



**IN THE HIGH COURT OF SWAZILAND**

Criminal case No: 163/12

In the matter between:

**REX**

**VS**

**ZWELITHINI TSABEDZE**

Neutral citation: *Rex vs Zwelithini Tsabedze (163/2012) [2012] SZHC168 6<sup>th</sup> August 2012*

**Coram:**

**M.C.B. MAPHALALA, J**

**Summary**

Criminal law – accused charged with murder.

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**JUDGMENT**  
**6<sup>th</sup> AUGUST 2012**

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- [1] On the first Count the accused was charged with the Crime of Murder and it being alleged by the Crown that on the 26<sup>th</sup> October 2011 at Deccapol Primary School in the Shiselweni Region, the accused unlawfully and intentionally killed Ntokozo Maseko. He pleaded not guilty to the charge.
  
- [2] On the second Count the accused was charged with contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act No. 24 of 1964 as amended. Crown alleged that on the 26<sup>th</sup> October 2011 at Deccapol Primary School in the Shiselweni region, the accused was found in possession of a firearm, a 9 mm calibre pistol, whose serial number was scratched without a licence or permit. He pleaded guilty to the charge; and, the Crown accepted the plea.
  
- [3] On the third count the accused was charged with contravening section 11 (2) as read with section 11 (8) of the Arms and Ammunition Act No. 24 of 1964 it being alleged by the Crown that on the 26<sup>th</sup> October 2011 at Deccapol Primary School in the Shiselweni region, the accused was found in possession of one round of ammunition of a 9 mm calibre pistol without a licence or permit. He pleaded guilty to the, and the Crown accepted the plea.

[4] Certain formal admissions were made: Firstly, a Statement of Admitted Facts duly signed by the parties was admitted in evidence and marked Exhibit 1. Secondly, the post-mortem report was admitted in evidence and marked exhibit 2. Thirdly, the ballistic report was admitted in evidence and marked exhibit 3. Fourthly, the photograph which shows the bullet entry mark on the deceased's face was admitted in evidence and marked exhibit 4. Fifthly, the photograph of the empty cartridge was admitted in evidence and marked exhibit 5. Sixthly, the photograph showing the toilet where the pistol was retrieved was admitted in evidence and marked exhibit 6. Seventh, the photograph showing the deceased lying on the ground dead is admitted in evidence and marked exhibit 7. Eighth, the photograph showing the toilet seat under which the pistol was hidden was admitted in evidence and marked exhibit 8. Ninth, the photograph showing a police officer using a metal detector and searching for the empty cartridge is admitted in evidence and marked exhibit 9. Tenth, the photograph showing the deceased lying down on the scene in a pool of blood is admitted in evidence and marked exhibit 10. The photograph showing the deceased lying on the scene covered with a blanket is admitted in evidence and marked exhibit 11. The 9 mm calibre pistol is admitted in evidence and marked exhibit A; and, the live round of ammunition is admitted in evidence and marked exhibit B.

[5] PW1 Mandla Hendrick Mavuso, a security guard at Deccapol Primary School testified that on the 26<sup>th</sup> October 2011, at about 10pm, he was at work and he heard people talking softly along the road which passes next to the school. He didn't hear what they were saying. As they passed the school gate, he heard a female voice saying "Hawu sekutheni", meaning "Oh what is happening?"; then he heard a big bang sound. Thereafter, he heard another sound "Di" like a person jumping over the gate into the school.

[6] Thereafter, he buzzed the Chairman of the School Committee Philemon Ngcamphalala who then phoned him; and, he told him what he had just heard. He asked the chairman to call somebody to come and help him. The chairman informed him that the people who could help him are the teachers because they were at the school. The chairman further told him that he didn't have airtime to phone the teachers so that they could assist him; and, that even if he had the airtime, he didn't have their cellphone numbers.

[7] After that the accused buzzed him, and he buzzed back; the accused asked him where he was and he told him that he was in a class-room. The accused told him to open the gate because he had asked Philemon Ngcamphalala to drive Ntokozo Maseko to hospital since he was injured. As he opened the gate, he saw the accused running from the direction of the

Teachers' Quarters towards the gate. The motor vehicle arrived and its lights enabled them to see the deceased.

[8] Philemon Ngcamphalala alighted from his motor vehicle, observed the deceased and told them that the deceased was dead, and, that they should call the police. PW1 also observed that the deceased was bleeding as well.

[9] Philemon Ngcamphalala asked the accused how the deceased was killed, the accused told him in the presence of PW1 that they were attacked by three unknown people who subsequently ran away, Philemon Ngcamphalala then took his gun and shot towards the direction in which the three men are alleged to have run away.

[10] Two teachers came through the gate and they were followed by community members; later the police arrived as well. PW1 reiterated that the accused only phoned him after the "loud bang" and shortly after he had reported the incident to the school chairman Philemon Ngcamphalala. He insisted that there was no missed call in his cellphone indicating that the accused had previously called him prior to the "loud bang".

[11] Under cross-examination PW1 admitted that he was previously attacked at the school by people armed with firearms and knives; and, that he reported

the incident to the police, and, the case was still pending since the attackers were not arrested. He further admitted that the area was infested with crime and that it was not safe to walk around at night. However, he admitted that the attack on the school had stopped.

[12] PW1 told the Court that on the day in question, it was misty with a moonlight; he denied that it was raining as alleged by the defence. He told the Court that it was possible to identify a person if he was close; and, that there was a lamp in front of the school office facing the Teachers' Quarters. He told the Court that Ngcamphalala's motor vehicle was helpful in identifying the deceased; and, that the accused was also carrying a torch.

