



**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 193/2019**

In the matter between:

**THE KING**

Versus

**MENZI PATRICK MAVIMBELA**

**NDUMISO GAGASHI SIMELANE**

**Neutral Citation:**        *The King vs Menzi Patrick Mavimbela [193/19] [2022]*  
*SZHC 61 (7 April 2022)*

**Coram:**                    **LANGWENYA J**

**Heard:**                    29, 30 March 2021; 2, 3, 9, 10, 16 June 2021; 30  
November 2021; 21, 22 23 February 2022; 1 March  
2022; 28, 29 March 2022; 7 April 2022.

**Delivered:**                7 April 2022.

**Summary:** *Criminal Procedure-accused charged with murder in furtherance of common purpose-first accused prime mover of conspiracy to murder his wife-second accused hired, transported and paid for executing murder at instance of first accused-both accused persons had intention to kill-they planned and prepared to execute the plan to kill the deceased.*

*Criminal Procedure-evidence of an accomplice witness-whether evidence of accomplice witness credible-cautionary rules application-section 237 of Criminal Procedure and Evidence Act 67/1938-evidence of accomplice witness found to be credible and sufficient to sustain conviction against both accused persons-Both accused convicted of premeditated murder.*

## **JUDGMENT**

### **Introduction**

- [1] The accused persons are charged with murder. It being alleged by the Crown that upon or about 29 April 2019 and at kaPhunga in the Shiselweni district, the said accused persons, acting in furtherance of a common purpose did intentionally and unlawfully kill Zinhle Mndzebele and did thereby commit the crime of murder.
- [2] The first accused person is an adult male liSwati from kaPhunga in the Shiselweni district
- [3] The second accused person is an adult male liSwati from Mahlangatsha in the Manzini district.

- [4] The deceased is Ms Zinhle Mndzebele, an adult female liSwati and a wife of the first accused.
- [5] It is common cause that Mr Mavimbela and Ms Mndzebele were married in terms of customary law when she died on 29 April 2019<sup>1</sup>. Their marriage was sealed on 30 June 2015. No child was born of the union. Ms Mndzebele has a girl child from a previous relationship. Mr Mavimbela has three children from other relationships. Mr Mavimbela is employed by eSwatini Umbutfo Defence Force as a soldier. Ms Mndzebele was employed by the Correctional Services as a wardress. At the time she died she was working at Sidvokodvo correctional services.
- [6] The allegations against the accused persons are that in April 2019 and in Mahlabatsini area at Jabulani Gcina Zwane's home, the said accused persons conspired to murder Ms Mndzebele. The first accused, it is alleged is the prime mover of the conspiracy as he promised to finance it. On 28 April 2019 the second accused travelled to kaPhunga with Mbongiseni Nkhambule to kill Ms Mndzebele. Mr Zwane waited for the duo at kaKholwane. On return from kaPhunga, the second accused and Mbongiseni Nkhambule informed Mr Zwane that they could not gain entry into the house because it was locked. Mr Mavimbela called Mr Zwane in the following morning, a Sunday and enquired if the mission was accomplished. The response was negative. Mr Mavimbela is said to have told Mr Zwane that the door lock at his house is damaged; if they pushed the door, it would open. On Sunday 29 April 2019 Mr Zwane transported the second accused and Mbongiseni to Sidvokodvo. They travelled on their own to kaPhunga where they killed Ms Mndzebele by hanging her on the rafters of her

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<sup>1</sup> Dr R.M. Reddy, the police pathologist testified that Ms Mndzebele died on 29 April 2019.

bedroom. It is alleged that Ms Mndzebele's death was made to look like suicide. It was a staged suicide.

- [7] The accused persons pleaded not guilty to the charge.
- [8] The Crown led sixteen witnesses to prove its case.
- [9] Each of the accused persons testified on their own behalf. They did not call witnesses.

### **The Crown' case**

- [10] Mr Ndumiso Austin Shabalala was the first Crown witness. His testimony was that Mr Mavimbela is his cousin. In 2018 he was approached by Mr Mavimbela who enquired if he still had a firearm. Mr Mavimbela requested Mr Shabalala to carry out a certain task on his behalf using the firearm. Mr Mavimbela is said to have assured Mr Shabalala that the task was nothing consequential. Three days later, Mr Mavimbela asked Mr Shabalala to kill Ms Mndzebele's child. Mr Mavimbela is said to have lamented that his step-daughter was used by his in-laws to cast spells and to bewitch him. Whenever Ms Mndzebele's daughter visited, Mavimbela said she would come with *umutsi* and on her departure she allegedly took Mr Mavimbela's underwears. Mr Mavimbela denied that he asked Austin Shabalala to kill his step-daughter and his wife. He did not, however, deny the evidence that he said his step-daughter was being used by his in-laws as a conduit to bewitch him.
- [11] Mr Shabalala testified that Mr Mavimbela told him that his step-daughter lives at his in-laws' home at Mhlosheni. Mr Shabalala said he was given directions of where the child lives by Mr Mavimbela. It is Mr Shabalala's evidence that the first accused sent him a photo of Ms Mndzebele's child.

When his phone malfunctioned, the child's photograph could not be retrieved. Mr Shabangu stated that he was given six hundred (E600) Emalangeneni to go scan and assess the place where Ms Mndzebele's daughter lived. Mr Shabalala never went to scan the area. When Mr Mavimbela asked if he had been to see the place where the child lived and schooled, Mr Shabalala lied and said he had but found that the child was still very young. Mr Shabalala says he advised Mr Mavimbela to carry out the hit on the child himself.

[12] Mr Mavimbela disappeared for months and resurfaced in February 2019 and asked Mr Shabalala to kill Ms Mndzebele because she was promiscuous. Mr Shabalala testified that Mr Mavimbela had confided in him that he had unsuccessfully tried to kill his wife using *umutsi*. This was not disputed by Mr Mavimbela.

[13] It is Shabalala's evidence that whenever he met Mr Mavimbela he would talk about the plan to have him kill Ms Mndzebele. Mr Shabalala realized that the first accused was serious and obsessed with the plan to kill his wife. Mr Shabalala informed Mrs Thandiwe Dudu Vilakati and Mr Nhlanhla Vilakati (PW4 and PW3 respectively) about the first accused's plot to kill his wife. At first PW3 and PW4 did not believe Mr Shabalala. Later, however they advised him to report the matter to the police. Mr Shabalala reported the matter to officer Gwebu at kaPhunga police station. Mr Shabalala is said to have requested officer Gwebu to be discreet when actioning the matter so that Mr Mavimbela would not suspect that he had reported the matter to other people.

[14] Mr Shabalala testified that on another time Mr Mavimbela called him over the phone and asked that they meet. Mr Shabalala declined the invitation and

told him that he was off to consult with his traditional doctor. After abruptly cutting the conversation over the phone, Mr Mavimbela called again to find out which traditional doctor Mr Shabalala was going to consult; he told him the traditional healer was from Shiselweni. Mr Mavimbela told Mr Shabalala that the traditional doctor he was referring to was the one that was being consulted by his wife.

