

CRIMINAL CASE NO. 47/97

In the matter between

REX

And

DUMISANI FAKUDZE

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. D. WACHIRA
MR. C. NTIWANE

JUDGEMENT

Maphalala J:

The accused person is charged with the murder of Jobe Simelane. It is alleged by the crown that upon or about 2nd September 1996 at or near Mbhoke area in the District of Lubombo, the accused did unlawfully and intentionally kill Jobe Simelane.

The accused person pleaded not guilty to the crime. The crown is represented by Mr. D. Wachira and the accused defended by Mr. C. Ntiwane.

By agreement the evidence of PW15 Thoko Mamba according to the crown's summary of evidence was dispersed with and thus the identity of the deceased is not in issue.

The crown called fifteen witnesses to prove its case. The first crown witness called was Albert Mathobela who told the court he knew the accused person as they grew up together. He also knew the deceased as well. On the 2nd September 1996, he saw the deceased person. The deceased collected him in his car. He was from Manzini going to Mbekwe area. It was 3.30pm. He also saw the accused that day. They met up with the accused when they were climbing the hills at Nsingweni. The accused was also driving a motor vehicle. When they were about to meet the accused motor vehicle, the accused stopped his motor vehicle on the road. The deceased branched his motor vehicle into the bush. The accused then chased the deceased motor vehicle. He chased him to a pit where it could not move any further. The deceased then stopped the motor vehicle. The accused was running after the deceased motor vehicle. The deceased then alighted from his motor vehicle. The deceased then started running. The accused did not hit him then. The accused returned to his motor vehicle which was on the road. He drove his motor vehicle in a bid to block the deceased. As they (PW1 and others) were left in the deceased motor vehicle they heard a gun shot at the direction in which accused motor vehicle went. The gun shot

went twice. They then alighted from the deceased motor vehicle and took their possessions in fear and ran away. They did not go to the scene but ran away. He was with Fungile Fakudze and Nester Thabsile Ndlovu who were his fellow passengers in deceased motor vehicle.

The witness told the court that the deceased was a taxi man and was driving a red sedan. The accused was driving a white van. The incident took place at the road leading to Mbokwe next to St. Anthony.

The accused parked his motor vehicle in the middle of the road. The deceased motor vehicle could not pass through. Fungile started crying and praying. The accused had something in his hands. He was carrying a firearm. The firearm is the one for hunting wild game. He did not see who fired the gunshot. The deceased never came back. He never saw the accused again that day. This is about the extent of PW1's testimony.

PW1 was cross-examine at some length where in my opinion he stuck to his evidence-in-chief except some minor slips as to the distances and time. The witness maintained under relentless cross examination by Mr. Ntiwane that he saw the accused carrying a firearm and later chased the deceased in his motor vehicle. He then heard gunshots where the deceased and the accused had disappeared. He told the court under cross-examination and also in chief that the reason the accused did not shoot the deceased was because one of the women he was with pleaded with the accused not to shoot the deceased.

The crown then called the evidence of its second witness PW2 Fungile Fakudze who was with PW1 when the incident took place. She is the one who had hired the deceased taxi. She was with Nester Thabsile Ndlovu. She told the court that she was also a resident of Mbokwe area. She knew both the accused and the deceased.

The deceased was her pastor in a church where she worships. On the 2nd September 1996, she saw both the accused and the deceased. She was from Mpompotha area and she had hired the deceased in his taxi. They travelled with him and as they were to reach a certain Mthethwa homestead the accused person approached. The accused put on his hazard lights on his motor vehicle. He stopped his motor vehicle and alighted from it. He was carrying a gun and deceased branched into the bushes. He alighted from his motor vehicle and ran away. The witness at that point cried. The accused was driving a white Ford Bakkie and was from Mbokwe to Mpompotha. She said they were coming from the direction in deceased motor vehicle with other passengers. The time when this took place was between 3.30pm to 4.00pm. Thereafter they all alighted from deceased motor vehicle in fear of the accused and ran away. She said the deceased ran away when she started crying. She did not say anything except that how can the accused kill the deceased in her presence. She thought the accused would kill the deceased. The accused did not say anything. She ran away to her home. She does not know what the accused did after that. She does not know if the deceased came back to his motor vehicle. The accused went to his motor vehicle he still had his firearm. That it was a long gun.

This is the extent of the testimony of this witness. She was cross-examined by the defence which suggested that she did not see the firearm carried by the accused because she was frightened out of her wits, but she said she saw what looked like a

gun.

The crown then called PW3 Tsembeni Mamba who told the court that she resides at Ngculwini, and that she occasionally visit Mbokwe area. She knew both the accused person and the deceased. On the 2nd September 1996, she saw the accused and the deceased. She heard the deceased raising an alarm for help. Then she saw the deceased being chased by the accused. They came to where they were and she was with one Michael Muntu Mamba who has since died (PW7 according to the crown's summary of evidence) Michael admonished the accused saying;

“Kahle (stop) Fakudze! mtwana wa Mandolwane (son of Mandolwane)”

The accused fired a shot and the bullet hit the ground. The deceased said to the accused;

“Stop do not kill me, let's talk, I will give you my permit!”

The accused then retreated and he loaded the firearm. He then turned and came to the deceased. The deceased ran away. She also ran away. The accused fired a shot at the deceased. The deceased was hit and he fell down. The deceased raised both his hands and cried. The accused then loaded another bullet and came to him and said:

“I have been always telling you!”

The deceased then spread his legs and died. The accused left the scene and joined Michael. He passed Michael. The time was about 4.00pm. The deceased before he died he said:

“Inyandzaleyo nangu Dumisane ufuna kungidubula” (Help! here is Dumisane he wants to shoot me!).

