

IN THE HIGH COURT OF ESWATINI
JUDGMENT

CRIMINAL CASE NO. 253/15

In the matter between:

THE KING

AND

SABELO SIBONISO MOTSA

Neutral Citation: *The King vs Sabelo Siboniso Motsa (253/15)*
[2020] SZHC (44) 25th March 2020

Coram: MLANGENI J.

Last Heard: 13th February 2020

Delivered: 25th March 2020

Summary:

Criminal law - accused charged with one count of murder - evidence showed that at the time of committing the offence accused was under the influence of alcoholic drinks - found guilty of murder extenuating circumstances.

Where the defence does not canvass extenuating circumstances but there is evidence pointing in that direction on, the court has a duty to examine this aspect.

Criminal law - accused charged with two counts of attempted murder - found guilty on both counts.

JUDGMENT

[1] An end-of-year crossover party which started on the 31st December 2013 ended in mayhem. In one moment of madness three revellers were stabbed with a knife and one of them, a 21 year old boy, died as a result of the stab wounds. One Sabelo Siboniso Motsa now faces three criminal charges as follows:-

Count one: Murder, **“In that upon or about the 1st January 2014 and at or near Dwaleni Power Station in the Manzini Region, the said accused person did unlawfully and intentionally kill SIBONGISENI HLATSHWAYO and did thereby commit the crime of MURDER.”**

Count Two: Attempted murder, **“In that upon or about the 1st January 2014 and at or near Dwaleni Power Station in the Manzini Region, the said accused person did unlawfully stab TENELE MASUKU with a knife, with the intention of killing her and did thereby commit the crime of ATTEMPTED MURDER.”**

Count Three: Attempted murder, **“In that upon or about the 1st January 2014 and.....the said accused did unlawfully stab Jabulani Gweceza Ngwenya with a knife, with the intention of killing him, and did thereby commit the crime of Attempted Murder”.**

[2] He has pleaded not guilty to all the counts.

[3] PW1 is Bhekithemba Hlatshwako. He testified in respect of count one only - the murder charge. He is the brother of the deceased and he testified that on the 1st January 2014 he was called to identify the deceased at RFM hospital in Manzini. He proceeded to do so and saw to the registration of the deceased whose body was subsequently kept in cold storage in the morgue. On the 2nd January 2014 he again identified the body of the deceased for purposes of a post-mortem examination. On the body of the deceased he noticed three injuries - one on the front part of the head, one on the left shoulder and the third one on the chest. He also stated that he knows the accused, and that after the fatal incident the family of the accused came to the witness' home to pass condolences and later assisted **“towards the purchase of the deceased's coffin.”** In cross-examination this witness was asked only one question and he confirmed that the accused's family came home to pass condolences. There was no re-examination.

[4] Dr R.M. Reddy testified as PW7. He has served in this country as a Police Pathologist since 1994. He stated that on the 2nd January 2014 he conducted a post-mortem examination on the body of the deceased, Sibongiseni Hlatshwako, and thereafter compiled a report which he handed in as Exhibit **“A”**. According to the report this witness observed three separate injuries on the body of the deceased – one on the right part of the forehead, another one on the left clavicle and the third on the **“left chest outer aspect”**. He further stated that the fatal wound was No.2, the one on the left clavicle, and that it was inflicted with **“a sharp cutting weapon.”** The injuries observed by the pathologist correspond to what was observed by PW1 who identified the body for purposes of post-mortem examination.

[5] Witnesses to the stabbing include the two victims who survived the attack and are the subject of the two counts of attempted murder.

[6] PW3 was Tenele Masuku who stays at Dwaleni. She testified that on the 31st January 2013 there was a cross-over party at her homestead and there were many people, some of them dancing to music at the veranda of a house. While sitting at the veranda she felt something cold at her backside and lost strength. She felt blood, and someone next to her told her that she had been stabbed. Next to her there was one Zinhle Sihlongonyane and Jabulani Gweceza Ngwenya who was also stabbed. She did not see who stabbed her but heard people shout that Sabelo (the accused) was the one who had stabbed them. She further stated that she knows this Sabelo Motsa and that earlier on that

day she had seen him, specifically at dusk, next to a shop near the homestead and he was drinking beer called '**stout**'. When she was stabbed she was sitting at the veranda watching the television where cross-over music was being played. Jabulani Gweceza Ngwenya, who was also stabbed, was sitting next to her.

