IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 116/09

In the matter between:

THE KING

VS

WILLIAM MCELI SHONGWE

CORAM: **SEY, J**

FOR THE CROWN **MR. MATHUNJWA**

FOR THE ACCUSED **MR NDZINISA**

J U D G M E N T

SEY, J

[1] The accused William Mceli Shongwe has been arraigned before me on a count of Murder. The Amended Indictment which was dated at Mbabane on the 21st day of March, 2011 reads:

"In that upon or about 20 March 2009 at or near Mbekelweni area, in the Manzini region, the accused did unlawfully and intentionally kill Mnotfo Innocent Ngwenya by inflicting injuries on him from which he died on the 24th March, 2009 and did thereby commit the crime of Murder."

[2] The accused person pleaded not guilty to the indictment. In support of its case, the Crown led the evidence of four (4) witnesses and at the close of the Crown's case, the accused gave evidence under oath and called one witness.

[3] It is pertinent to note that certain legal issues are common cause. In the first place, it is not disputed that the deceased Mnotfo Innocent Ngwenya is dead. In this regard, the postmortem report and the medical report in respect of the deceased were admitted by consent and marked as Exhibits A and B respectively. The police pathologist, Dr. Komma Reddy, recorded the following ante-mortem injuries on Exhibit A:

"1. Contusions of 2 x 1 cms and 1 x *l/A* cms, present on the right side of the fore head.

2. Sutured wounds of 5 cms in length and 1 cm length, present on the right side of the top of the head over the parietal eminence.

3. A contusion of 4 x 1 cms, present on the middle portion of the left side of the neck."

[4] It is also not in contention that the deceased died on the 24 March, 2009 as a result of severe head injuries and it is accepted that the aforesaid injuries were inflicted by the accused during the night of 20th March, 2009.

[5] The salient features of the Crown's evidence are to be found in the testimonies of PW1, PW2 and PW3. PW1 was Lomhlangano Ndlovu, the deceased's mother. She testified to the effect that, on the eve of the day the deceased was viciously assaulted by the accused, she had gone to the accused's homestead to visit his wife. She stated that the accused came out of his house and sat next to her and then said "gogo Ndlovu I am going to kill

your child." She said the accused then told her that he had joined the defence force for the purpose of killing and that was what he was going to do.

[6] PW1 further testified that the reason for this statement by the accused was because the deceased owed the accused money for shoes which he had sold to him. She went on to state that the deceased had informed her that he was going to pay the accused when he got paid and that the deceased was supposed to have received his pay on that Friday when he met his death.

[7] Jabulani Fakudze testified as PW2 and he told the Court that he and Bongani Dlamini (PW3) together with the deceased used to sell alcohol from the accused's home. He said in the process of doing that, the accused had borrowed E71 from them whilst the accused's daughter and her boyfriend had also jointly borrowed E70 from them. He said they had taken a radio from the boyfriend as security and that after 2 months the boyfriend had collected the radio from them and had informed him and PW3 that they should go to the accused's homestead to get their money. He said he and

PW3 went to the accused's home but the latter asked them to come with the deceased the following day since he had an issue to settle with him regarding the money for the shoes.

[8] In their various testimonies, PW2 and PW3 said on the following day they had to wait until the deceased came back from work around 7:30 p. m. before going to the accused's home. According to them there was nothing sinister in going to the accused's home at night since the accused ran a sheeben there and they were in the habit of going there at anytime on previous occasions.

[9] On their arrival at the accused's home they said they went straight to DW2's house to demand their money. They said they knocked and she responded and then told them to go to the other house where her father was to get the money. According to PW2's testimony, when they got to the accused's house he asked them who they were and PW3 responded and told him it was Bongani, Jabulani and the deceased. The accused came out, took a

closer look at them and went back inside his house. He said the accused then came out again carrying a knob-kerrie. PW2 went on to say that when they saw the accused with the knob-kerrie, he and PW3 moved away from him and that the deceased told the accused that they had not come to fight. Thereafter, the accused assaulted the deceased on the head four or five times with the knob-kerrie and as the deceased laid helplessly on the ground the accused insisted that no one but the police should come and rescue him.

[10] In answer to questions put to him under cross-examination, PW2 denied the allegation that as they were knocking they were harassing his daughters and that was when the accused had come out. Defence counsel also put it to PW2 that the accused only came back with the knob-kerrie after he had produced a three-star knife but PW2 denied this. He also stated that they could not assist the deceased because they were helpless and they were not carrying anything to defend themselves with.

