



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 254/2010**

In the matter between:

**THE KING**

**VS**

**MXOLISI BHADAZELA LOULL SUKATI**

**Heard: 22, 29 February 2012 and 8 March 2012**

**Delivered: 2 April 2012**

**Neutral Citation;** Rex v Mxolisi Bhadazela Loull Sukati (254/2010) [2012]  
SZHC 38 (2<sup>nd</sup> April 2012)

**CORAM: SEY J.**

**FOR THE CROWN**

**MS. L. HLOPHE**

**FOR THE ACCUSED**

**MR. LEO GAMA**

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**JUDGMENT**

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**SEY J.**

[1] The accused **MXOLISI BHADAZELA LOULL SUKATI** has been arraigned before me on two counts, being Murder and Rape. The amended indictment dated at Mbabane on the 28<sup>th</sup> day of

November, 2011 reads as follows:

**COUNT ONE:**

The accused is guilty of the crime of **MURDER**

In that upon or about 2<sup>nd</sup> May, 2010 at or near Mbabane in the Hhohho region, the said accused did unlawfully and intentionally kill **LOMAGUGU MAVUSO** and did thus commit the crime of **MURDER**.

**COUNT TWO:**

The accused is guilty of the crime of RAPE

In that upon or about 2<sup>nd</sup> May, 2010 at or near Mbabane in the Hhohho region, the said accused did intentionally have unlawful sexual intercourse with **LOMAGUGU MAVUSO** without her consent, and did thereby commit the crime of **RAPE**.

- [2] It is further alleged by the Crown that the crime of Rape is accompanied by aggravating factors as envisaged by Section 185 (bis) of the Criminal Procedure and Evidence Act 67/1938 as amended in that the accused stabbed the victim to death.
- [3] The accused person pleaded not guilty to both counts and defence counsel, Mr. Leo Gama, indicated to the Court that the pleas accorded with his instructions.

- [4] In support of its case, the Crown led the evidence of eight (8) witnesses who adduced *viva voce evidence*. These are Dr. R. M. Reddy (PW1), 3905 D/Constable Sandile Chonco (PW2), Captain Pen Msomi (PW3), Calisile Ncamsile Shongwe (PW4), Dumsile Sukati (PW5), Ndumiso Roy Skhokho Shongwe (PW6) 3643 D/Sgt. Lucky Simelane (PW7) and Musa Nxumalo (PW8). At the close of the Crown's case, the accused gave evidence under oath and called no witness.
- [5] It is not disputed that the deceased Lomagugu Mavuso was raped and murdered on or about 2<sup>nd</sup> May, 2010 at or near Mbabane in the Hhohho region. The accused has denied the commission of both offences as alleged and has pointed accusing fingers at one Musa Nxumalo, who testified as PW8, as the person who had raped and killed the deceased.
- [6] The question that calls for the Court's determination is whether the Crown has proved its case beyond a reasonable doubt that it was the accused who committed the two offences as charged.
- [7] The police pathologist, Dr. R. M. Reddy, testified as PW1. He said he conducted a post-mortem examination on 5<sup>th</sup> May 2010 on a female

Swazi adult called Lomagugu Mavuso aged 30 years. The body was identified to him by one Dudu Mavuso and 3643 D/Sgt. of Mbabane police station. PW1 produced and tendered the post-mortem report which was admitted into evidence as **Exhibit A**.

[8] PW1 further testified that he found the following ante-mortem injuries as recorded on **Exhibit A** as follows:

- “1. Cut wound in front of right ear 1.2 x 0.5cm skin deep with extended scratch 3cm length x 0.1cm.
2. Cut wound front of neck above thyroid cartilage margin transversely placed 10cm x 4.9cm vertebral body surface deep. Involved muscles, trachea, oesophagus, blood vessels, and nerves with cut wound right 1 x 0.5cm, left 1 x 0.7cm muscle deep above the margin of main wound.
3. Cut wound over chest above right nipple 2 x 1cm muscle deep.
4. Cut wound over left shoulder front 2 x 1cm muscle deep.
5. Penetrating wound over front of abdomen above umbilicus towards left 2.5 x 0.9cm entered abdominal cavity involved muscles, mesentry, aorta blood in peritoneal cavity 600ml front to back edges clean cut, angle sharp.
6. Cut wound over right flank outer aspect 2 x 1cm muscle deep.
7. Cut wound over outer aspect of right buttock 1 x 0.5cm muscle deep.
8. Cut wound over left thigh upper region 1 x 0.4cm skin

deep.