[13] PW1 confirmed that the Teachers' Quarters have flushable toilets; however, on the day in question there was no water at the Teachers' Quarters. He further confirmed that the deceased and the accused were staying together and sharing meals; however, he couldn't confirm that they had close friendship dating to the time when they were still students at the university as alleged by the defence. He couldn't confirm as well that the deceased and the accused often watched television together belonging to the accused; however, he confirmed that their girlfriends were friends. However, he did not deny that the accused and the deceased were friends.

[14] PW1 could not confirm as alleged by the defence that when there was no water at the Teacher Quarters, they relieved themselves in the bush and not in the pit latrines situated at the school. Similarly, he could not confirm that on the evening of the 26<sup>th</sup> October 2011, the accused phoned his girlfriend Phathisiwe Ngcamphalala, DW1, and told her that he would be coming to fetch her for a visit. Similarly PW1 could not confirm as alleged by the defence that the deceased accompanied the accused to fetch DW1; however, PW1 reiterated that the accused told him that they were returning from a bush where the deceased has gone to relieve himself when they were attacked by three unknown men.

[15] PW1 could not confirm as alleged by the defence that the deceased had refused to accompany him to fetch DW1 and insisted that he wanted to relieve himself in the bush; in fact PW1 said he didn't know anything about that allegations. Similarly, PW1 could not confirm that the accused and the deceased left the house together, the deceased to relieve himself and the accused to fetch DW1 or that they parted ways at the main gate. He told the Court that he didn't see them walking together as alleged by the defence.

[16] PW1 could not confirm that when the accused returned with his girlfriend, they saw a person standing by the school fence; however, he denied as false

the allegation by the defence that the accused phoned him upon seeing the man next to the fence but he didn't answer his phone. PW1 told the Court that the accused phoned him after the loud bang and after he had reported the incident to the school chairman; he denied that there was a missed call in his cellphone made by the accused before he spoke to the school chairman. He reiterated his earlier statement that the accused only called him after he had spoken with the school chairman. It was put to PW1 that the accused wanted to verify whether PW1 was the person standing next to the school fence; however, PW1 denied that the accused called him as alleged.

[17] PW1 could not confirm as alleged by the defence that after they had passed the said man, the person came charging upon them; and, that DW1 was afraid and he told her to stand behind him. PW1 told the Court that he was not aware of this allegation since he didn't witness the incident. Similarly, PW1 could not confirm as alleged by the defence that the stranger came close to the accused and collided with him; that that the accused first blocked him and then fired a single shot, and, ran thereafter to the Teachers' Quarters. As part of the defence it was put to PW1 that when the stranger charged upon them, the bullet was already in the chamber ready to be fired because the accused was afraid.



[18] It was further put to PW1 that when they reached the house, they looked for the deceased but couldn't find him, and, that it dawned on them that the stranger who came running to them was the deceased; however, PW1 disputed this evidence on the basis that the accused told them that they were attacked by three unknown men on their way to the house from the bush where the deceased had gone to relieve himself. PW1 reiterated that the accused phoned him and told him that the gunfire emanated from strangers who were shooting at them.

[19] The defence further put to PW1 that after the accused had spoken to PW1, he jumped over the fence with his torch in order to ascertain if the person he had shot was the deceased; however, PW1 denied that the accused had jumped over the fence as alleged. PW1 told the Court that the accused came inside the school premises, and that together they went through the school gate to the scene. PW1 further denied as alleged by the defence that the accused upon identifying the deceased had shouted calling the deceased by name and that he didn't answer.

[20] PW1 further denied as alleged by the defence that the accused then ran back to the house to notify DW1 that the person he had shot was the deceased. PW1 could not deny that the accused, after identifying the deceased,

informed PW6 about the incident because soon thereafter PW6 and another teacher arrived at the scene.

[21] Similarly, PW1 could not deny that when the accused phoned him he had already phoned the school chairman and told him that unknown people had shot the deceased; PW1 confirmed that when he came out of the classroom, the school chairman's motor vehicle was just arriving at the scene. He further admitted that when the motor vehicle lights lit the scene, he saw the body of the deceased. PW1 admitted that after that, the accused phoned the police.

[22] Under re-examination, PW1 told the court that the light from the administration block was obstructed by a wall and could not identify a person on the scene at a distance of five to ten metres. He reiterated that before he spoke with the chairman on the phone, there were no missed calls in his cellphone and, that nobody phoned him prior to the chairman.

[23] In the Statement of Admitted Facts the accused admit the following facts: Firstly, that the deceased was shot on the forehead; secondly, that he led the police together with PW3 to a toilet where he had hidden the pistol; thirdly, that he led the police to the place where the empty cartridge was subsequently found, and to that extent he does not dispute the evidence of

PW4, PW5 and PW6; fourthly, that he does not dispute the evidence of PW9 Absalom Maseko who identified the body of the deceased as that of Ntokozo Maseko; fifthly, that he does not dispute the evidence of the pathologist as reflected in the post-mortem report to the effect that the pathologist opined that the cause of death was due to firearm injury; sixthly, that the accused does not dispute the evidence of the Scenes of Crime Officers Constable Thulani Gama and Constable Thabsile Nkambule who took photographs of the scene as well as photographs of the pointing out respectively; seventh, that the accused asserted that he was attacked by a stranger whilst with his girlfriend and he fired a shot in self-defence; eighth, that the accused does not dispute the *actus reus* but *mens rea*.

