IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL CASE NO. 110 /04

In the matter between:

REX

VERSUS

ABEL D. MAKHABANE

CORAM SHABANGU AJ

FOR THE CROWN MR. P. MDLULI

FOR THE DEFENCE MR. A. LUKHELE

JUDGEMENT 5th August, 2004

The accused is charged with murder it being alleged that ;

> *"...upon or about the 4th February, 2000 and at or near Ndwabangeni area in the district of Hhohho, the said accused, did unlawfully and intentionally kill, one Mbalekelwa Gumedze."*

During submissions after the conclusion of the trial Mr. P. Mdluli pointed to what he described as an error in the indictment, namely, that the date of the alleged offence is given in the indictment as "4th February, 2000 whereas the evidence relates to an incident which clearly occurred on "4th February, 2003". The error as described by Mr. Mdluli is that instead of the indictment reading 4th February, 2003" it reads "4th February, 2000". Mr. Mdluli asked that he be allowed to ammend the said indictment accordingly. Mr. Lukhele for the defence opposed the ammendment. He conceded that there was no prejudice which would be occasioned to the accused if the ammendment or the correction

of the error, was allowed. Indeed at all stages during the trial the parties had no doubt and there was no confusion that the incident which was the subject of the trial allegedly occurred on 4m February, 2003. Mr. Lukhele cross-examined the crown wimesses at length in relation to the incident which was alleged by the crown wimesses to have occurred on 4th February, 2003. The accused himself when he gave evidence did so in relation to the incident of 4th February, 2003. Section 154 of the Criminal Procedure and Evidence Act 67 of 1938 makes provision for the correction or ammendment of indictments at any time before judgement, in the absence of prejudice to the accused. See also GARDINER & LANSDOWN SOUTH AFRICAN CRIMINAL LAW & PROCEDURE VOL. ONE 6th edition page 316. Subsection four of section 154 provides that;

> *"The fact that an indictment or summons has not been amended as provided in this section shall not, unless the court has refused to allow the ammendment, affect the validity of the proceedings thereunder."*

In the circumstances the correction of the error as applied for by the crown is granted and the charge is to be read as if the date of the incident which is the subject of the indictment is 4* February, 2003.

It is common cause on the evidence that there was bad blood between the deceased and the Makhabane family. The deceased at one time had to leave the Ndwabangeni area because of the aforementioned bad blood. It is also common cause that before the deceased left the area he had been attacked by the members of the Makhabane family who wanted to destroy his homestead because the Makhabane's accused the deceased of having caused the death of one Mgijimi Makhabane. The said Mgijimi Makhabane was a member of the Makhabane household and was an uncle to the accused. It is also common cause that the manner by which the deceased is alleged to have caused the death of the said Mgijimi Makhabane is by allegedly uttering words which were considered bad by the Makhabane family. They appear to have believed, whatever the exact words complained of, that the words spoken by the deceased caused the death of the said Mgijimi Makhabane. It is also the crown's case that the matter was, immediately after the death of Mgijimi Mkhabane, subject to debate and discussion at the UMPHAKATSI resulting in the deceased being fined a cow and a goat.

