CASE NO. 144/96

IN THE MATTER BETWEEN:

THE KING

VS

HAWUZILE MAZIYA

CORAM **S.B. MAPHALALA -AJ**

FOR CROWN: **MR D. WACHIRA**
FOR DEFENCE: **MR R.D. ZONDI**

JUDGEMENT

The accused person is charged with the murder of Ngwabela Jotham Vilakati in that on the 20th April 1996 at or near Manzana Area at Siphofaneni in the Lubombo Region the accused did unlawfully and intentionally kill the said Ngwabela Jotham Vilakati.

The accused pleaded not guilty to the offence. The post mortem report was entered by consent as exhibit "A" and thus the evidence of the pathologist Dr Christopher Aisu of Good Shepherd Hospital was dispensed with. The Pathologist in his report stated that the cause of death of the deceased was "severe haemorrhage from multiple stab wounds".

The evidence of PW2 Mdzandzane Vilakati who according to the summary of evidence was the sister to the deceased was dispensed of by consent. She identified the body of the deceased to the doctor at Siteki Good Shepherd Hospital.

The Crown then called a number of witnesses to prove its case. The first crown witness was Bhani Maziya who was introduced as an accomplice witness. He was with the accused when the murder of the deceased took place and evidence showed that he might also have participated in the commission of the offence to a certain degree. He gave a lengthy account of the sequence of events from the time he met the accused up to the time the deceased was killed until later on when the accused came to him to a night worship session. He told the court that the deceased was stabbed with a knife by the accused who later was hitting the deceased with a guitar and was holding a knife on the other hand. He asked him what he was doing to the man as the man was already dead whereupon replied him that he should mind his own business. After the deceased was killed the accused followed him to his home. He told

the court that he was threatened with dire consequences by the accused should he reveal what exactly happened. The witness was then subjected to a lengthy and searching cross-examination by Mr Zondi who represented the accused. However, in my view he came out unscathed except for minor contradictions which do not materially affected his testimony. The court also warned itself on the dangers inherent in the evidence of an accomplice witness guided by the appeal court decision in the case of Jeremia Petros Dludlu Vs The King Case No 12/93 where their lordships in that case discussed the case of Rex Vs Mandla Homeboy Dlamini 1982 - 86 (1) S.I.R. 348 on the degree of caution to be exercised in such cases.

The crown then called PW2 Lomagugu Doreen Zungu who told the court that on the day in question two men namely Hawuzile Maziya (the accused) and Bhani Maziya (PW1) came to her homestead. They requested permission to roast some meat on the fire. There were several people seated there including the deceased. She was roasting liver for her lover on the same fire. When the liver was ready it went missing from the grill. It turned out that the accused had stolen the liver and had hidden it beneath his seat. The deceased requested the accused to return the meat. The accused swore against the deceased saying that he would get him as they crossed the Usuthu river bridge. The deceased subsequently left followed by the two men. On the following day this witness received information that the deceased was dead. The witness was cross-examined by Mr Zondi but she maintained her story throughout.

The Crown then called PW3 Captain Botha a Forensic expert from Pretoria, in South Africa. She submitted an affidavit which was entered as exhibit “B” of her findings. Her task was to examine the knife as the murder weapon and various pieces of clothing belonging to the accused and the accomplice witness. In layman language he found that the knife had human blood and the clothes which belonged to the accused did not have bloodstains. The clothes belonging to the accomplice witness (PW1) had human blood stains.

The Crown then called PW4 Enock Gamedze who told the court that the accused was known to him. He told the court that on the 19th April 1996 at about 10.00pm there was a night vigil at his home when two men Bhani and Hawuzile Maziya arrived. Their clothes had blood stains. On Sunday 21st April, 1996 the police from Siphofaneni came in a car while Bhani Maziya was enjoying at Bhukeni Maziya’s homestead. There and there Bhani took to his heels and ran away. He pursued him with other members of the community. On his arrest this witness asked him why he had run away and he answered that it is because they had killed Jotham Vilakati. He then handed him to the police.