[24] Sergeant Vincent Mbingo deposed to an affidavit in respect of the ballistic report and concluded that the fired cartridge case and the fired bullet were fired from the pistol handed to the police by the accused. He also found that the pistol was serviceable and fired normally without any obvious defects.

[25] PW2 Xolani Mlungisi Jele, a teacher at Deccapol Primary School testified that on the 26<sup>th</sup> October 2011 at about 2200 hours, he was sleeping at the Teachers' Quarters; his housemate Mfanafuthi Ndwandwe PW6, a fellow teacher at the school, informed him that he had received a message that the

deceased had been injured. They looked for the deceased and the accused but couldn't find them in their house; they looked for them at the pit latrine toilet in the Teachers' Quarters and around the school premises but could not find them.

[26] They saw a motor vehicle by the school gate with its lights on; they found PW1, the accused and the deceased lying on the ground. When they pointed the torch at the scene, they discovered that the deceased was lying in a pool of blood. They phoned other teachers to come to the scene and to assist them.

[27] They enquired from the accused what had happened, and, he told them that they were from relieving themselves in the nearby bush with the deceased; they heard footsteps, and, when he looked back, he heard a gunshot and fell down. Soon thereafter, he stood up and ran to his house.

[28] PW2 further told the Court that on the 28<sup>th</sup> October 2011 the police came to the school at about 5 pm and took the accused with them. The police returned at about 2100 hours with the accused and went into the garden.

[29] He also told the Court that on the night in question, it was drizzling and dark but there was a light coming from the school which lit the scene.

Under cross-examination, PW2 admitted that the deceased and the accused were friends. He reiterated that the accused had not told them that he had shot the deceased accidentally but that they were attacked by unknown men. PW2 further told the Court that whilst the deceased was lying on the ground, the accused asked them to accompany his girlfriend from his house to her homestead.

[30] PW3 Constable Ntokozo Vilakati based at Sigwe Police Post testified that on the 26<sup>th</sup> October 2011, he received a report of shooting at Deccapol Primary School, and, he rushed to the scene where he found the body of the deceased lying on the ground. He was in the company of another police officer Constable Jabulani Mathobela.

[31] The accused told them that he was the one who had reported the incident to the police, and, that the deceased was shot by unknown people who subsequently disappeared. Thereafter, the accused recorded a statement with the police as an eyewitness. The defence did not cross-examine PW3.

[32] PW4 Detective/Sergeant Mduduzi Nsibandze, the investigating officer based at Hluti Police Station, testified that he arrested the accused on the 28<sup>th</sup> October 2011; thereafter, he pointed out a pistol and an empty cartridge.

[33] On the 26<sup>th</sup> October 2011 he found the deceased lying in a pool of blood on the ground. There was a light emanating from the school office illuminating the scene of crime. They stayed at the scene until the following day pending the arrival of police experts.

[34] On the 28<sup>th</sup> October 2011, during the investigations, the accused led them to a pit latrine toilet in the school where he had hidden the pistol underneath the toilet seat; the pistol was loaded with ammunition. On the 29<sup>th</sup> October 2011 the accused further led them to the scene where he pointed out an empty cartridge in a nearby grass; the police used metal detectors to allocate the empty cartridges. The accused was duly warned in accordance with the Judges Rules before the pointing out in respect of both instances. PW4 further handed to court the pistol, the empty cartridge as well as the live round of ammunition as part of his evidence.

[35] Under cross-examination, the defence counsel asked PW3 to read statements made by the accused as well as DW1 to the police. The accused's statement was to the effect that they left the house together with the deceased who was going to relieve himself in the bush outside the main school gate and the accused was fetching his girlfriend DW1; and that on his way back with his girlfriend, they saw a stranger next to the school gate. The stranger followed them and then ran to them; he kicked him on the

stomach in order to block him. After that he had withdrawn his pistol and corked it when the stranger was running towards them; after kicking the stranger, he accidentally pulled the trigger. It was dark and he couldn't identify the stranger. After shooting the stranger, they ran away from the scene.

[36] He mentioned that when they first saw the stranger, he phoned PW1 thinking it was him but he could not respond. He further mentioned that upon reaching the house, they looked for the deceased but couldn't find him; they phoned him but his cellphone rang unanswered. The statement also mentioned that he phoned PW1 and told him that certain people had fired a shot at himself and the deceased, and that he couldn't see the whereabouts of the deceased.

[37] The statement made by DW1 to the police states, *inter alia*, that the accused phoned her just before 2200 hours and informed her that he was coming to fetch her; and, that he was leaving the house with the deceased who was going to relieve himself in the bush since there was no water to operate the flushing toilet in the house. On their way to the Teachers' Quarters with the accused, she noticed a man standing by the wall, the accused corked the pistol getting ready to shoot; and, the person ran towards them.

[38] The statement further mentioned that before the stranger reached them, she ran away to the Teachers' Quarters. Ironically and contradictory, she further said "the person upon reaching Zwelithini, he pushed Zwelithini and Zwelithini kicked him and they were busy pulling and pushing each other and I never heard anyone saying any word. On that note, I then heard a loud sound of a gun".

[39] She further said after the shooting, they both ran to the house where they looked for the deceased but could not find him; then the accused phoned the security guard PW1 asking him if he had seen the deceased. The accused took a torch and said he was going to PW1 at the school; he came later to tell her that the person who was shot was the deceased.