9. Cut wound over left chest back 1.2 x 1cm muscle deep.
10. Laceration over left knee 1 x 1.5cm, 1.4 x 0.5cm, below right knee outer aspect 1 x 0.3cm, 1.4 x 0.2cm skin deep present.”

[9] According to the testimony of PW1, the fatal injuries were No. 2 and 5 and the cause of death was “due to multiple injuries.” He further testified that blood, vaginal swab, pubic hair and nail tips with scraping were removed from the body of the deceased and handed over to 3643 D/Sgt. Lucky Simelane for further examination for blood grouping, presence of spermatozoa, foreign hair and presence of tissue.

[10] Detective Constable 3905 Sandile Chonco testified as PW2. He said he is a police officer based at the Hhohho Headquarters as scenes of crime officer. On 4<sup>th</sup> May 2010 he received a call informing him that there was a murder case along the Mbabane/Manzini Highway just below Mbabane Government Hospital. He proceeded to the crime scene and upon his arrival, he found that some people had already converged there. He said he first interviewed the people and then he took photographs before examining the scene at around 8:30 am.

[11] PW2 further testified that he found the lifeless body of a lady who

was wearing a black leather jacket and a khaki top. Her trousers and underpants were half way down on her left leg and her shoes were off. He said she was soaked in blood displaying a cut in her neck and that, next to the dead body, he noticed a hand bag and a knife which he photographed. He also noticed that there was a used condom and, upon looking further, he saw two packet of condoms which he took and sealed in the official Swaziland police seal bags together with all the other exhibits which he collected at the scenes of crime. He said he sealed all the exhibits in bags as follows:

Orange top which was blood stained in FSX467108

Pink panty also blood stained in FSX467109

Black jacket in FSX467094

Purple top in FSX467107

Black leggings in FSX467103

Hairpiece in FSX467449

Pair of shoes and hand bag in FSX467450

[12] On the 5<sup>th</sup> of May, 2010, PW2 proceeded to the hospital where he took photos of the deceased before the post-mortem was conducted. He said the deceased's body displayed more wounds other than the cut wound he had seen on the neck. All the stab wounds were photographed and PW2 then sealed all the exhibits in front of PW1 and PW73643 D/Sgt. Lucky Simelane before keeping all

the exhibits in his custody.

[13] On 7<sup>th</sup> May 2010, PW2 received sealed exhibits from the investigator who told him he had made an arrest in connection with the murder case. The exhibits he received were two test tubes of blood sample, pubic hair, a pair of brown shoes, a striped shirt, a navy blue sweater, a pair of trousers and a cap. He said all the exhibits were sealed in the official police seal bags and on the 11<sup>th</sup> of May 2010, he took all the exhibits, including those he had taken from the scenes of crime, to police headquarters for the purpose of sending the exhibits to Pretoria for analysis and examination. After some months he received a report from the South African police in Pretoria together with all the exhibits. He said when the investigator handed over the exhibits to him they were already sealed. All the exhibits were kept at the police station and they were later sealed in new exhibit bags and they were all put in one seal bag with number FSG 341070. He said the rape kit, which was not from the primary scenes of crime, was numbered 600603 and it included the blood and swabs which were taken from the post-mortem examination.

[14] PW2 also produced and tendered 21 photographs taken by him at the scene and these were admitted into evidence and marked as **Exhibits B - B20** as follows:

