



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No.317/2007

In the matter between:

REX

Applicant

VS

PATRICK MASWAZI DLAMINI

Respondent

Neutral citation: *Rex vs Patrick Maswazi (317/2007) [SZHC209] [2013] [23rd August 2013]*

Coram : **MAPHALALA PJ**

Heard : **7th August 2013**

Delivered : **23rd August 2013**

For the Crown : **Mr. A. Makhanya**

For the Accused : **Mr. S. Nkosi**

Summary: (i) Accused charged with the crime of murder and the Crown called the evidence of four witnesses.
(ii) The accused gave evidence in his defence and did not call any witnesses. The accused's version of events was not put to any of the Crown witnesses in accordance with the *dicta* in the landmark case of the *King vs Dominic Mngomezulu and 9 Others, High Court Criminal Case No.94/1996*.

- (iii) A tug of war arose between the Crown and the defence as to the effects of the *dicta* in *Rex vs Dominic Mngomezulu (supra)* and this court invited both parties to file Supplementary Heads of Arguments on this point.
- (iv) This court finds the accused not guilty and adopt the arguments of the defence regarding the effects of the *dicta* in *Rex vs Dominic Mngomezulu*.

Cases referred to in the judgment

1. *Dominic Mngomezulu and 9 Others, High Court Case No.94/1996;*
2. *R vs Zikalala 1953(2) SA 568 (AD);*
3. *S vs Malele 1975(4) SA 128;*
4. *Rex vs Patel 1959(3) SA 121 (A).*

JUDGMENT

The indictment

- [1] The accused before court Patrick Maswazi Dlamini an adult male of Piet Retief area in the Republic of South Africa has been indicted in this court for the crime of murder where it is alleged by the Crown that upon or about the 28th May, 2005 and at or near Matsapa Mobeni flats in the Manzini District the said accused person did unlawfully and intentionally kill Bizo Hlophe by shooting him with a firearm and did thereby commit the crime of murder.

The plea

- [2] The accused pleaded not guilty to the crime and was represented by Mr. S. Nkosi. The Crown was represented by Mr. A. Makhanya where a number of concessions made by the parties were entered by consent and thus curtailed the proceedings in this criminal case.

The evidence of the Crown

- [3] The first witness for the Crown was PW1 Dr. R.M. Reddy introduced as a Police Pathologist based at the Police Headquarters who conducted a post-mortem examination on the body of the deceased. He testified in detail of his findings and hand it to court as exhibit “A” a post-mortem report.
- [4] The evidence of PW2 in the Summary of Evidence was entered by consent of the parties this being the evidence of PW2 Joshua Hlophe who is the grandfather to the deceased. He identified the body of the deceased during the post-mortem examination of Bizo Hlophe.
- [5] The Crown then called PW2 Ronnet Bongeleni Malinga who is a half brother to the accused person. He related at length the sequence of events leading to the death of the deceased on the day in question.
- [6] PW2 testified that at the time when deceased was shot accused had visited him at his rented flat at Matsapa. On the 22nd May 2005 in the evening he was enjoying a beer at Sidlamafa bar in Matsapa. PW2 testified further that whilst still at the bar he received a telephone call through his mobile phone from the accused enquiring about his whereabouts. He then directed him to come to the bar. The accused person did arrive and found him with other people and one Thulani Hlatshwayo (PW3) who knew the accused person and PW2. He

testified that when the bar closed they all proceeded to his flat at Mobeni. He testified that whilst there at the bar there was a fracas between the accused and one Stanley Nkambule and his friend such that they decided to leave the bar for Mobeni flats.