It is also common cause that on the evening of 4 February, 2003 the deceased was walking in the company of his wife one Cabangani Gamedze and one Thulile Nomsa Zwane from a Nsingwane homestead where they were drinking marula beer. The said Nomsa Zwane described the deceased as his father in law. Both witnesses, that is Cabangani Gamedze and Nomsa Zwane testified that as they walked from the Nsingwane homestead towards their own homestead the accused accompanied by one Sikelela Nkosi (or Dlamini) approached the deceased's and said the deceased was the person who killed his 'father'. Cabangani Gamedze says the accused rhetorically asked if the deceased was the person who had killed his father (uncle). By his father the accused was referring to M gijimi Makhabane. Cabangani says that as deceased was about to answer she advised him not to do so and the deceased took the advise and kept quite. The deceased accompanied by these two women continued on their way until the accused together with his friend Sikelela Dlamini caught up with them again and asked what the deceased was saying. The deceased naturally is said to have responded by saying that he had said nothing to the accused who he had not been with or seen the whole day. There is a dispute as to what happened after this. The crown witnesses say that the accused took out a knife at this stage and stabbed the deceased somewhere about the area of the collar bone and the neck. The first crown witness one Cabangani Gamedze who described herself as the deceased's wife says she tried to distract the accused by pouring on him the marula beer she had on his hand. However accused continued, according to this witness to stab the deceased. When the accused did not stop the stabbing inspite of the maruia beer which was poured on him the said Cabangani Gamedze ran away. In fact it appears everyone ran away including the accused's friend. This witness and the deceased's daughter in law, one Thulile Nomsa Zwane said before the accused produced a knife the deceased had done nothing in their presence which might have justified the attack. The deceased is said to have even tried to avoid a confrontation with the accused by stepping out of the way. It also appears to be common cause that the accused was also from another Nsingwane homestead where he had been drinking marula beer with his football teammates. It is disputed by the accused that the deceased never said anything other than the response to the effect that when asked by the accused what he (the deceased) was

saying, his reply was that he had not said anything to the accused because he had not even seen him since sunrise. The accused appears to suggest that he (accused) was threatened when the deceased allegedly uttered words that he would kill the accused just like he had killed his father. The accused also testified that the deceased had him under his grip when he took out his knife and stabbed him. The accused says he does not know how may times he stabbed the deceased. The deceased had about twenty stab and cut wounds both at the back and front of his body. These wounds are described in some detail in the doctors report filed as exhibit A. The defence accepted that the accused caused the death of the deceased but disputes that the accused had *mens rea* for the crime of murder. Mr Lukhele for the defence went so far as to state that he would concede that the accused may properly be found gudty of culpable homicide but not of murder.

Mr Lukhele relied on the unreported decision of the Court of Appeal in MAPHIKELELA DLAMINI V. **jk** CRIMINAL APPEAL NO. 9/80 delivered on the 27th January, 1981. In the case of MAPHIKELELA DLAMINI *supra* the court of Appeal per DENDY YOUNG J.A. formulated the test with the following words;

> *"If the assailant realises that the attack might cause death and he makes it, not caring whether death occurs or not that constitutes mens rea or the intention to kill. "*

The learned judge of Appeal went on to observe that the way the test has been applied is *"whether the assailant must have realised the danger to life and if he must have realised it in the opinion of the court then by inference he did realise it. This way of putting the test has created considerable difficulty in its application because it has been found difficult to distinguish the concept of 'must have realised' from 'ought to have realised'. But the concept of ought 'ought to have' is of course one relating to negligence which has no place in a crime of murder. In a recent case the Appellate Court of the Supreme Court of South Africa, that is in the case of the STATE V. DLADLA 1981 SA REPORTS page JANSEN J.A has pointed out that in applying the phrase dolus eventualis volition is a more convincing test than possibility. A man acts with dolus eventualis if he at least consents to, or approves of, or reconciles himself to, the possibility of death on the part of the deceased as part of the price he is prepared to*

pay for carrying out his intention; in other words, it becomes part of the bargain he makes with himself..."

