



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Appeal Case No. 06/2014**

**In the matter between**

**MALUNGISA ANTONIA BATARIA**

**APPELLANT**

**And**

**REX**

**RESPONDENT**

**Neutral citation:** *Malungisa Antonia Bataria vs Rex (06/2014) [2014] SZSC 45 (3 December 2014)*

**Coram:** **RAMODIBEDI CJ, M.C.B MAPHALALA JA AND OTA JA**

**Heard** **3 NOVEMBER 2014**

**Delivered:** **3 DECEMBER 2014**

**Summary:** **Criminal Procedure: conviction for the offence of murder; accused's defence of self defence not disclosed; culpable homicide; *dolus* and provocation considered; accused's bid for a conviction of culpable homicide fails; appeal dismissed.**

## JUDGMENT

### OTA. JA

#### [1] INTRODUCTION

This appeal depicts the senseless killing of innocent and defenceless citizens of this nation which is fast becoming the norm. The life of a young woman Philile Mlambo (the deceased), aged 37 years, was unceremoniously and prematurely terminated in a cruel and gruesome fashion. She had disappeared on 9 September 2011. In the wake of her sudden disappearance, seemingly without trace, suspicion mounted around the Appellant, Malungisa Antonia Bataria. He was the last known person who had physical contact with her on the fateful day before she vanished. On 15 September 2011, the deceased's body was found hidden in a railway tunnel beside the Usuthu River.

[2] Further investigations led to the arrest of the Appellant and his arraignment before the High Court, per **Hlophe J**, on a lone count of murder. The indictment alleged that upon or about 9 September 2011 and at or near Siphofaneni area in the Lubombo Region, the Appellant did unlawfully and intentionally kill Philile Mlambo.

[3] The Appellant pleaded not guilty to the charge and a full blown trial ensued. At the end of the trial which saw the emergence of several witnesses, inclusive of expert witnesses and forensic expert evidence, the High Court found the Appellant guilty of the offence as charged and convicted him accordingly.

[4] Crucially, the court held as follows in paras [38] – [45] of the impugned judgment:-

“[38] I have no hesitation rejecting the accused’s version of events firstly on the basis that such a version was made for the first time during the time he gave his evidence under oath. Failure by a witness to put his version to crown witnesses so as to enable them react thereto so as to help court determine its authenticity is not allowed and is called an afterthought, which ought to be rejected as stated above.

[39] I disagree with Mr. Gama’s submission that the principle of an afterthought was not applicable in this matter because according to him none of the witnesses had said anything requiring the defence to cross-examine him on it and even to put his case on the said witness. The position is now settled that the defence is obliged to put as much of its case to the crown witnesses as necessary to enable them react thereto.

[40] Furthermore, whereas an accused is not required in law to prove his innocence in court he is duty bound to explain any evidence connecting him with the offence. This explanation that he gives must be reasonably possibly true. The converse to this is that where he gives an explanation that is inherently false such an explanation ought to be rejected. The case of R v Difford 1937 AD is instructive in this regard.

[41] It seems to me that although the deceased and the accused were the only people present during the time when the deceased was killed, I have no hesitation that the story by the accused on how the deceased was killed is inherently false. This is because when one considers the injuries inflicted on the deceased on both the forehead and the front part of the head, they could not possibly have been inflicted in that manner if indeed the deceased was holding the accused’s testicles. I take judicial notice of the fact that if the accused was being held by his testicles as he says he was, it would not have been possible for him to hit the deceased with full force on both the forehead and the frontal part of the head as the deceased’s head would have been too close and beneath his own stomach for him to do so. This is simply a matter of common sense and logic. In fact a direct strike by him on the deceased’s head would have not only been devoid of strength but it would have been at the back of the head or on the back part of the body. It only makes it worse that the accused himself had a difficulty demonstrating how he had come to hit the deceased on the forehead and how she had held him by his testicle. It is also a mystery why the

accused did not immediately disclose his responsibility for the death of the deceased including the raising of an alarm which would have been a natural phenomenon.

[42] In this regard I reject as I should the story of the accused being held by his testicle on the basis that same is inherently false.

[43] If I have rejected the accused's story of being held by testicles entitling him to defend himself, it seems to me there is no longer a need for me to determine whether the accused acted in self defence let alone that he overstepped the bounds of self defence, as that does not arise in the matter owing to the conclusion I have reached.

