

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 302/22

In the matter between:

REX

Versus

WANDILE 'HARDY' MAZIYA

Neutral Citation: *Rex vs Wandile 'Hardy' Maziya (302/22) [2023]SZHC 71*
(3rd April 2023)

Coram: LANGWENYA J

Heard: 21-22 March 2023

Delivered: 3 April 2023

Summary: *Criminal Law-Murder-Private defence-test and requirements restated-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-the force used must also be commensurate with the danger apprehended.*

Criminal law-Provocation-requirements of provocation restated-effect of provocation in law and in the present case-whether or not case proved against the accused-accused guilty of culpable homicide.

JUDGMENT

Introduction

- [1] The accused is charged with the offence of murder. It being alleged that on or about 31 October 2021, and at or near kaKhoza in the district of Manzini, the said accused person did wrongfully, unlawfully and intentionally kill Menzi Mamba by stabbing him with a knife on the neck and did thereby commit the crime of murder.
- [2] When the charge was put to the accused, he pleaded not guilty and raised the defence of provocation alternatively private defence.
- [3] The Crown presented the evidence of ten witnesses and their testimonies primarily turn on events which are directly linked to the death of the deceased, while the accused was the only witness for the defence.
- [4] The brief summary of substantial facts is that upon or about 31 October 2021 the accused, the deceased, Silindile Nokubekezela Dlamini (Silindile), Londiwe Simelane, Thulani Mlipha were drinking alcohol from morning hours until late at night when the offence was committed at kaKhoza area in Manzini. The accused and the deceased were love rivals as they both had romantic relations with Londiwe Simelane at the time of the incident. The deceased was with Londiwe Simelane when the accused was called from a distance by Londiwe. When the accused found the deceased with Londiwe

he was angry and asked what was going on between the duo. In response, the deceased uttered unprintable expletives directed to the accused and swore to get even with the accused. Specifically the deceased is said to have told the accused not to have sexual intercourse with him (*angangizeki Wandile*) and that they were dealing with a vagina (*kuchubeka ligolo*). A fight ensued between the accused and the deceased while Londiwe left the scene to get someone who could come and diffuse the situation. It was during the fight that the deceased was stabbed by the accused with an okapi knife and later died.

The Crown's case

- [5] According to the post-mortem report, the accused died due to bleeding as a result of a penetrating injury over the left side of his neck which injury involved blood vessels. The report states that the blood vessels involved in the injury were the carotid artery, the jugular veins and the nerves. The carotid arteries are major blood vessels that provide the brain with blood supply¹. The internal jugular vein is a paired venous structure that collects blood from the brain, superficial regions of the face and neck and delivers it to the right atrium². The autopsy report was handed in by Dr R.M. Reddy and it was marked exhibit A.
- [6] The Scenes of crime officer 5571 Detective Constable Ronnie Mavuso filed an album of deceased's body lying in the mortuary at RFM hospital. The photos show a wound on the left side of the neck of the deceased.
- [7] The Court heard that Silindile and Londiwe are friends. On 31 October 2021 they were at kaKhoza and having alcoholic drinks. It was while they were

¹ <https://www.pennmedicine.org> visited on 30 March 2023.

² <https://www.ncbi.nlm.nih.gov> visited on 30 March 2023.

enjoying their drinks that Silindile's romantic partner-Ntokozo Dlodlu arrived in the company of Mageshi. Silindile was ordered by her romantic partner to go to his rented flat and when Silindile refused to do so she was assaulted by Dlodlu. After the assault, Silindile met the deceased who enquired why she was crying. It was when Silindile and the deceased were close to flats that were still under construction that they met Zodwa and Menzi Simelane. Zodwa took Silindile with her to her rented room where they continued to drink alcoholic beverages while they sat at the stoep of Zodwa's house.

- [8] No sooner had they started drinking alcohol while at Zodwa's place than Silindile saw a group of boys who were at a distance of about ten metres from where she sat. The accused was among the group of boys she saw. Silindile saw the accused push the deceased. After a while the deceased came to where Silindile was seated and was holding the left side of his neck where he was injured. Menzi asked Zodwa to help him go to his room. When they enquired from Menzi what the matter was, he only said 'Hardy' before he passed out. Menzi was subsequently taken to hospital by a vehicle after the ambulance failed to arrive. Menzi was certified dead on arrival at the hospital.
- [9] Silindile testified that although she had been drinking alcohol on that day she was not drunk.
- [10] PW3 is Londiwe Simelane. At the time of the incident, Londiwe was in a romantic relationship with both the accused and the deceased. Londiwe testified that on 31 October 2021 she was at eSicelwini enjoying alcoholic drinks with Silindile. They had alcoholic drinks from as early as 9am and were still having drinks when the time was going for 9pm. They were

drinking beer. She estimated that during the whole time they drank between two and three carry-packs of beer; there is six beers in a carry-pack.

