



IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.:46/2014

In the matter between

REX

VS

FRANCE DODO MTHEMBU

DUDUZILE MONICA MAVUSO

Neutral Citation: *Rex Vs France Dodo Mthembu and Another (46/2014) [2020]*
SZHC 28 (5th March 2020)

Coram: Hlophe J.

For the Crown: Miss N. Mhlanga

For the Defence: Mr D. Khumalo

Dates Heard: 20/11/19; 10/02/20; 11/02/20; 12/02/20; 12/02/20; 13/02/20;
25/02/20 and 26/02/20

Date Judgement Delivered: 5th March 2020

Summary

Criminal Law – Accused persons charged with Murder – Killing of deceased sparked by his having sold trees for felling from a forest whose ownership was disputed – Relationship between the deceased and the accused attended by various past incidents of acrimony between the two – Not in dispute that first accused was responsible for the deceased’s death - Whether provocation avails the accused as a defence – Whether accused justified in the circumstances to take the action he did so as to result in the death of the deceased – Accused persons alleged to have acted in pursuit of a common purpose - Guilt or otherwise of Second accused ascertainable from the facts - Whether or not accused persons guilty of the offence they are charged with.

JUDGMENT

[1] On the 6th January 2014, one Mpigo Mavuso, an adult male of Makhosini area in the Shiselweni District was killed while at his home situated in the same area. The accused persons were subsequently charged with the murder of the deceased.

[2] The killing of the deceased came about as a result of his having allegedly sold some trees from a nearby forest, to certain buyers. It transpired that ownership of the forest from where the trees were sourced, was in dispute between the first accused and the deceased who were neighbours.

[3]Whereas the deceased contended that the forest together with the trees that were fell belonged to him or his family; the first accused contended otherwise. The latter contended that the trees in question belonged to him. The allegation was that in selling the trees in question, the deceased had, at least from the accused persons point of view, overstepped his boundaries and encroached onto a portion of the forest that belonged to the first accused.

[4]The accused persons are connected to the murder of the late Mpigo Mavuso by the evidence of PW3 Ntombikayise Dlamini as corroborated and clarified further and respectively by the evidence of PW2 Margaret Ntshingila and PW1 Dumsile Mabel Mdluli. This evidence is further supported and corroborated by the pointing out of the items used in the killing of the deceased by the accused persons as well as by the unchallenged confession of the First accused. These pieces of evidence are summarized as set out herein below.

[5]According to PW3, Ntombikayise Dlamini, after the cutting of trees from the portion of the nearby forest she considered to belong to her uncle the First

accused, the latter arrived at their home in the company of the Second accused and asked from them who it is that had cut his trees from that portion of the forest he considered as his. Upon them explaining they did not know, he ordered them to find out. He was apparently seething with anger. At about that time her said uncle, whilst in the company of the second accused, saw the deceased at his nearby homestead. They started engaging with him. The upshot of what the accused persons were engaging the deceased about was the cut trees and it had culminated in the deceased being called over to come and explain to the accused persons which he had not done. This saw the two accused persons arming themselves with an axe and two sticks in the case of the first accused and with a bush knife and a stick in the case of the second accused.

[6] Although there are no details of what happened after the two accused persons had gone into the homestead of the deceased, the two eventually came back together. Soon thereafter, the first accused asked the second accused to bring him some water with which he washed blood stains from the axe he had armed himself with when he proceeded to the deceased's home. He also ordered her to wash the clothes he had been wearing comprising a brown striped T – shirt and a greenish pair of work wear pair of trousers.

[7] Although PW3 said she had not seen what exactly had happened at the deceased's home, she could guess from what was being done that the deceased had been killed. In fact at some point the first accused warned them not to tell any one about what they had seen or what had happened. The two accused persons had left the area the next day and gone back to the Republic of South Africa, being the place where the first accused was working. It was only after some time on the following day that the police arrived at their home and asked them about what they knew with regards the matter of Mpigo Mavuso, the deceased to whom she said she reiterated what has been stated above.

