



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 133/2018

In the matter of

REX

Versus

SIBUSISO NELISA HLATSHWAKO

Neutral Citation: *Rex vs Sibusiso Nelisa Hlatshwako [133/18] [2023]*

SZHC 110 (3 May 2023)

Coram: **LANGWENYA J**

Heard: **1, 16 August 2022; 6, 7 March 2023**

Delivered: **3 May 2023**

Summary: *Criminal law-Criminal Procedure-Private defence-whether private defence established-to constitute private defence the force used must be reasonably necessary in the circumstances for the accused to protect himself against an unlawful attack and must be commensurate with the danger apprehended-provocation-effect of provocation in law and on current charge-whether or not case proved against the accused.*

JUDGMENT

Introduction

- [1] The accused was charged with murder, it being alleged by the Crown that on 25 April 2018, at or near Msunduza in the district of Hhohho, the accused did unlawfully and intentionally kill Stanley Dlamini.
- [2] When the charge was put to the accused, he pleaded not guilty.
- [3] The Crown led witnesses and submitted documentary evidence in support of its case.
- [4] The accused testified on his own behalf and called one witness.
- [5] The brief summary of substantial facts is that in the early morning hours (between 3am and 4am) of 28 April 2018 there was an altercation between the accused and the deceased. The altercation degenerated into a fight over certain utterances the deceased is said to have made to Menzi Gama also known as 'Gauzen'. After the fight, the deceased was left lying on the ground bleeding. People who were at the scene administered first aid and stopped the bleeding. The deceased was later taken by the police to the

hospital where he was pronounced dead. The accused denies responsibility for the death of the deceased and pleads provocation and private defence.

The Crown's case

Evidence of Dr Swapnika Nugala-Police Pathologist

- [6] Dr Swapnika Nugala is a police pathologist who explained the contents of the post-mortem report. It was her evidence that the deceased person died due to multiple injuries caused largely by high impact blunt force¹. The Court heard that the deceased fractured the frontal bone and the left temporal bone of the skull; he had extra-dural and intra-cerebral bleeding in the brain; his ribs and chest bone was fractured; his heart, pericardial sac, mediastum² and thymus, the spleen and liver were ruptured. The doctor explained that the injuries resulting in the rupture of the following organs: mediastum and thymus, heart and pericardial sac, liver, gallbladder and biliary passages and the spleen were fatal.
- [7] The deceased also had abraded contusions³ on the following parts of his body: the left side of the forehead; the left cheek adjacent to and below the left eye; on the middle portion of the upper border of the left shoulder; on the right shoulder; on the right side of the forehead; on the right knee and on the left knee. The deceased also had a lacerated wound on the left side of the forehead. The doctor stated further that the injury beneath deceased's eye was not an old injury and that it happened at the same time as the other injuries. During cross examination it was suggested that the deceased was

¹ The doctor stated that blunt force is realized through anything that will not go into the body. The use of sticks, a rod, a stone or any blunt object may cause injuries noted on body of deceased. Blunt force may also be caused by falling forcefully onto a hard surface.

² Chest cavity housing the heart.

³ Contusions, the doctor explained is when bleeding occurs into the tissues because of rupture of small blood vessels. She also stated that friction against rough surface can cause contusions.

stabbed during a fight prior to the day of the present incident and her response was that there were no 'prior' injuries in the post-mortem report; that the injuries observed were suffered at the same time. She handed in the postmortem report.

Evidence of Ntombi Catherine Mazibuko

- [8] Ntombi Catherine Mazibuko and Sizakele Maziya are eyewitnesses and were called as PW3 and PW6 respectively. On 28 April 2018, both witnesses were at Msunduzi next to Solanis where they were selling roasted chicken to the people who had come to enjoy themselves at Solanis. The Court heard that it was a busy night as there were a lot of people and a lot of cars parked outside Solanis and music was played at a loud volume from Solanis. The street lights shone brightly on the night of the incident.
- [9] Ms Mazibuko testified that between 3am and 4am she was next to the braai area where chicken was sold when she saw three men coming from the Solanis direction towards where she was. One of the men was assaulting the other man with a jacket while the third man was recording a video of the assault and laughing. She thought the two men were playing/ joking with each other and not fighting. It was put to Ms Mazibuko that the accused was surprised when he was assaulted by deceased because they knew each other. PW3 reiterated her version that she thought they were playing or joking at the time deceased was hit with a jacket. PW3 testified that the accused was assaulting the deceased with a jacket. The man who was recording a video was Gauzen and he was egging the accused to carry on with the assault.
- [10] When the accused assaulted the deceased with a jacket, the deceased asked: 'what have I done?' Deceased was loud when he asked accused what he had

done to be assaulted. The accused and deceased went downward along the road to Dlangeni where they engaged in a fistfight. The deceased was unarmed.

