CRIM. CASE NO.168/98

IN THE MATTER BETWEN:

REX

VS

GOVU DLADLA AND FOUR (4) OTHERS

CORAM	**:**	**MASUKU A.J.**
FOR THE CROWN	**:**	**MR D.G. WACHIRA**
FOR THE ACCUSED	**:**	**MR Z.W. MAGAGULA**

JUDGEMENT

The accused were indicted for committing the crime of murder, it being alleged that upon or about the 15th March, 1998, at Mashobeni area, in the Shiselweni District, the said accused persons, acting jointly and with a common purpose, did unlawfully kill THUBESI DLADLA (hereinafter referred to as the deceased).

Govu Dladla (A1), was charged on the second count with contravening the provisions of Section 11 (1) of the Arms and Ammunitions Act, 1964, as amended, it being alleged that upon or about the 5th December, 1997, at Mashobeni (Mkhitsini area, the said accused person, not being holder of a permit or licence to possess a fire arm, did unlawfully possess one 303 rifle, bearing serial number ERA564751.

At the close of the Grown's case, an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended (hereinafter called "the Act") was moved on the accused persons' behalf for their acquittal and discharge in respect of Count 1. For reasons that I gave then, the application for acquittal and discharge was granted only in respect of A1 and the other accused were put to their defence. For reasons also handed down, then, I declined the application for acquittal and discharge of A1 in respect of Count 2 and ordered that he be put to his defence.

In my reasons handed down on the 20th May, 1999, in respect of the application in terms of Section 174 (4) of the Act, as amended, I analysed most of the Crown's evidence in detail and for that reason find it inappropriate to analyse the evidence afresh. It would therefore be useful, although not reader-friendly, to refer to the Ruling of the 20th May, 1999.

The Crown's case is based on circumstantial evidence in which it is alleged that the accused persons killed Thubesi Dladla, who was a half a brother to A2 and A3 and a a cousin to A4. I propose to analyse the evidence on Count 1 in respect of each of the remaining accused persons, considering both versions given by the Crown and the accused persons.

ACCUSED NO.2

In summary, the nub of the Crown's case was that this accused person, together with Sicelo Mavuso, lured the accused by inviting him to attend a Jericho Church service at Longayiyane in the Mashobeni area. PW 1 and PW3 stated that A2 and Sicelo Mavuso came to the deceased's home in the morning of the 15th March, 1998, to request the deceased to accompany them to Church.

PW 2, it was further testified, carried a knobstick and a bag on the way to Church. The Crown further led the evidence of Winile Kunene (PW 6), who said she knew the deceased and that in the afternoon of the 15th March, 1998, at or about 16h30, she met the deceased, who was then from Church and she was returning from Mkhitsini. According to her evidence, the deceased was accompanied by A2 and Sicelo Mavuso, returning to their respective homes.

PW 5 testified that she spoke only to the deceased, who referred to her as a cousin and told her that she was fortunate to meet him because he was to leave for Sigcineni. This was especially so because A2 and PW 4 had persuaded him (deceased) to use that route, which was long and winding leading away from the route used by most people, whereas there was a shorter and more direct route.

PW5 says that she was in the company of Lungile Dladla, Zungu Bhom Vilakati and Bheki Vilakati. She further testified as to what the deceased was wearing, namely a Bafana Bafana t-shirt, a black pair of trousers, a pair of soccer boots and a head band worn by members of the Jericho Sect.

PW5's evidence was confirmed by Bhom Vilakati PW 8, in material respects. I will

however analyse their evidence later in the judgement and after I have analysed the accused's evidence. PW3, Mageba Mabuza testified that he went to PW 5's homestead on the 17th March, 1999, to ask about the deceased's whereabouts and this was confirmed by PW5.

The Crown's case, in respect of A2 is that this accused person, together with PW 4 Nkosinathi Mavuso asked the deceased to go with them to Church on the 15th March, 1998. A2 carried a knob kerrie and a bag in which there must have been an axe. After the church service, they decided to use an unusual and tedious route where they must have killed the deceased, away from the public view.

As noted in the ruling, the evidence of the Pathologist did not rule out the use of a knob kerrie in assaulting the deceased. Unfortunately, the accused met Lungile Kunene and company on their return from church and their evidence places the accused in a position where they are linked to the accused's death.

To complete the story against A2 the Crown called PW 9 Winile Lovegirl Kunene, A 3's girlfriend, who testified that A2, DW 4 and A3, came to A3's home around midnight on the 15th March, 1998. A3, in particular, looked worried, requested her hurriedly to pack his clothes in a bag, had some food with A2 and DW 5. Thereafter, he told PW 9 that if anyone enquired about the date of his departure, she must inform him/her that he left the previous day i.e. 14th March, 1998. She testified that the threesome then left after 1h00.

The accused (A2) who adduced evidence under oath, gave the Court a very different version, which was corroborated in material respects by DW 4. He told the Court that on the morning of the 15th March, 1998, Mageba Mabhanya Mabuza's (PW 3) child was sent by the deceased to request A2 and DW 4 to accompany the deceased to church at Longayiyane.

A2 and DW 4 had by previous arrangement planned to leave on the 15th March, 1998 for Thembisa in the Republic of South Africa, where A2's brother Njinga Dladla needed A2 to look after his horses. This message had been relayed to A2 by DW 4, who was requested by the said Njinga to convey the message when DW 4 returned home from South Africa in August, 1997.

A2 then bathed and waited with his bag, intending to depart for Thembisa immediately after the church service. DW 4 then came and A2 advised him of the deceased request that they go with him to church, to which DW 4 agreed. The twosome then left A2's home and proceeded to the deceased homestead where they were told by PW 1 Lombango Kunene, the deceased's mother, that the deceased had already left and that A2 and DW 4 should walk fast in order to catch up with the deceased. Indeed A2 and DW 4 caught up with the deceased and they walked together to Church.

After the service, which ended at or about 13h30, A2 and DW 4 told the deceased that they were going to the bus terminus, where they would wait for transport to convey them to the border. The deceased on his own volition accompanied them to the bus

terminus and managed to stop a white van which offered a lift to A2 and DW 4. He also gave A2 and DW 4 E10.00 to enable them to buy some food on the journey.

This vehicle took the two and dropped them at the main road to Gege where they boarded a mini bus which took them to the border post at Gege. On arrival at Gege, they crossed the border illegally through the fence at or about 16h00 and boarded another mini bus which took them to Piet Retief. They arrived at Thembisa at or about 22h00.

In short, A2's story, confirmed by DW 4 is that after the end of the church service, they never returned home. They did not see Bhom Vilakati, Winile Kunene and their friends. They had previously arranged to proceed to South Africa, which they did. The Court is placed in a position in which it has to choose which evidence to believe, between the two versions of Bhom Vilakati and Winile Kunene, on the one hand and that adduced by A2 and DW 4 on the other.