[8] PW2's version corroborated the evidence by PW3. She also helped clarified her relationship with the accused persons, which could be the reason why her version was subdued and most of it came about after lots of probing. She otherwise clarified that PW3 was her daughter. The first accused was her brother in law, as he was a half-brother to her husband who although a Dlamini by surname, was born of the same mother with the First Accused.

The Second Accused was a common law wife of the first accused and they stayed together as husband and wife. She otherwise had seen the two accused persons leave their homestead whilst armed and went to the deceased's home following the dispute about cut trees from a nearby forest which was claimed by both the deceased and the accused, at least a certain portion of the forest, as theirs.

[9] PW2 clarified the nature of the acrimonious relationship between the first accused and the deceased. She confirmed under cross examination how the deceased had sold the trees belonging to the first accused's portion of the forest leading to the death of the deceased. She further testified how the deceased used to insult the first accused and how he always accused him of having established his home on his family's land. She further testified how the deceased at times had deliberately let or allowed his cattle to roam freely the fields of the first accused destroying his crops in the process. Their relationship was so bad, she testified, that the first accused had reported incidents of provocation by the latter to such structures as the Eswatini Police and the Umphakatsi or Chief's Kraal to no avail.

[10]According to PW1, she had in the morning of the 7th January 2014, removed some cattle belonging to the deceased from her fields, which she had impounded and driven to her home. She had hoped that their owner, the deceased, would come over to collect them without success. It was upon realizing he was not coming through around 1500hrs that day, that she decided to drive the cattle to the deceased's homestead in the hope she would find him there and accordingly raise whatever issues she had wished to.

[11]She had upon her arrival at his home not received a response to her salutations which made her to go to his house to knock by the door and ascertain if he was present. As soon as she got closer to the house, she noted that the door thereto had been broken down and removed such that it was lying outside on the ground. Inside the house she could see the deceased who was in a sitting position. She was to later notice that his clothes were blood – soaked with his face bearing serious gaping wounds. There was blood flowing from the house the deceased was sitting in through the door. As she observed him closely, she discovered that he was dead. She then called the Police and informed them about what she had discovered. The Police who had ordered

her to remain standing by the roadside at that area, responded promptly. As soon as they came their investigations commenced.

[12] The Police team that responded to the call by PW1 included the Principal Investigator PW8, 4965 Detective Constable Muzi Mkhabela and PW6, 4131 Sergeant Enock Mbabazeni Tsabedze, who introduced himself as a scenes of crime expert, among several other officers. The discovery by the Police on the 7th January 2014 was testified to in detail by PW6 Officer 4131 Detective Sergeant Enock Mbabazeni Tsabedze. He testified, after introducing himself including informing the Court about his experience, how he had on the said day, received a call from the Nhlngano Police to attend a scene of crime at Makhosini area at a place precisely called EnhlaNensimba. They were there at a homestead belonging to one Mpigo Mavuso, the deceased.

[13] He testified on the situation of the homestead in question, particularly that it was a one roomed flat homestead. As they approached the said flat they saw that the door had been dislocated from the flat and caused to lie on the ground, it apparently having been forcefully brought down. There was a

trail of blood apparently from the deceased indicating that same had earlier flown through the doorway although it was dry at the time. Inside the house was the deceased person in a sitting position and leaning against the wall of the house. His clothes were allegedly blood – soaked. He had several gashing wounds on his head and also at the back of his head. He took photographs of all the above discoveries or observations he made and the photographs were entered into court by means of an album prepared by him which was marked as exhibit B.

[14]PW6 also told the court about how he had undressed the corpse and kept the clothes it had been dressed in as exhibits which were taken for evidential analysis. The corpse was, on the 8th January 2014, taken to Mbabane Government Hospital for post – mortem purposes.

[15]PW5, Simeon Simelane introduced himself as a Community Police in the area, the position he held in February 2014 just as he still holds it today. He testified how he was, on a day he could not recall in February 2014, fetched at the local school where he worked, by Police Officers who wanted him to

witness the pointing out by the accused persons in the matter after they been arrested in connection with it.

