



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No: 370/11

In the matter between

REX

V

NHLONIPHO MPENDULO SITHOLE

Neutral citation: *Rex v Nhlonipho Mpendulo Sithole (370/11)*  
[2012] SZHC 169

**Coram:** OTA J.

**Heard:** 19<sup>th</sup> July 2012, 20<sup>th</sup> July 2012 and  
1<sup>st</sup> August 2012

**Delivered:** 8<sup>th</sup> August 2012

**Summary:** Accused charged with Murder: pleads guilty to culpable homicide: Murder and culpable homicide: principles thereof: plea of self defence raised-indirect intention to kill established: Accused convicted of Murder.

[1] The Accused person **Nhlonipho Mpendulo Simelane**, stands before this court charged with a single count of Murder.

[2] The indictment reads as follows:-

“ *In that upon or about 16<sup>th</sup> July 2011 and at or near KaZwayimbane area in the Hhohho region, the said accused person did unlawfully and intentionally kill one **SABELO DLAMINI** and did thereby commit the crime of MURDER”*

[3] When the charge was put to the Accused, he pleaded not guilty to Murder but guilty to Culpable Homicide, which plea his legal representation **Mr B. Dlamini** confirmed. **Ms Q. Zwane** who appeared for the crown, informed the court that the crown would not be accepting the plea of guilty for Culpable Homicide, but will be proceeding with the charge of Murder. This state of affairs necessitated that the crown produces evidence in proof of the offence of murder, beyond reasonable doubt.

[4] Before dabbling into the totality of the evidence serving before court, I should of necessity point out at this juncture, that on the state of the evidence some issues are common cause.

[5] These common cause issues are the following:-

1) On the day in question the Accused person inflicted stab wounds on the deceased with a knife, from which stab wounds the deceased eventually died.

2) The autopsy report which was admitted in evidence by consent as exhibit C demonstrates that the deceased died due to hemorrhage as a result of penetrating injury to left lung , heart.

[6] The post mortem report also demonstrates that the following antemortem injuries were seen:-

*“1. Cut wound over left arm 1.1x0.2cm skin deep present with scratch towards medially 4cm length 0.1cm front.*

2. *Sutured wound over front of left chest 3cms length 10cms below, outer to nipple present on dissection it involved 5 space intercostals structures (2.9m) pleura lower lobe lung, pericardium, apex of heart (2.7 x 1cm, 1.2x1cm) through and through edges clear cut, angle sharp, front to back pleuro-pericardial cavity contained about 1600ml blood''.*

[7] It is therefore not in controversy from the totality of the foregoing that the Accused stabbed the deceased on that day resulting in his death. And that the death of the deceased was caused by the injuries he sustained as a result of the stabbing by the Accused as are enumerated in Exhibit C the post mortem report.

[8] The foregoing common cause issues curtailed the questions left to be answered in this case, to the following:-

- 1) *Did the Accused kill the deceased intentionally.*
- 2) *Was there any justification, whether in full or partial for the killing.*

[9] It is apposite for me at this juncture to have regard to the key evidence led in casu, for a proper determination of the foregoing posers.

[10] Now in proof of its case, the crown paraded a total of 6 witnesses.

[11] PWI was **Mpendulo Simelane**. He told the court that on the day in question, the deceased had asked him to accompany him to go and buy eggs. When they got to the homestead where they were to buy the eggs, the deceased went inside but PWI remained at the gate. That the deceased met the Accused who was already inside the homestead and the Accused said to deceased that he didn't want him in his home because deceased's brother had impregnated the Accused's sister. That as the deceased started leaving the homestead, the Accused followed him to the gate and they started fighting. That the Accused drew out a knife and said he was going to stab the deceased because he is a dog. That PWI and the deceased started leaving again after the fight and the Accused followed them the second time. That the deceased went back to meet the Accused because both the deceased and the Accused were drunk. That they started fighting the second

time and it was then that the Accused got on top of the deceased, and the Accused drew out a knife and stabbed the deceased and said to him that he was going to die where he was going. That after that PWI and the deceased left. But the deceased fell along the way and PWI got help from one **Nkosinathi** who came to their assistance.

