



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 383/2016

In the matter between:

REX

And

THEMBA MXOLISI MASIMULA

Neutral citation: *Rex v Themba Mxolisi Masimula (383/2016) [2022] SZHC 57*
(28 March 2024)

CORAM : T. DLAMINI J

Heard : 26 October 2020 up to 26 July 2022

Delivered : 28 March 2024

[1] *Criminal law – Murder – Elements thereof considered*

Summary: *Accused is charged with the murder of his wife – At the time the wife met her death, she was in the same motor vehicle with the accused and were coming from a night prayer service held at Zulwini, Hhohho region – Upon arrival in Mbabane, the accused bought petrol at a filling station in order to fill a car that he left at Nkhaba without sufficient petrol, according to evidence he tendered – The accused resided at his parental homestead at Nkhaba whilst the deceased wife resided in Piggs Peak, a place that is some kilometres away from Nkhaba when coming from the*

Mbabane direction – They proceeded to Nkhamba and the accused was the driver – Upon arrival, the accused stepped out and went to his house and again returned to the vehicle as the wife insisted that they should spend the night in Piggs Peak and not at Nkhamba – Upon coming back he found that the wife had taken the driver's seat and he allowed her to drive – They started their journey to Piggs Peak – Having joined the main road and driving towards Piggs Peak, she lost control of the motor vehicle and it drove off the road and got into a nearby ditch – According to the accused, he suspects that his wife fell asleep while driving – The vehicle caught fire and was extensively burnt – The wife was found dead and extensively burnt in front of the passenger's seat after the fire had been put off by the National Fire and Emergencies Services – The accused was rushed to the Mbabane Clinic – He was later charged with the murder of his wife.

Held: *That the crown proved its case beyond reasonable doubt and the accused is found guilty as charged.*

JUDGMENT

T. Dlamini J

- [1] The accused person, Themba Mxolisi Masimula, is arraigned before this court on a charge of murder. According to the indictment, he unlawfully and intentionally killed Funekile Mdluli on or about the 8th October 2016 at or near Nkhamba area in the Hhohho Region. The accused and Funekile were husband and wife.
- [2] The crown paraded fourteen witnesses while the defence paraded two witnesses.
- [3] The first witness for the crown (PW1) is Mr. Sabelo Msibi, hereinafter referred to as Mr. Msibi. He testified that on 8 October 2016 he left his house at around 03:30 hours and proceeded to Piggs Peak to join those who were at a funeral for a colleague he worked with at the National Maize Corporation.

After having drove past the Nkhamba Clinic and dip tank, he saw fire flames near the road on the right side. Upon getting closer, he realized that a car was burning. The fire looked like it had just started. The time was around 04:00 hours. As he got closer, he developed a sense of fear as he suspected that some people might be on a trick to rob him of his car. To him, it looked like the car had been parked and not that it was involved in an accident.

- [4] Mr. Msibi also testified that the driver's door was wide open and he noticed that the fire looked like it started from the seat inside the motor vehicle. He then called the police emergency number '999' and reported the incident. A motor vehicle owned by Dups Funeral Home came and was also driving towards Piggs Peak. Together with the occupants of the Dups motor vehicle, Mr. Msibi got closer to the burning motor vehicle. They saw that the motor vehicle was on a ditch near the road on its one side and the area on its front was a descending slope. The motor vehicle would have gone down the slope had it not stopped where it was.
- [5] It was Mr. Msibi's further evidence that whilst they were still there, a delivery truck for Shoprite stores came from the Piggs Peak direction. Two gentlemen alighted from the truck and came to inspect the incident, and were carrying fire extinguishers to help put out the fire. The motor vehicle had been heavily burnt by then and one of the gentlemen suggested that they stay further from the burning car as its petrol tank might burst any moment. They indeed stepped back but as soon as they arrived where their cars were parked, the motor vehicle exploded due to the fire. Mr. Msibi then left and proceeded to the funeral as he was to make a speech.

- [6] On his way back from the funeral, Mr. Msibi found that the scene had been cordoned off by the police. He stopped there, as he is the person who called the police. He wanted to see what was happening, according to his evidence. He asked one of the fire and emergency personnel who were there and was told that a person was burnt inside the motor vehicle. He then informed this fire officer that he is the one who called and informed the police about the incident. The fire officer informed him that the police were about to call him. He then met a criminal investigation department (CID) police officer and recorded a statement.
- [7] The second witness for the crown (PW2) is Mr. Biyela Muzi Khanyile, hereinafter referred to as Pastor Khanyile. He is a resident of Nkhamba and is a pastor at a local church. He testified that the accused is his friend and he considers him as his brother. His evidence is that on 8 October 2016 at around 0430 hours he was called by the accused who asked him to come and help them as they had been involved in a motor vehicle accident with his wife. He immediately dressed up and washed his face and drove in his motor vehicle. As he had not asked the accused about the exact location of the accident scene, he then called the accused but no one answered the call. He however proceeded driving towards the main road but made a U-turn when he was about to join the main road.
- [8] Pastor Khanyile explained that his homestead is about one (1) km away from the main road. The Masimula homestead is located along the road to the Khanyile homestead when coming from the main road. My understanding of this evidence is that the Masimula homestead is between the main road and the Khanyile homestead.

- [9] Pastor Khanyile also testified that just after driving past the Masimula homestead on his way back, the accused called him again and stated that he hears the sound of his motor vehicle. He told him to find him by a Dunn's homestead. He proceeded there and found him. The accused got inside Pastor Khanyile's motor vehicle and they rushed to the accident scene. They got there in about three minutes as the place is close. The vehicle had been burnt such that its colour could not be seen. He noticed that the driver's door was open and a small fire was burning on the dash board. He asked the accused about who was driving and the accused said that it was his wife Funekile. He then asked him about where Funekile was and the accused said she was in the bushes. He also testified that he asked the accused about where he exited the car as the passenger door's was closed and the accused told him that he used the same driver's door that Funekile used.
- [10] Pastor Khanyile further testified that he had the deceased person's cellular phone number and he called her but it was not available on the network. At that moment, an ambulance from the fire and emergency services arrived and asked who was involved in the accident. He told them that it was the accused and they took him into the ambulance. When asked in-chief about the cause of the fire, Pastor Khanyile testified that the accused told him that the motor vehicle got into a ditch. When he tried to open the bonnet, the motor vehicle burst into flames, and complained about having been burnt on the face and hands in that process.
- [11] Pastor Khanyile further testified that the accused was rushed to hospital. However, before he left for the hospital, one of the fire and emergency

personnel informed him that the accused wanted to talk to him. He was informed by the accused that in the event a person by the surname of Dladla comes to see him, he should inform that person that he has been rushed to the Mbabane Clinic. The Fire and Emergency Services personnel continued to put out the fire.

[12] The third witness for the crown (PW3) is Dr. Komma Reddi, a police pathologist who conducted a post-mortem examination to determine the cause of death. He testified that on 12 October 2016 he conducted a post-mortem on the dead body of Funekile Bhekuyise Mdluli Masimula. His findings were that the cause of death *was due to stab and cut injury to the neck*. The post-mortem report that he prepared and handed-in as part of his evidence (EXHIBIT 'A') reflects that post-mortem changes present were that the body of Funekile *is completely burnt and charred remains (were) present*.

[13] He also testified that the body had antemortem injuries present. These are injuries sustained before a person dies. He described them as a stab wound of 2x1cm on the right side of the neck in the upper portion; a cut injury of 12x1 1/2cm on the front and middle portion of the upper portion of the neck and transverse in direction. The post-mortem examination report reflects that the body was completely burnt and charred remains were present; devoid of limbs, abdomen, pelvis and perineum. The post-mortem report reflects that on the neck, larynx, thyroid and other neck structures, the *blood vessels and muscles are cut in the front and upper portion of the neck and burnt*. The oesophagus was *cut in the upper portion*, and the *Trachea cut in the upper portion above the thyroid cartilage*.

- [14] Many parts of the body of Funekile were reported by the pathologists to have been burnt. These include the skull; brain and meninges and cerebral vasculature; orbital, nasal, accessory nasal and aural cavities; mouth, tongue and pharynx; ribs and chest wall; diaphragm; mediastinum and thymus; both right and left pleural cavities; both right and left lungs; heart and pericardial sac; large blood vessels; spinal column; and spinal cord.
- [15] The pathologist testified that the burning of the body occurred after the person had already died.
- [16] During cross-examination, the pathologist was asked to explain why he described the injury on the neck as the cause of death and that Funekile sustained it before she died. His response was that he had to determine the cause of death. He also explained that Funekile's body was facing down and when he lifted it upwards he discovered a cut on the neck and a stab wound as well. The pathologist was also asked about where the body of Funekile was kept before being handed over to him. His response was that the police are better placed to answer the question because the safe keeping of the dead bodies is not his responsibility. His duty commences when the body is placed on the table where he conducts the examination.
- [17] The fourth witness for the crown (PW4) is Menzi Nkhambule, hereinafter referred to as Mr. Nkhambule. He testified that he resides in Manzini and was coming from a funeral at a place called Malanti. He saw a burnt motor vehicle just before he was about to pass the Nkhamba dip tank. There was still some fire on the passenger's side of the motor vehicle. He drove passed the motor vehicle but again drove back and parked and alighted from his car. He looked

around but saw no one in the vicinity. A bakery vehicle came and the occupants told him that they came back to see and have already called the Fire and Emergency personnel who said they are on their way.