[44] In view of the failure by the accused to put his story to the crown witnesses for them to react thereto, I have to reject his defence which means that I cannot even find that he was provoked. I also have to come to the same conclusion through finding that the accused's version is inherently false and that it is too fanciful to be believed and I must therefore reject his defence.

[45] This being the case I am only left with one conclusion, and one conclusion only to reach, namely that the accused is guilty of the offence with which he is charged, and I accordingly convict him of the murder of Philile Mlambo.”

[5] **THE APPEAL**

The Appellant obviously derives no joy from the conviction. He has approached this court for redress upon the following grounds of complaint espoused by his notice of appeal.

- “1. The court *a quo* erred in law and in fact in convicting the Accused on the murder charge as the Crown failed to prove its case beyond reasonable doubt.
2. The court *a quo* erred in law and in fact in rejecting the defence story as it was reasonably possible in the circumstances.
3. The court erred in law in finding that the defence had a duty to reveal its defence through cross-examination.
4. The court erred in law in holding that the defence story was an afterthought as there are no basis for such a finding.

5. **The court erred in law and in fact in finding that the Accused inflicted 5 wounds on the deceased as that was not supported by the evidence.”**

[6] The poser here, is, did the court *a quo* err in any of the foregoing respects or did the court commit any material misdirection leading to a failure of justice, which will entitle this court to interfere with the assailed decision?

[7] I will deal with the issues raised in the grounds of appeal wholistically as they are largely intertwined. It is also convenient for me to refer to the Appellant as Accused from this stage and to take my bearing from the trial itself.

[8] **THE TRIAL**

The prosecution case was that on 9 September 2011, the Accused killed the deceased by hacking her on the head with an axe, when she had gone to collect from him the money he owed her on some chickens he purchased from her on credit. The Accused had purchased the chickens from the deceased to aid his own business of roasting and selling chickens which is known as chicken dust. The offence was committed at the Inkhundla Centre Siphofaneni, where the Accused and deceased were then employed.

[9] After killing the deceased the Accused hid her cell phone in a termite hill, concealed the axe, cleaned up her blood from the floor and then disposed of her body by hiding it in a railway tunnel next to the Usuthu River. It was from this tunnel that the deceased's body was recovered on 15 September 2011. She was in a decomposed state with maggots crawling all over her body.

[10] A post-mortem examination was conducted on the body of the deceased by the police pathologist, Dr R. M. Reddy. In his report the good doctor observed as follows:-

**“The following antemortem injuries seen:-**

- 1. Laceration over forehead 3 x 1.1 cm, parietal frontal region 3.4 x 1.2 cms, parietal region 7.5.3 2cms of scalp on dissection 3.1 cms x 0.3cm, parieto frontal region 2.2 cm area, parietal region 4.2cm area linear depression of skull vault present intracranial haemorrhage mixed with liquefied brain due to putrefaction.**
- 2. Contused area in the chest soft tissues on its front upper -----”**

[11] Of the utmost interest in the resolution of the issues arising *in casu*, is paragraph 1 of the post-mortem report. It shows massive injury on the forehead and head of the deceased. Whether the injury consists of just one wound as the defence contends or three wounds as found by the court *a quo*, is immaterial. The fundamental factor is the common cause fact that it was the infliction of the injury by the Accused that resulted in the deceased's demise.

[12] Suffice it to say that the Accused was arrested on 19 September 2011. Thereafter, he led the investigating police officers together with an independent private citizen, PW2, Zikodze Khumalo to a free and voluntary pointing out exercise at two locations. The first being the rented flat at Siphofaneni which he shared with his girlfriend, PW1, where he handed to them the items of clothing that he was wearing when he committed the offence. These included a black grey and white T shirt, a black puma tracksuit pants and black plastic pushin shoes.

