



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO: 572/20

In the matter of:

REX

Versus

NTUTHUKO MICHAEL TSEMBALENKHANYETI DLAMINI

Neutral Citation: *Rex vs Ntuthuko Michael Tsembalengkanyeti Dlamini*
[572/20] [2022] SZHC 281 (12 December 2022)

Coram: **LANGWENYA J**

Heard: 12, 13, 14 September 2022; 22, 23 November 2022; 5,
12 December 2022

Delivered: 12 December 2022

Summary: *Criminal law-Criminal Procedure-accused charged with three counts of murder and one count of contravening the Arms and Ammunition Act, 1964-accused pleaded not guilty to all counts and said he acted in private defence-requirements of private 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 all deceased persons in vital areas of the human anatomy-accused used disproportionate and unreasonable force-private defence fails-accused's version found to be false beyond reasonable doubt-accused guilty of murder with dolus eventualis.

JUDGMENT

Introduction

- [1] The accused, an adult male LiSwati from kaLaMgabhi area in the Manzini district was indicted in this Court on three charges of murder and one charge of contravening Section 11(1) read with Section 11(8)(a)(i) of the Arms and Ammunition Act.
- [2] In the first count, the accused is alleged to have murdered Themba Tsabedze. It is alleged by the Crown that on 7 September 2020 and at or near Mhlabubovu area in the district of Manzini, the accused unlawfully and intentionally shot and killed Themba Tsabedze.
- [3] On the second count, the accused is alleged to have murdered Sikhulu Shongwe. It is alleged by the Crown that on 7 September 2020 and at or near

Mhlabubovu area in the district of Manzini, the accused unlawfully and intentionally shot and killed Sikhulu Shongwe.

- [4] On Count three, the accused is charged with murder of Simon Dlamini. It is alleged by the Crown that on 7 September 2020 and at or near Mhlabubovu area in the district of Manzini, the accused unlawfully and intentionally shot and killed Simon Dlamini.
- [5] On the fourth count, the accused is charged with contravening section 11(1)(18)(a)(1) read with section 14(2) of the Arms and Ammunition Act, 1964.
- [6] It being alleged by the Crown that on 7 September 2020 and at or near Mhlabubovu area in the Manzini district, the accused not being a holder of a valid licence to possess a firearm did unlawfully and intentionally possess a brown and black Harrisburg P.A. pistol with serial number B57135.
- [7] The accused pleaded not guilty to all the counts and submitted that he acted in private defence when he shot complainants in count 1, 2 and 3. The accused argued that Simon Dlamini's death was caused by a *novus actus interveniens* as he developed an enterocutaneous fistula consequent to colostomy closure and died on 1 August 2021.

General Overview of evidence

- [8] The Crown presented evidence of thirteen witnesses in various categories.
 - 8.1 *Indvuna* of eLuyengweni Mr Dumisa Ginindza was present at the scene of crime at the relevant time.
 - 8.2 Mr Sihle Dlamini, a Prince and member of the Council of the royal household of Luyengweni.

- 8.3 Mr Bhekwako Mkhabela, *umsumphe* of Luyengweni and an uncle of the accused person.
- 8.4 Medical Personnel namely:
- 8.4.1 Dr Thindwa, employed at Mankayane Government Hospital who first treated and stabilized Simon Dlamini before he was transferred to Mbabane Government hospital;
- 8.4.2 Dr Tembe, employed at Mbabane Government Hospital, who received Simon Dlamini at the Casualty department.
- 8.4.3 Dr Michael Ggayi, employed at Mbabane Government Hospital, the surgeon who operated on Simon Dlamini.
- 8.4.4 Dr R.M. Reddy, employed as a Police Pathologist. He carried out post mortem examinations on Simon Dlamini, Sikhulu Shongwe and Themba Tsabedze.
- 8.5 Police Officials namely;
- 8.5.1 3238 Inspector Mngometuli, who was first called by the accused to attend to the complaint of the presence of the Inner Council of eLuyengweni at Mhlabubovu on the day of the incident;
- 8.5.2 6698 Detective Constable Babongile Dlamini, the police officer from Scene of Crime department who compiled the photo and sketch plan;
- 8.5.3 6286 Detective Constable Mthobisi Mfundo Vilakati, the police officer from the Digital Forensic Laboratory who extracted the video recorded by Mr Sihle Dlamini at the scene of crime.

- 8.5.4 3337 Assistant Superintendent Harry Vusi Madonsela, the police officer from the Ballistic department and a ballistic expert who tested Sikhulu Shongwe and the accused person's firearms and found them to be serviceable.
- 8.5.5 7213 Detective Constable Charlton Mthethwa, one of the investigating officers in this matter;
- 8.5.6 3458 Detective Sergeant Simon Mavuso, the police officer and Desk officer at Bhunya Police station.
- 8.6 The Crown tendered the following documentary evidence, which was admitted as evidence in this case:
- 8.6.1 Medical Reports submitted as exhibits consisted of:
- 8.6.2 The Post mortem report of Themba Tsabedze, Sikhulu Shongwe and Simon Dlamini which were marked exhibit 10, 11 and 12 respectively.
- 8.6.3 The medical report REPS 88 of Simon Dlamini which was presented by Dr Tembe and was marked exhibit 7;
- 8.6.4 The medical report REPS 88 of Simon Dlamini which was completed and presented by Dr Thindwa and was marked exhibit 6;
- 8.6.5 Medical report written by Dr Michael Ggayi on 25 July 2022 presented to court and marked exhibit 17.

8.7 Documentary Reports submitted by Police Officers are:

- 8.7.1 Sworn statement, key to Photographs, Photographs and copies of sketch plan prepared by the Scenes of Crime Officer marked as exhibit 1(Close range pictures of Themba Tsabedze)
- 8.7.2 Sworn statement, key to Photographs, Photographs and copies of sketch plan prepared by Scenes of Crime Officer marked exhibit 2 (Close range pictures of Sikhulu Shongwe)
- 8.7.3 Sworn statement, key to Photographs, Photographs of Simon Dlamini while admitted at Mbabane Government Hospital marked as exhibit 3.
- 8.7.4 Memorandum of seal bag containing Mr Sihle Dlamini's Samsung A 30 blue in colour cell phone with serial numbers (1) 3567231021465575/01 (2) 3567231021466573/01 addressed to National Commissioner of Police from Regional Commissioner in Manzini requesting that the video clip marked CM1 be retrieved and examined. Memorandum marked exhibit 4
- 8.7.5 Affidavit of Mthobisi Mfundo Vilakati detailing steps taken to retrieve video from Sihle Dlamini's cellphone, marked exhibit 5.
- 8.7.6 Affidavit of ballistic expert marked exhibit 8
- 8.7.8 IBIS report marked exhibit 9
- 8.7.9 Certificate of approval in terms of Section 6(1) & 16 of the Electronic Records (Evidence) Act 6 of 2009 granting authority

that electronic video extracted from Sihle Dlamini's phone be used in the prosecution of this case and marked exhibit 13.

8.7.10 The accused person's licence to possess a firearm marked exhibit 14

8.7.11 Memorandum from Station Commander Bhunya to Regional Commissioner, Manzini transferring Sihle Dlamini's cellphone requesting for retrieval and examination of video therein and marked exhibit 15.

8.7.12 Memorandum from Station Commander Bhunya to Regional Commissioner, Manzini detailing and transferring firearms, empty cartridges, a bullet head for ballistic examination and marked exhibit 16.

8.8 The Crown also presented real evidence namely, a disk where video that was recorded from Sihle Dlamini's phone was stored and marked exhibit 'B.'

