



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 490/19

In the matter between:

REX

Versus

THULANI MASUKU

Neutral Citation: *Rex vs Thulani Masuku [490/19] [2021] SZHC 63 (29 April 2021)*

Coram: LANGWENYA J

Heard: 21 April 2021; 22 April 2021; 29 April 2021

Delivered: 29 April 2021

Summary: *Criminal law-Criminal Procedure-accused charged with murder-plea-not guilty-accused shot and killed deceased-accused used firearm to thwart attack by deceased who carried a saw at the time.*

Accused pleads private defence-requirements of self defence-unlawful attack which has commenced or is imminent-defensive

act should be necessary to protect interest threatened-defensive act directed against attacker-attack should be reasonably proportionate to the attack.

Accused shot deceased on chest-deceased died from injury-accused used disproportionate and unreasonable force-self defence fails-accused's version found to be false beyond reasonable doubt-accused guilty of murder with dolus eventualis.

JUDGMENT

- [1] Before the charge was put to the accused person, Mr. Mdluli applied to correct the name of the accused. The indictment reflects the name of the accused as Jabulani Masuku instead of Thulani Masuku. There being no objection from the accused to have his name correctly reflected as Thulani Masuku, the application was allowed by the court.
- [2] The accused is charged with the offence of murder, it being alleged that on or about 2 December 2017 and at or near Mhlabuyaduma in the Shiselweni district, the accused unlawfully and intentionally killed Salebona Simelane.
- [3] The accused pleaded not guilty to the crime charged.
- [4] The Crown led the evidence of five witnesses and by consent the report of the scenes of crime officer was submitted as part of the evidence of the Crown.
- [5] The accused led his own evidence and did not call witnesses in support of his case.

The Crown's Case

- [6] Except for the pathologist and the investigating officer, the Crown witnesses who gave *viva voce* evidence are residents of Mhlabuyaduma in the Shiselweni district. PW2 Nonhle Felicia Simelane is a younger sister of the deceased and a former lover of the accused person. PW3 Sankie Mandla Ntjingila is a neighbor and friend of the deceased.
- [7] The scene of crime is at Mhlabuyaduma in a forest above the parental homestead of Salebona Simelane (deceased) and Nonhle Felicia Simelane (PW2). The date is the afternoon of 2 December 2017. Nonhle Simelane testified that the accused is her former lover with whom she has a child. She broke up with the accused after the accused had shot and killed Salebona her brother.
- [8] In the afternoon of 2 December 2017, Nonhle was asked by the accused to meet him at a place above her parental home. Nonhle went to meet with accused at the said venue. Nonhle was carrying their baby when she went to meet the accused. At the meeting place, Nonhle observed that the accused was carrying a firearm. She asked the accused where he was taking the firearm. Accused's response was that he was going to shoot a certain bird. It was while they were chatting when Salebona emerged at the scene. Salebona was carrying a bush knife and a saw. Salebona said: *wena mfana use la?* Words to the effect-this boy is still here. The utterances were directed at the accused person. The accused shot Salebona once in the chest area. The deceased fell to the ground. Without saying a word, the accused left the scene.

- [9] Nonhle checked the deceased and observed that he was bleeding from the chest where he had been shot. Nonhle went home and changed her clothes and left to report the incident at the accused person's parental home. She later returned to the scene and found a lot of people including the police. She informed the police that the deceased had been shot by the accused.
- [10] It was the evidence of Nonhle that the deceased was aware that she was going to meet up with the accused at the scene where he was subsequently shot by the accused. How the deceased knew PW2 and the accused were going to meet, was not explained by PW2. According to Nonhle's evidence, Salebona did not use the saw and the bush knife before he addressed the accused and said 'this boy is still here.' When Salebona was shot and killed by the accused he was at a distance of about two metres away from the accused person.
- [11] Nonhle testified that Salebona was the aggressor who came charging at the accused and threw a bush knife in the direction where she and the accused and the baby sat. According to Nonhle's evidence, when Salebona behaved in the manner outlined herein, she thought he was still at logger heads with the accused. Salebona did not approve of Nonhle's love relationship with the accused.
- [12] During cross examination, Nonhle agreed with defence Counsel that the accused was acting in self defence when he shot at Salebona.
- [13] Giving a background to the whole affair, Nonhle testified that in the year 2017, the accused was her lover; and that the accused supported and maintained the child she had with him. It was her evidence that Salebona

was her elder brother. Salebona did not approve of the love relationship she had with the accused. The result was that the accused was afraid of Salebona and would come to visit Nonhle at her parental home if Salebona was not at home. Consequently, the accused would call Nonhle and the two lovebirds would meet outside Nonhle's parental home-at the gate or some distance away from her parental home.

