CRIM. CASE NO. 104/98

In the matter between

REX

And

BONGANI ENOCK VILAKATI

Coram	S.B. MAPHALALA – J
For the Crown	MR. M. SIBANDZE
For the Defence	MR. B. SIGWANE

RULING ON OBJECTION
(12/05/99)

Maphalala J:

The crown as represented by the Deputy Director of Public Prosecutions registered an objection on the evidence of DW2 Chief Officer Gule who was called by the defence. The crown declined to cross-examine this witness after he had given his evidence-in-chief stating that his evidence is totally irrelevant for purposes of these proceedings and ought to be expunged from the court record.

The gravamen of Mr. Sibandze's objection is that the testimony of this witness has nothing to do with the killing of one woman and the injuring of the other at Mankayane. His testimony is that PW1 Mavuso and the accused were resident as inmates awaiting trial at a prison block notoriously known as "eZindongweni". Mr. Sibandze contends that all these matters have nothing to do with the issue of the killing. It is to attack the credibility of PW1, which is collateral. He argued further that answers given under cross-examination on credit are final and cannot be contradicted. To this end he referred the court to ***Hoffmann & Zeffert on The South African Law of Evidence (4thED) at 464*** where the learned authors have this to say:

> "In matters which are relevant to the issue, the answers of a witness under cross-examination maybe contradicted by other evidence, but his answers to questions which are solely to his credit are ***final*** (my emphasis). The rule is usually expressed by saying that a witness reply under cross-examination on a purely collateral matter is conclusive and the opposing party is not permitted to adduce evidence to contradict such a reply"(see ***S vs Sinkankanka and another 1963 (2) S.A. 531 (A) at 539).***

Mr. Sibandze urged the court to find the testimony of this witness inadmissible in so far as it is irrelevant.

On the other hand Mr. Sigwane for the accused is of the view that the testimony of this witness is relevant. Mr. Sigwane is of the view that the testimony of this witness fall under

the exceptions to general rule as argued by the crown where the learned authors ***Hoffmann and Zeffert (supra)*** at page 466 stated that there are two exceptions to the rule that answers to questions which go to solely to credit are final. These are the witness's previous convictions and questions, which tend to show that he is biased in favour of the party who had called him. That in the present case the defence is relying on the second exception. He submits that the evidence of this witness is highly relevant. Accused said he made this admission at Sidvwashini and this therefore make it an issue. It is highly relevant to establish the accused defence.

These are the issues before me. I have considered the submissions by both counsel and my view is that Mr. Sibandze's submissions are sound. There is no where on the record where the accused tells the court that he talked to PW1 at Ezindongweni about the killing. I agree further with Mr. Sibandze that this is character evidence that tends to show that PW1 is a liar. This is the evidence that the accused could not lead in chief.

In the result, on the basis of the crown's submission I come to the conclusion that the evidence of this witness is inadmissible within the ambit of the principle discussed by ***Hoffmann and Zeffert (supra)*** at page 464 and thus is expunged from the record forthwith.

S.B. MAPHALALA
JUDGE

In the matter between

REX

And

BONGANI ENOCK VILAKATI

Coram	S.B. MAPHALALA – J
For the Crown	MR. M. SIBANDZE
For the Defence	MR. B. SIGWANE

JUDGEMENT
(30/06/99)

Maphalala J:

The accused person Bongani Enock Vilakati is indicted on two counts set out below:

Count One: Murder charge – it is alleged that upon or about the 11th March, 1997 at Dvudvusini area in the district of Manzini the accused did unlawfully and intentionally kill Florence Vilakati.

Count Two: Attempted murder – it is alleged that upon or about the 11th March, 1997 at Dvudvusini area in the district of Manzini, the accused acting unlawfully and with intent to kill Dumsile Elizabeth Mdluli did stab her with a knife.

When the charges were put to the accused he pleaded not guilty to the two counts preferred to him by the crown. The accused person was duly represented by Mr. Sigwane.

