IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 232/2008

In the matter between

REX **Applicant**

VS

SIKHUMBUZO MDLULI **Respondent**

Neutral Citation: *Rex* Vs *Sikhumbuzo Mdluli (232/2008) [2018] SZHC 199 (5th September 2018)*

Coram: Hlophe J.

For the Applicant: Mr M. Nxumalo

For the Respondent: Mr M. P. Dlamini

DateHeard: 13th August 2018

Date Judgement Delivered: 05th September 2018

Summary

Criminal Law –Murder –Statement of agreed facts in line with Section 272 of the Criminal Procedure And Evidence Act of 1938 –Effect of a statement of agreed facts covering the entire crown's case with no conceivable different facts on the part of the defence case –Not in dispute that the accused landed the fatal blows on the deceased following a robbery –Crown submitting that the accused landed the blows in question recklessly without caring whether the deceased died therefrom – Notion of intention in law discussed at length including the difference between dolus directus and dolus eventualis –Defence case compromised by the fact that case against accused's coaccused who appeared to have played a lesser role in the killing of the deceased to the extent they were linked thereto merely by the common purpose, now finalized before by both the High Court and the Supreme Court confirmed their guilt –Whether in the circumstances it was possible for the accused to avoid liability for the deceased's death –Accused found liable for the death of the deceased and thus found guilty of murder .

JUDGMENT

[1] The accused was part of a group of four young men, who are alleged to have, on the 1st January 2008 and whilst acting in furtherance of a common purpose, robbed and also assaulted the deceased on the head with a bush knife, causing him serious injuries from which he later died.

[2] The four, including the current accused, were subsequently charged with two counts, comprising murder and robbery. It was contended on the first count that the accused persons had, whilst acting in furtherance of a common purpose on the 1st January 2008 unlawfully and intentionally killed David Mdluli whilst at Mhlaleni or Logoba area. In count two, it was contended that the said accused persons, had whilst acting in furtherance of a common purpose and through the use of violence, stolen items including a sum of E1500-00 together with a wallet containing among other things certain important documents and some further money belonging to the deceased against whom they had used violence to effect the said theft, thus committing the robbery.

[3] When the matter was finally mentioned in Court for trial before me in 2010, the current accused person did not form part of the accused persons allegedly because he had escaped from lawful custody. His apparent subsequent capture by the police led to the prosecution of his matter hence this judgement. It is important I mention, for the completeness of the background facts of the matter, that the trial of his co accused resulted in the conviction of two of them namely Sibusiso Mazibuko and Siyabonga Motsa.

This was after the other one, Lwazi Zikalala, had been turned into a crown witness following the withdrawal of charges against him.

[4] I further have to mention that the current accused person's two co-accused persons were sentenced to fourteen years imprisonment each. Although both of them had appealed both the conviction and sentence, both of those were upheld by the Supreme Court, which did so on two different sittings in courts manned by different justice of the Supreme Court as the accused persons had appealed separately.

[5] When trial of the current accused commenced before me, I was informed that both parties had, through their representatives, decided in the interests of time and on account of the fact that the facts on how the events leading to the deceased's death had unfolded, agreed to prepare a statement of agreed facts, in terms of Section 272 of the Criminal Procedure And Evidence Act of 1938. I accordingly gave the parties time to prepare such a statement which I did after I took the view that what the parties were doing was convenient and that it was going to save the court's time, whilst ensuring that those witnesses, who had initially been emotionally and adversely

affected by the deceased's death, and who would have healed by now, to relive did not have the sad and painful memories of the fateful day.

[6] Otherwise Section 272 of the Criminal Procedure and Evidence Act, 1938 provides as follows:-

> "Section 272(1):- In any criminal proceedings the accused or his representative in his presence may admit any facts relevant to the issue and any such admission shall be sufficient evidence of such facts."

[7] What needs to be emphasized is that the effect of what was being agreed upon was not just a simple fact but the entire crown case such that there was no need thereafter for any crown witness to be led.

[8] The statement in question which was handed into court as Exhibit A by consent reads as follows in its entirety.

“Statement of Admitted Facts In Terms Of Section 272 (1) Of The Criminal Procedure and Evidence Act No.76/1938.

Background

1.

The accused were charged with two counts being:

The accused were charged with the crime of murder in that upon or about the 1st January 2008 and at or near Logoba area in the Manzini Region; the said accused persons acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill one David Mdluli, and did thereby commit the said offence.

2.