- [13] He also led the party to the Youth Centre building at the Inkhundla Centre Siphofaneni, being the Scene of Crime. There, he pointed out to them a black and orange coloured axe which he used to commit the offence, a ZTE Cell phone belonging to the deceased which he had concealed in a termite hill and a hole beneath the fence via which he took the deceased's body out of the Inkhundla Centre.
- [14] The Scenes of Crime officer, PW6, 4588 Detective Zweli Nkomonye took numerous photographs during the pointing out and PW7, Philip Bongsi Mahlangu, the forensic expert witness from South Africa, applied two tests at the scene. One was a blue star test via which it was established that blood had been wiped off the floor of the room and the other was the amido black investigation, which established that a shoe had stepped on the spilled blood and later wiped off. This test established a shoe mark at the scene which was subsequently found to be a match to the pushin shoes which the Accused had handed over to the investigating team during the pointing out exercise. The investigating team also took swabs of blood at the scene.
- [15] All the items recovered from the scene of the pointing out as well as the items of clothing taken from the deceased's body were analyzed by another forensic expert, PW5, Santie Mathole. Her analysis established that the DNA recovered from the deceased's clothings and the DNA found in the blood which was swabbed at the scene as well as the axe, were a match. The DNA belongs to the deceased.
- [16] Importantly, during his analysis of the scene of the incident, evidence which is very critical and relevant to the alleged murder, PW7 testified to

some blood spats found on the side of the door, walls and roof of the room where the offence was committed. This is the same blood sample collected via a swab and was established as a match with the deceased's DNA via forensic analysis.

[17] In his expert opinion PW7 unequivocally stated that the blood spats occurred when a sharp object came in contact with the deceased. He obviously went on to demonstrate to the court how this was orchestrated. This was captured by the court *a quo* in para [18] of the assailed decision as follows:-

**“there were also blood spats on both the wall and side of the door. In his expert opinion, these blood spats, came about as result of hacking or chopping effected on the deceased with a sharp object. He in fact said, as he demonstrated with his hand, that the chop was effected in the form of a descending or falling or landing manner and was consistent with a hand moving upwards and downwards and not one that was horizontally effected. This aspect of his evidence was not disputed”**

[18] Admittedly, and as correctly observed by the court *a quo*, the Accused failed to dispute the evidence brought forward by the prosecution. Defence Counsel Mr Gama declined cross-examining the prosecution witnesses, save to suggest to one witness that the debt which the Accused owed the deceased bred bad blood between the duo. I will deal with the legal effect of this attitude of the defence to the Crown case later in this judgment.

[19] Now, in his defence the Accused admitted killing the deceased with the axe. He also admitted cleaning up after the fact, hiding both the axe and the deceased's cell phone and disposing of the deceased's body.

[20] He however sought to hide behind the defence of self defence. To this end he alleged that on the fateful day when the deceased approached him at the



Youth Centre where he was employed as a grounds man to collect her money, even though the debt was not due, a misunderstanding ensued between them. As a result, the deceased hit him on the face with a newspaper she was then carrying. Thereafter, she took an axe from other working tools nearby and allegedly hit him with it on the rib cage. He then dispossessed the deceased of the axe, as a result of which the deceased allegedly grabbed his testicles and held it so tightly, so much so that he felt that he was losing his breath. The Accused alleged that in an attempt to get the deceased to release his endangered testicles, he hit her twice on the forehead with the blunt side of the axe which he had dispossessed from her. This caused the injury in the middle of the deceased's forehead resulting in her instant demise. It is also the Accused's case that as a result of the injury inflicted on his manhood, it has remained dysfunctional.

[21] **ANALYSIS**

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 it is false.

[22] The foregoing principle of law was authoritatively stated by **Ramodibedi CJ**, in the case of **Bhutana Paulson Gumbi v Rex, Criminal Appeal No. 24/12, para [19]**, as follows:-

**“Similarly, the accused does not bear the onus to convince the court of the truth of any explanation he gives. If any authority be needed for this proposition, I am mainly attracted by the following remarks articulated by Watermeyer AJA in R v Difford 1937 AD 370 at 373**

**‘it is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.’**

[23] **SELF DEFENCE**

Bearing the above legal proposition in mind, the poser is, did the court *a quo* misdirect itself in rejecting the Accused’s defence of self defence? I think not. This is because having carefully perused the record, I am unable to fault the court *a quo* for discarding the Accused’s self defence gambit as inherently false.

[24] The facts of this case indisputably speak to the offence of murder and it is glaring that the prosecution proved its case beyond reasonable doubt. The defence of self defence was not made out. The principle or requirement for the invocation of this defence is not disclosed by the evidence of the Accused.