**Exhibit B** shows the full view of the crime scene;

**Exhibit B1** shows the close view of the crime scene;

**Exhibit B2** shows the body before the post-mortem examination

**Exhibit B3** shows the close view of the deceased person displaying  
the cut wound on her neck;

**Exhibit B4** shows the knife;

**Exhibit B5** shows the used condom at the scene;

**Exhibit B6** shows the condom packet;

**Exhibit B7** shows another packet of condom;

**Exhibit B8** shows the handbag found at the scene;

**Exhibit B9** shows the right shoe;

**Exhibit B10** shows the left shoe;

**Exhibit B11** shows the full view of the knife;

**Exhibit B12** shows the back side of body;

**Exhibit B13** shows the view of the whole body at the scene;

**Exhibit B14** shows the whole body at the post-mortem;

**Exhibit B15** shows the body at the post-mortem displaying the  
stab wound on the right shoulder;

**Exhibit B16** shows a close view of the facial appearance of the  
deceased as well as the cut wound on her neck;

**Exhibit B17** shows the stab wound on the right side of her body

**Exhibit B18** shows the stab wound on the right side of her  
buttocks;



**Exhibit B19** shows stab wound on the centre of her stomach;

**Exhibit B 20** shows stab wounds on her knee.

[15] It is worthy of note that some of these photographs tendered by PW2 are corroborative of the ante-mortem injuries shown on **Exhibit A** as well as the verbal account of the pathologist Dr. R. M. Reddy who had specifically told the Court that the cause of death was “due to multiple injuries.”

[16] In respect of the other exhibits, PW2 went on to testify that the main seal bag he had received from the investigator had been under his custody ever since it came from Pretoria. He produced and tendered all the exhibits without objection from defence counsel and they were admitted as part of his evidence and marked as follows:

Orange top with blood stains: **Exhibit C**

Pink panty also blood stained: **Exhibit C1**

Black jacket: **Exhibit C2**

Purple top: **Exhibit C3**

Black leggings: **Exhibit C4**

Hairpiece: **Exhibit C5**

Pair of shoes and hand bag: **Exhibit C6**

Knife: **Exhibit D**

Brown shoes: **Exhibit E**

Pair of trousers: **Exhibit F**

Striped shirt: **Exhibit G**

Cap: **Exhibit H**

Sweater: **Exhibit J**

[17] Under cross examination, PW2 told the Court that he had instructed PW1 to take finger prints in order for him to ascertain whether there were any tissues under the deceased's finger nails which would indicate that she had fought her assailant. He also said that he wanted the pubic hair to be examined to ascertain whether there were any pubic hairs belonging to the assailant so as to determine whether he had raped the deceased. He maintained that the blood samples were taken to Pretoria for DNA analysis and that they were later brought back to him sealed. He admitted that Exhibit B shows a lot of persons, who were not police officers, gathered at the scene. He denied defence counsel's allegation that a lot of onlookers were viewing the body of the deceased and he maintained that he had found a lot of onlookers at the shelter but not at the viewing.

[18] PW2 further testified that he did not know how many of the onlookers had interfered with the body before he got there but he believed the police officers who got there first had cordoned off the area. He said there was no tape but the police officers stood around

to prevent onlookers from coming to the area. He disagreed with the suggestion that the area had not been cordoned off and he said that he could see from Exhibit B that a human barrier had been used by some of the police officers to form part of the cordon before the onlookers. PW2 agreed that one of the duties of the police is to guard against contamination of the crime scene. When he was asked whether the extraction of samples was not normally done by doctors through police officers attached to scenes of crime office, he said that is not the practice and that there was nothing wrong with the investigating officer handing over the samples to him. He said that the DNA results were contained in the report that came back from Pretoria.

[19] In answer to questions put to him about lifting up finger prints from the knife, PW2 responded that he did attempt to lift finger prints from the knife found at the scene but he could not because the knife was wet and covered with dew and blood and under such conditions no one could lift any finger prints. He said he did not say so in examination in chief because he did not find it necessary. He said that when he found the condoms, which were about half a metre away from the body, he suspected the deceased had been raped. He said the used condom was not very far from the body and that he gave instructions for the lab to lift the DNA from the exterior

of the condom as well as from the inside.

[20] Prince Edward NkosiyoKuthula Msomi testified as PW3. He said he is a Captain in the South African Police Service attached to the Biology Unit of the Forensic Science Laboratory situated in Pretoria South Africa as a Senior Forensic Analyst since March 2002. He holds a National Diploma in Biotechnology majoring in Biochemistry and Microbiology obtained at Technicon Natal. He said he has undergone in-house training within the Forensic Science Laboratory with reference to the opening of parcels containing biological evidentiary material and the preliminary testing for body fluids thereof and DNA techniques which have offered him the knowledge and skills for Forensic Biology Analysis. He has 12 years experience in the biological sciences.