[18] Mr. Nkhambule also testified that Pastor Khanyile (PW2) then came driving in a Nissan motor vehicle and alighted. He was asked by Mr. Khanyile about the whereabouts of the woman and Mr. Nkhambule asked him which woman he was asking him about. Mr. Khanyile informed him that Mr. Masimula was with his wife in the burnt motor vehicle. They looked around for her but did not see her. Mr. Khanyile tried to call her cell phone number but the cell phone number was not available on the network.

[19] Mr. Nkhambule further testified that an ambulance and the National Fire and Emergency Services personnel arrived. The fire personnel alighted with a horse pipe and put out the fire. He informed the Fire personnel that the driver was with his wife in the burnt motor vehicle. The Fire personnel opened the passenger's door but an embankment prevented it from properly opening. After the fire had been extinguished, a rib bone was observed in the car. It was Mr. Nkhambule's further testimony that he then wanted to leave and go away but the Fire personnel informed him that he needed to wait for the arrival of the police because he was present when the discovery was made.

[20] The fifth witness for the crown (PW5) is Mr. Elphas Dlamini, hereinafter referred to as Mr. Dlamini. He testified that the deceased is his niece and was married to the accused. He identified the body of the deceased at the Mbabane Government Hospital before a post-mortem was conducted. He also testified

that the body was extensively burnt and had a cut on the neck. That was all he testified to and was not cross-examined by the defence.

- [21] The sixth witness for the crown (PW6) is Siphiwe Joice Dlamini, hereinafter referred to as Ms. Siphiwe. She testified that the deceased was her cousin and she stayed with her in Piggs Peak, beginning in December 2014. She was the care taker of the deceased's children. She also testified that the accused was the deceased's husband but resided at a place called *kaNdeva* and would visit them in Piggs Peak and stayed there for about two days and then return to where he resided. The accused and the deceased had two children who stayed with the deceased.
- [22] Ms. Siphiwe further testified that on 07 October 2016 the accused and the deceased left Piggs Peak and drove to Manzini to meet the Masimula family following the passing on of the father of the accused. Thereafter, they were to go to Ezulwini. She described the clothes that the two wore when leaving for Manzini. The accused was wearing a blue suit and a powder blue shirt with white strips. It was her evidence that the deceased never returned to Piggs Peak and that she received the news of her death at around 1000 hours on the next morning of Saturday, 08 October 2016.
- [23] During cross-examination, Ms. Siphiwe was only asked if it was correct that the homestead at *kaNdeva* was the marital homestead of the deceased, and if she knows that the deceased visited this homestead. She answered in the affirmative, and stated that the deceased visited this marital homestead when she was off work.

- [24] The seventh witness for the crown (PW7) is Grace Fikile Mdluli, hereinafter referred to as Mrs. Mdluli. She is the mother of the deceased. She testified that she received a telephone call from the deceased at around 1200 hours informing her about the passing on of her father-in-law. The deceased also informed her that she was going to Manzini to meet the Masimula family with her husband. She also testified that she was to get a ride from them as she was to go to a church service at Ezulwini. She however proceeded to the church service without them.
- [25] Mrs. Mdluli also testified that the church service started at about 1900 hours, and that the accused and the deceased came in together. The pastor who gave the word of God on that evening is the accused person. He read the book of Nehemiah where the message is about *rebuilding the fallen gates of the church* (rebuilding life). The service ended at around 0300 hours, according to Mrs. Mdluli. That was the last time she saw the deceased alive.
- [26] She further testified that she attended a morning church service on the 08 October 2016 and was called from inside the church. She found her sister crying outside and it was then that she was informed by her that her daughter Funekile has died.
- [27] The cross-examination of this witness was more about the sitting arrangement of the pastors and their wives during the night service held at Ezulwini, and particularly about how the accused and the deceased seated.
- [28] The eighth witness for the crown (PW8) is police officer 5527, Sergeant Sithembiso Dlamini, hereinafter referred to as Sgt. Dlamini. He worked under

the traffic department at the Mbabane police station. He testified that he resumed duty at 03:00 hours as it was commencement of the *Imbube Marathon* competition. As they were going about their duties as traffic police officers, they received a call about an accident that occurred at Nkhaba on the MR1 public road. He proceeded there with constables Fakudze and Magagula. At the scene they found people gathered there and there were also personnel from the National Fire and Emergency Services, hereinafter called the Fire and Emergency Services. There was also a motor vehicle that had been extensively burnt.

[29] Sgt. Dlamini also testified that they were met by Pastor Khanyile (PW2) who had first-hand information from the person who was travelling in the motor vehicle. Mr. Khanyile told them that he was informed by the accused that there was himself and his wife in the car and they had an accident. The accused had already been rushed to hospital, according to Sgt. Dlamini. They inspected the scene and the motor vehicle in order to ascertain how the accident occurred. The motor vehicle was positioned in a ditch on the right side of the road when travelling from Mbabane to Piggs Peak. In front of the vehicle was a small wattle tree.

[30] Sgt. Dlamini further testified that as traffic police officers, there are factors that they consider when ascertaining the cause of a motor vehicle accident. These causes, amongst others, include human error, a road failure, road surface, as well as the weather. Having considered the various factors that may cause an accident, their finding and conclusion was that this was not an accident. They therefore called the scenes of crime police who took pictures of the scene. Whilst waiting for the scenes of crime police, they interviewed

the people they found at the scene. He specifically interviewed Pastor Khanyile who informed him that he met the accused before the accused was taken to hospital. He was also informed by Pastor Khanyile that the accused left the scene after the accident and he met him on the way whilst coming from his homestead. He further informed him that the accused told him that the deceased was driving the motor vehicle, and that he (the accused) came out of the car through the driver's door as the passenger's door had difficulty in opening. The door was leaning on the wall of the ditch.

[31] Sgt. Dlamini further testified that the driver's door was wide open. The vehicle had no damage on the body that would result from an accident, but only an extensively burnt body, including the windows and tyres which were burnt and damaged. The surface had no marks indicating that there was some struggle to control the motor vehicle, and that given the position that the vehicle was found in, their conclusions were that the motor vehicle was driven to where it stopped and got burnt. He testified further, that they also considered the speed at which the vehicle was driven, and the distance from where the motor vehicle was coming and joins the main road. They further considered the distance of about plus or minus 500 metres that had been driven on the main road, and concluded that it was not possible for an accident to occur and the motor vehicle be in the position that it was found in. Had speed been a factor, the motor vehicle would have capsized given the position it was found in.

[32] Sgt. Dlamini further testified that they handed over the accident scene to scenes of crime officer D/Sgt. Mhlanga who inspected the inside of the motor vehicle and found a knife in the front passenger's seat, as well as the remains

of the deceased. The deceased was burnt beyond recognition, and her legs burnt to ashes. The knife was handed in as an exhibit. It was about 30 cm long but with a burnt handle. The blade is about 25 cm. They referred the matter to the criminal investigations department, and informed the Regional Branch Officer for the Hhohho Region and the desk officer in-charge of crime in Mbabane, about it. The remains of the deceased were taken to the Mbabane Government Hospital. This witness also described the clothing that the accused was wearing on this day as he found him at the police station following his discharge from the Mbabane Clinic after treatment. He was wearing an old looking long pants jeans trouser and a grey t-shirt with short black sleeves.

[33] During cross-examination, it was put to Sgt. Dlamini that when the accident occurred, the accused and the deceased had not slept and were tired, and that fatigue was the cause of the accident. His response was that this is the accused person's version but their finding and conclusion was that this was not an accident. It was also put to Sgt. Dlamini that the accused person's version is that the accused fell asleep. He woke up and found the motor vehicle in the ditch and that it was driven by the deceased. He tried to help the deceased to get out of the burning vehicle and he got burnt on his face, arms and the legs in the process. In response, he reiterated that this was a version of the accused. He also stated that he saw the accused after coming from the Mbabane Clinic. He stated that the accused had bandages but he did not see any wound, and that his clothes were not burnt.