[25] A starting point in demonstrating why I reach the conclusion above, is to acknowledge that the defence of self defence has constitutional hegemony in section 15 (4) of the Constitution Act 2005. That legislation postulates that a person shall not be regarded as having been deprived of life unlawfully and in contravention of the said section, if the person dies in consequence of force applied to such an extent as is reasonably justified in the

circumstances, for the defence of any person from violence or for the defence of property.

[26] An Accused who raises this defence must elicit evidence to establish it. What must be established is now judicially settled as the following:-

- (a) that he was unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker.
- (b) the means he used in defending himself were not excessive in relation to the danger.
- (c) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.

[27] The foregoing requirements find expression in the well articulated and oft quoted dictum of **Dr Twum JA**, in the Botswana Court of Appeal Case of **Mmolotsi v The State [2007] 2 B.L.R 708 (CA) para [44]**, as follows:-

**“Under the law of this country when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should be no more than reasonably necessary in the circumstances. The law also means that if the killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self defence.”**

See **Bhutana Paulson Gumbi v Rex (Supra)**.

[28] It is also the overwhelming judicial consensus that the court in ascertaining whether the Accused acted in self defence must not adopt what is known as

the “**armchair approach**”. This simply means that the court must place itself in the position of the Accused in the circumstances that existed at the time. See **Mmolotsi v The State (Supra), S v Jackson 1963 (2) S.A 626 (A), Magagula v The State [2006] 1 B.L.R 209 (CA)**.

- [29] Testing the facts and circumstances of this case against the rigours of the above stated precepts, I find that sadly, the Accused’s defence is completely bereft of any semblance of the relevant factors. This is because the prosecution successfully negated self defence. This onus which the law ascribes to the prosecution (see for example the cases of **R v Molife 1940 AD 202 at 204 and Motsa, Sipatji v R 2002 – 2005 SLR 79 (CA)**), was discharged through the unchallenged and undisputed evidence of the prosecution witnesses, especially PW7 as well as the post-mortem report.
- [30] The combined effect of the evidence led by the prosecution through PW7 and the post-mortem report establishes the gravity of the wound inflicted on a sensitive part of the deceased’s anatomy, her forehead and head, with a sharp object, and the degree of force used to inflict that wound.
- [31] In view of his defence of self defence predicated on the allegation that he used the back of the axe to strike the deceased twice on the forehead whilst she was holding his testicles and that the deceased did not start bleeding until she was lying down on the floor, thereby suggesting that the force applied was not grave, it was incumbent upon the Accused under cross-examination, to dispute the decisive evidence of PW7 and the post-mortem report, on the way and manner this crime was committed, also, to present his defence.

[32] The essence of cross-examination is to weaken, neutralize or demolish the case of the opponent's witness. It also seeks to obtain from one's adversary facts that are favourable to a party's case or to weaken and dilute the strength of the evidence in-chief. It must be related to relevant facts. It need not, however, be confined to the facts to which the witness testified in his examination in-chief. It is not confined to questioning the witness on the fact in issue and material to his case but transcends also to his credit. The sole purpose of the latter is to impugn the credibility of the witness and thus destroy his testimony. Its modus operandi in this regard, is to test the accuracy, veracity or credibility of the witness, to shake his credibility by injuring his character.

[33] If the facts testified to in examination-in-chief, are formal or admitted, cross-examination is not necessary. However, if a witness is not cross-examined, an admission of the truth of his evidence by the opposite party is ordinarily implied. Also a point on which a witness is not cross-examined and about which no rebutting evidence is tendered by the opposing party is established if the court does not disbelieve the witness. Furthermore, evidence which is unchallenged and uncontradicted, if credible, ought to be accepted as true as there is nothing on the other side to balance. Unless there is a statutory prohibition against the admission of such evidence, unchallenged evidence can be made use of by the court in arriving at its decision and must be given its full weight.