The first witness for the crown was PW1 Thokozani Benjamin Mavuso, an "inyanga" (traditional healer). He told the court that he knows the accused person as accused would come to him from time to time to seek his services as a traditional healer. Sometime in 1997 the accused person came to his homestead at Hluthi and found that he was not at home. The accused waited for him. PW1 later came to his homestead and met the accused. The accused informed him that he had accidentally injured people. He enquired how he did this the accused said he had stabbed them. He further told him that there was an old quarrel with them. He said these people were his neighbours. He said they were in Mankayane. He

asked him why he had stabbed these two women. Accused told him that was because of an old dispute between them. Accused then told him that he was going to his sister across the border in South Africa. He further told him that the people he had injured were his neighbours. Accused wanted “muti” from him to evade the soldiers who guarded the border between Swaziland and South Africa. PW1 prepared this “muti” for the accused person.

PW1 further deposed in chief that he never told the accused the way and methods to kill these people. He further told the court that the accused told him that the dispute between him and these two women was known by his sister. PW1 told the court that when this conversation took place between himself and the accused person it was in the winter of 1997. He cannot recall which month it was.

This is about the extent of Pw1’s testimony. He was cross-examined at length by Mr. Sigwane for the accused. I must say he went through a relentless and incisive cross-examination. It was suggested to him that it was pointless for the accused to request for this "muti" to evade the soldiers as it was general practice in that area as it was near the border for people to simply jump the fence to South Africa without going to the authorized checkpoints. The witness was adamant that the accused did ask for this "muti". It was also revealed through cross-examination that PW1 had on prior occasion treated the accused for other maladies, like impotence after he was referred to him by his sister. It was also suggested to PW1 that he once treated the accused for mental illness. To this he answered that he did not treat the accused for this as PW1 had a disagreement with accused’s sister as to his payment of a cow. It was also put to PW1 that at all relevant times the accused was resident at Pongola in South Africa where PW1 answered he did not know about that but what he knew is that he always treated the accused person in Swaziland. When asked when he last saw the accused. He answered that they met at Sidvwashini Remand Centre where they had gone to change belts to their way to the courts for their respective cases and this was last year, 1998 in February. It was suggested to him that is where the two discussed about the charge which had been preferred against the accused. PW1 vehemely denied having had discussions with the accused in this connection. PW1 revealed that at Sidvwashini he was an inmate of a block notoriously known as “eZindongweni” and that it was not true that in this block only people who where charged with murder resided there. He told the court that even people who had minor cases before the Swazi Court were kept there. PW1 denied when it was put to him that he resided there with the accused. The accused was kept in another block and they did

not have any contact at all. The gravamen of Mr. Sigwane's cross-examination was that these two people were together at "Ezindongweni" where they discussed accused's charges in 1998 and it was not true that accused told PW1 that he had injured two women at PW1's home in 1997. That conversation never took place. PW1 was adamant that it did and that he was never together with the accused at "Ezindongweni" for them to discuss accused's charges.

These are the salient points raised in the cross-examination of PW1.

The crown re-examined PW1 briefly where it was revealed that PW1 had made a statement with the police concerning this in 1997. The statement was identified as exhibit "A" to be handed formally on a later stage of the proceedings by a police officer who recorded it from PW1.

At this stage the court was informed that the evidence of the two doctors Dr. R.M. Reddy who conducted the post-mortem on the deceased in count one and Dr. Prahalath who treated the complainant in count two was entered by consent. The post-mortem report and the medical report were subsequently entered as exhibit "B" and "C" respectively.

The crown then called PW2 Nora Msibi who is a neighbour to the deceased. She told the court that early in the morning on the 5th March, 1997 she was going to Manzini to sell her handicraft. As she passed the deceased homestead the deceased came out of her hut running being persued by a male figure. As she was about to cross a fence nearby the male person got hold of her and the deceased cried out in alarm saying "inyandzaleyo LaMatsebula" (help, Miss Matsebula!). PW2 asked her who was attacking her. She did not answer that question. Then she heard some noise from her throat like a goat which was being slaughtered. She asked her again but there was no answer. Thereafter it was quite. PW2 told the court that the male figure was wearing a white cap. She then ran away and crossed a river to call the other neighbours to come to the scene. The neighbours came out and they went to the scene and found that the deceased had died.

PW2 told the court that she could not recognize the male person who was attacking the deceased. Thereafter, the matter was reported to the authorities. That the incident took place at about 5.00am.