From the number of stab wounds (about twenty) which the accused inflicted on the body of the deceased and the areas of<he body on which the deceased was stabbed (namely between the collar bone or neck and the chest) the accused must in my opinion have realised the danger to life. From this the inference can be drawn that the accused did realise the danger to life, but was reckless whether death did occur or not. From the aforementioned factors any other inference inconsistent with dolus eventualis is excluded. The inference may further be justified by the use by the accused of a lethal weapon such as a knife. Mr Lukhele however has argued that the accused was only seen inflicting one stab wound on the deceased by the crown witnesses. Whereas there may not be direct testimony by any witness who claims to have seen the accused inflict the other stable wounds I think that whether the accused after inflicting the first wound continued to inflict the other wounds is a matter that may reasonably inferred from the above facts. Any doubt that it is the accused who inflicted the other wounds may not reasonably be entertained on the evidence. To suggest that another person and not the accused might have inflicted the other stab wounds and cuts would amount to speculation on the possible existence of matters upon which there is no evidence. The possibility that some other person beside the accused is responsible for the other stab wounds is something which cannot reasonably be inferred from the evidence. Furthermore the accused was asked both during his evidence in chief and during the cross-examination, how may times he stabbed the deceased and he stated he does not recall. He appeared implicitly to accept that he stabbed the deceased more than once. Accused further stated he could not recall which part of the body he stabbed the deceased. All this was said during his evidence in chief. During cross-examination a slight variation of the evidence in chief on this point is made, namely, that the accused says he does not know how many times he stabbed the deceased but further that there were not many wounds. His evidence on this point during cross-examination is vague to the extent that it is not stated what he means by many wounds. Could it be that the accused does not think that twenty stab wounds are many? Furthermore when the accused was shown photographs of the

deceased and when it was suggested that there were twenty stab and cut wounds he did not in his testimony suggest that he did not inflict the other stab wounds nor did he testify that he had only inflicted one stab wound as suggested by Mr. Lukhele during submissions. The accused has offered no suggestion that he did not cause the other possible injuries nor has an explanation been offered by him as to who else might have inflicted the other wounds. Because of the aforementioned factors I cannot accept Mr Lukhele's submission that the accused only inflicted one would or injury on the body of the deceased.

Mr Lukhele further submitted that the accused lacked the required *mens rea* for murder because of provocation and intoxication. Mr Lukhele was prepared to concede that the accused may appropriately be convicted of culpable homicide but not murder. Even though the accused appeared to suggest during his testimony in chief that he was acting in self defence, no attempt was made during submissions by Mr. Lukhele to raise self-defence as a defence to the charge of murder. However I propose to deal with all the above matters, that is, intoxication, provocation and possibly self-defence under different subtopics in this judgement to determine if they assist the accused to avoid liability for the crime with which he is charged.

INTOXICATION AS A POSSIBLE DEFENCE

As already observed above Mr. Lukhele appearing on behalf of the accused submitted that I should Find that the accused lacked *mens rea* for the crime of murder. Mr. Lukhele further submitted that once I found that the accused lacked the necessary *mens rea* for murder I ought to return a verdict of guilty on the lesser competent verdict of culpable homicide. In other words, he was prepared to concede that the accused may still be convicted of culpable homicide which he described as a lesser competent verdict to a charge of murder. It has been accepted that intoxication, whether induced by the consumption of alcohol or the intake of drugs, may deprive a person of the capacity to appreciate the wrongfulness of his conduct or the capacity to act in accordance with such appreciation, (see E.M. & J.M. BURCHELL & P.M.A HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE, VOL-ONE, GENERAL PRINCIPLES OF

CRIMINAL LAW 3rd EDITION 1997 at page 183.) Mr Lukhele's submission may have as its basis the common sense recognition that intoxication removes or weakens the restraints and inhibitions which normally govern conduct and impairs the capacity to distinguish right from wrong or to act in accordance with that appreciation. Quoting from GLANVTLLE WILLIAMS PROFESSOR J M BURCHELL observes that intoxication "...may also conduce to crimes of negligence by impairing powers of perception, delaying reaction time, and rendering movement clumsy." See S.A. CRIMINAL LAW AND PROCEDURE *supra* at 183. Mr Lukhele's submission is consistent with the general principle of our criminal law that on a charge of murder, the crown must prove not only the killing, but that the killing was unlawful and intentional. (see R V. NDLOVU 1945 AD 369 @ 386. Even though from the point of view of principle Mr. Lukhele's submission would have made sense there appears to be no doubt that that approach though consistent with legal principle and logic is not consistent with the rule of the Roman Dutch law on the criminal liability of intoxicated persons. The Roman Dutch law position appears to have been founded on public policy considerations rather than principle and logic. At page 184 of Criminal Law and Procedure Vol 1 *supra* the learned authors observe that ;