8.9 A black and brown Harrisburg firearm belonging to the accused was marked exhibit C

8.10 A black and silver pistol belonging to Sikhulu Shongwe was marked exhibit D.

8.11 Three cartridges were collectively marked exhibit E

8.12 One bullet head was marked exhibit F

8.13 Sihle's cellphone was marked exhibit A

8.14 Brown holster belonging to the accused was marked exhibit G

8.15 Five live rounds were marked exhibit H

8.16 Two bullets belonging to the accused person were marked exhibit I.

[9] The defence called two witnesses namely the accused person and Mr Sipho Matsenjwa.

Prosecution's Germane Evidence

Evidence of eye witnesses

[10] Mr Dumisa Ginindza, *indvuna* of eLuyengweni under the jurisdiction of Prince Lembelele set the scene. On the fateful day, he was at Mhlabubovu as part of the Inner Council to allocate land to Mbongiseni Dlamini and another person. The land that was being allocated to Mbongiseni Dlamini belongs to a Motsa family. The Motsa family are subjects to Prince Lembelele. After the Motsa family had given a piece of their land to Mbongiseni Dlamini, it was incumbent to *indlunkhulu* of Luyengweni to formally sanction, approve and allocate the land to Mbongiseni Dlamini-this was done by the Inner Council on behalf of their Chief.

[11] After the process was completed and the Inner Council was being served food, the accused arrived at the scene in the company of three men. The accused twice enquired what they were doing on Chief Ndzimanye's land. None responded to the accused. The accused then called Mr Mngometulu, the station commander of Bhunya police station. He told Mngometulu to rush to Mhlabubovu because if he delayed he (the accused) would kill the people who were there.

[12] The accused called the people from Luyengweni *timfucuta*-a term that was considered derogatory by the people who were at the scene. Sihle argued

with the accused telling him not to call them *timfucuta*. The accused and Sihle started pushing and shoving each other. Mr Simon Dlamini, Mr Lokhokha Nhlengetfwa tried to intervene and told the accused and Sihle to stop what they were doing.

- [13] No sooner had the altercation between Sihle and the accused started than Mr Ginindza heard gunfire ring out. The accused shot Mr Simon Dlamini three times. Simon retreated and sat on a rock. At the time, Simon was bleeding. Mr Ginindza did not see if Simon did anything to attract the accused person's wrath. As a herd-man, Simon always carried his knobstick. At the time he was shot Simon carried a knob-stick but had neither lifted it nor used it to assault the accused. Simon was a metre away from the accused when he was shot.
- [14] Sikhulu Shongwe fired a warning shot into the air when Simon was shot. Shongwe was standing behind the accused when he fired the warning shot into the air. The accused turned and shot Shongwe in the abdomen. Shongwe was a metre away from the accused when he was shot.
- [15] Mr Themba Tsabedze was behind Mr Ginindza when he tried to cool tempers but was gunned down by the accused. Themba Tsabedze was unarmed when he was shot and he fell to the ground and died.
- [16] After Tsabedze was killed by the accused, the accused went to where Shongwe lay. The accused pulled Shongwe's jacket to see if he was dead and again fired at Shongwe at close range on his back. The accused also went to where Tsabedze lay; he turned him over to check if he was indeed dead.

- [17] Shongwe and Tsabedze died on the spot after being shot by the accused. Simon Dlamini was rushed to the hospital alive.
- [19] When the accused shot the deceased persons, the people fled from the scene. The accused pursued them. It was when the accused was going after the people who were running away from the scene that Mr Mkhabela Bhekwako admonished the accused to cease and desist from what he was doing as he had killed enough people already. The accused turned back and went to the scene where he collected empty cartridges and boarded his motor vehicle with his companions and drove off.
- [20] Accused's version was put to Mr Ginindza that the word *timfucuta* was directed to Big-Boy and Lwazi and not to the Inner Council of Luyengweni to which he said he had no comment. Another feature of the defence is that the accused fired at Simon in an effort to disarm him the knobstick. Mr Ginindza did not see that Simon was being disarmed when he was shot.
- [21] Mr Ginindza stated during cross examination that if Shongwe wanted to gun down the accused he could have easily done so and would have finished him off there and then. Shongwe only fired a warning shot into the air. The accused turned and faced Shongwe. The accused said 'oh, so you have a firearm?' and he shot Shongwe.
- [22] Mr Ginindza denied that Mr Tsabedze aggressively charged at the accused. He denied that Shongwe ever attempted to shoot at accused as he lay prostrate on the ground. It was suggested that the accused shot Shongwe the second time when Shongwe attempted to shoot the accused as he lay on the ground. Mr Ginindza testified that after Shongwe was shot the first time, he walked for a distance of a metre and fell on bricks and collapsed face-down

on the ground. That is when the accused went to Shongwe, pulled Shongwe's jacket and again shot him. At the time, Shongwe was dead already. Mr Ginindza denied that the only time the accused touched Shongwe as he lay on the ground was when he was taking Shongwe's firearm.

- [23] Mr Ginindza had nothing to say when it was suggested that the accused went to Tsabedze to check his condition and administer first aid if he was still alive.
- [24] According to Ginindza, all the people who were shot by the accused did not attack the accused.
- [25] Mr Ginindza remained rooted on his seat when people fled from the scene after the accused shot the deceased persons. The accused only glared and stared at him.
- [26] Sihle Dlamini's evidence corroborates the evidence of Mr Ginindza in material respects. He states that the accused arrived with his companions at the scene and shouted asking what *timfucuta* were doing on Ndzimanye's land. Mr Ginindza advised members of the Inner Council not to respond to the accused. Big-Boy however responded and told the accused that he should report the matter to proper structures. Accused was offended by Big-Boy's response as he then asked who Big-Boy thought he was. Accused told Big-Boy that he moves in circles of senior and important people. Sihle then interjected and reminded the accused that in years past he was a Cabinet Minister; that he therefore ought to respect elder people and not address them in a disrespectful manner.

- [27] Sihle corroborated Mr Ginindza's evidence that the accused called Mngometulu, the station commander and told him that there was going to be bloodshed at the scene. The accused then called the people of Luyengweni *timfucuta*. Sihle objected to the derogatory name-calling by the accused. The accused pushed Sihle and Sihle retreated as he was being pushed by the accused. Mr Lokhokha Nhlengetfwa intervened and told the accused to stop what he was doing. It was while the pushing and shoving was ongoing that one of accused's companions took a video using his cellphone. Sihle also recorded the scuffle using his cellphone-a Sumsung A30. His cellphone was blue in colour.
- [28] Sihle testified that the accused then moved away from him and took out his firearm from his waist and shot Simon Dlamini. Simon was a metre away from Sihle's right hand side when he was shot by the accused. Simon was shot three times on his left hand. At the time he was shot, Simon was carrying a knobstick which he used for support. According to Sihle, except to admonish the accused to stop what he was doing, Simon did not do anything to provoke accused's ire. Before Simon was shot, the accused is said to have quipped: 'you're pulling out a knob-stick for me?'
- [29] Sihle says when Shongwe saw Simon being shot, he fired a shot into the air. The accused turned around and said to Shongwe: 'you're firing at me?' He then shot Shongwe in the neck. Shongwe fell prostrate on the ground. Sihle fled the scene. It was while he was running away that he observed the accused lift Shongwe and shoot him at his back.
- [30] Sihle later saw the accused carrying firearms and going inside Mr Luka Dlamini's homestead. Mr Bhekwapo Mkhabela spoke to the accused and the accused turned back. Sihle hid from the accused. He was traumatized. He

was later driven by Mr Paul Lukhele to Malkerns police station where he recorded a statement. Sihle's cellphone was confiscated by the police after they had viewed the video he recorded at the scene. Sihle gave the police his security code of his cellphone. Because he used his phone for business communication, he later requested the police to return it to him. A month later, the police gave Sihle his phone. He did not apply to Court to have his phone returned to him.