- [15] Mr Shabalala further testified that at another time Mr Mavimbela came to him carrying *umutsi* in a plastic. He said Mr Shabalala should bath using the *umutsi* as he prepared to kill Ms Mndzebele. Mr Mavimbela told Mr Shabalala to kill Ms Mndzebele when she was on the mountain on her way home. He suggested to Mr Shabalala that when referring to Ms Mndzebele over the phone they would use code names and phrases. Mr Shabalala testified that Mr Mavimbela advised that if he phoned and said ‘he should go and build him a toilet’, he will know that Ms Mndzebele was home and he can go and kill her.
- [16] Mr Shabalala told the court that Mr Mavimbela later suggested that his wife be killed along Mkhondvo River Bridge before she took the turn to kaPhunga. Mr Mavimbela is said to have reasoned that he would be considered a suspect if his wife was killed after she had taken the turn off to her marital home kaPhunga.
- [17] The first accused is said to have later suggested that his wife be killed while she was at home. Mr Mavimbela requested Mr Shabalala to point at Ms Mndzebele with a firearm while forcing her to ingest a weevil tablet. It would appear that the plan was to make her death look like a suicide. The first accused assured Mr Shabalala that it would be easy for him to gain

entry into his house because the kitchen door lock was not in a working condition.

[18] Mr Shabalala testified that the first accused undertook to secure a loan of fifteen thousand Emalangeni in order to pay Mr Shabalala for killing Ms Mndzebele. Mr Mavimbela further promised to pay Mr Shabalala more money from the death benefits of Ms Mndzebele. He also promised to sell Ms Mndzebele's car and pay Mr Shabalala the proceeds therefrom. At the time, Mr Mavimbela was carrying fifteen thousand Emalangeni cash and a weevil tablet which he gave to Mr Shabalala. Mr Shabalala declined to take the cash and the weevil tablet. He told the first accused that he has weevil tablets at home. He told the first accused that since they were relatives, there was no need to give him the money at the time.

[19] Mr Mavimbela asked Mr Shabalala to kill Ms Mndzebele on a Friday of the week they met. Mr Mavimbela informed Mr Shabalala that when the coast was clear and he could go and kill Ms Mndzebele, he would call and inform him to 'go and deliver sandals/*tincabule*.' Indeed the first accused called and asked Mr Shabalala 'to go and deliver *tincabule*'. Mr Shabalala declined to go and stated that he was involved in preparations for a funeral at a Makhubu family.

[20] Mr Mavimbela was unrelenting. He called and told Mr Shabalala that he would be posted at Buhleni for buganu celebrations in the week he called. He asked Mr Shabalala to kill Ms Mndzebele on a Wednesday of that week. Mr Shabalala did not go to kill Ms Mndzebele on the said Wednesday. On the following day, a Thursday, the first accused called and asked if the mission had been accomplished. Mr Shabalala lied and said he did not find Ms Mndzebele at home even though her vehicle was parked outside. The

first accused later called Mr Shabalala and told him that he had consulted his traditional healer who told him that his wife was away at the police station where she had romantic liaisons with a police officer. That is why, Mr Mavimbela reasoned, when Mr Shabalala arrived at first accused house Ms Mndzebele was not at home.

[21] The first accused then called Mr Shabalala and made him talk to someone he said was his *inyanga*. The *inyanga* spoke in Zulu. It is not uninteresting that Mr Zwane – the *inyanga* for Mr Mavimbela spoke siZulu when he testified before Court. The *inyanga* asked when Mr Shabalala would carry out the job of killing Mr Mavimbela’s wife. Mr Shabalala reiterated the lies he had told Mr Mavimbela-namely that when he went to kill first accused person’s wife he did not find her at home. Mr Mavimbela’s *inyanga* told Mr Shabalala that Ms Mndzebele was away at the police station in the evening Mr Shabalala arrived. Mr Shabalala lied to the *inyanga* that he could not carry out the job because he was travelling to Matata to deliver meat. Mr Shabalala lied to avoid carrying out the killing of Ms Mndzebele. Mr Mavimbela asked to meet Mr Shabalala at Matata. The meeting never materialized because he did not go to Matata.

[22] On Monday, Mr Shabalala was called through the phone by Mrs Vilakati. Mrs Vilakati asked when last he had spoken to the first accused. He told her he had spoken to Mr Mavimbela on the previous week. Mrs Vilakati then informed Mr Shabalala that Mr Mavimbela’s wife was dead at her home.

[23] Mr Shabalala called and asked officer Gwebu why he had not told him that Mr Mavimbela’s wife had died. Mr Shabalala feared for his life because he knew about the plot by first accused to kill his wife. He went to the police station with Mr Gwebu. At the police station he asked the desk officer why



the report he made to the police was not acted upon. The desk officer is said to have told him that they were waiting for a certain Ndzabandzaba before actioning Mr Shabalala's report.

[24] While he was at the police station, Mr Shabalala called Mr Mavimbela and, using coded language asked him why he was not told when Mr Mavimbela was taking out his 'bird.' Mr Mavimbela simply stated that he was going to call Mr Shabangu in the morning and said he was still busy with elderly people. He never called.

[25] In cross examination it was put to Mr Shabalala by Ms Ndlangamandla that he never told police that the first accused wanted him to kill his wife; that if he had, the police would have considered him the first suspect. Mr Shabalala insisted that he did tell police about the matter. It was also put to Mr Shabalala that he was never approached by the first accused and asked to kill his step-daughter and Ms Mndzebele. In response he told the court that he discussed these issues with the first accused. It was put to Shabalala that the first accused was informed by Mr Shabalala that his wife was in a romantic relationship with a police officer. This was denied by Mr Shabalala. Mr Shabalala was quizzed further about why he did not tell his girlfriend about the plot to kill the deceased. His response was that he did not want her to share the information with other people. He stated that he told Mrs Vilakati because he was hoping she would amass enough courage to tell the deceased about the plot as the deceased attended prayer sessions with Mrs Vilakati.

[26] Mr Hlatshwayo on behalf of the second accused asked Mr Shabalala if he could identify the two men he suspects were waylaying him when he was going home on the day the deceased was found dead. His response was in the negative.

- [27] Vusi Nhlanhla Vilakati (PW2) and Thandiwe Dudu Vilakati (PW3) confirmed that Mr Shabalala had told them that the second accused was requesting him to kill his wife. PW2 testified that he was informed by Mr Shabalala that Mr Mavimbela had promised to pay him with cash and a car if he was able to kill Ms Mndzebele. Mr Vilakati was questioned about the discrepancy between his testimony in court and his witness' statement made before the police. He responded by saying he was surprised that his evidence was not captured in the statement he recorded at the police station; that he had asked Mr Shabalala early when he first heard that the first accused had asked him to kill his wife.
- [28] PW4 is Thembi Regina Matsebula. On Monday, the day deceased was discovered dead she was called by the first accused. The first accused called her at about 1pm. She only got to first accused's home at around 4pm. The first accused asked her if his wife was present at their stokvel meeting. PW4 told the first accused that they did not have a stokvel meeting on Mondays; that they held the meetings on Tuesdays. She testified that Mr Mavimbela said he had been calling his wife and her number is not available. He said he also called his parental home and they said she did not arrive.
- [29] PW4 went to first accused's home to see if his wife was there. At first accused's home she found a car parked outside. On the verandah she saw a pair of shoes, the upper part of the kitchen door was half open. She knocked and there was no response. She and there was still no response. She went into the sitting room door and knocked. There was still no response. When she tried to go inside, she got scared and phoned the first accused and told her of what she had seen outside and on the verandah.