[11] During the fight, the deceased fell on the ground and was assaulted by the accused with a brick on the face while he lay on the ground. When the brick landed on deceased's face, it broke into pieces. The deceased rose and staggered but was again hit with a big stone by the accused. The accused used both his hands to carry the stone which he threw and hit the deceased with. The big stone landed on deceased's chest. PW3 stated during cross examination that it is correct that she told the police that the stone hit the deceased on the head and she maintains that version in court. Soon after he was hit by the stone, the deceased collapsed and fell on the road. Ms Mazibuko testified that while the deceased lay on the road, the accused twice jumped on deceased's abdominal area and the third time he jumped on deceased's head. The deceased lay motionless and did not get up. The accused left the scene while the deceased still lay on the road. Fikile Shabangu then moved the deceased from the road and put him on the grass next to the road where he had fallen. The deceased lay motionless at the scene.

[12] When it was suggested to Ms Mazibuko that the deceased was the aggressor, she stated that it was the accused who was assaulting the deceased with a jacket while the deceased was retreating from the accused. It was suggested further to PW3 that the accused took the brick and smashed it on the tarmac in a bid to scare the deceased. PW3 stated that the accused smashed the brick on the deceased and not on the tarmac.

- [13] It was suggested also that a defence witness will tell the Court that the accused threw the brick at the deceased and missed him. It was put to Ms Mazibuko that there are Crown witnesses who confirm this version of events; to which Ms Mazibuko responded that the accused did not miss the deceased when he threw the brick at him. She reiterated that the accused hit the deceased with the brick and deceased fell on the road. I note that none of the Crown witnesses said the accused threw a brick at deceased and missed him.
- [14] Ms Mazibuko further disputed that when the duo were fighting, they both fell and rolled on the road. She testified that only the deceased fell as the fistfight was ongoing. The deceased fell and got up and staggered and they continued to fight with fists. Ms Mazibuko testified that she did not see the deceased hold the accused with the scruff of his neck and tear accused's t-shirt.
- [15] Ms Mazibuko denied that the accused assaulted the deceased with a stone and fled the scene because the deceased was heavily assaulting him. She stated that she saw the accused walk away with his friends and she does not know where they headed after the deceased was stoned by the accused.
- [16] While Ms Mazibuko was still testifying in chief, the Court had occasion to go on an inspection in *loco*, where it was shown the place deceased allegedly fell when he was stoned. The Court was also shown where Ms Mazibuko sat while he watched the fight along the Gobholo road. The distance from where Ms Mazibuko sat while the fistfight was ongoing was estimated to be about twenty-three feet away. We were also shown the direction from which the accused and deceased came while the deceased was allegedly assaulted with a jacket by the accused. The Court heard that during the fight, the street

lights shone brightly. I note here that the accused did not dispute that visibility was not a problem during the time of the incident. It was agreed during the inspection in *loco* that Ms Mazibuko was about twenty-three feet away from where the fistfight happened along the Dlangeni road.

Evidence of Sizakele Maziya

- [17] Sizakele Maziya testified that PW3 is her aunt. On 28 April 2018 between 3am and 7am she was at skom where she had been selling roasted chicken. She finished selling roasted chicken after 4am and went and stood at Solanis and chatted with Ntsika, a female acquaintance. Stanley stood alone outside Solanis at the time. Gauzen was also outside Solanis with a group of people. The accused came and joined Gauzen's group outside. Ms Maziya heard the deceased say to Gauzen: 'here is the rapist.' Gauzen retorted and said Stanley should not address him in that manner; that work-related matters must remain at work. The accused chipped in and asked why Stanley was talking about work-related matters in drinking places (*ematjwaleni*)? Stanley insisted that Gauzen raped his niece. Stanley spat on accused and told him not to meddle in affairs he knew nothing about. The accused enquired from Gauzen what he should do and Gauzen told him to see what he can do. The accused said he was going to assault Stanley there and then. Stanley was carrying his brown leather jacket. Stanley walked towards the braai area where chicken was sold and accused followed him, grabbed Stanley's jacket and assaulted Stanley with it. As he was assaulted by the accused, Stanley kept asking why the accused was assaulting him and what he had done for the accused to assault him. Stanley was heard by Ms Maziya saying 'why are you assaulting me my brother, I wasn't talking to you but to Gauzen who raped my niece.' A fistfight between Stanley and the accused ensued.

Gauzen was with another person who was recording a video of the incident. As if to diffuse the situation, Gauzen held Stanley and crossed the road with him towards the braai area.

[18] The accused threw a brick at Stanley. The brick landed on Stanley's face and broke into pieces. The brick hit Stanley underneath the eye and he bled from the injury. Stanley fell to the ground; he tried to get up and land a punch on the accused but was hit with a fist by the accused. Stanley staggered and again fell to the ground. Stanley again fell on the road. While Stanley lay on the road, the accused kicked him. Stanley turned over, rolled on the road and came to a stop. While Stanley lay on the road, the accused assaulted him with a big stone which he took next to the road next to a septic tank. Stanley bled from the injuries inflicted on him by the accused with a stone. The stone had a flat base and its top part was shaped like a triangle. The stone landed on Stanley's chest, face and the upper part of his body. The accused stomped on Stanley as he lay on the tarmac. PW6 heard Fikile Shabangu exclaim 'why is the accused stomping on the deceased when he had assaulted him with a stone already? (*hawu sekangaze amgcobagcobe nge tinyawo sekamshaye na nge litje?*)' The accused then said: 'I have killed the dog.' The accused then left with his friends.