This is the extent of PW2's testimony. She was cross-examined briefly where she told the court that the incident took place in summer.

The crown then called PW3 Elizabeth Dumile Mdluli who told the court that she knew the accused. She told the court further that the husband of the deceased was the brother to the accused person. She testified further that accused person will not be telling the court the truth if she said she together with the deceased were bewitching him. That on the 11th March, 1997 in the morning as she woke up a small child told her that there was a male person coming towards the homestead. When she got out of her sleeping hut he saw the accused carrying a knife and he was looking straight at his eyes. He stabbed her with the knife just below the left lung and pulled the knife as if he was skinning a goat and her intestines fell out. At that moment she fell down. The attacker then turned and walked away. She then made a prayer and said:

"Lord accept my soul!".

The accused came for the second time and saw her intestines falling out and threatened to stab her again. She further told the court that her husband had just passed away and she was in mourning. That according to Swazi tradition she was not supposed to be touched by a man. She told the court that she knew the accused very well as she knew him from childhood.

She then instructed her children to raise an alarm and the other residents converged at her home. She was taken to Mankayane Government Hospital and thereafter transferred to the Mbabane Government Hospital. She was treated there and after a week was discharged from the hospital. She told the court that the incident took place at around 5.30am. That the distance from her homestead to accused homestead would be about 200 metres and the distance to deceased homestead would be about 1 kilometres.

This is about the extent of PW3's testimony.

She was cross-examined at some length by the defence where it was suggested to her that they were so close to the accused homestead in that no single day would pass without members of each family greeting each other. To which she answered in the affirmative. She

was asked when last she saw the accused and she replied that she had last seen the accused after the Christmas of 1996. She also confirmed that the accused was generally resident at Pongola at his sister's place. The witness also told the court under cross-examination that when the stabbing took place it was about 5.30am as it was summer there was light. She further told the court that the attack took a short time of about 2 minutes. She further told the court that after the stabbing she was conscious until she arrived at Mbabane Government Hospital. She told the court under cross-examination that the person who attacked her was wearing a mask with a big red nose. When pressed by Mr. Sigwane that she could not have clearly identified her assailant as the accused because this person had his face covered and the attack itself took a short time. The witness maintained that although she could not see the assailant's face she could see the physical structure of the person and was able to recognize the person. She told the court when pressed further she was not mistaken at all that it was the accused who attacked her that morning. It was put to her that after she was released from hospital members of the accused family were arrested. Although she made a statement to the police she did not mention that it was the accused who attacked her thus the arrest of the whole family. She answered that she was not aware that other members of accused family were arrested.

The crown then called PW4 1408 Detective Sergeant S. Mdluli who at the material time was a scene of crime officer. He told the court that he took part in the investigation of this case. On arrival at the scene where the deceased was they found other officers some from Mankayane Police Station. He was shown the scene, which was the homestead of a certain Mr. Vilakati. Behind the house there was a body lying facing upwards. He then drew a sketch plan of various places at the scene. Before drawing the sketch plan she took some photographs of the scene. The witness showed the court the photographs he took of the scene of crime. The photographs were entered as part of the crown's evidence as exhibit "C1" to "C5" and the sketch plan was entered as exhibit "D". He further told the court that he did not participate in respect of the attempted murder charge the accused is facing. He was merely collecting physical evidence and he never questioned the accused.

This is about the extent of this witness testimony. He was cross-examined briefly by the defence nothing of significance was revealed.

The crown then called PW5 Tabhi Ndvuna Vilakati whose evidence was brief and of no consequence. He told the court that accused was his son. That the deceased was his daughter-in-law. She was married to his other son Themba Vilakati.

The crown then called PW6 2910 Detective Constable Motsa who is the identifying witness who told the court that on the post-mortem report he appears as the person who identified the deceased and gave her name as Tibekile Vilakati. He did not know the deceased during her lifetime. He was one of the first officers who arrived at the scene where the deceased was killed. They told him this name but later her husband gave him her correct name as Simile Florence Motsa.

The witness was cross-examined briefly by the defence and nothing of substance came out of it.

