**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE** **REVIEW CASE NO.20/2017**

In the matter between:

**MUZI BONGANI SIKHONDZE** Applicant

**VERSU**

**REX** Respondent

**Neutral Citation:** Muzi Bongani Sikhondze *versus* Rex *(1012017) [2021] [SZSC49] (3rd May 2021)*

Coram: **SP Dlamini JA,**
**MJ Dlamini JA;**
**SB. Maphalala JA**
**J.P. Annandale JA,**
**JM Currie AJA**

**Date Heard:** 4th March 2021
**Date of Judgment** : **3rd May 2021**

**Summary:**

*Application for review of unanimous judgment by the Supreme Court in its appellate jurisdiction - Section 148 (2) of the Constitution of ESwatini, 2005. - Applicant and another convicted of Murder and Robbery, sentenced to imprisonment of 25 years and 5 years respectively, to be served concurrently. Alleged irregularity in Judgment on appeal resulting in gross miscarriage of justice founded on patent error. - Appeal judgment premised on presence of applicant at scene of crime as established by ostensible cross-examination by legal counsel in the course of the trial, and consequent confirmation of common purpose and dolus eventualis. Transcribed record of proceedings in trial court absent of such statements by counsel. No legal basis to rely upon incriminating version which was not in fact put to witnesses. Both appeal and review proceedings dependent upon record. Held that crucial reliance upon statements allegedly made during cross-examination resulted in a patent error, causing a miscarriage of justice. Section 148 (2) of the Constitution provides appropriate remedy of review, not limited by stare decisis or functus officio. Ordered that applicant be forthwith released from prison. Convictions and sentences set aside and to be expunged from criminal record.*

JUDGMENT

Jacobus Annandale JA:

[I] The applicant in this application to review and set aside a judgment of the Supreme Court in its appellate jurisdiction would have faced insurmountable obstacles in the form of the legal principles of *res judicata* and *stare decisis* until the year 2005 when the Constitution of ESwatini became the Supreme Law of the Kingdom. It incorporates a new remedy to redress injustices where serious irregularities, mistakes, patent errors or some few other exceptional instances have occurred, by way of review. In the past, judgments on appeal were as good as the proverbial casting in stone. It was final and unassailable, no matter what. Once the Court of Appeal has spoken, it became *functus officio,* incapable of revisiting its own judgments on appeal. It was the end of the line.

(2] The advent of a review jurisdiction by the Supreme Court since the year 2005 empowers this Court to revisit its earlier judgments and in exceptional circumstances override the well-established principle of finality in litigation

in order to undo serious irregularities which would otherwise have caused the perpetuation of a gross miscarriage of justice. It functions like the safety valve on a pressure cooker, hardly ever employed in action but an important component to avoid serious mishaps.

[3] Section 148 (2) of the Constitution of ESwatini (2005), sets the mark for the deployment of this remedy.

> "(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court."

To date, there are not yet any such legislation or rules.

[4] The emerging jurisdiction of the ability of apex courts to review their own decisions is not unique to ESwatini. For instance, the elaborate and highly detailed constitution of India holds in article 137 that:

> "Subject to the provisions of any law made by Parliament or any rules made under article 145, [rules made by the Supreme Court itself for regulating generally the practice and procedure of the Court] the

Supreme Court shall have power to review any judgment pronounced or order made by it."

[5] The review jurisdiction of the Supreme Court must however not be seen as a licence to abolish or diminish the well-established and necessary principle of *stare decisis*. Consistency is a cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements that the courts have evolved the rule and role of precedents, principles of *stare decisis* etc. These rules and principles are based on public policy and if these are not followed by the courts then there will be chaos in the administration of justice - see Government of Andhra Pradesh v A.P. Jaisswal, AIR 2001 SC 499: (2001) I SCC 748: 2001Lab IC 479: 2001 SCC (L&S) 316 and The Constitution of India, Commentary by PM Baleshi, 6th Ed 2005 page 136.

[6] The object of the exercise remains to ensure fair and proper justice for all litigants who seek to drink from the pure fountains of justice. In the rare and exceptional case of for instance, a patent error which would otherwise have

resulted in a gross miscarriage of justice, the court is now empowered to revisit its own judgment and correct a mistake. Nobody could ever claim to have never mistakenly erred.