[7] PW2 testified that when they reached Mobeni in his flat he was with the other two people for a short while and then he went to sleep. But towards 11:00pm he was woken by some noise and he went to the sitting room to see what was happening. He found his cousin and Thulani Hlatshwayo still partaking to the liquor they had brought earlier on where they were all gathered. He testified that when he rejoined them he found them being joined by the two who had earlier left that was Stanley Nkambule and Bizo Hlophe. He found that there was a dispute between these people. Then Stanley Nkambule and the deceased went out of the flat. He told the remaining two people to keep it down. After a few moments he heard a gunshot. He then went to the sitting room again. He did not find the two who he had earlier left in the sitting room. He then went outside the flat and saw one person lying on the ground and that the person was the deceased. He then called the police to the scene.

[8] PW2 then related at length what he did with the police to locate the accused. This is about the extent of his evidence. He was not cross-examined by the Defence.

[9] The Crown then called PW3 Thulani Hlatshwayo who testified that he was a teacher by profession at Ludzeludze Primary School and corroborated the evidence of PW2 in all material respects regarding the events leading to the shooting of the deceased person. PW3 explained at great length the sequence of events after he came out from work on the 27th May 2005 up to the time he joined PW2 together with other friends on a drinking spree at the Matsapa Prison bar. PW3 testified that the accused joined the other people at the bar and continued to have a good time. At some point there was a dispute between the accused and one Stanley Nkambule as it was described by PW2. They then left the bar to PW2's flat to continue with their drinking. At that time Stanley Nkambule and his friend the deceased left their company and then left for PW2's flat at Mobeni, Matsapa.

[10] PW3 testified further that after their drinking PW2 then told them that he was retiring to sleep and went to the bedroom and he proceeded to drink with the accused person. After sometime Stanley Nkambule and the deceased joined them to continue with the festivities and the argument that has started earlier on between the accused and Stanley Nkambule and his friend was rekindled. He testified that PW2 was woken up and he came to put down the dispute and went back to sleep. At that time Stanley Nkambule and his friend the deceased also left at the juncture. He testified that the accused kept on going outside to smoke and come back. But at some point he heard a gunshot whilst the accused was outside. The accused came inside and showed him a firearm and

they decided to run away from the scene but nearby he saw a body of a man lying down.

[11] PW3 furthermore testified what he did with the accused when they ran away from the scene and the events of what took place the following day. He also testified on how the matter came to the attention of the police.

[12] PW3 was cross-examined briefly by the attorney for the accused but nothing of substance was revealed thereby.

[13] The fourth and last witness for the Crown was PW4 2277 Aaron Methula a member of the police force based Matsapa Police station. He testified that on the 28 May 2005 he was on duty at the police station when he received a report of a murder that had occurred at Matsapa in Mobeni flats. He proceeded to the scene together with other police officers. He testified that at the scene they found a dead boy of a Swazi male lying down dead. They then made investigations by talking to the occupants of the other flats in the vicinity. PW4 testified that when they observed the body of the deceased they saw a bullet wound over the right eye. They also gathered that the name of the deceased was one Bizo Hlophe.

[14] PW4 testified further that they then went back to the police station to Matsapa where they found one Ronnet Malinga who was introduced PW2. As a result

of those investigations the police went about locating the mother of the accused at Magubeleni area in the Shiselweni District.

[15] He testified that on the 1st June, 2006 the police received a telephone call from one Inspector Raymond Gledenhuis from Piet Retief Police Station in South Africa to come to South Africa. They proceeded to Piet Retief. He testified that he then met the accused in South Africa but asked the accused to come to Swaziland to surrender himself to the police. He testified that the accused indeed surrendered him from Mahamba border and he was accordingly arrested and charged with the murder of the deceased.

[16] PW4 handed to the court a number of exhibits pertinent to this case. These being the firearm which was entered as exhibit "1" and 14 rounds of ammunition which were entered collectively as exhibit "2".

[17] As I have stated earlier on that a number of exhibits were entered by consent of the parties being the post-mortem report entered as exhibit "A" which states the cause of death to be "due to crano-cerebral injury as result of firearm injury". The statement of agreed facts which was entered as exhibit "B". I must mention for the record that this statement was read to the record as part of the evidence entered by consent. Thirdly, exhibit "C" was entered by consent being an affidavit in respect of forensic ballistics conducted in the Republic of South Africa.