[12] Under cross examination, PWI admitted that this incidence occurred after sunset and it was dark. He agreed that the elders of the homestead which is the **Sithole** homestead were not around at the time of the incidence and that the homestead was left in the care of a 17 year old girl. He stated that he did not see the deceased peeping through the window of the homestead or talking to **Busisiwe** the 17 year old girl, which caused the Accused to quarrel with him. He said the cause of the quarrel was because deceased's brother had impregnated Accused's sister. PWI denied that the deceased was on top of the Accused strangulating him just before the Accused stabbed him. He stated that he did not notice that the Accused's jacket was blood stained.

[13] PW2 was **Busisiwe Sithole**. She told the court that she is 19 years. She said on the day of the incidence she was in the house with her siblings and the Accused who had come to see her mother. The deceased had come to her homestead to buy eggs around 7pm. That when the deceased got inside the homestead he showed his presence and identified himself. PW2 went to meet him. That whilst PW2 was talking to the deceased, the Accused who was already inside the house also came to talk to the deceased and asked him what he was doing at the homestead since it was already dark. The deceased replied that he had come to buy eggs. That the Accused and deceased started arguing as to what the deceased was doing at the homestead. The deceased decided to leave and the Accused followed him. PW2 then went inside the house. Thereafter, she heard a noise outside and she peeped through the window she realized that the Accused was still asking the deceased what he was doing at the homestead. That she then went outside and told the Accused that the deceased had come to buy eggs. She told the deceased to leave and go to his homestead. That the deceased left and the Accused followed him again. PW2 locked the gate and went to sit inside. She heard a noise outside again. She again peeped through the window and saw the Accused and deceased

fighting at the gate and she saw that the deceased had fallen down but she did not know why. That she informed her siblings and they went outside when they got outside she found that the deceased was now standing. That she could not see what was happening but she heard the deceased say to the Accused *“why did you have to kill me my brother in law would you not be in a position to need me tomorrow”*

[14] It was further PW2's evidence, that thereafter, she went back to the house with her siblings. That the Accused later came to the house. His jacket and hands were blood stained and he was carrying a knife and a pair of rebook pushins under his armpit. That the Accused told them that he had injured the deceased. He had actually killed the dog and he will be dead at any time. That Accused then used the knife he was carrying to make a cross on the floor as a sign that he had killed the deceased.

[15] PW2 further stated that when the Accused came back to the house after the fight he was drunk and when he uttered the words, he looked excited as one who was proud of what he had done.



[16] Under cross examination, PW2 agreed that she was not at the scene of the fight when the Accused stabbed the deceased and that she did not see the Accused stabbing the deceased. PW2 said even though she was not at the scene, when she peeped through the window she saw that the deceased was lying down and the Accused was standing, so its not true that the Accused stabbed the deceased because the deceased was on top of him strangulating him.

[17] PW2 said when the Accused came back and said he had killed the dog that she was with her siblings which included **Mayibongwe Sithole** and **Manqoba Sithole**. She denied that the only thing the Accused said was that he had injured someone at the gate.

[18] PW3 was **Manqoba Sithole** 17 years. He corroborated PW2's evidence in material respects. I'll repeat only the aspects of this witnesses evidence that were not highlighted by PW2. PW3 told the court that when the Accused came to the house he told them that he had come to borrow money from their mother to go to a funeral. That when the deceased arrived he identified himself and said he had come to buy eggs and PW2 told him that there were no eggs. That the

Accused then accused PW2 of opening the door to her boy friends when their mother was not home. PW3 said that the deceased left and the Accused followed him and the fight ensued just as told by PW2. That whilst they were inside peeping through the window they saw the deceased fall. It was at that juncture that PW3 and his siblings went outside. That when they approached both the Accused and deceased were standing and the deceased said to the Accused.

“ *why would you kill me my brother in law wouldn't you need my help tomorrow*”.

[19] Thereafter, the deceased left and Accused followed him. The deceased turned around punched the Accused and pushed him to the fence, then the deceased started running away. When deceased tried to run away he fell. That the Accused then got on top of the deceased. It was further PW3's evidence that he did not see what the Accused did to the deceased whilst on top of him. That, thereafter the deceased got up and PWI **Mpendulo** took him away.