- [31] While the phone was in his possession it fell and it had to be taken for repairs. The screen and frame of the cellphone was replaced and he could not identify the IMEI number of his cellphone as it was erased after the repairs. In Court, Sihle could not open his phone because he said it was glued. Mr Mtsetfwa, a police officer assisted Sihle to open the phone in Court.
- [32] The video that was recorded by Sihle was played during the court proceedings. In one of the video clips, Sihle is heard taunting the accused saying: the fact that the accused thinks he has some money and businesses means nothing.
- [33] The accused's version was put to Sihle that he was disrespectful to the accused by making these utterances. Sihle's response was that he lost respect for the accused when he called them *timfucuta*.
- [34] Sihle's evidence corroborates that of Mr Ginindza that Simon Dlamini never attempted to assault the accused with a knob-stick.
- [35] Sihle said he stopped recording the events at the scene when Shongwe fired a warning shot.

- [36] Sihle said he understood the use of the word *timfucuta* to be directed to the Inner Council of Luyengweni and not to Big-Boy.
- [37] It was suggested that accused's firearm was licensed but had not been renewed for some time. Sihle had nothing to say in response to the suggestion.
- [38] Sihle testified that he was traumatized by the incident and had to undergo counselling at the National Psychiatric hospital on the day of the incident. He still lives with the trauma.
- [39] Mr Bhekwako Mkhabela is an uncle of the accused person. He is born and bred at Luyengweni. He was present at the scene of crime on 7 September 2020. The accused arrived at the scene of crime driving a motor vehicle that was speeding. After parking the car, the accused alighted from the car in the company of three men. The accused was leading the way. Mr Mkhabela corroborated the evidence of Mr Ginindza that when they saw the accused coming their way, it was agreed that no one should respond to him. Before the accused arrived there was peace at the meeting of the Inner Council on that fateful day. It is Mr Mkhabela's evidence that the commotion was caused by the accused's use of insulting language when he referred to the people from Luyengweni as *timfucuta*.
- [40] Mr Mkhabela heard Sihle and Mr Shongwe protesting and telling the accused not to insult them. No sooner had the chaos erupted than Mr Mkhabela saw Mr Simon Dlamini fall to the ground. Simon was next to Mkhabela when he was shot. Mkhabela heard the accused say: (*ungisikita nge sagila ng iyi nyoka mine?*) which translates to-'you are brandishing a knob-stick aimed at me, am I a snake?' Immediately, Mkhabela saw

Shongwe fall. Mkhabela saw Tsabedze who had been seated next to him raising his hands and appealing for calm. Tsabedze suddenly fell to the ground.

- [41] Mr Mkhabela corroborates the evidence of Mr Ginindza and that of Sihle that the accused went to Shongwe, pulled him with his jacket and lifted him before he fired two gun-shots at Shongwe as he lay on the ground.
- [42] People ran helter skelter. Mkhabela remained rooted on the log on which he sat. He then stood to go to his vehicle. He saw the accused carrying two firearms and in hot pursuit of the people who were fleeing the scene. Mr Mkhabela then confronted the accused and told him to stop what he was doing and that he had killed enough people already. At that time the accused turned and went to where Tsabedze lay. He turned him over face-up and collected the cartridges that were there. Derrick Maziya, one of the companions of the accused shouted and said the accused must shoot Mkhabela. Mkhabela was shocked and terrified when he heard Maziya make those utterances.
- [43] During cross examination Mr Mkhabela stated that he saw Simon lifting his knob-stick. He did not see Shongwe fire a shot nor did he hear a gun-shot coming from Shongwe's direction. Mkhabela clarified during cross examination that when Tsabedze was shot he (Tsabedze) was standing where he had been seated and was shot when he tried to calm the situation.
- [44] The accused's version was put to him that after Tsabedze was shot, he went to him to render first aid. Mkhabela stated that Tsabedze was dead when the accused went to him.

[45] According to the eye-witnesses, Mr Shongwe and Mr Tsabedze died at the scene. Mr Simon Dlamini was rushed to hospital for treatment.

Evidence of Medical Practitioners

[46] Mr Simon Dlamini was rushed to Mankayane Government Hospital after the shooting incident. At Mankayane Government Hospital, Simon was attended by Dr Thindwa. Mr Dlamini is said to have presented with two puncture wounds on the abdomen and one puncture wound on the left forearm. Dr Thindwa determined that the patient required special care in the form of exploration of the injuries to ensure he had no internal bleeding. If the patient had internal bleeding he would require surgical intervention to stop the internal bleeding.

[47] Dr Thindwa took the patient's vital signs and stabilized him for transportation to the referral hospital. In stabilizing the patient, Dr Thindwa says he arrested the bleeding by applying a bandage and further put the patient on intravenous fluid. The patient was transported to Mbabane Government Hospital for further treatment.

[48] Dr Tembe was on duty at the casualty department at the Mbabane Government Hospital on 7 September 2020. On 7 September 2020 he received Mr Simon Dlamini-a patient who had been referred from Mankayane Government Hospital. The patient had been shot. He was ill-looking and was having difficulty ambulating. He was in respiratory distress and was receiving oxygen.

[49] Dr Tembe observed that Simon had a gun-shot wound on the left lateral hypechondric region, that is, below the chest. He also had a gun-shot wound on the lower side of the abdomen as well as on the left lateral forearm. The

patient was subsequently taken to the theatre to explore the injuries on his abdomen.

[50] Dr Michael Ggayi is a surgeon working at Mbabane Government Hospital. On 7 September 2020 he was on duty when he received Mr Simon Dlamini- a patient who had gun-shot wounds. He was shot in the forearm and in his abdomen. He had lost a significant amount of blood before admission in Mbabane Government Hospital. On arrival the patient was in respiratory distress. His condition was critical and he had to be resuscitated and taken to the theatre immediately. The patient had multiple injuries in the small and the large intestines. The Court heard that the small intestines are divided into three segments. Two parts of the small intestines heal better while the part that carries enzymes and food does not heal well as it breaks down and leak if injured. The large intestines, the Court was told repair better but contain human excrement and a lot of bacteria. In the case of injury to the large intestines, the bacteria leaks into the stomach and creates infection.

[51] Dr Ggayi testified that Simon had injuries on the part of the small intestines that is difficult to heal. He was also injured on the part of the large intestines which consisted of the descending colon. The multiple injuries that were found in Simon's abdomen were repaired and he was thereafter admitted to the surgical ward. His progress while in the ward remained unsatisfactory and he was again operated upon on 9 September 2020. On 15 September 2020 a laparotomy was done. Dr Ggayi explained that a laparotomy is a mid-line incision to open the abdominal cavity to see whether there is any trauma or injury on the intestines or organs. If there is injury to the large intestine, the large intestine is brought out to the skin and the colostomy bag is attached to it. The stool of the patient will then pass into the colostomy

bag. This procedure, he explained is temporary and is done to give the large intestine time to heal.

- [52] The patient was further given total parental nutrition-that is, special food given to the patient through the blood vessels). Psychological support was also sought from the Psychiatric department because the patient was depressed. The patient did not like the idea of a colostomy thus the depression. After all the medical intervention Mr Simon Dlamini then made good progress and was discharged on 25 September 2020.
- [53] The patient then developed wound sepsis from the gun-shot wound and was re-admitted on 9 October 2020. The infection was on the wall of the stomach. The cause of the infection was the bullets which tore into the patient's intestines. Mr Simon Dlamini's intestines were injured and his faecal matter was leaking and causing the infection on the wall of the stomach. Wound care was administered and the patient was discharged. At the time, Simon still had the colostomy. According to the doctor, a colostomy is usually kept for a period of three months before it is reversed but it can stay longer than three months if the condition of the patient so requires.
- [54] On 12 July 2021 Mr Simon Dlamini was re-admitted for a colostomy closure which was done on 13 July 2021. After the operation, Mr Dlamini started passing stool normally. He however later developed an enterocutaneous fistula post-operatively and died on 1 August 2021. This means after the operation to close the colostomy, the patient had a leakage of the repairs and an infection set in resulting in his death. Mr Simon Dlamini's death was caused by the faecal matter which leaked from the large intestines into the

stomach and later moved throughout his body-otherwise known as septicemia infection.

