IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 225/09

In the matter between:

THE KING

VS

NDABA KHUMALO

CORAM: **SEY, J**

FOR THE CROWN **MR. A. MAKHANYA**

FOR THE ACCUSED **MR. N.N. MANANA**

J U D G M E N T

SEYJ.

[1] The Accused is charged with the crime of Murder, it being alleged by the Crown that upon or about the 28th November, 2008 and at or near Pigg's Peak town in the Hhohho region, the accused person did unlawfully and intentionally kill one Andile Mncina and did thereby commit the crime of Murder. The accused person pleaded not guilty to the indictment. In support of its case, the Crown led the evidence of thirteen (13) witnesses and at the close of the Crown's case, the accused gave evidence under oath and did not call any witness.

[2] To begin with, there are certain legal issues that are common cause, namely, that the deceased, Andile Mncina, is dead. It is also not in contention that she died on 28th November, 2008 as a result of multiple stab wounds. In this regard, The post-mortem report, of Dr. R. M. Reddy, which was tendered by consent and admitted in evidence as Exhibit Z9, reflects that the deceased Andile Mncina was about 10 years old and that the cause of death was haemorrhage as a result of penetrating injury to the right lung.

[3] The following ante-mortem injuries were recorded:

> "(1) Penetrating injury above outer and third right clavicle present; right lung deep 3 x 1.5 cm irregular margin on medial cut with angle sharp. Other margin clean cut. It involved muscles, intercostal structures, 1st rib, pleura, upper lobe of lung (2 x 0.4cm) above downwards, medially, pleura cavity contained about 1200 ml blood clot.
>
> (2) Cut wound over back outer aspect of right elbow 6.1 x 2cms muscle deep.
>
> (3) Cut wound over outer aspect of iliac fosa left 5.9 x 2cms."

[4] I must state that these ante-mortem injuries are corroborative of the verbal account of the scene of crime officer D/Constable Sandile Chonco (PW12) who produced and tendered seven photos which were admitted in evidence as Exhibits Z1 - Z7. The said photos depict visible stab wounds on the right arm of the deceased and on the right side of her neck as well as another stab wound on the left side of her waist.

[5] This, in my view, would have meant inflicting one wound then extracting the knife and plunging it again and yet again into the fragile body of the 10 year old. It is also in evidence that the deceased's body was soaked in a pool of blood as she lay facing downwards on a small pathway towards the river.

[6] I shall now turn to consider the salient portions of the evidence led by the Crown. PW1 was Absalom Ndwandwe who is a half-brother to the accused. He testified that he had received a telephone call from PW2, his mother, informing him that the police were looking for the accused. He further testified that when he telephoned the accused person in South Africa to inform him that the police had alleged that the accused had killed a school girl and that E500.00 was needed to be sent to the deceased's family for assistance, the accused had told him that he did not know how the incident happened.

[7] PW2 was Bonisile Khumalo, the mother to both PW1 and the accused. She had been informed by police officers that the accused had killed a school

girl and she had passed on this information to PW1 and also requested E500.00 from him to give to the bereaved family.

[8] Goodness Dlamini testified as PW3. The main thrust of her evidence was that on 28 November, 2008 she was at the Pigg's Peak park during lunch hour with her mother. There were other people as well including the accused and his friends who were drinking beer at the park. An argument ensued between her and the accused who then abused her using vulgar language calling her a prostitute and a dog. PW3 further testified that the accused then threatened to kill her. As a result, she called the police but by the time the latter arrived the accused had gone to the VuyaVuya bar. PW3 went on to state that when she and the police got to the VuyaVuya bar, the accused came out of the bar and ran away. She then saw the police chasing after the accused who had crossed the dam and was fleeing towards Mhlatane High School.

[9] When asked to describe what the accused was wearing PW3 said, that at the time the accused confronted her at the park, he was wearing a white T-

shirt, blackish trousers, white sneakers and a hat that was khakis in colour and torn at the top so that she was able to see his hair. In answer to questions put to her under cross-examination, PW3 confirmed that the accused was drinking beer with his friends but added that she could not say if the accused was drunk or not because it was her first time of seeing him.