> *"The Roman-Dutch law did not recognise voluntary intoxication as a defence and, as a general rule, neither did South African law. This position was clearly dictated by public policy. Wessels J said in R V. BOURKE to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community...the regular drunkard would be more immune from punishment than the sober person. "*

The approach of the Roman-Dutch law therefore distinguished between voluntary and involuntary intoxication. It is one illustration of the often quoted statement of Mr Justice Oliver Wendell Holmes, an American Jurist of the realist school of jurisprudence that;

> *"the life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the ndes by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corrolaries of a book of mathematics."* (See also HAHLO &KAHN, THE S.A. LEGAL SYSTEM & ITS BACKGROUND)

More closer to home KOTZE JP an eminent SOUTH AFRICAN JUDGE in CAPE EXPLOSIVE WORKS, LTD V. SOUTH AFRICAN OIL AND FAT INDUSTRIES,

LTD observed;

> *"We should bear in mind that law in its development is apt to proceed on practical in preference to phdosophical lines. The practice of the law, as a living system, is based rather on human necessities and experience of the actual affairs of men, than on notions of a purely philosophical kind. Lord (sic) Bacon reminds us that the thoughts of the phdosophers may be likened to the stars, they are lofty, but give very little light. I speak with every respect, and while I am conscious that we should at all times strive to be logical in our reasoning, and as philosophic and systematic as we can in our laying down of legal principles, I hold it to be a sound notion that it is not a false philosophy to inquire what method serves the best practical purpose. "*

The South African law had initially not followed the Roman-Dutch law rule. It has been said that until the decision of the Appellate Division in S V. CHRETIEN 1981 (1) SA 1097 (A) South African law on the defence of intoxication had followed the English 'specific intent rule.' In terms of the 'specific intent' rule "voluntary intoxication of a degree sufficient to negative the relevant 'specific intent' required for particular crimes would be a good defence in that the accused was found not guilty of the crime charged, but guilty of a less serious offence for which such a verdict was competent. In crimes not requiring specific intent (such as culpable homicide) voluntary intoxication would not be a defence at all, but could be taken into account in mitigation of sentence (see CRIMINAL LAW AND PROCEDURE VOL I *supra* at 184). See also J. BURCHELL (1981) 98 SALJ 177. It may well be that Mr. Lukhele's submission finds its source from what used to be the South African law before S V.CHRETIEN *supra.* The CHRETIEN decision settled South African law with legal principle and logic inspite of the fact that the Roman-Dutch law position was dictated by public policy considerations rather than principle and logic. In 1988 the South African position was again altered by the Criminal Law Ammendment Act, 1988 (see Criminal Law and Procedure Vol. *Supra* at 188.)

The law relating to the defence of intoxication in Swaziland is governed by the CRIMINAL LIABILITY OF INTOXICATED PERSONS ACT 68 OF 1938. That act which is a very briefly drafted law provides in section 2;

"2 (1) Subject to this section, intoxication shall not constitute a defence to any criminal charge.

2. Notwithstanding subsection (1) intoxication shall be defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(1) *the state of intoxication was caused without his consent by the malicious or negligent act of another person; or,*

(2) *he was by reason of intoxication insane, temporarily or otherwise, at the time of such act or ommission.*

(3) *If a defence under subsection (2) is established, the accused shall be discharged if the case falls under subsection (2) (a) and if the case falls under subsection (2) (b) section 165 of the Criminal Procedure and Evidence Act, No. 67 of 1938, shall apply.*

(4) *Intoxication shall however be taken into account for the purpose of determining whether an accused had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence charged.*

(5) *For the purpose of this section 'intoxication' includes a state produced by narcotics or drugs. "*

To establish intoxication as a defence under The Criminal Liability of Intoxicated Persons Act 68/1938 beside the fact that the accused lacked an appreciation of the fact that his act in killing the deceased was wrong or lacked an appreciation of what he was doing, such intoxication must have been involuntary, in the sense that it is caused without his consent by the malicious or negligent act of another person. Failing this the intoxication must in order to constitute a defence to criminal liability have resulted in the insanity temporary or otherwise of the accused person.