The crown then called PW7 1797 Detective Inspector P.J. Shabangu who told the court that he was the investigating officer in this case. In the course of his investigation he went to the complainant in court 2, who was also injured at the time. She told him that she saw the person who stabbed her. She mentioned a name. He then went to the accused. He cautioned the accused in accordance with the Judges Rules. On the 7th April, 1997 the accused told him something and on the 9th April 1997, the accused took him to a forest called Block H there he produced a knife. He took possession of the knife. He told the court that he did not know that there was a knife before he was shown by the accused person. That he never made any promises to the accused which induced him to show him the knife and that the accused was in his sober senses. The witness handed the knife as part of the crown's evidence.

The knife which was a bayonet in a sheath with a blade measuring 14 centimetres and a black handle measuring 12 centimetres was entered as exhibit "1".

He further told the court that where the knife was retrieved it was very far from accused's homestead. Thereafter, he received certain information and proceeded to Pongola in South Africa where he retrieved a white cap.

The white cap was entered as exhibit "2". He then formally charged the accused with the two counts.

This witness was cross-examined at length by the defence. This witness was questioned that when accused lead him to Block H where the knife was recovered he was in authority over the accused and the accused was helpless in that also his mother had been arrested in connection with this offence. The witness replied that was not true.

The crown then closed its case whereby Mr. Sigwane moved an application in terms of ***Section 174 (4) of The Criminal Procedure and Evidence Act (as amended)*** that the crown has failed to prove a ***prima facie*** case to put the accused person to his defence. Mr. Sigwane advance lengthy submissions to support this application and the crown opposed the application. However, after considering the submissions the court found that the accused had a case to answer.

The accused then gave evidence under oath being led by his attorney. He gave a lengthy account on his version of events. The long and short of his testimony is that when these offences were taking place he was not in Swaziland but was at his sister's place at Pongola in South Africa. He had gone there in December. He was arrested in April, 1997 at Dvudvusini and people around his area knew that he was at Pongola. He told the court when he was arrested some members of his family were also arrested in connection with this offence including his mother who was kept in custody for two weeks. She was charged with two counts that of murder and attempted murder and she appeared before a magistrate for a formal remand. When he was arrested he was taken to police custody some days later he was taken back to his hut and the police found "muti". They asked him where he got the portion from and he told them that he got it from PW1.

The portion was for taking out "tikoloshe" (some evil animal) from his wife's uterus as his wife was sickly with a painful uterus. The accused told the court that PW1 was not truthful to the court that he saw him in January.

He went further to tell the court that he met PW1 after he was arrested at Hluthi Police Station where PW1 had come to explain how he treated him and also to explain the "muti" which was found in his possession. At the police station PW1 had a letter which was talking about how PW1 was to treat him. That the letter was from his sister. That this was the same letter he had given him in 1996. The accused stated that it was not true what PW1 told the

court that he came to him and asked for “muti” to evade soldiers manning the border. Further that he was not telling the truth that he told him that he had injured some women. He told the court that at some point PW1 was a resident at eZindongweni at Sidvwashini Prison. That they were cell mates at “eZindongweni” they discussed their respective offences and even showed him the summary of evidence in his case. That they discussed their cases every day.

The accused went further at length to explain the circumstances surrounding the issue of the knife. He told the court that he had hidden the knife at Block H on a prior occasion where a security guard approached because they had gone there with some boys to set up some snares in the forest unlawfully. The police when they came for the “muti” they asked him why he did not have a knife. He told them after a heated argument that he did not have the killer knife. The police ended up saying that he should give them any knife that he used whilst at home. That is when he led them to Block H where he had hidden a knife after a failed attempt at hunting game. He told them that this knife was not connected with the offences they were preferring against him. The police told him that they will not release his mother unless he produced the knife. That it was not true that they went to Block H two days after his arrest but went there after two weeks after his arrest.

Accused denied that he stabbed the two women as he was at Pongola. That he does not own a mask with a big red nose and also that the white cap was his.

This is about the extent of the accused testimony.

He was cross-examined at length by the crown. It was put to him that the story that he gave in chief about the knife was never put to Shabangu the investigating officer in this case and thus it was mere fabrication. The accused denied despite relentless cross-examination that he killed the deceased and stabbed the complainant in count two. That PW1 was telling lies that he told him that he had injured two women in Mankayane.