[16]The Police took him to a place next to the deceased's homestead where there were the two accused persons together with other Police Officers. He confirmed seeing the accused persons point out the following items allegedly used in the commission of the crime this matter is about:- The first accused pointed out an axe from under peach trees between an older and newer kraal after which he proceeded to point out two sticks comprising a long and a short one. He further pointed out a brown T-Shirt with stripes together with a green pair of work wear trousers, as well as a pair of brown shoes. The Second Accused on the other, hand pointed out a bush knife with a black handle, a small sized stick and a certain navy-blue dress (sidziya in Siswati). This dress was introduced as the one she had worn on the day the offence was committed. All these items were given exhibit numbers. Of significance is his testimony that all these items were freely and voluntarily pointed out by the accused persons after they had been warned they were not obliged to do so, in his presence, by the police.

[17]Under cross examination this witness testified being aware of a dispute between the deceased and the first accused relating to a certain forest near their homesteads. He was quick however to point out that there was no basis for the dispute because, as a matter of fact that forest belonged to the deceased, with that belonging to the first accused being situate across the nearby road. He testified further of being aware of an incident in terms of which the first accused reported a complaint against the deceased after the latter's cattle had roamed his fields; which he described as a common occurrence between neighbours. He further confirmed that the deceased was a person given to use fowl or insulting language although he did not believe it should have led to his death given that it had grown to become his daily habit without any real meaning to be attached thereto. He sought to deny knowledge of any acrimony or bad blood between the two.

[18]According to PW4, 2750 Inspector Nhlanhla Mkhabela, he was called by the Principal Investigator in the matter, PW8 4965 Detective Constable Muzi Mkhabela to attend a pointing out by the accused persons at Makhosini area. He was to cover the investigations (the pointing out) being conducted there through photography. This was on the 12th February 2014. Except to add that he took photographs, his evidence was substantially the same as that of

PW5 Simeon Simelane, in this regard particularly because they were part of the same team. They otherwise witnessed the voluntary pointing out of the items referred to by Mr Simelane in his evidence. He confirmed that this had occurred at the homestead of the accused persons. He handed into court the photographs in the album most of which showed the accused persons pointing out the items alluded to above. According to this witness the accused persons had pointed out the said items after having been cautioned in terms of the Judge's Rules. The witness further handed into Court the photographs he had taken in the form of an album. He went on to explain each one of the photographs.

[19]According to PW8, 4965 Detective Constable Muzi Mkhabela, he was the principal investigator in the matter. He had attended to its investigations on at least two distinct occasions. That was on the 7th January 2014 and on the 11th and 12th February 2014. On the first date (7th January 2014), he was part of a team that had been detailed to attend to an investigation of a murder said to have occurred at a place called Makhosini but specifically referred to as Enhla Nensimba. On the first occasion there, his evidence corroborated that of PW1 and PW7 who are respectively Dumsile Mable Mdluli and 4131 Sergeant Enock Mbabazeni Tsabedze.

[20]In a nutshell he testified that on the 7th January 2014 he had received a report of a murder that had occurred at a Mavuso homestead at Makhosini area. The person allegedly killed was one Mpigo Mavuso. He had thus put together a team of officers to go for investigation. That team comprised PW7 Detective Sergeant Tsabedze among others, whose evidence has been summarized above. During the conduct of the investigations, he had ascertained from witnesses who were members of that community that the suspects were the first and second accused. His attempt to find these suspects in order to interrogate them was failed by a discovery that the two had already left for Nsiligwane in the Republic of South Africa where he took them to have eloped to.

[21]On the second aspect of his investigations in the matter, PW8 testified that on the 11th February 2014, he received a call from 5990 Detective Constable Mthupha, to the effect that he had on that day arrested and detained the two accused persons. They had in fact been deported from the Republic of South Africa by the Police of that country through the Nsalitje Border Post. They were from there intercepted by the Hluthi Police who had transmitted them

to the Nhlangano Police where they were detained as at the time he was called by constable Mthupha and alerted of those developments.