The accused's evidence

[18] The accused then gave evidence under oath led by his attorney Mr. Nkosi and was later cross-examined by Mr. Makhanya for the Crown. The accused testified at great length on how he left South Africa to visit his brother PW2 who had recently lost his wife.

[19] DW1 outlined the sequence of events leading to what happened at the flat belonging to PW2 in more or less similar terms as PW2 and PW3. The accused testified that when he left from South Africa he had his firearm which he used for protection in his business in South Africa. He testified that when he crossed over the border at Oshoek border he forgot to declare the firearm and came with it to Swaziland. DW1 related the sequence of events in a similar manner as PW2 and PW3 up to the time he went outside to have a smoke. DW1 told the court that as he was outside the flat he was confronted by Stanley Nkambule and the deceased and one of them was carrying a knife about to stab him. That he then took out the firearm that he had in his possession and shot at the figure that was approaching him. He did not know whether he had shot Stanley Nkambule or the deceased but heard of this later on. He testified that one of the people outside was carrying a Rambo knife. He shot the figure which fell down. The other person disappeared from the scene. He testified that he was terrified and went back to his brother inside the flat and

told him that he was about to be killed outside. Then he fled the scene until he met Thulani PW3 the following morning.

[20] DW1 then explained at great length what happened until the matter was reported to the police but he left for South Africa where he surrendered himself to the police of that country. DW1 stated that the reason he did not surrender to the police in Swaziland there and there was because the police in Swaziland have a reputation of being ruthless to suspects and therefore he feared for his life. This is about the extent of PW1's evidence.

[21] DW1 was cross-examined searchingly and at length and on the main that he had the intention to shoot the deceased. However, DW1 testified that he was defending himself from the assault by Stanley Nkambule and the deceased who were armed with a Rambo knife at night whilst he was having a quiet smoke in the dark. I must comment that the Defence stated by the accused had not been suggested to the Crown witnesses who had given evidence in this case. However, more of this aspect of the matter will be revealed later on in this judgment.

[22] The accused then closed his case and did not call witnesses to buttress his evidence.

The application in terms of section 145 of the *Criminal Procedure and Evidence Act*

[23] At that stage the matter was then postponed to a future day for submissions of the parties. However at stage the Crown applied in terms of section 145 of the *Criminal Procedure and Evidence Act/as amended* that the accused be remanded in custody. The court agreed with the submissions of the Crown and remanded the accused in custody under the said section. The said ruling will form part of this judgment.

[24] The matter was then postponed to 14th September 2013 for submissions of the Crown and the Defence.

Submissions of the parties

(i) For the Crown

[25] The Crown prosecutor filed very comprehensive Heads of Arguments with decided cases on the subject. I must also state for the record that Mr. Nkosi also filed very useful Heads of Arguments for which I am grateful to both attorneys for the high level of professionalism displayed in this case.

[26] Mr. Makhanya for the Crown contends that it is not in dispute that it was the accused who shot the deceased and what this court has to determine, is whether or not when the accused person shot the deceased, he acted in self-defence.

[27] The Crown submitted that the facts of the matter are that the deceased was shot by the accused at Mobeni Flats in Matsapha on the 28th May, 2005 that the incident occurred outside the flat of Ronnet Malinga (PW2) where the accused and deceased had visited him. That this court has been told that before PW2, PW3 and the accused came to PW2's residence they had been at Mhlambanyatsi bar in Matsapa where it so happened that accused person and one Stanley Nkambule, who unfortunately passed away before the commencement of the trial had a misunderstanding but it was calmed down. The deceased was also present in that bar. PW2, PW3 and the accused then bought beer and proceeded to the flat.

[28] The Crown Counsel related that his court has also gathered that Ronnet Malinga (PW2) decided to retire to sleep leaving PW3 and accused continuing drinking the beer. They were later joined by the Stanley Nkambule and the deceased. There was misunderstanding between the accused and the said Stanley Nkambule which caused PW2 (Ronnet Malinga) to wake up. He then told the accused that the said Stanley Nkambule, deceased were his friends but it was decided that they should leave and they left.