[19] The stone that was used by the accused to hit Stanley was retrieved next to deceased's body when Ms Maziya showed it to the police. The stone was plus minus thirty centimetres away from the deceased.

[20] Stanley's tongue was protruding from his mouth and his eyes were wide open as he lay on the road. Ms Maziya, Fikile and Thobile boiled water and used a towel to try and soothe Stanley's injuries. The police and the ambulance were called. They were informed that there was no transport so

the ambulance did not come. The police eventually arrived a little after 5am at the scene.

- [21] When the police arrived at the scene, a certain man who later refused to record a statement with the police showed the police the stone that was used to assault the deceased. PW6 also showed the police the stone. The stone was identified by PW6 in Court.
- [22] It is Ms Maziya's evidence that during the fight, the accused had an upper hand and that Stanley was too drunk and appeared not have much strength to fight back. During the fight, PW6 heard people shouting and saying Stanley is too drunk why is the accused assaulting him because he is offering little resistance to accused's assault (*uyatishayela nje*). When Stanley tried to retaliate, he would fall to the ground.
- [23] After the fight, Stanley was bleeding. The bleeding stopped after Ms Maziya and other ladies soothed his injuries using warm water and salt and a towel. Ms Maziya did not see if the accused was injured.
- [24] It was suggested to PW6 that the accused found Stanley holding Gauzen by the collar at the entrance of Solanis; that Gauzen asked the accused to help him break away from Stanley. This was denied by Ms Maziya. It was further put to Ms Maziya that the accused tried to reason with Stanley and that Stanley spit on accused's face. Ms Maziya conceded that Stanley spat on accused's face. Ms Maziya testified that Stanley spat on the accused while he was telling him not to meddle in other people's affairs. It was further put to Ms Maziya that the accused was wiping the spit when Stanley held both fists and the accused did the same. It was suggested to Ms Maziya that the accused held his fists because he thought the whole thing was a joke. Ms

Maziya confirmed that she also thought the duo were joking with each other at the time. If the accused thought this was all a joke, how is it provocation.

- [25] Ms Maziya confirmed that the accused person's T-shirt was torn when Stanley tried to hold the accused during the fight. Ms Maziya testified that she did not hear the accused telling Stanley not to assault him while they walked towards the braai area but she did see Stanley walking ahead of the accused all the while asking the accused why he was assaulting him because he was not talking to the accused but to Gauzen who had raped his niece.
- [26] It was put to PW6 that PW3 testified that she saw both the accused and the deceased roll down the steep road; PW6 stated that she did not see the accused roll down the road and that only Stanley fell and rolled on ground. To correct the record, PW3 did not say the accused rolled down the road. She testified only about Stanley having rolled down the road.
- [27] It was put to PW6 that Phumla Khumalo and Chamkile Matsebula would testify and tell the Court that they never saw the accused stomp on the deceased person's head. I note here that the said Phumla and Chamkile were not called and no explanation was proffered why they were not called by the defence.
- [28] It was put to Ms Maziya further that Stanley and the accused insulted each other. Ms Maziya testified that he did not hear them trade insults.
- [29] When it was suggested that Ms Maziya was not close to the fighting duo when the altercation and fight eventually took place her evidence was that: at all material times she was close watching and following the fight between the accused and the deceased. Ms Maziya testified that she was behind them when the accused used Stanley's jacket to assault him. At the place where

chicken is braaied, Ms Maziya stood behind the duo next to a pole; when Stanley rolled on the ground, she followed them and stood on a sewerage/septic tank stand and continued to watch the fight. Ms Maziya repeatedly stated that she was able to watch the fight because she had finished selling her roasted chicken. When she watched the fight when the duo were at the braai area, she was also there as she had been following them from Solanis.

- [30] According to Ms Maziya the stone did not have deceased's blood because the stone rolled on the ground and landed next to a gate which is kept clean. The stone landed next to the deceased and it was about thirty centimetres away from the deceased when she showed it to the police.
- [31] During cross examination, Ms Maziya testified that the stone that was used to assault the deceased was not where the fight was taking place. The fight was on the lower part of the road while the stone was on the upper part of the road next to the road. Accused picked the stone with both hands, went to Stanley and hit him with it while Stanley lay on the ground.

Evidence of 7767 Constable Thabiso Maziya

- [32] Constable Thabiso Maziya (PW4) is one of the police officers who were first responders to the crime that was allegedly committed at Msunduza on 28 April 2018. At about 0555 hours, he received a report that an assault with intent to cause grievous bodily harm was committed at Msunduza next to Solanis. He went to the scene with Constable Melusi Dlamini. At the scene they found many people and a man who lay on the ground facing upwards. The police introduced themselves and explained their mission. The people who were at the scene refused to cooperate with the police. Constable

Maziya checked the pulse of the man who lay on the ground and found that he still had a pulse. The police soon found out that the man in question was Stanley. The police transported Stanley to hospital after the ambulance failed to arrive. When Stanley was taken from the scene of crime he had bruises and had injuries on the head but he was not bleeding. PW4 instructed his companion Constable Melusi Dlamini to sit at the back of the police van and hold Stanley's head to support his neck until they reached the hospital.