[7] In President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 others, Civil Appeal No. 11/2014, it was succinctly stated that:

> *"In its appellate jurisdiction the role of the Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction, this court has the purpose of preventing or ameliorating i-njustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this court is to avoid impractical situations and gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. The exceptional jurisdiction must be properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court process, this court cannot sit back or rest on its laurels*

*and disclaim all responsibility on the argument that it is functus officio or that the matter is res judicata. Surely the quest for superior justice among fallible beings is a never ending pursuit for our courts of justice, in particular the apex court with the advantage of being the court of last resort ... from the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice, or absence of effective remedy*. "

[8] It must be reiterated that fraud, malice, bias and suchlike maladies are not conditions precedent for intervention. An honest mistake or patent error suffices where non-intervention would otherwise have resulted in a gross miscarriage of justice and in this particular matter, the ongoing incarceration for a very long time of a person whose guilt has not been adequately proven by the prosecution and determined by the courts.

[9] The applicant herein and another were charged and convicted of the crimes of murder and robbery, resulting in effective sentences of imprisonment for

25 years. They both appealed their conviction and sentences, but they were dismissed. The applicant now prays for a review of the unanimous judgment on appeal. During the course of the trial as well as the appeal he had legal representation on a *pro deo* basis. He prepared his application for review without legal assistance, *prima facie* so, but when reading the document it is evident that with an educational level of Form I, the application itself demonstrates a remarkably high standard of draftsmanship.

[10] The gist of his application for review is that the Supreme Court erred by placing reliance on purported statements by his *pro deo* counsel to two witnesses of the crown, wherein it would have been put to them in cross examination that the two accused persons shot the deceased in self defence. Further, that the conclusion which was drawn to link him to a fire-arm, bullet and cartridge case is not supported by the evidence on record. The same applies to the sale of stolen cellphones to a third party, which likewise does not link him to the crime.

[11] From the onset it must be said that a review under section 148 (2) of the Constitution does not open the door for a rehearing of the former appeal, a

"second bite at the cherry", so to speak. In the matter at hand, all three of these issues were argued and considered on appeal. The conclusions which were drawn by the Court resulted in a factual finding that the second appellant, now applicant for review, is connected to the scene of crime. It ultimately resulted in the dismissal of the appeal against both conviction and sentence.

[12]. Properly applied, this Court would only interfere with the judgment on appeal in this particular matter if it is manifestly and unequivocally so that indeed there is a factual finding which resulted from a patent error which is the root cause of a flawed finding, causing a gross miscarriage of justice. Otherwise put, a patently clear error or mistake must have resulted in a pronouncement on appeal that the applicant is guilty and must serve his long custodial sentence whereas if it had not been for the patent error, he would have been liberated. The presumption of innocence is strong and the evidentiary burden of proof beyond reasonable doubt which rests on the prosecution is exactly just what it says. Guilt must be proven along the well established line of precedents, such as R v Blom 1939 AD 199; Sean Blignaut v The King Criminal Appeal No. I of 2003, and many other cases.

[13] The origin of this matter commenced with a robbery which went haywire during the night of the 17th January 2007, just over fourteen years ago. Two armed assailants entered the home of Nelsiwe Gwebu and her late husband, Themba Dlamini. They woke from their sleep and were threatened to remain quiet. They were then robbed of their Nokia cellphones and the keys to their vehicle, where after the robbers left. Her late husband then got hold of a bush knife and followed them outside in hot pursuit now that he also had a weapon.

[14] She then heard a shot being fired and hid herself in the home. The assailants returned to the house, did not find her and left again. She then raised alarm and the police were called. Her husband was found dead in their yard, having been shot. She mistakenly recognized one of the assailants as one Mphilisi Manana.

[15] Evidence by the police witnesses was to the effect that the deceased was found some 40 metres away from the house. He still had a bush knife with him. He was fatally shot in the chest. A spent bullet was found in the kitchen and an empty cartridge shell just outside the kitchen door. The

firearm which was used to kill the deceased was later on recovered and forensic examinations proved it to be the one which was used on the fateful day.

[16] The stolen cellphones eventually lead to the arrest of the two accused persons. Further evidence which was presented by the Crown during the course of the trial is that the two accused were arrested in June 2009, more than two years after the fateful shooting and robbery of two cellphones. It transpired that both accused were involved with the sale of these two phones to people who were later arrested but released thereafter. The phones were never recovered as they were further sold on to some Zambians who have left the country. It was the first accused who arranged the rendezvous where the sale took place. By all accounts, the second accused, now applicant for review, performed no greater role than merely being present during the sale of the stolen cellphones.