[34] The ninth witness for the crown (PW9) is officer 3444 D/Sgt. Patrick Mhlanga, hereinafter referred to as D/Sgt. Mhlanga. He was based at the

Hhohho Regional Headquarters Crimes of Scene section. He testified that on 08 October 2016 he received a call from officer 5527 Sgt. Sithembiso Dlamini (PW8) who requested him to attend to a crime scene at Nkhaba, after passing the dip tank. He proceeded to the scene and found personnel from the Fire and Emergency Services, and traffic police. Certain points of the crime scene were shown to him by Sgt. Dlamini. There was a burnt motor vehicle by a donga near the road. The colour of the vehicle was burnt beyond recognition. He was informed by the traffic police that there is a dead body inside the burnt vehicle. He took pictures of the vehicle and in the process he saw a knife in the motor vehicle. He estimated the knife to be about 30 cm. He then called officer Mavuso who was the desk officer but is now late, including officer Mr. Jele, and Inspector Percy Dlamini from the *Lukhozi* unit. They came and examined the scene. They concluded that it does not look like it was an accident, but a murder case. The driver's door was open, while that of the passenger was slightly opened. The dead body inside the vehicle was burnt beyond recognition.

- [35] They removed the dead body from the car but it was not easy. The body was still burning and was like touching meat that was being roasted. The dead body was then conveyed to the Mbabane Government Hospital for a post-mortem that was held on the 12 October 2016. Photographs of the dead body were taken from all angles during the post-mortem. A photo album, admitted as part of the crown's evidence and marked EXHIBIT "B", was prepared, together with a sworn statement. Photo number 10 (taken on 12 October 2016) shows a big cut on the neck of the deceased body.

[36] D/Sgt. Mhlanga also testified that due to the sensitivity of the matter, the National Commissioner of Police, acting through Senior Officer Mr. Sam Mthembu, requested the assistance of the South African Police Service (SAPS) for further and conclusive investigations. The SAPS, under the Forensic Department, including an officer who investigate fires, arrived in the country. Warrant Officer Rungani who investigated the source or cause of the fire, found a knife inside the motor vehicle. At this point, the vehicle was parked at the underground parking of the Mbabane Police Station. The knife was described by D/Sgt. Mhlanga as one of the small knives used in the kitchen when cooking. The knife is shown in photo 8 of EXHIBIT B. It was produced in court and was identified by D/Sgt. Mhlanga. It has a burnt handle and the blade is estimated to be about 8 cm.

[37] Photo 9 of EXHIBIT "B" shows an extensively burnt human body whose shape and make is disfigured from the chest to the feet. Photo 10 shows a long cut that covers the entire front portion of the upper part of the neck.

[38] During cross-examination, D/Sgt. Mhlanga was asked about what he did to the burnt motor vehicle after he observed the scene and took photographs, given that it was an exhibit. His response was that he handed it over to desk officer Mr. Mavuso. He was also asked if he is aware that the vehicle was taken to the Masimula homestead and its condition, as obtaining from the scene, was compromised. His response was that he is not aware. He was further asked if he was aware that the motor vehicle remained at the Masimula homestead for about two to three days before it was taken to the police station. His response was, again, that he is not aware. To his knowledge, the vehicle was taken to the police station on the same day of the incident. The defence

attorney informed this witness that the instructions she received are that when the work colleagues of the deceased visited the Masimula homestead on the following day in order to pay their condolences, they found the motor vehicle at the Masimula homestead. They stood near it and cried. In response, the witness informed the court that he has no knowledge of that, but left the scene and conveyed the burnt body to the mortuary. He, however, insisted that a break down was on its way to the scene.

[39] It was put to D/Sgt. Mhlanga that at the scene, the deceased did not have the cut wound that is seen in photograph 10, hence this picture was taken after the body had been removed from the scene. The witness' response was that at the scene, the body was still burning and was like meat whilst being roasted, and therefore could not be touched or carried anyhow. They therefore could not examine the burnt body whilst at the scene. It, however, had to be conveyed to the mortuary where a thorough investigation, in the form of a post-mortem, would be carried out.

[40] The tenth witness for the crown (PW10) is Samson Mabhoko Motsa, hereinafter referred to as Mr. Motsa. He is the driver of the tow truck that towed the burnt motor vehicle from the scene. At the time he was an employee of Mameju Towing Services based at Sidvwashini, Mbabane Industrial site. He testified that whilst at work, he was called by his superior who instructed him to drive to Nkhamba to tow a motor vehicle. He proceeded to Nkhamba where he found many cars parked on both sides of the road. Police who were in civilian clothing requested him to tow the burnt motor vehicle to a Masimula homestead at Nkhamba and he duly did so.

[41] He also testified that after having left the motor vehicle at the Masimula homestead, he drove back to Mbabane. He was again called by his superior who instructed him to go back to fetch the motor vehicle and bring it to the Mbabane police station. He had just driven past the Game reserve (Malolotja) when he received the call. He was informed that the police say the motor vehicle is supposed to be towed to the police station and not to the Masimula homestead. He drove back to Nkhamba and again towed the motor vehicle. He delivered it at the underground parking of the Mbabane police station.

[42] During cross-examination, it was put to Mr. Motsa that he did not go back to Nkhamba to tow the motor vehicle because it remained at the homestead for about two days. This was denied by Mr. Motsa. He maintained that he drove back on the same day that he had towed the motor vehicle from the scene. Mr. Motsa was also informed that when employees who worked with the deceased went to pay their condolences on the next day following the incident, they found the motor vehicle at the Masimula homestead where they looked at it. In response, Mr. Motsa said he doesn't know which car they looked at because he had towed the burnt motor vehicle from the homestead on the very same day of the incident.

[43] The eleventh witness for the crown (PW11) is Mr. Bongane Mlotsa, hereinafter referred to as Mr. Mlotsa. He resided at Nkhamba, at the parental homestead of the accused. His testimony described the Masimula homestead as fenced, with six houses, and having a gate as well. He testified that when one was inside his room, he was able to see the gate through the window. The accused person's house was behind his room but very close to each other.

- [44] Mr. Mlotsa testified that while he was sleeping on the night in question, he heard the gate opening. He peeped through the window and saw someone coming in. He then heard the sound of keys and a door was opened. The door is the one for the accused person's house. Shortly thereafter the person walked out of the house again and he saw him walking away. This person again entered the gate and the house, and the coming in and out of the gate and the house happened three times. He however did not see the identity of this person as there was mist, but believes it was the accused as the door that was being opened is that of his house. This person was wearing a suit coat although he was unable to see its colour given that there was mist.
- [45] The twelfth witness for the crown (PW12) is warrant officer 7203458-1 Phathutshegzo Russel Runguni, hereinafter referred to as warrant officer Rungani. He is a Forensic Analyst in the South African Police Service and is attached to the Chemistry Section of the Forensic Science Laboratory as a qualified Fire Investigator. His qualifications, experience, and the forensic investigations he is qualified to carry out are stated in the affidavit he deposed to in terms of s. 212 of the *Criminal Procedure and Evidence Act, 51/1977* (an equivalent of local *Criminal Procedure and Evidence Act, 67/1938*). The affidavit is attached in EXHIBIT "G" which the witness submitted as part of his evidence. This exhibit also has many pictures of the burnt vehicle taken at different positions. Warrant officer Rungani was engaged to assist the investigation by doing a forensic investigation to determine the cause and origin of the fire.
- [46] During the course of his testimony, an inspection *in loco* was also conducted at the underground parking of the Mbabane police station where the motor

vehicle was kept. Minutes of the inspection *in loco* (EXHIBIT Q) were prepared and read into the record.

[47] Warrant officer Rungani pointed out certain features that were caused by the fire on the body of the vehicle and explained them. On the left side, the vehicle was extensively burnt and remained with a greyish colour that looked white. This greyish colour but looking white is on the front passenger door on the left side up to the half portion of the back door behind. The remaining portion towards the back of the vehicle looked rust. The greyish colour which looked white was explained by the warrant officer to be a metal discolouration. He explained that it was caused by the intensity of the fire and the heat. He testified that it shows that the intensity of the heat was severe on the seat and door of the passenger than it was on the other parts of the left side of the vehicle.

[48] He also testified that the pattern of the spread of the fire on the left side of the vehicle is uniform and shows that both doors on the left were closed during the burning of the vehicle. He further testified that in terms of fire patterns, the part that becomes more damaged is the one from where the fire originates. *In casu*, the passenger compartment was the most exposed to the intensity of the fire and its heat, hence everything was consumed.

[49] The witness further testified that during their investigation, they investigated the passenger compartment where they found a knife underneath the debris. The blade is the only component of the knife that remained and was retrieved.

[50] The warrant officer also pointed at the driver's door. Like the passenger's door, it had a similar greyish colour that looked white. The portion above the opening handle had a navy blue like colour. This colour was visible up to the edge where the door opens and closes. The colour was also visible on the door panel up to the top portion of the panel. This is the panel that houses the window of the door. The colour was visible also on the inside of the door in a pattern similar to that on the outside of the door. Warrant officer testified that the blue like colour are remains of paint. He testified that the colour remains is evidence showing that the door was open when the vehicle was burning. The part with colour remains was a little further from the intensity of the heat as the vehicle burnt, hence the colour was not completely consumed by the fire.

[51] He further testified that they concluded that the window of the driver's door was open because it broke and fell inside the panel that holds it. Had it been closed, some particles of the window would have been found inside the car as well.