[10] PW4 was constable Sigicimba Dlamini a police officer based at the Pigg's Peak police station traffic department. His evidence was to the effect that on 28th November, 2008, he was with another traffic officer patrolling around Pigg's Peak when they were stopped by PW3 who made a complaint about the accused. He said he and the other officer together with PW3 proceeded to the VuyaVuya bar where they saw the accused but as they tried to confront him he ran away. PW4 testified further that when they chased the accused he outran them taking the pathway that leads towards the forest. He identified the accused in the dock as the person who had outrun them.

[11] Under cross-examination PW4 maintained that the accused was wearing a hat that was whitish in colour and torn at the top of the head. He also said

the accused was wearing a white short sleeved T-shirt with blackish trousers and white sneakers.

[12] The next witness to testify was PW5 Sikhumbuzo Mhlanga who is a friend to the accused person. He narrated how he and the accused had embarked upon a drinking spree at Pigg's Peak town from 27th November, 2008 to the 28th November, 2008. He stated that on the 27th whilst they were drinking at a VuyaVuya bar, the accused had got into a fight as a result of which he was injured. He said the accused asked him to lend him his hat so that the injury on his head would not show and in turn the accused gave him his red cap.

[13] When he was asked to describe the hat PW5 said it was cream in colour with the word "Nokia" inscribed on it and it had an opening at the top. He said after they had exchanged hats they continued drinking at the bar until it closed at 11 p. m. Then in the morning of the 28th November, 2008, PW5 said he was with the accused and two others at a drinking spot called Magwani

Shigbi where they bought nine bottles of beer. They stayed there until 11 a.m. and then they left and went to a shop where the friend they were with bought some clothes. The accused then asked them to accompany him to another shop where the accused bought two small knives.

[14] PW5 testified further that they went back to the bar and bought some beers but around 1 p.m. they decided to go to the Pigg's Peak park because there were a lot of people in the bar. He stated that whilst they were at the park the accused person showed signs of being drunk as he started to grab every female person who passed by. PW5 said the accused got into an argument with PW3 who then called the police after the accused had insulted her.

[15] It was PW5's further testimony that since they knew that the accused was hot tempered he and the other two friends (they were with) had hidden the knives the accused had bought in his bag. He said the accused had, however, removed the said knives from his bag before they left the park and proceeded

to the VuyaVuya bar. He further told the Court that whilst they were at the said bar, PW3 arrived with the police and thereupon the accused ran away and disappeared into the forest. PW5 further testified that after some time the accused came back to meet him at Lanyandza bottle store where he had gone to buy beer.

[16] I find a need to reproduce in extensor the next piece of PW5's testimony for ease of clarity. He said:

> "whilst there the accused came in. He was not the same person as before. He was angry and he told us he would not be able to go with us to his home. I asked him why he was changing his mind and he said he was going to Piet Retief. What I noticed was that there was blood on his sneakers. When I asked him about it he said he had bled from his nose and that blood had dropped on his sneakers as he was running away from the police. The blood was on the top of his sneakers. He took his bag and he gave me back my hat and I gave him his cap. He also gave

me his South African number and he told me I could contact him if I wanted to visit him. I mink the time was roughly past 3 p.m."

[17] Under cross-examination PW5 maintained that they had taken the knives from the accused because they had seen how drunk he was and knowing that he was short tempered they thought he would hurt someone if he was in possession of the said knives. PW5 said the accused had bought the knives because he had quarrelled with a certain man who was looking for him and he had earlier learnt that the man was in town.

[18] The only eye witness in this case was 12 year old Phiwayinkhosi Dlamini who testified as PW6. On account of her age, I first of all satisfied myself that she understood the nature of taking the oath before she was sworn. She then painstakingly narrated how she and the deceased were attacked by the accused whom, according to her, she did not know but was able to identify in the dock. She testified that on the 28th November, 2008, school closed at 2 p.m. and she and the deceased Andile Mncina took a pathway that goes through a forest towards Mhlatane High School en route

to the Mhlatane quarters where they were residing. She said the accused approached from the forest behind them and he told them he wanted to kill them.