[14] Nonhle told the court that on the Thursday preceding the death of Salebona on a Saturday, there was an altercation between the accused and Salebona. On the Thursday prior to the death of her brother on a Saturday, the accused called Nonhle and asked her to meet him at the gate of her parental home. Nonhle went and met with the accused. The time was about 6pm. Salebona found the two lovebirds sitting next to the gate of his parental home; looked at them and went home. Nonhle followed Salebona home but met him walking back towards the gate. At the time, Salebona was now carrying a knobkerrie. It was the evidence of Nonhle that the accused informed him that Salebona had assaulted him on the back with the knobkerrie on the Thursday they had met at the gate of her parental home.

[15] The Crown led the evidence of PW3 Sankie Mandla Ntjingila. He testified that Salebona was a neighbor and friend and that they grew up together in the same neighbourhood herding cattle and attending primary school together. It was his evidence that Salebona was not a violent person.

[16] He testified about an incident where he was with Salebona and they were going to a night vigil when they met the accused. The accused manhandled Salebona and threatened to kill Salebona. The accused made utterances to the effect that he will never respect Salebona in the presence of PW3. The

time this incident took place was in the month of November before Salebona died in December 2017. PW3 told the Court that Salebona went to accused's home to report the threats on his life and asked accused's family to mediate but the family failed to do so.

[17] The deceased was unhappy and did not approve of the relationship Nonhle had with the accused as Nonhle subsequently fell pregnant.

[18] On 2 December 2017, PW3 was at the veld herding cattle when Salebona came to him at about 3pm. Salebona is said to have told PW3 that on 1 December 2017 he had an altercation with the accused who came to his parental home at night and was drunk to visit Nonhle. Salebona told PW3 that he chased the accused away on the said night. Salebona left PW3 at the veld herding cattle and returned home.

[19] The time was after 4pm and at about twenty minutes after deceased had left PW3, PW3 saw the accused walking along the road and carrying a firearm. PW3 described the firearm as *luhlwayi* a rifle whose length was estimated to be 1.3metres. After some time, PW3 heard the sound of gunfire next to Salebona's parental home. Soon after, PW3 heard neighbours raise an alarm. PW3 went to the scene and found Salebona bleeding through the mouth and through the nostrils. Deceased was also bleeding on the chest and stomach. Fifty to sixty centimetres away from the deceased there was a bush knife and a saw. The police later arrived.

[20] According to PW3, the deceased had three minor children with his wife and one minor child born out of wedlock. When Salebona died, his three

children left and relocated to their maternal home. The child Salebona seared out of wedlock remained at Salebona's parental home.

[21] During cross examination, PW3 testified that the accused was not scared of Salebona as he would go to Salebona's parental home drunk and would go to Salebona's parental home even when Salebona was there. PW3 testified that the accused would go to Salebona's home and call Salebona's children and tell them to ask Nonhle to meet with him at the gate or in the forest. The accused would also go to Salebona's parental home and call Nonhle from the road and Nonhle would go meet with the accused. The uncontroverted evidence of PW3 is that the deceased did not drink alcohol and that the accused drinks alcohol; that PW3 was told by the deceased that the accused would come to deceased's parental home drunk. It is also uncontroverted evidence that, in the presence of PW3 accused said he will never respect the deceased.

[22] PW3 disputed that when Salebona was killed in the forest next to his parental home he had been tailing Nonhle to the place where she met with the accused. It was PW3's evidence that Salebona informed him when they met on the day he was killed that he was going to the forest to look for firewood in order to be able to prepare a meal for his children because their mother was away in South Africa. On the day Salebona met his death, he told PW3 that his wife was due home from South Africa. PW3 testified that indeed on the day of the incident, deceased's wife returned to deceased's parental home. PW3 testified that on the day of the incident, the deceased confided in him about the altercation he had with the accused on an earlier occasion.