[29] The Crown proceeded in paragraph 5 to 6 of the Heads of Arguments of Mr. Makhanya to relate the sequence of events in this tragic saga up to the death of the deceased.

[30] The Crown at paragraph [6] of the Heads of Arguments of Mr. Makhanya contends that the question then is was accused indeed attacked by the deceased and the said Stanley Nkambule as he told PW3. That the Crown contends that accused gave two versions. The first version according to PW3 is that he was attacked by the deceased and Stanley Nkambule (PW2) using weapons. The second version which he said to Ronnet Malinga (PW3) at Piet Retief in that he could not remember as to why he shot the deceased.

[31] In view of the above the Crown contends that accused's story is an afterthought that the deceased had a Rambo knife in his right hand. If accused's story is to be believed by this court, he had an option to enter into the house as it was not locked, or he could have fired a warning shot to scare away his attackers. The Crown contends that accused told the court that he was trained to use a firearm because he was issued with a licence.

[32] The Crown further contends that if indeed deceased had a knife in his hand when he was shot by the accused the investigators of the crime would have found the knife at the scene because accused testified he shot the deceased and he fell down. The Crown contends that the defence did not put the story of the knife to the investigating officer who gave evidence in this case yet there exist such duty. In this regard the Crown cited the landmark judgment in this court that of *The King vs Dominic Mngomezulu and 9 Others*, High Court of

Swaziland, Criminal Case No.94/1990 page 16-19 that therefore, the accused's story should be rejected by this court as an afterthought.

[33] Crown Counsel further addressed this court on the question of self defence and cited a number of legal authorities being the cases of *Rex vs Ahwood 1946 AD 331* at 346 and that of the *State vs Mashabane BLR 425*. In view of these authorities the Crown concludes that the accused in the present case was just trigger-happy. Therefore, accused had *dolus eventualis* and cited the case of *Tiki Sihlongonyane, Appeal Case No.40/1997* at page 3-6.

[34] I must also put it on record that the Crown also filed Supplementary submissions and expanded its arguments on the *dicta* in *King vs Dominic Mngomezulu (supra)*. I must also put it on record that in arguments the Crown opposed that the attorney for the accused file Supplementary Heads on this aspect of the matter at the invitation of the court. I must mention that a criminal trial is not a game where parties put their winning shots but the court ought to give justice between man and man.

(ii) **Accused's arguments**

[35] The attorney for the accused also advanced formidable arguments before court and filed very useful Heads of Arguments and later filed Supplementary Heads of Arguments as stated above in paragraph [34] of this judgment for which I am grateful.

[36] At pages 1 to 6 of the main Heads of Arguments Mr. Nkosi for the accused outlined the factual background of the matter. In this regard I find it imperative to outline the pertinent submissions at page 5 of the attorney's Heads of Arguments to the following:

“It was thereafter between 12:00 midnight and 1:00am that Stanley Nkambule and the deceased came to the flat. It seems clear from the accused's evidence that the two had followed them to the flat to continue with the altercation. He further confirms that his brothers intervened and the two were told to leave and they left. However before they left, it is the evidence of the accused that Stanley Nkambule threatened that they shall get him **“sitakutfole wena”**. After about 20 minutes, he went out to smoke prior to going to bed, he stepped outside, closed the door and lit up his cigarette. As he was smoking, the deceased with Stanley Nkambule followed him came to him with a knife. The deceased then said to him that **“we told you we shall get you and now I will show you”**. The deceased and Stanley Nkambule had come from around the corner of the flat thus they took him by surprise.