- [30] The first accused said it is just as well you are scared, it would be better if you were with a member of the Mavimbela family. PW4 later sent someone to call the first accused person's mother who, she was told was in the fields at the time. Mr Mavimbela's mother and other family members arrived at the scene. Police were called. They found the deceased inside her bedroom.
- [31] On 30 April 2019, and at Mbabane government hospital mortuary, Dr Reddy conducted a post mortem examination on the body of Ms Mndzebele. The pathologist found a red and white rope tied around the neck of the body of the deceased. The rope had two knots at the back of the neck of the deceased. The neck was swollen and the eyes were congested. The tip of her tongue was caught in between the front teeth and it was dry. The deceased presented with injuries which did not break part of her skin on the right side of the forehead and on her scalp. The doctor determined that the fatal injury was the one caused by the rope being tied around her neck resulting in her larynx and epiglottis being congested and with petechiae bleeding. Petechiae bleeding happens when tiny blood vessels called capillaries break open. When these blood vessels break, blood leaks into the skin. Ms Mndzebele died due to constriction of the neck. No toxic substance was detected on chemical analysis of the blood specimen taken from the deceased. The doctor handed in the post mortem report and the memorandum of the final opinion of the cause of death of the deceased. Both documents were marked exhibit 'A.'
- [32] Jabulani Gcina Zwane was introduced as an accomplice witness. He was accordingly warned in terms of section 234 of the Criminal Procedure and Evidence Act<sup>2</sup>. He testified that he is a traditional healer/*inyanga*, a member

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<sup>2</sup> No 67/1938.

of the community police and a resident of Mahlabatsini in Matsapha area. He testified that he knows both accused persons. He has known Mr Mavimbela since 2018 when he arrived in the company of his brother who was his regular customer/patient. Mr Mavimbela later came on his own and would regularly consult Mr Zwane as *inyanga*. Mr Zwane testified that he knows the second accused because they are members of the same church which they both attend. Both accused persons confirmed Mr Zwane's evidence in this regard.

[33] I am satisfied that both accused persons know and related with Mr Zwane for some time prior to the incident leading to the death of the deceased. Mr Zwane and the accused persons were not strangers to each other.

[34] Mr Zwane testified that in 2018, he was consulted by Mr Mavimbela who asked for *timbita* to get his wife to conceive. He gave Mr Mavimbela *timbita* for that purpose. Subsequently, Mr Mavimbela came to Mr Zwane and asked for *tilwane* to kill his wife. He said he wanted to kill his wife because he had seared a child out of wedlock. Mr Zwane did not give Mr Mavimbela *tilwane*. Instead, Mr Zwane gave the first accused *tihlati* with which to bath. Mr Zwane testified that he did not go along with the plan to kill the deceased.

[35] On 26 April 2019 Mr Mavimbela approached Mr Zwane and asked him if he knew of anyone who had a firearm. Mr Zwane referred Mr Mavimbela to Mr Simelane and the second accused herein. Mr Mavimbela left and returned to Mr Zwane's place in the company of Mr Simelane on 27 April 2019. There is no evidence that prior to Mr Zwane informing the first accused that the second accused may have a firearm or that he may know

someone who has one, and that he should try talking to him about same, the two accused persons knew each other.

[36] Mr Zwane says he asked Mr Mavimbela why he did not use his service firearm. Mr Mavimbela is said to have told Mr Zwane that he could not use his service firearm because it could easily be traced back to him.

[37] On 27 April 2019, Mr Mavimbela arrived at Mr Zwane's place in the company of Mr Simelane. The accused persons met and discussed different strategies to be used in killing the deceased at Mr Zwane's consultation room. The first accused said they could use a firearm to kill the deceased. They then said because the person they planned to kill knew how to use a firearm, it would be better to force her to ingest poison while they pointed her with the firearm. Mr Mavimbela suggested that his wife be made to ingest poison. Mr Zwane testified that Mr Mavimbela undertook to provide the poison. Mr Mavimbela promised to pay Mr Simelane with cash and a car for killing his wife. Mr Mavimbela promised to pay Mr Simelane with his wife's car. Once the job was done, the first accused promised to pay the second accused an amount of three thousand Emalangeni (E3000). Zwane was not promised payment for involvement in the killing of the deceased-so he testified. He says he only got three hundred Emalangeni from Mr Mavimbela-money which he used to fill up Mr Mavimbela's car with petrol. During cross examination by Ms Ndlangamandla, Mr Zwane was asked what the E300 he received from Mr Mavimbela was for. He stated that Mr Mavimbela gave him the E300 to thank him; he said it was an incentive and that Mr Mavimbela promised to give him more money.

[38] Mr Mavimbela asked Mr Zwane to transport the second accused and his accomplice to kaPhunga for the killing of his wife. To that end, Mr

Mavimbela left his motor vehicle in the custody of Mr Zwane. Mr Simelane returned to Mr Zwane's place and took Mr Mavimbela's car and said he was off to Nhlngano to secure a firearm from among his friends. Mr Zwane does not know if Mr Simelane was able to secure the firearm. There is no evidence before court that Mr Simelane secured the firearm.

[39] Mr Mavimbela had asked Mr Zwane to drive the second accused and his accomplice to Kaphunga where they were going to kill the deceased. Mr Mavimbela asked Mr Zwane to use his motor vehicle. Zwane refused to use his motor vehicle. Zwane used Mr Mavimbela's motor vehicle to transport the second accused to commit the murder of the deceased.

[40] On Saturday, Mr Simelane and Mbongiseni Nkhambule arrived at Mr Zwane's place and asked him to travel to kaPhunga with them. Mr Zwane declined to go with them and suggested that they ask Mbhekeni to take them to kaPhunga. Mbhekeni could not go because he was working a night shift. Mr Zwane changed his mind and took a bush-knife and left with the duo. Mr Simelane was driving Mr Mavimbela's car until they reached kaKholwane junction where Mr Simelane and Mbongiseni alighted from the car and walked on foot. It was night time already. Mr Zwane drove the car to kaKholwane and waited for the duo there. He was later called by Mr Simelane and Mbongiseni and asked to fetch them. They told Mr Zwane that they were unable to gain entry inside the house because it was locked.

[41] The next morning, Mr Mavimbela called Mr Zwane and enquired if the mission had been accomplished. Mr Zwane informed the first accused that his wife could not be killed because they could not gain entry to the house as it was locked. Mr Zwane testified that Mr Mavimbela told him the door lock is damaged. Mr Mavimbela also told Mr Zwane that he stole the key

and that the door is only supported by something that only needs a push in order for the door to open. The scene of crime report however reflects the door lock with the key inside<sup>3</sup>.

[42] On Sunday, Mr Zwane transported the second accused with Mbongiseni Nkhambule to Sidvokodvo. Mbhekeni Nkhambule was also present in the car. Mbhekeni returned to Matsapha with Mr Zwane.

[43] After receiving a call from the second accused and Mbongiseni at around 1.30a.m., Mr Zwane drove to kaPhunga to fetch them. The two came running. Mr Zwane drove past them and turned the car around on the road leading to kaPhunga. Once inside the car, the second accused complained that Mr Zwane was driving at a slow pace. Mr Simelane took over the driver seat and sped off towards the tarred road. Mr Zwane asked the second accused to stop the car and said he suspected something was wrong with the car. Mr Zwane drove the car.

