



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No: 122/15

In the matter between:

**REX**

**AND**

**SAMKELISO SKUTA MNDZEBELE**

**Neutral citation:** *Rex vs Samkeliso Skuta Mndzebele [122/15] [2018] SZHC 263*

*(27<sup>th</sup> November, 2018)*

**Coram:** FAKUDZE J.

**Heard:** 5/4/2017; 6/4/2017; 25/07/2017; 28/11/2017; 30/11/2017;

12/7/2018 and 11/9/2018

**Delivered:** 27<sup>th</sup> November, 2018

**Summary:** *Criminal law: murder – crown should prove its case beyond reasonable doubt – accused raises two defences: was not sober because he had smoked dagga on the day the offence was committed; and had been provoked by the deceased; the killing of the deceased was a mistake – defences considered – intention to kill proved – crown has proved its case beyond reasonable doubt – the verdict of guilty as charged is entered.*

### **JUDGMENT**

- [1] The accused person is charged with the crime of Murder in that upon or about 18<sup>th</sup> February, 2015 and at or near Ngwempisana area in the Manzini Region, the said accused person did unlawfully and intentionally kill Thoko Msibi and did thereby commit the crime of murder.
- [2] When the charge was read to the accused person, he entered a plea that he committed the offence but it was not intentional. The court entered a

plea of not guilty which was confirmed by the Defence. This was in terms of Section 158 of the Criminal Procedure and Evidence Act, 1938.

[3] In an effort to prove its case, the Crown paraded nine (9) witnesses.

**PW1 – Magistrate M. Dlamini**

This witness stated that he was on duty on the 20<sup>th</sup> February, 2015. The accused was brought to Him to make a confession. PW 1 testified that he enquired about the purpose of the accused's coming. A statement was recorded by the witness after he had satisfied Himself that the accused was not forced to approach PW 1 and that the statement, which is a confession, was freely and voluntarily made by the accused. After reading out the statement in court, this witness handed it in and the defence did not object to same being handed in. It was then marked "Exhibit 1." This witness had taken steps to ensure that the accused understands the contents of the statement before calling upon the accused to sign it.

[4] The defence counsel was given opportunity to cross examine the witness. The cross examination centred around the fact that the accused had been provoked, had smoked dagga and that there was communication breakdown between the accused and the deceased over some dagga field belonging to

the accused that had been burnt down by the police. There was no re-examination. The witness was then discharged.

**PW 2 XOLANI THWALA**

[5] This witness stated that on the 18<sup>th</sup> February, 2015 at around 1700 hours, he was requested by police officers from Mankayane Police Station to assist them. He stated that he noticed that in the police van there was the accused person. He further stated that the accused was well known to him and the accused voluntarily informed the witness that he wanted to show the police officers a bush knife that he used to assault the deceased with. He stated that the accused then led them to a forest which is above his homestead where he pointed out a bush knife, which was full of blood.

[6] He stated that the police then took the bush knife and then proceeded to the accused person's homestead where he gave the police a black and pink jacket which he alleged that he was wearing on the day of the commission of the offence. The cross examination by the Defence only established the fact that at all times the accused was co-operative with the police. The witness responded to this allegation in the affirmative.

**PW 3 – LINDIWE TFWALA**

[7] This witness stated that on the 18<sup>th</sup> February, 2015, she received a phone call from the deceased who informed her about the arrival of the police in the dagga field that was next to her homestead and that she feared that the Mndzebele boys would attack her as they suspected her to have informed the police about the dagga field. Her fear came about after someone had informed her that this was said by the father of the accused at the dip tank on the previous day. She further stated that at around 11.30 A.M, she heard someone raising an alarm and she rushed to the deceased's homestead with Phindile Mvelase and Simangele Ngubeni and upon arrival, they found Duma Mamba. On the ground was the deceased who was bleeding from the head and the arm.

[8] On cross examination, this witness maintained her version as per her evidence-in-chief. The defence put it to her that when she arrived at the Msibi homestead she saw two people coming from the Msibi homestead; one was putting on a red T. shirt and the other was putting on a white T. shirt. It was further put to this witness that the deceased was outside washing when

she had a confrontation with the accused. The confrontation was denied by this witness. The issue of the deceased's missing goat and the provocation was also put to this witness.