[34] This is the established position of the law as subtly acknowledged in the Appellant's heads of argument as follows:-

**“FAILURE TO PUT ACCUSED’S VERSION**

**In the case of S v GOVEZELA 1987 (4) SA 297 (O) the court stated the following “a duty rests on an accused in a criminal trial to put so much of his case to every STATE witness as is relevant in light of the evidence of the particular witness-----”**

**Dr. J.P Pretorius in his works titled’ cross-examination in South African LAW – Butterworths 1997 @ page 150 states, the duty to put the opposing side’s version or defence to a witness is however only applicable as far as the witness is concerned. There is thus no general burden of proof or onus to reveal a defence by means of cross-examination, irrespective of what the witness testifies. The duty to cross-examine arises only if the account affects the opposing side and is disputed. If the evidence does not implicate the accused there is no burden of proof on an accused to reveal his defence through cross-examination.”**

[35] The foregoing authority which emerged in this appeal by Mr. Gama’s own showing defeats his contention that the defence was not obligated to put its case to the prosecution witnesses, especially PW7. This argument loses sight of the fact, firstly, that the evidence of the prosecution witnesses implicated the Accused in the crime and secondly, that PW7’s evidence and the post-mortem report, which stand uncontested in the circumstance, prove that a sharp object was applied with considerable force to inflict the massive wound on deceased’s forehead and head. This counters the Accused’s version of events, defeats his testicles grabbing phenomenon and ought to have been challenged under cross-examination.

[36] This is so because if the deceased was holding the Accused’s testicles, as he contends, then the deceased was right on his body. It is commonsensical, as rightly found by the court *a quo*, that for the deceased to be able to hold his testicles in the fashion advanced by the Accused, then the deceased must have body contact with him. That being so, there would be little or no space

between him and the deceased. In that circumstance, it would not be possible for the Accused to have hit the deceased any blow with any serious impact because he will not have the space to manoeuvre his hands and swing it in a manner as to deliver a blow with such a serious impact as described by PW7, that it caused the sort of grave injury demonstrated in the post-mortem report.

[37] Similarly, as accurately observed by the court *a quo*, the Accused could not also have had the opportunity in these circumstances, to hit the deceased whether on the forehead, head or even at the back of the head, if the deceased was holding his testicles. It is therefore to be expected, as is the case herein, that when tasked to explain and demonstrate to the court under cross-examination how he could have possibly hacked the deceased on the forehead and head, thereby inflicting the magnitude of injury recorded thereon, if she was holding his testicles, the Accused failed to advance any plausible explanation.

[38] Yet, the Accused maintained that he gave the deceased the grievous injury on her forehead. This evidence is inconsistent with his evidence that the deceased was holding his testicles when the blow was delivered.

[39] In these premises, the court *a quo* was justified in my view, to reject the testicles grabbing theory as an afterthought. Not only is it highly improbable in light of the established facts, but it emerged for the first time in the Accused's defence not having been put to prosecution witnesses to test its veracity. The law as settled on this question is that where a party fails to put so much of his case to his opponent's witnesses where necessary under

cross-examination, the court will be entitled and justified to draw an adverse inference against such evidence as an afterthought. See **S v Dominic Mngomezulu and Nine Other Criminal Case No. 94/90, S V P 1974 (1) SA 573.**

[40] Furthermore, assuming without conceding, that the deceased's testicles grabbing theory is probable, the established evidence of the force and means which he used to ward off the alleged attack, was in my view, not reasonable in the circumstances.

[41] The seriousness of the injury and its infliction on a sensitive part of the deceased's anatomy, with two blows and with a dangerous and lethal weapon such as an axe, do not show reasonable prudence on the part of the Accused. This, I say in recognition of the fact that the Accused was pitched against the deceased, a woman, who by the natural order of things is a weaker being by way of physical strength. He could have easily overpowered and dispossessed her of his testicles without having to resort to the violent hacking incident. Ironically, by his own showing, the Accused was able to employ this superior strength of a man to disposses the deceased of the axe. There is no evidence to the contrary. Then, why not his testicles? The absence of reasonable prudence on the part of the Accused deprives his self defence bid of its flavor.

[42] Furthermore, in light of the established facts of the degree of force used to orchestrate this offence, it is not supprising that when this appeal was heard, Mr. Gama conceded that the force the Accused employed in warding off the alleged attack was excessive in the circumstances.



[43] The direct effect of this established fact is that it defeats one of the requisites of self defence which is that the Accused must show that the means he used in rebuffing the attack and defending himself, were not excessive in relation to the danger. This completely disables the self defence urged.

[44] **CULPABLE HOMICIDE**

Despite the above, Mr Gama has urged this court to return a verdict for culpable homicide on the premises that the Accused was provoked into committing the offence by the deceased who grabbed his testicles.