[40] The statement by DW1 differs from the statement made by the accused as well as the defence story put to the Crown witnesses. The statement by DW1 is that she ran away to the house before the stranger reached them; however, as the statement progresses, she changes and narrates what transpired when the stranger reached them saying that he pushed the accused who in turn kicked him and they were busy pulling and pushing each other and that they didn't utter a word to each other. She further states that after the gunshot, they both ran to the house with the accused.



[41] DW1 admits in her statement that on the 27<sup>th</sup> October 2011, she communicated with the accused using “mix-it” and discussed what he told the police about the shooting incident. According to her, the accused said he told the police that they had gone to the bush with the deceased to relieve themselves and that the deceased was shot on their way back by strangers; and that she was left in the house. DW1 further mentions in her statement that after her discussion with the accused, she resolved to tell the police the same version which the accused had told them.

[42] PW4 further explained to the court that they waited for the police experts overnight till the next morning because experts can only examine the scene properly during daytime. He admitted that the police van as well as the motor vehicle belonging to Philemon Ngcamphalala provided light to the scene during the night; however, he reiterated his earlier evidence that the light from the administration office also provided light to the scene.

[43] PW5 Daniel Simelane, the Headteacher of Deccapol Primary School, testified that he received a phone call from PW6 Mfanafuthi Ndwandwe informing him about the death of the deceased. When the incident occurred, he was at his homestead at Hluthi where he resides. He took with him five other teachers and went to the scene; they found that he was dead.

[44] At the scene the accused narrated to him how the deceased died; he told them that they had gone to relieve themselves with the deceased in the bush, and on their way back, they heard footsteps and then a gunshot; he fell down, rose up and ran away. PW4 didn't believe or understand the accused's story because the bushes around the school had been cleared some time back; in addition, there was a pit latrine toilet at the school.

[45] PW5 further told the court that there is a light from the administration office which covered the scene; and, that there was no obstruction of the light. He further denied that there was a mist or that it was raining. He submitted that if you were standing on the scene you could identify a person standing at the fence.

[46] Under cross-examination, he told the court that when he arrived at the scene, he switched off the lights of his motor vehicle; that the lights of the police van were switched off, and, that only the lights of the motor vehicle belonging to Philemon Ngcamphalala were switched on and focusing on the deceased body. He reiterated his earlier evidence that the light from the administration office provided sufficient light to the scene, and, that you could identify a person on the scene using the administration office light. He further reiterated that the weather was merely cloudy and insisted that it was neither drizzling nor misty.

[47] PW6 Mfanafuthi Ndwandwe, a teacher at the school testified that on the 26<sup>th</sup> October 2006, at about 2200 hours, he received a call from DW1 asking him to come to the accused's house; he didn't go there, even though she called him for the second time. When he asked for the whereabouts of the accused and deceased, she told him that they had gone to the school; however, he didn't go out of the house.

[48] After some time, the accused called him from outside the house saying that the deceased had been shot by unknown people; he woke up his housemate PW2 Xolani Jele but they could not find the accused outside the house. They went to the scene where they found PW1, and the accused; Philemon Ngcamphalala later arrived and provided light to the scene.

[49] The accused told them that they had gone to the bush with the deceased to relieve themselves when they were attacked by unknown people. PW6 phoned PW5 as well as the police informing them about the incident. Between 2 am and 3 am the accused asked him to accompany him to his house; he wanted to accompany DW1 to her homestead. They were joined by PW2 and a female teacher Olivia Hlatshwako. On their return from the house, they remained at the scene and the accused accompanied DW1 home. They remained at the scene until the next morning.

[50] The weather was cloudy and there was neither mist nor drizzling. He further explained that the scene was visible before Philemon Ngcamphalala arrived and lit the scene with his motor vehicle; and, that the deceased could be seen lying on the ground. He told the Court that the light from the administration office covered the scene of crime, and that he was able to identify the deceased lying on the ground. He wondered why the accused couldn't identify the deceased before he shot him.

[51] Under cross-examination he reiterated that the weather was not drizzling or misty. He further reiterated that he arrived at the scene with PW2 shortly before Philemon Ngcamphalala arrived and that he was able to identify the deceased with the assistance of the light from the administration office.

[52] The accused testified in his defence and told the Court that on the 26<sup>th</sup> October 2011, they were in his room with the deceased watching television; after that they ate food together which he had brought from his homestead. The accused phoned his girlfriend DW1 asking her to visit him, and the deceased phoned his wife. Since it was dark, he asked the deceased to accompany him but he told him that he wanted to go to relieve himself in the bush. He took his pistol and they left the house together. The parental homestead of DW1 is about 450 metres away from the Teachers' Quarters.

[53] They separated at the main school gate with the accused fetching his girlfriend and the deceased going to the bush next to the public road to relieve himself. On his way back with his girlfriend, but before reaching the main school gate, they saw a person next to the fence and close to the school gate. He phoned PW1 thinking it was him but he never answered his cellphone. They passed the stranger; however, he started walking fast towards them. Subsequently, he started running towards them. He pulled DW1 behind him, then cocked his pistol. The man came until he was a metre away from them.

[54] He blocked the man using his foot on the stomach; then, they collided and the man fell besides him. The pistol fired a shot, and, they ran away to his house. They did not know the man, and they looked for the deceased in the house but he was not there. Thereafter, it became apparent that he had shot the deceased. He also phoned him but his phone rang unanswered; then, he took a torch and ran to the scene.