[19] Testifying further, PW6 said the accused grabbed her hand, but when he saw the deceased running away, he let go of her hand and then chased after the deceased. She said the accused caught the deceased, laid her on the ground and then started stabbing her on her arm. It was at that point that PW6 shouted for help and raised an alarm. PW7 Lucky Mavimbela and PW10 Makhosazana Sikhosana arrived on the scene and called the police to whom PW6 described their assailant as being of medium height and dark in complexion and that he was wearing a hat which had an opening at the top. She was able to identify the said hat in Court.

[20] PW6 was cross-examined at length by defence counsel but she was not fazed and she maintained that she had seen the accused stabbing the deceased. In her own words she said: "I saw the deceased being stabbed and

what I am sure of is that she was not stabbed once. I could not take note of the other times because I was afraid." It was put to PW6 that she could not positively identify their assailant because she was afraid. This she denied as false and she maintained her stance that she was able to identify him as the accused person. It is pertinent to note that the defence did not put it to the witness that the accused person was never at the scene.

[21] PW13 was Raymond Nxumalo the investigator in this matter. He testified that when he took over the investigation he and his colleagues visited the scene of crime and having got the description of the assailant they then proceeded to Macembeni which is where the accused was alleged to have run to. Just before they reached Macembeni they came across PW8 Thabile Ginindza and PW9 Mandori Phiri and it was from these two witnesses that the investigating team had learnt that the suspect they were looking for was known to them as Ndaba Khumalo.

[22] PW13 further testified that they checked the Macembeni area but they could not locate the accused so they went to Pigg's Peak park where he had

been drinking alcohol with his friends. They later received information from PW5 Sikhumbuzo Mhlanga that the accused person had been wearing his topless hat when he ran towards Mhlatane High School direction and that he had later returned it to him before he left for Piet Retief. PW13 retrieved the said hat from PW5 and it was eventually admitted in evidence as Exhibit Z8. PW13 then concluded his testimony by giving a detailed account of the events that led to the accused being transported from South Africa to Swaziland and eventually being detained at Pigg's Peak police station after being cautioned in terms of Judges' Rules before being formally charged for the present offence.

[23] It is pertinent to note that all the Crown witnesses described Exhibit Z8 as the hat which the accused was wearing on that day. Moreover, the evidence adduced by PW6 about Exhibit Z8 is corroborated by the evidence of PW5, PW8 and PW9. Incidentally, these three witnesses had testified that they knew the accused person very well.

[24] I shall now turn to consider the defence put forward by the accused person who, as indicated earlier, elected to give evidence on oath. It was the evidence of the accused that he was working in the Republic of South Africa where he loaded logs unto trucks and that the said logs were transported to railway lines for the construction of railway tracks. He testified that he came back to Swaziland on 27 November, 2008 and on his arrival at Pigg's Peak around 6:15 p.m. he went straight to a bar and started drinking. He said as he was drinking, PW5 appeared and both of them continued with the drinking spree until the bar closed around 11 p.m. They then boarded a taxi to a PW5's workplace called A1 to spend the night. He said when they got to A1 they again drank until they felt sleepy.

[25] The accused further testified that on the following day which was 28th November, 2008, they woke up in the morning at 6 a. m. and they immediately started to drink. After they had finished drinking they boarded a truck that took them to Pigg's Peak town where they proceeded to Magwani Shigbi bar to continue with their drinking. Later around 09:15 they went to

Pigg's Peak town centre to buy something to eat and then they went to another bar to continue with their drinking spree. Later they bought more alcohol and then proceeded to the park where they sat at the same table with certain friends of PW5. He said as they continued with the drinking spree he got into an argument with certain ladies who had told them that they were noisy. The accused told the Court mat one of the ladies had told him that she was calling the police and when he saw the lady calling the police he told his friends that they should proceed to the VuyaVuya bar.