#### **PW 4 – GCEBUMUZI DLAMINI**

[9] This witness is a brother to the deceased. He stated in his evidence that on the 17<sup>th</sup> February, 2015, which was the previous day of the crime, whilst at the dipping tank, he overheard the father of the accused saying “uma kungenteka emaphoyisa ashise insangu yetfu, kutofa umuntfu” (meaning that if the police burn our dagga, someone will die). The witness asked those he was with as to whom was the father referring to. Sifiso, PW 5, told the witness that the father was referring to his sister. That led to him confronting the father as the only thing his sister had complained to the witness about was her missing goat.

The cross examination centred around the issue of the utterances by the accused's father that should the police destroy the dagga, someone will die.

#### **PW 5 – SIFISO HLATSHWAKO**

[10] This witness stated that on the 17<sup>th</sup> February 2015 at around 0700 hours he was at Ngwempisana dipping tank with PW 4 and the father of the accused who stated that on the Monday police surveyed his boys' dagga fields. The Mndzebeles suspected that the deceased informed the police about the dagga and that if the police were to burn the dagga field, someone would die. After that, a quarrel ensued between PW 4 and the father of the accused. He further stated that on the 18<sup>th</sup> February, 2015, whilst at a Msibi homestead kaBusisiwe where traditional brew is sold, the father of the accused who was also there, received a phone call from his wife telling him that his kids had caused some damage which she did not mention. The father then left for his homestead. PW 5 noticed that a lot of people were going to the deceased's homestead and he also went there. He found the deceased lying on the ground dead. In cross examination, the defence put it to PW 5 that the deceased had said that she would inform the police about the dagga fields. The police came to inspect the dagga fields before destroying same. In re-examination it transpired that what caused the deceased to make mention of the dagga field to PW 5 was the issue of her lost goat which had disappeared in the dagga fields.

**PW 6 – 5317 CONSTABLE MDUDUZI MHLANGA**

[11] This witness is the scenes of crime officer. He took photographs of the deceased, and the exhibits as well as the surroundings which he presented before court. He also presented a sketch plan. On the 18<sup>th</sup> February, 2015 at about 1300 hours, the witness received a report from the Desk Officer that somebody had been murdered at Ngwempisana. He went to the scene of crime in the company of other officers and upon arrival, there were a lot of people at the homestead of the deceased.

[12] A relative showed the officers the corpse of the deceased. It was covered with a kanga. The deceased was not breathing meaning that she was dead. He took photos of the body whilst it was covered and later took photos of the body whilst it was uncovered. The deceased body had multiple injuries on the head. She had a cut on the right hand and it looked as if the hand had been cut. There was another wound on the left arm. There were sandals not far from the corpse which were black in colour. There was also a red hat. The witness took photos of the sandals and the hat. There was a pool of blood on the ground.



[13] After taking the photos, the witness drew a sketch of the scene which he later developed into a sketch plan. The body was then taken to the mortuary. On the 19<sup>th</sup> February, 2015, PW 6 was called by the Investigation Officer into the murder. He told the witness that the suspect was there and wanted to point out something. When the witness arrived, he found the accused there and the accused was showing the Investigating Officer and the other officers the bush knife he had used to kill the deceased. PW 6 took a photo of the bush knife. On the 26<sup>th</sup> February, 2015, the deceased body was taken to R.F.M. Hospital. The witness asked the pathologist to extract some blood samples from the deceased body and these samples were sealed. The Investigating Officer also gave PW 6 the bush knife which was also sealed. It was together with a black jacket which the accused wore on the day of the murder. The bush knife and the jacket were put in different seal bags. The items were then taken to the Police Headquarters in order for them to be sent to South Africa for D.N.A purposes.

[14] The sketch plan sketch and the photos were handed in. The photos were marked as “Exhibit 2 and the Sketch was marked as “Exhibit 3.” The

Defence did not object to same being handed in. “Exhibit 3” relates to the scene of crime and the pointing out. The witness took the court through “Exhibit 3.” The measurement (as far as the scenes of crime is concerned) are in meters A to I and are shown as follows:

### Key to Plan

- A – Deceased
- B – Blood
- C – Fixed point 1
- D – Fixed point 2
- E – Red Hat
- F – Black pair of sandals
- G – House
- H – House
- I – Trees

### Measurements

- A – B 5.1 metres
- A – C 1.4 metres
- A – D 8.8 metres
- B – E 16.5 metres
- C – D 10.2 metres
- E – F 5.6 metres
- B – D 10.1 metres