[20] That later Accused came back to the house carrying pushins under his armpit and the Accused made a mark on the floor using the knife he was carrying, then said to them ‘*you must tell your mother that I have killed the dog*’.

[21] PW3 further testified that the distance from where they were peeping through the window to the gate is about 30 meters and though it was dark, it was not too invisible but visible, so they could see.

[22] Under cross examination PW3 agreed that the Accused’s clothings were blood stained after the fight. He denied that the clothes were blood stained because the Accused stabbed the deceased who was attacking him. He maintained that during the fight he was at the scene and that the Accused was on top of the deceased though he did not actually see the Accused stabbing the deceased. PW3 further denied that the only words the Accused said when he returned to the homestead after the fight was that he had injured someone at the gate. PW3 agreed that after the second fight, the deceased was on his feet being led away by PWI who was assisting him. He maintained that

this notwithstanding, the Accused thereafter told them that he had killed the dog.

[23] **PW4 Mayibongwe Sithole** corroborated the evidence of PW2 and PW3 in some material respects. I have no wish to repeat his evidence and nothing turns on his cross examination.

[24] **PW5 was Richard Nkosinathi.** He told the court that PW1 approached him to help the deceased who was lying at the bus stop. That he also roped in the help of his uncle. That the deceased told him that the Accused stabbed him because his brother had impregnated the Accused's sister. That the deceased was subsequently transported to the Buhleni Police Station by PW5's uncle together with deceased's relatives whom PW5 had called. That from the police station, they took the deceased to the Mkhuzweni Health Centre from where he was transferred to the Pigg's Peak Government Hospital.

[25] Under cross examination, PW5 told the court that though the deceased did not mention any names, however, he knew that deceased's brother impregnated a girl at the Sithole homestead.

[26] **PW6 was 4837 Detective Constable Sicelo Tsabedze.** He was the investigating Police Officer. He told the court that he received the docket concerning this case on the 17<sup>th</sup> July 2011.

[27] That his investigations revealed that the deceased had been stabbed by the Accused. That at that time the Accused was no where to be seen. That the police circulated the information to other police stations to be on the look out for the Accused. Later that evening, he got a message from the Tshaneni Police Station that the Accused had been apprehended and together with other police officers they proceeded to the Tshaneni Police Station where they found the Accused. That they introduced themselves to the Accused as police officers and that they were investigating a case of assault with intent to cause grievous bodily harm. Thereafter, they took the Accused to the Buhleni Police Station from where they called the Pigg's Peak Hospital to ascertain the status of the deceased. It was then they learnt that the deceased

had since passed away. It was further PW6's evidence that he then cautioned the Accused in accordance with the judges rules and formally charged him with Murder.

[28] PW6 further told the court, that he thereafter sought permission to search the Accused's bag, which permission was granted. That in the process of the search, he found the black rebook pushins or flip flops which were identified by the deceased's relatives as belonging to the deceased. The pushins were admitted in evidence as exhibit A. PW6 also told the court that he also found a blood stained khaki jacket in the Accused's bag which was taken by the scenes of crime officers for forensic analysis.

[29] Under cross examination, PW6 stated that he was told by the Tshaneni Police that the Accused was arrested around the Mananga area. When it was put to him that the Accused had gone to a funeral in South Africa where he was arrested by the South African Police who brought him to Mananga and handed him over to the Tshaneni Police, PW6 maintained that he was told that the Accused was arrested in Mananga in Swaziland. PW6 also told the court that he first

cautioned the Accused according to the judges rules at Tshaneni Police Station because that was the first time he was meeting him and not because the Tshaneni Police had not cautioned the Accused or informed him of why he was arrested. PW6 also stated that he further cautioned the Accused according to the judges rules at the Buhleli Police Station . Even though PW6 stated that the Accused had disappeared prior to his investigation, he however admitted that he was informed that the Accused had gone to South Africa to attend a funeral, though the exact location in South Africa was not revealed to him. PW6 denied that the Accused was assaulted at the Buhleni and Pigg's Peak Police Stations.

[30] At the close of the case for the crown, the Accused entered into his defence. He testified on oath and called no other witnesses.