[55] When he arrived at the school gate, he identified the deceased by the jacket that he was wearing. He jumped over the fence since the gate was locked; he shouted and called him but he didn't respond. The deceased was bleeding. He ran back to the house and was confused. He told DW1 that the person who was shot was the deceased. He phoned PW1 and told him

that the deceased had been shot by unknown people and that he was lying on the ground; he further told him that the incident happened on their way from the bush where they had gone to relieve themselves.

[56] The accused went to the house of PW6 and narrated the same version of how the deceased was killed. Before he arrived at the main gate, he phoned the school chairman Philemon Ngcamphalala and told him the same version of the story; then, he phoned PW1 to open the gate since he had asked Philemon Ngcamphalala to come to the scene. The school chairman arrived shortly thereafter and lit the scene with his motor vehicle. Again he repeated the same story to PW1 and the school chairman; then, he phoned the police and reported the incident. He repeated the same version of the story to the police on the phone. PW2 and PW6 arrived at the scene followed by the police and members of the community. He recorded a statement with the police as an eye witness with the same version of the story. PW5 also came and about three or four other police cars arrived on the scene. One police car and the chairman's car had lights facing the deceased body.

[57] The accused told the court that he was a close friend to the deceased since the time when they were at university, and, that their friendship was intact up to the time when the deceased died; he told the court that they did not

only share a house with the deceased but they bought food to be cooked together and ate together.

[58] The accused further made a startling revelation which constitutes a drastic departure from the version of events which he gave to PW1, PW2, PW3, PW6, Philemon Ngcamphalala the school chairman, the police when he reported the incident at the scene as well as members of the public. The accused's second version was similar to the statement he recorded at Hluti police station to Detective Constable Mthupha.

[59] He told the Court that the first version about going to the bush with the deceased to relieve themselves and being attacked by unknown people leading to the death of the deceased was not true; and that the true version was the second one in which he admitted shooting the deceased thinking that he was a criminal attacking him and DW1.

[60] The weather was drizzling on and off and that it was cloudy and misty. The visibility on the scene was about five to ten metres from the scene to the fence; and that he was able to identify the deceased by his jacket before he jumped over the school fence. Ironically and strangely, the accused did not identify the deceased when he was a metre away from him when he blocked him with his foot; they even collided with him before the shooting.

[61] He confirmed that the area was infested with crime; notwithstanding this, he walked alone from his house to the scene of crime. In addition he walked alone 450 metres from the Teachers' Quarters to the parental homestead of DW1.

[62] At about 0200 hours he went to his house to fetch DW1 so that she could go home. He was accompanied by PW2, PW6 and Olivia Hlatshwako. On their way from the house, he left them at the scene and proceeded with DW1. They waited at the scene until the next morning when police experts arrived and took photographs of the scene. He was subsequently arrested on the 28<sup>th</sup> October 2011. Upon his arrest, he recorded a statement at Hluti Police Station; the statement was admitted in court as evidence and marked Exhibit 12.

[63] On the 11<sup>th</sup> November 2011 he applied for bail before this Court. The second version was made the basis for his defence that the deceased was shot accidentally during the scuffle between himself and the unknown man; that the two had walked together from the house and separated after the main gate with the accused going to the home of DW1 and the deceased going to the bushes to relieve himself. The bail application has been admitted in evidence and has been marked Exhibit 13.



[64] Under cross-examination the accused admitted having told people the first version of the story that they were attacked by unknown people who short at the deceased. In his evidence in-chief he told the Court that when the stranger was a metre away, he blocked him using his foot, and then they collided and the stranger fell and the pistol went off; in the bail application, he said that he kicked him on the stomach after which a scuffle ensued resulting in the person being accidentally shot.

[65] The Crown further reminded him of the contradictory statements of DW1 and himself; the accused alleged that when they saw the stranger, he phoned PW1 trying to ascertain if he was the stranger standing next to the school fence but there was no response. DW1 and PW1 corroborated each other that the accused only phoned PW1 after the deceased had been shot.

[66] The Crown further reminded the accused that in his evidence in-chief he told the Court that he came into contact with the deceased during the scuffle, and that it was unlikely that he could not recognize him at close range.

[67] The accused admitted that he discussed the case with DW1 through “mix-it”, and, that he further advised her to deny that she was present when the deceased was killed. Similarly, he admitted that he lied when narrating

the first version because he didn't want people to know that he had shot his friend; this is contrary to his other allegation that he lied because he was shocked and confused.

[68] The Crown put to the accused that he had shot the deceased deliberately because he corked the pistol before he was attacked by the alleged stranger. Furthermore, that the light was sufficient for him to identify the man from a distance of five to ten metres in accordance with his own evidence; that he had not fired a warning shot or asked the man his name. The Crown further reminded him of the statement by DW1 that she ran away to the Teachers' Quarters before the stranger arrived; this statement contradicted the evidence of the accused that he held DW1 behind his back, and after the shooting, they ran together to the house.

[69] DW1 Phathisiwe Ngcamphalala testified that the accused phoned and asked her to visit him, and, that he subsequently came to fetch her from her parental homestead. On their way to his house and next to the school gate, they saw a stranger standing next to the gate, and the accused phoned PW1 twice thinking that he was the person they were seeing next to the gate; and he did not answer; then the accused corked his gun.

[70] She admitted that in the statement which she recorded with the police, she didn't mention that the accused phoned PW1 prior to the incident and that he didn't respond; she further told the court that after they had passed the stranger, he came running to them and the accused held her hand pulled her behind him and told her not to run away. They couldn't identify the stranger.

[71] She also told the Court that the weather was drizzling and dark. The accused then kicked the stranger. Again this is a drastic departure from her recorded statement where she stated that she ran away to the Teachers' Quarters before the stranger reached them.