[7] The witness further testified that she knew the deceased who was her neighbour. The deceased was together with the witness and many other people at the homestead where people were having alcoholic drinks and dancing. It is clear that this witness did not see the accused arrive at the veranda and, as she stated in her evidence, she did not see him stabbing her or anyone else. After she was stabbed she bled a lot and she was covered with a bath towel. A car was organised to take her to hospital. At that stage it was realised that one Sibongiseni Hlatshwako had also been stabbed. The witness lost consciousness along the way to hospital and when she regained it she was on a bed with a drainage pipe inside her body, at RFM hospital emergency ward. She further stated that her stab wound was on the backside, below the shoulder blade, and that immediately prior to the stabbing incident she did not see or hear any sound of conflict in the veranda or anywhere else.

[8] Upon cross-examination this witness said that there were about 90 people who had gathered in this home for the cross-over. Some people were next to a rondavel and many were at the veranda and close to it, dancing. The dance floor was overcrowded. She said that she was not drinking alcoholic drinks and

she confirmed that she had last seen the accused at about 8:00pm drinking '**stout**' next to her uncle's shop, and that she next saw him after she was discharged from hospital. The deceased was a regular visitor at this homestead and on this occasion he arrived before the accused did. At some point in time she left the crowd and went to sleep. She came back at about 2:00am and she was stabbed soon thereafter, towards 3:00 am on the 1st January 2014. While they were at the hospital emergency room the deceased called the name of Muzi Motsa, while crying, and he died soon thereafter. She knows this Muzi Motsa and he was also at the party. Although she knew the accused before the stabbing incident they never spoke, she often saw him in the neighbourhood on her way to school, and that she knows no reason for him to stab her. Some questions that were put to her, and the answers, appear below:-

Q: Apart from what you heard, accused did not stab you?

A: He did.

Q: Is that a conclusion from what you heard?

A: Yes. Because the others were also stabbed by him.

Q: Is it hearsay?

A: It is him.

Q: You told the court that you were admitted at RFM hospital for eight days, you did not furnish proof of that?

A: Yes.

She was not re-examined.

[9] Jabulani Gweceza Ngwenya testified as PW4. He stated that he resides at Dwaleni and he lives on piece jobs. He stated that on the 31st December 2013 to the 1st January 2014 there was a cross-over party at a Phakathi homestead which is at Dwaleni area. There was dancing and fireworks. At around 3:00 am he was stabbed while at the veranda, watching those who were dancing. He saw the accused passing and it is at that time that he was stabbed by the accused whom he saw coming from behind him. The accused stabbed him on the right side of the chest. At the time the accused was wearing a red trouser and earlier on in the evening they had had a conversation. He further stated that the trouser that was worn by the accused was short and he carried a back-pack on his back. The witness further stated that Tenele Masuku was also stabbed, but that he did not see the weapon clearly. He continued in this manner:-

“As we were being taken to hospital we noticed the deceased lying down and he was also taken to hospital”

[10] At the hospital this witness was treated and discharged on the same day and he left the others behind. He further stated that if the **‘trousers’** were in the courtroom he would recognise it. He proceeded out of the witness stand to a plastic bag out of which he pulled red shorts with Lacoste label and said that this is what the accused was wearing on the day of the attacks. He further testified that he was used to seeing the accused in the area and he pointed at him in the accused dock. Prior to the stabbing incident there was no conflict between this witness and the accused. The witness proceeded in the following manner:-

“When we spoke before the stabbing he was slightly drunk.....Before that there was a quarrel over a lady,

then they left and later he came back. That is when we were stabbed”.

He also stated that where the incident occurred there was electricity lighting.

[11] The witness was cross-examined at length. Below I capture some of the questions and answers.

Q: Did you see who stabbed you?

A: Yes. I saw Sabelo (Accused) go past me and heard someone say that we were being stabbed. He came from behind me and stabbed me. I did not actually see the stabbing, just saw a spurt of blood.

Q: Were you drunk?

A: No. I drink occasionally but on that day I did not. When accused arrived I was already at the homestead. They stood next to me and we spoke. When they arrived they were drunk. It was after 8:00pm.

Q: The accused continued drinking?

A: Yes. He had drinks in his back pack. He offered me a drink but I declined.

Q: You and the accused were friends?

A: No. We often met. I was used to Muzi.

Muzi is the accused’s brother who was initially charged together with the accused.

Q: There is no reason why he would stab you?

A: Yes. I had not provoked him in any way.

Q: Was there anyone in the party who was your enemy or that you had quarrelled with?

A: I do not have an enemy. Accused is also not my enemy.

Q: Who told you that you were being stabbed by the accused?

A: Zinhle.

Q: What was the distance between you and Zinhle?

A: About one metre.

Q: You were not stabbed by the accused?

A: I am sure it is him. He told the Police that **“besiyitjukutja.”**

The word **“tjukutja”** is from a popular hip-hop song from a few years back. In the context of this case I am not certain what it means.

[12] The next Crown witness was Edward Hlophe who testified as PW5. On the 1st January 2014 he was renting a room at the Phakathi homestead where the deadly conflict occurred. In the morning hours he was awoken by one Khayani Phakathi who told him that some people had been injured in the homestead. He came out and saw blood stains at different places in the yard, and in the veranda. He proceeded in the manner that follows:-

“We followed the assailants and saw them cross the river into a Motsa homestead. We did not want to lose sight of them. A police van came by and we told the Police what had happened. Other police came and together we went to the Motsa homestead and found three boys, but

accused was not among them. As the police enquired about him he suddenly came out of another house and said he is the Sabelo. They asked him for the assault weapon and he said that it was in another house which was used by Musa Motsa. He went inside the house where there were kitchen utensils and took the knife and placed it down. I was present. It was a kitchen knife with a yellow handle. The blade was silver. It was big, about 30 centimetres. The police told him to pick it up and he was photographed at that moment.”

[13] The witness proceeded to say that the accused was asked to produce the clothes he was wearing when the assault took place and he produced them and was photographed at that moment. The witness does not recall all the clothing items but he does recall a red pair of shorts. The police took the clothing items and the knife, and also took one other boy, Muzi Motsa. During this pointing out there were other people in the Motsa homestead, some of them of the same age group as the witness. He further testified that he can recognise the knife and the pair of shorts. He came out of the witness stand and picked it up. He picked up the shorts and the knife which he said is the one that was produced by the accused person and handed to the police. He ended up by saying that the accused, Sabelo Motsa, is the one in the dock.

[14] Under cross-examination the witness stated that the accused picked up the knife from a basin inside the house, that the house belonged to Musa Motsa, that he did not see blood stains on the knife. Asked whether he did enter into the house, he said that he did not, he waited at the door. He further stated that although he was at the cross-over

party earlier on, he left at about 11:00 pm and went to sleep, hence he did not witness the stabbing. When the knife was pointed out he was present.

Court: Was any pressure applied by the police before the accused pointed out the knife?

A: No.

Court: Was he co-operating with the Police?

A: Yes.

[15] PW6 was Zinhle Sihlongonyane. She testified that in the night of the 31st December 2013/1st January 2014 she was at the Phakathi homestead. Just before the stabbing incident she was sitting at the veranda with Tenele Masuku and Jabulani Gweceza Ngwenya. They were chatting. Her evidence proceeded as it appears below:-

“Accused came running, holding a knife. I stood up and at that time he stabbed Gweceza and Tenele. He wanted to stab me first but I stood up, so he proceeded to stab Tenele and then Gweceza, in that order. He stabbed Tenele at the back and Gweceza on the shoulder. He came from behind. When the knife fell on the ground I saw him pick it up and run away. There was electricity lighting. I did not raise an alarm because it all happened fast. He took the knife and ran towards the irrigation canal next to the road..... It was the first time I saw him on this day”.

[16] The witness was among the people who pursued the accused to his homestead. It was about 8:00am when the party got to his home, there they found police cars. The police asked her if she had seen the knife at the crime scene and she proceeded to describe it to the police, as having a yellow handle. This witness was there when the accused took the knife from a basin of kitchen utensils. Other than the police there was also Uncle Mfanimpela Phakati and others. She told court that she can recognise the knife and proceeded to pick it up from other exhibits and showed it to the court. She got to know the assailant's name after the incident, specifically when he pointed out the knife at his homestead. She further stated that she knows Muzi Motsa by sight, that she did not see Muzi Motsa at the party and emphatically stated that she is sure that it is not Muzi Motsa who stabbed Tenele and Gweceza but it is Sabelo Motsa, the accused. She also stated that on that day she did not drink alcoholic drink because she was still school-going, and that she remains teetotal.

[17] The witness was cross-examined, and below I reproduce some of the questions and answers:-

Q: What happened first, the stabbing or the falling of the knife?

A: The stabbing happened first.

Q: The knife falls down, you say nothing?

A: I was shocked. It all happened fast. They fell down (the victims), he picked up his knife and ran away.

Q: Muzi and Sabelo look alike and they are siblings?

A: They have resemblance but I can differentiate between them.

Q: You went to their home?

A: Yes.

Q: I put it to you that you describe the yellow knife in that manner because it is the only knife in the court room?

A: I saw it when it fell down.

Q: Who else did you tell that the knife was yellow?

A: At the Phakathi homestead I told **“bomake, bogogo naboMalume”** meaning some grown up women, grannies and uncles.

[18] At this juncture I may mention that upon inspecting this homestead I found it to be a very big homestead with several structures which appeared to be occupied by many people. Below are more questions and answers between the witness and defence counsel.

Q: When you saw the accused stabbing the two how far were you?

A: We were sitting close to each other.

Q: Were you told what to say?

A: No.

Q: You failed to tell the court what the accused was wearing?

A: Yes.

Q: My instructions are that there were many people at the party?

A: Yes.

Q: How would you see a knife falling when there were many people who were busy?

A: It fell from his hand and he picked it up and ran away.

Q: When did you see that it was yellow?

A: When it fell down. I saw him holding it, I also saw it fall down and when he picked it up.

Court: Are you sure that the person you saw stab the two is the one before court?

A: Yes.

[19] The next Crown witness was Dr Motuma Demissie who testified as PW8. He is a Medical Doctor at Raleigh Fitkin Memorial Hospital and practises as a General Surgeon. He has worked at the hospital for more than 15 years. He told the court that he knows Dr Tshilumba with whom he worked at RFM hospital until about 5 years ago when the latter left the country and returned to his home country DRC. He further stated that he knows Dr Tshilumba's handwriting. He was handed a document by prosecuting counsel. In response he said that he recognised the document and that it was made at RFM hospital in January 2014, that according to the document one Tenele Masuku was attended to by the said Dr Tshilumba, further confirming the signature on the document as being that of Dr. Tshilumba.

[20] According to the document, at admission the patient was weak; had a 4cm stab wound at the back, left side. There was blood and air on the left side of the thorax. A tube was inserted in her to drain the blood and the air. The witness continued to say that on the third page of the RSP 88 form the doctor made entries to show the location of the injury.

He recognised the hospital stamp on the document – the said Form RSP 88. He handed the document in as part of his evidence and it was marked Exhibit “**B**”. Upon cross-examination the witness confirmed that only one wound was inflicted on the victim Tenele Masuku.

[21] PW9 was Wandile Simanga Mtsetfwa. He testified that he is one of the many guests who were at the Phakathi homestead for the end-of-year party. He was in the company of Siphso Soko, Colani Makhubela, Nathi Simelane, Sibongiseni Hlatjwako and Dingiswako Mthethwa. They were drinking alcoholic drinks since about 18:00hrs. After midnight a white motor vehicle came, it had five people on board, including Muzi Motsa. He did not know the others. Muzi Motsa then came to this witness’ group and spoke to Colani Makhubela. Muzi’s gripe was that Colani had an interest in the former’s girlfriend and there was a fracas between the two. The two groups were made to leave the homestead and they went to a nearby road where they interceded between the two disputants. Afterwards the two groups, at different times, went back to the Phakathi homestead.

[22] According to the witness there was electricity lighting at the home, and extension cables supplied light beyond the fixed points. After the two groups had come back to the homestead Muzi Motsa again called Colani Makhubela who then spoke to Muzi’s friend who was wearing maroon shorts. Sibongiseni Hlatjwako, the deceased, said that he thought the two were quarrelling again. He stood up and went to make peace between them. At that point Colani Makhubela walked away, leaving Sibongiseni Hlatshwako. The witness proceeded as follows:-

“While we were sitting we saw the one with maroon shorts stabbing Sibongiseni on the shoulder with a knife. When Sibongiseni fell down he again stabbed him on the head. I did see the knife that was used. I saw it when Sibongiseni ran towards us. After the second stabbing he got up and ran towards us. That is when I saw the knife. The assailant was next to the Veranda where people were dancing.....I was about twenty metres away. The assailant went towards the veranda and I went towards Sibongiseni Hlatjwako who was stabbed. I found (him) on the ground, he was no longer talking. When I went back to the veranda I found that the same assailant had stabbed Tenele Masuku and Gweceza. He then ran away.”

[23] The witness said that the knife had a yellow handle, the blade was long and shiny. He said that he saw the knife clearly when the assailant stabbed Sibongiseni Hlatshwako on the head. The witness was asked by Crown Prosecutor if he could identify the knife and he said he could. He then came out of the witness box and picked up a knife which was in a plastic bag and showed it to the court. He further said that he was seeing the assailant for the first time on that fateful day, and that he was wearing Lacoste shorts. He testified that he can recognise the assailant and pointed at him in the dock.

[24] The witness was cross-examined at length. He said that he did record a statement at Matsapha Police Station on the 1st February 2014, and

that he recalls the contents of his statement. It was put to him that at paragraph 7 of the statement he said that he did not see the handle or the type of knife that was used. His answer was that he did not remember saying that. Some of the questions and answers during cross-examination appear below:-

Q: You identified the knife in court, per your statement you did not see the handle of the knife?

A: I saw the knife.

Q: On the 31st December you started drinking at about 3:00pm according to the statement.

A: Yes

Q: So it is now not 6:00pm?

Q: At around 3:00am you say in your statement you saw Muzi argue with Colani over Tenele Masuku. So the argument started at about 3:30 am?

A: Yes.

Q: Having started drinking at around 3:00 pm, at 3:30 am you were very drunk?

A: Not very drunk. At around 7:30pm I was taken by my brother to Oshoek, so I had a break. We went there to pick up Musa Mabaso and came back at about 10:30pm.

Q: You were about 20 metres away from the spot where Sibongiseni was stabbed.

A: Yes.

Q: You saw the accused stab Sibongiseni, Sibongiseni ran to you and you asked him what happened?

A: Yes.

Q: You had not seen what happened, you wanted an answer from him?

A: He did not answer. I wanted to know the cause of the stabbing.

[25] A fair amount of further cross-examination centred around this witness' reaction when he saw Sibongiseni and Tenele being stabbed, specifically that he did not raise an alarm. Many of the questions related to where the witness was when the stabbing occurred, the distance between where he was and where the stabbing took place, and the general scenario at the time. It became apparent to the court that an inspection of the crime scene would give a clearer picture of the scene and surroundings. An inspection in *loco* was undertaken on the 4th November 2019, with PW9 still under cross-examination.

[26] At the inspection in *loco* I observed a large homestead with many buildings - large, medium and small. The homestead is Phakathi, where the incident took place. PW9 showed the court the veranda where there was dancing. It measures about 5x5 metres. The veranda has open spaces between pillars, no windows. On two of the sides a knee-high wall provided sitting space for those who were not dancing. Under the roof of the veranda the court was shown the remains of a lamp holder that has no electric bulb and the witness said that on the fateful day the light was working and provided lighting in the veranda. The witness also showed to the court the spot where him and his

compatriots were sitting and it answers to a distance of about twenty metres. Witness further pointed at the spot where the deceased was stabbed. The spot is somewhere between where the witness was and the veranda, about 5 metres away from the veranda. He confirmed that as he was getting closer to the scene he saw the deceased being stabbed on the head while he (deceased) was down. Witness further showed the court where Tenele Masuku was sitting before she was stabbed – on the knee-high wall, adding that Tenele Masuku was sitting together with Gweceza Ngwenya. The witness was asked to show where he was at the time Tenele Masuku was stabbed and he indicated a spot close to where the first stabbing (of Sibongiseni Hlatshwako) occurred.

- [27] The investigating officer testified as PW7, Constable N. Masango. He testified that in January 2014 he was stationed at Matsapha Police Station under the Criminal Investigation Department, and that he is one of the investigators who were involved in this matter. He stated that on the 1st January 2014 while he was on duty he received a report of a case of murder which was said to have occurred at Mpanana area. Together with other police officers he proceeded to the homestead of the suspect, Siboniso Motsa. Upon arrival at the homestead he saw the accused and they introduced themselves to him as Police officers who were investigating a case of homicide. They cautioned the accused according to the Judges' Rules and then asked him about the murder weapon. Thereafter, the accused took the officers to a house within the homestead. Before entering the house, according the witness, they again cautioned the accused to the effect that **“whatever he gave to us could be used as evidence against him but he was not obliged to do so.”**

[28] Once inside the house, the accused pointed out a knife which looked like a kitchen knife with a yellow handle. The officer then took the knife and kept it as an exhibit. He stated that the knife is before court and walked out of the witness box to identify it. The court observed a non-folding knife with a yellow handle, blade about 15 centimetres long and sharp at the end. The handle is about 10 centimetres long with a T-shape at the rear end. At it's widest the size of the blade is about 1.8 centimetres. The witness handed in the knife and it was marked Exhibit "1". The witness proceeded to state that after the pointing out the accused was charged with one count of murder and two counts of attempted murder. The accused was initially charged together with his brother, but the witness said he does not know what became of the brother, the reason being that the principal investigator in the matter has since died. He re-iterated that the one who led the team of investigators to the knife is the accused before court. In the course of the Crown case the court became aware that the accused's brother is Muzi Motsa.

[29] After the testimony of PW9 the Crown closed its case. The defence case is based on the evidence of the accused who testified as DW1. The accused testified that on the evening of the 31st December 2013 he was in the company of his brother Muzi Motsa and some other people. They arrived at the Phakathi homestead around 7:00 pm. At the home they found some men who were having alcoholic drinks. The men then asked the accused and his companions to buy them drinks and when they said they did not have money the other group of men forcefully took drinks from the accused and his friends. Accused's brother Muzi Motsa resisted this act of aggression and was then

assaulted with open hands by one Edward Hlophe. He stated that him and his associates then ran away. He put it in the following words:-

“Muzi and others ran out of the yard. I ran to the veranda.”

Of significance is that Edward Hlophe, who testified as PW5, stated that when the stabbings took place he was asleep. He was awoken by one Khayani Phakathi after the conflict. He then joined the others in pursuit of the accused. So clearly he could not have been there when the stabbings took place, and I reject the evidence of the accused in that respect.

[30] The accused proceeded to say that sometime later, at about 2:00am on the 1st January 2014, his brother Muzi Motsa suggested that they must leave the homestead. His evidence continued:-

“As we were leaving from the veranda two gentlemen approached, one hit Muzi with an open hand. The two gentlemen are Colani Makhukhula and the other one I hear is Sibongiseni. The other one produced a knife and then he fell down. I picked up the knife - we both rushed to it but I picked it up first, then he got stabbed. He was stabbed by me. The knife belonged to Sibongiseni, the deceased”.

[31] In relation to the pointing out of the knife to Constable Masango, the accused testified that the knife he gave to the police is not the one that belonged to the deceased, and that the one that he used to stab the deceased **“got lost when I was running away”**, and that he does not know where he lost it, but he had it in his hand. He further stated that he remembers stabbing the deceased only once, at the

chest. He testified that he does not know who stabbed Tenele Masuku and Gweceza Ngwenya. He said the following:-

“I don’t know who stabbed them, I was told that I am the one. It was dark, hence I did not see who I stabbed..... I heard the following day that two other people had been stabbed.....I was told by one neighbour who drives a kombi. I don’t know if he was at the scene”.

[32] According to the accused, when the deceased was stabbed he was behind the house, not at the front area next to the veranda. He stated that at that time he was leaving the homestead, going home. Commenting on the evidence of Jabulani Gweceza Ngwenya who said that he saw the accused stabbing the deceased, the accused had the following to say:-

“I cannot deny that I stabbed him as I was running away. Whether it is him or not I don’t know.”

[33] Under cross-examination the accused admitted that it was not put to the Police Officer, PW7, that the knife that was pointed out and given to the Police is not the one that was used to stab the deceased and the other victims. He said that he was afraid to tell this to the police because if he was to be asked to go and look for the right knife he would be unable to find it and he would then be tortured. Some questions and answers during cross-examination follow below.

Q: You could have told the Police officer the right version once he was in court?

A: I did not get the chance.

Q: It was put to PW1 that your family sent condolences to the deceased family, is that correct?

A: They came to Zakhele Remand Centre and told me that they had done it.

Q: Did you tell them that you did not kill the deceased but you stabbed another man?

A: They did not ask me whether I committed the offence or not

Q: PW4, Gweceza, told the court that when you arrived at the homestead you offered drinks to him and he declined?

A: Yes.

Q: You did not dispute the evidence that when you stabbed the two the knife fell down and you picked it up and ran away.

A: I did not get the chance.

Q: Why would PW9, Wandile Mtsetfwa, create the story of how you stabbed deceased and proceeded to stab the other two?

A: Because he is one of the two who forcefully took our drinks

Q: No one forced you to drink alcoholic drinks on that day?

A: Yes.

The defence then closed its case

[34] A clear account of events just before the victims were stabbed was given by Pw9, Wandile Simanga Mtsetfwa. He was in the company of

five other people when Muzi Motsa approached them to talk to Colani Makhubela. There was a disagreement between the two over a girl. The issue seemed to be resolved, but only for a short while. The fray was later joined by the accused. The deceased stood up to make peace between the disputants and was stabbed on the shoulder by **“the one with maroon shorts”**. As he fell down he was again stabbed on the head, and within an instant he was no longer talking. This witness saw the knife with a yellow handle, with a long and shiny blade. Although this witness imbibed alcoholic drinks I am satisfied that he was not so drunk that he would not recognise what transpired around him. This is especially so in view of the break that he had from drinking between about 7:30 pm and 10:30 pm when he travelled to Oshoek border post to receive a relative who was coming to the country. The witness was taxed on not having shouted to alert those present about the attack and his account, just like that of Pw6, Zinhle Sihlongonyane, was that things happened too fast for anyone to have time to react rationally. In his evidence in chief the accused said that the deceased **“was stabbed by me”**, and added that the knife belonged to the deceased. I do not accept that the knife belonged to the deceased. The totality of the evidence points towards the accused as the one who had the knife, and after it fell from his hand he picked it up and ran away. If it was not his, there is no apparent reason why he would be so concerned about getting it back after it had fallen on the ground.

[35] In his evidence the accused further states that he remembers stabbing the deceased only once, in the head. According to the post-mortem report the deceased had three stab wounds – one on the head, one on the chest and one on the clavicle. There is no evidence of anyone else who brandished a knife at this party except the accused. And it is the

accused, under no pressure or threat, who pointed out the knife in the presence of the police and other witnesses, including PW6 Zinhle Sihlongonyane. The accused's version that the knife that he pointed out to the police is not the one that he used to stab the victims, and that the one that he used got lost somewhere as he was running away, is a hopeless afterthought that was not put to the crown witnesses. Equally hopeless is his version that when he stabbed the deceased they were behind the house and not next to the veranda. According to him, he was already on his way leaving the homestead. This was not put to the Crown witnesses, and in any event it is contrary to the preponderance of evidence that he stabbed the deceased first and proceeded to stab Tenele Masuku and Gweceza Ngwenya at the Veranda.

[36] I find as a fact that it is the accused who stabbed the deceased three times and I reject his story that the knife belonged to the deceased. It actually belonged to the accused person.

[37] In respect of the stabbing of Tenele Masuku and Gweceza Ngwenya, the evidence of PW6 – Zinhle Sihlongonyane, is of much assistance. Just before the stabbing she was sitting at the veranda with Tenele Masuku and Gweceza Ngwenya, chatting. She saw the accused running towards them, holding a knife. She stood up in the nick of time and at that moment she saw the accused stabbing Tenele and Gweceza. According to this witness the accused wanted to stab her first and would have stabbed her but for her timely reaction. This is materially corroborated by the evidence of PW4, Jabulani Gweceza Ngwenya who testified that just before he was stabbed he saw the accused coming from behind and he describes what the accused was

wearing. This appears to have happened in a flash and the witness says that he did not see the assault weapon clearly but he did see the other victim, Tenele Masuku, being stabbed. The evidence is that the knife then fell down, the accused picked it up and ran away with it. Somewhat mysteriously, according to the accused the knife then got lost. He does not know where exactly he lost it.

[38] I find it as a fact that it is the accused who stabbed Jabulani Gweceza Ngwenya and Tenele Masuku, each once. Jabulani Gweceza Ngwenya was treated at RFM and discharged on the same day, Tenele Masuku was admitted for eight days.

[39] It remains for me to consider whether the accused acted with criminal intent or not. The evidence before me shows clearly that the accused was on the warpath. The disagreement that had occurred did not involve him, it involved Colani Makhubela and Muzi Motsa. It is apparent that the deceased's only sin was to try and make peace between Colani and Muzi, and for that he sustained three stab wounds on delicate parts of the body – on the head, on the chest and on the clavicle. It has been observed, in my view rightly so, that the number of injuries that are inflicted on a victim, and the parts of the body where the injuries are inflicted, and the weapon used, may give a firm indication of an intention to kill. See: **R v MTSETFWA (81/10) [2010] SZHC 145 (16th September 2010)**. In the said judgment Masuku J. made the point in the terms that follow: -

“The nature, seriousness and number of the stab wounds, particularly considered in appreciation of the position on the deceased anatomy where they

are located, clearly show that the death of the deceased could not, regard being had to the definition of accident stated above, conceivably have occurred as a result of accident.”

See also the remarks of Schreiner J.P. in **NDIMANDE v R, 1970-1976 SLR 100 at p101**. In this case a spear was used.

[40] All three stab wounds sustained by the deceased were on his upper body - the torso, which is clearly more vulnerable than the limbs. The evidence shows that soon after the stabbing the deceased became unable to talk. I am satisfied that the accused had the requisite intention to kill the deceased and I accordingly find him guilty on count one - murder. In terms of Section 295 (i) I am required to state whether I find that there are extenuating circumstances or not. An extenuating circumstance is a factor or factors that reduce the moral blameworthiness of the accused, so that although he is guilty of murder the guilt, because of the extenuating circumstances, is less reprehensible. In the words of Dr Twum J.A.:-

“The time for gauging the existence of the extenuating circumstances is, of course, the time of the commission of the crime. This means that there must have been a real possibility that the accused at the time of committing the crime was in fact in a state of mind which lessened his moral blameworthiness.”¹

It is to be expected that extenuating circumstances would be raised and canvassed by the defence. In this case this did not happen, but there is no rule or principle that debars the court from examining this

¹ In Ntokozo Adams v The King, Criminal Appeal No. 16/2010, 30th November 2010 at page 4.

aspect of the criminal trial if there is evidence before it which points in that direction. (See NTOKOZO ADAMS v THE KING, CRIMINAL APPEAL NO.16/2010). Indeed, it appears to me that there is a duty upon the court to do so.

[41] There is no closed list of what constitutes extenuating circumstances. The common ones include intoxication and youthfulness², belief in witchcraft³, ect.

[42] It is common cause that alcoholic drinks were flowing at the Phakathi homestead on the night of the 31st December 2013 to the 1st January 2014. According to PW9 the drinking binge started at about 3:00pm on the 31st December, although under cross-examination he then mentioned 6:00pm. Of more significance, however, is that there is strong evidence that the accused was actively drinking alcoholic drinks, a mix of castle beer and castle milk stout, which he carried in his back pack in 750 ml bottles. The court was informed that upon his arrival at the homestead at around 6:00pm he offered drinks to the group of people that included Jabulani Gweceza Ngwenya, one of his eventual victims. His offer was declined. According to the evidence of PW3 and PW4, the accused was drinking alcohol. The accused also testified that he was drunk. The efficiency and precision in which he carried out the assault upon his victims suggests that he was not very drunk, but given what was going on at the homestead and around it, there is no way he would have been sober at the hour of 3:00 in the morning of the 1st January 2014.

² Mazwi Mesuli Mbatha & Another v Rex (05/2013) [2013] SZSC 04,31 May 2013.

³ R v Fundakubi & Others 1948 (3) SA 810.

[43] On the basis of the foregoing I find that there are extenuating circumstances in respect of count one.

[44] In respect of counts two and three, which is attempted murder of Tenele Masuku and Jabulani Gweceza Ngwenya, respectively, it is clear from the evidence that the two were sitting next to each other at the veranda when the accused pounced. His movements were fast, so fast that those who saw had no time to warn the victims. In one moment he stabbed the two, one after the other, his knife then fell down, he picked it up and ran for dear life. As he approached the two from behind, it is not surprising that Tenele Masuku was stabbed on the left back side and she required a chest tube to be inserted to drain out blood and air from the chest cavity. She was hospitalised at RFM for eight days and this is a reflection on the seriousness of the injuries that she sustained. According to her, when she arrived at the hospital she was unconscious. It is settled that to sustain a conviction for attempted murder it is not necessary to prove intention to kill. Indeed in many cases such intent may be difficult to prove. In the case of **REX v SIKELELA BRIAN MYENI**⁴ His Lordship T. Dlamini made the following statement of the law:-

“It is sufficient that there was an appreciation that there is a risk to life in the action contemplated. Such appreciation should be coupled with recklessness about whether or not the death eventually occurs.”⁵

⁴ (25/2012) [2017] SZHC 218.

⁵ At para 7 of the judgment.

[45] His Lordship Dlamini J's words echo the position as expressed by Nathan J. in the case of **R v MNDZEBELE**⁶, at page 199, paragraph C. I therefore find the accused guilty of attempted murder on count two.

[46] In respect of count three the victim was quite lucky to get away with a minor injury. His evidence is that he was treated and discharged on the same day. The stab wound was on the right side of the chest. Clearly, the injury could easily have been worse. On the basis of '**res gestae**' I am persuaded to see the accused's act of stabbing Jabulani Gweceza Ngwenya in the same light as the act of stabbing Tenele Masuku in respect of count two. I stated earlier on in this judgment that the accused was on the warpath and the stabbing of the two can be seen as '**res gestae**' - that it occurred in one transaction. But even if I am not correct on '**res gastae**', the accused's conduct falls well within the position that was articulated in R v MNDZEBELE, supra, namely that:-

“A person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not.”

[47] I accordingly find the accused guilty of attempted murder in respect of count three.

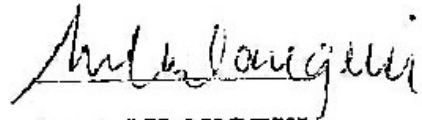
[48] For convenience I restate my verdicts as follows:-

⁶ 1970-1976 SLR 198 at p199.

Count one: Guilty of murder, with extenuating circumstances.

Count two: Guilty of attempted murder.

Count three: Guilty of attempted murder

A handwritten signature in black ink, appearing to read 'T.M. Mlangeni', written in a cursive style.

T.M. MLANGENI

JUDGE OF THE HIGH COURT