Applying these principles to the facts of this case it follows that intoxication cannot operate to assist the accused avoid liability, because firstly there was not even a suggestion by Mr. Lukhele nor evidence which would support a finding that there is a

reasonable possibility that the accused intoxication was involuntary or without his consent in the sense that it was caused by the malicious or negligent act of another person. Secondly, similarly it is not suggested by the defence that at the time of the killing of the deceased the accused had become insane temporarily or otherwise. Thirdly there is no evidence at all from which it may reasonably be said that the accused had reached such a degree of intoxication as would exclude the voluntariness of the act by which he killed the deceased, or would exclude the criminal capacity or intention, (see also S V. CHRETIEN 1981 (1) SA 1097 (A). The learned authors of South African Criminal Law and Procedure Vol,, One *supra* commenting on RUMPF C.J judgement in Chretien case observe that ;

> *"In holding that voluntary intoxication could be a complete defence to criminal liability, RUMPF C.J. stressed the importance of the degree of the accused's intoxication. At the two extremes are the person who is dead drunk... and the person who is slightly drunk in the sense that the liquor had an insignificant effect upon his mental state. The latter would have no defence since his criminal capacity had not been affected. The former would be acquitted if he was so drunk that his conduct was involuntary which would mean that he was unable to distinguish right from wrong or to act in accordance with that appreciation. Between these two extremes, where the accused's conduct is purposive, there are varying degrees of intoxication, and liability or otherwise depends upon whether the accused had been deprived of criminal capacity."*

Whereas it does not seem to be in dispute that the accused may have been intoxicated following the drinking of the marula beer between 15.00 hours to a time after sunset it cannot be said that it is reasonably possible that he had reached such a sufficiently high degree of intoxication that it can be said he did not know that his act of stabbing the deceased was wrong or that in stabbing the deceased he did not know what he was doing. The accused said during his evidence in chief that he was staggering when he left the Nsingwane homestead in the company of his two friends. However Toyota Gumedze could not support the accused's testimony that he was staggering. In fact Toyota Gumedze's testimony was that even though accused had taken the marual beer he was not staggering. The crown witnesses did not say that the accused appeared to be under the influence of alcohol to any degree at all, nor did defence counsel put it to the crown witnesses that the accused was drunk. In the circumstances I am unable to hold that the accused's intoxication may amount to a defence to the crime of murder. After all Mr. Lukhele who stated himself to be unaware of the Criminal Liability of Intoxicated

Persons Act 68/1938 did not rely on the provisions of this Act. He appeared to be relying on the specific intent rule in S V. JOHNSON 1969 (1) SA 201 (A) inspite of the fact that such an approach represented neither the Roman-Dutch Law nor die law as statutorily prescribed in the Criminal Liability of Intoxicated Persons Act, 68/1938.

PROVOCATION AS A DEFENCE

Having dealt with intoxication as a defence I shall now proceed to determine whether the accused can avoid liability for the killing of the deceased on the basis of some provocation which is alleged in his testimony. Again it may be helpful to note that both Roman and Roman-Dutch law did not regard provocation as an excuse for criminal conduct but only as a factor which might mitigate sentence.