- [11] It is Londiwe's evidence that Silindile was the first to leave the place where they were having drinks and she followed her later. As Londiwe walked home, she found Silindile along the way crying. While Londiwe was asking Silindile why she was crying, the accused emerged in the company of Thulani Mlipha aka Misteri. Londiwe called the accused. The accused came to where Londiwe was and found her in the company of Menzi.
- [12] The accused enquired what was going on between Londiwe and Menzi. The deceased replied and said the vagina was going on (*kuchubeka ligolo*). Menzi uttered unprintable expletive directed at the accused. Londiwe testified that the accused told Menzi he was asking why he was with Londiwe because Londiwe was his romantic partner. The accused asked Menzi why he was insulting him. Menzi's response was that he had been looking for the accused for some time now. At that time, Londiwe left the scene to look for someone who could help diffuse the situation. Londiwe returned to the scene with Ntokozo Dlodlu and found that Menzi was injured on the neck. The accused was no longer at the scene. Menzi was now with Silindile and lay next to the door unable to move.
- [13] During cross examination, Londiwe confirmed that she was the one who called the accused to come to where she was with Menzi. Londiwe testified that the accused was provoked by the deceased. According to Londiwe, the deceased was spoiling for a fight with the accused by belittling him through his utterances. Londiwe testified that at the time of the incident, she had terminated the romantic relationship with Menzi as she had started a new

romantic relationship with the accused. Londiwe testified that the deceased was unhappy that she had ended the romantic relationship with him.

- [14] The evidence of PW4 Thulani Mlipha is that on 31 October 2021 he was at kaMusa store where he was drinking alcoholic beverages with Londiwe (also known as Mlondi), Silindelwe and the accused. Mlipha testified that he is a friend and neighbour of the accused. As the evening wore on, Silindelwe and Mlondi left kaMusa while the accused and PW4 remained and continued to drink alcohol. Mlipha and the accused subsequently left kaMusa store and went to kaKhoza to buy more alcohol. It was while they were going to kaKhoza that they heard Londiwe call the accused. The accused went to where Londiwe was and this was ten metres away from where Mlipha was.
- [15] The accused found that Londiwe was with Menzi and an argument ensued. Mlipha heard Menzi shouting abusive language at the accused that the accused should not have sex with him (*angangizeki Wandile*). Mlipha tried to intervene and separate them without success. Mlipha saw the accused draw out a three star okapi knife and stabbed Menzi on the neck. Mlipha testified that he could see the accused stab Menzi because there was light coming from the flats that were still under construction. Immediately after stabbing Menzi, the accused fled the scene. Mlipha followed the accused but could not catch up with him. Mlipha testified that during the fight, Menzi was not carrying a weapon. Mlipha insisted during cross examination that he did not see Menzi take out a knife during the fight but did see the accused stab Menzi with the knife.
- [16] When it was suggested to Mlipha that the accused was scared of Menzi who was a bully, his response was that he was not aware that the accused was scared of Menzi. When Mlipha was probed further about his understanding

of Menzi's utterances that the accused should not have sexual intercourse with him he stated that he thought Londiwe was double-crossing the accused and the deceased. Mlipha testified that he did not think Menzi was going to attack the accused even though accused found deceased with Londiwe.

[17] On the night of 31 October 2021 Mzwandile Martin Dlamini was aboard a vehicle from Makholweni when he met the accused in the company of a female companion next to kaMtsetfwa homestead. The accused was carrying a three-star knife. Mzwandile thought the accused was fighting with his girlfriend. The accused and Mzwandile are friends. Mzwandile testified that he was informed by the accused that he had stabbed a certain man at kaKhoza and was now fleeing from Magesh and friends as they wanted to subject him to mob justice. The accused is said to have asked for E100 so he could go to Ludzeludze. Mzwandile says he took the accused from Kush station and dropped him off at Ludzeludze. At Ludzeludze, Londiwe received a call that Menzi had died. At the time the news of Menzi's death was communicated by Londiwe, the accused was carrying a beer bottle. When the accused heard the news of Menzi's death, he dropped the beer bottle out of shock. Soon thereafter, the accused ordered Mzwandile to go home. The defence did not cross examine Mzwandile.