The witness told the court that she was 15 metres away from where the deceased was shot. The accused was about 2 metres from the deceased when he released the shot. The witness told the court that the gun that was carried by the accused that day was similar to the firearm which was exhibited in court.

This is the extent of this witness testimony. She was cross-examined at great length by Mr. Ntiwane for the defence. The witness was questioned as why the version she told the court was different to what is reflected in the summary of evidence prepared by the crown. She did not know the reason for the discrepancy. She maintained that what she told the court in chief is the true version of events that day. It was also put to her that it was impossible that the accused would miss the deceased at a distance of 3 metres. However, she maintained that it took place. It was also revealed in cross examination that accused was barefooted when this incident took place. This point as we will see was taken up by the defence when making submissions at the close of

evidence.

The defence attempted to punch holes in the evidence of PW3 in pointing out inconsistencies between her testimony and the crown's statement of agreed facts but the witness maintained her story that the true version is what she told the court in-chief.

It was also put to her that accused never shot at the deceased as he was from Sabelo Manana. The witness replied that she was not going to comment on what accused will say, but she saw the accused shoot the deceased.

The crown then called PW4 Sibongile Alice Nhlabatsi. She told the court that she was also a resident of Mbokwe and the accused was his brother-in-law as she was married to his brother in terms of Swazi law and custom. On the 2nd September 1996 at 4.30pm she saw the accused in her homestead. The accused said:

“Jobe had died accidentally in my hands using a gun”.

When he told me this PW4 was in the company of one Chicco who was also her brother-in-law. The accused came driving his motor vehicle and he parked it near the gate. He called them and told them about the matter. He requested that PW4 tell her father-in-law about this incident. PW4 told him that she was afraid to do that. She told him to go and tell his father himself. He then went towards the direction where his father was. Later he came back and asked her to pack his clothes. She gave him a sum of E50-00 to buy another bag to replace the bag he had taken. He then took his packed bag and went to his motor vehicle and drove off. She told the court that her father-in-law's name was “Mandolwane”. This is the extent of the testimony by this witness.

On cross examination the witness told the court that in her statement to the police she told them that she did not know anything about this matter. However, the police kept on bothering her at her homestead to change her statement and admit that she knew what accused had done. The police came to her several times at one point she was locked up for a day in a room at KaPhunga Police Station. The police were suggesting to her that accused told her that he had killed the deceased. These officers were Sibandze from Hlatikulu and there was one who wanted to beat you up was a Mazibuko. She also told the court that after the 2nd September 1996, she saw the accused at the KaPhunga Police Station and looked like a person who had been beaten severely as he was bleeding through the nose and his face was swollen with a whitish substance coming out of his pores. She went further that the truth of the matter is that the accused never admitted the shooting to her.

Under re-examination the witness changed her story and told the court that what she told the court-in-chief was what took place on the 2nd September 1996.

The crown then called PW5 Nomthandazo Mamba who is accused girlfriend. She told the court that on the 13th September 1996, she was at work as she is a bar-lady at the LaCasserole Restaurant here in Mbabane. The accused phoned at her place of

work. He was phoning from Nseleni in KwaZulu-Natal –South Africa. The accused asked her to visit him there. She visited him on the 23rd September 1996 at Nseleni in South Africa. The accused told her that he was in South Africa because Jobe (the deceased) has accidentally died in his hands. She did not ask him what he meant. Accused said that after he had submitted himself to the police she should look for a lawyer for him. He said he will submit himself to the police. He did not tell her how he had injured the deceased. The accused gave her a sum of E2,000-00. Thereafter she reported a statement to the police.

This witness was not cross-examined by the defence.

The crown then called PW6 Nester Thabsile Khulu. She told the court that on the 2nd September 1996, she met Fakudze who hired deceased taxi. They boarded the motor vehicle with Fungile and a certain Mr. Mathobela. As they were at Dikweni, they met the accused driving his motor vehicle. The accused stopped the motor vehicle and switched on stop lights. He alighted from the motor vehicle and he was carrying a firearm. The deceased motor vehicle in which she was a passenger and four others branched into the bushes it went down to a donga near KaLukhele's homestead. The accused came and pointed the firearm at the deceased. He did not shoot at him. The deceased then ran away. The accused went back to his motor vehicle. They then all took their bags and joined the road to their respective homes. This is about the extent of this witness testimony.

The witness was cross-examined at some length but she was not shaken at all.

The crown then called its seventh witness PW7 Phumaphi Mamba. She is also a resident of Mbokwe. She knew the accused as well as the deceased. On the 2nd September 1996, she was from KaPhunga where he alighted from a taxi and was heading for Mpompotha. She asked for a lift from a certain headmaster by the name of Mamba. Mamba told her that his motor vehicle was full as was carrying planks. Then the accused and the deceased came to the scene. Mamba suggested that she should approach the accused for a lift. She went to the accused who agreed to offer her a lift. The accused took her luggage and loaded it on to his motor vehicle. A Lukhele boy who was there took her luggage from accused motor vehicle. The accused took back her luggage and loaded it on his motor vehicle against the Lukhele boy offloaded it from accused car. Then the accused did not say anything he merely drove away. The accused was accused of being insolent in that he was conveying people in his car as a taxi yet he did not have a permit to ply the KaPhunga route. The deceased who was also there came to her and apologized for the manner she was treated because she was caught in a dispute where the accused was refusing to obtain a permit for a taxi in that area. Thereafter she left with Mamba the headmaster. She said when the accused left the scene and drove away he appeared annoyed.

This witness was cross-examined briefly where she revealed that she did not hire the accused taxi but asked for a lift as a favour.