At this point the accused called PW2 Chief Officer Gule who told the court that he admitted the accused at “eZindongweni” and that PW1 was also resident there.

When the crown was to cross-examine this witness Mr. Sibandze for the crown applied that the evidence of this witness should be expunged from the record holding the view that the

testimony of this witness had nothing to do with the killing of one woman and the injuring of the other at Mankayane. His testimony is that PW1 Mavuso and the accused were resident as inmates awaiting trial at Ezindongweni. Mr. Sibandze contended that all these matters have nothing to do with the issue of the killing. It is to attack the credibility of PW1, which is collateral. He argued further that answers given under cross-examination on credit are final and cannot be contradicted (see ***Hoffmann's Zeffert on The South African Law of Evidence (4thED) at page 464).***

Mr. Sigwane on the other hand took the view that the evidence of this witness falls within one of exceptions to that general rule mentioned by the learned authors at page 466 of the same text. Mr. Sigwane argued that this evidence is highly relevant to establish the accused person's defence. However, the court ruled in favour of the crown and held that the evidence of this witness was inadmissible within the ambit of the principle discussed by ***Hoffmann and Zeffert (supra)*** at page 464 and thus expunged from the record.

At this point the court heard submissions from both sides.

The crown adopted its submissions made when the defence made an application for the accused discharge in terms of ***Section 174 (4) of The Criminal Procedure and Evidence Act (as amended).*** Briefly put those submission were that the crown was basing its case on a narrow margin. What the court is to look at is to find accused guilty on his alleged admission to PW1 at Hluthi that he had injured two women in Mankayane and connect that with accused pointing out a knife at Block H. That the court should draw an inference that the accused was the one who killed the deceased and stabbed the complainant in count two. This is essentially the case for the crown. Further, the crown attacked the evidence of the accused in chief and as well as in cross-examination that he was not a credible witness in that he was not telling the truth about his whereabouts and confused the times he was in Swaziland. On the evidence of the complainant in count two that of identification of her attacker as the accused conceded that this type of identification was weak but it is not inadmissible.

Mr. Sigwane on the other hand gave a long address to the court and also maintained that the submissions he made at the close of the crown case still stand. He submitted that the approach being adopted by the crown and the court in its ruling in terms of ***Section 174 (4) of The Criminal Procedure and Evidence Act (as amended)*** was not only narrow but also too

simplistic. The crown has not proved all the elements of the crimes preferred against the accused beyond a reasonable doubt. That here we are dealing with a highly technical matter to establish whether the crown has made a case beyond a reasonable doubt.

Mr. Sigwane attacked the evidence of PW1 the “inyanga” as incredible and that his evidence does not take the crown case any further. That it has been established that accused was with PW1 at “eZindongweni” at the remand centre and it would be dangerous to believe this man. That PW1 is an unmitigated liar who lies for no apparent reason. Why would he want to conceal that he was with the accused at Sidvwashini prison. PW1 told the court that the alleged admission took place in winter which is consistent with the crown’s analysis of the seasons. It could not have been in March in that PW1 said came to him in 1997 and it was in winter. If it happened in winter it happened well after the death of the deceased and the attack on PW3. According to Mr. Sigwane such discussions between PW1 and the accused took place at Sidvwashini. Mr. Sigwane further contended that the evidence of the accused was not contradicted by the crown in this regard and thus remains uncontroverted. Accused said he discussed the charges with PW1 and this was not challenged by the crown in cross-examination. They even discussed the summary of evidence.

There is no corroboration of PW1’s evidence as regards his encounter with the accused at his homestead. Further, that its strange why the accused would not ask for “muti” to cleanse himself as Pw1 admitted to the court that he was capable of making “muti” for a person to evade arrest or win a court case but opted to ask for “muti” to evade soldiers at the border where on prior occasions he cross the border illegally without such supernatural assistance.

Mr. Sigwane further contended that accused conduct of coming back to Dvudvusini with his wife from Pongola is not consistent with a guilty person. Mr. Sigwane further pointed out an anomaly in the evidence of the complainant in count two that if she knew who her attacker was why did the police not pursue the accused there and there instead of arresting almost all members of his family. The duration between the killing and the arrest of the accused is about a month. Police officer Shabangu did say that complainant told him that he had been stabbed by the accused. The question is why she did not say that she was stabbed by her nephew. According to Mr. Sigwane this explains why so many people were arrested in connection with these offences.