[52] Warrant officer Rungani also showed the court the front part of the motor vehicle. He then testified that there was very little damage on the front of the vehicle, including the bonnet. This was because the impact was very minimal, and could not ignite any fire. The impact, if there was any, was not enough to affect the engine and cause a failure of the electric wires. He pointed out the heat wave pattern on the bonnet. It comes from the direction of the passenger's seat area and moves to the front of the vehicle. Warrant officer Rungani testified that this was evidence that the fire originated on the passenger's seat area and spread to the front of the vehicle.

- [53] He also pointed out cable wires in the compartment that houses the engine. He testified that all the wires were thoroughly checked and no fault was identified. He stressed that the wires were intact and continuous, and were not cut or damaged. They therefore concluded that the wires were not the cause of the fire.
- [54] The witness then pointed at the floor area of the passenger and driver's seat. He testified that the driver's seat area had more remains than the passenger's. He explained that the fire caused more damage on the passenger's area because that is where the fire originated. He also pointed out the luggage compartment (boot) and testified that it was intensely damaged as well. He explained that the intense damage was caused by the load that was inside the luggage compartment, and also by the spare tyre, whose rim remained inside the compartment.
- [55] The investigation concluded that the luggage and the engine compartments were excluded as compartments where the fire originated. The fire pattern shows that the fire was spreading from the passenger's compartment and spread to the engine. This, according to warrant officer Rungani, shows that the fire originated from the passenger's compartment. He further testified that the investigation found and concluded that neither natural nor accidental causes were responsible for the fire. The only cause, according to their investigation and conclusion, was an open flame. The ignition factor was a deliberate human action.

[56] Warrant officer Rungani concluded his evidence by testifying that on the engine compartment, they looked at every possible cause of the fire and their finding was that the engine compartment is not where the fire originated. The luggage compartment was also examined and the finding was that it was not the source where the fire started. They also examined the wire cables and found that they were not the cause of the fire ignition. They also examined the underneath of the vehicle to see if there is any disturbance that could have ignited the fire. The bottom of the vehicle was carefully looked at and was found to be intact. It had no damage. Nothing happened underneath the vehicle could ignite a fire.

[57] During cross-examination, the witness was asked if each and every wire in the vehicle was examined and he answered in the affirmative. He was also asked to show to the court the debris of the windows that were closed when the vehicle burnt. In response, he stated that they removed them during the excavation that they carried out when conducting their investigation. He was further asked if he agreed that there were no window debris in the motor vehicle and that there is no evidence of their presence other than hearing about them from him. The witness answered by stating that he has evidence of their presence in the form of pictures that he took, although it would be difficult to see them due to the extensive damage that was caused.

[58] It was put to this witness that the motor vehicle was extensively tampered with before the examination was carried out, and the findings therefore, are not a true reflection of the vehicle's condition of the time of its removal from the scene. In response, the witness stated that although the vehicle was removed

from the scene, the burning pattern cannot be changed by any person. For that reason, the place of origin of the fire cannot be tempered with.

[59] It was also put to this witness that he based his conclusions on the information he received from the investigating officer, the late Superintended Sonyezane, who informed him that Funekile died before the accident, and that a petrol container was found at the scene. In response, the witness informed the court that he based his conclusions on the findings he obtained during his examination of the motor vehicle. He only interviewed Superintended Sonyezane in order to get background information about the case.

[60] The thirteenth witness for the crown (PW13) is Dr. Nosipho Ntombifuthi Nkonde, hereinafter referred to as Dr. Nkonde. She attended to the accused on 11 October, 2016, at the Mbabane Government Hospital, Out-patient Department, Casualty section. She testified that she examined the accused on 11 October 2016 at 09:06 hours. His physical appearance looked well and satisfactory. He had no bruises and abrasions but first and second degree burns on both his hands, and on the right knee and face. She also testified that she prepared a report of her examination on Form RSP 88. She handed-in the report and it was admitted as part of her evidence and was marked EXHIBIT "I".

[61] During cross-examination, Dr. Nkonde was asked if she treated the accused on this day. Her response was that she did. She cleaned the burn wounds and applied flamazine cream, and bandaged him. Dr. Nkonde was informed by the defence attorney that the accused had a cast on his right leg which is usually put when a person is fractured. She was asked if she knows anything about it.

Her response was that she remembers something about the cast as the accused complained about pain on his right leg. The defence attorney then informed Dr. Nkonde that the accused person's instruction is that after the cast was removed, he was to undergo physiotherapy sessions. She was asked if she knows anything about that. Her response was that she does not.

[62] The fourteenth witness for the crown (PW14) is officer 4573, D/Sgt. Sikhumbuzo Mamba, hereinafter referred to as D/Sgt. Mamba. He worked under the criminal investigations department (CID) at the Mbabane police station. He testified that on 08 October 2016 he was on duty at the Prince of Wales sports ground in Mbabane, where there was the *Imbube Marathon* competition. He was with officer 3492, D/Const. Mandla Malaza, and other police officers as well. At around 11:00 hours he received a phone call from officer Sonyezane Dlamini who was in-charge of the Hhohho CID. Officer Sonyezane informed him to go with officer Malaza to the Mbabane police station where they will find the accused person. He instructed them to come with him to Nkhamba, next to the dip tank where they will find him. At the police station officer Mamba found traffic police officer Sgt. Dlamini (PW8) who handed over the accused person to them.

[63] Officer Mamba also testified that introductions were duly made between them and the accused. The accused was wearing clean clothes, and he also looked clean. His two hands, however, were in bandages, and he had a burn wound on his forehead. They took him and proceeded to Nkhamba where they found five police officers, officer Sonyezane amongst them. The other police officers were Solomon Mavuso, who however, is now late; officer Jele, who was Head of the Fraud Department in the Hhohho region; Inspector Percy

Dlamini, who was head of all the Mbabane police station shifts but is now retired; and officer 3444 Sgt. Patrick Mhlanga, who was in-charge of the scenes of crime in the Hhohho region.

[64] Officer Mamba further testified that they were briefed together with officer Malaza by officer Sonyezane who informed them that the accused is a suspect in the death of his wife Funekile. Officer Sonyezane then introduced them to the accused who he informed that he is a suspect in the death of Funekile. He thereafter cautioned him according to the Judges' Rules. The accused said something that led them to go to the Masimula homestead and conducted a search. They found Bongani Mlotsa who resided at the homestead. The accused led them into his house where he pointed to them a black Samsung tablet, silver nokia cell phone, passport for the accused, and a pair of socks. They then returned to Mbabane.

[65] He testified further, that on 12 October 2016, he attended a post- mortem examination at the Mbabane Government Hospital with officers Mavuso and 7182 D/Const. Dumisani Dlamini. Also present were 3444 D/Sgt. Patrick Mhlanga and Funekile's uncle, Mr. Elphas Dlamini. The body of Funekile was severely burnt such that most of it looked like it turned to coal. The head, however, was visible as one could tell that it was for a human being and had remains of dread hair. A huge cut wound was discovered on the neck of the deceased below the chin. There was also a stab wound just below the right ear. D/Sgt. Mhlanga took photographs of the dead body and the discovered wounds.

- [66] Officer Mamba testified further, that at the beginning of November 2016 fire experts from the South Africa Police Service were involved to assist in the investigations. Colonel Beaaker and warrant officer Rungani arrived on 20 November and the burnt motor vehicle was handed over to them on 21 November in order for them to do the investigation which they concluded on 23 November 2016.
- [67] It was officer Mamba's further evidence that the accused requested to be taken to hospital on 11 October 2016 in order to have his bandages changed. Indeed, the accused was taken to the Mbabane Government Hospital where he was attended to by Dr. Nkonde. The doctor then completed Form RSP 88 after having finished attending to the accused.
- [68] During cross-examination, officer Mamba conceded that from the scene, the burnt vehicle was towed to the Masimula homestead but maintained that it was again towed to the Mbabane police station on that same day. It was put to him that the motor vehicle was tampered with whilst kept at the Masimula homestead but this was denied by officer Mamba. He stood firm on his testimony that the vehicle was towed to the Mbabane police station on the same day it had been placed at the Masimula homestead.
- [69] Officer Mamba was reminded about his testimony that the accused looked clean when they saw him for the first time at the Mbabane police station but the jeans trouser that he identified as having been worn by the accused looks dirty. He was asked to reconcile this inconsistency. His response was that after having seen the accused at the police station, they went with him to Nkhaba where they conducted a search in his presence. They walked in the open yard

of the homestead with the accused, and in the fields as well. The clothes therefore continued to be exposed to more dirt.

[70] After the testimony of officer Mamba, minutes of the inspection *in loco* conducted at the Mbabane police station were read into the record. They are marked EXHIBIT “Q”. The crown’s case was thereafter closed.