[21] PW3 went on to testify that during the course of his official duties on 29<sup>th</sup> March 2011, he received the case file and thereafter interpreted the DNA results of the crime and reference samples pertaining to Mbabane Swaziland RCCI 2314/10 (LAB No 95921/10, SLS 2010132846) by a process requiring competence in Biology. He produced and tendered an affidavit dated 4<sup>th</sup> October 2011 together with a report of the same date and a table detailing relevant DNA results. These documents were admitted and marked as **Exhibits**

**K, K1, K2** and **K3** respectively.

[22] The following findings have been made by PW3 from the DNA analyses on the exhibits:

*“The DNA result of the reference samples (RSPFSL-08219 “SUKATI MXOLISI”) and (RSPFSL-08208 “DECEASED’S PANTY”) is read into the mixture DNA result from the condom (SWAG 019913); and the most conservative occurrence for the DNA result from the condom (SWAG 019913) is **1** in **22 000** people.*

*The DNA result of the knife (RSPFSL-12385) matches the DNA result of the reference sample (RSPFSL-08208 “DECEASED’S PANTY”). The most conservative occurrence of this DNA result is **1** in every 245 billion people.”*

[22] PW3 further testified that the profile that was found from the knife matches exactly with the deceased’s profile and that it was definitely the murder weapon that was used to kill the deceased. He also said that the condom contained a mixture of DNA from the suspect and the deceased and that one can conclude that the condom was used on the deceased. He said they swabbed from the outside and the inside as well and the profile taken by the doctor from the vagina swab indicated that the deceased had had sexual intercourse with someone else before the accused but that they do

not know the person.

[23] Under cross examination, PW3 stated that they usually swab for cells only and when they swab they are not looking for blood. He said the pair of trousers was negative for blood and even though the shoes had blood on them that was not sufficient for testing. PW3 however maintained that the knife was definitely used as the murder weapon and when he was questioned about the used condom PW3 replied as follows:

*“With the condom, there is a DNA profile of the deceased on the condom and this condom also contained the semen of the suspect.”*

[24] PW4 Calisile Ncamsile Shongwe recalled the events pertaining to the matter before Court. She said that it was on a Saturday just before mid-night and Sindi, Fortunate and herself were sitting on a pavement at Apollo Printers and that was when they were joined by the deceased Lomagugu who came carrying a bottle of beer. She was from the bus rank. Fortunate left for Kalafata, then the accused came to them and he threw E200 note in front of them and he told them that he wanted to take one of them for the whole night for E150. He negotiated for sexual intercourse from Lomagugu but she refused and the accused insisted but Lomagugu still refused.

[25] The accused then took his E200 and Sindi agreed to go with him for half the night. Both the accused and Sindi left but the accused then came back and he left again. At that time Lomagugu was at Kalafata. When the accused returned for the second time Sindi had been taken by someone in a car and the accused went and stood by the hill near Kalafata.

[26] PW4 further testified that Lomagugu came out and stood by the Atlas Robots just by the big screen before the waiting room on the highway to Manzini. PW4 was seated on the pavement at Atlas facing Shell garage and while seated there she said that she saw the accused person following Lomagugu and he went and stood next to her. She saw him talking to Lomagugu and she saw them holding hands and they crossed to the other side of the highway from Manzini.

[27] PW4 was still seated there and after 20 minutes the accused came back to her and said *"sister, sister, I am from chasing a certain guy who had raped and murdered Lomagugu"*. She asked the accused for Lomagugu and he told her that Lomagugu was at the back of the waiting room and that she should go and look for her. She said she told the accused that she was afraid and that she would wait for

Sindi who had a cell phone which had a torch. She said the accused then went downwards towards Engen direction and that she stood for a few minutes and then left. She said she did not go to the waiting room as was afraid because she had seen spots of blood on the accused's trousers. The following morning Sindi phoned her and told her that Lomagugu was dead and after the call Sindi and some police officers came to Nkoyoyo to fetch her and they went to the mortuary at Mbabane Government Hospital where she was asked to identify the deceased.