[44] Inside the motor vehicle Mr Zwane complained that there was a foul smell of human excrement or faeces. Mr Simelane responded and stated that the person defecated on him. Mr Simelane and Mbongiseni informed Mr Zwane that they had killed the deceased by hanging her on the roof of her house.

[45] Mr Zwane drove the car via Ngwane Park filling station where the group bought coke and buns; ate and he took the duo to Mbhuleni and went home to retire for the night.

[46] The next morning, Mr Mavimbela called to find out if the mission was accomplished. Mr Simelane told him he had finished the task. After

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<sup>3</sup> See photograph 14 and 15 of exhibit 'B.'

receiving the report, Mr Mavimbela gave Mr Simelane money. Mr Simelane and Mbongiseni used the money to buy alcohol.

[47] On Monday evening and on Tuesday morning, Mr Mavimbela called Mr Zwane and asked him to diffuse the situation. Mr Mavimbela told Mr Zwane that people were talking too much and that it is bad so Zwane should diffuse the situation. According to Mr Zwane, Mr Mavimbela did not explain what he meant when he called for a diffusion of the situation. Mr Zwane last heard from the first accused on the Tuesday morning he asked him to diffuse the situation.

[48] Mr Zwane was twice called by the police. He met the police at a soccer field next to his home. The police were travelling in a white 4 x 4 motor vehicle. Mr Zwane was seen by Mr Simelane while talking to the police at the soccer field. Mr Simelane called Mr Zwane and enquired about the 4 x 4 motor vehicle and who he was with. Mr Zwane lied and said he was with some of his patients and was taking them to the veld for cleansing. He assured Mr Simelane that he will be back soon. At the time he said so, he was on his way to the police station with the police. He told the police what he knew about the matter.

[49] On his return, he was left at the soccer field by the police officers. Mr Simelane called Mr Zwane and asked where he was. Mr Zwane told him he was back at his consultation room. In the meantime, Mr Zwane was telling the police to stand at strategic places in readiness to arrest the second accused and his accomplice. Soon thereafter, Mr Simelane arrived at Mr Zwane's place and was invited inside Mr Zwane's *indumba*. When Mr Simelane was about to take a seat, the police pounced and arrested him. Mr



Simelane was taken to the police station. Mbongiseni eluded the police and fled the scene. He remains at large.

[50] Mr Zwane and Mr Simelane were taken to the police station. Mr Mavimbela's car was at Mr Zwane's place at the time.

[51] Mr Zwane stated that he had not reported the matter of the murder of the deceased because he feared for his life. He testified that Mbongiseni had informed him that he would be next to be killed to extinguish evidence. He was marked for death because, as he put it, he often objected to the plans to kill the deceased. For his objections, he was told he was loud mouthed and should therefore be eliminated.

[52] Mr Zwane testified that he drove deceased's assailants to kaPhunga because Mr Simelane did not have a driver's licence. In his evidence in chief, Mr Simelane confirmed that he did not have a driver's licence.

[53] It was put to Mr Zwane that Mr Mavimbela left his motor vehicle at Zwane's homestead after it developed mechanical problems. This was denied by Zwane. Zwane testified that he used Mr Mavimbela's vehicle on the two occasions to transport Mr Simelane and Mbongiseni to go and kill the deceased.

[54] It was further put to Mr Zwane that he considered Mr Mavimbela to be rich and they devised a strategy to go rob his home. Mr Zwane said that was news to him. I must note that the evidence of PW16 was that at the house of the deceased all looked normal; that they found her purse and cellphone on the dressing table. The police were of the view that there was foul play and that the 'suicide' was staged. This evidence was not disputed.

- [55] It was put to Mr Zwane his relationship with Mr Mavimbela was nothing more than a professional one; that he therefore could not have requested Mr Zwane to kill his wife. Mr Zwane denied that this was the case.
- [56] It was further put to Mr Zwane that Mr Mavimbela did not give Mr Zwane his motor vehicle. He, at no point authorized Mr Zwane to drive his motor vehicle-so it was put on behalf of Mr Mavimbela. Mr Zwane stated that Mr Mavimbela gave him his car and authorized him to drive the second accused and his accomplice to kill deceased.
- [57] PW15 5680 Detective Constable Sifiso Vilakati confirmed the evidence of Mr Zwane in so far as the arrest of the second accused is concerned. He is one of the investigating officers in this matter.
- [58] The Crown called PW16 2938 Assistant Inspector Mpendulo Dlamini. He is the chief investigator of this case. In 2019 he was stationed at kaPhunga police station as a desk officer. On 29 April 2019 and at about 1530 hours he received a report from a local member of the community Ms Matsebula. Ms Matsebula reported that she had been asked by the first accused to check his wife at his home as when he called her, she did not respond. Ms Matsebula requested police to check on her at her homestead.
- [59] Assistant Inspector Dlamini and other police officers 3239 officer Ndzabandzaba, 4740 Detective Constable Gwebu; 5441 Constable Mafiri; 7421 Constable Kunene and 4294 Constable Mkhonta went to deceased's home.
- [60] On arrival at deceased's home the police found a car Toyota Vios YSD 318 CM parked. On approaching the house by the kitchen door they found female black shoes; the door was ajar. The police searched around the house

and found that the windows were all closed. They entered through the kitchen door. PW16 was with 4740 Constable Gwebu when he entered the house. At the kitchen and in the sitting room the scene was normal. Inside the main bedroom, they found a female person's body hanging from the rafters of the house, undressed.

[61] He searched around the bedroom and saw a piece of a red and white rope next to the headboard. The piece of rope matched the one deceased's neck was tied with as she hung on the rafters. The rope tied around deceased's neck had two knots at the back of deceased's neck. He suspected foul play. The enamel chair inside the bedroom was broken. The bed reflected there had been a struggle before deceased died. PW16 then called the scenes of crime officers. PW16's evidence in this regard confirms that of 5970 D/Constable Thokozani Lukhele – the Scene of Crime Officer. Officer Lukhele's observations were:

**“The deceased hanged from the roof in a red rope and her feet were resting on the bed. The distance from the roof to the neck was very short about 40 cm, her right eye was swollen and her mouth was bleeding, also the neck had a red line and it could be established that the rope was inside the neck and it was hard to see it. The knot was found at the back of the neck just above the red line. A small piece of the red rope was found just at the floor with a knot and it was teared and you could judge it was used first in the neck before it teared. Also noted was a yellow chair broken and the bed was upside down, and she had defecated on herself. Also noted was a small blood clot in the left hand elbow.....”**

In my opinion, the injuries observed on the deceased's body by the Scene of Crime Officer, the Desk Officer and by the Pathologist; and the disheveled scene reminiscent of a struggle before deceased died, are not consistent with a suicide.