The accused's evidence is that at that point he was in fear of his life and in a bid to protect himself, he drew his firearm and fired thus hitting the deceased. At that point, the deceased fell and he was so traumatised by the incident that he rushed to the flat, told his brother that he had almost been killed but **“kwase kuyonakala”**. In panic and confusion and fearing the consequences of him having fired his gun which was not authorised in Swaziland, he fled the scene in confusion. He hid in the bushes until dawn when he met up with his brother.”

[37] The attorney for the accused contends under the heading “Findings” at page 6 thereof that the balance of accused’s evidence is in agreement with that of PW1, PW2, PW3 and the statement of agreed facts. That under cross-examination the accused’s evidence was not at any stage tripped up by the prosecution. That the accused stuck to his story and his demeanour did not change at all.

[38] That what became clear in evidence was that the evidence of Assistant Superintendent Methula (PW3) was in conformity with his assessment that his deceased was a short distance of about 2.5 metres from where he shot him. That in his evidence, he further states that given the fact that the deceased was rushing him he had a chance to escape and he acted in a split second to save his life. That PW2 confirmed that the deceased was about 2.5 metres from the doorway where it is now clear where the accused fired the shot. That the prosecution did not at any stage bring evidence to refute the story as told by the accused. In fact, it seems that the Crown witnesses all seem to support the version of events that was given by the accused.

[39] At pages 7 to 8 of the Counsel for the accused’s Heads of Arguments are made on the evidence to the following propositions:

- “(a) The accused did not know the deceased nor did he know Stanley Nkambule. The protagonists were clearly Stanley and the deceased.
- (b) Having left the bar, the three brothers went to the flat. It is clear from the evidence that it was the deceased and Stanley Nkambule who followed them a while later to the flat.
- (c) It is also quite clear that it was Stanley Nkambule and the deceased who had come to confront the ‘South African clever’ as a result of the bar altercation.
- (d) The fact that the deceased and Stanley Nkambule were told to leave the flat and did so shows that it was them who were spoiling for a fight.
- (e) It is irrefutable evidence that it was fifteen to twenty minutes later that the shooting incident occurred. The question is why did the deceased and Stanley Nkambule attack the accused when they should have long gone home.
- (f) The evidence seems to show that in fact they either way laid the accused or saw him come out for the smoke thus they attacked him as they had promised they would get him whilst in the flat.”

[40] The attorney for the accused contends that from the evidence it is also quite very clear that there is no reasonable and reasonable explanation for what occurred other than to draw inference from the facts to the behaviour of the deceased and his friend Stanley Nkambule.

[41] Mr. Nkosi further argues that on the facts the prosecution has taken an arm-chair critic position and evolved a theory not raised on any evidence.

[42] Lastly, on submissions of law Mr. Nkosi made very pertinent submissions citing relevant decided cases on the subject that of *Rex vs Zikalala 1953(2) SA 568*; and that of *Rex vs Hele 1947(1) SA 272* and referred to legal textbook by *Gardner and Landsdown (South African Criminal Law and Procedure Vol.II Juta, 1957* at page 1546-1548.

[43] The attorney for the accused contends that in this case it seems clear that the accused is availed of the defence of private defence. That this is a defence which justified the use of force against another person though normally unlawful but it is justified in defence of a person, property or other legal interest against an unlawful attack subject to certain conditions. For this legal proposition the attorney for the accused cited the textbook *A ST Q Skeen LawSA Vol.6 Butterworths 1996* at paragraph 37-48.

Clarity sought by the court on the duty to cross-examine witnesses by an accused person

[44] I mentioned earlier on the arguments of both attorneys on the effects of the *dicta* in *The King vs Dominic Mngomezulu (supra)* Mr. Nkosi for the accused filed Supplementary submissions on the invitation of the court. During submissions I sought clarification on a legal point raised by the prosecution vis whether or not the defence had a duty to question the Crown witnesses on the issue of the knife. Counsel for the Crown made a submission as follows:

“The defence did not put the story of the knife to the investigator yet there exists such a duty” (*paragraph 8 of Crown submissions*).