[31] The Accused told the court that he is 24 years old. That on the 16<sup>th</sup> of July 2011, that they were from playing soccer and that they were drunk. That he proceeded to the home of his uncle one **Elliot Sithole**

because he wanted to borrow money from the uncle's wife to attend a funeral in South Africa. That when he got to the homestead he found that none of the elders were home as the uncle's wife had also gone to attend a funeral. It was only the children at home left in the care of **Busisiwe Sithole** then 18 years. That just about 5 minutes after he got there, as he was about to leave, the deceased arrived at the homestead. That he found the deceased just close to the window. That he enquired of the deceased what he was doing at the homestead at that time of the night. That he did not get a favourable response. That he then asked the deceased to leave the homestead since it was only the children left alone in the house. That the deceased was reluctant to leave, therefore the Accused had to push the deceased outside the gate.

[32] It was further the Accused's evidence that when he pushed the deceased outside the gate, the deceased attacked him and a fight ensued between them. That in the course of the fight the deceased got on top of the Accused and was throttling him. That the Accused was loosing his breath, that was when he injured the deceased. That after



the fight he went back to the Sithole homestead and told them that he had injured the deceased. That he then left for home and on his way he met his father one **Petros Sithole** and he reported to his father that he had injured someone with whom he was fighting. That he also met his uncle one **Hazel Sithole** and he also reported the incidence to him.

[33] Accused further told the court, that he was too drunk on the day of this incidence. That the incidence happened around 7 pm and he did not have foreknowledge that the deceased would come to the Sithole homestead on the fateful day.

[34] It is further the Accused's evidence, that the morning after the incidence he proceeded to South Africa to attend the funeral because he managed to raise the money he needed. That whilst there, his father called his uncle and asked the uncle to get the South African Police to arrest him. That the South African Police arrested him and informed him that the deceased had since died. That the South African Police then handed him over together with his belongings to

the Swaziland Police at Tshaneni. That at the Tshaneni Police Station one of his legs was shackled with iron and he was asked to wait for the police officers from the Buhleni Police Post. That when the Buhleni Police Officers came he was put in the police van and taken to the Buhleni Police Post. That on the way to the Buhleni Police Post his state of mind was not right because the police were asking him a lot of questions and told him that the deceased was seriously injured. Then he realized that he had committed a crime and was being arrested and this was the first time such a thing had ever happened to him.

[35] Accused further told the court that at the Buhleni Police Station the police officers told him to tell them what happened and they brutally assaulted him. That he was shaking as he was speaking. After that they gave him a form to sign. Then they took him to the Pigg's Peak Police Station where he was also assaulted by a police officer in his stomach, using the butt of a rifle.

[36] Under cross examination, the Accused whilst agreeing that he heard PW2, PW3 and PW4 give evidence to the effect that when the deceased got to the house he showed his presence, then knocked and identified himself, however, insisted that he had seen the deceased peeping through the window because he was the first one to go outside the house. And that the deceased did not show his presence outside the door. When it was put to him that his evidence in this regard is an after thought because he did not put it to PW2, PW3 and PW4, the Accused replied that he did not think of asking them about that because the truth is that the deceased did not show himself outside as they alleged. It was further put to the Accused that he was the aggressor from the outset of this incidence, which Accused denied. The Accused denied that he stabbed the deceased because one of his brothers impregnated Accused's sister.

[37] Accused insisted that the deceased lied when he told PW5 that Accused stabbed him because one of deceased's brothers had impregnated his sister, and that he does not know why the deceased would say that. Accused stated that he did not have any grudge

against the deceased's family. When it was put to him that if he was remorseful he would have reported the matter to the police. The Accused stated that he was remorseful only that he did not realize that the deceased was badly injured, and that he was going home to tell his father of the incidence when he met his father along the way and told him. It was further put to the Accused that the first time he took out the knife as testified by PW1, he was the aggressor. The Accused denied this. Accused further stated that deceased never called him his brother in law and asked him why he would want to kill him would he not need his help another day.

[38] Accused stated that the deceased never pushed him against the fence and then run away, as testified to by PW3, that all the deceased did was that he slapped him and tore his T Shirt. When it was put to him that his evidence in this regard is an after thought because he failed to put it to PW3 the Accused replied that he was speaking the truth.

[39] The question to determine at this juncture, is, has the crown proved the offence of Murder beyond a reasonable doubt or has the crown proved that the Accused had the requisite intention or mens rea, whether direct or indirect to kill the deceased on the day of this incidence.