[45] I am unable to subscribe to this proposition. In the first place the Accused did not rely on provocation before the court *a quo*. Secondly, the legal effect of exceeding the bounds of self defence within the context of this case, is a finding of the offence of murder. This is because the prosecution proved intention in the form of *dolus eventualis*. In law the intention to kill can be deduced from the type of weapon used in committing the offence. (whether dangerous or lethal); the part of the body where the assault was directed at (whether delicate or sensitive) and the severity of the injury inflicted thereon. The degree of force employed will also come into play. It follows that by applying excessive force in hacking the deceased twice in a sensitive and delicate part of her anatomy, her forehead and head, with a dangerous and lethal weapon like an axe, the Accused clearly foresaw the possibility of his action resulting in the death of the deceased but, persisted in it, reckless as to whether death occurred or not.

[46] For the purposes of emphasis, it is apparent that the Accused must have appreciated, due regard being had to the sensitive and delicate part of the

body where he was delivering the forceful blows with the axe, which are parts of the body susceptible to deadly harm, that it might lead to the deceased's demise. Herein lies his intention. As the court observed in the case of **Mazibuko Vincent v Rex 1982- 86 377 (CA) at 380:-**

**“A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts reckless as to whether such death results or not.”**

[47] This is the same principle which was succinctly stated in **Rex v Jolly, 1923 AD 176 at 187**, in the following terms:-

**“The intention of an accused person is to be ascertained from his acts and his conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”**

[[48] The conduct of the Accused after the fact of the offence, which is a horse of a completely different colour, buttresses my view on his intention. He not only failed to raise an alarm or report the matter to the police, most importantly, he took very careful, meticulous, cold blooded and cryptic steps geared at concealing the offence.

[49] To this end, he concealed the deceased's cell phone; hid the axe used to commit the offence; disposed of the body in a brown cardboard and white paper which he covered with a refuse bag and tied up with telephone and electric cords. Thereafter, he took the body out of the premises in a brown box and hid it in a railway tunnel by the Usuthu River. To be able to take the deceased's body out of the premises the Accused dug a hole under the fence.

- [50] The Accused's plan to conceal the offence was a well projected one and shows that he was still in control of his reasoning. This counteracts his posture under cross-examination, that he took these steps because he was confused. I reject it.
- [51] His intention can be easily extrapolated from the stark enormity of his conduct after the fact of the offence. If not, why not report the crime rather than take steps to conceal it? This question begs the answer. His conduct after the fact of the offence does not add up with that of a person who acted unintentionally. It is a classical show of intention.
- [52] Once the intention to kill, whether *dolus eventualis* or *dolus directus*, is disclosed, as it is in this case, the competent verdict is one of murder and not culpable homicide. This is because the offence of culpable homicide presupposes that the Accused's action causing the death of the deceased was devoid of intention. Its perception is the unlawful negligent killing of a human being.
- [53] The authorities on this subject matter abound. One of such is the case of **S v Ntuli, 1975 (1) SA 429 (A) at 435-437** where the court comprehensively and exhaustively adumbrated on it in the following apposite context:-

**“In the present case, however counsel for the State contended that a conviction of culpable homicide, on the grounds that the bounds of self-defence were exceeded, means that inevitably, as a matter of law, an assault was involved. In order to answer this contention it is necessary to tabulate certain general principles relating to assault, self-defence, and culpable homicide applicable to the instant case.**

1. Assault is the intentional application of unlawful force to the person of a human being. For example, if A Assaults B by striking him, this comprises –
  - (i) the unlawful application of force; and
  - (ii) the intention to do that unlawful act (*dolus*).
  
2. Culpable homicide is the unlawful negligent killing of a human being. Thus, *culpa* is an essential element of this crime. See S. v Thenkwa en ‘n Ander, 1970 (3) S.A 529 (A.D.) at p. 534E; S.v Mtshiza, 1970 (3) S.A 747 (A.D.) at p. 752C-D; S. v Ngobozi, 1972 (3) S.A. 476 (A.D.) at p. 478C-----
  
3.
  - (i) A may intentionally and lawfully apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack at the hands of B. The test whether A acts reasonably in defence is objective; see Burchell and Hunt, S.A Criminal Law and Procedure, vol. 1, p. 278; S. v Goliath, 1972 (3) S.A. I (A.D.) at p. 11.
  