- [23] PW4 is Sanele Sydney Masuku. He is a brother of the accused person. The accused person's father is an uncle of PW4 (*ngu babe lomncane*). On 2 December 2017 he was called by accused's parents and requested to take the accused person to Hlathikhulu police station on the following day. He carried out accused person's parents' wish and left the accused at the police Hlathikhulu police station.
- [24] PW5 is 3716 Detective Sergeant Dumsani Zwane and is based at Hlathikhulu police station. He is the investigating officer in this matter. On 3 December 2017 he was on duty when the accused was brought to the police station by relatives. He introduced himself to the accused as a police officer and explained his mission to the accused. He told the accused he was investigating the murder of Salebona Simelane. He informed the accused of his rights and cautioned him in terms of the Judges' rules. The accused said something and later led him to his parental home. He later charged the accused with murder.
- [25] By consent, the report of the scenes of crime officer was entered into the court record as part of the evidence of the Crown. The report was marked exhibit 'B.' The scenes of crime officer is 6337 Detective Constable S Shongwe. He attended to the scene of crime in the early evening hours of 2 December 2017. The affidavit refers to his observations at the scene and the photographs he took of the scene of crime. He found the deceased lying facing upwards with his tools (a bush knife and a saw) near him. The body of the deceased was soaked in blood. The deceased wore a blue working suit and black water boots. He later undressed the deceased and took more photographs as shown in photos 4, 5, 6, 7 and 8. It is notable that in

photograph 3, the deceased lies facing upwards and wears a blue working suit and at his foot is a black bush knife. Photo 3 further shows deceased's lower posterior lying atop a saw. Photograph 1 and 2 are of the crime scene sealed with a yellow tape. The scene is a level forest with green vegetation. The body of the deceased lay within the area sealed with yellow tape as the scene of crime.

[26] Dr R.M. Reddy, a police pathologist was called as the first witness for the Crown. He testified that the deceased died due to shot-gun injury involving lungs and the heart. He detailed the injury he observed on deceased's body as: multiple pellets wounds present over the left side of the chest 18cm x 9.2cm area (0.4cm to 1cm) involving muscles, ribs, intercostal structures, pleura, lung, heart. He stated that the pellets were embedded posteriorly in tissues; few are muscle deep, one pellet crossed midline embedded in middle lobe of right lung. The thoracic cavity contained about 2500ml blood front and back.

[27] Dr Reddy handed in the post mortem report which was marked exhibit 'A'.

[28] The Crown closed its case.

The Defence Case

[29] The accused is an adult LiSwati male aged twenty-four years of age. He is a resident of Mhlabuyaduma. The accused was twenty years of age in the year 2017. He is unmarried and has a minor child with PW2. Salebona is the accused person's former brother in law. It was the evidence of the accused that he had a frosty if volatile relationship with the deceased. The accused testified that the deceased would fight him whenever they met. In support of

his evidence, the accused related to court an incident when he was confronted by the deceased at deceased's parental home. The accused testified that he had gone to deceased's parental home to see PW2 and give her items for their child in the evening hours. He met PW2 outside the gate of her parental home. The time was early evening hours. It was while he waited at the gate and PW2 was walking towards the gate to meet with the accused when Salebona followed PW2 and saw the accused standing outside the gate. Salebona turned to go towards his home only to return to the gate carrying a knobkerrie. Salebona attempted to assault the accused with the knobkerrie; accused evaded the assault, fled and outpaced Salebona. I note that the evidence of the accused contradicts that of Nonhle on the issue of assault with a knobkerrie. It was Nonhle's evidence which was not disputed that the accused informed her that he had been assaulted with the knobkerrie by Salebona.

[30] The accused further testified about an incident when he met Salebona who was with Sankie (PW3) at the time. It was in the evening hours and he was close to Salebona's parental home when he met the duo. Accused states that he was asked by Salebona and PW3 where he was going. Accused's response was that he was taking his minor child's money to Salebona's parental home. The accused testified that he was grabbed and manhandled by Salebona but while Salebona was removing a rucksack he was carrying, the accused freed himself from Salebona's grip and fled the scene.

[31] The accused denied ever threatening the deceased with death. He denied also that Salebona ever reported being threatened with death by the accused at accused's parental home. It was accused's evidence however that Salebona

only came to accused's parental home to cause a fight but found that the accused was not at home. Un-meritoriously, the version that deceased went to accused's home to cause a fight was not put to PW3.

[32] The accused testified that he did not intend to kill Salebona. After Salebona died, the relationship between their families became strained. The family of Salebona is said to have told accused's family to foot the bill of the funeral expenses of Salebona. Accused says he last set foot at Salebona's parental home when Salebona was 'accidentally' shot by himself. The accused told the court that Salebona's family denied him access to his child. Accused's minor child remains at deceased's family home to date.