[40] Since it is obvious from the Accused's evidence that his case is that he did not kill the deceased intentionally, I will approach an answer to this poser from the several defences which the Accused urged upon the court via his evidence. The first is the allegation of self defence which I gather from the Accused's evidence that he stabbed the deceased but was acting purely in self defence, because the deceased was strangulating him and he was out breath. I should point out at this juncture that the plea of self defence now has Constitutional hegemony. By this I mean that this defence resides in the Constitution of Swaziland Act of 2005, via Section 15 (4) (a) thereof in the following words:-

“ 15 (4) without prejudice to any liability for a contravention of any law with respect to the use of force in such cases as are mentioned in this sub section, a person shall not be regarded as having been deprived of life in contravention of this Section if death results from use of force to such extent as is reasonably justifiable and proportionate in the circumstances of the case

(a) for the defence of any person from violence or for the defence of property”.

[41] Therefore, for this defence to lie, the use of force employed must be “to such extent as is reasonably justifiable and proportionate in the circumstances of the case for the defence of any person from violence or for the defence of property.

[42] In considering this defence which was raised in the case of **Sandile Mbongeni Mtsetfwa Criminal Trial No. 81/10**, the court referred to the jurisprudence of Botswana, a country whose laws are in pari

materia with our own and whose jurisprudence is of high persuasive authority in the Kingdom, and stated as follows in paragraphs 44 and 45 thereof:-

(44) *I proceeded to consider a number of judgments from other jurisdictions in which the whole concept of the defence fell for determination. These included the cases of **Magula v The State [2006] I.B.C.R 209 (CA)** **Mmoletsi v The State [2007] 2 B.L.R 708; Palmer v R [1971] 55 CR. APP R 223.** In the **Magula case (supra) Tebbutt J.P** speaking for the majority of the court, enunciated the applicable principles in the following terms at page 212 of the judgment.*

“ *The courts have repeatedly emphasized that in considering whether an Accused person has acted in self defence, the court should not take what has been described as “the arm chair approach” to the facts. It is all very well, sitting in the cool, calm atmosphere of the court to opine that the Accused should have taken this step or that when faced with an unlawful attack upon him. The trier of fact must, however, try to place himself in the position of the Accused in the circumstances*

*that existed at the time---- it must also be remembered that it is not necessary that the Accused person should have feared for his life. He can act in self defence if he had a reasonable apprehension that the aggressor intended to inflict grievous harm on him. See S V Jackson 1963 (2) SA 626 (A)''*

*(45) In Mmolets, (supra) Dr. Twum JA said the following regarding the proper application of this defence:*

*“ Under the law of this country, when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should be no more than is reasonably necessary in the circumstances. The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious*



*injury or even death unless he took the action he did, the killing can hardly be described as self defence''.*

[43] Similarly, in the case of **John Tcharesakgosi Mothai v The State Criminal Appeal No. 21/82**, the court of Appeal of Botswana said the following :-

“ *In SNT (supra) the court held that the approach in a matter of this kind had been correctly set out by Van Winsen AJ (as he then was) in Ntanyana v Vorster and Minister of Justice 1950 (4) SA 398 ( C ) at 406 A, where, setting out that the test was an objective one, he said this:*

“ *The very objectivity of the test however demands that when the court comes to decide whether there was a necessity to act in self defence, it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted''.*

*In S v Ntuli 1975 (1) SA 429 (A1) E Holmes JA said the following:-*

*“ In applying these formulations to the flesh and blood facts, the court adopts a robust attitude not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death”.*

*Counsel for the appellant has also referred the court to the remarks of Lord Morris in Palmer v R 1971 (55) Criminal Appeal Reports (P 242) where he said the following:-*

*“ If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action”.*

[44] In casu, I find that when the facts of this case are juxtaposed against the foregoing principles, that the theory of self defence propounded by

the Accused, cannot lie. I say this because Accused's story that he stabbed the deceased because the deceased was on top of him and was strangulating him, cannot be believed in the face of the overwhelming credible and reliable evidence adduced by PW1, PW2 and PW3, who were all at the scene of this offence and told the court that it was the Accused that was on top of the deceased. PW1 who witnessed the stabbing incidence told the court that the Accused got on top of the deceased during the fight, took out a knife and stabbed him. PW2, and PW3 told the court that at no time during this incidence, neither when they were peeping through the window nor when they were actually at the scene, was the deceased on top of the Accused. Rather, it was the Accused that got on top of the deceased even though they did not see what the Accused did when he got on top of the deceased. However, PW1's evidence has established that it was at this material time that the Accused stabbed the deceased. I find PW1, PW2 and PW3 very credible, truthful and reliable witnesses.