[28] During cross examination of PW4, Mr. Gama put it to the witness that the accused would tell the Court that at no stage did he request for sexual intercourse from Lomagugu and that he only requested sexual intercourse from Sindi. In reply PW4 maintained that the accused first asked Lomagugu before Sindi agreed to go with him. She said the accused did not request sexual intercourse from her not even when he came back after taking Lomagugu. She admitted signing a statement at the police station but she said it has been a long time and she did not have any explanations for any inconsistencies in her evidence. When it was put to her that the accused would deny that he crossed over to the waiting room with Lomagugu, PW4 retorted that that would be a lie because both of them entered the waiting room together but the accused came out



alone.

[29] PW4's evidence in this regard is corroborated by the evidence of PW8 Musa Nxumalo who told the Court that he last saw the accused and the deceased by the guard rails which is an area close to the waiting room.

[30] PW7 3543 Detective Constable Lucky Simelane was the investigating officer in this case. He testified to the effect that he had cautioned the accused in terms of the Judges' Rules before he was formally charged for the present offence. He also told the Court that the allegation by the accused that it was PW8 who had murdered the deceased was fully investigated. He said that PW8 was interviewed and a statement was obtained from him. Under cross examination, he admitted that the accused had told him that he wanted to point out the man he had seen leaving the scene of the crime and that the man was at the same prison at the time. PW7 said they caused the accused to meet with Musa Nxumalo and after that meeting they felt there was no need to charge him and neither did they take any specimens from him.

[31] PW8 Musa Maplango Nxumalo testified that on 1<sup>st</sup> May 2010, he had arrived at Kalafata bar at around 6:30 pm and that he was in the

company of one Themba and Doing Power. He said they played snooker inside and then later went out and stood by the gate together with a security guard called Nxumalo. He said Fortunate came running and she narrated to the security guard that the accused was forcefully trying to take her to Manzini for a drink. At that time the accused approached from the pine tree carrying one litre of milk and he went inside the bar where Lomagugu was drinking with one man.

[32] PW8 went on to state that they were still standing outside smoking and then Lomagugu and the accused left and they were following each other and they continued walking together. He said that later he and Power ordered a kombi so that they could go and sleep and they gave Temba a lift and when the Kombi was leaving by Atlas, the accused and the deceased were seated by the guard rail next to the big screen and that was the last time he saw them. He said he did not have sexual intercourse with Lomagugu on that day. Later he was called by the police to meet with the accused in connection with this matter and he was told that there was one Mxolisi who was alleging that he was the one who had raped and killed the deceased. He said he told the police that indeed he had seen the deceased the previous night at the bar and he had also seen her when she was leaving with the accused whom he identified in the

dock.

[33] Under cross examination PW8 said that he knew the accused before that fateful day but he did not know his name. Defence counsel put it to him that on that night the accused had heard the screams of a woman and that he had seen PW8 running away and that he had chased him but that PW8 had run away from the bus stop where the body was discovered the next morning. In reply PW8 said he was not there and that the last time he saw them they were seated by the guard rail. When he was asked whether he had told the police that he had left the Kalafata premises with Power and Themba on that fateful night, PW8 said he did. The crown then closed its case.

[34] I shall now turn to consider the defence put forward by the accused person who, as indicated earlier, elected to give evidence on oath. It is the accused's evidence that he was born on 12<sup>th</sup> September 1986. That he did not commit the offences of murder and rape of Lomagugu as alleged and that he does not know about the crimes committed on 2<sup>nd</sup> May 2010. He said on the the 1<sup>st</sup> of May 2010, he was at Yemfo around 10-10:30 pm with a gentleman called Rodgers. They were having drinks and after the gentleman slept he left for Kalafata. When he was on his way to Kalafata just by the junction at Atlas, he said he found Okwethu and another lady who was unknown to him. Okwethu told him that they should have sexual

intercourse and so he took a E200 note and threw it down on the ground and then he took it again and said he was just going to Kalafata.