  - (ii) If A’s defence, so tested is reasonable, both his application of force and his intention to apply it, are lawful: so there is no question of *dolus* or assault on his part. *Dolus* consists of an intention to do an unlawful act.
  
4. Continuing with the situation in para. 3 (i) supra, if -
  - (i) the stage is reached at which A ought reasonably to realise that he is using more force than is necessary to protect himself against B; and
  - (ii) he ought reasonably to foresee the possibility of the resultant death of B; and
  - (iii) such death ensues,

A will be guilty of culpable homicide based on *culpa*. No *dolus* is involved and no assault. The death has resulted from his negligence, i.e, *culpa*, and not from any unlawful intention i.e., *dolus*. To put it another way, when he was negligently failing to realise that his defence was excessive, it cannot be said that he was unlawfully intending to use such excessive force. Furthermore, one must distinguish between the negligence *quoad* the injury to B, and the negligence *quoad* his death. See S. v Bernardus, 1965, (3) S.A. 287 (A.D.) at p. 298, lines 17-18. Proof of the first does not necessarily provide proof of the second. In our common law there is no crime of negligently injuring another. Assault involves unlawful intention.

5. **If A realises that he is using more force against B than is necessary, he is both applying force unlawfully and intending to do this (*dolus*); and he is then guilty of assault. Principles of self-defence no longer apply. Whether A realised that he was using excessive force is a question of fact, involving an enquiry into his state of mind.**
  
6. (i) **A is guilty of culpable homicide if, in so assaulting B, he ought reasonably to have foreseen the possibility of resultant death, and such death ensues. See *V.v Bernardus*, 1965 (3) S.A. 287 (A.D.) His *mens rea*, quoad the homicide, is *culpa* – his negligent failure to realise that he was endangering B’s life. His assault is a factor (and an aggravating one) leading up to the death. In that sense the culpable homicide can be said to be one “involving an assault” -----**
  
- (ii) **He is guilty of murder if he foresaw the possibility of such resultant death, but persisted, regardless whether it ensued or not. *S. v Sigwahla*, 1967 (4) S.A. 566 (A.D.) at p. 570B-E. (He would, of course, also be guilty of murder if, in the circumstances of 5, supra, and the resultant death, he directly intended to compass B’s death).”**

See ***Siphamandla Henson Dlamini v Rex*, Criminal Appeal No. 23/13.**

[54] **PROVOCATION**

Finally, and for the sake of completeness, the provocation bid cannot also avail the Accused. I agree that in terms of section 2 (1) of the Homicide Act, 1959, provocation will found the offence of culpable homicide instead of murder if the act which caused death is done in the heat of passion caused by sudden provocation as defined in section 3 thereof, before there is time for the Accused’s passion to cool.

[55] The qualifier to this provision is contained in section 2 (2) of the Homicide Act, which propounds that section 2 (1) will not operate to found the offence of culpable homicide, unless the court is satisfied that the act which causes the death bears reasonable relationship to the provocation.

[56] This qualifier militates against the Accused's contention for a verdict of culpable homicide. This is because an Accused who wishes to rely on this defence must prove

- (i) that the time lapse between the provocation and the act which causes death was reasonable; and
- (ii) a relationship between the provocation and the reaction of the Accused thereto which brings about the deceased's demise and a reasonable proportionality must exist between the two.

[57] Against the backdrop of the foregoing exposition, the provocation touted by the Accused has no basis, in view of my earlier finding that the excessive force used by the Accused to ward off the alleged attack was not reasonable within the context of this case. It was severe and bears no proportionality with the provocation. It was completely out of touch with it. In these circumstances the provocation bid does not serve to discount the Accused's offence from murder to culpable homicide. It fails.

[58] For the above stated reasons, the court *a quo* was correct to find that the prosecution proved its case beyond reasonable doubt and to convict the Accused of the offence of murder as charged. The court did not misdirect.

[59] **CONCLUSION**

In these premises, this appeal fails and is dismissed accordingly.

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**E.A. OTA**  
**JUSTICE OF APPEAL**

**I agree**

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**M.M RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**MCB MAPHALALA**  
**JUSTICE OF APPEAL**

**For Appellant:                      L. Gama**

**For Respondent:                      D.M. Nxumalo**