[45] In coming to this conclusion, I am not unmindful of the fact that there were some minor inconsistencies in the evidence of these witnesses, which to my mind did not however, serve to detract from the

truthfulness of their evidence, viewed objectively. These inconsistencies tended to the sequence of events leading to the stabbing of the deceased by the Accused, as to when precisely the deceased fell and was stabbed by the Accused, and when the deceased tried to run away after punching and pushing the Accused against the fence. It is my considered view that with the lapse of time between when this incidence occurred and when these witnesses testified, the witnesses cannot be expected to recall precisely all the minute details of the incidence. This is because human memory does not improve over time but deteriorates. As the court said in **State V Goganneskgosi (1980)B.L.R.133 (HC) at 140 B-C.**

“ *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 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 necessary make them untruthful''.*

[46] I see no reason why PW2 and PW3 would want to fabricate this magnitude of story against the Accused who is their blood relative, a cousin, he being the son of their fathers brother. There is no evidence of any bad blood between the Accused's family and that of the witnesses. Rather, what I gather from the evidence is a relationship of cordiality that can easily be deduced from the fact that the Accused had gone to their homestead that faithful day to borrow money from their mother to attend a funeral in South Africa. I'll uphold the testimonies of these crown witnesses and reject the evidence of the Accused.

[47] Furthermore, it is obvious from the evidence that the Accused was the aggressor leading to this unfortunate incidence. From the moment the deceased appeared at the Sithole homestead, the Accused took offence. He first accused PW2 of bringing boys into the house when their mother was not there. Then he questioned the deceased as to his mission in the homestead. Accused was apparently not satisfied with

the answer given by both PW2 and deceased, that the deceased was in the homestead to buy eggs, rather the Accused asked the deceased to leave. It didn't end there. As the deceased was leaving, the Accused followed him to the gate and fought with him. It was at that juncture that the Accused, according to PWI's evidence which was not disputed by the Accused under cross examination, first drew out the knife threatening to stab the deceased. After the first fight, the deceased and PWI started leaving, the Accused again followed them. It was at that point that the deceased turned back to retaliate. PW3 told the court that the deceased turned back, punched and pushed the Accused against a fence and attempted to run away. However, the deceased was not successful because in the process of running away, he fell down. It was at this point that the Accused got on top of him and stabbed him, as established by PWI's evidence.

[48] The evidence of PW3 that the deceased turned back punched and pushed Accused against the wall then attempted to get away, but unfortunately fell down was not disputed by the Accused under cross examination of PW3. I find Accused's attempts to dispute it in his defence, an after thought which cannot stand. It therefore stands

rejected see the case of **Dominic Mngomezulu and 10 Others vs Rex Case No. 94/10.**

[49] There is no evidence to show that the deceased was carrying a weapon through out this incidence. Rather it was the Accused welding the knife through out. He used the knife to attack the deceased whilst the deceased was in a position of weakness, lying on the ground. The Accused was all through in a position of strength, not only welding a knife but also being on top of the deceased. From the facts of this case. it was easy for the Accused to leave the deceased after he fell down and walk away, but the Accused pursued the deceased and stabbed him even in his state of weakness. Even if I were to accept the Accused's posture that he stabbed the deceased because deceased was strangulating him, which is not however my finding, I am still firmly convinced that even in that scenario, the means of retaliation employed by the Accused in warding off the alleged attack was not commensurate with the attack. The deceased tried to avoid this unfortunate incidence. He tried to leave when the Accused confronted him. The Accused would let him. He tried to run away the Accused would let up. The deceased even tried to pacify the Accused by

calling him his brother in law as testified to by PW2 and PW3, whose evidence I believe, but this did not deter the Accused. On the whole I find that there was no emergency facing the Accused out of which he could not avoid injury or death unless he took the action that he did. I thus reject the self defence which the Accused sought to set up in his evidence. I therefore hold that the Accused did not act in self defence.