At this point the crown called PW8 Enoch Mthethwa is also a resident of Mbokwe area. He told the court that he knew both the accused and the deceased. On the 2nd

September 1996, he was at home at KaMbokwe when he received a certain report. Acting on that report he went to the scene where he saw the deceased motor vehicle. He did not see the deceased at the scene. He found some people there. He then hired a car there and proceeded to look for the deceased. He was with one Nhlanhla Hlanze. They proceeded together to look for the deceased towards Mpompotha. Nhlanhla then saw accused motor vehicle, Nhlanhla then changed his mind and said he was no longer going with me and suggested that we run away. PW8 asked him to drop him but he refused. They proceeded up to a Dlundlu homestead. PW8 then went to Kubuta to make a phone call to the police. He informed the police about the deceased and what had befallen him. Thereafter they went to the scene where they found the deceased dead. He said he knew PW3 Thembeni Mamba and Michael Mamba who has also died. The latter was present at the scene when they saw the body of the deceased.

He said he saw accused motor vehicle whilst he was in Nhlanhla's motor vehicle. It was following them. The motor vehicle was in motion. It was travelling in another road from where the deceased body was to where he first saw the accused motor vehicle the distance would be 1.5 kilometres. He said when he saw accused motor vehicle the time was around 4.00pm. He told the court that it will not be the truth for accused to say that at about 4.00pm he was at Mpompota filling up petrol in his motor vehicle. This is about the extent of this witness testimony. He was cross-examined by the defence. Under cross-examination he told the court that the accused was not chasing them but was following them. That it would not be true that the accused was at Mpompotha at 4.00pm because he saw accused motor vehicle 30 minutes after he had called the police. He further maintained that he saw the police talk to Thembeni.

The crown then called PW9 Simon Mandolwane Fakudze who told the court that accused is one of his sons. He has four wives and twenty-eight (28) children. He owns a licensed firearm. He showed the court the various licences for his guns. He deposed that he went to visit the accused at KaPhunga Police Station although he is not sure on which date. The accused had been arrested. He did not have much time to talk to him. The accused talked to him for a short time. He was in the company of police officers. The accused told him that he used a shotgun to kill the deceased. He did not tell him why he killed the deceased. They did not have much time to talk because the police kept on pushing the accused. The accused told him that he had taken the firearm from the homestead of KalaDlamini one of PW9's wives. PW9 said he knew the deceased who was like a brother to him. He further told the court that he asked the accused how he found the firearm and also how he used it because the ammunition was still intact and it appeared as if it has not been used. Before the accused could answer the police took him away.

The witness further told the court that the relationship between the accused and the taxi men in the area was sour in that the others accused him of disturbing their operations as he did not have a permit to operate a taxi in that route.

On the 8th February 1996, PW9 was called by Inspector Mdluli, he found the accused there. He told him that there has been a complain from the other taxi operators that the accused was disturbing their business because he did not have a licence and was a pirate. The accused denied the complaint. Inspector Mdluli then warned the

accused that if he proceeded to operate the taxi business without a licence the police will impound his motor vehicle.

The accused replied that he only gave lifts to his relatives and girlfriends. This witness told the court that he did not see the accused when the deceased was killed neither did he see his motor vehicle.

He heard the news on a Tuesday that the accused had killed the deceased. This witness was cross-examined at great length by the crown where he told the court it was not the accused who pointed the firearm to the police but the police came and demanded the firearm. He said that the firearm appeared not to have been used according to his observation. He said the firearm was kept in the homestead of one of his wives and the ammunition kept in the homestead of another. Where the firearm was kept anyone had access to it as the room where it was kept was not locked. He said further under cross-examination that when the police first came to him they said they wanted the accused yet the accused had already been arrested. When he went to KaPhunga police station after being called by the police he observed that the accused face was swollen and he was bleeding. It appeared as though he had been severely beaten. The accused when he said he had killed the deceased he did not say this freely and voluntarily as the police were pushing and jostling him around the office where they all were. He also told the court he was also harassed by the police who hurled insults at him. However, when this witness was re-examined by the crown he told the court that the accused was not assaulted by the police in his presence.

The crown then called PW10 1371 D/Sergeant Edward Fakudze who told the court that on the 23rd August 1996, he was based at KaPhunga police station when a certain Lukhele phoned him from Mpompotha. He told him that as taxi operators they were having problems with the accused who was operating a taxi without a permit. This Lukhele asked him to call them together in order to discuss about the matter. On the 2nd September 1996, he together with other police officers went down to Mpompotha where they called all the taxi operators of the area. The accused was also present.

He asked the accused to relate his side of the story. The accused said he will continue to carry the people and he was not prepared to apply for a permit. PW10 advised him that it was illegal to operate a taxi without a licence. He further told him that as police officers it was their duty to go to Mpompotha to see what he was doing. The accused was adamant and said he was going to go on and operate illegally. Even the other people tried to explain to him, but he was not prepared to listen. Then the meeting closed in that note. The meeting took place in an office at the police station and it took about 15 to 20 minutes. The witness further told the court that he later heard that the deceased was killed on the same day in the afternoon. This is the extent of this witness testimony. He was also cross-examined by the defence.

The crown then called PW11 Dr. C. Rammohan who told the court that he is employed by the Swaziland Government as a pathologist. He told the court that he hold a post-graduate degree in forensic medicine obtained from the University of India. That he has worked as a Pathologist for 30 years. He went on to read the postmortem report he compiled after examining the deceased. He said the pellet that

killed the deceased entered into the chest cavity and went through the right lung. The pellet entered the armpit. Four pellets were recovered from the lung and three pellets were found in his chest muscles. A plastic cover of the cartridge was found lodged in deceased armpit. All in all, seven pellets were found inside the body of the deceased. The seven pellets were entered as exhibit "4" and the plastic piece found underneath deceased armpit was entered as exhibit "5" for purposes of identification.