I am inclined to believe the evidence of A2 and DW 4 for reasons that follow herein below. Firstly, PW 5, Winile Kunene stated that they met the deceased in the company of A2 and DW 4 on 15th March 1998 at around 16h30. She described the clothes worn by the deceased accurately and is corroborated in this regard by Inspector Magongo, who went to fetch the deceased corpse. When PW 5 was asked by Mr Magagula in a tense battle of wits, as to what clothes DW 4 and A2 were wearing, she said she could not see what they were wearing because she was drunk and it was becoming dark.

I reject this evidence as false because in her evidence in chief, PW 5 said she met the three at or about 16h30. There is no suggestion in her evidence either in Chief or under cross-examination that she spoke to the deceased for a long time such that it became dark. According to PW 5 and PW 8 Zungu Bhom Vilakati, the conversation was short. I take judicial notice of the notorious fact that in March, which is in the Summer season, dusk occurs after 18h00. It could not have suddenly become dark to PW 5 at 16h30. I can only conclude that this witness was untruthful as there is no reason why she did not see and recall even one item of what A2 and DW 4 were wearing. This is especially so when she was able to mention all the items which were found on the deceased when his corpse was found with extra–ordinary precision. Further, she never mentioned that she was drunk in her evidence in Chief. Worse still, her state of inebriation allowed her to see what clothes the deceased wore but it did not allow her to see what clothes A2 and DW 4 were wearing. The sudden darkness also appears to have affected her only in so far as it related to A2 and DW 4. I agree with Mr Magagula's conclusion that she suffered a "blackout" in recollecting what the A2 and DW 4 wore, which is inconsent with her lying under oath.

PW 5 also gave confusing evidence regarding where she had seen A2 and DW 4 before the 15th March 1998, and appeared to contradict herself. This is another weakness that I have noted in her evidence and which suggests and points to the inescapable conclusion that her evidence was nothing but outright falsehood.

Turning to the evidence of PW 8, Zungu Bhom Vilakati, Mr Magagula, in a searching cross-examination put the following questions as recorded in my notes.

Q: What was Thubesi wearing?
A: A black trouser, a Bafana Bafana T-Shirt, a head band worn by the Jericho Sect.
Q: What was A2 and Sicelo (DW 4) wearing
A: I did not notice what they were wearing

The only thing this witness forgot to mention was the pair of soccer boots. It is therefore inconceivable that two witnesses would recall what the deceased was wearing with precision but fail to recall even one item of clothing that was worn by the others who were with him. The inescapable conclusion that I arrive at is that both witnesses were schooled by Police Officers to give this piece of evidence in order to draw a nexus between the deceased's death and the accused persons. I will have occasion to deal with this aspect later in my judgement.

The role played by the Police with regard to this witness will be apparent hereunder, from the following excerpt obtained from my notes during the cross – examination of Zungu Bhom Vilakati:-

Q: Are you certain that A2 is Sicwangu and Sibhuluja
A: I am certain about the name Sibhuluja. Sicwangu was a name used by the Police when they were confused about his real name.
Q: You were told by the Police that his name is Sicwangu
A: Yes. They said Sicwangu and Sibhuluja mean the same thing.

This is a witness who had testified to the effect that he knew DW 4, very well but did not know his real name. Later on, he stated, as appears from the excerpts that the name he knew was told to him by the members of the Royal Swaziland Police. The question crying for an answer is where, when and under what circumstances would Police Officers have the need and time to divulge A2's name to the witness. If indeed PW 8 was a true witness, he would have told the Police what he had heard, done or seen without having to be told anything by Police Officers.

I accordingly reject the evidence of PW 5 and PW 8 to the effect that A2 and DW 5 returned home. This will to some extent affect the credibility of PW 9: evidence, which will be dealt with when I analyze the evidence against A3 David Dee Dladla.

There was also evidence by 1652 Sub-Inspector Magongo (PW 13) to the effect that during interrogation, A2 admitted that he was at some stage in the company of David Dee Dladla (A3) together with the accused on the 15th March, 1999. PW 13 stated that he cautioned A2 in terms of the Judge's Rules and A2 gave that information. In cross-examination, it was put to PW 13 that A2 was assaulted and tortured and was never cautioned in terms of the Judges' Rules. This PW 13 vehemently denied.

In his evidence under oath, A2 stated that during the assaults and torture by the Police, PW 13 coerced A2 to admit that he returned home after the Church service on the 13th March, 1998, in the company of Vusi Malinga (A4). He was also told to agree that on the way, A2 and A4 met A3 and killed the deceased together acting on the instructions of Govu Dladla (A1). This witness stated that on account of the assault

and in a bid to save his life, which was evaporating in his sight as it were, in the hands of the Police Officers, he admitted the suggestions made to him by Magongo.

I accept A2's version of the events notwithstanding Inspector Magongo's protestations of innocence in relation to the assaults. The story forced down A2's throat by Inspector Magongo was to corroborate the evidence of PW 5 and PW 8, which I have rejected. I therefore hold that any admission made by A2 and the other accused persons, were not made freely and voluntarily but were occasioned by the torture and assaults. For that reason, these I find to be inadmissible.

One of the major reasons for believing the version of the accused persons in relation to the assaults was adverted to in the Ruling of the 20th May 1999. It was put to the Police Officers that accused No.1 Govu Dladla, had been assaulted by the Police during interrogation and even reported this to presiding Magistrate at Nhlangano. The Police vehemently denied both the assault and the report. The Crown then shot itself in foot as it were, when it handed in the record of proceeding for another purpose but it confirmed that indeed, A1 had reported to the Magistrate that he had been assaulted by the Police and needed medical attention. For this reason, I do not accept Inspector Magongo's evidence.

On the whole A2 proved to have been truthful and honest witness. He maintained his story under tense and incisive cross-examination by Mr Wachira. His only fault in my view was that he tended to exaggerate the assaults to the extent of watering down his evidence and tended to lie on simple and unimportant issues like whether he had discussed the trial with his co-accused. His evidence was therefore in my view, save for minor blemishes adverted to, truthful, probable and reasonably true compared to that of Crown.

DAVID DEE DLADLA (A3)

The evidence adduced against this accused person was largely from PW 6 Doris Santinyana Mabuza, PW 9 Jabulile Lovegirl Kunene, A 3's girlfriend and that of PW 13, Sub Inspector Magongo. It must be borne in mind though that other evidence led against this accused person by Abraham Gazathi Methula was rejected on grounds set fully out in the Ruling hitherto referred to. No further mention need be made of that evidence.

Doris Santinyana Mabuza testified that on the 5th March, 1998, she had gone to Vulamehlo, Mashobeni area to offer condolences to a Kunene family, to which Lovegirl Kunene (PW 9) is a daughter. The condolences were offered in relation to a child that had died in that family.