- [62] He observed two scratch marks around the neck which confirmed to him that the deceased did not die by suicide. There was also no suicide note in the bedroom. This evidence was not disputed.
- [63] While searching around the bedroom, he saw deceased's cellphone, purse with coins and a ring on the dressing table. This made the desk officer suspect there was foul play.
- [64] When he searched around the house, he noticed that the kitchen door was tampered with and there were scratches on the door frame. The key lock was on a locking position. This also made him suspect foul play.
- [65] He began his investigations and recorded a statement from Austin Shabalala. He stated what he had told the police on an earlier occasion-namely that the first accused asked him to kill the deceased. The report was made to the junior police officers. Police had not acted on the report when deceased died. He recorded statements from PW3 and PW4 who both confirmed Austin had informed them that the first accused had asked him to kill the deceased.
- [66] He interviewed Mrs Nomsa Mndzebele-deceased's step mother to ascertain what kind of relationship deceased had with the first accused person. Mrs Nomsa Mndzebele told PW16 that Zinhle's relationship with Menzi Mavimbela was in a bad state; that it was an unhappy relationship.
- [67] Through information he gleaned from Austin's statement that Menzi had consulted *inyanga* he then called Jabulani Zwane. On 2 May 2019 the police took Mr Zwane from his home at Mahlabatsini to Sigodvweni police station, interviewed him and recorded a statement from him. On the same day they arrested Menzi. Menzi was at a restaurant opposite the University campus at

Matsapha. The police introduced themselves to the first accused and explained their mission to him. They cautioned him in terms of Judges' rules and told him he was under arrest for the murder of his wife. The accused was informed of his right to legal representation and his right to silence. Menzi was taken to Sigodvweni police station where he was again cautioned in terms of the Judges' rules and questioned about the matter. The first accused said nothing. The police then introduced Jabulani Zwane to him. The police asked Menzi if he knew Jabulani Zwane; Menzi did not respond to the question. The police then excused the first accused.

[68] Jabulani Zwane informed the police that Gagashi Simelane and other accomplice made an appointment with him for cleansing. Mr Zwane went to his consultation room at Mahlabatsini and police arranged with him to lay in wait for the second accused person and his accomplice when they got into Zwane's *indumba*. The police arrested the second accused while at Zwane's *indumba*. The other accomplice fled into the night. He is still at large.

[69] Gagashi Simelane was arrested and the police introduced themselves to him and explained their mission. They cautioned him in terms of the Judges' rules and told him he was under arrest for the murder of a female of kaPhunga. He was informed of his right to legal representation and his right to silence. Gagashi said something.

[70] After being questioned at Sigodvweni police station, both accused persons were transported to kaPhunga police station where they were detained. On 3 May 2019, the accused persons were taken to Matsapha police station for the purpose of handing in of the motor vehicle which transported Gagashi and his accomplice to kaPhunga for the murder of the deceased. The motor vehicle was handed in by Jabulani Zwane. The first accused admitted that

the car in question was his. It is a Toyota Vios KSD 914CM. The motor vehicle was taken to kaPhunga and kept there as an exhibit.

[71] The police also took clothes that Gagashi wore during the commission of the offence. The clothes were taken so that forensic examination could be carried out. After due caution, Gagashi handed in a pair of brown shoes, trousers and a top. The clothes were, however never taken for DNA analysis but were kept at kaPhunga police station. Asked where the clothes were and if the forensic examination was carried out, the response from Mr Dlamini was shocking. He told the court that the clothes were never taken for DNA analysis. He said the clothes were kept at kaPhunga police station. He further said the clothes could not be brought to court because the police at kaPhunga police station failed to find the key to the exhibit room because the officer who keeps the key was not at work on the day of the trial. To say this was the highest form of dereliction of duty on the part of the police is an understatement.

[72] On 3 May 2019 and after due caution to both accused persons they elected to say something. Statements were recorded from both accused persons. They were each asked separately if they would like to make the said statements before a judicial officer and their answers were in the positive. On 4 May 2019 the accused were remanded by the principal magistrate and taken back to kaPhunga police station because the correctional services do not admit new inmates on weekends. The accused only made their confessions before a magistrate on Monday 6 May 2019 and were taken to the correctional services on that day. The Court's ruling that accuseds' confessions were inadmissible and reasons thereof are captured in Rex vs Menzi Patrick

Mavimbela and Another (193/20) [2022] SZHC 27 (1<sup>st</sup> March 2022) and should be read as part of this judgment.

[73] PW16 handed into court the exhibits in this matter: the piece of rope found next to the headboard (it measured plus-minus 50cm), the rope with which deceased was tied around the neck, it had two knots; the enamel chair which was broken and cream white in colour as well as the two motor vehicles.

## **Defence case**

### **DW1 Menzi Patrick Mavimbela**

[74] Mr Mavimbela testified that the deceased is his wife.

[75] Growing up at kaPhunga Mr Mavimbela testified that he knows Austin Shabalala. They are ‘cousin’ because Austin’s mother is a Matsebula. The Mavimbela and Matsebula clans do not intermarry. Mr Mavimbela describes Mr Shabalala as an entrepreneur who does upholstery, repairs fridges and crafts leather sandals. Mr Shabalala also served as a referee in community soccer tournaments.

[76] Mr Mavimbela said he had a happy marriage relationship with his wife. His marriage, like all other marriage relationships had its ups and downs. In 2017 he seared a child out of wedlock. His wife was not too pleased. She was angry with him for about two weeks. She would go visit her parental home when the first accused was off duty and was at their marital home. His wife then forgave and reconciled with him. She recommended that the first accused paid damages for the child and bring him home.

[77] Mr Mavimbela testified that he got along with his wife. His wife had a child from a previous relationship. He got along with his step-daughter. He would

drive her to school and fetch her from school. At the time the child lived with the deceased at Sidvokodvo correctional staff quarters. He would also drive the child to her maternal grandparents' home when schools were closed and fetch her when school holidays were over.

[78] Mr Mavimbela denied hiring Austin Shabalala to kill his wife. He says he had no reason to kill his wife because he was in good terms with her. He denied ever asking Austin to kill his step-daughter. He denied that he paid Mr Shabalala E600 to kill his step-daughter. He further denied that he tried to kill Mr Shabalala. He denied asking Mr Shabalala if he still had a firearm. He testified that he uses a firearm at work and does not own one. It is his evidence that he is not allowed to use his service firearm when he is off duty. Strangely, during cross examination when it was put to Mr Mavimbela that he had enquired from Mr Zwane if he knew someone who had a firearm; his response is that is not true; he uses a firearm from work. He said he thinks he would use his service firearm. How he could do that if he was not allowed to carry the firearm if he was not on duty; how he could now use a service firearm when, as he put it, it could easily be traced back to him is unclear to me.

[79] He confirms that he called Ms Matsebula and asked her to check on Ms Mndzebele at her homestead. He called Ms Matsebula because she and his wife were members of the same stokvel; he called to find out if they were in a meeting together. In times past he had called his wife and she could not reach her. It transpired that she had been in a meeting of their stokvel with Ms Matsebula. Mr Mavimbela says he called Ms Matsebula because he wanted to ask his wife to pay a brick-layer he had hired with money he had left at home. Mr Mavimbela says he also called his biological mother but



could not reach her as her phone was not available on the network. He called make Ndwandwe as well as his father-in-law Mr Siphon Mndzebele. Menzi testified that his father-in-law informed him that Zinhle had said she was coming to Mhlosheni in the evening. Menzi says he then asked his father-in-law to inform Zinhle to call him as he wanted her to send money to a brick-layer through mobile money. When he was asked where Zinhle would get the money since he had said he left the brick-layer's money at their marital home, he said Zinhle always carried money with her.