[35] The accused said Sibusiso and Dumfunda Thuala Dlamini were at Kalafata and that they bought drinks and whilst drinking Musa Nxumalo came to the bar. He said they told him that they should go to extension 3 to a new bar that was open. But he said he told them that he will not be able to come because he had left Rodger at Yemfo. The accused further testified that he left them at the bar and went back to Okwethu who was with Ncamsile. He gave her the E200 and they left using that gravel road by Atlas. They had sexual intercourse and she gave him E150 change. He then went back to Kalafata bar and found the two men and they had drinks and they left for the new bar. He bought some more beer and cigarettes and they went by the tarred road. The accused said at that time Lomagugu came from the bar. They exchanged greetings and then she asked him to accompany her to the hitch hiking spot.

[36] The accused said they sat by the guard rail and he asked her who she was visiting at Ezulwini and she said she was visiting her boyfriend. Whilst they were conversing a patrol vehicle came and she went to talk to the people who were inside the car. Then she

boarded the car and disembarked again. He said he then told her that he was going back to Kalafata bar and he said he left the deceased there. When he arrived at Kalafata he bought some more beer and when he finished drinking his beer he went back to the M4.

[37] The accused testified further that as he was by the robot about to take the turn towards Galp filling station he heard someone screaming at the waiting room. He said he stood still and when he looked towards Galp filling station he saw three gentlemen. When they came to him he did not know their names but he could recognize them from town. He asked them whether they had heard the screams and they confirmed so. It was a lady's cry for help that he had heard. He said one of the gentlemen suggested that they should go and check and they did. They reached the bus stop and Musa Nxumalo came running towards the nurses' home. They tried to run after him but he went into the bushes and they decided to wait a little bit so that he would come back. They also switched off their phones and waited.

[38] The accused said that they went back down the steps and they never went to check what had happened at the waiting room. He then took the direction to Kalafata and he was met by Okwethu. He

said he asked her for Lomagugu and she told him that she might have gone to Ezulwini to see her boyfriend. It is the accused's evidence that Okwethu suggested that they have intercourse and they took the gravel road just below the waiting room on the way to Manzini. They had sexual intercourse and he used a condom. Then he headed towards the filling station and he bought pizza and then he went straight to Yemfo where he found Roger and they continued drinking until around 4am when they left for town in a kombi.

[39] It is the accused's evidence that he had never told Ncamsile that Lomagugu had been raped and killed and was lying behind the waiting room. It is also the accused's evidence that the condom he had used on both occasions he had sex with Okwethu had been left at the spot near where the deceased's body was found behind the waiting room. The accused also told the Court that he lied to his aunt Dumsile Sukati (PW5) that he was at Cuddle Puddle because he did not want her to know that he had dealings with Lomagugu.

[40] The accused further denied the expert's allegation that the used condom had his DNA and that of the deceased. He suggested that the condom he and Okwethu had used might have been placed near the crime scene by members of the public who appear in the photographs. In cross-examination, Ms. Hlophe asked him why he

had not told his attorney that the condom had been planted at the scene of crime. The accused, however, said he did tell his attorney this and he did not know why the question was not put to PW2 PW3 and PW7. When he was further asked how he would reconcile his evidence with that of PW3 who had testified that the used condom had his DNA and that of the deceased, the accused simply stated that he thinks the people in the photographs had touched the deceased with the used condom such that his DNA was found with that of the deceased.

[41] It was also put to the accused that what he was telling the Court that the deceased was raped and killed by PW8 was an after thought. He denied this and he also denied the allegation that he had crossed the road with the deceased and gone to the bus stop near the Mbabane hospital. He maintained that they had run after PW8 when he was running from the waiting room going up the steps towards the nurses' home. He said it was when he went into the bushes that they switched off their phones and waited for 35 minutes thinking PW8 would appear but he did not. He said on their way down they did not see the deceased behind the waiting room.

### **Assessment of the Evidence**

[42] PW3's evidence was very impressive as he gave a detailed account of DNA analysis showing that, with the exception of identical twins, all humans have a unique DNA that is present in their skin, hair, blood and other bodily fluids.

I find the DNA evidence as outlined in Exhibits K -K3 damning and it conclusively places the accused at the scene of crime on the day in question. PW3 emphatically stated that there is a DNA profile of the deceased on the used condom which was found at the scene by PW2 3905 Detective Constable Sandile Chonco, scenes of crime officer, and this same used condom which fully appears in photo Exhibit B5 also contained the semen of the accused. According to the evidence of PW3, the DNA analyses on the exhibits proved that the DNA result of reference samples (RSPFSL-08219 "Sukati Mxolisi") and (RSPFSL0828 the "deceased panty") is read into the mixture DNA result from the condom (SWAG 019913) and the most conservative occurrence for the DNA result from the condom (SWAG 019913) is **1** in **22 000** people.