A – H 2.5 metres

A – G 0.5 metres

B – F 26 metres

### Pointing out scene

#### Key to plan

A – Deceased

B – Fence

C – Dagga Fields

D – Accused homestead

E – Pointing out scene

### Measurements

A – B 88 paces

B – C 73 paces

C – D 197 paces

D – E 97 paces

[15] After PW 6 had testified and before he was cross examined by the Defence, an inspection in loco was carried out. The inspection revealed that the distance where the association meeting as per PW 3's version was approximately 2 km from the deceased homestead. Busisiwe Msibi's homestead, the one who raised the alarm, is about 1.5 km from the homestead of the deceased. The father of the accused was at Busisiwe

Msibi's homestead where the traditional brew was sold when the deceased took place. The pathway above the homestead of the deceased, which the accused was using during the alleged provocation, was about 300 metres from the homestead. The deceased was at her yard at that time. PW 3 came with Phindile Mwelase to the deceased homestead using the gate entry point that leads to the cattle kraal.

[16] During the inspection, the Scenes of Crime Officer, Mr. Mduduzi Mhlanga, proceeded to give evidence at the scene. He confirmed the measurements referred to above. He further stated that on arrival at the deceased homestead, he was shown the body of the deceased which was covered with a kanga. The body of the deceased was found in between two houses which was a distance of about 5.5 metres. He also noted a red hat and blood at a distance of about 16.5 metres from the body of the deceased. A pair of black sandals, which was about 5.6 metres away from the hat, was also noted. There was a pool of blood next to one of the houses. The sandals were 22 metres away from the blood. From the kitchen to the main house, it is about 70 metres. From the fence of the deceased homestead to where the dagga field was is about 73 paces. From the accused homestead to the dagga fields is about 197 paces. From the accused homestead to where the

bush knife that was used for committing the offence was hidden is about 97 paces. This witness took us to all the above mentioned sites during the inspection in loco. After the compilation of the inspection in loco report, it was read into the record of proceedings. The defence and the prosecution confirmed its content.

[17] On cross examination of PW 6 by the defence, it was put to him that there was confrontation between the accused and the deceased before the incident. It was further put to the witness that the accused was provoked prior to the incident and that he was under the influence of dagga. On the issue of the pointing out of the weapon that was used to kill the deceased, it was put to the witness that the accused was not cautioned according to the Judges' Rules before pointing it out. He responded by saying that he accompanied the investigating officer in order to take photos of the scene.

**PW 7 – Florence Msibi**

[18] This witness is the deceased sister in law. She stated that her sister in law stayed with two minor children as her husband was working and staying in Matsapha. On the 18<sup>th</sup> February, 2015, she received a call from her brother

telling her that an incident had happened at his home. The witness met the brother in Manzini who told her that the deceased had been killed. They then proceeded to Mankayane Police Station where the Station Commander broke the news that the deceased had been murdered. Later, the witness and her brother went to Mankayane hospital to see the corpse. She noticed some wounds that were on the head and the arm. When asked about how the relationship between that of the accused and that of hers was, she responded by saying that it was cordial. The witness pointed out that there had been tensions around the issue of the dagga fields. The deceased had made mention of these tensions to her prior to her being murdered. There was also mention of the issue of the goat that belonged to the deceased which had disappeared in 2014. This witness was not cross examined by the defence.

**PW 8 – Ashley Gunas**

[19] This witness conducted the D.N.A. He is a Forensic Analyst attached to the Biology Section of the Forensic Science Laboratory in the South African Police Service. He holds a Bachelor of Science Degree majoring in Bio Chemistry and Microbiology which he obtained from the University of KwaZulu Natal. Included as part of the above mentioned course is

molecular and cellular biology, which is relevant to D.N.A. He has been attached to the Biology Section of the Forensic Science Laboratory since 1 July, 2009. He has undergone in-house training with reference to serological and DNA techniques. He has approximately eleven years experience in biological sciences.

[20] The witness testified that during the course of his official duties on 25<sup>th</sup> May, 2015, he received the case filing pertaining to Mankayane (Swaziland) RCCI 126/15 (64322/15). He then evaluated the results from the samples that were subjected to DNA analysis by a process requiring skill in biology. He used the blood sample that was on the accused jacket marked “MN 2” – evidence sealing bag RSPFSL – 24202. The next sample is the reference sample [10D3AB8125XX] [10D3AB8125EB, “M.M 3” which was the blood extracted from the deceased body. The expert then drew up a Table and then made the following finding.

*4.1 The DNA result from the “Jacket” [blood] RSPFSL – 24202 “M.N. 2”) matches the DNA result from the Reference Sample [10D3AB8125XX] (10D3AB8125EB “M.M. 3”).*

4.2. *The most conservative occurrence for the DNA result from the “Jacket.”* The expert handed in His report and there was no objection from the defence. Same was marked as “Exhibit 4” by the court. There was no cross examination of this witness by the defence.