This witness further told the court that at the night vigil he was the preacher and the accused offered E2.50 as a donation and PW1 a sum of 50c when the time for offerings came.

The Crown then called PW5 2152 Gilbert Mamba. He told the court that on the 20th April, 1996 he proceeded to Madlenya area to investigate this case. He arrived at the scene of

murder where he found the deceased. His body had stab wounds on the stomach and on the head. On the scene were struggle marks. He collected some broken pieces of a guitar, a black torch, black knife and a container. On the 21st April, 1996 while investigating this case they approached Bhani Maziya (PW1) who ran away. He was subsequently arrested by members of the community and was handed over to the police. Subsequently the accused was arrested. They were cautioned in terms of the Judges Rules and interrogated. They both led the police to the home of accused father. The said Hawuzile Maziya gave the police a knife, brown shirt and khaki trouser with stains. On further investigation both accused implicated each other. This witness was cross-examined at length by the defence. The thrust of the defence cross-examination was that it was not the accused who produced the murder weapon but it was the accomplice witness. However, this witness, in my view stuck to his original story.

The Crown then closed its case. Mr Zondi made an application in terms of *Section 174 (4) of the Criminal Procedure and Evidence Act (as amended)*. The import of which is that the crown has not made a prima facie case to put the accused to his defence. The crown opposed this application. The court entertained submissions for and against the application. The court ruled that the crown had made a prima facie case to put the accused to his defence and indicated that it was going to advance its reason for such ruling when giving final judgement in this matter. Now I attempt to do so. *Section 174 (4) of the Criminal Procedure and Evidence Act* has since been amended and it now no longer deals with a sufficient case but deals with what the court had been referred to as a prima facie case upon which a reasonable man might convict. The amended section now gives the court a very wide discretional power which it should exercise judicially. The court is well alive to the precept that no onus rests on an accused person to prove his or her innocence but the onus rests on the crown to prove the guilt of the accused beyond doubt or at this stage make out a prima facie case. There is a standard which the court ought to apply. Justice J. Matsebula of this court in the case of Rex Vs Thabsile Mhlambo (Criminal Case No. 81/95 (unreported) succintly articulated the standard to be applied by the court, thus:

> "It is appropriate at this stage to deal briefly with the standard the court applies at the end of the crown case when we are dealing with whether or not there is a prima facie. That standard is to consider whether or not there is a prima facie case made out against an accused person, and the court has got a discretion if that discretion is exercised judicially the application is granted or refused then the next stage is another standard to be applied, that is whether the crown at stage at the close of the defence case the crown has proved the case beyond any reasonable doubt..."

In the case in casu the court was satisfied that the crown had made a prima facie case at that stage. The evidence of the accomplice witness PW1 Bhani Maziya was to a large extent corroborated by the evidence of PW2 Lomagugu Doreen Zungu and that of PW4 Enock

Gamedze. The latter two witnesses were credible witness and stood the test of relentless cross-examination very well. These two witnesses had no reason to lie against the accused. Lomagugu had no reason to lie that the accused issued a threat on the deceased prior to his demise. Enock had no reason to lie that both the accomplice witness and the accused joined a night vigil where he was a preacher and made certain offerings. The accomplice witness also said the same thing and placed their coming to the vigil at more or less the same time mentioned by Enock.

It was for these reasons therefore that I rejected Mr Zondi's application.

Thereafter the accused took the witness stand where the accused gave a lenghtly account of his own version of events. The long and short of his story is that he did not commit the offence but it was PW1 who assaulted and killed the deceased with the knife. He was not involved at all in the commission of the offence save that he was present. He said he never quarrelled with the deceased. However, it was Bhani Maziya who went up to the deceased and talked to him. They then started fighting. He went there and tried to separate them. After separating them he collected his bags and proceeded home. The following morning he was informed that the deceased had died. He denied flatly that he went with Bhani to the night vigil as stated by both Bhani and Enock the priest. He was cross-examined at great length by the crown where I must say he was a sorry sight to behold. He was evasive to crucial questions and in others blatantly lied before this court. Accused was a pathetic sight in the witness stand.