[71] The first defence witness is the accused person, Mr. Themba Mxolisi Masimula. He testified that on 07 October 2016 he received a call from his aunt Sarafina Masimula informing him about the demise of his father. He then called his wife and informed her about the sad news. A while later, he received a call from his wife requesting to be picked up from Piggs Peak so they can go to meet the other Masimula family members. He indeed drove to Piggs Peak where he parked the Ford Ranger vehicle that he used and they drove in the smaller car that the wife was using. Around Malolotja they picked up the accused person’s aunt and drove with her to Fair View in Manzini where they arrived at around 18:00 hours.

[72] The accused also testified that they left Fair View at around 21:15 hours and proceeded to Zulwini where he preached at a half-night church service organized by his church nationally. The service went on until around 02:00 hours. The accused and Funekile thereafter started their way to Piggs Peak. They made a stop in Mbabane at Engen filling station where the accused purchased local newspapers, and a five (5) litre of petrol. He explained that the petrol was for his Honda CRV car that he left at Nkhoba. They then proceeded with their journey. Before they reached Nkhoba, he was overcome by fatigue. He testified that the fatigue was physical, emotional and spiritual,

following that he had just lost his father. He then suggested to his wife Funekile that they should sleep over at Nkhamba as he has a house there. She however counter-suggested and said they should proceed to Piggs Peak because they left children with the maid.

[73] The accused further testified that before they reached Nkhamba, Funekile dozed off and fell asleep. He then decided to turn off from the main road at Nkhamba and took the turn to his parental homestead where he has a house. Funekile woke up when the accused made a stop at the gate of the homestead. She asked him about where they were and the accused told her that they were at the gate of the homestead at Nkhamba. The accused then took house keys, cell phone and iPad and went to open the gate. As he was opening the gate, Funekile then shifted from the passenger's seat and occupied the driver's seat. The accused explained that he took this positively and thought that Funekile was sparing him from coming back to the vehicle after opening the gate. He proceeded to the house hoping that she would drive in and park the car. He went into the house and changed the clothing he was wearing. Funekile then phoned and informed him that they should proceed to Piggs Peak and that she would relieve him and drive.

[74] The accused testified further that his intention was to take the clothes he was wearing to Piggs Peak for dry cleaning purposes. He went back to the vehicle and sat on the passenger's seat as his wife had occupied the driver's seat and was ready to drive. They drove back to the main road and Funekile was driving the vehicle. He testified further that he quickly took a nap on the passenger's seat as he still felt the fatigue. He woke up due to noise he heard as the car was driving off the road into a ditch. He shouted and told his wife

to be careful. Instinctively, he opened the door on his side and jumped out. As he was outside, he realised that his wife had not come out of the car. He went to the driver's door and tried to rescue her. He however realised that she had shifted to the passenger's seat where he was seated. He thought it was an attempt to follow him as he had jumped out of the vehicle from that side. Unfortunately, the car had slid further into the ditch and the door was closer to the ditch embankment. As he tried to pull her out, a blaze of fire occurred under the dashboard and it threw him off the vehicle. In his words, he said said "*The effect of the blaze and the shock threw me off the car*".

[75] The court sought clarity on the word '*threw*' that the accused mentioned. He explained that the impact and effect of the blaze threw him off the vehicle. He was dazed and lost his thoughts for some time. When he regained his thoughts, he discovered that he landed into the canal on the other side of the road. He then remembered that he was involved in an accident before losing his thoughts. He looked around and saw a very huge flame across the road where his vehicle was. He got very shocked and started making frantic calls trying to get help. He called his very close friend, Pastor Khanyile. His phone was busy and only went through when he called for the third time.

[76] The accused informed the court that while waiting for Pastor Khanyile, he ran to a nearby Dunn family homestead to seek help. He therefore informed Pastor Khanyile to find him below the Dunn family homestead. Pastor Khanyile then arrived and the accused abandoned his way to the Dunn family. They proceeded to the scene where they found the vehicle still engulfed in flames. According to the accused, they thought that Funekile managed to escape from the vehicle. On this, the court asked the accused if he referred to thoughts of

both Pastor Khanyile and himself. In response, he said he meant what they both thought. They then began to call her cell phone number but it was not available on the network. At that moment, a Fire and Emergency Services motor vehicle, accompanied by an ambulance, arrived. One of the personnel asked about the occupants and “*they*” informed them that the accused is one of them but “*were two inside the vehicle and were still trying to find the other occupant*”.

[77] The accused testified that he was given first aid by the Fire and Emergency Services personnel in the ambulance, and thereafter was taken to the Mbabane Clinic. His face was starting to develop some blisters, and his hands were burnt. Just before they left, he asked them to call Pastor Khanyile who he requested to inform one Isaac Dladla that he had been taken to hospital. The burn wounds he sustained were covered in bandages at the Clinic, except the ones on the face as he was informed that the blisters were still swelling. His friend Isaac Dladla arrived and they exchanged pleasantries. He was then discharged and Dladla was informed to bring the accused back later for further treatment.

[78] They sat at the Clinic’s parking and talked about the accident. Mr. Dladla then asked that they pray. He deduced from the prayer of Mr. Dladla that his wife died from the accident. Mr. Dladla thereafter received a call informing him that he should come with the accused to the Mbabane police station. The accused, however, proceeded there with his brother Mr. Mandla Luphondvo who had just arrived as Mr. Dladla had other errands to do. The accused recorded a statement with the traffic police. Two police officers then came and drove with him back to Nkhoba. They parked by the dip tank. At the

instruction of Officer Solomon Mavuso, they drove with the accused to the Masimula homestead at Nkhaba. They found Bongani Mlotsa and they entered into the accused person's house. Nothing was found in the house.

[79] On the 09 October 2016 the accused was taken by the police to his home at *kaNdeva*, according to his evidence. Nothing was found at that homestead. On the 10 October 2016 he made a court appearance for the first time. He had no legal representation. He testified that he was asked by the magistrate if he wished to be represented on the charge preferred against him. His response, according to his evidence, was that he is "*not aware of any charge, and no one had told me of any charge after all*". The prosecutor then rose and said there has to be a trial within a trial. The accused testified that he understood what this meant, hence he requested from the court an adjournment so that he may arrange for legal representation. He arranged for Ms. Ndlangamandla, who is now the defence attorney, to be called and requested that she comes to court.

[80] The accused testified that he was eventually charged on the 11 October 2016, a day that became his second court appearance. He was asked by the defence attorney if he recorded a statement with the police. His response was that he recorded one with the traffic police on the 08 October 2016. He recorded another one with the CID police on the 10 October 2016. He was then given a statement recorded on Form RSP 218 which was handed in and marked as EXHIBIT "R". The statement is dated 11 October 2016. He was asked if this is the statement he recorded with the CID police. He answered in the affirmative and mentioned that since this happened very long ago, he admits the date to be 11 October 2016. The statement is one that is to be recorded by

a person after being cautioned in terms of the Judges' Rules. The statement states that “*All that I would want to say is already recorded in the police statement which I have already signed*”. This statement bears the signature of the accused. The importance of this statement is that the accused testified that he recorded it on the day that the charge for murder was preferred against him.

[81] The accused was informed by the defence attorney that the evidence led before court suggests that a knife was found in the vehicle. The accused denied knowledge of the knife and stated that he read about it in the newspapers, and also heard about it here in court. He was then asked by the defence attorney about the date of the removal of the burnt motor vehicle from the Masimula homestead at Nkhaba. The accused stated that he was sure that it was after 10 October 2016 because he saw it placed behind his house when the police, led by officer Mavuso, took him to Nkhaba on the 10 October 2016.

[82] When asked if he had anything more he wished to tell to the court, the accused stated that he has something. He informed the court that officer Mavuso told him that since he cannot point out any criminal element in the matter, they will be forced to create one. In his own words, he said officer Mavuso stated that “*licala nasingaliboni tsine sitawulakha*”. These words were repeatedly said after his first court appearance on 10 October 2016, according to the accused. He also informed the court that officer Mavuso told him that he has to give to his in-laws all that he owns. It therefore was for this reason that on 09 October 2016 his in-laws said he should give them keys for the motor vehicle that was parked at Piggs Peak.

- [83] He further informed the court that during the first week of his detention at the Sidvashini Correctional Facility, two of his in-laws, *viz.*, Sabelo Edwin Phiri and Elphas Dlamini, came with an affidavit that purported to have been written by him. It stated that he was surrendering his signatory rights to all his financial accounts to his mother in-law Mrs Mdluli. He however refused to sign the affidavit. Furthermore, he informed the court that on 13 December 2016 more of his in-laws went to his home at *kaNdeva* driving in a truck. They said they came to collect every movable property in the homestead but were prevented by his cousin, Vusi Magongo, who had gone there to repair roof which had been blown off.
- [84] During cross-examination, the accused testified that he drove from Ezulwini to Engen Filling Station in Mbabane. He also drove from Engen filling station to the Masimula homestead at Nkhamba. He started feeling tired when they were around Hawane area. He was asked about when did Funekile insisted that they drive to Piggs Peak instead of Nkhamba. His response was that she never insisted but made a counter suggestion. She counter suggested when they were around Hawane, and also when they were at the Nkhamba homestead. He was inside his house at the time and Funekile called him on the phone. He was also asked about what he was wearing on this day, starting from the time they left Piggs Peak and proceeded to Manzini, up to the church service at Zulwini. He informed the court that he was wearing a blue suit, white shirt with soft blue stripes, and brown shoes. He took off these clothes when he was inside the house at Nkhamba and put on other clothes. When Funekile called and said they should proceed to Piggs Peak, he took the suit and the shirt and went back to the car. When they got involved in the accident, the suit was among the items that got burnt.