[43] I accordingly reject the accused's defence that the used condom might have been planted at the scene of crime as an untruth and an after thought since it was not suggested to PW2, PW3 and PW7 during cross-examination. Further more, under cross- examination the accused admitted that he did not see anyone place the condom



at the scene of crime. I accept PW2's evidence that the scene had been cordoned off from the presence of onlookers. I further reject the accused's defence that the same people in the photo may have touched the deceased with the condom so that the deceased's DNA may also be found in the condom as an untruth since he failed to suggest same to the crown witnesses especially PW2, PW3 and PW7. This is clearly an afterthought. See **The King v Siboniso Mazibuko & Others Case No. 232/2008** (unreported) where **Hlophe J.** held as follows: *"the position is now settled that an accused person is required to put his version to the complainant or any other crown witnesses for them to react thereto. Failure to do so is indicative of an afterthought."*

[44] In **Rex v Dominic Mngomezulu and others Criminal Case No. 94/1990, Hannah CJ** made the following pronouncement at page 17 therein of the said judgment:

*".....failure by counsel to cross-examine on important aspects of a prosecution witness's testimony may place the defence at risk of adverse comments being made and adverse inference being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and*

*denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story."*

[45] I further reject the accused's defence that the condom found at the scene of crime, as appears in Exhibit B5, was the one used by him and Okwethu as a bald denial and an after thought since he failed to put it to PW3 during cross-examination. If the accused's allegation is anything to go by, it would have been suggested to PW3 that there was DNA of someone else besides the DNA of the accused and the deceased.

[46] Defence counsel, Mr. Leo Gama, submitted that the DNA expert had found evidence of the DNA profile indicating that the deceased had sexual intercourse with somebody other than the accused. Counsel further submitted that even if the Court were to find that the accused had murdered the deceased, the Crown had still not proved beyond any reasonable doubt that the deceased was raped or that if she had sex with the accused it had not been consensual.

[47] It appears to me from the appearance and condition of the deceased as depicted in the photographs that the defence of

consensual sex cannot stand. The body reveals blood stains all over the face, neck and chest, with the throat deeply slit like an animal that has been freshly slaughtered. It looks to me more like a crime of passion than an act involving consensual sex.

[48] I equally note and accept Ms. Hlophe's submission that the accused's explanation pertaining to the events that occurred on the day in question and on the issues of the used condom is false beyond any reasonable doubt. In the case of **Rex v Difford 1937 at 373, His Lordship Watermeyer A.J.A.** stated as follows:

*"it is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation even if that explanation be 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 also **Van der Spuy in S v Munyai 1986 (4) SA. 712 at 716** where he said as follows:

*"The fact that the court looks at the probabilities of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all probabilities the version made by the accused is so*

*improbable that it cannot be supposed to be the truth, then it is inherently false and should be rejected."*

[49] On this score the accused's version of events about him and three unknown men chasing PW8 up the steps behind the waiting room and waiting for him for 35 minutes with their phones switched off, is so improbable that it cannot be supposed to be the truth. I find it inherently false and I accordingly reject it. The most logical thing for the accused, and his other so called knights in shining armour, to have done was to have searched the immediate area around the waiting room to ascertain where the cry had emanated from since they were supposedly responding to the desperate plea of a damsel in distress.

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

justice. I so hold.

[51] I am equally alive to the fact that in some instances the untruthfulness of the accused is a factor which a Court can properly take into account as strengthening the inference of guilt. See the case of **Ndlovu v The State 2000 (2) [BLR] 158** where **Korsah JA** held that *“Lies told by an accused in order to distance himself from an offence may, in such circumstances, be taken as a weight to strengthen the case for the prosecution.”*

[52] In any event, it is trite that the strength of a case is not judged by the number, but the veracity of witnesses. Having carefully weighed and considered every aspect of the accused's evidence and having regard to the foregoing paragraphs, I must conclude, as I do, that the accused's testimony is false beyond reasonable doubt.