The doctor opined that the injuries sustained by the deceased are consistent with a person who has raised his hands during the shooting. He told the court that the cause of death of the deceased was "haemorrhage and shock consequent to shot-gun injury". The postmortem report was entered as exhibit "B". He said he handed the report to a police officer from KaPhunga police station. The direction of the wound was from right upwards and down and up. The witness was cross examined briefly where he told the court that he did not see any gun powder on the deceased clothing. Further that according to his observation the accused was shot from the side not from the back.

The crown then called PW12 Eric Hlandze. He told the court that he was also a taxi driver resident at Sithobelweni area. He knew both the accused and the deceased. He met these two at the taxi rank at Mpompotha. The accused had a motor vehicle, but he did not have a permit to operate as a taxi. The deceased had a permit for his taxi. On the 2nd September 1996, he attended a meeting at KaPhunga police station. They had gone there to ask the police to protect them as the accused was operating without a licence. He was with one Philani Lukhele and the deceased. The accused was also in attendance. The police warned the accused that he was tailing their customers and if he wanted to trade he should apply for a licence. He refused and raised his voice and told the police that he was going to do so unless they built a road in mid-air. He also said he was going to finish them off. The police tried to calm the accused down, but he maintained his attitude and had no respect for the police. The police officers told him that if he continued they were going to arrest him. Later in the day he met Mthethwa who is a pastor. They met at Sinkweni at a hill. He stopped him and said the witness accompany him to hospital to take the deceased to hospital as he had been just shot. When they alighted from their motor vehicle to see where the deceased was, they saw the accused car coming towards them. They then drove off running away for about ten kilometres. The accused then overtook them. The witness braked his motor vehicle and made a u-turn and drove back to Sithobelweni police station to report the matter. He did not see deceased body neither did he see his motor vehicle.

This witness was cross examined at some length by the defence.

The crown then called PW13 Constable Nhlengethwa who told the court that on the 2nd September 1996, he was stationed at Hlatikulu police station. His duties was that of a photographer and to make sketch plans of scene of crimes. On the day in question he received a report concerning the case before the court and acting on that report he went to the scene of crime. He found some police officers at the scene and they gave him certain information. He proceeded to take photographs of a dead body of a human being. He observed that the corpse had a wound on his right arm. It looked like a gunshot wound. He took a photograph of the wound. He then drew a

sketch map to indicate the position of the body and the area on which the body was found. One police officer Super Dlamini showed him a green spent cartridge. He then went to where the deceased had left his motor vehicle.

On the 21st October 1996, Constable Goje came with a shotgun and he asked him to seal it. This shotgun had serial no H09083 embossed on it. There was also a green spent cartridge that was found at the scene. He then sealed these two items and sent them to the police headquarters in Mbabane for them to send them to Pretoria/South Africa for forensic analysis. The witness identified and handed the photographs presented to the court and they were entered as follows:

- 1) The one marked "A" shows the deceased with one of his wounds lying facing down.
- ii) "B" and "C" shows a picture as the deceased was before he was turned over.
- iii) "D" shows where the deceased motor vehicle was
- iv) "E" shows two photographs they depict the deceased motor vehicle and show that it did not have number plates "(E1)".
"E2" show a picture of the deceased motor vehicle which is standing next to a donga.
- v) "F" shows a rear view of the deceased motor vehicle. It also shows clearly its number plate and that the motor vehicle was in the middle of a bush. The photographs were entered collectively.

The witness also identified and handed to court as part of the crown's evidence the sketch plan which he drew at the scene of crime. The sketch plan was entered as exhibit "D". The witness read to the court the sketch and marking up pertinent landmarks and homestead. The witness also mentioned that the sketch plan was not drawn to scale. This is the extent of this crown witness testimony. He was cross examined by the defence and it was put to him that prior to him taking the pictures, the body of the deceased had been moved. He maintained that it had not been moved. It was also put to him that police officers who first came to the scene removed his shirt as PW13 found him shirtless. He also answered negatively that it was not true that the other police officers removed his shirt. From the cross-examination it emerged that the sketch plan had a number of inadequacies i.e. that he did not include in the sketch plan the forest which featured prominently in the evidence of the other crown witnesses. He also revealed that he did not pick up the

empty cartridge on the ground, but was given by one of the police officers Super Dlamini and he could not tell the court where the cartridge came from.

The crown then called PW14 Dumisane Lukhele who is also a resident of the area. He told the court that on the 2nd September 1996, he was at home. He saw a taxi standing next to the trees. He saw people in and outside the taxi. He also saw the accused carrying a firearm. After that he saw the accused going back to his motor vehicle and then he drove down. He did not see anything thereafter. He then heard gun shots later. From the time he saw the accused driving down to the time he heard the gun shot the period was about three to four minutes. He did not see the deceased that day. The time was about 3.30pm.

He saw accused motor vehicle again after the gunshots. He heard two gunshots. When he saw the accused motor vehicle for the second time it was proceedings to Mpompota. The witness told the court that the sketch plan by Pw13 does not reflect the scene of the. His homestead is the one marked "K". This witness was also cross examined at length by the defence.

The crown then called PW15 D/Constable Super Dlamini who told the court that on the 2nd September 1996, he was at KaPhunga police station. At about 4.00pm he got a report that one Jobe Simelane has been killed. He together with other officers proceeded to a place called Sikweni where they found the body of the deceased. They found many people at the scene and the body of the deceased was covered with a bed sheet. He went to check after he was told that the deceased was still alive and peered under the sheet and he confirmed that fact. He saw that the deceased was wearing a maroon shirt which he took off to see the injuries. He saw one big wound on the right upper arm. Blood was flowing through his mouth, nose and ears. He then saw that he was dead. He covered him again and called the scenes of crime squad to come over. As he was preserving the scene for them, the late Michael Mamba handed to him an empty cartridge. Also present was a sister to Mamba. He asked them how the deceased died and these two related the sequence of events leading to the death of the deceased.