[33] At the hospital, Stanley was attended to by the medical personnel and he was certified dead on arrival at the hospital.

[34] PW4 and his companion returned to the scene of crime where PW6 showed them a stone that was allegedly used in the assault of the deceased. The stone was found next to the deceased. He described the stone as a granite stone. The stone was taken as an exhibit. The stone was labelled as RSPSFL 1601161. The mass of the stone was estimated to be about five kilograms and one would have to use both hands to lift it. The police took the stone because the atmosphere was volatile at the scene of crime as the people were drunk and angry.

[35] It was put to PW4 that the accused person went to Mbabane police station on the morning of the incident at about 0515 and reported that he had been assaulted; because the accused presented with bruises on the face and injuries on the right elbow, he was given a medical form (REP 88) by 2951 Sergeant Mkhwanazi. PW4's response is that he does not think Sergeant Mkhwanazi would have attended to the accused if the police were aware that the accused was involved in the death of the deceased at the time he reported that he was assaulted.. According to PW4, if the police were aware that the

accused was implicated in the death of Stanley, they would not have allowed him to leave the police station.

Evidence of 5492 Detective Sergeant Xolile Dlamini

[36] She is a scenes of crime officer. She arrived at the scene long after the deceased was taken to the hospital. She prepared a report and photo album which was handed in court with the consent of the Defence. She handed into court the exhibit she collected pertaining this case. The exhibits included the clothes the accused was wearing at the time of the incident to wit: a pair of blue jeans, boots, black and red leather jacket, white t-shirt and a stone. Accused's clothes were later taken for forensic examination in South Africa.

[37] The stone (exhibit 5) was not taken for forensic examination in South Africa. This was because she did not get the stone from the scene of crime. She further testified that the stone was returned from the police headquarters with the instruction that she should swab it but she could not do so as she did not retrieve it at the scene of crime. This witness further stated that it was risky for her to open the sealed stone as it could be contaminated.

Evidence of 7182 Detective Constable Dumsani Dlamini

[38] He is one of the investigating officers in this matter. In the morning of 28 April 2018 he was on duty at Mbabane police station when he received a report from the Desk officer Mr Solomon Mavuso about a case of murder at Solanis, Msunduza. The report was that Stanley Dlamini had died and that the accused is a suspect. He went to the scene in the company of other police officers and found that the deceased had been taken to the hospital. The accused was not at the scene of crime. He learned that some exhibits were taken by the police who were first responders to the incident.

- [39] While the police were at the scene, they received a phone call from the accused person. The accused told them that he is aware that the police were looking for him and that he was at Checkers. At the scene of crime the police met Ntombi Mazibuko and Menzi Gama.
- [40] The police found the accused at Cozy Corner, Checkers. The police introduced themselves and explained their mission to him. They cautioned him in terms of the Judges rules. They explained his rights to legal representation and his right to remain silent. The accused said something and was advised to follow the police to Mbabane police station. The accused was driven by his friends to the police station. At the police station, the police continued with their investigations. The police again cautioned the accused in terms of the Judges rules and the accused voluntarily gave the police the clothes he was wearing during the commission of the crime. The clothes were: a white t-shirt, navy blue jeans, white sneakers and a black and red leather jacket. Nhlanhla Masuku gave the accused other clothes. The clothes were packed, sealed and marked in front of the accused. The stone was handed in as an exhibit by officers from the General Duty department.
- [41] The accused showed the police REP 88 which he said he got from the police station. The medical form was not filled because the accused did not go to the hospital. The accused did not go to the hospital because he was not injured. Even when blood samples were taken from the accused, he did not express a wish to be taken to hospital.
- [42] The police made an application at Mbabane Magistrate Court for blood samples to be taken from the accused person. Accused's clothes as well as his blood samples were taken to the Republic of South Africa for forensic examination. The samples were first conveyed to police regional

headquarters while the clothes were taken to the scenes of crime and from there they were relayed to the police headquarters.

- [43] Statements were recorded from Sizakele Maziya after she was interviewed. It was difficult to get some witnesses to come to court because they were threatened.
- [44] During cross examination, this witness conceded that he met Menzi Gama and he recorded a statement from him. He contacted Gama and asked him to give evidence in this matter and he declined to do so. It was put to this witness that he did not ask Gama to come and testify in this matter because his evidence is out of step with the version that was propagated by the police. PW7 insisted that he did call and ask Gama to come and testify. He conceded that Gama was the only witness who recorded a statement and said Stanley spat on the accused before the fight began.
- [45] Gama is said to have distanced himself from the altercation between the accused and the deceased because his bail conditions precluded him from getting involved in violent situations. PW7 conceded that Gama/Gauzen may have shouted to the accused to hit the deceased and that he may have said this while distancing himself from the whole scenario of the altercation.
- [46] PW7 testified further that Mr Khanyile from Solanis refused to give police videos showing the fight between the accused and the deceased because the accused was a regular customer there. He testified also that other witnesses were scared to come forward and testify in this matter because they feared that the people from Solanis would kill them. PW7 surmised that the accused has a relationship with Solanis because the people at Solanis called and informed the accused that the police were looking for him before the police

called the accused. The people responsible at Solanis refused to help the police with information. Khanyile refused to record a statement; instead, he called the accused and told him that the police were looking for him.