[22]He said he had responded to the call by going to the Nhlangano Police where upon he introduced himself to the accused persons and eventually cautioned them in terms of the Judge's Rules. The caution was to the effect, he said, that he was conducting an investigation into the murder of Mpigo Mavuso and that they were not obliged to say anything but that if they did, whatever they said would be recorded down and could be used in court against them. Following what the accused had told him in line with the choice the latter had made pursuant to the caution in accordance with the Judges' Rules, he had arranged with the Police team comprising among others PW4, Nhlanhla Mkhabela to attend to the accused's homestead on the 12th February 2014 where the accused wanted to point out certain items in connection with the crime.

[23]At their homestead, the accused persons allegedly pointed out the items as indicated in the evidence of 2750 Inspector Nhlanhla Mkhabela. This they did after they had been cautioned in terms of the Judges' Rules. The items

said to have been pointed out by the first accused were the axe, the two sticks comprising the long and short one, the brown striped T-Shirt together with the green pair of work wear trousers and the brown pair of shoes. Those attributed to the second accused were the bush knife, the small stick and the navy blue dress (sidziya) with white sports and certain stripes.

[24] This witness went on to hand into court the said items which were also given exhibit numbers.

[25] Otherwise the first accused was shown to have been taken for recording a confession with the learned Nhlanguano Magistrate of the time, Mr M. Nxumalo. This confession was entered by consent as part of the Crown's evidence. The said confession had the following contents which proved to be crucial in the matter. Sometime in October 2013, and whilst at work in the Republic of South Africa, the accused claimed to have received a call from his home situated at Makhosini area in Eswatini. The message was to the effect that his house situated at Makhosini area had been set on fire which had razed it down. His consultation with a certain Sangoma had

revealed that one Mpigo Mavuso was responsible for setting his house on fire.

[26]Sometime in January 2014 he learnt from some relatives of the deceased that the latter was planning to attack him. An attempt was allegedly made against him only to find that he was able to raise an alarm which scared his attackers.

[27]He claimed to have reported those incidents to the Police and to other community structures to no avail. This was the background when during that month of January 2014, he received information from his wife to the effect that the deceased had sold “his” trees as found in the nearby forest to some buyers who cut them. The forest according to the confession belonged to him.

[28]His intervention in it was met with a flurry of insults allegedly from the deceased who told him that the home he had there did not belong to him. His

response to the cutting of his trees had seen him and his lover, the second accused, go to confront the deceased at his home.

[29]Because he considered the deceased dangerous as he had allegedly killed his own mother in the past, he had caused himself to be armed as he went with Monicah Mavuso to his homestead. Upon arrival, the deceased who had hitherto been hurling insults at them allegedly ran into his house and locked himself in there whilst he was armed with a bush knife and a stick.

[30]He said he followed him to the house he had run into, brought down the door to the said house by hacking it with his axe as a result of which it collapsed. Inside the house the deceased allegedly attacked him with the bush knife but allegedly missed him after he allegedly evaded the blow. This enabled him to allegedly hit the deceased twice on the forehead causing him to fall.

[31]His wife allegedly picked up the bush knife which had fallen from the deceased's hand as he had missed him during the attempted blow. Even before she could do anything on the deceased with the bush knife, she saw

blood flowing from the wounds he had effected on the deceased. Given that she was afraid of blood she allegedly ran away and only met her later as they proceeded back home. The first accused had otherwise left Mpigo Mavuso for death, allegedly hoping that he was going to survive.

[32]There was also handed into Court by consent the Post Mortem Report, Exhibit

C. According to that report the cause of death was recorded as “due to multiple injuries”. The Pathologist observed eight injuries on the deceased; most of which were fatal. These were listed as:-

(a)Cut wounds over the forehead 7cm X 1 cm, Below it 3cm X 1 cm inner aspect of right eye, 2 cm X 1 cm Bone deep present with intra cranial hemorrhage, (sic) fractured skull present.

(b)Cut wound extending from ear right to cheek 8 cm X 2 cm bone deep involved muscles, nerves, blood vessels.

(c)Cut wound over upper region neck on Right side towards midline 3 cm X 1cm Vetebral deep present involved muscles, nerves, blood vessels with effusion blood in soft tissues.

(d)Cut wound at the back of right elbow 3.2 cm X 1 cm muscle deep.

(e) Abrasion over arm left upper region 2cm X 1 cm with cut 3 cm area elbow outer aspect 3 cm area exposing bone chip.