She testified that she saw A3 outside the precincts of the Kunene homestead and he beckoned her to come to him using his hand. She obliged and on reaching him and in a jovial mood, she asked for E1.00 from the accused person (A3) to which the accused said he did not carry any money any more but was on the mission to PW 6's

home to kill. PW 9 asked why A3 should kill and he replied by saying that he will use a firearm to kill Thubesi first, then Mabhanya (PW 3) and lastly PW 6's mother Lombango Kunene (PW1). The reason for killing the above-named was that they were troubling Govu Dladla (A1) A3's father over fields.

In a rather strange twist of events, A3 instructed PW 6 to raise up her hand and bid her family farewell (presuming that they were to be killed). It is noteworthy that none of the family members mentioned were there but that notwithstanding, she bid them farewell. PW 6 stated further that when she arrived at home, she informed the deceased, PW 3 and PW 1 about the incident.

In cross - examination, Mr Magagula posed a question which visibly stunned and shook this witness to the very core. She was asked whether she imbibes alcohol. Her reaction completely betrayed her and became obvious that her denial that she imbibed alcohol was false. Looking at her from the witness box, I formed a distinct impression that she drinks alcohol. Her facial features were consistent with a person who heavily indulges in alcohol consumption. This falsehood forced me to regard the rest of her testimony with great suspicion and circumspection.

Mr Magagula then put to PW 6 that on the day she met A3 she was drunk and behaved in an unbecoming manner such that on their next meeting, she voluntarily apologised to A3 for her behaviour. In appreciation of the devastating effect of the question about PW 6's drinking on PW 6's credibility, the Crown called PW 9, who amongst other things was to mention that she knows PW 8 and that she (PW 8) does not drink, an issue which was out of place from the general tenor of her evidence.

Accused No.3's version of this event was that on the 3rd January 1998 he had come with PW 9, his girlfriend who had gone to her home. PW 6 beckoned A3 to come to her but he would not go to her because that area belonged to his in-laws and it was improper for him to go there. PW 6 then took the initiative to come to him. PW 6 was in a drunken state and asked for sweets or money and he gave her E4.80, which she appreciated.

At that stage, PW 6 told A3 of a confrontation between A1 and PW 1, to which A3 replied by saying that this was a matter involving elderly people and with which he would not involve himself. PW 6 then proceeded to say that it was unfortunate that A3 had returned as she had been made to understand that he (A3) would kill the deceased PW 1 and PW 3. This A3 said he denied.

A3 further denied that the day of the meeting was when PW 6 had gone to offer condolences. His recollection was that she had gone to the Kunene family solely to drink liquor as it was her custom.

Because of PW 6's reaction to the question about drinking, I formed an impression that she was lying. Hence I have great difficulty accepting her evidence. It is also puzzling, if her version is to be believed, as to why she raised her hand bidding her absent relatives farewell. She did not give a plausible explanation for her behavior.

Furthermore, PW 1 and PW 3, whom she alleges she told about her encounter with A3 never mentioned that PW 6 had reported this to them. This was a very important

piece of evidence which if true must have been in the forefront of PW 1 and PW 3's mind. For that reason, I reject her evidence as false. The accused's version appears more worthy of credit. For instance, he stated plausible reasons as to why he would go not to PW 6's home as his girlfriend had come home to take away her clothes and it was unacceptable at customary law for him to go to that homestead.

I pause to mention that if it had been A3's intention to kill the deceased amongst the others, he would not need to tell PW 6 because that would have landed him in trouble immediately. Furthermore, it was placed in evidence that A3 was ordinarily resident in South Africa. Had he intended to kill the deceased, he would have carried out this act completely undetected and moved away swiftly to South Africa.

It is also worthy of note that there is no motive suggested for A3 killing the deceased, it having been established in both the Crown and Defence cases that A3 and the deceased were in very good terms. I accordingly reject this evidence.

For the reasons set out in the analysis of Inspector Magongo's evidence against A2, I also reject his evidence against A3. A3 was also guilty however of exaggerating the assaults and tended, like A2 to lie on unimportant issues. This however does not detract from the larger portion of his evidence which was honest in many respects. Even on the issues when his evidence was unsatisfactory, it was not in relation to the key areas which would confirm his involvement in the deceased's death. It must be borne in mind that the Court is a large, whilst accepting one part of a witness' evidence, to reject another portion – See **R.V. Khumalo 1916 AD 480 at 4841.**

Regarding the evidence of PW 9, I can only say that PW 9's evidence is premised on the evidence of PW 5 and PW 8, who testified that A2 and A5 returned home together with the deceased. I rejected that evidence as false.

PW 9 testified that she met A3 on 21st December 1997, and that it was a case of love at first sight as they began to live together at A3's home from that day. She testified further that on the 15th March 1998, A3 was at home in the morning and left to see his father A1 on that afternoon and never returned until midnight. On his return, A3 was accompanied by A2 and DW 4. A3 looked worried and requested PW 9 to pack his clothes so that he could leave for South Africa.

She packed his clothes and gave A3 and his friends food to eat. Before they departed, A3 told PW 9 that if anyone asked when he had left, she should tell them that he had departed on the 14th March, 1998. A3 also asked her to hand over a firearm to A1 the following day. On the following day, she went to A1's home and found him lying on a rock. She stated that she was worried about the manner in which A3 had departed as it was sudden and he looked ill – at ease. A1 replied by saying that that was consistent with A3's behaviour who could leave at any time without notice.

A3 on the other hand said that, he returned to South Africa on the 7th March, 1998 and PW 9 told lies against her because she wanted to go to South Africa with him but he refused. A3 denies having been at home on the 15th March, 1998 and further

denies being with A2 and DW 4 or even traveling with them in the early morning hours of the 16th March, 1998.

In my view, this evidence was fabricated by the Police and spoonfed to PW 9 in order to link with the evidence of PW 5 and PW 8 and to depict a complete picture of the circumstances from which it can be deduced that the accused persons killed the deceased. I accordingly reject this story. The accused, in rebuttal of PW 9's evidence was upright and was never shaken. Furthermore, his explanation of the events is not only probable but reasonably true.

VUSI GEBHU MALINGA (A 4)

This accused person is a nephew to Govu Dladla (A1). He is a son to A1's sister.

Save evidence of PW 4 (Abraham Gazathi Methula), which I rejected during the Section 174 (4) application, the only evidence, as recorded in my ruling on the Section 174 (4) is that of Inspector Magongo.

None of the Crown witnesses alleged that there was only bad blood or even any cause of a quarrel between A4 and the deceased. Even PW 1's evidence did not suggest that this accused person killed or had any motive to kill the deceased person.

PW 13, Inspector Magongo's evidence was that A4, after his arrest on the 3rd April, 1998, having been duly cautioned in terms of the Judge's Rules, confirmed that he had been with the deceased on the 15th March, 1998, in the company of A3 and DW 4.

He proceeded to say that on the 18th April, 1998, having been duly cautioned, A4 took him to his home and produced a knobstick. Later, A4 took Sub-Inspector Magongo to a certain shop at Mkhitsini where he told his wife Peter Maseko to give him a knife, which she did. Sub-Inspector Magongo vehemently denied having assaulted the accused persons, including A4.