**PW 9 Dr. Komma Reddy**

[21] This witness examined the body of the deceased. The post mortem report revealed that the deceased suffered many injuries on the head which were all fatal. Further, it was revealed that the deceased had injuries on the arms with the left hand almost chopped off. The following antemortem injuries were present:-

1. Chop wounds of 12 X 1 cms and 10.1 cm, present on the middle portion of the top of the head.
2. Chop wounds of 9 X ½ cm, 8 X ½ cm and 3 X ½ cm, present on the back side of the head.
3. Cut wounds of 5 X ¼ cm muscle deep, present on the middle portion of the left side of the lower jaw.



4. Chop wound of 12 X 7 cms, present on the middle portion of the left forearm.
5. Right forearm is cut in the middle portion and the severed portion is hanging with skin.
6. A cut wound of 7 X 2 cms, muscle deep, present on the middle of the right forearm.
7. Cut wounds of 10 X ½ cm, 6 X ½ cm, 16 X ½ cm and 4 X ½ cm, muscle deep present on the top of the left shoulder.

[22] This witness further stated that injuries 1, 2, 4 and 5 were the most fatal and severe. The post mortem report was handed in and marked as “Exhibit 5.” The defence did not object to it being handed in.

**PW 10 – 5037 Detective Mduduzi Ndlangamandla**

[23] This witness received a report that death had occurred at Ngwempisana. He then went there in the company of Detective Sergeant 2142, Wilmoth Tsabedze. This witness also saw hacking wounds on the deceased head and hands. There were clothes scattered around the yard including her shoes and

a red hat. Upon inspecting the house, the witness saw some items that were scattered. He realised that there had been some struggle.

[24] This witness conducted interviews with some of the people who had gathered around the deceased homestead. They pointed to Skuta Mndzebele who is the accused person in the case before court. We then went to the accused place. The accused was not there as he had left for Jericho in the Shiselweni Region. We then left for Jericho and on arrival, we found accused at a Mabelesa homestead. The witness managed to locate the accused because he had his photo. He then introduced himself and the other police officers who were accompanying the witness. The witness told the accused that he was being investigated for a murder case. He cautioned him according to the Judges' Rules that he was not obliged to say anything and that whatever he says would be used as evidence against him during the trial. He elected to say something and then volunteered to take us to Ngwempisana. Before being taken there, the accused was told of his right to remain silent and the right to legal representation.

[25] On arrival at Ngwempisana, PW 10 secured the services of Xolani Thwala, PW 2 as an independent witness. In the presence of Xolani, the witness

cautioned the accused according to the Judges' Rules that he was not obliged to say anything and that whatever he says will be used as evidence against him during the trial. The accused voluntarily led us to a mountain that is above his homestead. Xolani and the Scenes of Crime Officer were part of the team.

At the mountain, PW 10 cautioned the accused that he was not obliged to say anything or do anything and that whatever he said or do will be used as evidence against him during the trial. The accused elected to conduct a voluntary pointing out in the presence of the scenes of crime officer, Xolani and the witness. He took a bush knife that was blood stained. Continuing with the pointing out, the accused led them to his homestead where still under caution, he pointed out a black and pink sweater that had blood stains. The accused had been putting on the sweater on the day of the incident. The witness took the sweater as an exhibit to be produced before court.

[26] The accused was then taken to Mankayane Police Station for further investigations. At the police station and in the presence of the accused, the bush knife and the sweater were sealed separately. They were then

forwarded to the scenes of crime officer who then despatched them to South Africa for forensic analysis. At the police station, the witness cautioned the accused according to the Judges' Rules that he was not obliged to say anything and that whatever he says will be used as evidence against him during the trial. The accused elected to say something and that was reduced to writing. The accused then requested to make a confession. He made this request voluntarily. The witness then facilitated for the making of the confession which led to the accused being brought before a magistrate. As part of his testimony, the witness presented the shoes and the hat, that were found at the deceased homestead, the bush knife that was pointed out by the accused, and the red and black jacket. These items had been earlier on, presented by the scenes of crime officer and same had been marked as "Exhibit 3."

[27] During the cross examination by the Defence it was put to this witness that the accused was not cautioned during the pointing out, the visit to the scenes of crime and the investigations. It was put to the witness that the caution he administered only dealt with the issue that a statement made by the accused would be used as evidence against him during the trial. It did not go further to touch on the issue of pointing out. The witness responded by saying that the caution was properly administered. On the issue of the confession, it

was said that the witness did not properly explain to the accused what a confession is; otherwise he would not have agreed to make it if he knew what it was. The witness responded by saying that many cautions were administered and the accused was co-operative throughout. He was also informed what a confession is all about and its contents before the accused indicated that he wanted to make it.