The scenes of crime people came and inspected the body which was later take to Sithobelweni and thereafter to Hlatikulu mortuary. The body was subsequently taken for an autopsy where a number of pellets were taken from the body of the deceased. He took the pellets as exhibits in this case and also the empty cartridge.

They then started to conduct their investigation and concentrated them at the home of the accused. On the 12th September 1996, he got a tip-off that a gun was used in the commission of the offence and that the gun belonged to accused father Mandolwane. He proceeded to accused father and found the firearm. He also found some cartridges which were similar to the one found at the scene of the killing. He then took the firearm and handed it to ballistic experts together with the cartridges. He gave these to the scene of crime squad at police headquarters

Then he got information from accused girlfriend who informed him that the accused was in South Africa at Mpangeni and she had already given him some money to

instruct an attorney on the 9th October 1996. He then proceeded with other officers to Nseleni in South Africa. They found the accused and introduced themselves as police officers from Swaziland and told him that they are investigating about the death of the deceased who had died in Swaziland. They told him that they did not have authority to arrest him, but his name has been implicated. They asked him if he would not mind coming with them back to Swaziland. The accused agreed because he wanted to come back, but had not used a passport to enter South Africa. They told him that they will sort that out with their South Africans counterparts. They crossed the border to Swaziland on the 10th October 1996, went through the Lavumisa Border post. They then took him to KaPhunga police station where they cautioned him in terms of the Judges Rules. On a Friday they took him to the Magistrate Court for a formal remand. On Saturday his father called to see the accused person in custody. They then proceeded to the accused homestead where the accused pointed to where he took the firearm in a house belonging to his mother. The room was not locked. They again cautioned the accused in terms of the Judges Rules and thereafter charged him for the crime of murder.

The witness told the court that he recorded a statement from Sibongile Nhlabatsi and from his girlfriend. He also obtained a statement from the accused father. PW15 told the court that the accused was not assaulted as there was no need to do so as this was a straight forward case. This is about the extent of this witness testimony.

This witness was cross-examined at great length by the defence. He told the court under cross examination that he removed the deceased shirt in order to render first aid to the deceased as it was believed at that time he was still alive. It also emerged from this witness testimony that he recorded a statement from accused girlfriend who said accused had instructed her to get a lawyer on the 17th October 1996. The witness further denied under intense cross examination that he assaulted the accused to admit to his father that he had killed the deceased.

The crown then called its last witness PW16 2418 Sergeant Gamedze, who told the court that he was based at Matsapha Police College as an Assistant Force Armorer. On the 30th September 1996, he was on duty when a shotgun serial no H09083 was brought to him by 2616 Dlamini for examination. He examined the firearm and found that it was serviceable.

The crown then closed its case.

The accused then gave evidence under oath being led by his attorney Mr. Ntiwane. The accused gave a lengthy account of his version of events. He told the court that on the 26th in the morning he left his homestead for Mpompotha driving his motor vehicle. Along the way he met three police officers from KaPhunga police station. One of them was a Middleton and the other a Fakudze. He stopped his motor vehicle and told them that he had heard that he had been called to come to the police station in order to discuss the misunderstanding amongst taxi operators as to permits. He told them that he could not make it that day as his motor vehicle was not in good shape. They asked him to appoint a convenient day and he chose a Thursday. The officer asked him to inform the other taxi operators of this change. He declined because he

said he was not in good terms with the other taxi operators and suggested that the police better inform them themselves.

He met the officer again that day who told him that he was required at the police station that day to discuss the matter as there was a Lukhele man who had insisted that the meeting be held that day. He went to the police station where the issue of permits was discussed. After the meeting he left the police station and went to Mpompotha where along the way he gave gogo Phumaphi a lift. She had asked for a lift from him because she had initially asked for a lift from a headmaster at Mbokwe. He afforded her the lift, but the Lukhele man prevented him to load the old woman's luggage into his bakkie. Lukhele was with others who came to him in an aggressive way and they looked like they were challenging him to a fight. He did not say much, but boarded his motor vehicle and drove home. He later went to Mpompotha. When he came from home he parked his motor vehicle next to a big tree. He took out a tyre pump to inflate his tubeless tyres. He pumped the wheel and finished. As he was taking the pump to the car, he heard loud sound behind him. He turned back, he heard a crying noise and he saw a motor vehicle disappearing into the forest behind him. He did not see who the owner of that motor vehicle was. He went to investigate what had happened and he saw people getting out of the motor vehicle and disappearing further into the forest. He recognized the motor vehicle as belonging to the deceased. He did not see the deceased there.

He further told the court that it was not true that at that place he was carrying a firearm neither did he talk to the occupants of the deceased motor vehicle. When he got to his car he placed the pump there and drove off to Mpompotha. He went there to pay a certain petrol attendant at Mpompotha. From there he left to check of his girlfriends. He did not find his girlfriend and decided to visit her grandmother near Kamfishane. As he was going to Kamfishane, he saw a van and he followed it and wanted to see who was the owner. He caught up with it gave him space and he overtook it. The van belonged to Malota Hlandze and he was in the company of Reverend Mthethwa. He never chased after Hlandze.

He then went to park his motor vehicle at home and then went to South Africa. The reason he went to South Africa was to check his aunt as he wanted to acquire South African citizen documents in order to get a job. He went through South Africa illegally. Eventually the police came to arrest him.

The accused told the court that PW3 and PW1 were telling lies against him here in court. The accused went on to give a lengthy account of how the police wanted to kill him forcing him to admit that he is the one who killed the deceased. They used all sorts of torture methods on him and insulted him with all manner of insults. Super Dlamini one of the police officer told him that when his father arrived at the police station accused should admit that he is the one who killed the deceased using his father's firearm. When his father came he was bleeding below his right eye. By force he said the words in the presence of his father.