The evidence, sought to link A4 to the commission of the offence is the pointing out of the knife, which according to the evidence of the Pathologist, was likely to have been used in inflicting some of the injuries on the deceased. The question becomes whether this pointing out was done freely and voluntarily and also whether it is admissible. Although Sub-Inspector Magongo testified that he cautioned the accused person, his evidence does not go far enough to show that before the pointing out, he warned the accused person that he need not point out anything. This renders the pointing out inadmissible. In this regard, see the judgement of **Maphalala J** in the case of **REX v Bongani Enock Vilakati case No.104/98** (unreported) and the cases therein cited.

Sub-Inspector Magongo's evidence also falls to be rejected because there is no other credible evidence from the Crown that A4 was ever seen with the deceased on the 15th March, 1998. Even the accused person said he did not see the deceased on that day. A4 also testified that Inspector Magongo and his investigation team assaulted and tortured him. For reasons mentioned earlier, I will reject Sub-Inspector

Magongo's evidence and give the benefit of the doubt to the accused persons and hold the pointing out not to have been made freely and voluntarily. It is worth mentioning that Officer Magongo handed in an axe as one of the weapons pointed out but the evidence of the Pathologist was to the effect that the injuries on the deceased were inconsistent with the use of an axe.

In this regard, it is important to note that A 4 stated that Magongo told A4 to take him (PW13) home and show him a knife. When they arrived, A4 showed him a table knife used for cutting water melons and which Magongo rejected and said he wanted a smaller knife.

On being further assaulted, Magongo asked what A4 used to cut items like meat, whereupon A4 said he borrowed a knife from his in laws. It is then that the A4's wife was requested to get a knife from her home, which she did.

I must however mention that the one weakness noted in the Defence case was that there were many important espects which were not put to the Crown witnesses and only emerged when the accused persons gave their evidence in Chief. These are some of the glaring examples.

- that A4 was assaulted at his home in a house by the Police
- whereas it was put to PW 9 that A3 had left on 14th March, 1998, A3 Said he left on 7th March, 1998
- that PW 1 had to ask A4 to walk fast in order to catch up with the deceased on 15th March, 1998
- that A3 separated with PW 9 over A3's refusal to go and live with PW9 in the Republic of South Africa
- that PW9 threatened A3 by saying that if he refused to go with her, she would return to her husband in Malkerns.

In all these issues, the accused persons stated that they had given instructions to their attorney and did not know why their version was never put to the Crown's witnesses.

The importance of putting the whole of the defence case to the Crown's witnesses was stressed by **Hannah C.J. (as he then was) in THE KING V DOMINIC NGOMEZULU AND 9 OTHERS CASE N0.94/90 (unreported)** at page 16 – 17, where the learned Chief Justice stated as follows;-

> *"Counsel for the defence is, therefore under a duty to put the defence case to prosecution witnesses, what if he does not?.... It is, I think, clear from the foregoing that failure by counsel to cross examine on important aspects of prosecution's witness testimony may place the defence at risk of 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 into the witness box and denies the evidence in question the Court may infer that he has changed his story in the intervening 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."

See in this regard also the Judgement of Macdonald J.P. in S. vs P. 1974 (1) SA 581 at 582, where the learned Judge President stated thus:

> *"It would be difficult to over – emphasize 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 most certainly be a denial .... So important is the duty to put the defence case that, practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case or seek guidance from the court."*

The Court is entitled to see and hear the whole of the defence case put and to have the benefit of seeing the reaction of the Crown's witnesses thereto. Should this not be so, the Court is then at large to infer, and reasonably so, that the accused story has changed.

In the case of **REX V DE VILLIERS 1944 AD 493 at 508, DAVIS A.J.A.** stated the approach to be adopted by the Court in dealing with cases based on circumstantial evidence. The learned Judge stated as follows;-

> *"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative affect of all of them together, and it is only after it has done so that the accused is entitled to the benefit any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."*

I must now ask myself, whether the inference of guilt is the only inference, which can reasonably be drawn against the accused persons? I answer this question in the negative. The cumulative effect of the evidence led in this matter is not inconsistent

with the accused persons' innocence.

From the analysis of the evidence in respect of each accused persons, it must be borne in mind that the Crown has failed to establish a motive for the killing. The only person who could harbour such a motive could be A1 and then, only against his wife, PW 1 Lombango Kunene. There was no motive for him to kill his son, his own flesh and blood. It was also established in evidence that the accused persons were all in very good terms with the deceased person. I even noted that they always referred to him in an affectionate manner everytime they mentioned him. Their affection for the deceased appeared to me not to have been rehearsed as it exhibited throughout their sojourn in the witness box. Furthermore, the accused explained that what has been referred to as weapons with were suspected to have been used to bring about the accused's death by the Crown are actually items of worship widely used in the Jericho Sect to which they all belong. This serves as a plausible explanation as to why A2 carried the knobstick on the 15th March, 1998.

In the often quoted case of **REX v DIFFORD 1937 AD 370 at 373, Watermeyer A.J.A.** propounded the law as follows:

> *"It is equally clear that no onus rests on the accused to convince the*
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> *Court of the truth of any explanation he gives. If he gives an explanation even if that explanation be 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. It there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal....."*

The explanations given by each of the accused persons in this case and which I have analysed in detail above, are clearly probable and reasonable. Although some aspects may not be convincing, particular regard being had to the fact that in some respects, the accused's case was not put to the Crown witnesses, I cannot say that their respective explanations are beyond any reasonable doubt false. As there is great reasonable possibility that their explanations are true in this case, according to the dictum in REX V DIFFORD (supra), then the accused persons are entitled to their acquittal.

I am also mindful of the instructive propositions of the law by **Isaacs J.A. in – Mcube & Another V R 1982 – 86 SLR 59 @ 65 G** where the learned Judge of Appeals stated as follows:-

> "*In my view there is no onus on the accused to prove that their versions were true and that of the Crown false. The mere fact that there may have*
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> *been lies in their evidence is not sufficient to convict them if the Crown evidence standing alone does not prove their guilt beyond a reasonable*

> *doubt. If evidence of an accused person is so incredible as not to be possible of belief, it would be a factor to be taken into consideration in assessing his innocence or guilt."*

I accordingly find the accused persons 2,3 and 4 not guilty of the crime of murder and I acquit and discharge them.

I wish to comment however on the investigation of this case by the Police. The members of the Police Force are there to investigate crime, collect evidence and make such evidence available to the Court that tries accused persons in relation to the charges preferred against them, based on the investigations and the evidence collected by the Police Force. It is however not the function, of the Police Force to manufacture and concoct evidence in order to make a case that does not exist.