(f) Linear scratch upper region front of abdomen right 6 cm X 0.3 cm.

(g) Linear scratches over Right forearm 6 cm X 1 cm, 4.2 cm X 1 cm.

(h) Scratches right leg front 6 cm X 1 cm, 2.2 cm X 0.3 cm.

[33] The case put by the defence to several crown witnesses was in summary that the deceased had provoked the accused persons, particularly the first accused over a sustained period of time. Their relationship had graduated into enmity therefore. The deceased was allegedly given to subjecting the accused to ill treatment allegedly claiming that he was staying on a land that belonged to the deceased's family. The deceased also allegedly allowed his cattle to roam the accused's fields and destroy his crops. The final straw was allegedly the selling of the trees cut from the disputed forest.

[34] At the close of the crown's case, it was indicated that the accused persons were to be individually called to the witness stand to give their side of the story. Upon being eventually called, the first accused tried to maintain the case put

to the witnesses mainly that the deceased had repeatedly provoked him over a sustained period which provocation culminated in the selling of the trees that were sold to and cut by PW 6 Nkosinathi Mavuso.

[35] Testifying on how the incident that gave rise to the death of the deceased had arisen including how it unfolded, the first accused maintained that although he had always had a bad relationship with the deceased who allegedly subjected him to ill treatment by such incidents as constant insults, allowing his cattle to roam his fields and destroy his crops as well as reminding him at any possible moment that his homestead had been built on his family's land, he had always put up with such until the day when he said he was visited by his common law wife the second accused, who told him that the deceased had sold his trees to some people who had already cut some of them in their forest.

[36] He said that upon arrival at his home he tried to engage the deceased about the cutting of his forest which however only attracted insults from the deceased, with no cooperation. He said he decided to arm himself in order to go and find out from him why he had done what he had done. He said he called the

second accused to accompany him there. He allegedly armed himself in the manner he did because he was afraid of the deceased whom he knew to be dangerous and had allegedly killed his own mother sometime back.

[37]On what happened upon their arrival at the deceased's home, he reiterated mainly the contents of his confession. He said they found the deceased armed with a bush knife and a knob stick. When they arrived at the latter's home he, after having insulted them, ran into his house which was a one roomed flat. The first accused says that he gave chase and upon finding the door locked with the deceased in there, he had hacked the door with the axe he was carrying, causing it to collapse in the process.

[38]He said a fight broke out between him and the deceased, where the latter was the aggressor. Although the deceased had allegedly tried to hack him with the bush knife, he missed and the bush knife fell onto the floor. His wife, the second accused, picked up the knife as he hit the deceased twice on the forehead with the axe resulting in blood gushing out as the deceased fell. The second accused allegedly saw the blood after picking up the bush knife and ran away as she was a person afraid of blood.

[39]He maintained that he left the deceased after he had fallen down. He allegedly went back to his house not thinking that he had died in the process.

[40]When called to her defence, the second accused told the court that there was bad blood between her husband and the deceased. She infact tried to corroborate what the first accused had said with regards his relationship with the deceased. She maintained that the death of the deceased was sparked off by the latter's having sold trees from what she termed her husband's forest. She clarified how she had on the day the forest was cut, gone to her husband at his place of work in the Republic of South Africa to report the cutting of his trees at the instance of the deceased who was her grandfather as a Mavuso.

[41]She denied that when she armed herself and joined her armed husband they intended killing deceased. She said they intended to engage him and to seek answers on why he had sold her husband's trees. She said they had had to arm themselves because the deceased was an alleged dangerous man who had allegedly killed his own mother. It was the deceased who upon their

arrival at his place, started insulting them. She did not want to confirm that the deceased had run into his house or flat and locked himself in there but rushed to say that when the fight broke out between her husband and herself, she only picked the knife that had fallen onto the floor and ran away as she saw blood which she was afraid of.

[42]From the evidence it was never in dispute that the accused's death was brought about in a brutal and savagery manner by at least the first accused. The question is really whether there was any legal justification for that. The second question concerns the role of the second accused person. In other words, did she take part in the killing of the deceased? Further still did she act in furtherance of a common purpose with the First Accused.