[28] After PW 10 had finished giving evidence, the crown closed its case. An opportunity was given to the defence to present its case. The counsel for the defence indicated that the defence is also closing its case without leading any evidence or calling a witness.

### **The parties' submissions**

#### **The Crown**

[29] The Crown submits that it has proven its case beyond reasonable doubt. The evidence led shows that it is the accused who committed the offence of murder. The accused also recorded a confession before Magistrate M. Dlamini wherein he stated that he killed the deceased using a bush knife.

The accused further pointed out the bush knife he used when committing the offence was later hidden in a mountain above his homestead.

[30] The Crown further submits that the murder of the deceased was premeditated as it was pointed out by PW 4 and PW 5 that on the previous day they had overheard the father of the accused stating that should the police burn his son's dagga field, somebody was going to die and indeed the deceased was killed. The accused in his confession stated that he was passing by the deceased homestead when the deceased told him that the police had done well by spraying the dagga and after that there was confrontation and the accused assaulted the deceased on the head. The accused stated in his confession that he was aggrieved by the police act of spraying his dagga.

[31] It is the Crown's submission that after the police had sprayed the dagga and left, the accused smoked dagga and proceeded to the homestead of the deceased who was in the kitchen cooking and hacked her. The deceased tried running away from the accused but could not outpace him as he was butchering her with the bush knife. No one from the Mndzebele homestead came to assist the deceased notwithstanding that their homestead was close

by. PW 5 also gave evidence that the father of the accused received a call from his wife informing him that the accused had injured the deceased. The women that were about 1.5 km away from the scene of the crime rushed to the deceased homestead to try to rescue the deceased. This seeks to prove that the Mndzebeles knew about what had happened and who had done it.

[32] The Crown submits that the accused and his family were clearly a menace to the deceased and her family especially when you look at the proximity of the deceased homestead to the dagga fields as opposed to the parental homestead of the accused. After the commission of the offence, the accused proceeded to Jericho to a homestead of a traditional healer. The accused was found by the police there waiting for his turn to be attended to by the healer.

[33] The injuries inflicted by the accused on the deceased were gruesome. The post mortem report indicated that most of the injuries sustained by the deceased were fatal.

[34] The Crown humbly prays that the accused person be found guilty of murder.

### **The defence**

[35] The defence submits that the basis for the Crown to contend that the accused be found guilty of murder is the confession the accused made before PW 1 Magistrate M. Dlamini. The accused states in the confession that he mistakenly killed the deceased and that he had smoked dagga. On the basis of the statement, which it must be noted, has been brought by the Crown as evidence, mens rea on the part of the accused is eliminated. It is further contended that since such evidence was brought by the Crown and accepted by the defence, the fact of the accidental death of the deceased is common cause.

[36] The defence further submit that once evidence on confession is tendered everything contained in it should be considered and the court should not concentrate only on the incriminating aspects and ignore and/or disregard the exculpatory aspects of it. **Joubert – the Law of South Africa Vol 9** at page



367 paragraph 536 is authority for this proposition where it is stated that “The whole confession becomes admissible when an accused referred to it directly, or by way of cross examination ..... The court ..... found that there was no reason why a court should be entitled to have regard to the incriminating parts of such statements while ignoring the exculpatory parts.”

Further authority for the proposition is **Rex v Mathabane 1945, P.H.H. 52** where it is stated that “a statement made by an accused or any other person against whom it is sought to be proved must, of course, be read as a whole.”

[37] The defence submits that if the confession is the basis for the Crown’s case, the other witnesses that were led merely related the circumstances around the commission of the offence, that is, the pointing out, and their arrival at the scene after the offence had been committed. There are no witnesses who witnessed the incident and can dispute the accused person’s version. The defence contends that looking at the evidence as a whole, did the accused person have the intention to kill the deceased? It therefore humbly submits that the accused person did not have the intention to kill the deceased. In other words, the accused acted negligently and/or recklessly.

[38] The defence finally submits that the burden of proof in criminal matters lies with the Crown. In the present case, the Crown has not proved that the accused set out to kill the deceased and had the necessary intention to do so. The accused should therefore be acquitted and discharged in respect of the offence of murder and be found guilty of culpable homicide.