[18] The arrest was a result of information obtained by the police from the original purchasers of the stolen cellphones. From information given by the arrestees, the handgun which was used at the time of the murder was

retrieved from the house of a third party. It was given to him to keep by the girlfriend of the first accused who was asked by the first accused to recover it from his home and give it to the third party. This he said from the inside of the police vehicle in which he and the applicant were after their arrest. The firearm was recovered more than two years after the incident.

[19] There exists a strong *nexus* between the firearm which was used to kill the deceased and the first accused. Likewise with the cellphones. In contrast, the second accused or applicant for review has no link or proven interaction with the recovered pistol. The only link between him and the crime, insofar as the evidence goes, is that he was present during the sale of the phones, a meeting which was arranged by the first accused. There is no evidence about his role during the transaction or anything that he might have had to say about it.

[20] The evidence of the deceased's widow was all along that the whole incident was perpetrated by two assailants. She testifies that one of them was known to her by name but the police followed it up and said that it was a case of

mistaken identity. She did not identify either of two accused in court as having seen them before.

[21] Accordingly, from my careful and anxious reading of the evidence as presented by the prosecution in the trial court, it is clear that the first accused was sufficiently linked to the Norinco pistol which was used to shoot the deceased. Nobody knows who pulled the trigger, which of the two assailants, but it does not matter. The two Nokia cellphones which were taken from the house of the deceased and his wife also establish an evidentiary chain between the first accused and the robbery.

[22] However, I fail to find any such *nexus* between the second accused, now applicant for review, or any other direct evidence which is consistent with his guilt. There is no confession either. Seemingly, the trial court formed the impression of self-incrimination *infacie curiae* in that it was ultimately held:

> "[69] It is worth noting that when Accused 1 and Accused 2 advanced their defence through cross-examination they indicated that when the deceased was shot, they were defending themselves from him as he chased them with a slasher. However, when they both gave their

evidence m chief they denied any knowledge of the deceased's death."

[23] It ties in with an earlier summary of evidence where it was said that:

"The defence advanced by the accused is that the deceased chased them after they had left his house with a slasher. The suggestion is that they were defending themselves when they shot the deceased".

[24] The origin of this seems to be recorded in the trial summary in relation to a police officer was not present during the commission of the crime as follows:-

"The line of cross-examination further gave the impression that after the suspects retreated it was the deceased who then became the aggressor by following them outside and that is when he got shot in self-defence."

[25] I will soon revert to the degrees of participation of a crime, based on the well-established doctrine of common purpose. Likewise with *do/us*

*eventualis,* both which feature prominently in the judgment on appeal which is under consideration.

[27] While I agree with both the trial court and the Supreme Court that self incriminating statements which are made by the legal representative of an accused person during the course of cross-examination of a prosecution witness is usually admissible to assess his guilt, my present concern is whether or not such statements were actually made in open court and so reflected on the record. To solve this dilemma, the only recourse is by reference to the record of proceedings. This is where a diligent search for statements as referred to above should surface and sustain the adverse inference which is sought to be drawn from it. In view of the available direct evidence as captioned above, both the inference and actual statements must tally and lead to an inescapable inference that indeed it was put to the witnesses that the accused persons acted in self defence against an attack by the deceased. Apart from considerations about the legality of such an averred attack and the requirements of self defence, the statements as such must be clearly evident from the record.

[28] The trial court made no such reference regarding the one and only eye witness, the wife of the deceased. PW5 is a police officer who photographed the scene of crime. Officer Sipho Magagula is referred to by the trial court in paragraph (18] of the judgment. It was held that the "line of cross examination gave the impression. . .. that is when he got shot in self defence."

(29] Turning now to the recorded *viva voce* proceedings as per page 69 (or the original p.24) where officer Magagula as PW5 was cross-examined: He adjudged the deceased's body to have been found about 40 metres away the kitchen door. He still had a "slasher" or bush knife in his hand. He was taken to task over some tiny blood specs on the scene and his professional expertise. Not having been present at the relevant time, he could not testify about the origin at the bush knife or that a scuffle might have ensued outside the house. The wounds etcetera were explored and recorded as well as could be. No fingerprints of significance were found anywhere.

[30] Despite not having been "steeped into the atmosphere of the trial", I fail to find any statement or question to this witness to bear out any possible

conclusion at all that the assailants or accused persons acted "in self defence", or any variant thereof. Yet, the trial court held otherwise and made a finding, ostensibly based upon *"the impression"* which ultimately resulted in the conviction of the appellant. Also, "the assailants" do not automatically equate to "the accused". The objective of the prosecution was to prove who were the intruders or assailants, and this had to be done beyond reasonable doubt.