[85] The accused was asked about the need for him to buy the 5 litre petrol. He said it was for his Honda CRV car parked at the Nkhaba homestead. He explained that it did not have sufficient fuel to reach any petrol filling station. He was asked to inform the court about what became of the 5 litre petrol and container as they were not among the items he carried out of the vehicle when arriving at the Nkhaba homestead. His response was that he believes that they were burnt with the other items in the vehicle. He was then reminded that the 5 litre petrol, according to his evidence, was for a Honda CRV vehicle that was at the Nkhaba homestead. The accused responded by stating that their purpose was to sleep at Nkhaba, and that even if they were to proceed to Piggs Peak, they were still going to come back to Nkhaba in the morning for funeral preparations. The crown asked the accused if in short he was telling the court that the 5 litre petrol that he purchased at the Engen filling station did not remain at the homestead at Nkhaba. His response was that *“I believe so unless someone produces it because it was all over the newspapers that it was found lying next to the completely burnt car”*.

[86] During cross-examination, the accused testified that he got back into the car and found Funekile occupying the driver’s seat. He therefore occupied the passenger’s seat and tilted it back for better relaxation. Funekile drove and they proceeded to the main road. He fell asleep and woke up when he heard strange noise as the vehicle drove off the road and went into a ditch. His evidence is that *“I quickly shouted the name of my wife telling her that the car was driving into a ditch. I then opened the door on my side and jumped out of the car. Seeing that she had not come out of the side of her door, I rushed to the driver’s door to open it, with the intention of pulling her out of the car. I*

found that she had shifted to the other side and I assumed that she was trying to follow me and get out using that same door I used. Unfortunately the car had slid further into the ditch and the front passenger's door had closed but not completely. When I tried to pull her out, the fire blazed inside the car. The impact of that fire blaze and the shock threw me off the car.

- [87] The accused was asked by the crown to give an estimate of the distance from the homestead at Nkhaba up to the scene of the incident. His response was that he believes it is between one and two kilometres, but not less than one kilometre. He was also asked about the where about of Funekile when he opened the driver's door from outside. His answer was that "*she had shifted to the front passenger's seat*".
- [88] He was further asked to explain what he did when trying to pull his wife out of the car. His response was that he remembers holding her clothes at the upper part of the right arm and pulling her towards himself. He was further asked to explain his position in the car at the time he was pulling his wife. He said that his left knee was kneeling on top of the driver's seat while his right leg was dangling between the steering wheel and the driver's seat. His upper body and arms were stretched towards the passenger's seat.
- [89] The accused was further asked to tell the court about what then happened as he was trying to pull his wife out of the car. His response was that a blaze of fire erupted with a bang from underneath the steering wheel and the dashboard but not where the pedals are located. It was a fire whose impact and shock threw him out of the car. He further was asked to explain what he means by '*impact of the fire*'. His response was that he cannot find the right English

word to use but he means that the fire *“did not start like a small fire but was just a boom that quickly burnt the side of my face which was facing its origin”*.

[90] The second defence witness (DW2) is A/Supt. Bonginkhosi Dlamini. He is a Staff Nurse of His Majesty’s Correctional Services based at the Manzini Remand Centre. He testified that the accused was admitted at the Manzini Remand Centre on 09 April 2021 after having been kept at Sidvwashini Correctional Facility. He received medical records of the accused during his admission to the facility. He read for the court a medical record bearing a date stamp of the Mbabane government hospital for 13 October 2016. It says that the accused was seen at the Eye Clinic. Further below, it has a record of the out-patient department saying that the accused *“had a backslap which was broken on day of insertion. To remove backslap and review. Still has tenderness and limited room of movement knee. Replace above knee backslap”*. This medical record was admitted as part of the defence’s evidence and marked EXHIBIT ‘R1’.

[91] The witness also read a medical record in respect of 02 December 2021. It says that the accused has been discharged from physiotherapy with an exercise program which he is meant to carry out as a life-long management program for his condition. This record was admitted as EXHIBIT ‘S’. Both exhibits ‘R1’ and ‘S’ bear date stamps of the Mbabane Government Hospital.

[92] During cross examination, the witness was asked to explain what the two medical records meant and he did. He however conceded that he does not know the persons who appended their signatures on both medical records. He

also conceded and confirmed that he is not the one who filled both exhibits 'R1' and 'S'.

- [93] Murder is committed by an unlawful and intentional killing of another person. In order to prove the guilt of a person on a murder charge, the crown must establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*. ***See: Director of Public Prosecutions, Gauteng vs Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015), para [25].***
- [94] *Dolus* is two-fold in murder cases. There is *dolus directus* and *dolus eventualis*. *Dolus directus* occurs when the death of the person was desired by the accused. In other words, it occurs when the accused person acts with the object and purpose of killing the deceased. ***See: Rex v France Dodo Mthembu & Another (46/2014) [2020] SZHC 228 (5 March 2020), para [48].*** *Dolus eventualis*, on the other hand, occurs when the accused person foresees the possibility of his action resulting in death but persists in doing it, reckless whether death ensues or not. ***See: Rex v Thandi Tiki Sihlongonyane (40/1997) [1997] SZSC 11 (24 September 1997).***
- [95] On burden of proof, the appeal court, in the case of ***Malungisa Antonio Bataria vs Rex (06/2014) SZSC 45 (3 December 2014)***, states what is quoted below:

An accused person bears no burden to convince the court of the truth of any explanation he gives. The learning is that the court will not convict an Accused person willy nilly when he advances a defence which is reasonably possible of being true. In that circumstance, he is entitled to an acquittal. In the converse, the court will not let a guilty man go scot-free where it is

obvious that his defence is not only improbable, but that beyond any reasonable doubt is false. (para [21])

- [96] On an analysis of the facts, it is common cause that Funekile was driving in the same vehicle with the accused when she met her death. No other person came to be with them until the motor vehicle burnt with Funekile inside. She was severely burnt until her body had charred remains, according to evidence that was undisputed. The burning of the vehicle started when there was only the accused and Funekile in the vehicle, and there was no other person in the vicinity of the scene where the vehicle was burnt. According to the evidence of the accused, the fire started while he was trying to get the deceased out of the vehicle following that its control was lost and it drove off the road into a nearby ditch.
- [97] According to the evidence of the pathologist (PW3) who conducted a post-mortem examination, the cause of death was due to a stab wound and a cut injury to the neck. The pathologist described the stab wound as 2x1 cm on the right side of the neck, and the cut injury as 12x1.5 cm on the front and middle portion of the upper portion of the neck and transverse in direction. The cut injury is shown in picture 10 of exhibit 'B'. During cross-examination, the accused informed the court that it worries him why these wounds were not seen at the scene of the incident where a scenes of crime police officer of more than nineteen years' experience took pictures. D/Sgt. Mhlanga testified that the body was still burning at the scene and it was not easy to touch it or carry it anyhow. To touch it, according to his evidence, was like touching very hot meat that was being roasted, hence the cut on the neck was discovered when the body was turned to face upwards, during the post-mortem examination.

- [98] The post-mortem examination report which was admitted as part of the crown's evidence reflects that on the neck, and other neck structures, the blood vessels and muscles were cut in the front and upper portion of the neck, and burnt. The stab wound and cut injury which caused the death of the deceased were sustained before she died. The pathologist testified that the burning of the body occurred after she had already died.
- [99] The defence submitted that the explanation given by the pathologist on why he came to the conclusion that the deceased sustained the stab and cut injuries prior to her death is not satisfactory and this court should not accept it. The purpose of a post-mortem is, *inter alia*, to determine the cause of death. This is a specialty area for pathologists and no *contra* medical opinion has been given to this court to persuade it not to accept the finding and conclusion of the pathologist.
- [100] A knife was discovered by the police on the front passenger's seat. This is where the body of the deceased was found. The handle was burnt and only the blade remained. A picture of the blade was taken at the scene and is shown in picture 8 of EXHIBIT "B".
- [101] The defence submitted that many members of the public had access to the vehicle prior to the arrival of the police. The vehicle was therefore tempered with and compromised. The evidence of PW1 who arrived first at the scene is that his arrival was followed by that of a Dups vehicle, and also by a Shoprite delivery truck, whose occupants joined him. As they got closer to the burning vehicle, one of these gentlemen suggested that they stay further from the vehicle as its petrol tank might burst any moment. They indeed stepped

backwards and as soon as they got to where their cars were parked, the vehicle exploded.