The accused were charged with the crime of robbery in that upon or about the 1st January 2008 and at or near Logoba area the said accused persons acting jointly and I furtherance of a common purpose did unlawfully and intentionally while using force and violence to induce submission by David Mdluli, did take and still from him a sum of E1500.00 (One Thousand Five Hundred Emalangeni) in cash and a cell phone; which was his property or his lawful possession and did thereby rob him of same.

3.

The accused were arrested on different dates. Accused 1 and 2 were arrested on the 9th January 2008. Accused 3 was arrested by the community on the 10th January 2008 and handed over to the Police on the 11th January 2008. The fourth accused who is now before court was arrested on the 1th January 2008. He escaped from lawful custody on the 22nd December 2008.

4.

When the matter was heard in 2010, accused 4 had escaped from prison and this necessitated that the crown applies for a separation of trials and it proceeded against the three accused persons. Before the three accused persons pleaded the crown withdrew charges against accused 2 and turned him into an accomplice witness. The two accused; being the 1st and 3rd accused pleaded not guilty. The crown paraded its witnesses to prove its case. Accused 1 and 3 were found guilty on the basis of *dolus eventualis*. They were both sentenced to 14 years imprisonment without an option of fine in Count 1 and 7 years imprisonment without the option of a fine in Count 2. The two sentences were to run concurrently with effect from the date of arrest; namely the 9th January 2008.

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Accused 4 was subsequently arrested on the 28th October 2015. He was tried at the Magistrate Court (Mbabane) in respect of his escaping from lawful custody and sentenced to two years imprisonment without the option of a fine. He has been in custody since 2015.

6.

Today is a trial in respect of the two counts of Murder and Robbery which occurred on the 1st January 2008. He pleads guilty to a lesser crime of, namely Culpable Homicide in respect of Count 1 and the crown does not accept the plea. He pleads guilty to Count 2, the robbery, and the crown accepts this plea; although it shall lead evidence in the form of this statement in relation to Court 2.

Accused 4 does not dispute all the evidence of the crown, as contained in the summary of evidence as well as the evidence by the accomplice witness (accused 2) stated herein below. He also does not dispute the evidence of the former convict, Siyabonga Siera Motsa whom the crown has added as shown or set out herein below.

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In a nutshell the 4th Accused does not dispute the following evidence of the Crown.

<u>PW1-Lwazi Zikalala</u>.

7.1. **The evidence of this witness points to that on the 1st January 2008, at about 0200hrs while at Mhlaleni together with his friends Muzi Dlamini and Mhlonishwa Nxumalo, were drinking alcohol at KaNgwenya. They then proceeded to KaMkhosi at Logoba. When he went to KaMkhosi he was with Mandla Dlamini, Siyabonga Motsa, Mthabiseni Mtsetfwa and Mzekezeke Mdluli (4th Accused).**

7.2. **Along the way to KaMkhosi they saw a white sedan with a GP registration being pushed by the deceased and his daughter Tengetile Mdluli. The four accused persons as they appear in the indictment went to the car and pretended to assist the deceased. When they went to the car this witness was armed with a knife. Accused 4 was armed with a bush knife (which he ended up using when he killed the deceased) and one of the other two accused was armed with an iron rod.**

7.3. **While the four accused were still pretending to be helping the deceased in pushing the car, accused 4 got hold of the deceased but unfortunately he was unable to pick-pocket him as the deceased had a knobkerrie with which he tried to assault the accused persons but they did not run away. During the skirmish, accused 4, vice gripped the deceased on the neck as he (accused 4) came on the back and inserted his hand into the deceased's pockets and took a sum of**

E500.00. As the deceased was still fighting. Accused 4 assaulted the deceased twice on the head with his bush knife and he fell down. Accused 4 then took a wallet containing E1000.00 and a cell phone from the deceased. This witness also inserted his hand into one of the deceased pockets but did not find anything.

7.4. Accused 1 was busy with the lady (Tengetile) demanding money from her. Accused 3 was busy searching the car by that time but did not find anything. They then proceeded to KaMkhosi (Shebeen). At KaMkhosi accused 4 and 4 showed this witness and those in their company a sum of E900.00 instead of E1500.00 telling them that it was the only money they got from the deceased.

7.5. They then shared the amount of E900.00 among themselves each getting E200.00 and E100.00 was given to the others to buy beer. They proceeded with the drinking spree until the early hours of the 1st January 2008.

8.

<u>PW2 Siyabonga Siera Motsa</u>

This witness is a former convict having been convicted of the same charges presently faced by accused 4. This witness corroborates the evidence of PW 1 above.

9.

The accused further does not dispute the evidence of the following witnesses.