In this case, I have formed the distinct impression that the Police concocted a story in a quest to bring the blame of death of the deceased's death to somebody's door, who in this case happens to be the accused persons. Certain witnesses were schooled and forced to commit the crime of perjury. In the words of **Knigh – Bruce V.C.** in the case of **Pearse V Pearse,** I find this quotation apposite.

> *"Truth like all other things, may be loved unwisely – may be pursued too keenly –may cost too much..."*

Burning with ambition to ascertain the truth, the energetic Police Officers in this matter pursued the truth too keenly, and when it proved elusive, they resorted to schooling certain witnesses and creating a fanciful, believable but untrue story. That is in the words of Knigh – Bruce V.C. "too great a price to pay for truth itself."

That Thubesi died a gruesome death and that not sufficient evidence has been brought to this Court to convict those responsible is worrying. The Court does not deal with suspicions but with evidence and the Court must always be mindful of the old-age adage that it is better to allow 100 guilty persons to escape their just punishment than for one innocent person to be placed behind bars.

Turning to Count 2 in respect of Accused NO.1, 3624 Detective Constable Mtsetfwa testified that on the 5th December, 1997, he received a report that A1 had in his possession an unlicensed firearm. Pursuant to that information, Detective Constable Mtseftwa, in the company of Constable Sacolo proceeded to A1's home at Mashobeni.

The accused was alone outside his home at Mashobeni next to the cattle byre. Officer Mtseftwa introduced himself and Officer Sacolo as Police Officers from Gege Police Station and requested permission from the accused to search his huts. A1 agreed to the search.

Officer Mtsetfwa then searched a hut in which A1 said he slept and noticed something like the butt of a gun under the bed. He shifted the bed to the side and saw a firearm, bearing serial number ERA 564751. When called upon by these Police Officers to

produce a licence for the gun, the accused failed.

Officer Mtsetfwa then informed the accused person that they were investigating the illegal possession of a firearm and he duly cautioned the accused person in terms of the Judges' Rules, took the firearm to the Police Station and charged the accused accordingly.

Nothing came out of the cross examination of this officer in relation to the gun. I formed an impression that he was impressive witness. He answered all questions put to him in cross-examination frankly and clearly and matter of factly. He stood up well to the searching cross – examination by Mr Magagula. He certainly has a glittering future in the Police Force if groomed accordingly. I reiterate the compliments that I addressed to him during the Ruling on the 174 (4) application.

The accused person, on the advice of his attorney, declined to lead any evidence relating to this offence. His explanation is therefore unknown to this Court. Mr Wachira, in his submissions urged the Court to consider the fact that the accused declined to take the witness stand and referred me in that regard to the case of **VINCENT SIPHO MAZIBUKO V R. 1982 – 86 SLR 377 at 381 where HANNAH C.J.** cited with approval a dictum of Holmes J.A. **in S. V SNYMAN 1968 (2) SA 582 (AD)** where the learned Judge propounded the Law thus;-

> *"Where there is direct evidence that the accused committed the crime, in general his failure to testify (whatever his reason therefor)* ***ipso facto*** *tends to strengthen the State's case, since there is not testimony to gain say it and therefore less occasion for material doubting it."*

Hannah C.J. proceeded to state thus;

> *"But of course as stated in Nyati's case and in Motsepi supra this must not be pressed too far..... These dicta accord in my view with common sense. They do not in any way conflict with the right, constitutional or otherwise, of an accused to refuse to give evidence. He cannot in my opinion complain if he elects not to give evidence and if in so doing his failure to give evidence may be used as a factor in determining his guilt."*

Detective Constable Mtsetfwa gave direct evidence showing that A1 was in possession of the firearm in question. When asked to produce a licence, A1 was unable to produce any. The cross examination of Officer Mtsetfwa never pointed to any defence, for example – that the hut did not belong to A1 as stated by Officer Mtsetfwa, nor was it put to the officer that the other people than A1 had access to the hut at the material time.

Once it was established that A1 was in possession of the firearm, it was for him to give a plausible explanation in the witness box. He did not take advantage of the witness box to explain but chose, on his attorneys instructions, to remain silent.

In the case of **S v Khomo and others 1975 (1) SA 344 at 345 H, Miller J** stated as follows:-

> *"In general, greater weight will be attached to silence where there is direct testimony implicating the accused, which the Court could reasonably expect he would simply explain away if it were not true, than in a case where there is no such direct evidence, and where the question of his guilt or otherwise depends upon inferential reasoning."*

An appraisal of the totality of facts as stated above, particularly the direct evidence adverted to, coupled with the accused's silence, lead me to conclude that the Crown has discharged its onus and has established the accused's guilt beyond reasonable doubt.

It is not inconsequent that when this charge was put to the accused person, he pleaded guilty, without being prompted. After a brief consultation with his attorney, his plea changed to that of not guilty. In my view, his decision not to take the stand is consistent with his earlier plea.

I thus find accused No.1 guilty on Count 2.

Finally, I wish to record my appreciation and indebtedness to both Counsel who assisted this Court. Both Mr Wachira and Magagula save where otherwise stated performed their duty to assist the Court admirably.

<u>T.S. MASUKU</u>

ACTING JUDGE

CRIM.CASE NO. 168/98

IN THE MATTER BETWEEN:

REX

vs

GOVU DLADLA AND 3 OTHERS

CORAM : MASUKU A.J.
FOR THE CROWN : MR. D.G. WACHIRA

FOR THE ACCUSED : MR. Z.W. MAGAGULA

RULING ON APPLICATION IN TERMS OF SECTION 174 (4)
OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938,
AS AMENDED
20/05/99

The accused stand charged on Count one, with the crime of murder, it being alleged that upon or about the 15th March 1998, at Mashobeni area in the Shiselweni District, the said accused persons, acting jointly and with a common purpose did unlawfully kill THUBESI DLADLA.

On Count 2, Accused 1 is charged with contravening the provisions of Section 11 (1) of the Arms and Ammunitions Act, 1964, as amended, it being alleged that upon or about the 5th December 1997, at Mashobeni/Mkhitsini area, the said accused person, not being a holder of a permit or licence to possess a firearm, did unlawfully possess one .303 rifle serial number E564751. By consent between the Crown and the Defence attorney, the serial number of the firearm was amended to read ERA564751.

Before the accused were called upon to plead, the Crown withdrew charges against Accused 5, one Sicelo Mavuso. Thereafter, the four accused persons pleaded not guilty to Count one and Accused 1 pleaded not guilty to Count 2.

After the Crown closed its case, Mr. Magagula, who appeared for and on behalf of all the accused persons moved an application in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, for the accused persons to be acquitted and discharged on the first count and for Accused 1 to be acquitted and discharged on the second count. This application was vigorously opposed by the Crown.

Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, reads as follows:-

> *"If at the close of the case for the prosecution, the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."*

As correctly observed by Dunn J, in **THE KING v DUNCAN MAGAGULA AND 10 OTHERS, CRIMINAL CASE NO, 43/96** (unreported), the Section is of similar

effect with the South African Criminal Procedure Act 51 of 1977. In the same case, Dunn J. laid out, the test to be applied in such applications as being whether there is evidence on which a reasonable man, acting carefully might or may convict – See also Commentary on the Criminal Procedure Act, Du Toit et al P.174 and the cases therein cited.