Similarly the approach in most legal systems is that provocation does not excuse from criminal liability. It has been observed that people are expected to control their emotions. Furthermore, in many cases the response to the provocation is in the nature of a revenge for harm suffered. Since it is a fundamental principle of modern systems of criminal justice that vengeance for harm suffered must be sought through the public criminal process and not by personal self help, the criminal law is precluded from admitting that provocation should be a justification for unlawful conduct. In Swaziland it would seem that the Homicide Act 44 of 1959 governs the matter and provides in section 2 that;

> "2 *(1) A person - (a) who unlawfully kills another under circumstances which but for this section would constitute murder; and (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool shall only be guilty of culpable homicide.*
>
> *(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation. "*

Then, for the purpose of the Act provocation is defined in section 3 as follows;

> *"Subject to this section "provocation " means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self control and to induce him to assault the person by whom such act or insult is done or offered.*

(2) In this section 'an ordinary person' means an ordinary person of the class of the community to which the accused belongs. "

Sections 2 (2), 3(1) and 3(2) of the abovequoted Act, that is, the Homicide Act 1959 appears to introduce an objective dimension to the examination of provocation which objective dimension has been described as essential for practical reasons. As the learned authors of the South African Criminal and Procedure Vol.-one *supra* at page 204 in their comment on what used to be section 141 of the Transkeian Penal Code observe;

"The Transkeian Penal Code refers to provocation which is sufficient to 'deprive an ordinary person of the power of self control'. An objective assessment of provocation thus applied - the test being whether a reasonable person would have lost his or her self control. SCHREINER J.A. in R V. KRULL emphasised that an objective dimension to the examination of provocation was essential for practical reasons. Hotheaded persons, so the argument ran, should not be allowed to give free reign to their emotions. They should rather control their emotions. "

Secondly, the Homicide Act directs that the enquiry includes an assessment of objective factors such as the proportionality between the provocation received and the retaliation by the accused. See SECTION 2(2) OF THE HOMICIDE ACT, 44 of 1959. In other words the reaction of the accused to the provocation must in accordance with the contemplation of the section, be confined within reasonable bounds. So not only must the provocation result in (a) the loss of self-control on the part of the accused but (b) the reaction it elicits from the accused must bear a reasonable relationship to the provocation. The act which is elicited by the provocation must be done in the heat of passion and before there is time for his passion to cool of. Once the court is satisfied about the existence of the abovementioned factors it may only find the accused guilty of culpable homicide. The solution presented by the Homicide Act to the dilemma posed by provocation is premised on the fact that even a reasonable person may lose his or herself control. The authors of criminal law and procedure vol. One *supra* at pages 215-17 in discussing possible approaches or solutions to the problem presented by provocation as a defence to homicide cases make the following observation to the objective approach namely that;

"One of the consequences of this approach is that it may lead to some of the fine distinctions which are drawn in the English, Australian and Canadian law in order to determine the reaction of a reasonable person placed in the same circumstances as

> *those faced by the accused. The English courts have held that the reasonable person must be endowed with the accused's characteristics which affect the gravity of the provocation. For instance, the gender, age, physical condition, appearance or any other characteristics of the' accused which bear upon the gravity of the provocation have been considered relevant to the enquiry into the reasonableness of the accused's conduct."*

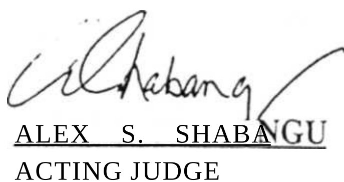
If an accused reaction to the provocation can be said to be an act which bears a reasonable relationship to the said provocation then depending on whether the other requirements of the Homicide Act are met the accused can only be convicted of the lesser offence of culpable homicide.

There was no attempt by Mr Lukhele who seemed to be unaware of the Homicide Act to bring the facts of the present matter within the provisions of that act. Applying the principles discussed above it appears that the accused says in his testimony that he was walking with one Sikelela Nkosi from the Nsingwane homestead where they had been drinking the marula beer. On the way they met the deceased who was in the company of Ms. Nomsa Zwane and Cabangani Gumedze. The accused alleges that the deceased then insulted him together with his friend by describing them by their mother's private parts. The deceased is also alleged to have told the accused that the accused will die young unless he conducted or looked after himself properly. The accused says that he asked the deceased what he meant by saying he (accused) will die young to which the deceased is said to have responded by saying to the accused that he will die like his uncle in apparent reference to one Mgijimi Makhabane who had died some years earlier when the accused was still of tender age, below the age of 14 years. The accused says that at this stage the deceased's wife Cabangani Gumedze poured marula beer on the accused's face. The accused continued to state in his testimony in chief that he tried to wipe off the marula from his face and that the deceased hit him with his fist and held him by his clothes. He then says that the deceased whilst he held him by his hands mentioned that he wanted to kill him and took out a knife to stab the accused. The accused then says that because of this he could not run away and that at this stage he defended himself and stabbed the deceased with a knife. He says he could not recall how many times he stabbed him or which part of the body he stabbed the deceased. During cross-examination by Crown Counsel Mr. Mdluli, the accused says that he did not see the knife by which the deceased