[80] Mr Mavimbela confirmed Mr Zwane's evidence on how they first met. He testified that he regularly consulted and was treated by Mr Zwane-his *inyanga*. Mr Zwane would provide him with *timbita* and *tihlati*. He used *tihlati* to cleanse himself. In his evidence in chief the first accused said he was close friends with Zwane as he consulted him often. This evidence is new and diametrically opposed to the line of cross examination which implied that the relationship between Mr Mavimbela and Mr Zwane was strictly professional. During cross examination, Mr Mavimbela stated that he only discussed how Zwane could help him as his *inyanga* and when Zwane asked to use Menzi's car to attend night vigils and to travel to far flung areas to practice his trade and never discussed issues about if Zwane knew of anyone who had a firearm. He denied ever hiring Zwane to kill his wife. He stated that he could not do that because Zwane is a member of the community police and works with the government police service.

[81] When confronted with the evidence that Zwane said he was informed by the first accused that he could not use his service firearm to kill his wife because it could easily be traced back to him; Mr Mavimbela's response was that his relationship with Zwane was that of *inyanga* and patient (something akin to

doctor/patient) relationship; Zwane treated him with *imbita* which helped cure his ulcers; he said Zwane knew nothing about firearms. This response, in my view is evasive.

[82] In my view, Mr Mavimbela's evidence that he would lend his car to Mr Zwane to travel to far flung areas in pursuit of his vocation as a traditional healer and to attend night vigils seems to confirm that this was not an ordinary *inyanga* and patient relationship but one of people who were good friends too.

[83] Mr Mavimbela confirmed that his motor vehicle was in Mr Zwane's possession when his wife died.

[84] Mr Mavimbela denied hiring the second accused and promising to pay him with cash and with a motor vehicle belonging to his wife. It is his evidence that he first met the second accused on 2 May 2019 when he was arrested.

[85] Mr Shabalala and Mr Mavimbela's relationship is also one that must be unpacked. Mr Shabalala testified that the first accused is his 'cousin' and they related well together. Mr Shabalala told the court that Mr Mavimbela would come to him and discuss the subject of killing his wife on different occasions in person and through telephone calls. Mr Mavimbela admitted that Austin was his cousin but said their relationship was a professional one as Austin was way older than him. Probed on how Austin knew Ms Mndzebele had a child if their relationship was not close, the first accused said Austin once worked and lived at Mhlosheni ka Mhlanga next to Ms Mndzebele's parental homestead. He therefore knew the child because she lived at Zinhle's parental home. Mr Mavimbela testified that he got to know that Mr Shabalala worked at ka Bhukuda at Mabhananeni at Zigi's garage

when they met at Zinhle's parental home during their *lobola* ceremony. Mr Mavimbela testified that he was informed by Austin that he lived at kaMhlanga. It is noteworthy that Mr Shabalala was never confronted with the evidence that he once lived, worked in Mhlosheni; that he attended deceased and first accused's *lobola* ceremony. This version has all the makings of a well-oiled but transparent fabrication and it is not reasonably possibly true.

### **The case of the second accused**

#### **DW2 Ndumiso Gagashi Simelane**

[86] Mr Simelane hails from Mahlangatsha in the Manzini district. His parental home is at Malutha. He has four children. He is thirty-one years old. His education level is standard one. In years past he lived in Mbabane with his aunt. He would work as a gardener in people's homes as well as wash cars. He relocated to Matsapha in 2008 and lived at kaNdlunganye.

[87] He testified that he was arrested on 2 May 2019 at Mr Zwane's *indumba*. When he was arrested, he had just returned to Matsapha from Malutha. At Malutha he had been working on securing roof poles to supply to a customer who had given him a tender in that business.

[88] On 2 May 2019 he had been called by Mr Zwane earlier during the day. Mr Zwane had requested Mr Simelane to transport him to a night vigil that week. When he received the call from Mr Zwane he was with a friend Dumsani Nhleko. He declined Zwane's request because the mini-truck he was using was not in a good mechanical condition. I note that the Malutha version, the story that Zwane requested Mr Simelane to take him to a night vigil using a mini-truck is new; it was never put to Mr Zwane.

[89] In chief, Mr Simelane portrayed himself as a hustler and a man of affairs who was busy tending to his agricultural and poultry farming business, selling chickens and getting tenders to prepare and deliver roof poles. He testified that Zwane was one of his loyal customers as he bought chickens from him for domestic consumption and for church meetings.

[90] Mr Simelane denied ever travelling to kaPhunga with Mr Zwane and Mbongiseni Nkhambule. He insisted that on 29 April 2019 he was at Malutha. At Malutha he lived with his parents. He denied ever being hired to kill Mr Mavimbela's wife in return for cash and a car. Notably, Mr Simelane introduces his *alibi* when he gives his evidence in chief. None of the aspects of his *alibi* were put to Mr Zwane.

*Proof beyond reasonable doubt*

[91] To convict the accused persons of murder, I must be satisfied beyond reasonable doubt that the first accused made an agreement with Mr Simelane that Mr Simelane would kill Ms Mndzebele, and that Mr Mavimbela took steps to aid Mr Simelane in doing so. A mere agreement between the two would result only in a conviction for conspiracy to murder. To be guilty of murder, Mr Mavimbela must also have assisted Mr Simelane in implementing the agreement<sup>4</sup>. In establishing whether the Crown has proved its case beyond reasonable doubt I must ask myself what facts I can be sure are true from the evidence led before court, and then go on to decide whether there is any reasonably possible account of those facts, however unlikely, that is consistent with Mr Mavimbela and Mr Simelane's innocence.

[92] It does not matter whether I subjectively believe that both accused persons are guilty of the murder of Ms Zinhle Mndzebele. Nor does it matter if I

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<sup>4</sup> See: *R v Njenje* 1966 (1) SA 369 (SRA) at 377.

subjectively disbelieve parts or the whole of the accused persons' versions. What matters is whether, objectively evaluated, the facts proved before Court are consistent with the reasonable possibility that the accused persons are innocent. If the facts are found to be so consistent with the reasonable possibility of the accused persons' innocence, I must acquit them.

[93] Conversely, the Crown must have established that both accused persons' knowing and intentional participation in the murder was in furtherance of a common purpose and is the only reasonable conclusion to be drawn from the proven facts.

[94] Differently put, in criminal matters the Crown bears the *onus* of proof beyond reasonable doubt. The accused persons, on the other hand, may only provide an explanation which may be reasonably possibly true in order to be found not guilty and acquitted. It is further trite that even where the accused persons' explanation is found to be improbable, the court may not convict such accused persons unless it is satisfied that the explanation is false beyond reasonable doubt.

#### *Evidence of a single witness*

[95] The evidence of Mr Zwane constitutes that of a single accomplice witness evidence in as far as planning and execution of the murder of the deceased by the accused persons is concerned. The evidence of Mr Shabalala is also that of a single witness in as far as the meetings he held with the first accused and plotting to kill the deceased and her child is concerned. It is trite law that evidence of a single witness should be approached with caution. It is however also trite that the exercise of caution should not displace the exercise of common sense<sup>5</sup>.

