitigation of sentence, the accused argued as follows: firstly, that he was gainfully employed as a bricklayer before his arrest; secondly, that he has two minor children who depend upon him for financial support; thirdly, that he admitted to the killing of the deceased and the Crown did not have to prove the *actus reus*; fourthly, that he was a first offender; lastly, that he was arrested on the 15<sup>th</sup> March 2011 and released in mid-April 2011, a period of about three weeks in detention.

[22] In aggravation of sentence the Crown argued that the use of knives in murder cases leading to the loss of innocent lives is on the increase in this country, and, that the Court has a duty to impose appropriate deterrent sentences in order to curb the abuse of dangerous weapons. I cannot agree more with this submission.

[23] In arriving at the appropriate sentence, I will take into account the triad, that is the personal circumstances of the accused, the seriousness of the offence as well as the interests of society. Undoubtedly, this is a very serious offence in

which a human life was lost; and, the accused has failed to justify his conduct of carrying a dangerous weapon when attending a funeral. If he was not in possession of the weapon, the deceased would still be alive. As stated in the preceding paragraphs, there is no evidence before this Court that the deceased or the other boys were armed with any weapon. Despite this, I will consider that the accused is a first offender who has lived his life for many years as a law abiding citizen, and, that he was provoked by the deceased.

[24] Accordingly, the accused is sentenced to fifteen years imprisonment, and, the three weeks spent in custody prior to trial will be taken into account in computing the period of imprisonment.

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

For Crown  
For Defence

Principal Crown Counsel S. Fakudze  
Attorney N. Manana