[102] It is common cause that this fire was put out by the Fire and Emergency Services personnel. There is no member of the public who had access to the vehicle and came closer to it until the Fire and Emergency Services personnel, followed by the police, arrived and put out the fire.

[103] Evidence of the accused is that he drove the vehicle from the church service that he attended with the deceased at Ezulwini and he made their first stop at Engen filling station where he bought the local newspapers and 5 litres of petrol. He bought the petrol for his Honda CRV vehicle that was parked at the Nkhaba homestead. It however, is common cause and an undisputed fact that the accused did not take out of the vehicle the 5 litres with petrol upon arrival at the Nkhaba homestead. Instead, he only took out his keys, Black Samsung iPad and cell phone and went into his house. He changed the suit he was wearing and put on a jeans trouser and a t-shirt.

[104] It was also the evidence of the accused that he was called on the phone by his wife and he went back to the car. They swapped the driving role with the deceased and he became a passenger and the deceased drove the car. He tilted back the seat for better relaxation and Funekile drove the vehicle towards the main road. He however, according to his evidence, fell asleep and only woke up after hearing noise following that the deceased lost control of the vehicle and it went off the road got into a ditch. It was his evidence that the distance from the homestead to the incident scene is about a kilometre or two kilometres, but not less than a kilometre. It is my considered view and finding

that this distance is too short for an adult person to fall asleep when he had been driving; made a stop at a gate of the home where he resides; collected some of the belongings he had in the vehicle; go out of the vehicle and open the gate and his house; change clothing and walk back to the car, lock the gate, and seat in the car and then immediately fall asleep within that very short distance they had travelled.

[105] The distance estimated by Pastor Khanyile who is a very close friend of the accused is less than that estimated by the accused. Pastor Khanyile testified that his homestead is about a kilometre from the main road. He also testified that the Masimula homestead is between his homestead and the main road. The distance that had been travelled on the main road by the accused and his now deceased wife was estimated at about 500 metres. Beyond a doubt, I find no reasonable possibility of the version of the accused that they both slept within that very short distance being true. I accordingly reject this evidence of the accused.

[106] It is the evidence of the accused that Funekile lost control of the car and it got into a ditch next to the road. He suspects that she fell asleep while driving. He shouted alerting her and told her to be careful. Instinctively, he opened the passenger's door and jumped out of the vehicle. Realising that his wife had not come out of the vehicle, he opened the driver's door from outside and attempted to pull her out but found that she had shifted to the passenger's area. His left knee, according to his evidence, was kneeling on top of the driver's seat while his right leg was dangling between the steering wheel and the driver's seat. His upper body and arms were stretched towards the passenger's area where Funekile was. As the accused, according to his evidence, was

trying to pull his wife out of the car, a blaze of fire erupted from underneath the steering wheel and the dashboard. He was thrown out of the vehicle by this huge fire blaze and found himself in the canal on the other side of the road. He then saw a very huge flame across the road where the vehicle was.

[107] In light of the position that the accused said he was in when trying to pull out Funekile from the car, the fire must have originated from his right side closer to his hip. I find beyond any reasonable doubt that any force or pressure that could be caused by the alleged huge blaze that originated on his right hip side cannot 'throw' him out through the open driver's door which was on the back side of his body. Logic dictates that it should throw him towards the back of the car on his left hip side. The version of the accused that he was thrown out of the vehicle by the huge blaze and landed across the road into the canal is thus not reasonably possible to be true. The direction to which he alleged to have been thrown, considered with place he pointed to be of origin of the fire blaze, do not correlate.

[108] I take note of the fact that this is a road with three lanes. The force necessary to cause him to be thrown to the canal across the road in the manner that he explained can only be force of a strong tornado. Given that the version of the accused is that he was thrown off the vehicle and landed in a canal across the road by a blaze of fire, I find it to be without any reasonable probability of being true, and I accordingly reject it.

[109] Further evidence of the accused is that he suffered a dislocation when he was thrown off the vehicle as his leg could not support his weight. As a result, a plaster of paris was put on his leg. Medical records with stamps of the

Mbabane Government Hospital, one dated 13 October 2016 (EXHIBIT R1), and another dated 02 December 2021 (EXHIBIT S) were produced, read and handed-in as part of the defence evidence by DW2 who is a Correctional Services Staff Nurse. DW2 testified that he received these medical records when the accused was admitted at the Manzini Remand Centre on 09 April, 2021.

[110] Exhibit R1 states that the accused had a backslap which was broken on insertion. He explained a backslap to be an unfinished cast of plaster that has its other unfinished part used to access the inner part of the body. According to this exhibit, the accused was on plaster as he testified.

[111] Exhibit S states that the accused has been discharged from physiotherapy with an exercise program that he is to carry out as a life-long management program for his condition. The Staff Nurse testified however, that he does not know the persons who authored these documents (exhibits) and signed them. As a general rule, a party who tenders a document is required to adduce evidence of its authenticity. If its authenticity is not proved, its contents cannot be used as evidence. *See: Hoffmann and Zeffert, The South African Law of Evidence, 4th ed., p.399-400*

[112] The crown referred the court to EXHIBIT I, dated 11 October 2016, which Dr. Nkonde (PW13) authored, and whose contents she testified about. The evidence of D/Sgt. Mamba (PW14) is that on 11 October 2016 the accused requested to be taken to hospital in order to change the dressing for his burn injuries. They took him to the Mbabane Government Hospital where he was attended to by Dr. Nkonde who authored exhibit 'I'. This exhibit reflects that the accused had second and first degree burn in the face, both hands and the

right knee. It also reflects that he had no fractures or dislocations, and had no other injuries. Dr. Nkonde came to court to testify about the contents of this exhibit, and there is therefore no question about its authenticity.

[113] The authenticity of exhibits 'R1' and 'S' is wanting as it has not been proved. The contents of these exhibits cannot therefore be used as evidence. To add salt to the injury, exhibit 'S' bears the Mbabane Government Hospital stamp dated 02 December 2021 yet DW2 gave evidence that these exhibits (medical records) were given to him when the accused was admitted to the Manzini Remand Centre on 09 April 2021. The date of 02 December 2021 comes seven months after the admission of the accused to the Manzini Remand Centre on 09 April 2021. In addition, no evidence was tendered by DW2 or the accused, to suggest that the accused came from the Manzini Remand Centre and was attended to at the Mbabane Government Hospital on this date of 02 December 2021.

[114] Pastor Khanyile testified that the accused told him that he escaped through the driver's door. The accused was informed of this evidence and was asked about what he can say to it. His response was that this evidence is correct because his last point of exit from the car was the driver's door. It is my observation and finding that by giving this answer, the accused is evasive and avoiding the real question. He is doing so because he gave conflicting versions to the court and to his most trusted and very close friend, Pastor Khanyile. The only reason why he would give these conflicting versions is because he is untruthful.

[115] The version of the accused that Funekile shifted to the passenger's seat when the alleged 'accident' occurred is, without any reasonable doubt, not credible but designed to conceal the truth about what happened. Funekile had just started driving, and had driven a very short distance of less than two kilometres. I fail to accept that this alleged 'accident' which did not look like an accident to those who arrived at the scene, could confuse the deceased to the point of making her to attempt to escape through the passenger's door when she actually was the driver of the vehicle. There was nothing to confuse her because the burning of the vehicle had not even started. A careful analysis of the evidence of the accused suggests that Funekile shifted to the passenger's area before the fire erupted. I so conclude because his evidence is that the fire erupted when he was trying to pull her out of the vehicle from the passenger's seat area. I therefore reject this version as I find it not reasonably possible to be true.

[116] In his evidence in-chief, the accused testified that when the vehicle was in flames, he began to make frantic calls trying to get help. One of the people he knew would be of help at that hour is his very close friend, Pastor Khanyile who he called. While waiting for Pastor Khanyile, the accused also tried to run to a nearby Dunn homestead to seek help.

[117] No attempt was made by the accused to call the National Fire and Emergency Services or the police. Mr Msibi (PW1) testified that he is the one who called the police emergency 999 number and reported the incident. It was never put to him that the accused also called the police. As a matter of fact, the accused was asked, under cross-examination, why he did not call the police. His response was that the police would not arrive as soon as someone who was

within the vicinity of the area. He also stated that sometimes the police would give excuses and tell you that there is no car or fuel.

[118] When asked about why he did not call the Fire and Emergency Services, his response was that *"I did not say I did not call the Fire and Emergency Services but said I called many people including Pastor Khanyile. I never took note of every number that I called because I never knew that at some point in time I would need to mention all the numbers I called"*. He also said it was unfortunate that the evidence of his calls is not available because the police confiscated the cell phone he used.

[119] The above mentioned responses by the accused are evidence that he never called the Fire and Emergency Services or the police. His failure to call them fortifies the inference and conclusion that the fire was ignited intentionally by him.

[120] Warrant Officer Rungani, a Forensic Fire Investigator expert examined the burnt vehicle, in order to determine the origin and cause of the fire. His evidence is that they found a knife underneath the debris during an excavation that they carried out while investigating. I find it apposite to mention that this was a second knife as the first knife was found while the vehicle was at the scene of the incident.