[11] PW3 Bongani Dlamini corroborated the evidence of PW2 on all material issues. He further testified that on Thursday 19th March, 2009, the accused had questioned him about the whereabouts of deceased and that the accused had threatened to beat up the deceased and kill him because of the shoes that he had not paid for. PW3 also testified that the accused had stated that he was a soldier and he had taken the oath to kill.

[12] Regarding the assault by the accused on the deceased on Friday 20th March, 2009, PW3 testified that the accused struck the deceased with the knob-kerrie about five times on the side of his head and also around his neck. He also told the Court that after the deceased was hit and had fallen to the ground he and PW2 attempted to help the deceased but the accused had prevented them from helping and had insisted that he did not want anyone there except the police.

[13] Under cross-examination, PW3 confirmed that prior to their arrangement with the accused to sell alcohol during the festive season, the accused used to

sell the traditional brew at his homestead. He added that during the festive season people wanted beers. He denied that PW2 was carrying a three star Oka knife on that fateful day and he added that if there was any knife it could have been used on the accused after what he had done to the deceased. PW3 also denied defence counsel's allegation that they had planned to attack the accused at his homestead on that day.

[14] PW4 was the investigating officer Detective Constable David Tsabedze who testified that he had arrested the accused at his home on the night of 20th March 2009 and that he had cautioned the accused in terms of the Judges' Rules before he was formally charged for the present offence. He produced and tendered the knob-kerrie without objection from defence counsel and it was admitted in evidence as Exhibit 1.

[15] I shall now turn to consider the defence put forward by the accused person who, as indicated earlier, elected to give evidence on oath. He testified that in December 2008 he had allowed PW2, PW3 and the deceased

to sell alcohol from his home during the festive season. He said they continued to sell the alcohol until 1st January in the new year 2009 and after that they packed their things and left his homestead. The accused further testified that he had never borrowed any money from the young men and denied any knowledge about the E71 PW2 and PW3 had testified about. He also said he did not know anything about any shoes that he had sold to the deceased for E120.00 and he denied making any threats to PW1 that he would beat up and kill her son.

[16] Testifying further, the accused told the Court that on the 20th March, 2009, he was asleep around midnight when he heard some noise coming from the house which is used by his daughters. He said he then came out and asked who it was that had come to his home to make so much noise at that time of the night. He went on to say that he saw three young men moving from his daughters' house and walking towards him and that he heard the sharp voice of the deceased stating "we have come here for you." The accused told the court that the deceased walked until he reached his door and that was when

he went back inside the house to put some clothes on because he was only wearing his underpants.

[17] The accused continued with his narration as follows:

> "When I tried to close the door he hit my door and the door was damaged.....After he had hit the door he then insulted me using traditional insults. This is when I took my knob-kerrie which was close to the door and I went outside to him. I was dressed by then. I saw two other boys standing behind him while he was still busy fiddling with the door. As he tried to push the door he fell inside the house on the steps. That is when I hit him with the knob-kerrie after he fell inside the house. He was fighting with me and that was when I hit him about three times. I first hit him on his head and as he tried to stand up I hit him again on the back and when he was outside he was still fighting me and that was when I hit him again on his head and he fell down. After that he kept fighting with me and I hit

him again on the head and he fell on the ground and that was when he could not get up."

[18] For ease of clarity, I have taken time to reproduce in extensor that piece of the accused's testimony which is the crux of his defence. Having fully considered the said evidence, I must state that I find it peppered with a lot of inconsistencies. In one breath, the accused said he had taken his knob-kerrie which was close to the door and that he had gone outside to meet the deceased. In another breath, the accused stated that the deceased was still busy fiddling with the door and as he tried to push the door he fell inside the house on the steps. I ask my self the following questions: Why would the deceased have been fiddling with the door? And was it necessary for the deceased to have pushed the door when the accused was already out of the house? I do not believe the accused's testimony in this respect and I accordingly reject it.

[19] Moreover, the accused's assertion that the deceased was fighting with him cannot reasonably be true. It is in evidence from the accused's own testimony that the deceased had fallen on the steps and was on the ground when he first struck him. In my view, it is inconceivable that the deceased, who was unarmed, was able to rise up and fight after being struck by the accused with the knob-kerrie. I have had the opportunity of seeing and touching the said knob-kerrie which was admitted as Exhibit 1 and it is my considered view that the deceased could not have withstood even a single blow on the head much more three to five such blows. In fact, the post-mortem report reflects that the " left temporal bone, left parietal bone and occipital bone" in the skull were all fractured.

[20] Under cross-examination, the accused stated that when PW2, PW3 and the deceased got to him they did not explain anything to him and that they just fought with him. He also alleged that PW2 had produced a knife. To my mind, this is not plausible because had there been such a knife it would have been used by one of them. After all, the situation that presented itself on that

fateful day was that of a 52 year old man in a stand-off with three young and able-bodied men who were all in their 20s. In my view, PW3 summed up the situation in a nutshell when, in answer to a question under cross-examination, he had responded that if there was any knife it could have been used on the accused after what he had done to the deceased.