Mr. Sigwane also made an important observation that there is no reason why the child who raised an alarm on seeing a man approaching complainant's hut was not called to give evidence. This witness could have corroborated that of Pw1. She was not called because the police were firing in the dark and it was in these circumstances that the accused produced a knife as people were roped in the police were desperate. This was a desperate arrest.

Further, after the police found "muti" in the possession of the accused they took him to Hluthi Police Station so that he meets PW1. Nothing came out of the encounter. PW1 never said anything about that encounter at Hluthi Police Station.

Mr. Sigwane then went on to address the court on the evidence of PW3 that it was not only weak but hopeless and should be rejected. There are so many loopholes.

On the evidence of the pointing out Mr. Sigwane directed the court's attention to the case of ***Rex vs Magungwane Shongwe and others 1986-87 (1) S.L.R. 427 at 431 (C-E).*** The mere fact of pointing out a thing does not presume guilt in law. How is the knife linked with the killing of the deceased and the assault of the complainant. The evidence of the interrogation is irrelevant and inadmissible as we do not know the nature of the questions put to the accused by the police. There is nothing which ties the knife with the commission of the offences. There has to be relevant. The knife was in the possession of the crown but it was never shown to the crown witnesses, more particularly PW3 who said prior to being stabbed she saw something flashing in her assailant's hand. She never identify the knife before court, in fact, she never show the knife. Mr. Sigwane is of the view on this point that this is a knife in the air that we have before court.

Mr. Sigwane further directed the court's attention to the case of ***R vs Busisiwe Dlamini 1977-78 S.L.R. 43 at page 47*** on the cardinal rule on the requirements to be met before a court can make inferences from a set of facts.

Mr. Sigwane furthermore, argued that the security guard at Block H was never called although he was cited in the crown's summary of evidence. Further that the white cap retrieved by police officer Shabangu at Pongola was not connected with the accused in that no evidence was led to prove that this cap belonged to the accused and that it was the white cap worn by the male who attacked the deceased

These are the submissions by counsel in this case. I am indebted to them. I have carefully looked at the evidence in its totality and considered the submissions by counsel and the authorities I was referred to.

It cannot be gainsaid that these offences perpetrated on these women were so heinous that they defy any description. However, the court has to follow the laws of evidence and criminal procedure. In order to obtain a conviction, the prosecution must prove the accused's guilt beyond a reasonable doubt. The onus or burden rests on the prosecution because in law an accused is presumed innocent until found guilty. This means that the accused person does not have to prove that he is innocent. The prosecution must cover adequately every substantive element of the crime as defined in criminal law which the accused is alleged in the indictment to have perpetrated, by presenting concrete and admissible evidence in order to prove that the accused is guilty.

Due to the presumption of innocence, every person is regarded as innocent until properly convicted by a court of law. The adverb "properly" involves, ***inter alia*** compliance with the rules of evidence and criminal procedure. A conviction is an objective and impartial official pronouncement that a person has been proved legally guilty by the crown (prosecution) in a properly conducted trial, in accordance with the principle of legality, i.e. in a trial where the crown obeyed the rules of criminal law, criminal procedure and evidence. A person may in the public's subjective view be factually or morally guilty of a crime, but that does not say that he will or can be proved to be legally guilty. In a state under a rule of law, only legal guilt counts, to "convict" a person in any other way may amount to vigilantism, mob trials and even anarchy. If an accused is convicted by a trial court, but is acquitted on appeal because the higher court finds that a rule of evidence required some evidence, which is crucial to the crown's case, to have been excluded at the trial (eg evidence improperly obtained after the accused was tortured by the police), it would be wrong to say that the rule of evidence has caused a criminal to go free; it has simply caused a person who had been presumed to be innocent from the outset to continue to be presumed (labelled) innocent because the crown could not prove his guilt with due regard to the requirements of the principle of legality – the ***status quo ante*** remains. If there is a reasonable possibility that his version may be true, this "possibility" need not be a probability. If there is a reasonable doubt that every single element of the offence has been proved, the accused gets the benefit

of it. ***In dubio pro reo*** (see ***Criminal Procedure handbook (2nd ED) by Geldenhuys and Joubert at 5 and 6).*** There is nothing in criminal law as a narrow approach as a standard of proof otherwise courts of law would be rendered automatically obsolete.