The defence then closed its case where the court entertained submissions from both counsel. I have considered the evidence very carefully and also the able submissions by both Mr Wachira for the crown and Mr Zondi for the defence.

Firstly, I must say the defence case was badly presented in that new material facts emerged when the accused was giving evidence-in-chief which were never put to the crown witnesses. It is of fundamental importance to explain the defence counsel's duty to put the defence to the prosecution. In the case of SVSP 1974 (1) S.A. 581 (RA) Macdonald JP at page 582 stated as follows:

> "It would be difficult to over - emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial. So important is the duty to put the defence case that, practioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court".

Counsellor for the defence is, therefore, under a duty to put the defence is, therefore, under a duty to put the defence case to the prosecution witnesses. But what if fails to do so? The

position is set out in Phipson on evidence at page 10 read at paragraph 1542 as follows:

"As a rule a party should put to each of his opponents witness in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he ask no question he will in England though perhaps in Ireland, generally be taken to accept the witnesses account. Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examine, however, will not always amount to an acceptance of the witness testimony e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the absentees arises from more motives of delicacy or when counsel indicates that he is merely abstaining from convenience e.g. to rare time..."

Hannah CJ in the case of The King vs Dominic Mngomezulu and others Criminal Case No. 96/94 (unreported) at page 17 had this to say on this point:

"It is, I think, clear from the foregoing that failure by counsel to cross-examine an important aspects of a prosecutions witnesses testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes to the witness box and denies the evidence in question the court may infer that he has changed his story in the interviewing period of time. It is also important that counsel should put the defence case accurately. If he does not and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused's story".

In the present case accused denies that he had a hand in the killing of the deceased and that he was ever at the night vigil as deposed by PW1 the accomplice witness and Enock the pastor. These facts were never put to these crown witnesses instead defence counsel cross examined PW1 at length on the participation of the accused in the night vigil rather putting it simply to him that accused was not there at all. The defence failed to put its case to these witnesses and only sprung the surprise when accused was giving evidence. The accused in cross-examination was in great difficulty in explaining this and he ended up in a number of material respects lying through his teeth to try a cover-up. However, he was an unmitigated liar and a pathetic witness that his story in chief should be thrown out "in toto".

Lomagugu and Enock had no reason to lie against the accused they proved to the court to be credible witness and I have no reason to doubt their testimony at all. Lomagugu told the

court that the accused threatened the deceased prior to his demise. This evidence stood the test of cross-examination. Enock told the court that the accused was at the night vigil which was not challenged by the defence in cross-examination but only came out when the accused was giving evidence in-chief. The accused had a grudge against the deceased and the evidence before court is abundantly clear that the knife which was used to kill the deceased belonged to accused father. The accused together with PW1 used the knife to slaughter a pig the previous day of the murder and the following day the two went around the shebeens and homestead's selling the pork and the very same knife was used from time to time in their sale of the meat. There is evidence that the knife was subsequently found at accused homestead after being produced by his father. It is inconceivable that PW1 might have placed the knife there after he had killed the deceased as the accused alleged in his evidence in-chief. That it was PW1 who killed the deceased. When did he get the chance to take the knife to accused homestead and place them where accused father could find it? The indications are that throughout the knife had been with the accused from the time they slaughtered the pig to the time deceased was killed up to the time it was found in his homestead with his father.

Mr Zondi, with the greatest of respect, made a feeble submission that the accused has low intelligence that is why he made so many mistakes in cross-examination. Low or high intellectual capacity has nothing to do with one telling the truth or lies.

For the reasons that I have advanced I hold that the crown has proved its case beyond a reasonable doubt and the accused is guilty of the crime of murder.

S.B. MAPHALALA
ACTING JUDGE