The accused went on to tell the court that he heard the evidence of Sibongile that he told her that he had killed the deceased. He said he did not see her on the 2nd September 1996. He said all this witness told the court was not true. What is true is that he was with her sometime in September 1996 in South Africa. They were

relaxing together and she happen to say that if she knew that Mpangeni was near Durban, she would have brought more money so that she goes to Durban to buy goods for resale. He told her that she should have done a good thing because it was not safe to travel in kombies. She told her that he once saw the deceased motor vehicle involved in an accident.

This witness was cross examined at length by the crown. It was put to him by the crown that the crown witness at the scene had no reason to lie against the accused that he was carrying a gun and that he chased after the deceased. The accused replied that all these crown witnesses would lie against the accused, he replied that he did not know. When asked about the evidence of his girlfriend who told the court that the accused was at Nseleni in South Africa. He told her that the deceased died in his hands. The accused said she misunderstood her what he told her was that the deceased was nearly injured in front of him. He denied that he asked the girlfriend to look for a lawyer for him. The accused in cross examination told the court that the girlfriend was telling lies against him in all what she told the court in her evidence-in-chief. He also denied that he gave his girlfriend at Nseleni a sum of E2,000-00 to instruct a lawyer. The accused also told the court that the evidence of Sibongile Nhlabatsi was pure fabrication. He also told the court that the police officer's who gave evidence were lying against him. He admitted that he crossed the border to South Africa illegally and gave the court the impression that this was normal that at Shololo there is a gate where about 2,000 people cross the border without passport everyday. He was asked why he did not report to the magistrate on his first remand hearing that he had been tortured by the police the accused answered that he did not know that he was entitled to inform the magistrate. All in all the accused denied that he killed the deceased.

These are the facts for and against the accused in this case.

The court then heard submissions from both the crown as represented by Mr. wachira and Mr. Ntiwane for the accused.

Mr. Wachira argued that we have evidence of three witnesses who all told the court that they were passengers in deceased motor vehicle. When the deceased motor vehicle was to meet that of the accused, the deceased branched off into the bush. These witnesses told the court that the accused person was carrying a firearm which was similar to the one exhibited before court. At that time the deceased ran into the forest. Mathobela told the court that the accused drove down to meet the deceased. Thereafter, the three witnesses heard two gun shot emanating from the direction taken by the deceased and subsequently by the accused in pursuit of the deceased. Mr. Wachira argued that assuming that was the only evidence before court. The circumstantial evidence in this case at this juncture would have been sufficient to convict the accused person.

Mr. Wachira went on to contend that the court has the evidence of Lukhele the young man who told the court that accused is known to him and that accused came carrying a firearm and thereafter the accused drove down. He then heard two gunshots within a duration of about 2 to 3 minutes of the accused disappearance. He saw accused motor vehicle after the gunshot on its way to Mpopotha and on its way back. This evidence is corroborated by the evidence of PW1 Albert Mathobela.

Mr. Wachira went on to direct the court to the evidence of PW3 Thembeni Mamba who is the eye witness who saw the actual killing of the deceased by the accused. She told the court that the accused shot the deceased twice. She also told the court that at the homestead where the killing took place she was with his brother Michael who has since died. Her brother pleaded with the accused calling him the son of “Mandolwane” but the accused did not hear, but proceeded to kill the deceased.

Further that the court has the evidence of accused sister in law Sibongile Nhlabatsi who stated in her evidence in chief that accused came to the homestead on the day in question and called them and told them about the matter. Accused requested her to go and tell accused father that the deceased had died in the hands of the accused.

There is also the evidence of accused girlfriend Nomthandazo Mamba who told the court that the accuse called her to come to Nseleni in South Africa. The accused told her that the deceased died accidentally in his hands. Accused said he will surrender himself to the police. He gave her E2,000-00 to get a lawyer. She said she instructed Mr. C. Ntiwane. The defence did not challenge the evidence of Nomthandazo Mamba and thus remains uncontroverted. This evidence on its own can sustain a conviction according to the crown. Mr. Wachira went on to contend that the evidence of accused father is that the firearm was his.

There was a meeting that afternoon at the police station and it was found that the accused was the only one who had no licence to operate a taxi in that area. The accused chased the deceased for 2 kilometres. The intention was to kill the deceased. He fired the first shot which missed and again he loaded the gun and shot the deceased.

Furthermore the evidence of the investigating officer Super Dlamini is important in that he told the court how the firearm was retrieved .

In treating the evidence of the eye witness Mr. Wachira directed the court’s attention to the case of Rex vs Simelane and two others 1979 – 81 S.L.R. 251 in the treatment of the summary in terms of Section 88 bis of the Criminal Procedure and Evidence Act No. 67 of 1938 where Cohen J held that although the summary must be taken from the statements of witnesses for the prosecution, the witness concerned are not personally responsible for the contents of the summary. Save when there has been a clear departure on material issues, discrepancies between the summary and the actual testimony of a witness should not be over emphasized. This is especially so in the case of illiterate persons who would in most cases be too nervous even to correct a police officer’s error when the statement is read over to them as confirmation.

Turning to the accused person’s demeanor the crown is of the view that the accused was very evasive and the version he gave is outright false. Accused story has a lot of improbabilities. He is a man who is prepared to lie as evidenced by how he crossed the border to South Africa.

The crown urged the court to convict the accused of the crime of murder as the evidence before court is overwhelming.

In reply Mr. Ntiwane addressed the court at great length. He contended that none of the passengers in deceased motor vehicle saw the accused chasing the deceased. They did not see the direction which was taken by the deceased.