[72] She heard a gunshot and asked the accused why he had fired the shot; and she further asked him what if the victim was her relative Mlandisi Maphosa, and, the accused responded by saying what if the stranger had stabbed him. This piece of evidence further contradicts her recorded statement that she ran away to the Teachers' Quarters before the stranger reached them.

[73] After the incident they both went to the house, looked for the deceased inside the house but they could not find him; they phoned him twice but the

phone rang unanswered. The accused left the house but came back to tell her that the person who was shot was the deceased.

[74] She confirmed recording a statement with the police on the 29<sup>th</sup> October 2011 at Hluti Police Station. The statement is self-contradictory as to the version of events leading to the death of the deceased. She recorded that before the person could reach them, she ran away to the Teachers' Quarters; however, she continued and told the court what transpired when the stranger reached them and in particular, that the stranger pushed the accused who in turn kicked him, and that they were busy pulling and pushing each other. Nobody spoke to the other; and, then she heard a loud sound of gunfire, and the stranger fell to the ground. She asked the accused why he shot the deceased. After that they both ran to the house.

[75] Under cross-examination she told the court that the accused phoned PW1 before and after the shooting; however, the Crown reminded her that she did not mention that in her recorded statement. She merely stated that the accused phoned PW1 after the incident. The Crown put it to her that this was an afterthought.

[76] The defence made an application directing and authorising MTN Swaziland Ltd to furnish the High Court with a call history of cellphone numbers

76444084, 76034081 and 76452595 for the 26<sup>th</sup> October 2011. Cellphone number 76452595 belongs to PW1; cellphone number 76034081 belongs to the accused and cellphone number 76444084 belongs to DW1. The three printouts were admitted in evidence and marked exhibit 15 in respect of PW1's cellphone, exhibit 16 in respect of the accused's cellphone and exhibit 17 in respect of DW1's cellphone.

[77] The accused sought the MTN printout in order to prove that he phoned PW1 prior to the shooting of the deceased. The accused had earlier testified that he phoned PW1 before and after the incident. However, PW1 had testified and maintained that the accused only phoned him once after the incident; that the accused buzzed him and he buzzed back, then the accused phoned him. In her statement recorded with the police she said the accused phoned PW1 after the shooting; however, under cross-examination she said that the accused phoned PW1 prior and after the shooting.

[78] However, the MTN printouts, exhibits 15 and 16 merely show that the accused called PW1 once at 21.56 hours; and the printout supports the version by PW1 that the accused only phoned him once. In addition the printouts do not assist the court because they do not indicate whether the call was made prior or after the incident because it is not known when the deceased was shot.

[79] The accused had pleaded guilty to count 2 relating to the contravening of section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act No. 24 of 1964 as amended in that on the 26<sup>th</sup> October 2011 at Deccapol Primary School he was found in possession of a firearm, 9 mm calibre pistol, without a licence or permit. The serial number of the pistol was scratched. The accused has also pleaded guilty to count 3 relating to the contravening of section 11 (8) of the Arms and Ammunitions Act No. 24 of 1964 as amended in that on the 26<sup>th</sup> October 2011 he was found in possession of one (1) round of ammunition of the 9 mm calibre pistol without a licence. Accordingly, the accused is found guilty on counts 1 and 2 being the unlawful possession of a firearm and one live round of ammunition.

[80] With regard to the first count relating to murder, the evidence of the accused and DW1 is contradictory, unreliable and highly inconsistent. The accused gave two versions of how the deceased died. Shortly after the death of the deceased, the accused told PW1 Philemon Ngcamphalala, PW2, PW3, PW6, the police as well as members of the community who came to the scene the first version that they were attacked by unknown gunmen on their way from the bush where they had gone to relieve themselves. The accused maintained this version from the 26<sup>th</sup> to the 28<sup>th</sup> October 2011 when he was arrested.

[81] After being arrested, the accused changed to the second version alleging that he shot the deceased by mistake, and that he was walking to his house from fetching his girlfriend; that they saw a stranger standing next to the fence and that, when they had passed the stranger, he charged upon them; he blocked the stranger using his foot, and they collided; then, there was a scuffle and the gun was cocked with his hand on the trigger, and the deceased was accidentally shot.

[82] Similarly, the statement recorded by DW1 with the police contradicts her evidence in-chief. In the statement recorded with the police she ran away to the Teachers' Quarters before the stranger reached them; and, in her evidence in-chief, she told the court that she ran away after the accused had kicked the stranger.

[83] The Crown witnesses contradict each other whether it was misty and drizzling or if the weather was merely cloudy. However, and notwithstanding this, the accused told the court that when he came back from the house and before he jumped the fence, he was able to identify the deceased by his jacket and that the scene was visible for five to ten metres. However, it is strange why the accused could not identify the deceased when he was at close range such that they collided with the deceased. The evidence of PW1, PW2, PW4, PW5, PW6 corroborate each other that the

light from the administration office illuminated the scene of crime. Similarly, the evidence of the accused is that there was a five to ten metres visibility from the fence to the scene of crime.

[84] In his evidence in-chief the accused disclosed that the first version was not correct. He maintained this evidence under cross-examination. He said the correct version was the second one. However, the second version itself has its own problems because in his own admission, visibility from the fence to the scene of crime was about five to ten metres; hence, it is unlikely that he could not have identified the deceased at close range.