### **APPLICABLE LAW**

[39] Although no witness was brought to testify to the killing of the deceased, there seems to be no contention that the accused is the one who killed the deceased. This is evident from what the accused said when he was called upon to plead when he stated that he killed the deceased but the killing was unintentional. In other words, the killing was a mistake. The confession, which was unchallenged by the defence, also confirms the accused's position that he did not intend killing the deceased. The submissions by the defence at the close of the prosecution's and the defence's case also point towards the fact that the accused was allegedly provoked and that he was under the influence of dagga. This, according to the defence, vitiates the intention to kill. Likewise the D.N.A. points to the accused as the perpetrator.

[40] The question that begs for determination is whether the accused intentionally killed the accused or not. If the intention has been established, the accused will be guilty of murder. If it is not established he will be guilty of culpable homicide. In so making this determination the principles are worth considering before same are applied to the facts. In the case of the **Director of Public Prosecutions v Oscar Pretorius Criminal Appeal No. 96/2015**, His Lordship Leach JA observed at page 7 that:-

*“Murder is the unlawful and intentional killing of another person. In order to prove guilt of an accused on a charge of murder, the state must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill known as dolus. Negligence or culpa, on the part of the perpetrator is insufficient.”*

[41] The Learned Judge continued to say that:-

*“In the case of murder a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis on the other hand, although a relatively straight forward concept, is somewhat different. In*

*contract to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur therefore "gambling" as it were with the life of the person against whom it is directed."*

[42] Dolus directus is about the perpetrator purposing to cause death whereas dolus eventualis is about the perpetrator foreseeing the risk of death occurring, but continues to act, reckless as to the consequences. The perpetrator must therefore (1) foresee the possibility of death occurring, and (2) reconcile with that foreseen possibility. In the case of **Sihlongonyane v Rex Criminal Appeal 40/1997**, His Lordship Tebbut JA made a clear distinction between *dolus eventualis* and culpa when He said at page 5 that:-

*"It will be appreciated that the cardinal point to the whole concept of dolus eventualis is the element of foresight. It is perhaps this that has caused the greatest confusion in deciding whether the Crown has established dolus eventualis or merely culpa, due it*

would seem, to a lack of a proper appreciation of the distinction between the two. In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it. It is here that the trial court must be particularly careful. It must not confuse “must have known,” with “ought to have known.” The latter is the test for *culpa*. It is an objective one. In our law it is whether a reasonable person in the position of the accused ought to have foreseen the consequences of his conduct.”

[43] The Learned Judge continued to summarise the essential elements of *dolus eventualis* at pages 4 and 5 as follows:

“They are: 1 Subjective foresight of the possibility, however, remote of the accused’s unlawful conduct causing death to another. 2.

*Persistence in such conduct despite such foresight.* 3. The conscious taking of the risk of result and death, not caring whether

it ensues or *not.* 4. *The absence of actual intent to kill. In the case of*  
*dolus eventualis it must be remembered that it is necessary to*  
*establish that the accused actually foresaw the possibility that*  
*his conduct might cause death. This can be proved directly or by*  
*inference, i.e. if it can be said from all circumstances that the*  
*accused must have known that his conduct might cause death, it can*  
*be inferred that he actually foresaw it..... The issue of*  
*dolus eventualis is whether the accused himself or herself foresaw the*  
*consequences of his or her act.....”*

[44] A more practical approach to the issue of mens rea or intention was established by His Lordship Maphalala M.C. B. J, as He then was, in the High Court case of **Rex v Sabelo Kunene Case No. 445/2011** where His Lordship observed at page 18 what He said earlier in the case of **Shongwe v Rex Criminal Appeal No. 24/2011** at paragraph 46, that:

*“46. In determining men rea in the form of intention the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could*

not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous weapon, the only reasonable inference to be drawn is that he intended to kill the deceased. See also *Ntokozo Adam v Rex, Criminal Appeal No. 16/2010* and *Xolani Zinhle Nyandeni v Rex, Criminal Appeal No. 29/2018.*”

[45] The accused states that he was provoked by the deceased beside the issue of him having smoked dagga. In our jurisdiction the defence of provocation calls for the consideration and application of the Homicide Act No. 44 of 1959. Section 2 of the Act provides that:

“2. (1) A person who:-

- (a) Unlawfully kills another 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 and before there is time for his passion to cool shall only be guilty of culpable homicide.