<u>PW3 Tengetile Mdluli</u> who was present at the scene and she corroborates accused 3 (PW3).

10.

<u>PW4 Ciniso Mdluli</u> who approached accused 3 (PW2) on suspicion that accused 3 was in possession of the deceased's missing items. PW2 (accused 3) showed this witness the deceased's items (a licence and other documents which were in the deceased's wallet).

11.

<u>PW5 Agnes Nhleko</u> who identified the body of the deceased as that of David Mdluli.

12.

<u>PW6 Dr R.M. Reddy</u> who is a Police Pathologist. He examined the body of the deceased and he opined that the cause of death was due to "a head injury".

13.

The issue before court now is whether the 4th accused had (the) necessary intention to kill the deceased as he pleaded guilty to a lesser charge of culpable homicide. This is a legal issue to be determined by this Honourable Court since the

crown contends that the accused had (the) necessary intention in the form of *dolus eventualis*.

14.

The above admitted facts do not preclude the Honourable Court (from calling) any of the above witnesses or other witnesses if it deems fit as per Section 199 of the Criminal Procedure and Evidence Act No.67 of 1938.

Dated at MBABANE on this 13th day of August 2018.

(Duly Signed)	**(Duly Signed)**
Macebo Nxumalo	**Mpendulo Dlamini**
For The Crown	**For Accused 4.**
	Accused 4
	Personally

[9] When the charges were put to the accused person at the commencement of the hearing, he indicated that he was pleading guilty to the lesser crime of culpable homicide on count 1 while pleading guilty to count 2. Crown Counsel did not accept the plea of guilty to culpable homicide tendered by the accused whilst he indicated that the statement of agreed facts prepared and cosigned by all the parties was going to provide evidence for both

counts 1 and 2 in proving both charges. I was obliged to record the plea as not guilty in Count 1 and as guilty in count 2.

[10] As soon as the statement was read I concluded, and I believe this was the only reasonable inference consistant with all the facts I could draw, that the crown and the defence were on count 1, agreed on all the facts of the crown's case except what the facts surrounding the pickpocketing and what the bashing of the deceased's head with the bush knife by the accused meant. Whereas to the crown it meant that the accused had intentionally inflicted the injuries in question as a sign of proof intention particularly legal intention or dolus enventualis; to the defence it was proving that there was no intention in inflicting the said injuries but that they were inflicted negligently hence the tender of the plea of guilty to culpable homicide. This was the only part therefore that the two parties were not agreeing upon in the statement even though they did not put it so eloquently. The point therefore is the meaning and effect of the bashing of the deceased's head with the bush knife, that is what inference can be drawn from that in law.

[11] The Court was told that the agreed procedure between the two parties was that after the presentation of the statement of agreed facts, the crown was

going to close its case and the defence was going to commence its case by calling the accused person to the witness dock. In light of the entire defence case and more having stated in the statement of agreed facts, I sought to understand what it is that was going to be said by the accused in his defence short of possibly denying what he had expressly agreed as the facts in the statement. Of course I could not get an answer from both counsels. What it is that had not been ably put in the statement which was now going to be stated by the crown witness I wondered. I asked this particularly question having observed that no dispute had been expressed on how the incident that resulted in the death of the deceased had unfolded. Further in so far as the issue was over the meaning and effect of the injuries inflicted on the deceased's head, it had been agreed that meant different things to the different parties and I doubted it could be changed by the accused giving evidence over and above the statement.

[12] Both parties' counsel agreed that what the stage after presentation of the statement of agreed facts meant was that the parties were in a position to make their submissions and in particular the accused's counsel agreed that there was nothing different he expected his client to say. It was agreed that

the parties go ahead and address the court on their submissions on the meaning and effect of the hitting of the deceased on the head by the accused.

[13] It came out very clear from crown counsel's address that they were not contending that there was any direct intention to kill the deceased than that the accused was reckless in hitting the deceased on the head with the bush knife which indicated that he did not care whether death resulted or not. This, it was argued, became all the more stronger when one considered the part of the body on which the injury was inflicted together with the weapon used. In other words, it was argued that the accused had used a lethal weapon in the form of a bush knife to hit the deceased on a delicate part of the body namely the head.

[14] The Court was urged not to loose sight of the fact that the other two accused persons who were tried for this offence were convicted of murder on the basis of common purpose and that whereas they had merely taken part in the crime commission for them to be liable of the ultimate result, the current accused was the actual perpetrator as per the evidence contained in the statement of agreed facts.