[85] Furthermore, another weakness with the second version is that he shot at the deceased accidentally. However, he admitted that he took out his pistol before the stranger charged upon them, corked the pistol and placed his finger on the trigger. There is no suggestion in his evidence that he activated the “safety pin”. By his own admission, his conduct constitutes “*dolus eventualis*” because he foresaw that by corking the pistol and placing his finger on the trigger, he would shot the stranger but he was reckless whether or not the deceased was shot.

[86] The accused has not offered any explanation to the Court why the deceased could attack them with his girlfriend. The evidence that the accused and



the deceased were close friends since their days at university was not disputed. Similarly, the evidence that they shared a house and meals as a sign of their friendship was also not disputed. In addition the evidence that they left the house together and parted at the gate was not disputed; hence the accused knew that the deceased went to the bush when he went to fetch DW1. The accused also knew what the deceased was wearing and there was visibility of the scene at least for five to ten weeks.

[87] DW1 and the accused admitted that they communicated with each other after the incident with a view to present the same version of the incident which would not place DW1 on the scene when the deceased was shot. The accused actually advised her to deny that she was on the scene when the deceased was shot. In the circumstances the evidence of both the accused and DW1 is not reliable not only because it is contradictory with divergent versions of the same event but because they admitted to have tried to fraudulently concocted a version that they would mutually present to the Court; a version that was not necessarily true in order to conceal the circumstances leading to the death of the deceased.

[88] The accused claimed that the area was infested with a high rate of crime but he doesn't explain why he walked by himself from the school gate to the homestead of DW1 and back. He doesn't explain as well why he was able

to walk from his house to the scene by himself in a crime infested area. From the scene he walked back to his house to tell DW1 that the person who was shot was the deceased. Again he walked by himself from the house and back to the scene.

[89] I accept that the accused has put the defence case to the Crown witnesses; and I further accept as trite law that no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal. See the judgment of *Rex v. Difford* 1937 AD 370 AT 373.

[90] In light of the contradictory evidence of both the accused and DW1, I am convinced that the explanation which the accused gave in court is not only improbable but that beyond any reasonable doubt it is false. The defence has not shown in the circumstances that the pistol was fired accidentally. In addition the accused has not shown that there was imminent danger, he alleged that the stranger ran to them; there is no evidence that the stranger assaulted him or that he was armed with a dangerous weapon. Under cross-examination the accused told the court that he blocked the stranger when he

was a metre away and they collided with the stranger who then fell down and then the pistol went off.

[91] An event occurs by accident if it is caused by an unforeseeable occurrence. In the present case the shooting and killing of the deceased was foreseeable because the accused knew that the pistol was serviceable but he corked it and placed his finger on the trigger. See the High Court case of *Rex v. Sandile Mbongeni Mtsetfwa* criminal case No. 81 of 2010.

[92] In the case of *S v. Ndiwenyu* (1990) BLR 409 at 416 *Gyeki Dako J* had this to say:

**“...an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought under the circumstances in which it is done, to take reasonable precautions against it.”**

[93] At 407 His Lordship stated as follows:

**“...In my view therefore, the meaning to be attributed to the expression “event occurs by accident” as a result which is caused by an unforeseeable occurrence.”**

[94] In the case of *S v. Modise Mokwati Fly CHFT – 0000057-07* which was confirmed by the Court of Appeal of Botswana cited as *Fly v. The State* BLR1 57 CA the Court stated as follows:

**“...there appears to be two cognate elements to an accident. First, there must be no intention on the part of the doer to obtain the results of his action. In other words, the results of his action must be unintended by him or her. Secondly, is the foreseeability test, which necessarily invokes the concept of a reasonable man, i.e. whether a person of reasonable prudence would have foreseen the harm and taken reasonable precautions to guard against it eventuating. It is against both yardsticks that the defence raised by the accused ought to be considered in *casu*.”**

[95] The above cases decided in Botswana were followed by this Court in the case of *Rex Sandile Mbongeni Mtsetfwa* criminal trial No. 81 of 2010. These cases reflect the law in this country; however, I am alive to the origin of the defence in Botswana, that it arises from the Penal Code, Cap 08:01 at section 8 (1).

[96] *Hannah CJ* in the case of *Mazibuko Vincent v. Rex* 1982 -1986 SLR 377 at 380 (CA) states the following:

**“A person intends to kill if he deliberately does an act which he in fact appreciates might result in death of another and he acts recklessly as to whether such death results or not.”**

[97] It is my considered view that the accused foresaw that when he corked his pistol and placed his finger on the trigger, he would shoot and kill the deceased hence his conduct cannot in the circumstances be classified as an accident

[98] The defence did not raise the issue of self-defence during the criminal trial; however, this was raised in his heads of argument. It is trite law that a person may apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack. The test is whether the accused acts reasonably in defence is objective. However, the force used must be commensurate with the danger apprehended, and, if excessive force is used, the plea of self-defence will not be upheld. See the cases of *Rex v. John Ndlovu* 1970-1976 SLR 389 AT 390-391, *Rex v. Sifundza* 1970-1976 SLR 314 at 395; *Rex v. Mgilija Sam Dlamini and Others* 1970-1976 SLR 53 at 54

[99] In *Shiba v. Rex* 1977-1978 SLR 165 at 167 *Smit JA* said the following:

**“The law with regard to self-defence requires that a person should rather flee than kill his assailant where he can save himself by flight, but that no one is expected to take flight to avoid an attack where flight would not afford him a safe way of escape. A person is not bound to expose himself to the risk of a stab in the back when by wounding or killing his opponent he can secure his own safety. Furthermore, in considering the question of self-defence the Court must endeavour to imagine itself in the position in which the accused was.... The Court must be careful to avoid the role of armchair critic, wise after the event weighing the matter in the secluded security of their court-room.”**