[18] On the night of 31 October 2021 at about 2300 hours Mkhulisi Lindokuhle Mswane (PW6) was on his way home when he met the accused. The accused was with a female companion. The trio went to the home of Lindokuhle and they had two bottles of beer. At Mkhulisi's home they drank and finished the two beers and Mkhulisi suggested they could buy more drinks from Malindi's place. The accused gave Mkhulisi a three-star okapi

knife for protection because it was late at night. Mkhulisi told the accused that at night he goes with his dogs for protection.

- [19] Mkhulisi testified that the accused told him that he had stabbed someone at Sicelwini. Mkhulisi took the knife and noticed that it had traces of blood. He put the knife inside a hole next to the gate of his homestead. Mkhulisi then left to buy more liquor and on return he found a lot of people and the police on the yard of his parental home. The police asked him if the accused was present at his homestead. The police went inside one of the houses and found the accused with his female companion. The police arrested the accused and took him away.
- [20] The following morning the police returned with the accused and were looking for Mkhulisi who was not at home at the time. Muzi was at Mkhulisi's parental home at the time. Mkhulisi directed Muzi on where to find the knife over the phone. Mkhulisi subsequently arrived at his parental home and found the police and the accused. The accused got off the police van and asked Mkhulisi where he had put his knife. Mkhulisi gave the knife to the accused. The police took the knife and left with the accused. Mkhulisi tendered the knife, exhibit 1 as evidence. There was no cross examination of Mkhulisi.
- [21] Muzi Mswane's evidence is that he was at his parental home at Ludzeludze on 1 November 2021 when police arrived with the accused at about 2100 hours. The police asked to speak to Mkhulisi. Mkhulisi was not at home at the time. Mkhulisi was called and he directed Muzi to where to find the knife they were looking for. Muzi retrieved the knife and the accused confirmed that the knife was his.

[22] The accused recorded a confession before a judicial officer on 1 November 2021. By consent of both parties the confession was admitted as evidence and the statement was marked exhibit B.

[23] The confession was recorded before magistrate Nelisiwe Hlophe at Manzini Magistrate Court and it states as follows:

'It was a Sunday 31/10/21 whilst I was at Secelwini at a rented flat for the deceased. We had a disagreement before with Menzi. The argument was over a female companion. After the argument we spoke about it after I had caught them red handed. I asked them again what was happening and Menzi the deceased insisted nothing. I then stabbed him at the collar bone once with an okapi three star , I then ran away. I then left with Londiwe the girl we were fighting over at Ludzeludze. Londiwe was receiving calls from one of her friends whom they were staying together on the rented flats. She is the one who led police to my parental homestead at Ludzeludze. What made me to talk about it is because I want closure and peace. I am still confused it was not my intention to kill someone. That is all.

Signed by the judicial officer, interpreter and the deponent.

The confession was marked exhibit B.

[24] PW8 is Detective Constable Mthandeni Wandile Dlamini. He is one of the police officers who were first responders to the matter before court. On 31 October 2021, the police received a report that a person had been stabbed at kaKhoza. When they went to the scene they met a vehicle whose occupants reported that the injured person was being rushed to hospital in the car. The person who was driving the vehicle was Mageshi. The passengers in the vehicle were Silindile and Jabu Mamba.

[25] At RFM hospital the deceased was certified dead by a doctor. PW8 entered the cubicle where the deceased lay and observed that he had a stab wound on the neck.

[26] The police later returned to the scene of crime and they were attended by Zodwa Dlamini. At the scene they observed there was blood in the yard

toward the house where the deceased was allegedly going and next to the doorstep of the said house there was a pool of blood where the deceased is said to have collapsed after losing strength.

[27] Scene of crime officers were notified. The accused was subsequently arrested.

[28] PW9 5498 Detective Sergeant Thembinkosi Mamba testified that he arrested the accused at kaMswane at Ludzeludze. They found the accused with a female companion. The female companion told the police her name is Mlondi. The police introduced themselves and explained their mission to the accused; they cautioned him in terms of the Judges rules and arrested him.