- [55] Mr Dlamini was screened for co-morbidities and was found to have no other illness other than the gun-shot wounds.
- [56] The version of the accused was put to the witness, in that the operation to reverse the colostomy did not go well, thus the re-infection resulting in the death of the patient. Dr Ggayi disputed that the operation to close the colostomy did not go well. He testified that after the operation, the patient was able to pass wind and stool normally-a sign that the operation was successful. Dr Ggayi stated that the patient failed to heal properly after the reversal of the colostomy.
- [57] It was suggested to Dr Ggayi by defence Counsel that the doctor was unable to detect the leaking intestine when the colostomy was closed; to which the Dr responded that he identified the leaking intestine and repaired it. The doctor conceded during cross examination that it was the intestine that was initially pulled out of skin of the patient to be attached to the colostomy that caused the infection resulting in the death of the patient. The doctor disputed that when he reversed the colostomy the operation did not go well. He stated that the operation went well because the patient improved and did well for a day or two. The patient was able to pass wind and stool-a sign that the operation had been successful. The doctor surmised that the cause of the leakage of the intestine after the colostomy closure operation was because the patient failed to heal properly from the reversal of the colostomy.
- [58] Dr R.M. Reddy conducted post-mortem examinations of all the deceased persons.

Post-mortem examination of Themba Andreas Malungisa Tsabedze

- [59] Mr Tsabedze's reputed age was about sixty-nine years when he died. His death was due to fire-arm injury involving the heart and lungs. The pathologist determined that the entry wound was on front of chest, 10cm below the medial nipple. The exit wound was 1cm x 0.7cm on the outer aspect of the chest left side. The track involved muscles, intercostal structures, pleura, pericardium, right ventricle through and through the left lung, intercostal structures, pleura, 8 rib left muscles, right to left direction. The chest cavity contained about 2 litres of blood.

Post-mortem examination of Sikhulu Jameson Sedzelelo Shongwe

- [60] Mr Shongwe's reputed age was seventy years when he died. His death was due to multiple fire-arm injuries. He had abrasions over the forehead covering 2.1cm area. The deceased had an entry wound over the left ear region which measured 0.7cm. The exit wound was over the neck below the chin and measured 1cm. Track involved facial muscles structures bone downwards and neck structures, effusion of blood in soft tissues.
- [61] Mr Shongwe had an entry wound with an abrasion to the collar measuring 0.6cm back to right of chest with exit wound measuring 1cm on the lower region of the neck on the left side front, track involved muscles, intercostal structures, pleura, lung through and through, lower cervical vertebral anterior surfaces, neck structure effusion blood in soft tissues below upwards right to left.
- [62] There was another entry wound with abrasion on the collar measuring 0.6cm back left of chest with exit wound on the front of auxillary region measuring 1.2cm track involved muscle, intercostal structure, pleura, rib margin, lung

through and through muscles, blood in chest cavity measuring about 2 litres, back to back.

- [63] There was also an entry wound with abrasion on the collar measuring 0.6cm back to left chest next to above injury muscle deep above medially.

Post-mortem examination of Simon Sipho Dlamini

- [64] Mr Dlamini's reputed age was sixty-one years when he died in August 2021. The pathologist stated the cause of death to be due to complications consequent to abdominal injury as a result of a gun-shot. According to Dr Reddy the bullet hit the intestines of Simon and a surgeon operated on him. When he conducted the post mortem report he noticed that pus had formed in the intestines. The deceased died a while after he had been operated upon.
- [65] Dr Reddy testified that a surgeon operated on Simon after he suffered gun-shot wounds in the abdominal area. When he conducted the post-mortem report he found the deceased with two colostomy bags kept with the body on the front to left side of the opening with opening wound over the left hypochondrium measuring 1.4cm x 1cm (entry) wound and right hypochondrium measuring 2.1cm (exit) present.
- [66] On dissection of deceased he found repair of intestinal loops anastomosed (means the doctor took a portion of the intestine and connected it to the gaping wound) and connected to opening wound for excretion of waste. Adhesion of intestines present with slight pus formation in abdominal cavity. Midline scar formed wound 19cm length front of abdomen present (surgical).
- [67] Healed wound over left forearm measuring 1.1cm, 1.7cm entry, exit present muscle deep.

[68] During cross examination Dr Reddy was asked when Simon got the infection. His response was that he got infection nine months after he was shot; he however added that only the doctor who treated him would know with certainty when Simon got the infection. Dr Reddy determined that the cause of infection may have been as a result of poor immune system or illness of the patient.

Evidence of Police Officers

[69] I move to the Police Officers. Inspector Mngometulu testified that on 7 September 2020 he received a call from the accused reporting that there were people from Luyengweni at Mhlabubovu unlawfully allocating land to certain people. The accused asked Mngometulu to send police officers to the scene to send the Luyengweni folks away. Mngometulu informed the accused that he would call the police right away. This, he did because he was aware there was a land dispute between the two chiefdoms involving the area of Mhlabubovu. Five minutes later, the accused again called and said Mngometulu should hurry up as delaying would result in chaos at the scene. At the time, Mngometulu had called police from Bhunya police station and told them to go and investigate at Mhlabubovu.

[70] When accused called the second time, Mngometulu told him to be patient as police were on their way and he was also on his way to the scene. In less than five minutes after the second call, the accused again called for the third time and said commotion had ensued already; people have assaulted each other with knob-sticks and some have fallen. Accused said some of the people were dead. Accused then said he was also fleeing the scene because the people almost beat him. The call was abruptly cut and Mngometulu assumed it was because the accused was running for his life.

- [71] He arrived at the scene and found two bodies of dead people on the ground. The accused was not at the scene. The people who were dead at the scene had gun-shot wounds. He spoke to Mr Ginindza and was informed the people were shot by the accused. He was informed that a third person was also shot by the accused and was rushed to hospital. When he arrived at the scene there were police officers from the traffic department and not those from Bhunya police station.
- [72] Mr Mngometulu received a phone call from Bhunya police station that the accused person and his three companions were now at the police station. Mr Mngometulu then left the scene because there were police investigating the matter already and he went to Bhunya police station.
- [73] Back at the police station he advised the accused to secure the services of an attorney. He ordered that the accused be detained but did not confiscate accused's cellphone.
- [74] Officer Babongile Dlamini is the police officer from the Scene of Crime department. He compiled the photo album and sketch plan. It was done on 7 September 2020. He documented the scene through photographing the material points. He detailed his investigation in Court. He found three empty cartridges at the scene and one bullet head.
- [75] Officer Mthobisi Mfundo Vilakati is a police officer from the Digital Forensic department. He received a Samsung galaxy A3 with serial numbers RR8M 70079SY it has a unique Identification number or IMEI No: 35672310214657501 and 35672310214657301. The phone was without its Sim Card nor a micro eSwatini card/memory card. He extracted the video clip titled Mhlabubovu murder. He detailed to Court the process he followed

in doing so. He saved the video in compact disk. The compact disk was played in court during the leading of the evidence.