The accused denies that he was ever at the scene of crime. The main witness in this case is Tsembani and she has not been corroborated and thus it cannot be said that the crown has proved its case beyond a reasonable doubt. Mr. Ntiwane contended that the court is to take the evidence of this witness with a pinch of salt in that there was no way if his narration was correct that the accused would miss the deceased on the first shot if these two were so close as the witness would like the court to believe. Mr. Ntiwane concluded that she must have lied before court. He further argued that this witness did not see anything she could not identify the deceased assailant. Her story that the accused was barefoot when he pursued the deceased should be thrown out as there was no way the accused could drive a motor vehicle barefooted.

Lukhele told the court that he did not see accused motor vehicle stop. Hlandze's evidence corroborates that of the accused and also the evidence of Lukhele corroborates that of the accused.

Mr. Ntiwane then submitted that when the accused was arrested in South Africa he was not injured, infact he was as fit as a fiddle. But when he was brought before his father he was injured. There is no reasonable explanation as to the cause of the injury. The accused has testified how he got these injuries and they were also seen by her sister-in-law who gave evidence for the crown. Can it said that the accused made a lawful admission. The admission is not valid in law. Accused denies that he made an admission.

The court should reject the evidence of the sister-in-law and the evidence of Monthandazo Mamba can only be circumstantial. Mr Ntiwane further argued that whilst the crown alleges that the firearm which was exhibited here in court there is no evidence to provr that this was the firearm used to kill the deceased. The pellets exhibited in court were not shown by evidence that they were fired from this firearm. The police retrieved the firearm on their own and was not pointed out by the accused person. According to the *dicta* by Rooney J in the case of ***Rex vs Joconiah***. The firearm has not been proved to be the killer weapon.

Mr. Ntiwane urged the court to follow the ratio in the case of ***Rex vs Difford 1937 A.D. 370*** where Greenberg J were the standard to be used by the courts was aptly stated thus:

“No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is 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. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal”.

In the case in casu can it be said that accused version is false. The accused has no duty to prove his innocece. Finally he urged the court to give the accused the benefit of the doubt.

In reply Mr. Wachira submitted that the defence never challenged the evidence of the accused girlfriend who gave damning evidence against her own lover. Thus the evidence of the girlfriend remains uncontested. To support this submission Mr. Wachira cited the case of S vs P 1974 (4) S.A. 581 (A) where Macdonald JP stated the importance of cross-examination. On the issue of the evidence of Tsembani the eye witness the crown is of the view that in terms of Section 236 of the Criminal code the court can convict on the evidence of a single witness. This witness was not shaken in cross-examination and proved a credible witness.

On the issue of the firearm Mr. Wachira submitted that the force armoror gave evidence before court and the evidence of the pathologist is clear as to what was the cause of death. The accused himself pointed to the police where he found the firearm the previous day to the shooting. Further the defence should not be allowed to blow hot and cold on the evidence of Lukhele as to the time frame the events took place. The defence tried in cross-examination to show that Lukhele was poor with time but now when making submission uses that for its benefit. All in all the crown submitted that it has proved its case beyond a reasonable doubt for the court to safely return a verdict of guilty for the crime of murder.

These are the facts before the court. It is trite law that the onus probandi in criminal matters rest on the crown to prove its case beyond a reasonable doubt and no onus rests on the accused to prove its innocence. I have considered the evidence in its totality and also the submission made by both counsel. My view on the matter is that the crown has proved its case beyond a reasonable doubt. The evidence of the witnesses who were passengers in deceased motor vehicle on its own put the accused at the scene of the crime and more important that he had a rifle that day with which he pursued the deceased. I agree with Mr. Wachira in his summary as regards the credence of these witnesses. I do not see how three people can come to this court and tell lies against the accused whom they did not any gripe against him. I found that their evidence was truthful and was not wavered at all despite long and relentless cross-examination by the defence. Their evidence corroborated each other in all material respects and I have no reason to doubt its truthfulness. Further the evidence of Lukhele the young man also confirms that accused that day when he saw him he was carrying a firearm and thereafter he drove down. He then heard two gunshots. These two gunshots were also heard by the three witnesses who were passengers in deceased motor vehicle. He then saw accused motor vehicle after the gunshots heading in the direction of Mpopotha. This evidence is corroborated by the evidence of PW1 Albert Mathobela. Then I proceed to consider the evidence of the only eye witness in this case the old woman PW3 Thembeni Mamba. Her evidence was clear that she knew the accused and on that day she was at home with one Michael who has since died. When the deceased came running being chased by the accused brandishing a rifle, she described in gory details how the accused shoot the deceased despite Michael's pleas and also deceased last cries for mercy. The accused shot the deceased to death. The defence tried to discredit this witness in other aspects of what she observed but my view is that the body of her testimony remained intact.hj

Processing further to the evidence of accused sister-in-law Sibongile Nhlabatsi, her evidence put accused in bad light and it cannot be wished away. There is also the evidence of accused own girlfriend Nomthandazo Mamba who told the court that tehe accused called her to come to Nseleni in South Africa. She went there. The accused

told her that the deceased died accidentally in his own hands. Accused told her that he will surrender himself to the police. He gave her a sum of E2,000-00 to get a lawyer. She instructed Mr. Ntiwane. The defence did not challenge the evidence of this witness and thus it remains uncontrorveted. There is a bevy of authorities to the proposition of the weed for the defence to put as much of its case by cross-examination. I would refer to the dicta in the case of S vs P 1974 (1) S.A. 581 (A) by Macdonald JP at page 583 where the learned judge president stated as follows:

“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 almost certainly be a denial, so important is the duty to put the defence case that practioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court”.