[47] According to PW7, the accused had no visible injuries. Sergeant Mkhwanazi gave the accused REP 88 because the accused said he wanted to go to hospital and not because he was injured. The accused had no injuries, he was given a medical form and he chose not to go to hospital rather to be with his friends. It is the evidence of PW7 that Nhlanhla Masuku recorded a statement that the accused never went to hospital. Accused was given a chance to call his relatives and also to go to hospital after he was arrested, he chose not to.

[48] PW7 testified that when the accused was questioned about the matter he did not deny that he committed the offence. His friends were present when the accused handed his clothes to the police.

[49] During re-examination, PW7 testified that the accused had no visible injuries and that if he had visible injuries, the Magistrate Court where he was remanded would have observed those injuries and so too Correctional Services. The Correctional Services, the Court heard, would not have admitted the accused if he had injuries before he was taken to the hospital. The Crown closed its case.

Defence case

[50] The accused (DW1) is forty-six years old; unmarried and has four children. The accused's eldest child is twenty years old and the youngest is eight years old. The accused testified that he used to work at the Ministry of Public Works and Transport but resigned two years ago because he could no longer

work as a result of this incident. It was his evidence that this incident affected him. The accused lives with his mother at Thembelihle. He now earns his keep by doing piece jobs.

- [51] The accused testified that on 28 April 2018 he was at Solanis with his friends-Bathandwa Hlatshwayo and Nhlanhla Masuku where they were having alcoholic drinks. While at Solanis, accused and his friends expected Mlungisi to join them. When Mlungisi did not show up, they decided to go to his house. Just when they were leaving Solanis to go to Mlungisi's house, the accused says he was called by Menzi also known as Gauzen. Gauzen was pressed against the wall by Stanley. Gauzen requested the accused to talk to Stanley. The accused testified that he approached Stanley and told him to leave Gauzen alone because his case was pending in court and that it was unprofessional of Stanley to talk to Gauzen about a case that was in court.
- [52] The accused testified that while he was speaking to Stanley, Stanley grabbed him and spat on him. The accused says he moved away from Stanley and asked why he was spitting on him. It is the evidence of the accused that he then retreated but was followed by Stanley. The accused says he tried to reason with Stanley to no avail as when they were next to where taxis park, he was punched by Stanley with fists while he was retreating.
- [53] The accused further told the Court that Stanley took off his jacket and used his fists to assault the accused. At the time, the accused says he continued to retreat and took the Gobholo direction. The accused says while he was retreating, he picked a brick and threw it on the ground in a bid to get Stanley to move away from him. When Stanley continued to come charging at him the accused fought back and they both rolled on the ground. The

accused stood up and grabbed a stone which he threw at Stanley. The accused says he did not see where he hit the deceased with the stone because it was dark. It was after he had thrown the stone at Stanley, that Nhlanhla grabbed the accused and suggested that they should move away lest Stanley gets up and assault the accused further. The accused then left the scene with his friends.

- [54] During cross examination, the accused testified that he hit the deceased with a stone because he feared for his life. He said he was afraid of Stanley because he was always involved in bar brawls. During cross examination the accused denied assaulting the deceased. He denied that the multiple injuries suffered by deceased were inflicted by him. Although the accused conceded that the deceased suffered the injuries observed by the pathologist, he denied that he inflicted the said injuries on the deceased.
- [55] During cross examination, the accused persisted in his denial that he ever touched the deceased. He testified that he only threw a stone at the accused and that it was the deceased who was assaulting him. The accused denied that he said he had killed the dog in reference to Stanley. It was his evidence that knowing what he knows now, he would have never laid his hand on Stanley.
- [56] When the accused was confronted about Gauzen's statement that he never requested the accused to help him; the accused said he was saddened by the fact that Gauzen is now denying calling him to assist him. The accused testified that if he had not stopped to talk to Stanley about Gauzen's matter, he would not be here today.