- [76] Officer Harry Vusi Madonsela is a ballistic expert. He examines firearms and related tools. On 23 September 2020 he received sealed bags containing a semi-automatic pistol with one magazine; a 9mm parabellum Harrisburg semi-automatic pistol with serial number B 571 35 and another firearm said to belong to Shongwe. He tested both firearms and found them to be serviceable. He also received 3 fired cartridges which were fired from the 9mm parabellum Harrisburg.
- [77] Officer Charlton Mtsetfwa is based at Bhunya police station under the Criminal Investigation department. On 7 September 2020 he was on duty but assigned to work on a matter at Mangcongco. He was at Mangcongco when he received an instruction from the Desk officer-Mr Mavuso- to rush to Bhunya police station. On arrival at the police station Officer Mtsetfwa found the accused person, Derrick Maziya, Sipho Matsenjwa and Vusi Zulu. The accused was in a jolly good mood. He greeted the accused who then freely and voluntarily showed this witness photographs of dead bodies on his cellphone.
- [78] Before the accused showed this witness the photographs, he was cautioned in terms of the Judges' rules. The accused further gave the police two pistols: a brown Harrisburg pistol and a silver black pistol. The silver and black pistol belonged to the deceased Sikhulu Shongwe while the brown Harrisburg pistol belonged to the accused person. The serial number of the black Harrisburg pistol is B57136. Serial number of Sikhulu Shongwe's black and silver pistol is A9776. Mr Shongwe's pistol contained five (5) live rounds of ammunition while the accused's firearm contained two (2) live

rounds of ammunition. Both pistols and live rounds were handed over to the Desk officer.

- [79] He conducted his investigations and collected Sihle Dlamini's cellphone which had two videos of events preceding the death of the deceased.
- [80] He later cautioned the accused and his companions before he detained them. The accused and his companions were transferred to Mafutseni police station after the police received a report that people were baying for their blood. On 8 September 2020 he went to Mafutseni police station where the accused and his companions were questioned. The accused was charged with three counts of murder and one count of contravention the Arms and Ammunition Act for possession of a firearm without a licence. He sealed the pistols and sent same to Police headquarters. The exhibits were sealed in the presence of the accused person and the exhibits were handed over to the Scene of Crime officer for onward transmission to police headquarters.
- [81] On 9 September 2020 the accused gave him the firearm licence for his pistol. The licence expired on 20 August 2019. This information was confirmed at police headquarters. The licence number was 3016/2018. Sikhulu Shongwe's firearm licence was expired too. He charged the accused for contravention of the Arms and Ammunition Act.
- [82] He went to the Ministry of ICT and secured the certificate of fitness of the video that was later played during court proceedings.
- [83] He went to Mbabane Government hospital where Simon Dlamini was now admitted. He assessed his condition and found that he was shot on the left hand side of the arm and also had two gun-shot wounds on the left hand side of the abdomen.

[84] He also received 3 cartridges from the scene of crime officers. These were transmitted to police headquarters for ballistic examination.

[85] During cross examination, Officer Mtsetfwa stated that the accused stated that he had solved a problem that had been troubling them for a long time, that is *wetfule ingwe esihlahleni*. The accused was gloating when he said this.

[86] The Crown led the evidence of Officer Mavuso who is Desk officer at Bhunya police station. He confirmed the evidence of Officer Mtsetfwa in material respects.

[87] That is as far as the evidence led by the Crown goes.

The defence case

[88] Before the accused started to tell the court his version of events, he apologized to the families of the deceased, to the nation and to his own family for the events of 7 September 2020.

[89] The accused testified that on 7 September 2020 he was at his business premises doing some work there in the company of his business partners and their spouses. He was asked by three men to come and intervene and tell the people from Luyengweni to leave the area of Mhlabubovu. The accused asked the men to wait as he was still busy. The men disappeared but returned and again asked him to accompany them to the place where the Luyengweni folks were as the situation could get out of hand. The accused subsequently left with the men to the area where the Inner Council of Luyengweni was.

[90] The accused testified that the three men who accompanied him to the scene were: Derrick Maziya who is *umgijimi lomncane*; Sipho Matsenjwa a

member of the Inner Council and a community police at Mhlabubovu; and Vusi Zulu a resident of Mhlabubovu.

- [91] On arrival at the scene, the accused said he greeted the people he found there and enquired what they were doing in Prince Ndzimanye's land. Big-Boy Maseko asked the accused what position he held at *indlunkhulu* of kaLaMgabhi. The accused says he explained and then moved away from the Inner Council of Luyengweni. He phoned Mr Mngometulu, the station commander at Bhunya police station at the time. He requested Mr Mngometulu to send police officers at Mhlabubovu because there were people there who were illegally allocating land in the area.
- [92] After he made the call, the people from Luyengweni shouted and told him that if he had an issue with what they were doing, he should report the matter to the relevant structures. Accused stated that he was calm when all this was happening. He then addressed his uncle, Mr Mkhabela and expressed surprise that Mkhabela was also present at the scene. Mkhabela did not respond. Instead, another person who sat next to Mkhabela responded and told him that Prince Lembelele had asked them to allocate land to certain people at Mhlabubovu. The accused was disturbed by the man's utterances and told him to shut up as he did not talk to *imfucuta*. It is his evidence that he did not call the Inner Council of Luyengweni *timfucuta*.
- [93] According to the accused, *imfucuta* is a person who has no position, status, title in his/her community-(*ngumuntfu longenasigaba emumangweni*). The accused initially thought the term was not offensive but on reflection considers it is offensive (*liyahhedleta*). He told the Court that he would not have made such an utterance if he knew it would stir a commotion.

- [94] The accused was upset that Sihle got involved and protested that the accused should not call them *timfucuta*. What upset the accused is that he was not addressing Sihle nor the Inner Council from Luyengweni but the man who sat next to Mkhabela when he made the utterances about *imfucuta*.
- [95] Themba Tsabedze and Sihle came charging at the accused and told him not to call them *timfucuta*. Sihle reminded the accused that as a former Cabinet Minister he was well versed with the law. There was an altercation between the accused and Sihle as both raised their voices with the accused telling Sihle he could do nothing to him. Sihle, on the other hand told the accused not to brag about the little money he had. It was in the heat of the argument, Sihle then retreated to his seat. As Sihle went to his seat, Simon Dlamini stood and walked for about five metres towards the accused. When Simon was close to the accused, he raised his knobstick with the intention to assault the accused. The accused says he unfortunately (*wehlelwa lishwa*) shot Simon while trying to disarm him. He shot the hand that carried the knobstick. Simon did not stop but came charging at the accused. The accused tried to make Simon turn back and he was inadvertently shot (*wadubuleka*) in the abdomen.
- [96] The accused told the Court that Sikhulu Shongwe was at his far right hand side and behind the accused when the accused shot Simon Dlamini. From behind the accused, Shongwe stood and came charging at the accused. Shongwe shot at the accused but missed him. Three people shouted and said 'he has shot him.' He says he turned around and saw Shongwe pointing a gun at him. The accused shot Shongwe on the chest and on impact Shongwe was flown into the air. It was while Shongwe was airborne that the accused again shot him. Shongwe swung and fell on his face to the ground.

- [97] When Shongwe fell to the ground, Tsabedze came running-an indication that he was also fighting. Tsabedze was also shot (*wadubuleka*).
- [98] At the time, accused was on alert and paying attention to all that was happening at the scene. He was shocked when he saw Shongwe try to reach for his gun. He then went and shot Shongwe. He says he went to Shongwe and at a distance he shot him (*wadubuleka*). Immediately thereafter the place fell silent. His companions remained seated and silent. He then took Shongwe's firearm and holster.
- [99] Mr Mkhabela went to his car. The accused followed Mkhabela to his car and showed him Shongwe's gun. The accused told Mkhabela that they had put him in an awkward position. Mkhabela expressed surprise that Shongwe was also carrying a firearm. The accused again called Mr Mngometulu and informed him about the incident.
- [100] The accused then turned and went to his companions and they went to Bhunya police station to report the matter.
- [101] The accused was carrying a firearm because, prior to this incident there had been a spate of robberies at his shopping complex.
- [102] At Bhunya police station he reported the matter to officer Mavuso. He voluntarily handed over his firearm which was in a brown holster and had two live ammunition. He also handed over Mr Shongwe's firearm which had five live ammunition. He was later detained at Mafutseni police station.
- [103] During cross examination the accused described the relationship between the Luyengweni and kaLaMgabhi communities as cordial. He explained that Luyengweni never stopped allocating its people land at Mhlabubovu but that

when they did, the kaLaMgabhi people would report the matter to the relevant structures for their intervention.