allegedly threatened to stab him. He further admits that no knife was found to have been in the possession of the deceased. I will therefore accept that the deceased did not have a knife. It was not even put to the crown witnesses that the deceased was carrying a knife or any kind of weapon. The accused does not appear to have been injured at any stage by the deceased even though when it was put to him that he was not injured he says he was injured though he does not say what was the nature of the injuries he suffered. When pressed on whether he received any treatment for the alleged injuries he merely says that he obtained tablets for pain. There is a dispute only as to how the altercation which led to the stabbing of the deceased by the accused began. The Crown wimesses as already observed earlier in this judgement describe the accused as the aggressor who attacked the deceased for no apparent reason other man that he accused the deceased as having killed his uncle. The crown witnesses say the deceased never responded to this accusation but took the advice of his wife who told him not to respond. This is not disputed by the defence. The crown witness state that they continued to walk towards their homestead in the company of the deceased until the accused and his friend caught up with them again and demanded to know what the deceased was saying to which the deceased politely responded by saying that he was not saying anything and had not said anything to the accused whom he had not seen at any stage during the day. According to the crown witness the deceased stepped out of the way to avoid the accused who was advancing towards him at which stage the accused took out a knife and stabbed the deceased somewhere between the neck and collar bone. The crown witness testified that the accused stabbed the accused from behind on the right side of the body. The crown witnesses namely Cabangani Gamedze and Nomsa Zwane appear to me to be credible and they gave their evidence in a straight forward manner. They were not shaken during cross-examination. On the other hand the accused had contradicted himself on the matter of the knife which he says the deceased produced. He had to admit during cross-examination that he did not see a knife on the person of the deceased at any stage. The accused had to accept further that no knife was found on the deceased at any stage even after his death. The accused did not say on the evidence what form did the act of provocation take. Nor is there any indication as to when the accused might have lost self-control if he ever did at all. There is nothing on the evidence which has been suggested

to me from which I may conclude that there is a reasonable possibility that the accused lost his self-control and stabbed the deceased during the heat of passion occassioned by provocation and before there was time for his passion to cool. I am not satisfied that the stabbing of the deceased by the accused bears a reasonable relationship to any act of provocation by the deceased. See SECTION **2(2)** OF THE HOMICIDE ACT. In fact the defence does not even attempt to identify the act of provocation which allegedly cause the accused to loose control. If it is being suggested that the alleged verbal threats and grabbing of the accused by the clothes provoked the stabbing I am not satisfied that there is a reasonable relationship between the verbal threats, the grabbing of the accused by the clothes on the one hand and the act of stabbing the deceased in such a brutal fashion. In any event I reject as not being credible or reasonably possible the version given by the accused as to how the deceased ended up being stabbed. In me circumstances I am not satisfied that the accused's action falls within the contemplation of the provisions of the Homicide Act, 44 of 1959. The common law position as already observed is that provocation is not a defence to a charge of murder. Furthermore there cannot be a basis for holding that self-defence as a defence excluding criminal liability can assist the accused avoid criminal liability for his conduct in stabbing the deceased.

In the circumstances and on the basis of the aforegoing I have no alternative but to find the accused guilty of murder. The verdict therefore, is that the accused is guilty of murder.



ALEX S. SHABANGU

ACTING JUDGE