[33] According to the evidence of the accused, he was responsible for impregnating Nonhle while they were both still at school. The accused did not pay *inhlawulo* for deflowering Nonhle and pleaded poverty. After their child was born, accused testified that Nonhle was again enrolled at school. Their child was four months old when Salebona died.

[34] The accused surmised that the reason he did not get along with Salebona is because the latter did not approve of the love relationship he had with Nonhle. Nonhle is a younger sister of the deceased. The accused stated that he thinks the reason for the misunderstanding between himself and Salebona is that he impregnated Nonhle while she was still at school. In accused person's view, Salebona was not justified to disapprove of the relationship he had with Nonhle. With an air of unalloyed arrogance, the accused stated that only Nonhle's parents and not her elder brother were justified to be offended with the relationship he had with Nonhle.

- [35] It was only during cross examination that the accused ventured to tell the court that he later resorted to send his sister to Salebona's parental home to give Nonhle things for the child. Needless to point out, this version of the accused's defence was not put to any of the Crown witnesses. When the accused was asked why this aspect of his evidence was not put to the Crown witnesses through his attorney-he gave a curt answer that he forgot and it slipped his mind to tell his attorney so.
- [36] During cross examination it was put to the accused that when he continued to go to Salebona's parental home in defiance of Salebona's disapproval of his relationship with Nonhle, the accused stated that it was a short period before the accident resulting in the death of the deceased. The accused did not deny that he acted in defiance of Salebona in the circumstances. The posture of the accused person's evidence in this regard tends to support the evidence of PW3 who testified that the accused once said he will never respect Salebona.
- [36] It is the evidence of the accused that on 2 December 2017 his father gave him his gun and told him to go to Galathiya *emagomini* to shoot *loklwebe*- a bird which snatched and ate chickens at accused's home. Accused testified that his father put one round of ammunition in the firearm and told accused to just pull the trigger and kill the said bird. The accused did not find the bird. He then went to Nonhle's parental home as he was close by. He called Nonhle to come over and she came with the child. The two lovebirds and the child sat at a place above the home of Nonhle in a bush. While they were enjoying each other's company, Salebona came at the scene. The accused testified that he was surprised and shocked to see Salebona there. It was the

evidence of the accused that no sooner had Salebona made an appearance unannounced than he asked accused why he was still there. The accused said Salebona threw the bush knife he was carrying in their direction and it grazed their child. Surprisingly, the four month old baby suffered no injuries. The accused testified that he took the gun which he had hidden in the bush about a metre away from where he sat and meant to scare Salebona. It was while he was scaring Salebona with the gun that he accidentally shot him. The accused testified that the place where the accused found them allowed no room for him to flee. PW3 was not confronted with the version that the bush they were in allowed no room for the accused to flee when he was confronted by the deceased.

[37] The evidence of the accused became more tenuous when he stated that Nonhle only got to see the gun when he retrieved it from where he had hidden it after he was confronted by Salebona at the scene of crime. In my view, it is improbable that if the accused was under attack from Salebona he could have been explaining the bird story to Nonhle. It is more probable that Nonhle saw the gun when she first came to the scene to meet with the accused and enquired about it.

[28] The accused told the court that he hid the gun because his father was against showing off with the gun. Strangely though, when the accused was seen by PW3 walking along the road and carrying the gun, he had not hidden it. PW3's evidence in this regard was not disputed.

[29] Soon after shooting Salebona, the accused left the scene. The accused did not render assistance to Salebona after he shot him. He says he went home

to report the incident. He was later taken by his relatives to Hlathikhulu police station where he was subsequently charged with murder of Salebona.

Submissions on behalf of the Crown

[30] There is no dispute that deceased died as a result of a gun-shot injury in the hands of the accused. The Crown submitted that the accused was armed with a gun in order to kill Salebona who disapproved of his relationship with Nonhle. The Crown contended that in light of the evidence and all admissible evidential material, the accused intended to kill the deceased and he did not act in self defence. In the alternative, the Crown argued that the accused grossly exceeded the bounds of self defence because in shooting at deceased, he foresaw the reasonable possibility that he was exceeding the bounds of self defence and proceeded, nevertheless-regardless of whether or not he was exceeding the bounds of self defence.

Submissions on behalf of the Accused

[31] Ms Ndlangamandla on behalf of the accused submitted that in self defence a person being attacked does not have to retreat if such action will threaten their life. She argued that the accused was attacked by the deceased who threw a bush knife in his direction; the accused had to use whatever means necessary to safeguard his life against an unlawful attack by the deceased.