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<sup>5</sup> *S v Snyman* 1968 (3) SA 582(A); See also *S v Sauls and Others* 1981 (3) SA 172(A).

[96] The court in *S v HN*<sup>6</sup> said the following regarding the evidence of a single witness:

**Evidence of a single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there some shortcomings in the evidence of a single witness the court is satisfied that the truth has been told.'**

[97] Mr Shabalala's evidence that the first accused enquired if he still had a firearm; that the first accused requested him to kill the deceased by forcing her to ingest a weevil tablet is consistent with Zwane's evidence with regard to steps that the first accused took to plan the murder of the deceased. Mr Shabalala's version is believable because he reported the matter to PW2 and PW4 (Mr and Mrs Vilakati) as well as to the police at kaPhunga. I am satisfied, despite the cautionary rules applicable to his evidence, that Mr Shabalala told the truth and that his evidence is credible and reliable.

#### *Evidence of an accomplice witness*

[98] The law relating to the acceptance of accomplice evidence is settled. It is based on section 237 of the Criminal Procedure and Evidence Act<sup>7</sup>. Several authorities have distilled at least three guidelines on the application of this section namely: (i) that the court must find that the evidence of the accomplice witness is credible; (ii) there must be independent evidence that the offence was actually committed and (iii) there is a need in the court to observe the cautionary rule.

[99] When considering the accomplice evidence of Mr Zwane, as regards the involvement of the accused persons in the commission of the offence, the

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<sup>6</sup> 2010 (2)NR 429(HC) at 443E-F

<sup>7</sup> 67/1938 as amended

court must follow a cautious approach. By his nature, an accomplice witness has intimate knowledge of the crime committed and is therefore able to shift the blame onto the accused persons and extricate himself from the commission of the crime, thereby reducing his blameworthiness. To reduce the risk involved in his evidence is to look for corroboration in other reliable evidence<sup>8</sup>.

[100] Nathan CJ in *R v Mtetwa*<sup>9</sup> stated as follows:

**‘This is accomplice evidence. In terms of section 237 of the Criminal Procedure and Evidence Act 67/1938 a court may convict on the single evidence of any accomplice provided that such offence has by competent evidence other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of the court to have been actually committed. This section does not require that there should be corroboration implicating the accused; but nevertheless as pointed out by Hoffman: *South African Law of Evidence 2<sup>nd</sup> ed. P. 399*, corroboration implicating the accused still falls to be considered under the well-known ‘cautionary rule.’**

[101] In the absence of evidence corroborating that of an accomplice the court may still convict an accused person provided there is some other assurance that the evidence of the accomplice is reliable. That assurance may be found where the accused is a lying witness or where he does not give evidence. The risk of incrimination will also be reduced, the courts have held, in a proper case where the accomplice is a friend of the accused. Where none of these features exist, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance and rejection of the accused’s evidence is only permissible where the merits of the accomplice as a witness and the demerits of the accused as a witness are beyond question<sup>10</sup>.

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<sup>8</sup> *S v Gurirab and Others* 2008 (1) NR 316 (SC).

<sup>9</sup> 1976 SLR 364 (HC) at 367BC

<sup>10</sup> *S v Masuku* 1969 (2) SA 25A, 375 (N) at p. 375-377; See also *S v Ncanana* 1948 SA 399 at 405-406

[102] The court in *S v Tuzembeh*<sup>11</sup> on the evidence of an accomplice said that corroboration is merely one indicator required to show that the evidence of the accomplice is trustworthy; there could be other indicators to show trustworthiness. The totality of these indicators are referred to collectively as the cautionary rules.

[103] The court emphasized in *S v Francis*<sup>12</sup> that it is not expected that the evidence of an accomplice should be wholly consistent and wholly reliable, or even wholly truthful. It is sufficient that in its essential features it has a ring of truth. Nonetheless it is still necessary that the court should be satisfied beyond reasonable doubt that in its essential features the story which he tells is a true one.’

[104] When applying these principles to the evidence of Mr Zwane, it is key to bear in mind that he at no stage during his testimony tried to extricate himself from the commission of the offence of murder. What appears to be significantly relevant with the assessment of Zwane’s evidence is that, upon his being questioned by police, he immediately came clean and cooperated with the police, sequential thereto he made a statement to the police which culminated in him being made an accomplice witness.

[105] As with the evidence of a single witness, the evidence of an accomplice witness need not be completely free from defects, provided the court in the end is satisfied that the truth has been told.

[106] As far as the evidence of Zwane implicates both the accused the gist thereof is that from the outset, and at the instance of the first accused, Mr Zwane and the accused persons were involved in the planning and execution of Ms

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<sup>11</sup> 1993 NR 134 HC

<sup>12</sup> 1991 (1) SACR 198(A) at 205c-e



Mndzebele's death. The first accused confided to Mr Zwane his desire to kill the deceased. Mr Mavimbela sought a firearm; Mr Zwane directed him to the second accused, who in turn travelled to Gege/ Nhlango to look for a firearm from among his friends. During the planning of the murder of the deceased, it appears that the firearm was not so much going to be used to fire at the deceased as much as it would be pointed at her while she was forced to ingest poison. It was impressed that the firearm had to be a real one because the deceased knew a firearm. Mr Zwane and the second accused did not know the deceased. They did not know she was a wardress and therefore knew a real firearm. This information was the exclusive preserve of the prime mover of the conspiracy who also promised to finance it to achieve his interests-Mr Mavimbela.

[107] The aim was to make the whole act look like a suicide. There is, however no evidence that the deceased died due to poisoning. There is evidence from the scene of crime officer and from the police pathologist that the deceased died due to constriction of the neck. The deceased was found hanging from the rafters of her room. It was a 'suicide,' only it was a staged suicide. PW16 said so much. It has not been disputed that the deceased was murdered. PW16 told the court about evidence at the scene of crime which negated death of the deceased by suicide. He also informed the court about evidence which negated that a robbery was carried out at deceased's home.

[108] Mr Zwane testified that he received a report from the second accused and Mbongiseni Nkhambule that they hanged the deceased. This report was communicated to the first accused when he called and asked to be updated if the mission had been accomplished.

[109] Mr Zwane testified that when he collected the second accused and Mbongiseni Nkhambule after they had been to kill the deceased, there was a foul smell of human excrement soon after the duo boarded the car Zwane was driving. Zwane says he was told by the second accused that the deceased had defecated on him. This evidence was not disputed by the second accused. Evidence corroborating Zwane's evidence in this regard is that of the scene of crime officer who notes that the deceased had defecated on herself.

[110] Contrary to the beliefs of Counsel for the defence, in my opinion Zwane testified in an honest and forthright manner. He was consistent throughout and appeared confident when questioned in cross examination; neither did he contradict himself in any material respect.

[111] For the aforementioned reasons, I am satisfied, despite the cautionary rules applicable in his evidence that Zwane told the truth and that his evidence is credible and reliable. He is accordingly indemnified from prosecution for the murder of the deceased herein.

*Did accused persons act in furtherance of a common purpose?*

[112] The doctrine of common purpose states that the co-accused are liable because they participated in the killing of the deceased with the necessary intention. Put differently, the accused persons are co-perpetrators (*socii criminis*) and their liability falls to be decided on the usual common law principles relating to *actus reus* and *mens rea*.