- [57] When it was revealed that Gauzen's statement to the police says Gauzen was never attacked and pressed against the wall by Stanley, the accused said he could not say Gauzen was telling a falsehood. The accused also stated that he was not telling an untruth in what he testified to regarding Gauzen's role in luring the accused to assist him when Stanley attacked him. The accused denied that he had a prior grudge and other unfinished business with Stanley.
- [58] After leaving the scene with his friends, along the way the accused suggested that they report the matter to the police. At the police station, the accused was given a medical form. He went to the hospital with his friends and was told that there was no doctor available as it was too early. He was advised to return to the hospital later. The accused and his friends then left the hospital and went to Mlungisi's house where they continued to have alcoholic drinks.
- [59] While at Mlungisi's house, the accused received a phone call from Khanyile informing him that the police were looking for him. He called Solomon, one of the police officers he was told was looking for him and informed him about his whereabouts. He met the police next to Checkers' shop where the police informed him that Stanley had died. He went to the police station where he was subsequently arrested and detained.
- [60] The accused stated that the incident affected him greatly and that he was deeply hurt about the incident. He apologized to his family and to the family of the deceased. The accused stated that it was all a mistake. The accused testified that the stone he threw at Stanley was not big as he used one hand to carry and throw it at Stanley. The accused denied that he jumped on Stanley as he lay on the ground. He testified that his t-shirt was torn when Stanley held and pulled the accused and they both rolled on the ground.

Evidence of Nhlanhla Masuku

[61] Nhlanhla Masuku is the second defence witness. He testified that on 27 April 2018 he was at Solanis with the accused and Muzi Mathunywa and they were having alcoholic drinks. They left when Solanis was about to close. Outside Solanis he saw the accused and the deceased having an altercation next to the road. The accused and the deceased engaged in a verbal showdown and they fought while they were both drunk. Nhlanhla and other people intervened and removed the accused from the deceased. As he was leaving with the accused, Stanley accosted the accused and the two fought and were separated for the second time. The accused fled from Stanley and went towards Msunduza. The accused was pursued by Stanley who eventually caught up with him and they again fought, fell and rolled on the ground along the Gobholo road. The way the accused and deceased fought did not raise concerns that they could inflict serious injuries on each other. For this reason, the people around the scene were not even concerned about the fight of drunk people. The accused got up, took a stone and assaulted Stanley with it. The stone that was used by the accused is from road failure and not the stone that was presented to Court as an exhibit. Nhlanhla again pulled the accused and took him to the car they were using and they left the scene.

[62] During cross examination it emerged that Muzi Mathunywa statement to the police stated that the accused used a big stone and that during the fistfight the accused was winning the fight. Nhlanhla testified that he could not say Muzi Mathunywa recorded a false statement to the police; that he is sure that what he himself has told the court is the truth about the incident. When

pressed further about Muzi's statement to the police, Nhlanhla testified that Muzi recorded a false statement to the police. It was also suggested to Nhlanhla that Muzi's statement says it is Nhlanhla and not the accused who directed that they go to report to the police that the accused assaulted a person and left him lying on the ground and could not wake up. This was denied by Nhlanhla.

- [63] Along the way, the accused said Stanley is a lawyer; and it was therefore important for him to go and lay a charge with the police before Stanley did so. Indeed, they went to the police station and the accused got out of the car and went to the police station to report the matter. When they left the police station, Nhlanhla fell asleep inside the car and only woke up when the driver, Muzi was at Nhlanhla's residential place where he was dropped off. Defence closed its case.

The Crown's Submissions

- [64] Mr Nxumalo submitted that the Crown has proved its case beyond reasonable doubt that the accused inflicted mortal injuries on the deceased on delicate parts of the human anatomy. It is the Crown's submission that the post-mortem report reflects that the deceased had a fractured skull, ribs, ruptured spleen, heart and liver among others-evidence that is consistent with the evidence of Crown witnesses. The extent of injuries used and the manner the injuries were inflicted, the Crown contends show that the accused had indirect intention to kill the deceased.
- [65] The Crown contends further that the evidence of the accused that he only threw a stone at the deceased is devoid of content and false considering that

the accused person is the only person who was involved in a fight with the deceased on that fateful night.

- [66] It was submitted further that the Defence failed to raise the defence of provocation with Ms Mazibuko and only relied on provocation after Ms Maziya had conceded that the deceased spat on the accused before a fight between the accused and the deceased ensued. It is submitted that the deceased was not the aggressor as he was only addressing himself to Gauzen and not the accused.
- [67] The Court is further urged by the Crown to reject the accused's version that at all material times during his encounter and fight with the deceased the accused was acting in private defence was acting in private defence. This, it is contended is because accused's evidence is not corroborated by the evidence of Nhlanhla Masuku that the accused was attacked by the deceased.

The Defence's Submissions

- [68] It was contended on behalf of the accused that the evidence led by the Crown is not inconsistent with the accused person's innocence in respect of the murder charge, but is consistent with that of culpable homicide. It was urged that the circumstances of this matter are indicative of the fact that the assault of the deceased was a result of the unjustified spitting on accused's face and that the provocation of being spat upon would have deprived a reasonable person of the power of self-control as envisaged in the Homicide Act of 1959.