[21] To my mind, had it been that PW2, PW3 and the deceased had gone to attack the accused with the knife as he has alleged, the story would have been different. I do not believe the accused's version of events. Rather, I am of the view that the three young men were unharmed and their so called peaceful mission in a bid to recover their money had taken a turn for the worse. On the whole, I find the evidence of PW2 and PW3 to be credible reliable and corroborative and I accept it.

[22] It is also worthy of note that even though the accused had denied that he ever sold shoes to the deceased, his own daughter, who testified as DW2, admitted that he had sold shoes to the deceased. The said DW2 also

confirmed that the accused used to run a sheeben at his home and this is a fact that the accused had also denied. The accused also denied having made threats to kill the deceased notwithstanding the overwhelming evidence adduced by the prosecution in this regard. In particular, I note the testimony of PW1 and how she recounted a chilling account of the threats the accused had made directly to her when he had said "gogo Ndlovu I am going to kill your child." Regarding this issue, I must say that I believe PW1 and I find that she had no reason to fabricate such evidence.

[23] Judging from the facts adduced before me, the accused did not make a favourable impression on me as a witness of truth. I find that the accused has told a number of untruths, coupled with glaring inconsistencies in his testimony and these can be seen as evidence of his guilt. Although the Court is mindful of the fact that people may lie to bolster up a just cause, out of shame, or out of a wish to conceal disgraceful behaviour, as per the directions in the English case of **R** v. **Lucas 1981 QB 720, 73 Cr. App. R. 159 CA,** I find that the lies told by the accused in this case were deliberate

and were not told for an innocent reason, but rather to evade justice. I so hold.

[24] I must also mention that I am in agreement with the submission of Crown counsel that in some instances, the untruthfulness of the accused is a factor which a Court can properly take into account as strengthening the inference of guilt.

See the case of **Ndlovu v The State 2000 (2) [BLR] 158** which I find very instructive on this issue. It was held by **Korsah JA** that:

> "Lies told by an accused in order to distance himself from an offence may, in such circumstances, be taken as a male-weight to strengthen the case for the prosecution."

[25] It has been submitted that a substantial amount of the Crown's evidence was never challenged by defence counsel during cross-examination of the prosecution witnesses and that the accused sought to challenge such pieces of evidence when he testified. These include the fact that the accused made threats to PW1 that he was going to kill the deceased; that he told PW2 and

PW3 to come with the deceased to collect their money; the fact that he owed them; the fact that the three young men arrived at his house after 1900 hours and the fact that he was arrested by PW4 on the same night after assaulting the deceased. These were never challenged by the defence and it was never put to PW2 and PW3 that they had gone to the accused's homestead at midnight.

[26] At this stage, I find it necessary to say something on the subject of counsel's duty to put the defence case to prosecution witnesses. In **S v P 1974 (1) SA (Rhodesia, A.D.) Macdonald JP** said at page 582:

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

[27] In **Rex v Dominic Mngomezulu and others Criminal Case No.**

94/1900, Hannah CJ made the following pronouncement at page 17 therein of the said judgment:

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

[28] In this present case, when the accused gave evidence, it became apparent that in several respects he was taking issue with prosecution evidence which

had not been challenged. For instance, on the issue of his arrest, what the accused told the Court was that it was the next morning that he had made attempts to surrender himself at Matsapha police station. However, this was never put to PW4 at the time he had testified to the effect that it was on the same night of the 20th March, 2009 that he had arrested the accused at his home. I must state emphatically that I do not accept the evidence of the accused in this regard and I would discountenance it as nothing but an afterthought to exculpate him from the charge.

[29] I shall now turn to deal with the legal question which calls for determination in this case, namely:

(a) whether or not the Crown has proved beyond reasonable doubt that the accused, in killing the deceased, did so unlawfully and intentionally.

[30] In determining the above question posed, I have given much thought and weight to the following pieces of evidence: the fact that the accused assaulted the deceased with a knob-kerrie several times on the head, the part of the body assaulted, the type of weapon used, the force applied, the number of times which the deceased was assaulted, the accused's utterances on previous occasions that he was going to kill the deceased and the accused person's callous and outright refusal to allow PW2 and PW3 to assist the deceased as he laid wounded on the ground. On the whole, I find that there was no legal justification for the accused's vicious attack on the deceased. I therefore find the said killing unlawful and I so hold.