[113] There is evidence that both accused persons had the intention to kill the deceased. They planned and strategized for carrying out the murder of the deceased. The first accused is the prime mover of the conspiracy to murder

the deceased. He financed the endeavour and provided transport to the place where the deceased was killed. The second accused executed the plan by hanging the deceased. He reported back to the first accused and was given money by the first accused for executing the plan. Common purpose couldn't be clearer.

### *Analysis-Defence Case*

[114] Next I turn to consider the accused persons' defence in light of the evidence as a whole and whether there it is reasonably possibly true. What is required of the court is to decide on the strength of all the evidence adduced whether there exists no reasonable doubt that the accused persons committed the offence for which they stand charged.

[115] The dictum from *R v Mlambo*<sup>13</sup> is apposite where it is stated:

**'An accused's claim to the benefit of a doubt when it might be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'**

### *Analysis & Conclusion of Mr Mavimbela's case*

[116] The first accused person's defence in this instance amounts to nothing more than a blunt denial of the offence charged, claiming never to have planned or plotted and executed his wife's murder. Besides the evidence of Zwane which directly implicates the first accused, there is no evidence in support of the first accused person's version.

[117] When considering the first accused person's versions against the proved facts, it is evident that Mr Mavimbela indeed met with Mr Zwane and Mr

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<sup>13</sup> 1957 (4) SA 727(AD)

Simelane and conspired to kill the deceased. When the first accused testified he denied that he initiated the plot to kill the deceased and that he had promised to pay Mr Shabalala, Mr Zwane and Mr Simelane for executing the plan to kill the deceased. Mr Zwane testified that there was a meeting at his consultation room where himself, the first and second accused met and strategized on how the deceased would be killed. The first accused requested the second accused to kill deceased and promised to pay him E3,000 and a car. After a report was made to the first accused that the mission had been accomplished, he gave the second accused some money.

[118] Mr Mavimbela was the prime mover of the conspiracy to kill his wife. Mr Mavimbela promised to finance the conspiracy and infact did in order to achieve his own interests. Mr Mavimbela played a major role because Ms Mndzebele would not have been killed if he had not actively participated in the plan and provided his motor vehicle to ferry Ms Mndzebele's murderers and requested Mr Zwane to drive the second accused and Mbongiseni to kaPhunga for the murder of the deceased.

[119] When confronted with the version of the Crown witnesses, Mr Mavimbela persisted in his bare denials and kept adjusting his version by introducing new evidence during the defence case. This court has no doubt that the evidence of the first accused standing at variance with that of Mr Zwane's and that of Mr Shabalala's and that of PW16 evidence is false and falls to be rejected.

[120] The behaviour of Mr Mavimbela after the death of his wife cannot be seen as reasonable and consistent with that of a person who had just lost a beloved person. He was notified about the death of his wife as early as Monday morning by Mr Zwane and Mr Simelane. When Mr Mavimbela

called Ms Matsebula, Make Ndwandwe and deceased's father; he knew already that Ms Mndzebele was dead. The police called and informed him that his wife was dead in the afternoon when they made the gruesome discovery. PW16 testified that the first accused kept promising to come home but did not arrive. He was arrested at a restaurant; two days after his wife had been dead.

*Analysis and conclusion of evidence of Mr Simelane*

[121] The second accused denied any involvement in the commission of the crime charged. There is evidence from Mr Zwane that Mr Simelane admitted hanging the deceased and further stated that the deceased had defecated on him in the process. Mr Zwane who implicated the accused persons as perpetrators was not discredited during cross examination and neither is there proof from Mr Simelane's evidence that Mr Zwane concocted his version to falsely incriminate the second accused.

[122] Mr Simelane distanced himself from the offence claiming an *alibi* that he was at Malutha at the relevant time. There is no duty on the accused to prove his *alibi*, if it is reasonably true, then he must be acquitted<sup>14</sup>. The *alibi* must further not be considered in isolation but in the light of the totality of the evidence. When the court is faced with an *alibi* that is false, the effect thereof on the accused's case is that it places him in a position as if he had never testified at all<sup>15</sup>. The giving of a false *alibi* in circumstances where there is direct evidence of the commission of the offence, *ipso facto* tends to strengthen the direct evidence against him as there is no evidence gainsaying it.

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<sup>14</sup> *R v Hlongwane* 1959 (1) SA 337(A) at 340H.

<sup>15</sup> *S v Shabalala* 1989 (4) SA 734(A) at 736B-C.

[123] The remarks by the Court in *S v Zwayi*<sup>16</sup> are apposite:

**‘If the accused’s defence is that he was not present when the offences were committed but somewhere else it is manifestly an alibi defence. But the accused does not bear a burden of proving that his alibi is true. The Court is required to assess his alibi in the same way as any other defence, namely whether it can be accepted as being reasonably possibly true or whether it should be rejected as it is obviously false. See *R v Biya* 1952 (4) SA 514 (A) 521D-E and *R v Hlongwane* 1959 (3) SA 337(A) at 340H and 341A-B at 340H and 341A-B as well as *S v Mhlongo* 1991 (2) SACR 207(A) at 210d-f at 210d-f.**

**It should be apparent that if the Court is properly to assess whether there is a reasonable possibility of the alibi being true, the details thereof should be provided since in the absence the accused’s defence is simply a bare denial. In my view, if these details are only disclosed as in the present instance, at the late stage when the accused testifies, the value to be accorded to the alibi may be adversely affected. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he had to disclose the details of his alibi defence during the cross examination of the State’s witnesses. On the other hand, if he withholds same until he testifies there is prejudice to the State since the State will not have been provided with the opportunity of leading evidence which could expose the alibi as being false.’**

I respectfully associate myself with these sentiments.

[124] Mr Simelane in the present instance denied having been present when the murder was planned and committed. It was only during his own testimony that he claimed to have been at Malutha at the relevant times. This had not been put to the witnesses for the Crown during cross examination which might have prejudiced the Crown by not affording it the opportunity to call witnesses that could possibly have refuted the accused’s *alibi*.

[125] When evaluating the *alibi* defence in the light of the totality of evidence adduced, the court is faced with a conflict of fact and the proper approach in such a case is for the court to apply its mind not only to the merits and demands of the Crown and defence witnesses respectively, but also to the probabilities of the case.

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<sup>16</sup> 1997 (2) SACR 772 (CKHC).

[126] There is no explanation why the above new version that surfaced in the evidence of the second accused was not put to the Crown witnesses. In the absence of an explanation, this court is constrained to conclude that the Crown's case, which is at variance with the new version of the second accused, stands to be accepted as a true version of the events that occurred on the fateful day deceased died.

[127] For the afore-stated reasons, it seems inescapable to come to the conclusion that the defence of the accused persons is not reasonable possible and falls to be rejected as false where in conflict with that of the Crown witnesses.

[128] I am accordingly satisfied that the accused persons committed the offence of premeditated murder of Zinhle Mndzebele.

[129] Accordingly: Menzi Patrick Mavimbela you are found guilty of premeditated murder of Zinhle Mndzebele.

[130] Ndumiso Gagashi Simelane you are found guilty of the premeditated murder of Zinhle Mndzebele.

For the Crown: Ms L Hlophe assisted by Ms F. Gamedze

For the first accused Ms N. Ndlangamandla

For the second accused: Mr A. C. Hlatshwako