Further Hannah CJ in the case of the King vs Dominic Mngomezulu and others criminal case no. 96.94 (unreported) at page 17 had this to say on this point:

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

In the present case counsel failed to put the defence case at all. I disagree with Mr. Ntiwane that it would have been pointless to do so as this witness was told under duress what to say. At the least it should have been put to her that the evidence she had given was spoonfed on her. Further more the evidence of the investigating officer is very important that the firearm was retrieved from accused father.

In treating the evidence of the eye witness I have considered the ratio pelidendi in the case of Rex vs Simelane and two others 1979 81 S.L.R. 251 where Cohen J stated that although the summary of evidence must be taken from the statement of witnesses for the prosecution, the witnesses concerned are not personally responsible for the contents of the summary. Save where there has been a clear departure on material issues, discrepancies between the summary and the actual testimony of a witness should not be over emphasized. This is especially so in the case of illiterate persons who would in most cases be too nervous even to correct a police officer’s error when the statement is read over to them for confirmation. In my view this seems to be the position in respect of the evidence of this witness.

Now turning to the accused story. In my view it is totally false and I reject it in toto. He cries crocodile tears that he was beaten by the police such that he was severely injured. The court does not have an iota of evidence that accused attempted to report this to a magistrate when he was taken there for remand. The accused is no fool he appeared to me to be wise to the ways of the world. As to his disposition in this court it leaves a lot to be desired. The accused was evasive his version was shown to have a lot of improbabilities. He is a man who is prepared to lie in order to save his own skin.

In sum the accused killed the deceased in cold blood because of the dispute he had with the other taximen including the deceased. I have no hesitation at all in coming to the conclusion that the crown has proved its case beyond a reasonable doubt.

I thus find the accused guilty of the murder of Jobe Simelane on the 2nd September 1996, at Mbhoke area in the Shiselweni District.

S.B. MAPHALALA

JUDGE

CIV. CASE NO. 47/97

In the matter between

REX

And

DUMSANI FAKUDZE

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. D. WACHIRA
MR. C. NTIWANE

**RULING ON EXTENUATING CIRCUMSTANCES
(07/06/99)**

Maphalala J:

At this stage of the proceedings the court has to establish whether there are extenuating circumstances for the accused to escape the sentence of death as prescribed by the provisions of the *Criminal Procedure and Evidence Act (as amended)*. The proper approach of determining extenuating factors was enunciated in the recent case of the Appeal Court in *Daniel Dlamini vs Rex Appeal Case No 11/98* where their Lordships after considering a number of decided cases (*Biyana 1938 EDL 310 at 311, S vs Letsolo 1970 (3) S.A. 476 (A), R vs Fundakubi and others 1948 (3) S.A. 810 at 818* and the landmark decision of the Botswana Court of Appeal in *David Kaleletswe and others vs The State Criminal Appeal 26/94*). They came to the conclusions that no *onus* rests on the accused person to prove extenuating circumstances. That it was the duty of the court. In that case *Daniel Dlamini (supra)* their Lordships had this to say:

We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on an accused person and, as mentioned earlier herein, the question of onus is really inappropriate to the enquiry. This is made clear by what was said in that case about the duty of the Court:

“We note in particular the significance which Scheiner JA ascribes to the “subjective side” and that no factor not too remote or too faintly or indirectly related to the commission of the crime” and which bears on an accused’s moral guilt can be ignored. (*R vs Fundakubi (supra)*).

It seems to us that there is therefore an over-riding responsibility on the Court and its officers – Counsel – to ensure that the second phase of the process – the enquiry as to the presence or absence of extenuating circumstances – is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is *inter alia* to probe into whether or not any factor is present that can be considered to extenuate an accused’s guilt within the context and meaning described above...when all the evidence is in, the Court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating ...This would include evidence tendered during the second phase enquiry. It will then make its “value or moral judgement”.

That the court is to make a value or moral judgement. Before delving to do so in the present case I find it important to say something about the concept of extenuating circumstances and the duty of the court in considering this question. The accepted general definition of an extenuating circumstances is one which morally, although not legally, reduces an accused person’s blameworthiness or the degree of his guilty.

In *casu* on the question of extenuating circumstances the accused person did not testify and his attorney relied upon the evidence which had been given. As to that, it was submitted on behalf of the accused person that when he committed this offence he acted on provocation. That there was an ongoing feud amongst the taxi men of the area who all banded against the accused person who they accused for plying the route without a licence. They even enlisted the might of the police who were against the accused and told him that if he did not listen they will leave him to these people who will do a “mbaiyane” on him (to kill him). Mr. Ntiwane submitted that this preyed on the accused mind, moreso in that some of the accusers did not have permits themselves to ply the route. That on the day of the murder the accused person had given a lift to an old lady but the deceased together with one Nhlanhla another taxi man kept on removing the old woman’s luggage from his car until it got damaged. He became angry and was seen by one of the crown witness in that state. He left the scene at the taxi rank seething with anger. Mr. Ntiwane implored the court to use a subjective test in assessing the state of the accused mind prior to the killing.

On the other hand Mr. Wachira is of the view that there are no extenuating circumstances in this case. The manner in which the killing was executed was so cold blooded that it defies words. The facts of the matter are chilling to relate.

On my part, I have looked through the record. This indeed is a serious crime. Nothing can gainsay that. I would agree with the significance which Schreiner JA

ascribes to the “subjective side” and that no factor not too remote or too faintly or indirectly related to the commission of the crime and which bears on the accused moral guilt can be ignored (see *R vs Fundakubi (supra)*). It may well be that in *casu* looked at subjectively the provocation meted by the two at the taxi rank preyed on his mind such that although some time had passed from the provocation blinded his mind from reason when he confronted the deceased person for the second time before the killing.

In the circumstances of the case and also looking at the probabilities of the case I find that there is an extenuating factor, albeit based on narrow margins. The accused person thus escapes the prescribed punishment, that of death in terms of our criminal code.

S.B. MAPHALALA

JUDGE