[43]On the question whether or not there was any justification for the accused to have killed the deceased, the accused sought to rely on an alleged bad relationship between the two of them as well as an alleged ill treatment he allegedly suffered in the hands of the deceased. He further sought to rely on provocation by the deceased firstly based on the deceased's alleged selling of trees from the disputed portion of the forest and secondly from the insults

he had used against him. He then sought to paint the deceased as the aggressor, who was hit by him after he had tried to hack him with a bush knife.

[44]Whereas PW5 Simeon Simelane sought to paint a picture of a normal relationship between the two, it did come out that there was a standing dispute over the forest in question between the two. He however did not hesitate to say that the forest in question belonged to the deceased and not the accused. For purposes of the matter before court, it is not necessary for me to decide in the course of these proceedings who the owner of that forest or its portion was. It suffices that there was a dispute over its ownership and whether it was ever resolved. All I noted is that whereas PW 1 and PW 5's evidence corroborated each other on the ownership of the forest in so far as they both denied the accused had anything to do with it; PW 2 and PW 3 both supported the First accused that the forest was his.

[45]It also did come out that at some point the first accused's house was destroyed by fire whose source was never formerly established. The accused attributed that incident to the deceased even though that was never established as a fact

except that he had contacted some traditional healers who had allegedly implicated the deceased. The issue of the deceased's cattle once straying into the deceased's fields was established although according to PW 5 it had been resolved.

[46]The point being made here is that there was some bad blood between the first accused and the deceased. It however could not have justified the first accused attacking and killing the deceased in the manner he did. If the incident of the cattle that had roamed into his fields was dealt with by the Umphakatsi, I do not see why they would have failed to address that of the forest if the first accused was genuine on it belonging to him.

[47]Furthermore the evidence, in the form of the First accused's own confession, reveals that the deceased had run away and locked himself in his house even before any fight had broken out. For the first accused to have gone on to hack and bring down the door of the house in which the deceased had locked himself, was an expression of a strong resolve to kill the deceased which would be a clear intention to kill. The accused's action at worst depicted *dolus directus* and at best *dolus eventualis* which gets to the same result

namely that the accused cannot escape liability or responsibility for the murder or killing of the deceased.

[48]For the sake of completeness dolus directus occurs when the death of the deceased was desired by the accused person. If the First accused had the audacity to, whilst armed with a deadly weapon, hack and bring down the door of the house in which the deceased had locked himself and then gone on to inflict 8 wounds on the delicate parts of the deceased's body, some of which were found to be fatal, it would be hard if not impossible to convince anyone that the killing of the deceased that resulted was not intended. On the distinction between dolus directus and dolus eventualis see the case of **Thandi Tiki Sihlongonyane Vs Rex Court of Appeal case 40/1997 SZSC 35 (24 September 1997)**.

[49]Even if for whatever reason dolus directus (that is direct intention), may be construed not to have been harboured by the first accused, he cannot in my view escape a conclusion of him having harboured dolus eventualis or legal intention, when considering how the whole incident of the deceased's death came about. Firstly, by hacking and bringing down the door and then going

on to inflict the injuries that were inflicted on the deceased's head or face and to the other delicate parts of the latter's body the accused cannot avoid being construed to have intended to kill the deceased, which is to say he committed the murder of the deceased.

[50]Our law is clear that where an accused person hit the deceased with a lethal weapon on a delicate part of his body like the head, he intended to kill in law, his true desire not mattering. See in this regard **R V Jabulane Philemon Mngomezulu 1970 -76 SLR 17 B – C** as well as **R V Jolly and Others 1923 AD 176 at 187** where the following was said:-

“The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[51]Although the first accused sought to rely on provocation to justify his actions, I cannot accept that the provocation was of such a nature as to have made him act under a heat of passion. This is because he did have time for a cool off when considering the events from the day he got to know about the cutting

of his alleged trees and the time he eventually got to the deceased's place to eventually kill him. It cannot be that he could travel from his place of work in the Republic of South Africa to Makhosini in Eswatini without cooling off so as to control his emotions.