[29] PW10 6999 Detective Constable Sanele Myeni is an investigating officer in this matter. When he started his investigation of the matter he found that the accused was already in a police cell. He introduced himself to the accused and explained his mission to him. He took the accused out of his cell to an office in the criminal investigation department. He cautioned the accused in terms of the Judges' rules. The accused freely and voluntarily led the police to kaMswane at Ludzeludze where he pointed out a three-star knife. The pointing out took place in the presence of an independent witness. The accused was again cautioned in terms of the Judges rules before he pointed the knife out. The knife was taken and kept as an exhibit in this matter. The accused was charged and detained at the police station in Manzini. PW10 handed in the knife as evidence.

[30] The Crown closed its case.

[31] At the close of the case of the prosecution, an application to invoke section 145 of the Criminal Procedure and Evidence Act 1938 was made. It was

argued by the Crown that after compelling evidence has been led against the accused no less by his friend-Mr Mlipha there was a chance the accused would evade reporting to court for the continuation of his trial. Mr Mamba argued further that the charge is one of murder which attracts a minimum sentence of fifteen years and this could impel the accused not to return to court for the continuation of the trial.

[32] Mr Mabila for the accused argued that the evidence of the Crown does not prove that the accused had the intention to kill the deceased. It was Mr Mabila's contention that the evidence before the Court might prove that the accused was negligent in stabbing the deceased and that would result in a conviction of culpable homicide which permits the payment of a fine.

[33] During the continuation of the trial, I observed that the accused was apprehensive especially when Mlipha was testifying. I took the view that the court's discretion should be exercised to withdraw accused's bail to ensure that he attends trial until the matter is concluded. There was one caveat to accused's withdrawal of bail namely that his trial will be finalized within the shortest available time within the current session.

Defence Case

[34] The accused testified that he is twenty-four years old, unmarried and the last born in a family of eight siblings. He dropped out of school when he was in Form 1 because his mother did not have money to pay his school fees. He lives with his mother at kaKhoza. His father is deceased. He has a minor child who is five years old. He works in Matsapha as a welder and earns E2,500 per month. He was arrested on 1 November 2021 and was admitted to bail in June 2022 but was only able to go out on bail in August 2022.

- [35] The accused testified that he is no longer in a romantic relationship with Londiwe. He told the court that his family went to apologize on his behalf to the family of the deceased. He testified that he does not drink alcohol any more and is now on the straight and narrow because his mother keeps a hawk's eye over him to ensure that he does not find himself involved in another unfortunate predicament such is the one in the present matter.
- [36] On 31 October 2021 the accused was at Sicelwini kaMusa's store where he was drinking alcohol with Thulani Mlipha. They started drinking alcohol from as early as 9am until at about 9pm. At 9pm they left kaMusa store and went to kaKhoza to collect Mlipha's cellphone at ka LoSo shebeen. It was while they were walking to ka LoSo when the accused heard a voice calling his name at a place adjacent to flats that were still under construction. He went to where the voice calling him came from and found Mlondi and Menzi.
- [37] The accused testified that Mlondi was his romantic partner. The accused knew Menzi to be his love rival as he was also in a romantic relationship with Mlondi.
- [38] The accused asked Menzi and Mlondi what was going on between them. In response Menzi is said to have uttered unprintable expletives directed at the accused. Accused testified that when he asked Menzi why he was insulting him, Menzi said he has been looking for the accused. The accused says Menzi then started pushing him and the accused pushed him back. It is the version of the accused that Menzi then slapped him and a fight ensued as the two wrestled and rolled on the ground. The accused says he does not know where he got the courage to fight the deceased because he feared him.