The applicable legal principles

- [69] The basic principles of criminal law and the law of evidence are settled. The first principle is that in criminal proceedings, the Crown bears the onus to prove the accused person's guilt beyond reasonable doubt⁴.
- [70] No onus rests on the accused to prove his innocence⁵. The version of the accused cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond reasonable doubt⁶.
- [71] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite, is that the accused's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false⁷.
- [72] The version proffered by the Crown and that of the accused are diametrically opposed to each other as far as the precursor of the confrontation and the manner in which the fight between the accused and the deceased ebbed and flowed resulting in the death of the deceased. The version of the Crown portrayed the accused as a busy-body who meddled in a matter that had nothing to do with him; it also portrayed the accused as an aggressor as he was the first to assault Stanley using Stanley's jacket. Stanley is portrayed someone who was no match to accused's assault which led to him suffering mortal injuries in the hands of the accused.

⁴ *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Schackel* 2001 (4) SACR 279 (SCA).

⁵ *S v Combrinck* 2012 (4) SACR 93 (SCA) at para 15.

⁶ *S v V* 2000 (1) SACR 453 (SCA) at 455B.

⁷ *S v Sithole and Others* 1999 (1) SACR 585 at 590.

[73] The version of the accused on the other hand portrays the deceased as the aggressor and provocateur who assaulted the accused even when the accused fled from him. The deceased is portrayed as someone who was on a 'war path' against the accused as he landed 'killer punches' on a fearful and drunk accused person.

[74] From the above, the two versions in my view are mutually destructive.

[75] The approach to resolving two irreconcilable, mutually destructive factual versions is well established in our law and requires no repetition⁸. Applying these principles to the evidence above, it is common cause that the Crown relied on the evidence of PW3 and PW6. Both witnesses were at the scene at the time of the incident. There is no motive for both eyewitnesses to incriminate the accused falsely as it has not been shown that there was bad blood between them and the accused person. PW3 and PW6 made a good impression to the Court in their demeanour and the manner they clearly answered the questions put to them. There were no material contradictions in their versions.

[76] The evidence of PW3 and PW6 was clear and unequivocal. The accused's evidence is also in congruence with the evidence of PW3 and PW6 in that the accused hit the deceased with a stone as he lay on the ground.

[77] Furthermore, PW3 and PW6's evidence of how the deceased was assaulted was corroborated by PW1 and the post-mortem report. Notably, the accused admitted that the deceased had the injuries as identified by the pathologist but distanced himself from causing deceased's injuries. Like Peter denying

⁸ See: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & CIE SA & Others* 2003 (1) SA 11 (SCA) para 5.

Jesus before the cock crowed⁹, three times the accused denied that deceased's mortal injuries were inflicted by him.

[78] Professor Ryan Blumenthal, a forensic pathologist says something profound about the dead. He states as follows:

'Even though the dead cannot speak, they have a lot to say'¹⁰.

Stanley's injuries told a story about the nature of force used to inflict his injuries. The fracture of the skull, the rupture of vital organs like the heart and pericardial sac, the liver, gallbladder and biliary passages and the spleen; the rupture of the mediastum and thymus was caused largely by high impact blunt force and were fatal.

[79] PW3 and PW6 detailed how deceased got injured. The accused stamped on deceased's abdomen and chest, and on the head. Crown witnesses testified that the accused assaulted the deceased on the head with a granite stone which weighed no less than five kilograms; that the deceased was again assaulted with a brick on his head and face. In his evidence when he was applying for bail, the accused corroborates the evidence of Crown witnesses that he hit the deceased on the head with a stone¹¹.

[80] The version of the accused and his witness was anything but clear and unequivocal. The accused and his witness were poor in their testimony, contradictory and mendacious in certain respects. For instance: they both minimized the size of the stone. Nhlanhla Masuku said the stone was a result of 'road failure.' It was not put to the Crown witnesses that the stone was a result of 'road failure' when they testified that the stone used was a granite

⁹ Mark 14: 68-72.

¹⁰ Blumenthal, Ryan 'What the dead can teach the living.' Insight, Forensic Pathology, Sunday Times April 30 2023 at page 12

¹¹ *Sibusiso Nelisa Hlatshwako v The King (133/18) [2018] SZHC 99 (18 May 2018) at para [10].*

stone. Muzi Mathunywa, (a friend of the accused and his witness and their driver for the night of 27/28 April 2018) recorded a statement to the police where he said the stone used by the accused was big. The statement further states that the accused had an upper hand in the fight with the deceased.

- [81] In minimizing the size of the stone defence witnesses were trying to create an impression that since the stone was small, it therefore could not have caused fatal injuries on the deceased.
- [82] Nhlanhla Masuku said twice he separated the accused from the deceased. The accused says nothing about Nhlanhla twice rescuing him from the deceased. The accused says he did not see where the stone he threw at deceased hit him because it was dark; uncontroverted evidence from PW3 at the inspection *in loco* is that the street light shone bright where the deceased was hit with a stone.
- [83] Nhlanhla Masuku testified that along the way, the accused suggested that because Stanley was a lawyer, it was necessary for the accused to report the matter first to the police before Stanley did so. At the police station, the accused was given a medical form ostensibly because he reported that he was involved in a fight. When he was not attended at the hospital, the accused continued to his friend's house at Checkers where they continued to drink alcoholic drinks. This, to me suggests that if the accused was injured as a result of the fight, his injuries were not as serious as that of the deceased.
- [84] Statements recorded by Menzi Gama to the police do not support accused's version that Menzi requested him to talk to the deceased who had pinned him to a wall and was calling him a rapist. The statement recorded on 11

May 2018 by Menzi Gama is explicit that he was not assaulted by Stanley on that day. The statement also says Menzi did not ask the accused to come to his aid on the night in question.