This therefore, is the legal background in which the guilt or otherwise of the accused is to be determined. The quatum of proof is big and anything less would constitute a travesty of justice.

Now reverting to the facts in the case in ***casu*** it appears to me that Mr. Sigwane is correct in most of his submissions, more particularly that it would be highly dangerous to convict on the narrow approach adopted by the crown and confirmed by the court at the close of the crown case – ***albeit,*** viewed restrospectively to be incorrect.

I will start with the evidence of PW1 the inyanga. His evidence is highly suspect in that it would be dangerous to accept it in that he has proved to this court to be an unmitigated liar. He lies for no apparent reason. Why did he have to lie that they were together with the accused at "eZindongweni" he hid that fact under relentless cross-examination. The big question is why? Thus I reject his evidence in ***toto*** as to his meeting with the accused at his homestead where accused is alleged to have told him that he has injured two women as a work of fiction. Why would the accused ask for "muti" to evade soldiers at the border when he had on prior occasions done so without such isoteric assistance. If the story is to be believed why did the accused ask for "muti' to evade detention of this crime which PW1 was capable of concocting. This is strange, indeed. Further, we are not told what transpired when the police took the accused to meet PW1 at Hluthi Police Station. The statement by PW1 was not entered as evidence the crown wittingly or unwittingly omitted to call a police officer to hand it in as it has intimated. The last were heard about that statement was that it was to be handed to the Registrar and when the court reconvened to determine its admissibility or otherwise. Here there was a loose end on the part of the crown.

Now coming to the evidence of the complainant in count two the crown itself conceded that her evidence of identification is weak but not inadmissible. According to the writers ***Hoffmann and Zeffert at page 612 (supra)*** it is generally recognized that evidence of identification based upon a witness's recollection of a person's appearance is dangerously

unreliable unless approached with due caution. The Appellate Division in ***S vs Mthetwa 1972 (3) S.A. 766 (A)*** laid down as follows:

> "Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight: the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait, and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities".

The learned writer went further to state that the average witnesses ability to recognize faces is poor. On the question of identification, therefore, the confidence and sincerity of the witness was not enough. As Williamson JA has said:

> "The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence".

The evidence of identification requires to be closely scrutinized. In ***R vs Shekelele 1958 (1) S.A. 636 (T) at 638,*** Dowling J said:

> "Witness should be asked by what features, marks or indications they identify the person whom they claim to recognize. Questions relating to height, build, complexion, what clothing he was wearing and do on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistake".

The evidence of PW3 is thus suspect in that respect it would have been boosted if the small child was called to come and give evidence as she might have seen who this male figure was moreso, the accused was their neighbour and also a relative. The crown blundered in not calling this child who as I have already said might have shed more light on the identity of the attacker that fateful morning.

Further, on this witness it is very strange that the crown does not show her the knife which is alleged to have been used in the commission of the offence. She mentioned in her evidence-in-chief that her attacker flashed a shining object. She might have identified the knife as the one which was carried by her assailant. The strange thing is that the knife was here in court. This created a glaring loophole in the crown's case because this evidence might have linked the knife with the attack and also link the accused person to the commission of the crime.

Another uncanny aspect of this witness's testimony is that after she was stabbed by her attacker she did not lose her consciousness until she was conveyed to Mbabane Government Hospital if her story is correct that she saw that it was the accused who attacked her why wait for about a month to tell the police that it was her nephew the accused who attacked her, or tell any other people who attended her after the stabbing. In that kind of scenario she must have been asked by the other residents who attended her as who had done this ghastly deed. She would have easily have said it was the accused her nephew. But that was not to be. She reports to the police a month later after almost all members of the accused family had been arrested including his mother who was kept in custody for two weeks and charged with the offences of murder and the attempted murder of PW3.

It is clear, therefore, from the aforegoing that the evidence of this witness is not only weak but hopeless and should be rejected as regards identification.

Another piece of evidence is that of the security officer of Block H who is cited as a witness in the crown's summary of evidence but this witness was not called. This witness might have contradicted the evidence of the accused person given in chief.