- [39] It was the accused's further testimony that while they were wrestling and rolling on the ground, Menzi took out a knife and the accused disarmed him. The accused stabbed Menzi with the knife. The accused says he does not know where, in the body, he stabbed Menzi. This evidence contradicts his confession. In the confession the accused states that he stabbed the deceased on the collar bone. The accused testified that after stabbing Menzi he fled the scene because he was scared that Menzi would retaliate. This evidence is also at variance with the undisputed evidence of Mzwandile Dlamini that he fled the scene because he feared that Magesh and his crew would subject him to mob justice after he stabbed Menzi.
- [40] The accused stated that he was also injured on his left jaw as a result of the fight with Menzi.
- [41] The accused testified that he was arrested by the police at kaMswane at Ludzeludze.
- [42] During cross examination, the accused conceded that although he had been drinking on 31 October 2021 he walked unaided from kaMusa store to ka LoSo shebeen. The accused stated that he knew Menzi to be his love rival and he was not pleased to find him with Londiwe on the night in question and that is why he confronted the deceased. During cross examination the accused conceded that he was angry to find Menzi with Londiwe. He stated further that although he was angry at Menzi, he did not want to do anything about the incident.
- [43] Accused further testified that when he stabbed Menzi he was acting in self-defence. When it was suggested to him that the knife in question belonged to him and not to Menzi, the accused prevaricated. Instead of responding to

what was suggested to him he stated that he was not in possession of a knife on the day prior to the incident and cited Mlipha's evidence in that regard.

- [44] When it was suggested to the accused further that his evidence about wrestling with Menzi; and that the accused overpowered Menzi is an afterthought as it was not put to Mlipha who witnessed the fight between the accused and the deceased. The accused's response is that Mlipha could not have witnessed the fight because of visibility issues.
- [45] When the accused was asked why he did not flee the scene after disarming Menzi of the knife; his response is that he was drunk and his mind was not functioning properly. It is strange however that after stabbing Menzi, the accused was able to flee the scene.
- [46] The accused testified that when he stabbed Menzi, it did not occur to him that Menzi could die because, as he puts it, he did not know which part of the body he stabbed him. When it was suggested that he stabbed Menzi out of anger when he found him with Londiwe, the accused stated that if they had not engaged in a fight with Menzi he would not have stabbed him.
- [47] The accused stated that he did not call the police after stabbing Menzi because he was afraid that Menzi would retaliate and that is why he fled the scene. The accused stated also that he could not call the police or ask the people who gave him a lift to Ludzeludze to take him to the police because he was drunk, shocked, confused and not in his sound and sober senses.
- [48] The defence closed its case.

Issues that are common cause

[49] First, it is common cause that there was an altercation and a fight between the accused and the deceased over Londiwe who was in a romantic relationship with both men. Second, the accused stabbed the deceased with an okapi knife as a result of which deceased died. Third, the cause of death was the stabbing which the post-mortem report described as bleeding as a result of the penetrating injury over the left side of the neck involving blood vessels. Fourthly, it is further common cause that the accused person did not challenge the production and inclusion of the statement he made before a judicial officer where he confessed to the commission of the offence charged. Lastly, it is not in dispute that the accused admitted to and confessed to stabbing Menzi with an okapi knife.

Analysis of evidence

[50] There is no doubt that Menzi is dead and that he died of a stab wound inflicted by the accused on the neck. The stab wound on the neck severed the blood vessels and nerves on the neck. The question to be answered is whether in doing so, the accused subjectively foresaw the possibility of his act causing the death of the deceased.

[51] Evidence from Crown witnesses is that there was an altercation between the accused and the deceased after the accused found Menzi with his girlfriend who was two-timing him with Menzi. After the accused had enquired from Menzi what was going on between him and Londiwe, Menzi uttered unprintable expletives directed at the accused. An argument between the accused and the deceased ensued. When Mlipha tried to separate them, the accused drew out a knife and stabbed Menzi on the neck. According to Crown witnesses, Menzi was unarmed during the altercation with the accused.

[52] The case put to Crown witnesses was that the deceased was a bully and aggressor; that he provoked the accused by making unprintable expletives directed at the accused; and that the accused was acting in self-defence when he stabbed the deceased.

[53] None of the Crown witnesses testified that the accused and deceased fought, wrestled and rolled on the ground during the altercation. The information about wrestling and rolling on the ground only came to light when the accused was giving his evidence. It was not put to Crown witnesses. It is rejected as an afterthought.

[54] It was suggested to Mlipha that it was while Menzi and the accused were pushing and shoving each other that Menzi drew out a knife but was disarmed by the accused. This was denied by Mlipha who stated that he did not see Menzi take out a knife but did see the accused stab Menzi.

The applicable law

[55] As stated in the preceding paragraphs, it is common cause that on the date in question there was an altercation between the accused and the deceased; that the accused stabbed the deceased with a knife once on the neck; the accused was also injured on the left jaw and that the deceased died as a result of the injury inflicted on him by the accused.