[100] At page 168 *Smit J* stated the following:

**“It is well established in our law that a person is justified in killing in self-defence, not only when he fears his life is in danger, but also when he apprehends grievous bodily harm.... The danger may in truth not have been great, but the jury must consider whether a reasonable man, in the circumstances in which the accused was placed, would have thought that he was in great danger....**

**The test whether the appellant exceeded the bounds of self-defence is an objective one. But this objectivity demands that the court considers all the surrounding factors operating in the appellant’s mind at the time she acted and avoid the role of armchair critic.”**

[101] The test for self-defence is objective. In light of the evidence of the accused that there was visibility of five to ten metres from the school fence

to the scene of crime, absence of evidence that the deceased was armed or that he attacked the accused, the force used was excessive in the circumstances and not commensurate with the danger apprehended. Furthermore, the deceased did not assault the accused and the accused did not fire a warning shot. It is the evidence of the accused that after blocking and kicking the stranger, they collided with each other and the stranger fell besides him. The accused shot the stranger after he had fallen, and, at the time his life was neither in danger or threatened; and, he didn't at that stage apprehend grievous bodily harm.

[102] In the circumstances, I am convinced that the Crown has proved all the three counts with which the accused is charged beyond reasonable doubt. The accused is convicted on all three counts. With regard to counts 2 and 3, section 238 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides that if a person is arraigned before the High Court and has pleaded guilty to any offence other than murder, the Court may sentence him for such offence without hearing any evidence. However, in addition to the plea of guilty, the accused has made formal admissions which were admitted as part of the evidence of the Crown. In addition there is a Statement of Agreed Facts which has also been admitted as part of the evidence of the Crown in accordance with section 272 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 which provides that in any

criminal proceedings the accused or his representative is his presence may admit any fact relevant to the issue and any such admission shall be sufficient evidence of such fact.”

[103] The next question is to consider the existence or otherwise of extenuating circumstances with regard to the count of Murder. It is trite law that extenuating circumstances refer to any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. The list is not exhaustive and includes such factors as youth and immaturity, intoxication, provocation as well as a belief in witchcraft, illiteracy and social upbringing. The cumulative effect of these facts must bear on the accused’s state of mind and influence his conduct to commit an offence. The onus to establish the existence of extenuating circumstances rest with the accused. See the cases of *S v. Letsolo* 1970 (3) SA 476 (AD) at 476; *Philemon Mdluli and Others v. Rex* 1970-1976 SLR 69 (CA) at 75D; *Mbuyisa v. Rex* 1979-1981 SLR 283 (CA) at 285 as well as *Rex v. Enos Khumbula Shongwe* 1977-1978 SLR 60 (HC) at 61F.

[104] The defence submitted as an extenuating circumstances the fact that he shot at the deceased because “he felt that he was under a threat of being attacked by the deceased”. However, before convicting the accused I considered



that fact, and, the evidence adduced. In the circumstances, I find the accused guilty of murder without extenuating circumstances.

[105] In mitigation of sentence the defence submitted the following: firstly, that the accused is a first offender; secondly, that he was 34 years of age when he committed the offence; thirdly, that he has shown remorse by undertaking to make a confession but was dissuaded by his previous attorney; fourthly that he prepared and signed a Statement of Agreed Facts with the Crown admitting the *actus reus*; fifthly, that he never challenged what was said by the Crown save to explain his version of the story; sixthly, that prior to his arrest he was employed by the Swaziland Government as a teacher; seventh, that he is single with a minor child of two years to support; eighth, that he took responsibility for the death of the deceased; ninth that the accused and the deceased were very close to each other; tenth, that there is no evidence of premeditation; that the period from the date of his arrest on the 28<sup>th</sup> October 2011 should be taken into account.

[106] The Crown initially argued that there were no extenuation circumstances in existence which would reduce the moral blameworthiness of the accused. Similarly, I find none in the circumstances of this case

[107] With regard to aggravating circumstances, the Crown submitted that a human life was lost and that a lenient sentence would result in the loss of confidence in the Courts by members of the public. He submitted that the sentence should be proportionate to the offence, and that since the killing was brutal, a deterrent sentence was required. In addition the Crown argued that the accused killed his close friend who has trust in him; and that he betrayed the deceased.

[108] I have considered the triad that is the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. Section 15 (2) of the Constitution provides that the death penalty shall not be mandatory in those instances in which no extenuating circumstances exist; hence, I am not obliged to impose a death penalty. Similarly, section 15 (3) of the Constitution provides that a sentence of life imprisonment shall not be less than twenty five years imprisonment.

[109] Accordingly, the following order is made:

- (a) The accused is hereby sentenced to thirty years imprisonment in respect of the first count of Murder.
- (b) The accused is sentenced to five years imprisonment or to a fine of not less than E5 000.00 (five thousand emalangeni) in respect of the

second count of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act No. 24 of 1964.

- (c) The accused is hereby sentenced to two years imprisonment or a fine of E2 000.00 in respect of the third count of contravening section 11 (2) as read with 11 (8) of the Arms and Ammunition Act No. 24 of 1964.
- (d) The sentences imposed in respect of the three counts will run concurrently.
- (e) The period spent by the accused from the date of his arrest on the 28<sup>th</sup> October 2011 shall be taken into account in computing the period of imprisonment.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For the Crown  
For the Defence

Attorney N. Maseko  
Attorney N. Manana