[32] During cross examination Nonhle stated that Salebona did not attempt to use the bush knife to attack the accused when he saw the accused. Nonhle denied that the deceased tried to hack the accused with a bush knife. Nonhle's evidence is that the deceased threw the bush knife in the direction of Nonhle and the accused but missed them and instead the bush knife

slightly scrapped the baby. According to Nonhle's evidence, Salebona was still carrying a saw after he threw the bush knife at the duo.

- [33] Where the threat is one of personal injury, self defence is not necessary if the attack can be avoided by retreat or escape. In fact, in legal systems where the preservation of human life is held in high esteem-the victim of an attack is duty bound to retreat in so far as this is possible and would not expose the victim of the attack to even greater danger. Clearly, if to flee would be to worsen the accused's chances of avoiding the injury, he would be justified in standing his ground and defending himself. This, in my view is the position of the law in our jurisdiction.

Restatement of the Applicable Law

- [34] According to Synman, 'a person acts in private defence and his act is therefore lawful if he uses force to repel an unlawful attack which has commenced, or is imminently threatening upon him or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack¹.'
- [35] The requirements of private defence can be summarized as follows: (a) to give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which has commenced or was imminent; (b) the defence must be directed against the attacker and

¹ CR Synman *Criminal Law* 6th ed page 102.

necessary to avert the attack and the means used must be necessary in the circumstances².

- [36] When the defence of self defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and or requirements of self defence have been met, which includes the question whether the bounds of self defence were exceeded. The test here is objective but the *onus* is on the Crown to prove beyond reasonable doubt that the conditions or requirements for self defence did not exist or that the bounds of self defence have been exceeded.
- [37] When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the court must put itself in the position of the accused at the time of the attack. If the Crown does not discharge this *onus*, then the accused must be acquitted. Conversely, if the Crown discharges the said *onus*, that is not the end of the matter as the second leg of the enquiry must be evaluated. The second leg of the enquiry is then whether the Crown has proven beyond reasonable doubt that the accused did not genuinely believe that he was acting in self defence and that he was not exceeding the bounds of self defence. In this regard, the test is subjective and the reasonableness or otherwise of such belief, whether or not it is based on or amounts to a mistake of fact or of law or of both, is only relevant as one of the factors in the determination of whether or not the accused held the aforesaid genuine belief. If the Crown discharges the *onus* to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said *onus* is not

² See CR Synman above at page 101-102.

discharged, then the accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but can be convicted of a crime not requiring *dolus* but merely *culpa*, such as culpable homicide.

- [38] Culpable homicide will be a competent verdict where, for example the accused, although he genuinely believed that he acted in self defence and within the bounds of self defence, was not, objectively speaking acting reasonably in holding the aforesaid belief.

Evaluation of Evidence

- [39] It is not in dispute that the accused shot the deceased in the chest. The main issues for resolution were the circumstances surrounding the shooting and whether the accused acted in self-defence in shooting the deceased. The Crown relied on the oral evidence of PW1, PW2, PW3 and PW5 as well as the report from the scenes of crime officer.
- [40] The evidence pointed to the accused having been defiant of deceased's disapproval of accused's relationship with PW2-a younger sister of the deceased. The deceased had warned accused not set foot at deceased's parental home. Accused disregarded deceased's warning. The Court heard that the accused would come to deceased's home drunk and asked that PW2 come and meet up with him at different areas next to PW2's parental home. Accused's behaviour offended the deceased.
- [41] The Court heard that it was per chance that the deceased found the accused and PW2 in a forest close to deceased's home. According to the evidence of PW3, the deceased had been with him a few minutes before he met his death at the hands of the accused. The deceased is said to have told PW3 that he

was off to get firewood to prepare food for his children as well as to leave some for his wife who was returning home from South Africa on that day. The deceased was in possession of a bush knife and a saw when he parted ways with PW3 before he was later killed on that day.

[42] The evidence at every turn pointed to the accused having been in continuous defiance of deceased's caution that he stopped coming to deceased's parental home. The evidence also revealed that the accused had no respect for the deceased and he said so much within earshot of PW3. The accused disputed the evidence that he had threatened the deceased with death on an earlier occasion. The accused disputed further the evidence of PW3 that he had manhandled the deceased on an earlier occasion. There was no challenge to PW3's evidence that the accused came to deceased's home drunk and that he had said he will never respect the deceased.