[52] Similarly in so far as he seeks to rely on the alleged insults to justify his having had to kill the deceased, it is clear from the evidence that such cannot succeed. The circumstances are very clear that the deceased was a person given to vulgar language which he used at will. It could not be therefore that this time around the first accused would have been so provoked that he could not control himself.

[53] For the foregoing considerations I am convinced that the first accused cannot escape liability for the murder of the late Mpigo Mavuso.

[54] As concerns the second accused, the question is as recorded above whether or not she played any part in the killing of the deceased. It is not in dispute that she did arm herself with a bush knife and a stick from their house as they

went to the deceased's place. Although she wanted to paint a picture of her having armed herself only with the small stick, there was evidence which was not challenged from PW3 that she had armed herself with the bush knife contrary to her saying she had found the bush knife at the deceased's place as he was fighting with accused 1. It was never put to PW3 that the second accused had never armed herself with a bush knife and instead that she had found it at the scene during the fight. This makes her assertion she picked it up at the place of the fight an afterthought. Authority is abound in our jurisdiction that an afterthought cannot help an accused person but instead it works against her.

[55]I will therefore conclude that she had armed herself with the bush knife as they went to the deceased's place. There is however no evidence of any crown witness on what she did once she got there. The only evidence there is that of the First Accused as contained in the confession and by the said accused person in court as well as that of the second accused herself. All these pieces of evidence corroborate each other on this aspect of the matter which is that she ran away upon the sight of blood without having done anything on the deceased.

[56]Although PW2 saw the bush knife being washed as well together with the axe, this is not confirmed by PW3, who only saw the axe being washed. There is also no evidence of any wound having been inflicted through the use of a bush knife which would have required her to explain; that is to give a reasonable and possibly true explanation, which is the standard required by the law in an accused's explanation.

[57]It is not unusual for a rural Swazi to arm himself or herself with a stick and an item like a bush knife when attending to a dispute. The issue is more what one does with such weapons upon reaching the person he is having a dispute with. In the case of the accused the question is whether it can be said that the explanation she gave was not reasonable and possibly true. Her explanation is that she ran away with the bush knife at the time she saw the deceased bleeding.

[58]I have to reiterate the position of our law to the effect that an accused person has no duty to prove his innocence. If he gives a reasonable and possibly true explanation he is then entitled to his acquittal. See the age old case of **R**

V Difford 1937 AD 370 at 373. That position was captured in the following words:-

“No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, that 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.”

[59]This position of the law was further elucidated in **R V M 1946 AD 1023 at 1027** when the court said the following:-

“the court does not have to believe the defence story, still less does it have to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

[60]In so far as it cannot be construed as beyond a reasonable doubt that when the second accused person armed himself with the bush knife and a stick she intended to kill the deceased, particularly if there is no evidence to gainsay

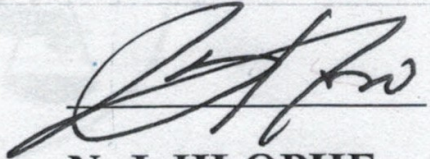
that she ran away from the scene as soon as the fight had broken out with blood having begun to flow, it cannot be said that her explanation is beyond any reasonable doubt false. In my view not even her subsequent eloping with her husband to the Republic of South Africa can be used to safely conclude that she was evading arrest out of a guilty conscience. It cannot be the only reasonable inference. She could have done it in support of her common law husband as opposed to avoid arrest because of some guilt on her party.

[61]For these reasons I cannot say that a case has been proved against the second accused beyond a reasonable. There could be all sorts of suspicions perhaps even a strong one at that but that is not what the law requires to sustain a conviction. It requires proof beyond a reasonable doubt that she had committed the offence but the evidence has fallen short of meeting that standard.

[62]Consequently I have, for the foregoing reasons, come to the following conclusions, which are the orders I make.

1.The First accused be and is hereby found guilty of the murder
of one Mpigo Mavuso.

2.The Second Accused be and is hereby found not guilty of the
murder of the late Mpigo Mavuso and she is acquitted
and discharged.



N. J. HLOPHE
JUDGE – HIGH COURT