[26] Testifying further, the accused stated that when PW3 and the police officers arrived at the VuyaVuya bar he ran away and they chased him. He said he ran into a narrow pathway and that when he looked back and he was not able to see the police he remained there for a while and waited for the police officers to leave. He said that he returned to town around 1 p.m. to collect his bag from PW5 and that whilst he was in town he had received a phone call from his employer who had informed him that he should rush back to work. He then retrieved his bag from PW5 and he left for South Africa.

[27] The accused went on to state that he had later received a call from his brother Absalom (PW1) who had informed him that it had been alleged that he had killed someone in Swaziland. He said he had told Absalom that he did not know what he was talking about because he had been drunk on the day he was referring to.

[28] The accused was cross-examined at length and he denied the evidence led by the Crown witnesses and which incriminated him. For instance, the accused denied that he had insulted PW3 at the park. He could not remember what PW5 had said about him buying two knives from the shop and that all he remembered was him going to a shop to buy something to eat. He said he did not remember accompanying PW5 to the bank and that he only saw him when he came back with his friends who were carrying some clothes. When Crown counsel put it to the accused that PW5 had told the Court that he had exchanged hats with the accused and that the accused was wearing Exhibit Z8, the accused retorted that he could not remember that.

[29] Furthermore, the accused denied using the pathway in the forest and he could not remember accosting PW6 and the deceased and telling them that he wanted to kill them. He said he could not remember chasing after the deceased and he denied the allegation that he had stabbed and killed her. He also said that he could not remember most of the things PW8 and PW9 had testified about and that they had fabricated evidence against him. The accused also denied Crown counsel's suggestion that he was trying to evade arrest by going back to South Africa.

[30] It is my firm view that the evidence of PW8 and PW9 clearly negates the evidence of the accused that he had gone back to town around 1 p.m. These two witnesses had testified to the effect that they know the accused personally and that on 28th November, 2008, they had seen the accused around 3 p.m. at Macembeni where he had approached them and had asked them to give him a towel to wipe his clothes and shoes. According to their testimony, the accused was drunk and he had insulted them using vulgar

language. He had also produced a knife and threatened to kill PW8's child when they refused to give him a towel.

[31] It is worthy of note that the defence has alluded to some contradictions in the witnesses' evidence concerning the colour of the pair of trousers which was worn by the accused on the day in question. It has been submitted by defence counsel that PW3 and PW4 had testified that the accused was wearing a pair of darkish trousers but PW8 had said that he was wearing a pair of khaki trousers whereas PW9, who said she spent some thirty [30] minutes with the accused, had maintained under cross examination that she did not notice the colour of the trousers. It is defence counsel's contention that this militates against the Crown's case in so far as the person who committed the offence is concerned.

[32] I must state that I am disinclined to accept defence counsel's submission in this regard. To my mind, when viewed objectively, these inconsistencies relating to the clothes the accused was wearing do not serve to detract from

the truthfulness of the witnesses' accounts. I am fortified in my view by the pronouncement of my learned brother **Masuku J** in **Rex v Mfanzile Mphicile Mndzebele,** Criminal Trial No. 213 of 2007 where he opined at page 22 as follows:

> ***"Ceteris paribus,*** human memory does not improve with time. To the contrary, it deteriorates and witnesses cannot be correctly accused of not recalling all the minute details of events they testify about years after their occurrence. Otherwise, they would be punished for their memory failing them, which is not an offence."

[33] His Lordship then referred to the case of **State** v **Gogannekgosi 1989 B.L.R. 133 (HC) at 140 B-C** where **Gyeke - Dako J.** said:

> "For an inconsistency to be material, such inconsistency must in my view, be of a material nature, capable of turning the result of the case one way or the other. For there could

> hardly be any witness of truth if the principles were otherwise, since in nine cases out of ten, witnesses are called upon to give evidence upon matters about which they might have witnessed or given statements months or even years before. In such cases, the possibility of minor slips, which may be in conflict with their previous statements, cannot be ruled out. But that should not necessarily make them untruthful."