[50] Now, what we are left with is Accused's plea of guilty to the offence of culpable homicide. By so pleading the Accused is saying that he did not have the necessary intention to kill the deceased. Before dabbling into the law on the offence of culpable homicide, I find it convenient at this juncture to detail the position of the law on what constitutes intention in cases of Murder.

[51] The position of the law is that intention consists of *dolus directus* and *dolus eventualis*, which both will found the offence of murder. While *dolus directus* simply consists of the Accused directing his will to causing the death of the deceased, *dolus eventualis* on the other hand, stems from the Accused foreseeing the possibility of his action resulting in death of another person, however the Accused persist in



that action and is reckless as to whether death occurs or not. In the **South African Law and Procedure volume I, Third edition page 36**, the learned editor **J.M Burchell**, had this to say on *dolus directus*:-

“ *Dolus directus is intention in its ordinary sense and refers to where the Accused’s aim and object was to perpetrate the unlawful conduct or cause the unlawful consequence*”

[52] **Similarly, Jonathan Burchell’s Principles of Criminal Law, Third Edition at page 467**, defines *dolus eventualis* as follows:-

“ *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)*”.

[53] Now, Section 2 of the Homicide Act, 1959 reads as follows:-

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

[54] Furthermore, Section 3 (1) defines provocation as meaning and including any wrongful act or insult of a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in relation of master and servant, to deprive him of the power of self control and

induce him to assault the person by whom such act or insult is done or offered.

[55] Case law has distinguished the offences of Murder and culpable Homicide in the following words:-

“ *Murder is the unlawful killing of a human being with intent to kill where this intent is absent, the offence is culpable homicide----- . A definition of Culpable Homicide is the unlawful negligent causing of the death of a fellow being*”.

[56] See **R v Thulani Doctor Mthembu criminal trial No. 125/06 R v Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09.**

[57] Now, I see no provocation to the Accused demonstrated in the totality of the evidence serving before court that spontaneously deprived him of self control causing him to commit the said offence for me to arrive at the conclusion that his action was purely negligent. Even though the Accused alleged that the deceased was peeping through a window at the homestead on the fateful day, this piece of evidence however

has no legs to stand upon. This is because of the overwhelming evidence to the contrary demonstrated by PW2, PW3 and PW4 who were all there and whose evidence I believe. They told the court that when the deceased got to the homestead, he showed his presence. He knocked and identified himself. The Accused only came out of the house to meet the deceased whilst PW2 and deceased were already talking. The Accused did not dispute this piece of evidence whilst cross examining any of these witnesses. His feeble attempts to do so in his defence amounts to nothing but an after thought and it is thus rejected.

[58] Furthermore, the evidence of PW1, PW2, PW3 and PW4 was also to the effect that when the Accused asked the deceased to leave, there was no resistance, the deceased proceeded to leave but the Accused followed him irrespective of this and fought with him at the gate. I cannot therefore find any provocation in this respect.

[59] Assuming, without conceding, that the presence of the deceased in the Sithole homestead at that time of the evening and in the absence of the elders of the homestead could be viewed as having provoked the

Accused, I do not see this state of affairs as having such a provocative effect on the Accused as to deprive him of the power of self control which is required to establish the offence of culpable homicide in terms of Section 2 (2) of the Act. For as **Smit JA** said in the case of **Sipho Isaiah Lukhele v Rex 1970-1976 SLR 164 at 164 (A)**

“ *Provocation will only avail as a defence if it resulted in a loss of self-control to such an extent that the mental element requisite for murder may not have been present*”.

[60] Similarly, the suggestion that the deceased provoked the Accused when he punched and pushed him against the fence in a bid to get away from him as testified to by PW3 must also fail. This is because the Accused himself told the court that this piece of evidence is not true, that all the deceased did was that he slapped him and tore his T shirt. The Accused cannot then be allowed to approbate and reprobate, shift goal posts, by seeking to now rely on this piece of evidence to establish culpable homicide. I thus reject the defence of provocation.