[104] When it was put to the accused that there was tension between the two communities as a result of the land dispute, the accused went historical as he told the Court about the origins of the land dispute. The accused conceded that the Motsas at Mhlabubovu are subjects of Prince Lembelele of Luyengweni.

[105] During cross examination it was suggested to the accused that he ought to have gone and reported the matter to relevant structure than approach the Luyengweni folk. The accused said he was not aggressive when he talked to the Luyengweni people. The accused stated that the people from Luyengweni were not aggressive and they were not fighting him. He said if they had been aggressive towards him, he would have left the scene and do as they had advised him.

[106] The accused testified that Sihle was the only person who was offended by the use of the word *timfucuta*. He said the rest of the group was not offended as they remained quiet because they did not find the word offensive. The rest of the group just mumbled.

[107] In cross examination the accused said he could not leave the scene when the people mumbled because Sihle came charging at him and everything else happened in a twinkle of an eye.

[108] The accused denied ever pushing Sihle during their altercation. When asked if Sihle assaulted him; the accused said he does not know what stopped Sihle from landing a punch on him.

- [109] When it was suggested that Simon Dlamini never assaulted the accused, the accused said Simon raised his knob-stick meaning to assault him. The accused said he was injured as a result of Simon's attack and that is why he was forced to defend himself. Un-meritoriously, the accused did not say where he was injured as a result. Mr Matsenjwa testified that the accused and his companions were not injured during the commotion at the scene.
- [110] The accused further disputed that Simon died as a result of injuries inflicted on him by the accused. The accused stated that Simon died due to bacteria when the colostomy was closed.
- [111] In twenty-five minutes from the first call he made to the station commander the accused had shot three people; when asked why he was not patient and wait for the police to come to the scene. The accused said he expected the police to get to the scene quickly; he said if he took five minutes to get to Bhunya police station, driving and paying no regard to speed humps, nothing would prevent the police from doing same seeing they use government vehicles.
- [112] When Ms Masuku put it to the accused that he could not wait for the police to arrive at the scene because he was hellbent on dealing with the Luyengweni folk by shooting them, the accused retorted: the prosecutor speaks as if this is a pleasant thing. This thing has closed many opportunities for me. I have said I am sorry I am not proud of what I did.
- [113] The accused testified that he gave his firearm permit to the police on 9 September 2020. When he was told that his gun permit had expired; his answer was-if you have a shop and its permit expires, it does not mean you no longer have a shop.

[114] The accused denied that he collected empty cartridges at the scene before he left with his companions.

The evidence of DW2-Sipho Matsenjwa

[115] Sipho Matsenjwa's evidence corroborates the evidence of the accused in material respects. He confirms that he was with Maziya and Zulu when they approached the accused and asked him to stop people from Luyengweni from allocating land at Mhlabubovu.

[116] When they got to the scene with the accused, the accused addressed the people from Luyengweni. He asked what they were doing in Prince Ndzimanye's land. The people kept quiet and only one person asked who the accused was. The accused phoned station commander of Bhunya police station and reported that there were people illegally allocating land at Mhlabubovu. DW2 corroborates the evidence of the accused on: the issue that accused spoke to Mkhabela and asked him what he was doing there as he was aware of the ruling concerning the land in question; and that someone told the accused to report the matter to relevant structures; the accused then said he does not talk to *timfucuta*. The Luyengweni folk began to mumble and make noise.

[117] Sihle got up and went to accused and remonstrated with him showing that he did not like what accused said. While Sihle and accused were pushing and shoving each other Simon, Dlamini stood up and walked like someone who was going round. Simon emerged behind the accused. Simon tried to hit accused with a knob-stick. The accused retreated and asked Simon if he wanted to hit him with a knob-stick. Simon stood there as if to hit the accused with his knob-stick. The accused took out a firearm and shot Simon.

He thinks Simon was shot three times. Matsenjwa did not see where Simon was shot but he did see Simon's knob-stick fall from his hand. He conceded that when Simon was shot for the second and third time he was unarmed. Simon fled after he was shot.

[118] Shongwe was standing behind the accused when he took out a gun, shot and missed the accused. The accused turned around and saw Shongwe had a firearm. Accused shot at Shongwe twice and Shongwe fell to the ground. The accused again shot Shongwe while he lay on the ground. The last shot was the third one being fired at Shongwe. The accused then went towards Shongwe and took Shongwe's gun and its black holster. The accused then went downwards and this witness does not know what he did. People fled the scene. The accused then went to Mkhabela.

[119] Mr Matsenjwa does not know how Tsabedze was shot.

[120] The accused, Maziya, Zulu and Matsenjwa went to the police and reported the matter.

[121] During cross examination Mr Matsenjwa testified that when they roped in the accused to come to speak to the Luyengweni people, they expected him to tell the Luyengweni people that what they were doing was wrong; that they should go back to Luyengweni since they know where their boundary ends. Matsenjwa testified that on previous occasions people from Luyengweni allocated land to people at Mhlabubovu. Even after the incident pertaining this case, people from Luyengweni continue to allocate people land at Mhlabubovu. Each time they did so, people from kaLaMgabhi would report the matter to the Regional Administrator. On 7 September 2020 they did not report the matter to the Regional Administrator because they only

realized land was being allocated after the ceremony to allocate land had been concluded.

[122] When it was suggested to him that the reaction from the Luyengweni people was due to accused's utterances of calling them *timfucuta*, Mr Matsenjwa said he does not think the accused called the Luyengweni Council *timfucuta*

[123] Mr Matsenjwa stated during cross examination that none of them was injured during the commotion and that includes the accused.

[124] The defence closed its case

Closing Submissions

[125] Both parties drew the court's attention to selective portions of the evidence in pursuit of their paths, which I will briefly summarise. Counsel for the Crown, Ms Masuku emphasized the evidence of the eye witnesses who saw the accused shoot the deceased persons; and the evidence of doctors who treated Simon Dlamini; and that of the police pathologist who determined the cause of death to be due to gunshot wounds. Counsel argued that the accused was the aggressor who used insulting language against the people from Luyengweni and that when they protested, he intentionally shot them dead.

[126] Ms Masuku submitted that from the evidence of all Crown witnesses, the accused failed to prove that he acted in self-defence when he shot and killed the deceased persons.

[127] Ms Ndlangamandla, Counsel for the accused argued that Sihle and the deceased persons were aggressors and that the accused faced imminent danger and had to use his firearm to protect life and limb. It was submitted

further that the accused did not exceed the bounds of self-defence in the circumstances.

[128] With regard to the last count, it was submitted that the Crown failed to prove that the accused's firearm licence had expired. It was urged that the accused bears no *onus* of proving his innocence and that the Crown has a duty to prove beyond reasonable doubt that the accused person's firearm licence had expired and they failed to do so.

[129] During cross examination of the accused, he stated that in his view Simon did not die due to the gunshot wound but that he died due to septicemia infection as pointed out by Dr Ggayi. This, I understand the accused to have been saying that the death of Simon Dlamini was not caused by the gun-shot wounds, but by a medical intervention which broke the chain of causation.