[34] One striking piece of evidence worthy of note is the sighting by PW8 and PW9 of the accused in Macembeni around 3 p.m. In my considered view this places the accused near the scene of the crime rather than en route to South Africa as he stated in his defence. Furthermore, it is also in evidence, from the testimony of PW5, that when the accused went back to town to return Exhibit Z8 and collect his bag from him the time was "roughly past 3 p.m." This, undoubtedly, negates the testimony of the accused who had told

the Court that he returned to town around 1 p.m. to collect his bag from PW5. I therefore find that the accused lied to the Court in this regard.

[35] I must also mention another significant piece of evidence which I have taken into consideration. PW5 was one of the witnesses who had the opportunity of seeing the accused when he returned to town after having disappeared into the pathway that leads to the forest. What he noticed was that there was blood on the top of the sneakers which the accused was wearing. On noticing this PW5 did not just keep his mouth shut. As a friend he had asked the accused about it and the explanation the latter gave him was that he had bled from his nose and that blood had dropped on his sneakers as he was running away from the police.

[36] Generally, in my assessment, I must say that I find the evidence of all the Crown witnesses credible, corroborative and therefore reliable. I believe them and I accept the bulk of their testimonies in its entirety.

[37] On the other hand, I have found the accused to be unimpressive and elusive as a witness. He professed not to have known how the crime was committed because he was drunk. Judging from his demeanour, he exuded an air of what I would term as "selective memory" thus choosing to remember only few events that happened on the 28th November, 2008. For instance, the accused remembered all the drinking spots they had been to that day, he also remembered fleeing from the VuyaVuya bar after PW3 had phoned the police. Also, that he went back to town to collect his bag from PW5 around 1 p.m. I find this assertion by the accused, that he was in town by 1 p. m. on that day, to be nothing but a calculated and deliberate lie aimed at misleading the Court to believe that he was nowhere near the scene of the crime. Moreover, I have carefully considered the evidence of PW6 and I accept the fact that she and the deceased were accosted by the accused after they had finished school at 2 p.m. I therefore find for a fact that the accused's evidence that he had returned to town at 1 p. m is false.

[38] On the whole, I find that the defence of the accused was nothing but an outright bald denial of the evidence adduced by the Crown's witnesses and I accordingly reject the said defence. In particular, I reject his defence that he does not recall what happened.

[39] At this stage, two crucial questions need to be addressed viz:

> (a) whether the Crown has proved that the stab wounds inflicted upon the deceased were intentionally inflicted by the accused; and
>
> (b) whether or not the defence of intoxication can avail the accused.

[40] It is the Crown's contention that it has been established beyond reasonable doubt that the accused had intention, in the form of legal intention, otherwise known as ***dolus eventualis,*** to commit the offence he did. It was submitted by Crown counsel that since the accused voluntarily drank beer from the 27th November, 2008 until the time when he was chased by the Police from the VuyaVuya bar on the 28th November 2008, his intoxication

cannot be a defence. Counsel also submitted that the accused had the necessary intention to kill the deceased because he had told PW6 and the deceased that he wanted to kill them.

[41] However, it was submitted by defence counsel that the Crown has failed to prove beyond reasonable doubt that the accused had ***dolus*** in either the form of ***dolus directus*** or ***dolus eventualis*** and that it should be found that a proper verdict in the totality of the circumstances of the case is one of culpable homicide.

[42] Let me pause here at this stage to examine the concept of ***dolus*** as propounded by **Tebbutt JA** in ***Thandi Tiki Sihlongonyane v R*** **Appeal Case No. 40/97.** He said: " 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."