[61] Now, there is evidence that after the Accused stabbed the deceased he went back to the Sithole homestead and uttered words to the effect “*I have killed the dog and it wont even get to where it is going to*”. and made a cross on the floor with the knife he was carrying. This piece of evidence is vehemently contested by the Accused who told the court that all he told PW2, PW3 and PW4, was that he had injured someone at the gate. I however find that I do not believe the Accused’s version in the face of the cogent, consistent and reliable evidence led by PW2, PW3 and PW4 to this effect. Besides I have already held that there is no reason urged why PW2, PW3 and PW4, Accused’s siblings, would contrive such a story against him. There is also evidence that after the stabbing, the Accused did absolutely nothing to help the deceased but rather went away with the deceased’s pushins, exhibit A. The Accused did not report this matter to the police but proceeded to South Africa the following day to attend a funeral, from where he was arrested by the South African Police and handed over to the Swaziland Police at Mananga. It is obvious from the evidence led that the Accused did not flee to South Africa in order to evade arrest, but was merely attending the funeral in respect of

which he had gone to borrow money from his aunt at the Sithole homestead on the day of this incidence. PW6 admitted that though he could not find the Accused immediately upon receiving the information about the offence, but that he was informed that the Accused had gone to South Africa to attend a funeral, though the exact location in South Africa was not disclosed to him.

[62] Then there is the evidence from PW1 and PW5, that the reason why the Accused stabbed the deceased is because the deceased's brother impregnated Accused's sister. While PW1 told the court that he heard the Accused telling the deceased to leave the Sithole homestead for this reason, PW5 for his part told the court, that the deceased himself gave him that information while lying down at the bus stop. This piece of evidence is also velimently opposed by the Accused who denied ever saying that to the deceased. I am unable to accept the crowns case in this respect, that the reason why the Accused stabbed the deceased was because his brother impregnated the Accused's sister. This is because there is no proper basis on which to reject the Accused's version. I say so because PW1 was at the gate at the material time the Accused met the deceased inside the homestead and

asked him to leave. PW2, PW3 and PW4, who were with the Accused and deceased at that material time when the Accused asked the deceased to leave the homestead gave no evidence to this effect. It appears very unlikely to me in these circumstances, that PW1 who was some distance away was able to hear these utterances, yet PW2, PW3 and PW4 who were right at the same spot with the Accused and deceased gave no evidence whatsoever to this effect.

[63] On the whole, I do not think that I can properly find that the Accused had direct intention to kill the deceased. This is more so as it is proved that the Accused was already in the Sithole homestead with the knife before the arrival of the deceased and there is no evidence whatsoever to show that the Accused knew that the deceased would be coming to that homestead on that day .

[64] I however find for a fact from the totality of the evidence led, that the Accused is guilty of murder. In coming to this conclusion, I am mindful of the fact that the Accused was drunk at the material time of this incidence. I accept this. I however hold the view that the Accused was sober enough to know and appreciate what he was doing



and the events of that day. Therefore he was able to relate to this court the events leading up to the death of the deceased on the day and even disputed the evidence tendered by crown witnesses. It was his unlawful actions which led to the death of the deceased. I find this as a fact. He had no lawful justification for doing what he did, which I also find as a fact. I further find as a fact that by using the kind of weapon employed in this crime, which is a knife and stabbing the deceased in such a sensitive part of his body such as the chest, and inflicting such magnitude of injury to the extent that the heart and lungs were affected, as demonstrate in exhibit C, the Accused foresaw the prospect of harm resulting from his actions, but was nevertheless reckless as to whether death did or did not occur.

[65] This is also clearly evident from the words which the Accused said to PW2, PW3 and PW4, that he had killed the dog. He clearly foresaw that his actions had the prospects of harm but was reckless as to whether death occurred or not. Therefore, he did nothing to assist the deceased after the stabbing. He did not report the matter to the police or take the deceased to the hospital. Rather he proceeded to South Africa the following day to attend a funeral.

[66] I thus find that the Accused had *mens rea* in the form of *dolus eventualis* and is guilty of Murder. Accused is therefore accordingly convicted of the offence of Murder as charged.

For the Crown:	Q. Zwane
Accused in person	B. Dlamini

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE .....DAY OF .....2012**

**OTA J  
JUDGE OF THE HIGH COURT**