[45] Mr. Nkosi for the accused filed very useful Supplementary submissions on this question analysing the case of *Rex vs Dominic Mngomezulu*. The arguments advanced will be addressed later on in my analysis and conclusions of the evidence in this case.

The court analysis and conclusion thereon

[46] Having considered the able arguments of both attorneys of the parties and the facts of the matter it is common cause that the act of death of the deceased was caused by the accused and therefore the *actus reus* is beyond question. The only controversial issue is that of the intention whether the accused intended the death of the deceased or whether he acted in self defence. Therefore, this aspect of the matter concerns the *mens rea* as provided by the law.

[47] The Crown as it has shown above contends that the accused intentionally killed the deceased on the day in question. Furthermore, the Crown contends that the accused cannot rely on his evidence as that version of events was not put to the Crown witnesses in accordance with the *dictum* in the landmark case of *Rex vs Dominic Mngomezulu (supra)*. The arguments of the Crown in respect of this aspect of the matter are in the Crown’s Supplementary submission where Mr. A. Makhanya pointed out that the failure by Counsel to cross-examine an

important aspect of prosecution witness's testimony may place the defence at risk of adverse comments being made and an inference being drawn. Therefore, in this instant case, the conversation between accused and PW3 that accused told him that the deceased and his companion attacked him carrying weapons but did not state what sort of weapons, that means the defence accepted such testimony but failed to put to him that infact the deceased was carrying a Rambo knife. Therefore according to the *Dominic Mngomezulu's case (supra)* the defence failed to challenge PW3's testimony.

[48] On the other hand it is contended for the accused that the Crown did not at any stage bring evidence to refute the story as told by the accused. That in fact, it seems that the Crown witnesses all seem to support the version of events as given by the accused.

[49] It would appear to me that if I were to apply the *dictum* in *Rex vs Dominic Mngomezulu (supra)* as contended by the Crown in assessing the evidence of the accused there would be no evidence on the intention of the accused. I say so because the accused was the only witness who testified on what really happened that fateful night. The other witnesses for the Crown did not touch on this very important aspect of this case. However, because of this state of affairs it becomes important to now consider the Supplementary argument by Mr. Nkosi on the effect of the *dicta* in *Rex vs Dominic Mngomezulu (supra)*.

The first port of call therefore is a determination of the basis of the *dicta* in *Rex vs Dominic Mngomezulu (supra)* in resolving this dispute on this point the court will then be able to decide the issue of *mens rea* of the accused.

[50] Mr. Nkosi for the accused person at paragraph 3 of his Supplementary submissions contends that on the reading of the case of *Dominic Mngomezulu (supra)* relied on by the Crown it does indeed appear that issues pertaining to when there arises a duty on the Defence Counsel to put the defence's case to the prosecution witness is dealt in details by *Hannah J* then Chief Justice of Swaziland at page 16 to 19 of the judgment.

[51] Mr. Nkosi contends that the prosecution has completely misconstrued the essence of the learned *Hannah CJ's* exposition of the law of evidence on when a Defence Counsel assumes the duty to put the defence case to Crown witnesses. In fact, the point seems to have been missed completely.

[52] The attorney for the accused person contends that the essence of this judgment is that, if a prosecution witness gives evidence which is adverse to the defence case, then the Defence Counsel has a duty to cross-examine that prosecution witness on those aspects of that witness's testimony which impacts negatively on the defence case. In this regard the court was referred to page 16 and 17 of the *Dominic Mngomezulu (supra)*.

[53] The attorney for the accused contended that the learned Judge in that case examined a number of legal authorities and then made an incisive statement which incapsules and put the issue to rest in the following formulation:

“It is, I think, clear from the foregoing that 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 inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made 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 also 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”.