[121] The defence submitted that the vehicle was kept at the Masimula homestead for a minimum of two days after the accident. It therefore submitted that the vehicle was tampered with and thus compromised, although no specific manner of tempering was suggested. It is common cause that the motor

vehicle was towed from the scene and taken to the Masimula homestead at Nkhaba. Evidence of the tow-truck driver Mr. Motsa is that he was called by his superior when he was returning to Mbabane and instructed him to go back to fetch the vehicle and bring it to Mbabane police station. He maintained his evidence during cross-examination that he towed the vehicle to Mbabane police station on the same day. That was shortly after having towed it to the Masimula homestead. This evidence was corroborated by evidence of D/Sgt. Mhlanga and D/Sgt. Mamba.

[122] It is my finding that there was no interference with the vehicle as it was towed from the Masimula homestead to the Mbabane police station within a short space of time after it had been towed to that place. When the issue of interference was put to warrant officer Rungani, he confidently stated that nothing can interfere with the pattern of the spread of the fire as that is what they also analyze to determine the origin of the fire. This, in my view, is beyond reasonable doubt, credible evidence.

[123] In the affidavit that warrant officer Rungani attached to EXHIBIT “G”, he deposed that *“The vehicle was total burn; intense destruction of paint, metal discoloration and distortion were observed at the front passenger side (photograph 5 and 6) when compared to the rest of the vehicle. This is an indication that the said area was exposed to intense/persistent heat, hence closer to the area/compartment of fire origin.”*

[124] Warrant officer Rungani also deposed that *“The passenger’s compartment (Photographs 16 to 21) had the most intense fire damage. Under normal fire*

behaviour, the compartment with the most intense fire damage indicates the compartment of the origin, thus an indication of the fire origin inside the passenger's compartment." He further deposed that "*Analysis of fire patterns such as; thermal decomposition and paint blistering, destruction of combustible materials, degree of fire damage, metal discoloration and radial fire patterns of the vehicle (Photographs 22 to 25), indicated that the fire originated at the front side of the passenger"*.

[125] He also testified and made depositions in his affidavit concerning the cause of the fire. He deposed that "*Ignition sources classified as Natural fire causes, such as lightning, seismic activities and spontaneous combustion could be excluded as the cause of the fire, as there was no scientific evidence to that effect ... Legitimate ignition sources classified as Accidental such as, electrical malfunction of conductors could be excluded as causes of the fire, as there were no signs of electrical malfunction or conductor failure within 'Area A' (Area of fire origin). Other legitimate accidental ignition sources such as smoking material could be excluded as the cause of the fire as there was no forensic evidence to that effect."* He therefore excluded natural fire causes and accidental fire causes as the cause of the fire.

[126] Based on the assessment of the fire damages, fire patterns and fire dynamics within the area of origin, warrant officer Rungani deposed that "*the ignition source consistent with the data can only be the application of an open flame. He further deposed that "For a fire to occur, a balanced interaction of four components (fuel, heat, oxygen and chain reaction) is required. In this instance the oxygen was available in and around the entire vehicle. The legitimate fuel load was the combustible components in passenger's*

component such as; upholstery from the seats and plastic internal component. Therefore, the combustible contents within the direct vicinity of fire origin could be regarded as the first fuel ignited. The heat source was an open flame. Once the fire is initiated, the resulting exothermic chain reaction sustains the fire and the fire will continue to burn until at least one of the components is removed. In this instance, the ignition factor was the deliberate human action which brought the fuel load and ignition source together in an oxygenated environment, thus results the developing growth and spread of the fire.

[127] Warrant officer Rungani testified that the conclusion arrived at is that the fire originated in the passenger compartment. Legitimate fire causes classified as natural and accidental are excluded. Based on analysis of the data of the investigation they carried out, the ignition source can only be the application of an open flame.

[128] The evidence of warrant officer Rungani concerning the origin of the fire is consistent with the evidence of the first person to arrive at the scene. This is Mr. Msibi (PW1) who testified that the driver's door was wide open and the fire looked like it started from the seat inside the motor vehicle.

[129] I accept, beyond any reasonable doubt, that Funekile did not die from the alleged 'accident' as alleged by the accused person. She died from a stab wound and deep cut injury to her neck as per the post-mortem examination findings and evidence of the pathologists. The cause of the fire was open flame and was deliberately ignited as per the findings of the Forensic Fire Investigator expert. Explaining how the fire started, the accused testified that it did not start like a small fire but was just a boom of a huge blaze of fire. A

sudden boom of a huge blaze of fire which the accused described would be caused by open flame when exposed to flammable liquid or substance.

[130] The 5 litre of petrol which the accused purchased at Engen filling station in Mbabane was not removed from the vehicle upon arrival at the place where he said he intended to use it. The accused sustained burn wounds on the face, legs and hands. When asked which part of the hands were burnt, his response was that it was the outer part on both hands. He was also asked what he was exactly doing when he sustained the burn wounds only on the back part of the hands. His response was that *"I don't know, but what I know is that when the fire started I was thrown out of the car, and when I regained consciousness I realised that I had been burnt on those parts of the body I mentioned in my evidence."*

[131] The evidence of the accused that he was burnt while attempting to pull out of the car his wife by pulling her hand, and that the fire started underneath the steering wheel and the dashboard, do not correlate. The evidence he gave is that his left knee was kneeling on the driver's seat while his right leg was dangling between the steering wheel and the driver's seat. His body was leaning towards the passenger area where his wife was and he was trying to pull her to get out of the car. It logically cannot reasonably be true that a person can be burnt on the face and outer parts of both hands by fire that starts on the driver's seat area while that person is leaning towards the passenger's seat area.

- [132] The manner that the accused said he was thrown out of the car by a huge flame of fire that erupted is not consistent with the origin of the fire that he pointed out. Any force of fire coming from the fire origin place that the accused pointed out would logically be from the right hip side and blow towards the left hip side of the accused. It cannot throw him out of the car through the open driver's door which is at his back side.
- [133] The burn wounds sustained by the accused on the face and hands can only be, and are consistent, with those sustained at a moment of exposing naked flame to a flammable liquid or substance.
- [134] The long pants jeans trouser and t-shirt which the accused testified to have been wearing were not burnt anywhere. Notwithstanding the serious burn wound that the accused sustained on the right knee, the portion of the jeans trouser corresponding to the right knee area remained intact and was not burnt in anyway.
- [135] Now coming to the time of preferring a murder charge against the accused, he testified that when he made his first court appearance on 10 October 2016 he had not been charged with any offence. He was eventually charged on the 11 October 2016. I am not persuaded to accept this testimony as truthful because the accused personally informed the court when giving his evidence in-chief that the magistrate asked him if he wished to be represented on the charge that he was facing. The question directed to the accused by the magistrate is evidence that a charge had been preferred against him when he appeared before the magistrate on 10 October 2016.

[136] Pastor Khanyile was described by the accused as his very close friend who he can call at any time of the day and night, and would answer his call. Pastor Khanyile testified that the accused informed him that he sustained the burn wounds on the hands and face when he opened the bonnet of the vehicle at the scene. In my opinion, Pastor Khanyile has no reason to tell a lie about what the accused said to him. If there is anything he would be expected to do is to protect him than to tell a lie about him. The evidence which Pastor Khanyile tendered concerning how the accused said he sustained the burn wounds on both hands, fortifies a conclusion that the accused is concealing the truth about the cause of death of his wife Funekile, and the cause of the fire that extensively burnt the motor vehicle and the body of Funekile.

[137] On the totality of the evidence placed before court, it is my finding that the crown proved its case beyond reasonable doubt. The late Funekile did not die from an accident, but was killed through infliction of a stab wound on the right side of her neck, and a big cut injury on the front and middle portion of the upper portion of the neck that resulted in blood vessels and muscles being cut. From the moment Funekile left the church service at Ezulwini with the accused, no other person was ever with them. It was only the two of them until the vehicle they were driving in was extensively burnt with the body of Funekile inside. There is no other inference to make other than that he was killed by the accused. I strongly hold the view, and I do so beyond any reasonable doubt, that the extensive burning of the vehicle with the body of the late Funekile inside, was an attempt to conceal the evidence on Funekile's murder.

[138] In the determination of intention to kill, His Lordship **M.C.B. Maphalala JA**, as he then was, stated in the case of *Shongwe v Rex (24/2011) [2012] SZSC 43 ((30 November 2012))* what I quote below:

“... the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous weapon, the only reasonable inference to be drawn is that he intended to kill the deceased.” (para 46)

[139] It is my finding on the facts, that the accused had the necessary intention to kill, in the form of *dolus directus*. The verdict I pronounce, therefore, is that the accused person, Themba Mxolisi Masimula, is found guilty of the murder of his wife, Funekile Mdluli.



T. DLAMINI
JUDGE

For the crown: Ms. L. Hlophe
For the accused: Ms. N. Ndlangamandla