[56] The issue in dispute is whether the accused was acting in private defence at the time he stabbed the deceased and if he was indeed acting in private defence whether he exceeded the bounds of private defence.

[57] In considering private defence and the evidence presented in each case, it is essential to understand that in a fight, the unlawful attack need not emanate from the original aggressor³.

[58] It is trite that when an accused pleads self-defence in a murder trial, the Crown carries the burden of proving beyond reasonable doubt that the accused did not act in self-defence. The accused has no duty or burden whatsoever to prove his innocence.

[59] According to Snyman⁴, 'a person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interests which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.'

In *Naftali*⁵ the court set out the requirements of private defence as follows:

'The requirements of private defence can be summarized as follows: (a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent. (b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. When the defence of self-defense is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and or requirements of self-defense have been met, which includes the question whether the bounds of self-defense were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements of self-defense did not exist or that the bounds of self-defense have been exceeded.'

[60] When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the court must put itself in the position of the

³ *State v Malaika Penda Nanyemba* (CC 12/2018) [2021] NAHCNLD 20 (9 March 2021).

⁴ Snyman, C.R. (2008) *Criminal Law 5th edition* Durban: Lexis Nexis at 103.

⁵ *S v Naftali* 1992 NR 299 HC at 303-304

accused at the time of the attack. If the Crown does not discharge this onus, then the accused must be acquitted.

[61] On the other hand, if the Crown discharges the said onus, that is not the end of the matter because the second leg of the enquiry must be carried out. The second leg of the enquiry is: whether the Crown has proven beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the bounds of self-defence. Here, the test is purely subjective and the reasonableness or otherwise of such belief, is only relevant as one of the factors in the determination of whether or not the accused held the aforesaid genuine belief. If the Crown discharges the onus to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but can be convicted of a crime not requiring *dolus* but merely *culpa*, such as culpable homicide.

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

Evaluation of the evidence

[63] Having stated the legal position of private defence I will now relate the facts of this case to the law. Mlipha stated that the deceased was unarmed during the fight with the accused. The accused stated that the deceased was armed with an okapi knife and that he disarmed the deceased of the knife and stabbed him. I accept that Mlipha's version is the correct one-namely that the

deceased was unarmed during the confrontation with the accused. Mlipha is a credible witness who tried to intervene to stop the fight and later witnessed the accused stab the deceased on the neck. Even if I am wrong in accepting Mlipha's evidence, the version of the accused leaves a lot to be desired. The accused testified that during the confrontation he disarmed the deceased of the knife and was now in control of the knife. Any danger the accused may have been confronted with ceased to exist when he took control of the knife. At the moment he took control of the knife the threat to his life was removed; any action taken by the accused thereafter could not be self defence. Such conduct amounts to grossly exceeding the bounds of private defence. In this case, I find no justification that necessitated the use of the knife on an unarmed and defenceless Menzi if the attack on the accused had ceased already at the time of stabbing. For this reason, I find that the version of the accused fell short of satisfying the first leg of the requirement of self-defence and is rejected as implausible and unreliable. I accept the version of Crown witnesses.

[64] Furthermore, the accused, in my view was not honest in his evidence. His testimony of wrestling and rolling on the ground while fighting with the deceased; his testimony that the deceased was the first to draw blood by slapping him with an open hand on the face and that he overpowered the deceased and disarmed him of the knife was tailor made to suit his version. Such evidence was not put to Crown witnesses especially Mlipha who witnessed the confrontation between the accused and the deceased.

[65] The accused had time to desist from his unlawful and intentional conduct but proceeded to stab the deceased well knowing that the deceased was unarmed. The accused stabbed the deceased at a vulnerable part of the

human anatomy-the neck. The intention of the accused can also be deduced by the fact that after stabbing the deceased he did nothing to assist the deceased. Instead, he admitted to all and sundry that he had stabbed the deceased at Sicelwini; he did not report the matter to the police but escaped to Ludzeludze where he continued his drinking expedition for the rest of the night.