The law and analysis

The law

[130] For the Crown to succeed it had to prove, beyond reasonable doubt, that the accused shot Simon Dlamini and Sikhulu Shongwe multiple times and Themba Tsabedze once in the chest with a firearm with the intention to kill them and that the gun-shot wounds caused the deceased persons' death.

[131] Mr Ginindza, Mr Sihle Dlamini and Mr Mkhabela are eyewitnesses who gave detailed evidence that they saw the accused shoot the deceased with a firearm. Dr Reddy the police pathologist determined that the deceased died due to the following reasons: Mr Themba Tsabedze died due to a firearm injury involving the heart and lungs; Mr Sikhulu Shongwe died due to multiple firearm injuries over the left ear region, the collar region affecting the neck, facial muscles, the chest region as well as the lower cervical

vertebral anterior surfaces; Mr Simon Dlamini died due to complications consequent to abdominal injury as a result of a gun-shot.

[132] In light of the accused's testimony that he acted in private defence in count 1, 2 and 3 when firing the shots at the deceased, it seems necessary to briefly state the requirements of private defence.

[133] C.R. Synman in the well-known academic work¹ defines private defence as follows:

'A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening upon her 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 attack.'

Professor G. Feltoe² defines private defence in the following terms:

'The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack or take reasonable steps to defend another against an unlawful attack. Harm, and sometimes death, may be inflicted on the assailant in order to ward off the attack.'

In *S v Shaningua*³ said the following about private defence:

'In respect of the attack, it is required that the attack must be unlawful upon a legal interest which had commenced or was imminent, while the defensive act must be directed against the attacker the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances⁴. Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed. A further requirement for a defensive act is that the attacked person must be aware of the fact that he or she is acting in private defence, meaning, that the attacked person subjectively genuinely believed that he or she was acting in self-defence. A person therefore cannot accidentally act in self-defence as it requires an act of will. The onus is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded.

¹ Criminal Law, 6th edition, (2014) at page 102

² A Guide to Criminal Law of Zimbabwe, at page 45

³ (CC 09/2016) [2017] NAHCMD 224 (14 August 2017)

⁴ *S v Naftali* 1992 NR 299 (HC).

[134] From the above authorities, the following ingredients of private defence may be distilled namely that: (i) there must be an unlawful act; (ii) upon the accused or a third party where the accused intervenes to protect that third party; (iii) the attack must have commenced or must be imminent; (iv) the action taken must be necessary to stop the attack; and (v) the means used to avert the attack must be reasonable.

[135] Another instructive authority on private defence is *S v Steyn*⁵ where Leach J listed a number of factors which can be considered when adjudicating the question of whether a person acted in self defence. He said the following:

‘Every case must be determined in light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However there should be a reasonable balance between the attack and the defensive act as ‘one may not shoot to kill another who attacks you with a flyswatter’ (See: CR Synman ‘Criminal Law’ 5ed, at 103-107). As Prof Burchell has correctly explained ‘...modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account the defender acted reasonably in the manner in which he defended himself or his property.’ Factors relevant to the decision in this regard include the following (the list is by no means exhaustive)

- **The relationship between the parties**
- **Their respective ages, genders and physical strengths;**
- **The location of the incident;**
- **The nature, severity and persistence of the attack;**
- **The nature of the weapon used in the attack;**
- **The nature and severity of any injury or harm likely to be sustained in the attack;**
- **The means available to avert the attack;**
- **The nature of the means used to offer defence; and**
- **The nature and extent of the harm likely to be caused by the defence.’**

Analysis of evidence

[136] It is trite that the Crown bears the *onus* to prove the guilt of the accused beyond reasonable doubt. I will proceed to evaluate the evidence in its

⁵ 2010 (1) SACR 411 (SCA)

totality. I will juxtapose the evidence of the defence and that of the Crown. It is common ground that on the fateful day the accused shot the deceased persons. That much he admitted and pleaded private defence.

Shooting of Simon Dlamini

[137] In his evidence, the accused says Simon was accidentally shot (*wadubuleka*).

A person cannot accidentally act in self-defence as it requires an act of will.

[138] Concerning the shooting of Simon, the evidence from Mr Ginindza and from Mr Sihle Dlamini is that Simon approached the accused to calm the tempers between Sihle and the accused and that he never raised the knob-stick against the accused. According to Mr Ginindza and Mr Sihle Dlamini, Simon neither assaulted nor attempted to assault the accused. On the contrary, Mr Mkhabela's testimony is that Simon did raise his knob-stick towards the accused as if to assault him. Mr Mkhabela's version corroborates that of the accused.

[139] The law on self defence in eSwatini is settled. The legal position is that a person who is attacked and fears for his life or that he would suffer grave injury may defend himself to the extent necessary to avoid the attack. In other words, the attacked person is at large to use force to repel the unlawful attack against him. The degree of force used in repelling the attack should be no more than reasonably necessary in the circumstances. Consequently, a revenge or attack in retaliation for an earlier grievance is not protected by the law of private defence. An accused who pleads private defence should have been facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did⁶.

⁶ *Malungisa Antonia Batari v Rex*

- [140] At the time of the incident Simon was sixty-five years old⁷ while the accused person was forty-nine years old. Simon was part of the Luyengweni Inner Council meeting that was disrupted by the arrival of the accused and his companions. The accused asked the Council what they were doing on Prince Ndzimanye's land and no one answered him, he moved away from the group and called the station commander. He asked him to quickly send police to the scene or the accused will kill the people who were there. It is important to note that the accused says he asked the station commander to send people at the scene because people from Luyengweni were illegally allocating land there. If the version of the accused is correct, he ought to have waited for the police to come and intervene. He did not.
- [141] He then went back to the Inner Council from Luyengweni and used offensive language that was considered unacceptable by the Luyengweni folks.
- [142] Clearly, the accused was the aggressor at this stage of the incident. Accused confirms that the people from Luyengweni were not aggressive when he confronted them about why they were at Mhlabubovu on that day. They did not fight the accused. Chaos ensued when the accused used offensive language against them. Accused's explanation that he directed the offensive word to Big-Boy and not to the Luyengweni Inner Council is mischievous, misconceived and misleading because Big-Boy was part of the people from Luyengweni.
- [143] The accused was armed with a firearm. He was angered by a response from one of the Inner Council members that they were at Mhlabubovu on the instruction of Prince Lembelele. He then had an altercation and a scuffle

⁷ See Exhibit 17 at page 1.

with Sihle. Simon Dlamini and Themba Tsabedze are some of the people who tried to calm the tempers. They were both shot by the accused.

[144] The accused's version that he was under attack from the deceased persons, and, that he was defending himself by warding off unlawful attacks on his bodily integrity from the deceased cannot stand in the light of the totality of the evidence. The accused started the commotion which led to the confrontation between himself and Sihle. The people from Luyengweni were entitled to be upset at being labelled *timfucuta*. There is no evidence that shows that Simon was involved in the protestation. There is evidence however that he set out to calm tempers between Sihle and the accused. There is evidence also that he raised a knob-stick to strike the accused.

[145] If Simon was carrying a knob-stick and raised it towards the accused, the accused used disproportionate force to disarm him. As Snyman points out, one may not shoot to kill another who attacks you with a flyswatter. The accused shot Simon on the arm and the knob-stick fell to the ground-this was confirmed by both Crown and defence witness Mr Matsenjwa. The accused twice shot Simon in the abdomen, while he was retreating and unarmed. Accused's bodily integrity was not in imminent danger. The injuries inflicted on Simon Dlamini were grave and substantial and it defeats any notion of self-defence allegedly invoked by the accused person.