Now the only evidence that remains is that of the accused pointing out a knife in a forest at Block H kilometres from his homestead. Is this evidence admissible in law? To answer that I was directed to the case of ***R vs Magungwane Shongwe and others 1982-86 (2) S.L.R. 427 at 431 (C-E)*** where Hannah CJ dealt with the evidence of pointing out in the following manner:

> "The South African sub-section expressly distinguishes between (1) things pointed out by the accused, and (2) facts or things discovered in consequence of information given by the accused whereas or Section make no such distinction. Our Section refers to specifically to facts or things discovered either in consequence of a pointing out or in consequence of information given. In my opinion, the difference in wording between the two sub-sections is an important one. Whereas under the South African Legislation, " mere pointing out, which is an act of the person under trial himself, is sufficient by itself to prove his knowledge of the thing pointed out or some facts connected with it (see ***R vs Tebetha 1959***

> ***(2) S.A. 337 (A) per Hoexer JA at 346 D),*** in our sub-section it is not the evidence of pointing out which is admissible but the "evidence that any fact or thing was discovered in consequence of the pointing out".

It appears, therefore, from this ***dicta*** by the learned Chief Justice Hannah (as he then was) that in the case in ***casu*** the evidence of pointing out of the knife by the accused at Block H which is sought by the crown to be admitted cannot be in view of the ***ratio decidendi*** in the aforegoing case.

Further on the issue of pointing out officer Shabangu (PW7) testified that he cautioned the accused in accordance with the Judges rules. On the 7th April, 1997 the accused to him something and on the 9th April 1997, the accused took him to a forest called block H there he produced a knife. The sheer weight of legal authority seem to indicate that the pointing out by the accused of the knife subsequent to the caution did not go far enough. He should also have been warned that he need not point out anything before he did so. To this effect I defer to case of ***Alfred Phekwa and another vs Rex Criminal Appeal No.21/1994, (unreported).***

In that case a warning had been given in terms of Judge's Rules to an accused by a police officer. The accused subsequently pointed out certain items linking him to the crime with which he was charged to another police officer, a Detective Sergeant Mamba, who did not give him a similar warning prior to such pointing out. The Court held the evidence as to such pointing out to be inadmissible. Browde JA who gave the judgement of the Court referred to the case of **JULY PETROS MHLONGO AND OTHERS VS REX (CASE NO.155/92)** where this Court approved the decision of the South African Appellate Division in **S VS SHEEHAMA 1991 (2) SA 860 (AD)** where the following was said:

> " A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which ***prima facie*** operates to his disadvantage and it can thus in an appropriate case constitute in extra-judicial admission. As such, the common law, as confirmed by the provisions of Section 219A of the **CRIMINAL PROCEDURE ACT 51 of 1997,** requires that it be made freely and voluntarily."

For a pointing out to be made freely and voluntarily, a warning to the accused in terms of Judge's Rules would be necessary. As Browde JA said in regard to the pointing out by the accused in Shekwa's case:-

> "In this regard it was, in my opinion, essential for Detective Sergeant Mamba to have said, if such was the case, that he warned the appellant according to Judge's Rules."

This is compounded by the fact that the knife was never sent for forensic test to determine whether there were any blood stains which might have boosted the crown's case. The knife was not shown to the only witness who saw a flashing object to say whether it was the knife that was used in this attack.

In conclusion, it appears to me that crown is of the view that the court should speculate on broad possibilities. The accused person might conceivably have committed the murder of the deceased and the attempted murder on PW 3, but the quantum of proof and probabilities seem entirely against it. This is against the principles governing the court in reasoning by inferences (see regarding the very important cardinal rules of logic in the case of ***Blom 1939 A.D. 188*** and also the local case of ***R vs Busisiwe Dlamini 1977-78 S.L.R. 43 at 47*** where

those principles were adopted). The case for the crown is based on a narrow margin which is an unheard of legal standard (if I may call it that) in criminal procedure.

The ***onus probandi*** lies with the crown to prove its case beyond a reasonable doubt. In the instant case the crown has failed to discharge that onus and the accused is thus found not guilty and is acquitted forthwith.

S.B. MAPHALALA
JUDGE