(2) *This Section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.”*

[46] In Section 3, the Act defines provocation as follows:

*“3 (1) Subject to this Section “provocation” means and includes any wrongful act or insult of such 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 the relation of master or servant to deprive him of power of self-control and to induce him to assault the person by whom such act or insult is done or offered.*

(2) *In this Section, “an ordinary person” means an ordinary person of the class of the community to which the accused person belongs.....”*

[47] In the recent case of **William Valinzawo Ndlandla v Rex Criminal Appeal No. 19/2015**, the Supreme Court formulated the test as to whether the defence of provocation may succeed or not at page 21 as follows:



*“[36] That key phrase lies in the underlined words: which but for. “A person who otherwise would be convicted of murder, were it not for the saving grace of the statute AND who kills in the heat of passion caused by sudden provocation before there is time for his passion to cool may avoid a conviction of murder. Most importantly, the court must be satisfied that the act which causes death bears a reasonable relationship to the provocation. Also, that the act of provocation on which reliance is placed, must deprive the accused the power of self-control and to induce him to assault the other.”*

[48] In so determining that the act which caused the death bears a reasonable relationship to the provocation, the court takes into account first of all the time lag between the provocation and the act. This means that there should be no cooling off period. Second, the relationship between the nature of the provocation and the reaction of the accused thereto which brings about the deceased’s death. In other words, there must an element of proportionality between the two.

[49] As stated earlier, the accused by way of confession and by what he put to some of the Crown witnesses, states that he did not deliberately, consciously or intentionally kill the deceased because he had smoked dagga. In **S v Eadie 2002 (1) SACR 663(SCA)**, the accused was charged with murder. He raised the defence of non-pathological criminal incapacity. The court ruled that there was no distinction between non-pathological criminal incapacity owing to provocation on the one hand, and the defence of sane automatism, on the other hand. It further held that the defence of sane automatism was rarely raised and rarely succeeded and that expert or scientific evidence was necessary to sustain it. On the *onus* of proof, the court stated that the accused does not bear any *onus* to establish or prove his innocence. The duty lies with the Crown to prove his guilt beyond a reasonable doubt. But where the accused admits or the Crown proves that the actions by the accused were *prima facie* unlawful, the accused has a responsibility at least to lead evidence in rebuttal. It was finally held that in the absence of expert medical evidence, the court will require some indication of an emotional nature that could serve as a trigger mechanism for the unusual condition of sudden absence of cognitive control. Such trigger has been found in circumstances giving rise to stress, provocation, frustration, fatigue and so forth.

## COURT'S ANALYSIS AND CONCLUSION

[50] The question that must be answered by the court is whether or not the accused killed the deceased intentionally given the two defences the accused has raised which are the defences of provocation and sane automatism. On the issue of provocation, the court is mindful of the fact that the confession by the accused helped strengthen the Crown's case in that the confession was not challenged. It is also mindful of the principles alluded to by the Defence that not only should the court focus on the incriminatory aspect of the confession but also take into account the exculpatory aspect of it. As part of the confession, the accused told PW1 that:-

*“As I was passing by the deceased's homestead, I saw her outside washing dishes. Upon her seeing me as well she left what she was doing and started shouting something to the effect that what happened to the dagga fields I was growing? She further stated that she had proved me wrong. When she was stating all these, she was not aware that I was hurting inside. I got extremely angry and provoked by her words. I really lost my cool and composure and went to her and upon reaching her I struck her with a bush knife on the head.”*

[51] The court is inclined to agree with the accused that he was provoked as per the confession. We must bear in mind that the only people who know what really happened on the day of the crime are the accused and the deceased. The crown relied on circumstantial evidence. However, not only should the court be satisfied that there was no cooling off period, it must also be satisfied that the act which caused the death bore a reasonable relationship to the provocation. The provocation must also pass the proportionality test. There would be no proportionality in cases where the provocation is slight but the reaction is severe and completely out of touch there with. See **Valindawo Ndlandla v Rex (Supra)**. In view of the weapon used, the number of wounds inflicted on the deceased, their seriousness and the places where they were found on the deceased body prove that there was no proportionality. The evidence of PW 9, Dr. Komma Reddy who prepared the post mortem report, established that there were chop and cut wounds inflicted on the deceased body. Wounds 1,2, 4 and 5 were the most fatal and severe. The defence of provocation cannot therefore stand.