[146] Dr Tembe said Simon had a gun-shot wound below the chest, on the lower side of the abdomen and on the left lateral forearm. Dr Ggayi states that Simon had gun-shot wounds on the forearm and on the abdomen. This is contrary to defence Counsel's submission that Simon was shot once on the left arm and the other injuries to the abdomen were a result of that one bullet

exiting in Simon's abdomen. Accordingly, accused's version on this point is rejected as false.

[147] When it was put to the accused that soon after Simon was shot on the arm, Simon retreated and leaned on rocks, the accused deflected and prevaricated. Instead of answering the question, the accused gave the Court details about when he first became a licensed firearm owner. He told the Court he was trained to use a firearm. The Court heard that he was only twenty-six years old when he first owned a licensed firearm.

Novus actus interveniens

[148] The material question is whether it can be inferred that the accused's actions were the cause of Simon's death? The accused admitted inflicting gun-shot wounds on Simon's arm and abdomen. His evidence was corroborated by eye witnesses and medical doctors who treated Simon as well as the police pathologist who conducted the post-mortem.

[149] It is common cause that Simon died on 1 August 2021; that the post-mortem was conducted by Dr Reddy and he recorded the cause of death as complication consequent to abdominal injury as a result of gun-shot. Dr Ggayi treated and operated on Simon before the patient died. He recorded the cause of death as enterocutaneous fistula (after colostomy closure the patient had a leakage of the repairs on the intestine and an infection set in resulting in his death). Simon died of septicemia infection. Dr Ggayi gave a cogent account of the steps he took in treating the patient. The evidence reflects that proper procedures were followed and proper treatment was given at the Mbabane government hospital but still the patient died.

[150] From Dr Ggayi's evidence I deduce that if Simon was not shot on the abdomen, he would not have died. I therefore find that the cause of Simon's death was a direct result of the actions of the accused and that there was no intervening act between the accused person's conduct and deceased's death. Accordingly, the defence of *novus actus interveniens* in respect of the murder charge of Simon Dlamini must fail.

Shooting of Sikhulu Shongwe

[151] Mr Sikhulu Shongwe was behind the accused when, according to Crown witnesses he fired a warning shot into the air. This happened when the accused shot Simon Dlamini. Defence witnesses however say, Shongwe fired at the accused and missed. In my view, it is improbable that Shongwe fired at the accused and missed. It is more probable that when the accused fired three shots at Simon, Shongwe fired into the air in a bid to stop the accused from firing more shots. There is no reason in my view why a retired police officer who was not far behind the accused would have missed his target if he intended to shoot the accused. Sihle's evidence is more probable that Shongwe fired a shot into the air to scare the accused and not aimed at the accused. The voices heard saying 'he has shot him' were in reference to the accused shooting Simon before the accused turned and shot Shongwe. Mr Ginindza and Mr Sihle Dlamini testified that Mr Shongwe fired a warning shot when Simon was shot.

[152] There is ballistic evidence that Shongwe's firearm discharged ammunition at the scene.

[153] Shongwe was shot at close range by the accused. After being shot, Shongwe walked for a metre, fell on bricks and collapsed face down on the ground. In

the photographs presented as evidence from the Scene of Crime officer, Shongwe's body is pictured next to bricks. If Shongwe fell prostrate on the ground, he was unable to see where the accused was as the commotion went on. In my view he therefore could not have drawn his firearm and aimed it at the accused as he lay on the ground. Evidence from Crown witnesses is that the accused shot Shongwe as he lay on the ground facing down. The post-mortem report confirms the evidence of Crown witnesses that Shongwe was shot on the neck and on the spinal column.

- [154] When the accused shot Shongwe as he lay prostrate on the ground he was under no imminent attack to his person; he was now the attacker. It appears to me that the accused was now acting in retaliation for an earlier grievance that Shongwe also had a firearm. His conduct on this score is not protected by the law of private defence. The accused grabbed and pulled Shongwe's jacket and twice shot him at the back. The accused used deadly force against a dying Shongwe. For these reasons, self-defence does not avail the accused.

Shooting of Themba Tsabedze

- [155] There was no unlawful attack to the accused by Themba Tsabedze because he was unarmed when he was shot once on the chest by the accused. Tsabedze is said to have raised his hands as he tried to calm the situation. This evidence was not disputed by the accused. The accused only said he was disputing this evidence during cross examination. This smacks of an afterthought on the part of the accused.
- [156] During cross examination the accused was asked if Tsabedze was armed. Accused stated that there was a fight and he could not say if Tsabedze was armed.

[161] Coming to the issue whether the accused had acted with intention, it is not in dispute that the accused used a firearm to shoot all deceased persons. He shot them on delicate parts of the human anatomy. It is a notorious fact that chest, abdomen and neck are vulnerable parts of the human body where most vital organs are located. What is clear from the injuries sustained by the deceased is that the gun-shots were directed to parts of the human anatomy that are considered exceptionally vulnerable. The accused confirmed having shot Simon Dlamini and Sikhulu Shongwe multiple times which shows that even when the deceased persons were no longer a threat towards him, he went on with the shooting unperturbed. The weapon used by the accused is lethal and was not commensurate to the alleged threat.

[162] The only reasonable inference is therefore that the accused acted with intention to kill the deceased persons. Prior to the commencement of the commotion, the accused was heard telling the station commander that he was going to kill the people at the scene if the police did not get there quickly. Even though his version is that he simply reported the unlawful allocation of land at Mhlabubovu to the station commander, one has to consider what he did after dropping the first call to Mr Mngometulu. The accused was impatient with the police; he returned to the people from Luyengweni and provoked them by using derogatory language to refer to them; he again called the station commander to tell him to hurry up or chaos and bloodshed would ensue. He then shot and killed the deceased. He suffered no physical injuries during the commotion.

[163] Even after the deceased were killed, the accused is said to have gloated about his escapades as he allegedly told people he called while in police

custody that *wetfule ingwe esihlahleni*-that is, he solved a problem that was frustrating them for a long time.

[164] Having regard to all the circumstances of this particular case, the Crown proved the existence of *dolus eventualis*. When the accused brutally shot the deceased inflicting multiple injuries on them, he foresaw the possibility of his unlawful conduct causing the death of the deceased but he persisted in such conduct despite such foresight.

Count 4

[165] Officer Charlton Mtsetfwa submitted exhibit 14 being-a certificate of registration of firearms and a licence to possess a firearm in the name of the accused. According to the documents submitted, the accused was first issued with the firearm with serial number B57135 a 9MM pistol on 20 August 1997. This evidence was confirmed by the accused. The accused's licence to possess the firearm which is an exhibit before court was issued on 19 September 2018 and the expiry date is 20 August 2019. The accused neither admitted nor denied that his firearm licence expired in August 2019. He told the court that the expiry of a trading licence does not imply that the shop-owner no longer has a shop. In the judgment of this Court⁹ it is stated that the accused used to have a licence for the firearm but it had expired at the time of his arrest.

[166] I am satisfied that the accused was not in possession of a valid licence or permit to possess a firearm with live rounds of ammunition in contravention of provisions of the Arms and Ammunition Act, 1964.

⁹ *Ntuthuko Michael Dlamini v The King* (572/2020) [2021] SZHC 26 (10 March 2021) at page 1.

[167] In the result, the court finds as follows:

Count 1: Murder of Themba Tsabedze. The accused is found guilty

Count 2: Murder of Sikhulu Shongwe. The accused is found guilty

Count 3: Murder of Simon Dlamini. The accused is found guilty

Count 4: Contravention of Section 11 (1) (8) (a) (i) read with Section 14 (2) of the Arms and Ammunition Act, 1964. The accused is found guilty.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown: Ms Ncamsile Masuku, assisted by Ms N Mabila

For the Defence: Ms Noncedo Ndlangamandla, assisted by Ms L. Shongwe