[43] The Court observed that the accused was most at pains in crafting his version of events when it came to explaining the reason he shot the deceased. The accused resorted to becoming a man of few words and appeared to recalibrate his defence as he went along. Initially he pleaded self defence, but he later stated that he accidentally shot deceased after he had retrieved the gun from where he had hidden it while he sat with PW2. How the accidental shooting happened was not fully explained. Accused stated he tried to scare the deceased by pointing the gun at him; the gun was loaded with one live round of ammunition and the accused unexpectedly pulled the trigger and shot the deceased. How, if the accused was in imminent danger he found time to retrieve a gun which he says he had hidden and scare his assailant is unclear. What imminent danger the accused was in after

deceased is alleged to have thrown a bush knife in his direction is also unclear. The accused had difficulty giving a fuller account of what happened immediately before, during and after he shot deceased. This, to the Court was indicative of a person who had to make up his story as he went along since deceivers tend to use fewer words in communication and fewer factual statements for fear of being caught in the lie³.

[44] The accused's evidence on how he ended up in possession of a gun and shooting the deceased was not only incredible but false and fallacious beyond reasonable doubt. It was apparent that accused was unhappy that on a previous Thursday he had been chased away by deceased from his home. The accused was angry at deceased. He armed himself with a gun and went and called PW2 against the wishes of deceased. It is improbable that the accused would go in search of a wild bird next to deceased's home; and conveniently not find the bird and without fear this time return to deceased's home so soon after he had been chased away by the deceased. He had the courage to confront the deceased because this time around he was armed with a gun.

[45] The accused told the Court that he was afraid of the deceased. In word he wanted the Court to believe that he was a victim in the whole saga resulting in the death of Salebona. I reject the invitation to view the accused as a victim and the 'hunted' in the whole affair leading to the death of Salebona for the following reasons: first, the accused defied Salebona's instructions to stop coming to Salebona's parental home drunk and pursuing a love relationship with Nonhle who was still school going; second, the accused

³ Barry R, Morrison and Warren Comean *Judging Credibility of Witnesses* 25 *Advoc. Quarterly* 411 2001-2002 at page 422.

displayed an air of arrogance when he told the court that only Nonhle's parents-and not Salebona- had a right to be indignant that he had deflowered Nonhle while she was still at school and lastly, the Court heard that the accused once told Salebona that he will never respect him-this evidence was not controverted by the accused. The accused came across as someone who was arrogant and insistent on having his way of continuing with the relationship at all costs with Nonhle. On the Thursday prior to the death of Salebona, the accused had been chased from Salebona's parental home by the deceased. On Saturday, the accused shot and killed Salebona at a place near Salebona's home.

[46] In my view, the accused was still upset that Salebona had chased him away on the previous Thursday; he did not respect Salebona and had, on an earlier occasion threatened to kill him. When Salebona found accused in the forest with his sister and the accused was in possession of a gun, the stage was set for the accused to carry out his threat against the deceased. And he did. Soon after shooting deceased, the accused left the scene without so much as establishing the extent of deceased's injuries and rendering first aid. To him, this was mission accomplished as he walked home soon after shooting the deceased.

[47] The accused shot Salebona in a delicate part of the human anatomy-the chest cavity. I cannot but conclude that using a firearm to thwart an attack by a man who, at the time carried a saw is disproportionate to the attack and thus unreasonable in the circumstances. The explanation by the accused that the scene of crime allowed of no escape is also rejected as false beyond reasonable doubt for the following reasons: first, it was not put to the Crown

witnesses; and lastly, the scene of crime is an open forest without any pitfalls in the country-side⁴-the accused could have made good his escape without any engagement in combat or confrontation with the deceased. The deceased was supposedly only armed with a saw after he had thrown the bush knife in the direction of PW2 and the accused.

[48] In this case the accused used a firearm to shoot the deceased on the chest. The weapon used and the manner it was used given the part of the body to which it was directed established the requisite *mens rea* in the commission of the offence charged. Given the nature of the injuries occasioned, the weapon used and the manner in which the assault was perpetrated one cannot fail to read realization of risk or possibility of death ensuing from such conduct. Accordingly, the accused is found guilty of murder.



M. LANGWENYA J.

For the Crown: Mr. S. Mdluli

For the Defence: Ms. N. Ndlangamandla

⁴ See Exhibit 'B' and photograph 1 and 2.