The test is not should a reasonable man convict – See **GASCOYNE v PAUL and HUNTER 1917 TPD 170; SUPREME SERVICE STATION (1969) (PVT) LTD v FOX and GOODRIDGE (PVT) LTD 1971 (4) SA 90 and S V MORINGER AND OTHERS 1993 (2) SACR 268.**

From the test laid out above, it is clear that the decision to refuse a discharge is a matter solely within the discretion of the trial Court. This is borne out by Legislature's choice of language, namely, the use of the word "may". The exercise of this discretion may not be questioned on appeal. See **GEORGE LUKHELE AND 5 OTHERS v REX Court of Appeal Case No. 12/95**, at Page 8 where the learned Judges of Appeal stated as follows:

> *"It is now well established that no appeal lies against the refusal of the trial Court to discharge an accused at the conclusion of the prosecutions case".*

Having said this, the discretion must be properly exercised, depending on the particular facts of the matter before Court.

Having ascertained the test to be applied as herein above set out, the question that arises is whether or not the credibility of Crown witnesses should be taken into account in deciding whether or not to grant a discharge.

In **S V MPETHA AND OTHERS 1983 (4) SA 262 at 265 D – G, WILLIAMSON J,** stated the position of the law as follows:-

> "*Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of BOUWER AND NAIDOO correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no*

> *reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one position of the sworn testimony of a witness, to accept another portion' – See* ***R v KHUMALO 1916 AD 480 at 484.*** *Any lesser test than the very high one which, in my judgement, is demanded would run counter to both the principle and the requirements of S.174".*

In the Kingdom of Lesotho, this very question was considered by Cotran C.J. in the case of **REX v TEBOHO TAMATI ROMAKATSANE 1978 (1) CCR 70 at 73-4.** The learned Chief Justice propounded the law as follows:

> *"In Lesotho, however, our system is such that the judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the crown witness has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence".*

In the case of **THE KING v DUNCAN MAGAGULA AND 10 OTHERS (supra)**, Dunn J, was of the strong persuasion that this Court should follow a similar approach as that in Lesotho, proper regard being had to the similar position in which trial judges are placed in both Kingdoms. Similarly, I endorse that view.

Having set out the law regarding applications in terms of the provisions of Section 174 (4), I shall now proceed to analyse the evidence adduced on behalf of the Crown in order to ascertain whether there is evidence that the accused persons committed the offences preferred against them or any other offence of which they might be convicted.

I will preface the analysis of the evidence by stating that the Crown's evidence that the accused killed the deceased is in large measure circumstantial.

In dealing with Crown witnesses, I will consider the evidence adduced against each of the accused persons, beginning with Accused 1. PW1, Lombango Kunene is a wife to Accused No. 1 and the mother of the deceased, who was Accused 1's son.

Her evidence is that she had lived peacefully with Accused 1 until a dispute over land arose between her and Accused 1. At one stage, the matter was reported to the Chief of the area and later to Ndabazabantu in Nhlangano, for purposes of resolution. The dispute was over ploughing fields, which PW1 alleges was allocated to her by the Chief's kraal where she had khontaed. On the other hand, Accused 1's version was that the fields were allocated to him by the Chief, and he in turn, gave the fields to PW1 for cultivation purposes.

Sometime in October, 1996, PW1 and the deceased were ploughing the fields, whereupon they were confronted by Accused 1 and 4. Accused 1 went straight to PW1, carrying a firearm and pointed it at her. Accused 1 told PW1 to stop cultivating the fields, failing which he would shoot her. It is not suggested that A4 did anything to the deceased at all from PW1's evidence. She proceeded to state that the relationship between her and Accused 4 became strained.

There is clearly a long lapse between this confrontation and the death of the deceased; in the excess of one year. There was no other dispute that arose between the two.

From this evidence, it can hardly be said that Accused No. 1 had a motive for killing the deceased because he never confronted the deceased nor did he ever threaten him in any manner whatsoever. In cross-examination, PW1 conceded that the dispute over land was only between PW1 and Accused No. 1 and did not involve the deceased. If there was a person that Accused 1 had a motive to kill, it would be PW1. In view of the aforegoing, I cannot find that Accused 1 had a motive for killing the deceased.

The next witness was Adam Mhlanga, (PW2) whose evidence was that he was Accused 1's nephew. On the 16th March 1998, he went to Accused 1's homestead to deliver a horse in respect which the accused person had placed an order. He found A1 alone at his home and before PW2 could sit down, A1 told him that the deceased had died at a place which A1 pointed out. A1 said that Dee Dladla (A3) killed the deceased on his own and A1 gave money to A3 to return to Thembisa, where A3 ordinarily resided. A1 then asked PW2 to look after his cattle as A1 was to attend a trial at Nhlangano.

In cross examination by Mr. Magagula, PW2 conceded that on the Wednesday 18th March 1998, A1 complained to him that he was told by A4's wife that the deceased had disappeared and was aggrieved that PW1 had not taken it upon herself to inform him (A1) of his son's disappearance. I disbelieve PW2's evidence because A1 could not have voiced his complaint about PW1 not advising him of the deceased disappearance if he knew that the deceased had died, which PW1 said A1 told him on the 16th March 1998. This is clearly contradictory and rendered PW2's evidence unreliable.

Furthermore, there is a wide age difference between A1 and PW2, possibly more than

50 years. It is inconceivable that A1 would readily tell PW2 about this incident even before PW2 had taken a seat. There was no suggestion that A1 and PW2 were so close so as to render A1 likely to volunteer such damning evidence readily to his nephew who was many years his junior.

I was also not impressed with PW2's answers to enquiries by Mr. Wachira. To demonstrate this, I will quote certain portions of his evidence as recorded in my notes:

Q: Did he (A1) say who sent Dee (A3) to kill the deceased
A: He did not

Q: Did you ask if Dee (A3) was alone
A: I was afraid to ask him

Q: Why
A: I just panicked

Q: Did he (A1) tell you how much he gave to Dee (A3)
A: No. I did not even ask him how much

Q: Did he tell you how he knew that Dee killed the deceased
A: No

Q: Why did you not seek details about the deceased' death
A: I was afraid to ask him

Clearly, PW2's answers are unsatisfactory. If his uncle had volunteered such information regarding his cousin's death, he would have put these logical questions to his uncle. There was no reason in my view for him to be afraid and I attribute this solely to him being untruthful. To further substantiate this, I will quote excerpts or some portions of PW2's cross-examination by Mr. Magagula.