[54] Mr. Nkosi for the accused then analysed the evidence of each Crown witnesses being PW2. PW3 and PW4 and at paragraph 9 of his Heads of Arguments made the following submissions:

“The other witnesses, being ‘PW2’ and ‘PW3’ did not at any point give any adverse testimony either. The truth is that ‘PW3’ in fact confirmed that the accused had informed him that the deceased had attacked him carrying ‘silimato’. ‘PW3’ gave his evidence prior to that of the

investigating officer. With due respect, it would be absurd to say that the defence counsel, and not Crown's Counsel was under a duty to raise the issue of weaponry with the investigating officer.

Obviously, the prosecution dismally failed to adduce any evidence on the knife when counsel for the Crown was leading the investigating officer in chief.”

[55] The attorney for the accused further cited a plethora of decided cases on the subject being *S vs Malele 1975(4) SA 128*, *R vs Zikalala 1953(2) SA 568 (AD)* and that of *Rex vs Patel 1959(3) SA 121 AD* and that the court was further referred to legal textbook by *Joubert, The Law of South Africa Butterworths 1996 Volume 6* at page 49.

[56] Mr. Nkosi in his final submissions on this aspect of the matter that the prosecution's contention that it was the defence's duty to adduce evidence on the knife from the Crown witnesses is inaccurate and has no foundation in our law.

[57] Having considered the arguments of the parties to and fro on this aspect I am inclined to agree with the arguments advanced for the accused that the prosecution has completely misconstrued the essence of the judgment in *Rex vs Dominic Mngomezulu* or when a Defence Counsel assumes the duty to put the

defence case to Crown witnesses. I agree with Mr. Nkosi on the submission that in fact, the point seems to have been missed completely.

[58] In my assessment of all the evidence and the submissions of the attorneys of the parties I am inclined to agree with Mr. Nkosi for the accused who contends that from the evidence it is also quite very clear that there is no other rationale and reasonable explanation for what occurred that night other than to draw inference from the facts pertaining to the behaviour of the deceased and his friend Stanley Nkambule. There was an altercation, accused and his brothers left the scene because of this altercation it was clearly the accused who was the target of the antagonism displayed by the deceased and his friend. There can be no question that these two, not being satisfied with the outcome of the altercation in the bar decided to follow up on the wrangle or row, they went to the flat and it is clear that they were the protagonist. There is no doubt that their intention was to confront the accused. This they succeeded in doing, however they were eventually told to leave the flat. Clearly they were picking the fight.

[59] Having said the above in respect of the *Rex vs Dominic Mngomezulu (supra)* judgment what remains for this court is to determine the efficacy of the defence advanced by the accused that of private defence and having read the legal authorities cited by Mr. Nkosi for the accused that of *Rex vs Zikalala (supra)*,

Rex vs Hele (supra) on the facts of this case as clearly outlined by the attorney for the accused in the preceding paragraphs of this judgment.

[60] It seems clear to me that accused is availed of the defence of private defence. I also agree to the legal proposition that this is a defence which justifies the use of force against another person, though normally unlawful but is justified in defence of a person, property, or other legal interest against an unlawful attack subject to certain conditions. In this regard the legal authority in *A St Q Skeen Law SA Vol.6 Butterworths* at page 37-48 is apposite.

[61] *J Joubert, LAWSA at A St Q Skeen Vol.6* at paragraph 45 put the position of law as follows:

“45 Defence necessary to protect interest The use of force in private defence is justified only where it is necessary to protect a threatened legal interest which cannot effectively be protected in another way. Relief by legal process may, for instance, be an effective alternative to force where a lessee fails to vacate the leased premises, but not where there is an immediate threat of personal injury. Even where personal injury is threatened, the threatened person should flee if the harm can effectively be avoided by flight, but he is not required to gamble with his life by resorting to flight. However, a person called upon to act promptly and without opportunity for reflection in a sudden emergency will not be expected to exercise too nice a discrimination in deciding how to act. In judging whether the use of force was necessary in the

circumstances, the criterion is whether the defender's assessment of the circumstances would have been shared by a reasonable man".

[62] In the result, for the foregoing reasons the defence of private defence succeeds and therefore is found not guilty of the indictment and is acquitted forthwith.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE