

**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 442/14**

In the matter between:

**THE KING**

Versus

**NONHLANHLA MNGOMETULU**

**SONKHE DLAMINI**

**NOLWAZI MNGOMETULU**

Neutral Citation: *The King vs Nonhlanhla Mngometulu and 2 Others*  
(442/14)[2021]236(7<sup>th</sup> December 2021)

Coram: LANGWENYA J

Heard: 14 March 2018; 15 March 2018; 22 March 2018; 26 June 2018;  
13 December 2018; 14 April 2019; 17 April 2019; 10 June  
2019; 1 March 2021; 7 April 2021; 31 May 2021; 14 July 2021;  
10 September 2021; 10 November 2021; 7 December 2021.

Delivered: 7 December 2021.

Summary: *Criminal law-accused charged with murder with common purpose-accused plead private defence-Crown has failed to prove accused did not act in self-defence-accused acquitted and discharged.*

## JUDGMENT

### **Introduction**

- [1] The accused persons are charged with murder. It being alleged that on 14 December 2014 and at Mpholonjeni area in the Hhohho district, the said accused persons, each or all of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill Bongani Mngometulu.
- [2] The accused pleaded not guilty to the charge.
- [3] The Crown led the evidence of nine witnesses to prove its case against the accused persons.
- [4] Each of the accused gave evidence in support of their case. The defence further called two witnesses.

### **Brief Background**

- [5] The first accused Nonhlanhla Mngometulu (nee Ngcamphalala) was married to Bongani Mngometulu through customary law on 14 September 1997. A daughter-Nolwazi Mngometulu was born of the marriage. Sonkhe Dlamini is a biological son of Nonhlanhla Mngometulu and Bongani Mngometulu was a step-father of Sonkhe.

- [6] The marriage between Nonhlanhla and Bongani was not a happy one. It was mired in violence and abuse of Nonhlanhla by her husband. The court was told that Nonhlanhla was subjected to a catalogue of violent scenes over many years. Nonhlanhla testified that her husband started being violent towards her long before she got married to him. He would assault her with an assortment of weapons and missiles ranging from fireplace poker, sjambok, flat side of a bush knife, small axe/hammer, fists, kicks, stick, a chair and many more. She recounted an incident when her husband pushed her out of a moving car he was driving. She fell out of the car and was injured. She reported the matter to the police but nothing came out of the matter as it never saw the light of day in court.
- [7] She reported her husband's violent outbursts to the police, the magistrate court where she sought peace binding orders, to SWAGAA to neighbours and *endlunkhulu* at Mpholonjeni. She testified that when she sought and got a peace binding order against her husband at the magistrate court, Mbabane, her husband tore it and told her he was not going to be stopped by a piece of paper from assaulting her. He went ahead and assaulted her after that.
- [8] She further told of an incident when her husband splashed dirty water mixed with urine at her while they lived at his parental home at Mvutshini. On another occasion her husband beat her with a stick along the road next to a bus stop until she was rescued by members of the public at Mvutshini bus stop. In order to escape further abuse from her husband, Nonhlanhla told the court she once left her marital home and returned to her parental home at esigangeni. Her mother was still alive then. No sooner had she arrived at her parental home than her husband arrived and assaulted her with kicks and

fists in the presence of her mother. He then took her back to Mpholonjeni where he continued with the physical assault.

- [9] She recalls one incident when her husband was locked up by police and subsequently tried and fined by the National court at Lobamba. This was when he assaulted her at the police station in the presence of police officers. Nonhlanhla testified and named certain police officers as officers she reported the abuse to both in Mbabane and Lobamba police stations.
- [10] When the police were requested to furnish the defence with a record of the dockets that were opened when she made the reports to the police, the police did not cooperate.
- [11] The court heard that at another time, Nonhlanhla was assaulted by her husband using a small axe/hammer on the head. She was admitted at ICU and spent days in hospital. On many occasions her husband threatened her with a firearm and one time he fired a shot on the floor while they were in their bedroom.
- [12] The court heard that the deceased intentionally infected his wife with HIV by forcing himself on her when he knew he was sick and HIV positive. Nonhlanhla had not consented to sexual intercourse with her husband when he forced her to have sexual intercourse with her. At the time Nonhlanhla was not HIV positive.
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- [13] There are many other incidents of violence that were visited on the first accused by the deceased culminating to the death of the deceased. What is clear is that the first accused was subjected to physical, emotional, economic, sexual and psychological abuse by her husband over many years.

[14] The second and third accused were not spared from deceased's violent outbursts.

### **Crown's Case**

[15] Mr Mpumelelo Lokotfwako, a resident of Mpholonjeni was called by the Crown as PW1. He also doubles up as a community police at Mpholonjeni. He testified that the accused persons are his neighbours. Between 6pm and 7pm on 14 December 2014 he was at home when he received a phone call requesting him to go to the Mngometulu homestead as there was noise there. It was dusk when he arrived at the gate of the Mngometulu homestead where he found a crowd and heard a lot of noise there.

[16] At the gate of the Mngometulu homestead, he found the first and the third accused persons telling the people who were there already to go away. PW1 was also told by Nolwazi to move away. Lokotfwako did not leave as instructed by Nolwazi, instead he moved two to two and half metres closer to Nonhlanhla and Nolwazi. He observed the deceased lying on the ground with blood on his face and blood all over his body. He did not come close to deceased who was unresponsive at the time. He heard the crowd shouting that someone was dying. PW1 did not see any of the accused persons throwing stones at the deceased while he lay on the ground.

[17] Lokotfwako called Mr Simelane, a police officer to come to the scene. Simelane arrived at the scene and was subsequently followed by other police officers who secured the scene and carried out their investigations. The accused persons were taken by the police.

[18] During cross examination Lokotfwako testified to three occasions when he had come to deceased's homestead to quell violent scenes between the

deceased person and the first accused. He recalls Nolwazi reporting to him that the deceased was assaulting the first accused. Nonhlanhla had on other occasions reported to the community police that the deceased was assaulting him. In all the instances he went to deceased's home to investigate and bring peace between Nonhlanhla and her husband, Lokotfwako never saw the weapons that were used to assault Nonhlanhla. It was his evidence that he does not know if the said weapons were concealed once neighbours and community police arrived at the Mngometulu homestead.

[19] According to PW1's evidence, the violent scenes at the Mngometulu homestead were only prevalent when the deceased was home and not when he was away from home. It was Lokotfwako's evidence that on another occasion he received a report from the chief of Mpholonjeni, babe Dvuba to summon the Mngometulu couple to *endlunkhulu* and to ask them to each come with their family members so that the issue of violence in their homestead could be addressed. The chief summoned the couple after PW1 had been to their home to calm another violent situation there. PW1 testified that babe Dvuba had received a report from Nolwazi about the violent scenes at her parental homestead where the deceased assaulted his wife. PW1 conveyed babe Dvuba's message to the couple. PW1's evidence regarding reports of violent scenes made to *endlunkhulu* by Nolwazi is confirmed by Nolwazi in her evidence.

[20] PW1 testified that he was not aware that the deceased had again assaulted the first accused a week prior to the day he met his death.

[21] The Crown led the evidence of a neighbor of the accused persons PW2 Albert Mthunzi Magagula. He testified that on 14 December 2014 he was at

home when he received a phone call from a neighbor who requested him to come out of his house as someone was being assaulted. He went outside his house and heard a voice of a male person calling for help. He went to the scene of crime where he found the first and third accused who told him to go back. PW2 testified that the accused persons pelted the deceased with stones. Magagula says he pleaded with the accused to stop the assault of the deceased to no avail. Magagula testified that he restrained Nonhlanhla while begging her to stop the assault but she did not stop. What is unclear with this part of his evidence is how, if Nonhlanhla had been restrained by PW2 she could still be able to throw stones at the deceased. This was not canvassed nor was it explained by the witness. PW2 stated also that while he held Nonhlanhla, Nolwazi picked a stone and threw it at the deceased. PW2 says he stopped restraining Nonhlanhla and dashed to restrain Nolwazi. It is his evidence that when he let go of Nonhlanhla, Sonkhe took over and held his mother in an effort to stop her from continuing with throwing stones at the deceased. This evidence is denied by all accused persons. The accused state that when the deceased fell outside the gate, none of them threw stones at him. They testified that they followed the deceased to where he finally fell and sat a close distance away from him. They thought he was faking and would get up and fight them. As they sat next to the deceased, they say they were all talking in loud voices and recounting the hardship and problems he had subjected them to over time. They were shouting and saying they now had no phones because of the deceased-among other things.

- [22] PW2 testified that the first and third accused only cooperated with him once Nolwazi had been restrained by himself and Nonhlanhla had been restrained by the second accused.

PW2 testified that the stones before court were the ones used by the accused persons to assault the deceased. Notably, PW2 was unable to describe the stones that were allegedly used by the accused before he pointed same out to the court. He could not tell the court how big or small the stones were and neither could he give the court a description of how the stones looked. PW2 conceded also that he never showed the police the stones, and that he did not describe the stones to the police when he recorded his statement. PW2 recanted his evidence that he never showed the police the stones he was now identifying in court as the stones allegedly used by the accused persons to stone the deceased. Magagula was insistent however that although he did not identify the stones used by the accused persons to assault the deceased, he was able to identify the stones. How he was able to make that identification, was not explained by Magagula.

[23] Magagula testified further that the accused made certain utterances to the deceased as they pelted him with stones. Initially, Magagula testified that he did not recall exactly what was said by the accused persons when they allegedly stoned the deceased. He subsequently testified that he heard the accused say *uyasicaphata lenja!* Who exactly of the three accused persons allegedly made the utterances; whether they allegedly made the same utterances in unison, was not stated by PW2. The accused persons denied ever making such utterances. Notably, PW2 conceded that when he recorded his statement to the police, he never told the police of the said utterances allegedly made by the accused persons directed to the deceased. PW2 testified that he never told the police about the said utterances because he did not know he could do so. He thought the information was not important in the case. I find this part of evidence difficult to understand. Why the



could have been discounted as unimportant for police consumption but important for the court's use is unclear to me. The impression I have of PW2 is that he was trying too hard to embellish and exaggerate his evidence. He also came across as a witness who took the posture of someone who recalled everything as a matter of fact. In reality however, that was not the case as the issue of description of stones seems to show.

- [24] There is also the issue of when PW2 arrived at the scene and who he found there. Magagula testified that he arrived at the scene in the company of PW3 Sibusiso Madolo. Magagula told the court that when he got to the scene Lokotfwako was not there. This evidence is contradictory to that of Sibusiso Madolo who testified that when they arrived at the scene with Magagula, they found Lokotfwako at the scene of crime. PW2's evidence was further in knots when he testified that he did not agree with Madolo regarding the order of their arrival at the scene. On the same breath, Magagula stated he did not know who between himself and Lokotfwako got to the scene first. Such is the texture of PW2's evidence in this regard.
- [25] Magagula testified that he recalls two incidents where he went to the Mngometulu homestead to intervene and quell violence between the deceased and the first accused. On the first incident, the children from the Mngometulu homestead came to report that the deceased was assaulting their mother. Nonhlanhla later came to PW2's home after the report of the first assault was made to Magagula and spent the night there. She was fleeing violence meted to her by the deceased. Magagula stated that he did not recall Nolwazi breaking a window at her home as a result of violence that was happening inside her home between her parents.

- [26] The Crown led the evidence of Ralph Sibusiso Madolo-PW3. It was his evidence that he was at home on 14 December 2014 when he heard a loud noise as if of an explosion which sounded like one of crickets or a firearm. He wondered who could be using fireworks at that time of the year. He heard people arguing out loud. When he arrived at the scene he heard a faint male voice calling for help. When he got close to the male who was raising an alarm, he saw the three accused persons throwing something which looked like stones at the male who lay on the ground. It is his evidence that although he did not see the stones being thrown at the deceased, he was sure that deceased was hit with stones all over his body.
- [27] It is the evidence of Madolo that when he arrived at the scene he found only the deceased and the accused persons and no one else. When he tried to intervene as the accused persons assaulted the deceased with stones, he was chased away by the accused. He left and returned to the scene with PW2. On returning to the scene he found a number of people present there. Madolo did not see Lokotfwako at the scene. When he returned to the scene with Magagula, the deceased was no longer shouting and calling for help. The deceased lay outside and below his homestead and next to Magagula's homestead fence. Madolo remained at the scene until police arrived.
- [28] It was put to Madolo that when he arrived at the scene the fight was over and the accused were no longer throwing stones. PW3 stated that he did not see that and that what he recalls is what he saw.
- [29] The Crown led the evidence of PW5 3905 Detective Sergeant Sandile Choncho-a scenes of crime officer who was based at Mbabane Regional Police Headquarters at the time. At around 1800 hours on 14 December

2014 he received a telephone call from Freddie Simelane calling him to attend to a scene of crime at Mpholonjeni. He went to the scene of crime and got there at around 1900 hours. Present at the scene of crime was 3053 Simelane and other members of the community. He also found a man lying dead with stab wounds. He secured the scene and took photographs of the scene and of the deceased person. He also collected exhibits at the scene. He compiled an album of the photographs he took at the scene of crime. The photo album was handed in to court and marked exhibit 'B.'

[30] Clearly, the scenes of crime officers did not take photographs of the area within the homestead where the threat to beat Nonhlanhla started and where the 'scuffle' between Sonkhe and deceased took place. There is no evidence that the scenes of crime officers secured that part of the homestead where deceased's firearm, magazine and live ammunition is alleged to have fallen to the ground. There is no reason advanced by the Crown why that is so.

[31] PW6 is 2149 Assistant Superintendent Vusi Mabuza who, in 2014 was stationed at Mbabane police station as a shift officer. On 14 December 2014 at about 1840 hours he was on duty when he received a message from 999 reporting a case of assault at Mpholonjeni. He proceeded to the Mngometulu homestead where he found a group of people and police officer 3095 Detective Sergeant Simelane. He interviewed officer Simelane and the other people who were there.

[32] PW6 testified that he introduced himself to the accused and explained his mission to them. He also cautioned them in terms of the Judges' rules and explained to them their legal rights. The second accused was in possession of a short spear which was confiscated by PW6 when the second accused

was arrested. PW6 handed the short spear to the scenes of crime officers. All the accused persons were arrested on 14 December 2014. PW6 as well as the investigating officer (PW7) do not appear to have gone inside the Mngometulu homestead to carry out their investigation considering that the fight started within the homestead's yard. They did not tell the court they viewed the scene of crime inside the homestead. They seem to have been content that the deceased had reported his firearm stolen; and that deceased even told his friend about theft of his firearm. The police refer to the said friend but they did not record a statement from him neither was he called to testify and confirm that aspect of the Crown's evidence. It appears to me the explanation given by Nonhlanhla that there was no way she could have 'stolen' deceased's gun because he always kept it in a safe; that he was the only one who knew the code to the safe and the fact that deceased always carried his gun with him was given short shrift or no consideration at all. And yet, in my respectful view this piece of Nonhlanhla's evidence is reasonably possibly true.

[33] On 15 December 2014, the investigating officer took over the matter from PW6. PW6 handed to court the short spear. The spear was marked exhibit '1.' PW6 explained that the short spear is used for hunting and killing beasts. During cross examination, this witness stated that it was incorrect that the accused used the said spear in the family's piggery business. He subsequently ~~conceded however that he does not know what the~~ Mngometulu family used to slaughter the pigs in their piggery business.

[34] PW7 is 3053 Sergeant Freddie Simelane. He testified that in 2014 he was based in the Criminal Investigation Department (CID). During the trial, PW7 stated that he was now based at a police post at Mpholonjeni. On 14

December 2014 he received a report from Lokotfwako that he should rush to deceased's home. He found the deceased dead already. He called the scenes of crime officers as well as the Desk officer at Mbabane police station. He cordoned off the scene of crime until his superiors arrived at took over the matter. All the accused persons were present at the scene and sat on the ground.

[35] On 15 December 2014, he was assigned the case to investigate. All the accused persons were in police custody already. He took them out of the police cells, introduced himself to them, explained his mission to them before he cautioned them in terms of Judges' rules. All the accused persons said something. At about 1245 hours on 15 December 2014 he again cautioned the accused persons and requested them for the clothes they wore on the day the offence was committed. All accused persons freely and voluntarily handed to PW7 the said clothes after they were taken to their home where they retrieved the clothes in question. The first accused handed over to the police a black top and a black skirt; the second accused handed over to the police a pair of black half boots; a track suit top which was black and had white stripes, a pair of jeans which were torn on the left leg. The third accused handed in a black top and a black skirt. The clothes were taken for forensic testing. PW7 handed the clothes over to the scenes of crime officers for further action.

[36] After due caution, all accused persons' blood samples were taken after the police had requested the accused for permission to do so. The accused freely and voluntarily consented to the request to have their blood samples taken.

- [37] PW7 testified that he was unaware of complaints filed by the first accused against the deceased with the police for assault. It was his evidence that he was unaware there were misunderstandings between the deceased and the first accused. He testified also that he was unaware that the couple had once been summoned to *endlunkhulu* to deliberate on the issue of domestic violence within their homestead.
- [38] PW8 is Senzo Vilakati a resident of Mpholonjeni and a neighbor of the accused persons. On 14 December 2014 he was playing soccer with his friends when he heard a loud sound as if of crickets exploding. Immediately thereafter they heard a voice shout for help. They went to the scene and PW8 was running ahead of the people he had been playing soccer with to the scene of crime. At the scene of crime he found the first and third accused throwing stones. At first he did not see what it was they were pelting with stones. He later saw that they were hitting the deceased with the stones. PW8 testified that he was prevented by the first accused from coming close to the scene. PW8 testified that the first accused told him not to come to her; PW8 came close to the first accused regardless. The first accused is said to have then thrown a stone at PW8 and only then did PW8 retreat. PW8 testified that the first accused had no beef against him as such she had no reason to pelt him with a stone. It was PW8's view that it was because of the commotion that was taking place at the scene that he was pelted with stones by the first accused. I note and restate again that the accused persons denied ever pelting the deceased or anyone else for that matter with stones at the scene where the deceased lay dead.
- [39] PW8 testified that while he was on his way to the scene he met Madolo. Madolo told him he was going to call Magagula. Sihlongonyane arrived at

the scene and restrained Nolwazi from behind. When this happened, Nolwazi screamed and Nonhlanhla rushed to her side to help her. PW8 says he then got a chance to hold and restrain Nonhlanhla when she rushed to Nolwazi's aid. I find it difficult to believe that the first and third accused would on the one hand pelt PW8 with stones and at the same time allow him to restrain them. It is also not probable that with the crowd present at the scene already the accused persons could throw stones at an unresponsive deceased without attracting reprisals of the crowd.

[40] It is also unclear when and how Magagula, Madolo, Vilakati and Sihlongonyane each restrained the accused persons at the scene. Contrasting the uncontroverted evidence that Sihlongonyane and his wife were the first to arrive at the scene and that Sihlongonyane's wife prayed at the scene, it is unclear when then Sihlongonyane also got into the mix and restrained the accused in the manner testified to by PW8. Sihlongonyane was called as a witness for the defence and he was never confronted with the evidence that he restrained Nonhlanhla at the scene of crime. For their part, the accused persons denied that scenes of violence persisted when deceased fell outside their gate where the rest of the Crown witnesses and other members of the community found him. The contradiction in the evidence of the Crown witnesses is telling in as much as it concerns a material part of the evidence that seek to discount the defence of private defence marshaled by the accused persons.

[41] The Crown further called the evidence of the pathologist Dr Allen Reddy. He examined the body of the deceased and carried out a post mortem examination on 17 December 2014 at Mbabane government hospital mortuary. He noted several ante-mortem injuries on the deceased: i) multiple

intermingled cut wounds, lacerations over the scalp; a few scalp deep and others bone deep as well as a comminuted fracture on the skull vault to base mixed with intracranial haemorrhage over the brain; ii) contused abrasion over the right face, chin and left cheek area; iii) laceration over chin skin deep, and in the lower lip; iv) cut wounds over the top left shoulder; v) cut wounds over the front of left chest muscle deep and at medial to nipple outer aspect penetrating wounds and lung deep. This injury involved intercostal structure, pleura, upper lobe clean cut edges angle sharp front to back, there was blood in pleural cavity; vi) there was also a contused abrasion below the right nipple area; vii) there was also a contused abrasion over the right forearm; viii) there were cut wounds over the back of left chest in the upper region and below the scapula which was muscle deep with abrasion; ix) there were contused abrasions over the left thigh area; x) there was abrasion medial aspect of left forearm; xi) there was an abrasion over the left knee and xi) an abrasion on the right thigh upper region to groin area.

- [42] The pathologist concluded that the death of the deceased was due to multiple injuries. The fatal injuries were capture under head (v) and head (i) of the autopsy report. The fatal injuries were a result of stab wounds to the lungs; brain injuries leading to haemorrhage resulting in blood clots to the brain. It was the doctor's observations that the lacerations and abrasions and other non-fatal injuries were caused by blunt objects like stones, brick where more force was applied to fracture the head. According to the pathologist, the injuries to the skull were inflicted with blunt objects which could include stones, bricks or any other blunt weapon. The doctor testified further that the injuries to the skull could also be a result of a fall or a push. The doctor handed in a post-mortem report which was marked exhibit 'A'.



- [43] There is no dispute that the deceased was hit with stones by the accused when he fought Sonkhe. It is also not denied by Sonkhe that he stabbed the deceased. It is also not denied that deceased tripped and fell at the gate. It is also not denied that the place where the deceased fell had rocks and stones. There is however a dispute on whether he was hit with stones while he lay on the ground outside his gate. The pathologist's evidence leaves room for doubt on how the injuries to deceased's head were inflicted. In his opinion the injuries to the skull could have been the result of the use of blunt force or blunt objects. It could also be a result of a fall or a push.
- [44] PW9 is Captain Ashley Gunas. There is no contest regarding his evidence. He testified that the blood of the deceased was found on the clothes worn by the second and third accused on the day the deceased died. I pause to observe that the accused are not disputing that the deceased died as a result of their conduct; they argue however that in all their actions on the fateful day, they were acting in private defence.
- [45] The Crown closed its case.

### **Defence Case**

- [46] DW1 is Nonhlanhla Mngometulu. She testified that on 14 December 2014 her husband was armed with a stick with which he assaulted her. Her husband was angry that the accused had reconnected power which he had disconnected when he left home earlier that day. The deceased, without rhyme or reason started disconnecting power leaving the meat which they stocked in the fridge to sell to customers at the risk of rotting. When the power was disconnected by her husband, all the plugs in the house would be without power except for the plug which was in deceased's bedroom. A

fridge containing deceased's alcoholic beverages was the only plugged on with power. When they discovered the trick of switching on the power when her husband was away, they simply reconnected the power when he was away and would disconnect it when they saw his car coming at a distance.

[47] On 14 December 2014 deceased returned home unexpectedly and to his chagrin, found power was reconnected. He was livid with rage. His wife apologized for using power against her husband's will. He would hear none of it. He left home on foot with Malindzisa and returned home carrying a stick with which he assaulted his wife. All family members were outside the house when deceased returned home carrying a stick. Nolwazi was washing dishes outside while Sonkhe was tending to the pigs in the pigsty. When DW1 was told by the deceased to get inside the house, she refused because she knew deceased wanted to assault her inside the house. Deceased shouted unprintable expletives at DW1 and then chased her around the yard, grabbed her by the T-shirt and it tore. DW1 wiggled out of deceased's grip and fled. Deceased chased after her. She fled toward the gate. Nolwazi called Sonkhe. Sonkhe arrived at the scene. When Sonkhe arrived at the scene, deceased was about to catch DW1. Sonkhe and Nolwazi asked the deceased what he was doing to their mother. Deceased said he wanted to beat DW1. All hell broke loose. Sonkhe and Nolwazi are said to have said 'you won't do that to our mother today.' At the time tempers were high and all the accused persons and the deceased were speaking with raised tones. The deceased was sober.

[48] While they exchanged heated words, the stick that deceased was carrying fell to the ground. In a split second, deceased took out a firearm from the coat he was wearing. Sonkhe held deceased's hand and twisted it in an effort

to disarm him. Deceased pointed the gun at DW1. Sonkhe held deceased's hand and twisted it. Deceased fought back. The magazine of the gun fell to the ground and live rounds of ammunition scattered on the ground. Deceased tried to retrieve the magazine and live rounds of ammunition in an effort to reload same. He was, however unable to finish doing so because he was pelted with stones by DW1 and Nolwazi. The accused (1 and 3) pelted deceased with stones to stop him from reloading live ammunition in the magazine.

[49] At the time the deceased was fighting with Sonkhe. Sonkhe stabbed deceased with a short spear which he used to slaughter pigs in the family business. Sonkhe held deceased's hand when immediately thereafter a gunshot was heard coming from deceased's gun. DW1 does not recall how Sonkhe stabbed deceased as everything happened quickly in a short space of time.

[50] Deceased fled the scene towards the gate and tripped on a small rod at the gate and fell to the ground. DW1, Nolwazi followed deceased to the gate and thought he was faking sleep. They sat next to deceased who lay outside the gate. Make Sihlongonyane arrived at the scene and prayed about the situation. Lokotfwako arrived at the scene at dusk and shone a light at deceased using his cellphone. He called deceased's by name and there was no response.

[51] DW1 denies that she or any of the accused persons continued to pelt the deceased with stones when he tripped and fell at the gate. At the gate, the accused were still speaking in raised voices shouting that the deceased would get up. DW1 testified that when her neighbours arrived he told them

to leave because she did not understand why they were eager to come and help on that particular day when they were slow to do so in the past occasions deceased assaulted her.

[52] DW1 denied that Magagula found her and Nolwazi hitting deceased with stones and begged them to stop. She told the court she does not recall telling Magagula Albert to go away.

[53] On arrival at the scene, police informed the accused that they could not determine the state of deceased's health.

[54] The accused were arrested and taken to the police station where they were locked up. The accused informed the police that the deceased was carrying a firearm. The police collected the firearm and the ammunition from the ground where it had fallen. The accused were charged with murder.

[55] It is DW1's evidence that when the deceased pulled out a gun, they feared for their lives and started pelting him with stones in order to disarm him.

[56] The accused spent almost two months in custody before they were released on bail. When they returned to their home they found a lot of their household effects were stolen, the house had been burgled; some of their livestock was stolen. Some of the pigs died of hunger. After they were released from custody, life was and continues to be difficult for the accused persons as they had to begin to rebuild their lives.

[57] During cross examination, DW1 stated that the stoning of the deceased did not take a long time. When DW1 was asked during cross examination to look at the photographs of the deceased, she was distraught and broke down. She struck me as an honest witness who exhibited signs of a battered

woman<sup>1</sup>. For instance when she was repeatedly questioned about the role her children played in the death of her husband, she once again broke down and told the court that her children are not to blame for what happened; she said she takes the sole and full responsibility for all that happened. She was, in my view an emotional wreck.

[58] DW1 testified that when her children said 'not today' when deceased threatened to assault her, she understood them to be saying deceased was not going to beat her as they (Nolwazi and Sonkhe) had spoken to him to desist from doing so on previous occasions. The words were spoken in anger by Sonkhe and Nolwazi-so she testified. DW1 stated that the words 'not today' were not uttered while they were all outside the yard and deceased was threatening to assault her; they were uttered outside the gate after deceased had tripped and fallen there.

[59] DW1 denied that Senzo Vilakati held her in order to restrain her. She denied they threw stones at deceased as she lay on the ground. She stated that she is still haunted and traumatized by the manner deceased lost his life in their hands.

#### **Evidence of DW2-Sonkhe Dlamini**

[60] He confirmed his mother's evidence regarding the events of 14 December 2014. It was his evidence that the reason his step-father, the deceased was violent towards his mother is because he did not want them to remain in their homestead at Mpholonjeni. He confirms that when his step-father starting threatening to assault his mother on 14 December 2014, he was in

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<sup>1</sup> See: Buddy, T 'The Warning Signs of Domestic Abuse' paper medically reviewed by Steven Gans, MD. See also William Moore on 'What are the Signs of Domestic Abuse?' Medically reviewed by Jennifer Casarella, MD at [webmd.com/mental-health/mental-domestic-abuse-signs](http://webmd.com/mental-health/mental-domestic-abuse-signs) (Visited on 6 December 2021)

the pigsty tending to the pigs and was called by Nolwazi. He arrived at the scene and found deceased held his mother *kabuhlungu* under his armpit. DW1 wiggled her way out and escaped from deceased's grip whilst deceased was facing the direction from where Sonkhe was coming. When Nonhlanhla wiggled her way out of deceased's grip, the deceased threw the stick on the ground and produced a gun, breached it and pointed it at his mother. Sonkhe says he blocked and disturbed deceased but failed because deceased fired a shot.

[61] Sonkhe states that he was able to block the deceased so that he could not shoot at his mother. In order to disarm the deceased, Sonkhe testified that he stabbed him twice and held his hand while deceased still tried to shoot at Sonkhe as he pointed the gun at Sonkhe. Sonkhe says he again stabbed deceased and they wrestled until they both fell. Sonkhe stated that he was the first to get up from the ground and that is when Nolwazi and his mother threw stones at deceased. At the time deceased was crawling towards the gun, magazine as well as the live ammunition which had fallen to the ground. The deceased could not retrieve his weapon because he was disturbed by DW1 and Nolwazi who were throwing stones at him; he then fled out of the gate all the while raising an alarm and calling for help. At the gate, the deceased tripped and fell. There were stones in the area where deceased fell.

[62] Sonkhe testified that none of the accused threw stones at the deceased when he fell outside the gate. Sonkhe denied the evidence of all Crown witnesses to the effect that the accused stoned the deceased when he fell and lay on the ground outside the gate. It is Sonkhe's evidence that he was with Mr

Mazibuko when they looked for deceased's gun and found it. The gun and the spear were given to the police.

- [63] Sonkhe apologized to the family of the deceased and stated that he was pained by the incident as he did not intend to kill the deceased. He testified that he was trying to protect his mother and himself. He stated that he thought the deceased would shoot and kill his mother. He spent about three months in pre-trial incarceration before he was admitted to bail. He confirmed his mother's evidence that when they were released on bail and returned home, they found the place in a shambles. Some of their livestock was stolen while some of the pigs died of hunger. The house was burgled and household effects stolen.
- [64] During cross examination, Sonkhe stated that the deceased was carrying a stick that is big and thick enough to be used to herd cattle. Sonkhe clarified that his mother wiggled her way out of deceased's grip not that deceased let go of her when he was carrying the stick and aiming to assault her. Sonkhe testified further during cross examination that utterances that deceased was not going to assault his mother on that day were made at the end of the commotion after the deceased had been pelted with stones. It is his evidence that on previous occasions when deceased assaulted DW1, Senzo would intervene and would himself be assaulted. Senzo says he armed himself because the deceased was armed also.
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- [65] DW2 testified that the shot fired by deceased went in the direction of Sonkhe's mother. It was not a warning shot. Sonkhe stated that when deceased pointed the gun at the first accused, he was disturbed by Sonkhe who stabbed him and twisted his arm.

[66] The following questions asked during cross examination of Sonkhe are pertinent:

Q- If it was not for your actions, the deceased would still be alive.

A- It is possible my mother would have died on that day.

Q- do you agree that the going off of the gun happened when you were there with your spear?

A- Correct

Q- In fact the taking out of the gun in your presence was because you came to deceased with a dangerous weapon.

A- The truth is deceased did not see what I was carrying.

Q- Deceased said he wanted to assault the first accused and not to kill her.

A- I did not hear deceased say those words.

Q- You acted without knowing the true intention of the deceased.

A- I did not know his intention.

Q- Didn't the words of the deceased indicate his intention was to assault and not to kill the first accused?

A- I saw that his intention was to kill her.

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[67] From Sonkhe's responses to the questions above, it is clear he feared for the life of his mother. The intention of the deceased is of no moment as it is not a requirement for the defence of private defence. It suffices that Sonkhe



feared for the life of his mother and stabbed the deceased in order to protect her mother and himself.

### **Evidence of DW3 Nolwazi Mngometulu**

- [68] Nolwazi was led by the defence as DW3. She testified that she was twenty years old in the year 2014. She dropped out of school because of the abusive environment at her home; she could not study because the situation at home was volatile, volcanic and violent. DW3 testified that her father was promiscuous and unfaithful to her mother; because deceased cheated on her mother, he accused the first accused of infidelity too. The first accused was faithful to the deceased. It was the evidence of Nolwazi that the deceased would bring his girlfriends at home when her mother was away at work. The children would report such incidents to the first accused. When first accused enquired from deceased about the said girlfriends, she would be assaulted by the deceased.
- [69] There was a woman who is a soldier who would send pictures of herself to Nolwazi's mother via WhatsApp. When Nolwazi's mother enquired about this woman from the deceased, she was assaulted.
- [70] Nolwazi recounted an incident when her mother was thrown out of a moving car by the deceased. Deceased was driving the car in question. DW1 was injured as a result of that incident.
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- [71] The deceased used different weapons to assault the first accused on a regular basis. In one incident, the first accused was assaulted with a poker by the deceased on the head; deceased further hit the first accused with fists and kicks. Nolwazi went and sought help from Sihlongonyane and Magagula neighbours who came and tried to intervene. Deceased did not stop

assaulting the first accused even in the presence of neighbours. He locked himself and first accused inside the house and continued to assault her. Mr Ndwandwe pleaded with deceased to open the door so that the first accused could be taken to hospital. Eventually the door was opened and first accused was taken to hospital where she was admitted for a number of days.

- [72] In 2011, the first accused was assaulted by deceased with fists and kicks and ordered to sign certain documents concerning the family business against her will. On another occasion, deceased assaulted the first accused with a sjambok for installing a burglar door at the homestead.
- [73] As the violent and abusive scenes escalated at her parental home, Nolwazi relocated to Carolina where she lived with her aunt from May 2013 until September 2013. Even when she was away, she knew that her mother was still subjected to abuse and violence at the hands of her father. Her mother would send her photographs of her bruised and battered body and inform her that her father was still abusive towards her. Her mother further informed her that the deceased had since acquired a licensed firearm.
- [74] In September 2013 Nolwazi returned home and found that the situation of abuse and violence had deteriorated. Her father did not want Nolwazi back at home and he took her personal effects and threw them outside. Nolwazi says she was told by her father that he was ejecting her from her parental home. Nolwazi reported the matter to the chief. The chief reprimanded the deceased. This evidence is corroborated by the evidence of Lokotfwako.
- [75] On a different occasion, Nolwazi testified that she was asleep in her bedroom at around midnight when she heard a loud bang from her parents' bedroom. She would learn later from her mother that deceased fired a gun

and the bullet penetrated the floor of her parents' bedroom floor. Nolwazi confirmed the information by seeing for herself the area where the floor was damaged by the gunshot. In Nolwazi's view, all the abuse was happening because her father did not want Nolwazi to live at her parental home, Mpholonjeni.

[76] Nolwazi related another incident where her father was gun totting and threatened to shoot the first accused. On this occasion they were from a funeral kaDlamini and returned home and prepared to go to church. It was when they were about to drive out of the home going to church that the deceased stopped the car that first accused was driving and told them not to go to church. Deceased hit the window on the driver's side with the firearm and threatened to shoot the first accused. Nolwazi's mother quickly reversed and drove away. The matter was reported to the police but nothing came out of it.

[77] On 14 December 2014 deceased returned home on foot and found that the accused had reconnected power using a cable from deceased's bedroom plug to a plug connected to a fridge in the kitchen. The fridge had meat from the family piggery business. The deceased was angry that they had reconnected power which he had disconnected. He assaulted the first accused with fists outside in the family yard. Nolwazi called Sonkhe and he came and intervened by standing between his parents. Deceased assaulted Sonkhe; pulled out a gun and the two wrestled. A gunshot was fired and the gun fell on the ground and emptied itself of live ammunition. Sonkhe and the deceased fell on the ground. The deceased tried to reach for his gun and reload it but was hit with stones which were thrown at him by Nolwazi and

her mother. This was done in order to stop deceased from reaching for his gun and shooting the accused. The deceased fled out the gate.

- [78] Nolwazi broke down and cried when she testified that she did not see Sonkhe stab the deceased. She cried when she related to court how pained she was of her father's death. The witness was distraught and ashen as she recounted the events of that fateful day. She stated that the incident could have been avoided if her father had not taken out the gun. She stated that the deceased pointed the gun at the first accused. She denied that they continued to pelt the deceased with stones when he fled and when he had fallen outside the gate. It is Nolwazi's evidence that the gun was found after the incident.
- [79] During cross examination, she testified that she does not recall making or hearing any of the accused persons saying 'not today' in reference to the assault of her mother. It is her testimony that they did not collect stones with which they pelted the deceased. All they did was to pick the stones which are readily available in her home environment on the yard, at the gate and outside the gate.
- [80] When the gun went off, Nolwazi says she was terrified and was hiding behind Sonkhe. She testified that she was shocked scared and confused and did not see Sonkhe stab the deceased.
- [81] The stones that are seen in the photos prepared by the police are what Nolwazi described as *intsaba* that is part of her homestead. She testified that her father slipped and fell where there are stones. This evidence could have been dispelled by evidence of the police who investigated the matter. It was not.

[82] There are inconsistencies in the evidence of Sonkhe and that of Nolwazi regarding the number of gunshots that were fired by deceased. I am alive to the fact that two or more witnesses rarely give identical evidence with reference to the same incident or events. I have had regard to the evidence as a whole and have decided that the contradiction is not sufficiently material to warrant the rejection of both accused's evidence in this regard.

#### **Evidence of DW4-Phindile Nelisiwe Shabangu**

[83] DW4 is a neighbour to the Mngomezulu family. She testified that deceased and DW1's marriage was not a happy one as it consisted of constant fights and violence. She recalled one incident where the first accused came to her homestead all bloodied and visibly injured. Nonhlanhla reported to her that she was now leaving the deceased because if she does not, deceased will kill her. She stated that first accused had been beaten by the deceased with the side of a bushknife. DW4's husband called the deceased and sought to bring peace between the couple. The deceased is said to have stated that the first accused does not respect her. The first accused and deceased subsequently 'smoked the peace pipe' and returned home.

#### **Evidence of DW5-Mr Sihlongonyane**

[84] He is also a neighbour of the Mngomezulu family. He told the court about an incident when Nolwazi came to DW5's home in the middle of the night crying and reported that her father was assaulting her mother. When he went to Nolwazi's home to investigate, he found the door locked and saw the first accused had wrapped herself with a curtain in the living room while deceased was assaulting her. DW5 says deceased was using a small axe and hammer to assault his wife.

[85] When the door was eventually opened, he saw that the first accused was badly injured on the head. The deceased, for his part was bleeding on the face. The first accused was seriously injured and was taken to the hospital. This witness saw the deceased assault his wife on this night.

[86] The Defence closed its case.

### **Application of the law to the facts**

[87] The accused persons do not deny that they acted in concert in inflicting injuries which resulted in the death of the deceased. They plead private defence. Private defence is a denial by the accused persons that their conduct was unlawful. The *onus* is on the Crown to prove the required intention of murder and unlawfulness (i.e that the accused persons did not act in private defence).

[88] In considering whether the accused persons acted in private defence, a court is not required to consider whether there was an equilibrium between the weapons used. I am also mindful of the fact that in this particular case the accused persons acted in an emergency situation.

[89] The act of private defence may, however not be more harmful than necessary to ward off the attack but much depends upon the varying circumstances in each case in deciding whether the bounds of private defence have been exceeded. In the consideration of this question, the courts adopt a robust approach.

[90] In *Ntanjana v Vorster and Minister of Justice*<sup>2</sup> Van Winsen AJ stated the following:

'The very objectivity of the test however, demands that when the court comes to decide whether there was a necessity to act in self defence it must place itself in the position of the person claiming to have acted in self defence and consider all surrounding factors operating at the time he acted. The court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the court room...Furthermore, in judging the matter it must be ever present to the mind of the Judge that, at any rate in the particular circumstances of the case, the person claiming to act in self defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.'

[91] In *Ntsomi v Minister of Law and Order*,<sup>3</sup> Van Deventer AJ stated the following:

'As both Snyman and De Wet and Swanepoel point out, it would be nonsensical to require equilibrium between weapons used. An assailant selects his method of attack and picks his weapon. A victim can only employ the weapon that happens to be at hand. An offender who uses an object such as a stone to attack a policeman who is armed only with a shotgun is certainly not entitled to expect the policeman to lay his shotgun neatly aside and to take up the challenge to a fight with a stone in hand.'

[92] In *S v T*<sup>4</sup> Steyn J stated that the true legal position is that where a person who is being attacked does not find himself in a life threatening situation, but who can only escape mutilation or serious bodily injury by using a firearm against his attacker, may do so and if necessary even kill the attacker.

[93] In my respectful view, and in the final analysis as was stated in *Ntsomi* (above) the question is not whether there were other methods of defence

<sup>2</sup> 1950(4) SA 398 CPD at 406A-D

<sup>3</sup> 1990(1) SA 473 CPD at 529C-D

<sup>4</sup> 1986(2) SA 112 OPD at 128DMT

which might have been successful in averting the unlawful attack but whether the method in fact adopted can be justified in the circumstances.

[94] In this particular instance the first accused was unlawfully attacked by her husband who was wielding a stick; she fled from her assailant but was tripped and fell and her assailant caught her. She wiggled out *washimpilika* and tried to free herself from her assailant. At the time Nolwazi was shouting and calling Sonkhe to come and help the first accused. It was when Sonkhe came intervened and stabbed the deceased that the first accused was able to escape the grip of her assailant. The firearm went off after deceased aimed it at the first accused. The firearm fell and when deceased tried to retrieve it he was pelted with stones to stop him from reloading his firearm.

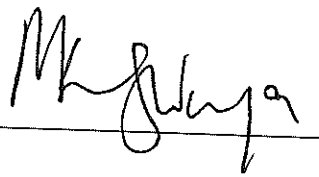
[95] Sonkhe was called from the pigsty where he was tending to the pigs. He came to the aid of his mother. The short spear he used to stab the deceased was a tool used by the family in slaughtering the livestock and pigs. The deceased selected his method of unlawful attack; it is the deceased who picked his weapon. The accused persons had no such luck. They could only employ the weapons that happened to be at their disposal at the time. Unlike the deceased, they did not plan nor were they prepared for the violence that ensued as a result of deceased's unlawful conduct.

[96] The first accused had been cornered and held by the deceased who wanted to assault her. Nolwazi called for help. Sonkhe came to his mother's aid. In my respectful view it would not have been reasonable to expect of Sonkhe, Nonhlanhla and Nolwazi to put away the spear and the stones aside and to engage their assailant with anything else but what was available at their disposal. In my view, it would have been the height of folly to have expected



them to do so. I am of the view that the accused persons were justified to use the spear and stones in the circumstances.

[97] The Crown therefore did not prove beyond reasonable doubt that the accused persons did not act in self-defence. They are accordingly acquitted and discharged.

A handwritten signature in black ink, appearing to read 'M. Langwenya', is written over a horizontal line.

**LANGWENYA**

**JUDGE OF THE HIGH COURT**

**For the Crown:**

**Mr B. Magagula**

**For the Defence:**

**Mr B.J. Simelane**