- [66] Although the deceased could have been the initial aggressor and bully, the accused should not have confronted the deceased the way he did. The most logical thing expected of a reasonable person in the circumstances was to refrain from confronting the deceased having known him as a bully who was drunk on the fateful day. I find that the accused confronted the deceased because accused was armed and angry that the deceased was still in a love relationship with Londiwe who was also in a romantic relationship with the accused. Although by law the accused has no duty to flee, he could have walked away and reported the matter to the police instead of stabbing the deceased.
- [67] The accused's conduct during and after the stabbing, the seriousness and the location where the injury was inflicted, the lethal weapon used on a human being as well as the anger he felt in finding the accused with Londiwe appear to suggest a deliberate motive to commit murder. That, however is not the end of the enquiry. The court has to consider the defence of provocation that was also raised by the accused.

Provocation

- [68] It is undeniable that the deceased made insulting if derogatory statements directed at the accused before he was stabbed by the accused. Clearly these

words were *prima facie* provocative. The question is do the words satisfy the elements of provocation in law. The answer to this question is defined by common law and provisions of the Homicide Act⁶.

[69] The learned authors Gardner and Lansdown⁷ define the common law position of provocation in the following terms:

'On a charge of murder or assault with intent to murder or do grievous bodily harm, the presumption of intention of reasonable and probable consequences may be negated by evidence that the accused was subjected by his victim to provocation which:-

- a) Was such as to upset the balance of mind of a reasonable man and deprive him, for the time being, of the power of self control or of the faculty of realizing the probable consequences of his act; and**
- b) Did in fact, exercise such an influence on the mind of the accused;**
- c) Provided it be proved that the conduct of the accused immediately upon the provocation, was the natural reaction to it, and was not disproportionate to the provocation.**

[70] I am of the view that the accused was provoked by the deceased who uttered unprintable expletives directed at the accused when the accused asked what was going on between Londiwe and the deceased. It remains to consider whether there was a time for the accused's temper to cool after the utterances and when he stabbed the deceased. The evidence before the court shows that the stabbing of the deceased was instant after the derogatory utterances were made by the deceased. I therefore find that the accused was provoked and that the provocation deprived him of the power of self-control. The provocation had the effect of dislodging intention from the crime of murder and then reduces it to the crime of culpable homicide.

⁶ The Homicide Act 44/1959.

⁷ *The South African Criminal Law and Procedure, Volume 1 General Principles and Procedure*, Juta and Company at page 101.

[71] Even if I am wrong in my conclusion in this regard, it seems to me that the same conclusion is inescapable under the provisions of the Homicide Act, 1959⁸. The Homicide Act states as follows:

'Killing on provocation

2(1) a person who-

- a) **Unlawfully kills another under circumstances which but for this section would constitute murder and**
- b) **Does the act which causes the death in the heat of passion caused by sudden provocation as defined in Section 3 and before there is time for his passion to cool;**

Shall only be guilty of culpable homicide.

2(2) this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

Provocation defined

3(1) Subject to this section 'provocation' means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.'

[72] The above provisions state that a person who unlawfully kills another in the heat of passion as a result of provocation by the deceased shall be guilty of culpable homicide.

[73] The provocation contemplated in the Homicide Act includes any insult of such a nature when directed to the accused would likely deprive him of the power of self-control and induce him to assault the deceased who directed the insult at the accused.

[74] I find that the words directed to the accused when he asked deceased what he was doing with Londiwe-accused's romantic partner-and deceased stated that a vagina was going on and that the accused should not have sexual

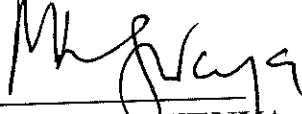
⁸ Section 2(1)(a)(b), 2(2) and Section 3(1)

intercourse with him was provocative particularly because they were acted upon immediately after they were uttered in the heat of passion and before there was any time for the accused's temper to cool.

[75] The accused should be found guilty of culpable homicide given that the circumstances justify a conclusion in that regard.

[76] Mr Mamba for the Crown argued forcefully that the circumstances of the accused's action were indicative of *dolus eventualis* for murder when one considers the weapon used and the part of the body on which the blow was inflicted. I must reiterate that there is no dispute that the finding of culpable homicide is not because murder could not be proved but it is because of the effect of provocation on what would have been an act of murder which is reduced to culpable homicide.

[77] Consequently, and for the foregoing reasons the accused is found guilty of culpable homicide and I convict him of same.


M.S. LANGWENYA
JUDGE OF THE HIGH COURT

For the Crown:

Mr T. Mamba

For the Defence:

Mr S. Mabila.