- [85] The accused's version is that he was mightily assaulted by the deceased. He however does not tell the court where he was injured as a result of the fight. Much against the overwhelming evidence from both Crown and defence witnesses, that he fought with the deceased; the accused denies that he even touched the deceased except with the stone he threw at him.
- [86] The accused testified that he threw the brick on the ground in order to scare the deceased. At the same time, the accused gave defence Counsel instructions that he threw the brick at the deceased but missed him. This is evidence of a contradictory nature which, when taken together cannot be both correct.
- [87] To my mind, in light of the solid evidence of Ms Mazibuko and Ms Maziya, the evidence of the accused that he was not involved in the murder of the deceased is contrived, far-fetched and cannot be said to be reasonably possibly true. It must be stressed that the incident happened at night, street lights shone bright at the place where deceased died. Ms Mazibuko and Ms Maziya were close from where the incident happened. Ms Mazibuko and Ms Maziya were not drunk and they had ample time to observe how the deceased lost his life. The fact that other people were not called to testify is inconsequential.
- [88] The bare denial of the accused of the assault is to be expected in the circumstances but it cannot be accepted as true. For these reasons, I find that

the Crown has proved that the accused committed the crime of murder beyond reasonable doubt.

Provocation

- [89] Evidence before Court is that the deceased spat on the accused when the accused confronted the deceased and told him not to discuss work-related matters at drinking spots. The deceased was addressing Menzi Gama. Menzi Gama's statement reflects that he was not manhandled by the deceased on the night in question and that he never sought accused's intervention on that fateful night. The accused meddled in the matter. He was a busy-body when the deceased spat on him.
- [90] It is argued that the accused was provoked by the deceased who spat on him. It was stated that according to provisions of the Homicide Act of 1959, provocation has the effect of reducing the crime of murder to that of culpable homicide. I agree that this is the position of the law. The question to be answered at this stage is does the defence of provocation avail the accused in this matter?
- [91] In my assessment of the evidence it is clear that even though the accused meddled in deceased's matter with Menzi Gama, the deceased provoked the accused when he spat on him. The first enquiry is whether the accused was entitled to use a severe form of violence against the deceased in the circumstances. I think not. It is not every provocation that entitles an accused person to use a severe form of violence against his provocateur¹². The accused used disproportionate force in light of the slight provocation. The reaction of the accused was severe and completely out of touch

¹² Rex V Bhekumusa Mapholoba Mamba Case No. 127/2007

therewith. The next enquiry is whether there was time for the accused's temper to cool after the 'spit' incident and when he violently assaulted the deceased. The evidence before court shows that the stoning, stomping, kicking and smashing of the deceased with a brick was not instant after deceased spat on accused. The accused had time for his passion to cool. Soon after the incident Stanley left the scene and walked towards the braai area. There is evidence that after he was spat on, the accused went to Menzi and asked him what he should do. After talking to Menzi the accused was heard saying he was going to assault the deceased. Indeed he went and caught up with the deceased, beat him with his jacket and later used the deadly force on deceased. Even though the accused was provoked, I find that the provocation did not deprive him of the power of self- control. This I say because after the provocation, the accused acted in a rational, cohesive and calculated manner when he said he was going to assault the deceased. Consequently, the provocation in this case, I find, did not have the effect of dislodging intention from the crime of murder and then reducing it to the crime of culpable homicide. For these reasons the defence of provocation does not avail the accused.

Private defence

[92] The accused stated that he stoned the deceased because he feared for his life. Here is pleading private defence. Even though the deceased provoked the accused by spitting on his face, I however cannot say that from the evidence presented in court the accused was entitled to stone and stomp on the deceased in the manner he did or that he was justified to kill the deceased in the manner he did.

[93] In *R v John Ndlovu*¹³ the law regarding private defence was stated as follows:

'A person acting in self-defence may apply such force as is reasonably necessary in the circumstances to protect himself against an unlawful threatened or actual attack. The test whether a person acts reasonably in self-defence is an objective one. The force used must be commensurate with the danger apprehended; and if excessive force is used the plea of self defence will not be upheld.'

[94] It is my considered view that the force used by the accused was not commensurate with the danger apprehended. There was no reason to use such force against a drunk and unarmed deceased person especially because the accused had an upper hand and was winning the fight. When the accused hit the deceased with the stone and stomped on him, the deceased was lying on the ground and posed no threat to the accused at the time. For this reason, the private defence does not avail the accused.

[95] Consequently, and for the foregoing reasons the accused is found guilty of murder with indirect intention and I convict him of same.


M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Mr D. M. Nxumalo

For the Defence:

Ms N. Ndlangamandla

¹³ 1970-76 SLR 389