Q: Is there any reason why A1 would tell you about Dee (A3) killing the deceased
A: No

Q: Did it cross your mind to report what A1 had told you about deceased's death
A: No

Q: Even when you heard that the deceased's body had been found, you still did not report
A: No
In re-examination, Mr. Wachira posed this question

Q: Did you not refer your uncle to the fact that he had told you about Thubesi's death and later complained about PW1 not telling him of deceased's disappearance.

A: No. I did not.

From the above excerpts, no reasonable man acting carefully can convict on such

evidence. PW2's demeanor on the stand was unimpressive. He was shifty and uncomfortable. I accordingly reject his evidence as it would unsafe to rely upon it (Furthermore, such confession would only operate against A1 and not A3).

PW3 was Mageba Mabhanya Mabuza, who is PW1's son from a previous marriage. He set out in detail how A2 and A5 came and requested the deceased to go with him to Church. He further stated his role in reporting the deceased's disappearance and where and how he found the deceased.

I consider this witness to have been very truthful and stood up well under cross-examination. The only portion of his evidence that I find unsatisfactory was with regard to the relationship between A1 and the deceased. In his evidence in chief, he stated that he did not know what the relationship was like. In cross-examination, he changed his story and said that A1 and the deceased quarreled and were not in good terms.

He said he did not know of the cause of the quarrel but he was informed by the deceased and other family members of the quarrel. When asked why he did not tell the Court his version had changed, he attributed this to an allegation that he had not understood the question clearly. It is significant that the hearing was adjourned for the day after PW4 had given his evidence in chief. The change of his story in cross-examination suggests that he was reminded to mention that the relationship was not good between A1 and the deceased. For that reason, I will not accept this portion of his evidence. It must always be borne in mind that the trial Court is at large, while rejecting one portion of the sworn testimony of a witness to accept another portion – See **R v KHUMALO 1916 AD 480 at 484.** See also **S V OOSTHUIZEN 1982 (3) SA 571 at 577.**

The Crown then called Abraham Gazathi Methula (PW5), who stated that he was arrested and detained at Gege Police Station on a charge of stock theft. He was arrested on the 13th April 1998 and stated that he knew all the accused persons as they were detained in the same Police Station and they attended remand hearings together.

In relation to A1, PW5 stated that A1 informed him of his involvement in the death of the deceased, namely that A1 wrote a letter to the other accused persons calling upon them to return home to kill the deceased as he was causing A1 lots of trouble over land and cattle. The other accused persons arrived, killed the deceased and were given money by A1 to return to South Africa.

A1 then requested PW5 to go to A1's home and kill PW3 in order to destroy all available witnesses. A1 further told him to go to A1'' daughter-in-law by the surname of Malinga, where he would find a gun for killing PW3.

I have great difficulty in accepting this witness' evidence for reasons that follow below. Firstly, there is a material contradiction between his evidence and that of the Police Officers PW11 3558 Detective Constable Walter Muzi Jele regarding a remand hearing on the 24th April, 1998 at the Nhlangano Magistrate's Court. Whilst PW11

says they were in Nhlangano for about an hour, having arrived at 12.45, PW5 says they were there for more than three hours which presumably gave him an opportunity to speak to the accused persons and to obtain details about their involvement in Thubesi's death. PW12 on the other says they were in Nhlangano at or about 11h00 and found that the Court was in session and only took the accused for remand at or about 14h30. This witness said they waited for their vehicle which was taken for repairs at the Central Transport Administration, Nhlangano.

These I view as serious inconsistencies in their evidence, in relation to the accused's opportunity to discuss with PW5. Secondly, PW12 stated that PW5 was inside Court during the remand hearings, whilst PW5 maintained that he was outside.

There is also an inconsistency between the evidence of PW2 and PW4. PW2 said A1 told him that he had given money to Dee Dladla to return to South Africa, whereas PW4 said A1 said he had given money to A3, A4 and A5 to escape to South Africa after the deceased's death.

Furthermore, the only dispute led in evidence between A1 and PW1 was over land. PW4 said he was informed that the deceased was troubling A1 over land and cattle. This issue relating to cattle I reject as falsehood because it was not even suggested to the crown witnesses in cross-examination.

Further, PW5 stated that he was meeting A1 for the first time at Nhlangano. It would be unusual for A1 and A3 and A4 to tell him their story having met for the first time on that day.

Another portion of the Crown evidence that I am compelled to reject is with regard to the assault of A1 by the Police Officers Messrs Magongo, Jele and the other members of the investigating team. In cross-examination by Mr. Magagula, all the Police Officers vigorously denied ever assaulting A1 during interrogation. Mr. Magagula put it to Officers Magongo and Jele that A1, due to the assault, lodged a complaint to the presiding Magistrate during a remand hearing and the Magistrate ordered that A1 be taken for medical attention.

The Crown, on its own volition applied to produce the record of proceedings from the Subordinate Court. The Defence did not object thereto. The record was marked Exhibit D. From the record, it appears that on the 5th May 1998, Al lodged the complaint and the record reflects as follows:-

"Accused 4 (A1 before this Court) states that he was assaulted by the Gege Police as a result he is not feeling well and he cannot hear properly. He states that he needs medical attention.

"Court orders the correctional services to take Accused 4 to a doctor for medical examination and treatment".

The Court record submitted by the Crown which controverts the evidence of the Police Officers in relation to A1 has inflicted a gaping wound to the credibility of the Police Officers respecting the assault of A1, which they vigorously and unequivocally denied. This episode clearly weakens the ailing evidence against A1.

In view of the aforegoing, it is my considered view that the evidence adduced by the Crown in support of Count 1 does not meet the requirements of Section 174 (4), in so far as A1 is concerned. I therefore find that there is no evidence on which a reasonable man, acting carefully might convict. I accordingly acquit and discharge A1 on the first count.

In relation to Count 2, the Crown adduced the evidence of 3624 Detective Constable Sipho Mtsetfwa. His evidence was that on the 5th December, 1997, he received a report to the effect that A1 had in his possession an unlicenced firearm. Acting on that report, he, in the company of Constable Sacolo proceeded to A1's home at Mashobeni, where they found the deceased outside his home next to the kraal. He was alone.

Officer Mtsetfwa introduced himself and Sacolo as police officers from Gege Police Station and requested permission from A1 to search the huts. A1 agreed. Officer Mtsetfwa then searched the hut in which the accused said he slept. He noticed something like the butt of a gun under the bed. He then shifted the bed to the side and saw the gun, a 303 rifle, bearing serial number ERA564751. Accused 1 was requested to produce a licence to no avail.
Officer Mtsetfwa then proceeded to inform the accused that he was investigating the illegal possession of a firearm and duly cautioned A1 in terms of the Judge's Rules. He took the firearm to the Police Station and charged the accused accordingly.

I have no hesitation in accepting D/Constable Mthethwa's evidence. He was clear and gave his evidence in a satisfactory manner and stood his ground under cross-examination. He struck me as a bright young police officer, who with further training and exposure, has a glittering future in the force. I commend him.