[43] His Lordship then went on to state the constituent elements of ***dolus eventualis*** in the following terms:

"(i) subjective foresight of the possibility of death however remote, as a result of the accused's unlawful conduct;
(ii) persistence in such conduct, despite such foresight;
(iii) the conscious taking of the risk of resultant death, not caring whether it ensues or not; and
(iv) the absence of actual intention to kill…"

[44] I have also found **Jonathan Burchell's Principles of Criminal Law, Third Edition** instructive on this point. At page 467 therein he states that:

*''''**Dolus eventualis*** exists where the accused foresees the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur, or the prohibited circumstance might exist and he accepts this possibility into the bargain (i.e. reckless as regards this possibility.)"

[45] On a proper analysis of the evidence and the submissions in this case at hand, it is accepted that the injuries sustained by the deceased were inflicted by the accused on the 28th November, 2008. I find this as a fact and I so hold. It also appears to me that the accused's conduct, as described by PW6, had all the hallmarks of legal intention. By stabbing the deceased and inflicting injuries on different parts of her body, which was in the circumstances unlawful, the accused clearly foresaw a possibility of death and he must have known that his conduct could cause death.

[46] Moreover, judging from the facts before me, it cannot be said that the accused was so drunk that his actions were involuntary. I find that although the accused was drinking beer throughout, he was not so drunk as not to appreciate his actions. I am of the view that the accused was only slightly drunk on the 28th November, 2008 and that the bottles of beer he had consumed had no significant effect upon his mental state. This I find because he appreciated most of the events that happened on the day in question. It cannot be said that the accused did not know what he was doing because he

was able to flee from the police and he was also able to return to town to retrieve his bag from PW5, hand him back his hat and then leave the country. I am equally of the firm view that the accused knew precisely what he was doing and was just totally reckless as to whether the stabbing of Andile Mcnina would cause death or not. I so hold. The accused therefore would have no defence since his criminal capacity had not been affected.

[47] I can only add that I am fortified in my view by the **Court of Appeal** decision in **Annan Lokudzinga Mathenjwa v R 1970-1976 SLR 25** at **30 A** where it was held as follows:

> "If the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not he ought to have realised the risk, since he killed unlawfully." (per Schreiner P, Caney JA concurring.)

[48] Also, in the case of **R. v. Jabulane Philemon Mngomezulu** 1970 - 1976 **SLR** 6 at7 **(HC), Troughton ACJ** had this to say:

> "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."

[49] In light of the foregoing, the conclusion, which I regard as inescapable in this instant case, is that the stabbing of the deceased was intentional in the sense of ***dolus eventualis.*** I find that mens rea in the form of ***dolus eventualis*** has been proved by the Crown beyond reasonable doubt and I therefore find the accused guilty of murder as charged and I hereby convict him accordingly.

[50] It must be borne in mind, however, that **Section 295. (1) of the Criminal Procedure and Evidence Act 67/1938**

> mandates a Court which convicts a person to state whether there are extenuating circumstances. It 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.

(2) 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.)"

[51] In construing the above sub-section, I must state that I agree with the observation of **Dr. Twum JA** in **Ntokozo Adams and The King Criminal Appeal Case No. 16/10** where he stated that:

"The Legislature has not defined what circumstances are extenuating circumstances and it is left to the Court to decide whether there are such circumstances in each particular case."

[52] Another case which I have also found instructive on this issue 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.

[53] When dealing with the issue of extenuating circumstances in **Bhekumusa Mapholoba Mamba v Rex, Criminal Appeal No. 17/2010,** His Lordship **Ramodibedi CJ** pronounced that, in his view, a locus classicus exposition of extenuating circumstances was 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);

(b) 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."

[54] It is pertinent to note that in this jurisdiction **S v Letsolo** (supra) was approved and followed by the Court of Appeal, as it then was, in the case of **Philemon Mdluli and Others v Rex 1970-1976 SLR 69** at **75D (HC).**

[55] Coming to the instant case, it is inexorably apparent that the accused was drunk at the time of commission of the offence charged. Earlier on in this judgment, I had made a finding of ***dolus eventualis*** as opposed to ***dolus***

directus. I now consider that such finding of ***dolus eventualis*** coupled with intoxication constitute extenuating circumstances.

[56] 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, as amended.

[57] 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