[52] On the issue of sane automatism the accused does state in his confession that he smoked dagga as well in addition to being alone where he pondered on the fact that his source of living had been destroyed. The actions of the accused

before and after the incident seem to suggest that he was conscious of what he was doing. After smoking the dagga, the accused states that he decided to check on his friend whom he had earlier on planned to cut logs in the bush. He saw the deceased outside the house washing dishes as he passed by her homestead. The accused heard the deceased shouting at him about what had happened to the dagga he was growing. All the utterances caused the accused to hurt from inside his heart. The accused remembers that he lost his cool and composure and went to her and upon reaching her, he struck her with a bush knife on the head. He then ran away from the scene and later hid the bush knife within the home compound. All these are pointers that the accused knew what he was doing and was therefore conscious of his acts.

[53] The Crown takes the position that the murder was premeditated. It bases its argument on the utterances that were made by the accused father at the dipping tank to the effect that if the police destroy the dagga, someone will die. These

utterances were heard by PW 4 and PW 5. The fact that the Mndzebele family never came to the rescue of the deceased should be another factor to take into account in concluding that the murder was premeditated. As indicated earlier, the accused stated that he stands by his confession. In the

confession the accused states that he was provoked prior to the incident. He was passing by the homestead of the deceased to meet a friend who would go with the accused to the forest to cut logs. The utterances that should the police destroy the dagga, someone will die cannot be attributed to the accused since same were uttered by the accused's father. It would have been otherwise if the words were uttered by the accused. There is nothing that suggests that the murder was premeditated. The intention was in the form of *dolus eventualis*.

[54] It is trite law that in murder cases, the Crown must prove beyond reasonable doubt the commission of the offence by the perpetrator. In order to succeed, the Crown must establish that the perpetrator committed the unlawful act with the necessary intention to kill. The accused has not disputed that he did the unlawful act that led to the death of the deceased. The confession confirms this point. Likewise, the blood tests that were done on the accused's clothes when compared with the blood taken from the accused prove that the accused was responsible for the death of the deceased. On the issue of intention, the Crown has made an attempt to establish that the intention on the part of the accused to cause the death of the deceased was premeditated and pre-planned. The court has already stated

in paragraph 53 that the evidence suggests that the intention was in the form of *dolus eventualis*. As stated in **Rex v Kunene (Supra)** mens rea in the form of intention can be seen from the lethal weapon that was used, the extent of the injuries sustained as well as the parts of the body where the injuries were inflicted. If the injuries are severe such that the accused could not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous weapon the only reasonable inference to be drawn is that the accused intended to kill the deceased. With respect to the case at hand, a bush knife was used and the medical report established that the wounds on the head, were among others, the most fatal ones.

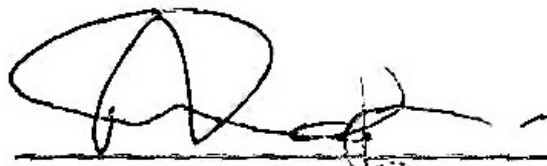
[55] Although it is not clear as to whether the fatal wounds were individually or cumulatively fatal, the court summoned Dr. Reddy to come and clarify this point. All the parties were present. The Dr. did clarify that each wound was fatal on its own meaning that the deceased would have died even if one wound had been inflicted. The accused does confess to hacking the deceased on the head which means that wound 1 and 2 were inflicted by the accused. The confession has not been contested by the accused. The confession coupled with the D.N.A. results suffices to establish the Crown's case. The link or match between the blood that was found on the jacket the accused was

putting on suffices to establish that the accused did kill the deceased. It is independent evidence to the accused's confession.

[56] We will recall that medical evidence established that seven chop and cut wounds were inflicted on the deceased's body. We have already seen that the accused confessed to having hacked the deceased on the head. The question remains: who inflicted the other five wounds? By way of establishing that the accused was responsible for all the cuts and the hacking, medical evidence was tendered by the Crown, which was not disputed or challenged by the Defence in the form of cross examination. After PW 3 had given evidence the defence put it to her that after the hacking of the deceased this witness went to the Msibi homestead. She saw two people coming from there; one was putting on a red T. shirt and the other was putting on a white one. There was no suggestion on the part of the defence that these two people might have been also been responsible for inflicting further wounds on the deceased. Circumstantial evidence has been adduced by the Crown to prove that the accused inflicted the other five wounds. The accused was given an opportunity to disprove the Crown's case but he decided not to give any evidence. The evidence of the Crown therefore remains unchallenged.



[57] In the totality of the evidence before this court it is this court's humble view that the Crown has established that the accused unlawfully and intentionally killed the deceased Thoko Msibi on the 18<sup>th</sup> February, 2015. It has done so beyond reasonable doubt and the accused is guilty of the crime of murder as charged. I accordingly return the verdict of guilty to Murder.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

Crown: N. Masuku

Defence: N. Ndlangamandla