The only aspect pointed out by the Defence attorney about his evidence was that in his evidence in Chief he never mentioned that there was a shooting incident before they proceeded to A1's house. This was elicited through cross-examination. I however do not find this attack justified as people regard incidents differently – one may regard an incident as insignificant and another as significant. He explained the incident in a satisfactory manner and I cannot fault him on this. Though Officer Sacolo was not called to corroborate Officer Mthethwa's evidence, I regard Mthethwa's evidence as credible and reliable, even in the absence of corroboration. I accordingly find that there is evidence on which a reasonable man acting carefully may convict A1 in respect of count 2. I therefore order that A1 be put to his defence in relation to this Count.

Accused No. 4 (VUSI GEBHU MALINGA)

This accused person is A1's nephew. I have already stated PW1's account of A4's involvement in confrontation of PW1 and the deceased, where A4 accompanied A1. From that evidence, it is not suggested that A4 did anything unlawful to either the deceased or to PW1. PW1's evidence does not in anyway implicate A4. The only connection with A4 was that the disputed land was to be given to A4's mother.

In point of fact, in her examination, in chief, the following was the discourse between Mr. Wachira and PW1.:

Q: How was the relationship between you and A4 before the confrontation
A: I was in good terms with him because they were all my children

Q: How was the relationship between you and A4's mother
A: It was good

From the aforegoing, I do not find that there is any evidence that A4 participated in the killing nor has it be shown that he had a motive to kill the deceased.

The next piece of evidence linking A4 is that of PW4, Abraham Gazathi Methula. I have stated the reasons why I will not accept his evidence in relation to A1. Those reasons apply with equal force and I will not repeat the contents thereof.

Evidence, which in my finding links A4 to the commission of the offence is the that of PW13 Sub-Inspector Norman Magongo, whose evidence is to the effect that during the interrogations, A3 said he had seen the deceased on the 15th March 1998 and that he was in A4's company and the deceased was in the company of A2 and A5. This A4 allegedly admitted.

During Sub-Inspector Magongo's further interrogation, he alleges that A4 freely and voluntarily took Inspector Magongo to A4's home on the 18th April 1998, where he gave Inspector Magongo a knobstick, Exhibit 7. On the same day, he took Sub-Inspector Magongo to Mkhitsini area to a certain shop where A4 told his wife Peter Maseko to hand him a knife. This knife Exhibit 8 was handed to Sub-Inspector Magongo by A4.

It is worth mentioning that according to the post-mortem report, the Pathologist, PW said the injuries found on the deceased body were consistent with injuries inflicted by a knob-kerrie and a knife.

In my view, this evidence points to A4's involvement in the deceased's death and as such, he must be called to his defence in order to explain and put his side of the story before Court. In the result, the application for A4's acquittal and discharge on Count 1 is refused.

Accused 2

PW1 states that on the 15th March 1998, A2, accompanied by A5 came to her homestead and requested the deceased to go with them to the Jericho Church. The deceased did not return and the following day, she went with Jabulani Mabuza to search for the deceased.

This evidence is confirmed by Mageba Mabhanya Mabuza. There is also evidence

by Bhom Vilakati, Bheki Vilakati and Winile Kunene that the deceased was last seen in the company of A2 and A5 on their return from Church on the same day. Furthermore, Mageba stated that A2 carried a bag and a knob-kerrie on his way to Church, which was undisputed by the defence.

After the deceased's disappearance and the discovery of his corpse, A2 then disappeared without trace as the members of the Royal Swaziland Police were searching for him. He was only arrested on the 18th April 1998.

For considerations mentioned elsewhere in this ruling, I will not allow the evidence of PW4 in so far as they relate to A2.

Before closing the issue relating to A2, it is worth mentioning that PW9, Jabulile Lovegirl Kunene, A3's girlfriend states that A3 came at or about midnight on the day that the deceased disappeared in the company of A2 and they left after 1h00. I will deal with this evidence in greater detail below.

It is therefore my considered view that A2 should also come to his defence and state his own side of the story, particularly because he carried a knob-kerrie and was one of the last persons to be seen with the deceased whilst the deceased was alive.

Accused 3

This accused person is A1's son from another wife, namely Lomgcibelo. Evidence linking him to this offence was adduced by PW2 and PW4, respectively. For reasons set out elsewhere, I will not rely on that evidence as it is not convincing and is unreliable.

PW9, A3's girlfriend gave evidence to the following effect: that on the 15th March 1998, A3 was at home from early morning and only left in the late afternoon to visit A1's home. He did not return until around midnight.

On his return, PW9 was already lying in the bed falling asleep. She however woke up and dished some food for him. A3 was in the company of A2 and A5. A3 requested PW9 to pack his clothes, a green trouser, striped T-shirt with a green collar and his toiletry, which she did.

A3 told PW9 that he was leaving. On enquiring as to why A3 was leaving suddenly, he answered by saying that he had told PW9 that he leaves at any time and time had come for him to leave early that morning. He took his bag and stood at the door and to said to PW9 that if people enquire regarding his departure, she should say that he left on the 14th March 1998. All this time, A2 and A5 were outside the hut. He also told PW9 to take his firearm and give it to A1 the following morning for safe-keeping.

Indeed the following morning she proceeded to A1's house and found A1 lying on a rock. She told A1 about the gun and A1 said he would come to fetch it. She then asked A1 what had happened to A3 as he (A3) appeared worried when he left and to which A1 answered by saying that that was A3's normal behaviour and that A3 left at

any time.

PW9 stated that A3 departed at around 1h00 in the company of A2 and A5 and she never saw him again until she heard that he had been arrested in connection with the deceased's death.

In the battle of wits that ensued in cross-examination, Mr. Magagula suggested that she was fabricating evidence against A3 because he had refused to travel to South Africa with her which she denied. She maintained her story and her cool while closely cross-examined by Mr. Magagula. I accordingly have no hesitation in stating that she gave a truthful and credible account of what she knew and her evidence cannot be faulted.

Her evidence clearly suggests that A3 knew about the deceased's disappearance. This is evident from A3's sudden departure and the instruction that she should lie about the date of his departure.

From the evidence of Sub-Inspector Magongo, A3 admitted to having seen the deceased on the day of his disappearance and that he was in A4's company. Inspector Magongo further said A3 and A1 pointed out an axe, presumably used in killing the deceased. However, the Pathologist's report excluded as unlikely that an axe was used to inflict the injuries regard being had to the fact that there were no fractures to parts like ribs. He suggested that a sharp instrument like a knife was likely to have been used to inflict the injuries on the deceased.

From the aforegoing, I am of the considered view that A3 should also be put to his defence. I accordingly refuse the application in terms of Section 174 (4) in so far as it relates to him.

In the result, the application is granted only in respect of A1 regarding Count 1. He must conduct his defence, in respect of Count 2. The application in respect of the other accused persons is refused. They must likewise be put to their defence and it is so ordered.

T.S. MASUKU
ACTING JUDGE