[31] Having found the killing unlawful as aforesaid, I would now proceed to deal with the vexed question of whether or not it was intentional. In ***Thandi Tiki Sihlongonyane v R*** **Appeal Case No. 40/97. Tebbutt JA** opined as follows: " Dolus can, of course, take two forms:

(i) *dolus directus* where the accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and

(ii) dolus eventualis where the accused foresees the possibility of his act resulting in death, yet he persists in it reckless whether death ensues or not."

[32] On a proper analysis of all the evidence and the submissions before me, I find that the accused's conduct, as described above, has established beyond reasonable doubt that the accused had evinced an intention to kill the deceased. As it was succinctly stated by His Lordship **Troughton ACJ** in the case of **R.** v. **Jabulane Philemon Mngomezulu 1970 -1976 SLR** 6 at **7 (HC),** "the intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased."

[33] In this instant case, I find that by striking the deceased with the knob-kerrie five times on the head, which was in the circumstances unlawful, the

accused clearly intended to kill the deceased. Furthermore, the fact that the said assault on the deceased was vicious and cold blooded can be gleaned from Exhibit A which reflects that the "left temporal bone, left parietal bone and occipital bone" in the skull were all fractured.

[34] To my mind, what is worse and totally revolting, is the callousness the accused demonstrated after he had struck the deceased. Even though he had seen that the deceased had been injured, he refused to allow PW2 and PW3 to assist the deceased as he laid motionless on the ground. Instead the accused heartlessly stood guard over the deceased whilst still brandishing his weapon. He certainly showed no remorse whatsoever at the time, and I would add that the same obtained even when he appeared before this Court. The accused never apologised for his actions.

[35] In the light of all the foregoing, the conclusion, which I regard as ineluctable is that the assault by the accused on the deceased was intentional in the sense of *dolus directus.* I so hold and I find that the Crown has

discharged the burden of proving the guilt of the accused beyond reasonable doubt. I therefore find the accused guilty of murder as charged and I hereby convict him accordingly.

[36] It must be mentioned that I have also come to the considered conclusion that the Crown has satisfied the degree of proof required in criminal law as enunciated by Lord Denning in ***Miller v Minister of Pensions 1947 ALL ER*** at ***372*** where the learned Judge stated as follows:

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it's possible but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

[37] At this stage, I deem it necessary to advert my mind to the provisions of **Section 295 (1) of the Criminal Procedure and Evidence Act** 67/**1938** which provides as follows:

> "If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them; Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof."

Sub-section (2) thereof provides "that in deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs (Amended P. 47/1959.)"

[38] To this end, His Lordship **Ramodibedi CJ** pronounced in **Bhekumusa Mapholoba Mamba v Rex, Criminal Appeal No. 17/2010** that, a locus classicus exposition of extenuating circumstances was, in his view, made by **Holmes JA** in **S v Letsolo 1970 (3) SA 476 (AD) at 476 G-H** in the following terms :-

> "Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to consider -
>
> (a) Whether there are any facts which might be relevant to extenuating, such as drug abuse, immaturity, intoxication, provocation, (the list is not exhaustive);
> Whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
>
> (c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did;

> In deciding (c) the trial court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances."

[39] Another case which I have also found instructive is the Swaziland Court of Appeal case of **Daniel M. Dlamini** v **Rex Criminal Appeal No. 11/98** where it was held that "no onus rests on an accused person who is convicted of murder to establish extenuating circumstances." It would appear therefore, that, in reaching a conclusion as to whether or not extenuating circumstances are present, the duty falls upon the Court.

[40] In considering the above in this particular case, I would take into account two salient portions in the testimony of the accused. He had told the Court that it was when the deceased had hit his door and then insulted him, using traditional insults, that he had picked up the knob-kerrie from behind the door before going outside.

[41] It is also in evidence that the accused had showed his displeasure regarding the fact that the deceased (together with PW2 and PW3) had gone to harass his daughters in their house at night. It is also worthy of note that during cross-examination of PW2 and PW3, defence counsel had put it to them that they had demonstrated lack of judgment by going to the homestead of the accused at night against Swazi custom.

[42] In my considered judgment, such facts, in their cumulative effect, probably had a bearing on the accused's state of mind thus provoking him into doing what he did. I am therefore of the opinion that there are extenuating circumstances in this case and I so return this opinion as required by **Section 295 (1) of Criminal Procedure and Evidence Act, 1938,** supra as amended.

[43] In the result, the verdict of this Court is as follows:

"Guilty of murder with extenuating circumstances."

DELIVERED IN OPEN COURT IN MBABANE ON THIS....3rd....DAY

OF JUNE, 2011

M.M. SEY(MRS)
JUDGE OF THE HIGH COURT