[53] Au contraire, I find the Crown's evidence largely credible, corroborative and therefore reliable and I accept it.

PW4's evidence is to the effect that she saw the accused cross the road with the deceased to the other side of the highway from Manzini direction and that after sometime the accused came back alone. It is also worthy of note that indeed the deceased was found dead behind the waiting room the following morning. PW4's Evidence in this regard is corroborated by the evidence of PW8 who

told the Court that he last saw the accused and the deceased by the guard rails which is an area close to the waiting room.

[54] This, however, does not mean that the State is home and dry. It must still prove beyond reasonable doubt that the deceased died at the hands of the accused, acting of malice aforethought. The accused's evidence having been rejected, there is no direct evidence of the deceased's death. The state case therefore rests entirely on circumstantial evidence. The evidence before me is such that the question of malice aforethought is beyond challenge. It must be assumed that the person who inflicted all those vicious and horrific wounds on the deceased must have intended to cause her grievous bodily harm. What remains to be determined is whether that person was the accused.

[55] The principles of circumstantial evidence were articulated by the Court of Appeal, in **Ndlovu v The State [2000] 2 B.L.R. 158 at p 161 E** where the Court adopted the following statement in **R v Sibanda and Others 1965 (4) SA 241 (SRA) at p 246B:**

*“Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt; it is sufficient if*

*there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of an accused beyond reasonable doubt."*

[56] I am in agreement with the Crown's submission that there was no legal justification for the accused's unlawful attack on the deceased. Further more, the accused had the intention to kill the deceased in the form of *dolus directus*. This is supported by the fatal injuries sustained by the deceased as they appear in Exhibit A, namely, the post-mortem report which was compiled by Dr. R.M. Reddy and in the photographs taken by PW2, the scene of crime officer. Also the size of the knife, as depicted in photo Exhibit B4 and which, according to the findings of PW3, was the murder weapon also prove that the accused had the intention to kill the deceased. I therefore find the accused guilty as charged on **Count 1** and I hereby convict him accordingly.

[57] In respect of **Count 2**, I must state that I find that the Crown has proved beyond a reasonable doubt all the elements that must be proved in a rape case as were stated by **Her Lordship Ota J.** in **The King v Sibusiso Xolandi Dlamini** Case No. 142/2011 (unreported) at 9 as follows:

"it is therefore now the judicial consensus that in proving the offence of rape beyond a reasonable doubt, the Crown is tasked to

prove 3 factors namely:-

1. the fact of sexual intercourse or indecent assault
2. the lack of consent on the part of the complainant and
3. the identity of the accused."

[58] On the fact of sexual intercourse or indecent assault, I find that the accused had sexual intercourse with the deceased. Such evidence is supported by the used condom which was found at the scene of crime by PW2. According to the evidence of PW3, as I had earlier on alluded to, the used condom had the DNA of the suspect and the deceased which according to PW3 shows that penetration had occurred. Also to support the evidence that the deceased was raped are the photographs which show that the deceased's trousers were halfway down on the left leg and her panty was fully removed on the right leg. The inference to be drawn in *casu* is that the accused had sexual intercourse with the deceased. This is supported by the evidence of PW4 that the accused had requested to take the deceased for the night to have sexual intercourse with her. In **R v Blom 1939 AD 188 at 202-3** the Court stated as follows:

"In reasoning by interference there are two cardinal rules of logic which cannot be ignored:

1. The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.



2. The proved facts should be such that they exclude every reasonable inference from them save on the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct".

[59] On the issue of lack of consent on the part of the complainant, I accept, from the totality of the evidence adduced before this Court that the deceased had not consented to have sexual intercourse with the accused as the accused cut and stabbed the accused to death. The identity of the perpetrator has also been proved by the Crown beyond any reasonable doubt and I accept that it was the accused who raped the deceased as the deceased was found at the scene where she was murdered and further a used condom with the DNA of the accused and of the deceased was found at the scene.

[60] In the light of all the foregoing, I have come to the inescapable conclusion that the accused is guilty as charged on **Count 2** and I hereby convict him accordingly.

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

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

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***M. M. SEY (MRS)***

**JUDGE OF THE HIGH COURT**