[15] In his submissions Crown Counsel contended that although the death of the deceased had ensued from the incident the deceased had himself become an aggressor as he had hit the accused as having deceased as a means to merely incapacitate him who he left lying down there as soon as that was accomplished. It was argued it could not necessarily follow that the accused was reckless in effecting the injuries concerned on the deceased. Instead, it was argued the circumstances indicated negligence or culpa hence the tender of a plea of guilty to culpable homicide.

[16] All the parties were alive to the fact that there is a difference between negligence and intention and that whereas the standard for determining the latter was subjective, that of determining the former was objective. In other words whereas for intention to be found to have been in existence the accused would have foreseen the consequences of his action earlier because he desired them or because he was reckless whether or not they ensued; in negligence the contention would be that the accused ought to have foreseen the consequences of his action. See in this regard the book **Burchell and Hunt, The South African Criminal Law, Volume 2 at pages to .See also**

the Criminal Law Book by Burchell and Milton Criminal Law, Juta and Company at page 401.

[17] I otherwise agree with counsel for the crown that where an accused person uses a lethal weapon on a delicate part of a deceased person's body, he is in law taken to have intended the natural consequences' of his action. This principle has been a subject of several judgements of this court. In **Mandla Mlondozi Mendula Vs Rex Criminal Appeal Case No.12/2013**, the Supreme Court had the following to say which was expressing this principle:-

> *"In determining mens rea in the form of intention, the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are so severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous lethal*

weapon, the only reasonable inference to be drawn is that he intended to kill the deceased."

I cited this principle in approval in **Rex Vs Thokozani Joseph King Mngomezulu, Criminal Case No.481/2010 [2015] SZHC 125**.

[18] This principle was expressed even clearer with regards dolus eventualis in **SV Mnisi 1963 (3) SA 188 (A) at page 192 F-G**, which was cited with approval in **R V Jabulane Philemone Mngomezulu 1970-76 S.L.R. Page 7 at B-C**. There the principle was captured in the following words:-

"A person in law intends to kill if he deliberately does an act which he infact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."

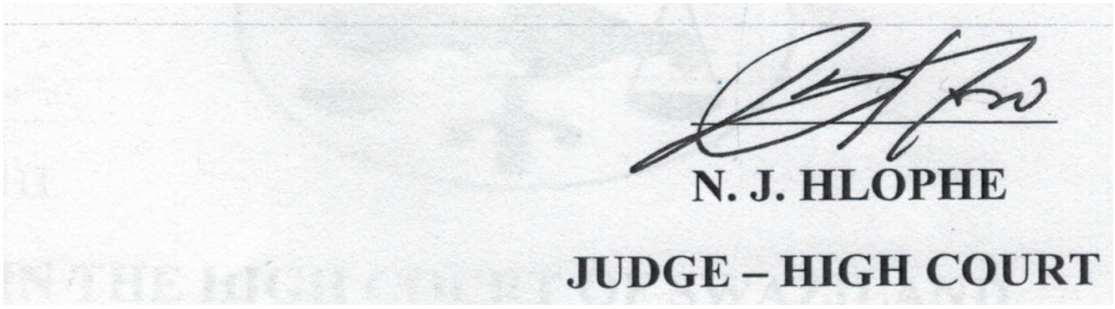
[19] That such intention is to be determined or ascertained from the nature of the weapon used as well as from the part of the body on which the weapon was captured as follows in **R V Jolly and Others 1923 AD 176 at 187**:-

> "*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*."

[20] I agree further that the accused person's case is further complicated by the fact that the admitted evidence depicts him as the perpetrator. It is also dealt with after that of his two partners in crime was dealt with resulting in both of them being convicted on the basis of common purpose. It can hardly be disputed that the foundations of that common purpose was the current accused to whom the evidence pointed as the perpertrator. As observed nothing has been presented by the accused make the court reach a different finding. In fact that position was found by this court and confirmed by the Supreme Court even in the previous trial and its resultant appeals. See in this regard the judgements in **Siboniso Mazibuko Vs The King and Others Supreme Court Case No.232/2008** as well as in **Siyabonga Siera Motsa Vs The King Appeal Case No. 25/2010**.

[21] It would therefore be unreal and against the weight of all the evidence and circumstances in this matter for this court to find that there was merely negligence in the infliction of the injuries from which the deceased died. I have rejected the crown's version for the foregoing reasons.

[22] I have therefore come to the conclusion that the accused person is guilty of the murder of the late David Mdluli and I accordingly convict him.



N. J. HLOPHE

JUDGE – HIGH COURT