[31] As said, there lies no issue between the first accused and his conviction or sentence. It is only the applicant who now says that "a patent error" has been made. He says that it was this error which resulted in a finding by the Supreme Court on appeal that he was justifiably convicted and sentenced, as confirmed by the unanimous judgment of the Supreme Court.

[32] It seems to me that the nearest quotation to the mark is to be found at page 75 of the record (p.30 of the transcription) where it was said:

> "Whilst the intruders were inside, they were confronted by the deceased. Did you discover that when the deceased attacked them, they had not demanded anything from the deceased and his wife."

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Also that: "Were you able to ascertain whether or not the intruders retreated from the house and the deceased followed them outside with a bush knife."

[33] Notably, the repeated reference to "the intruders" is totally in line with all of the available evidence. Also, that they acted in common purpose, yes, and death should also have been foreseen. The question still remains as to the identity of the co-perpetrator, the first accused in the presence of whosoever. Whether or not "the intruders" or "the assailants" did this or that, it still does not form a *vinculum iuris*, an evidentiary chain of circumstantial evidence, even as possibly could have been fortified with a crucial finding of self incriminating evidence. Only then could the effect have been to hold that the applicant put it through his counsel that he, the second accused, was present at the murder scene when the deceased was shot *"by us (or by the accused persons) in the self defence"*. But, I cannot find any room for such a conclusion by the learned trial judge nor by the Supreme Court.

[34] It is when the matter came up for appeal before the Supreme Court when the occasion of a patent error come to the fore. It is this patent error which is

now said to have caused the prolonged incarceration of the applicant, resulting in a gross miscarriage of justice and thus worthy of consideration to deal with his issue insofar as the Constitution provides.

[35] The applicant challenged his conviction and sentence on appeal. Before the hearing, the Respondent submitted Heads of Argument. It is still on record. The only way in which one could venture even a vague guess, would have been to ask how it came about that Supreme Court ruled in its judgment that part of the admissible evidence is that it was put to witnesses that "they", meaning the accused persons before the court, "Shot the deceased in self defence". The court did not refer to the relevant portions of the record, for instance foot notes, quotations, pages, or otherwise. It seems as if it was taken for granted that the record bore out the origin of the attributed statements on behalf of both accused on trial.

[36] In search of the answer to this vexed question of origin, it becomes insightful to yet again visit the Heads of Argument which the Respondent/Crown filed in the appeal.

I quote:-

"During cross examination of PWl being Nelisiwe Esther Gwebu (pg. 50 of record) and PW5 being Sipho Magagula (pg.72 of record) (Scenes of Crimes Officer), accused suggested that they shot deceased in self defence. This suggestion places them squarely to the (sic) scene of crime."

[37] Turning to page 50 of the record which reflects cross examination of Nelisiwe Esther Gwebu, PWl, I yet again fail to find the incriminating statement. For sake of completeness, I reproduce the half page as is relevant.

"DC: In your statement to the police, "portion read to witness".. ." ...after the deceased had woken up, he took a bush-knife.: .Did that occur or not, in view of the evidence you have given to court? (sic).

PWl: Yes, that is correct, I was able to recognize one of the attackers as one who looked like Mphilisi Manana.

DC: The items that were lost, when exactly did you discover that they were lost or that they were no longer in the house?

PWl: I discovered that they were missing when I was recording the statement

CC: No re-examination"

[38] Whichever innovative reading mode one adopts, it is impossible to conclude from this portion of the record a statement such as that which is relied upon by the Respondent. There is no scope in the portion relied upon to draw any inference, let alone a most damming one, that the accused persons placed themselves on the scene of the crime by putting it to a witness that "they [the accused persons, not just any two assailants] shot the deceased in self defence."

[39] Astonishingly, this issue is yet again raised in argument by the Respondent during the proceedings on review. This time it reads:-

> "Respondent submits that this Honourable Court did not misdirect itself when it inferred that appellant pleaded self defence through cross examination of PWl, PWS and this more fully appears in the evidence in cross examination of PW6 ( page 66-76 of the record of proceedings)."

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[40] As already said above, PWl (Nelisiwe Esther Shongwe) had nothing put to her which leaves any scope to say that she was confronted by counsel with a statement that "the accused", one or both of them, would have "acted in self defence when shooting her husband." The same applies to officer Magagula (PW5) as shown above, but this time specific reference is made to page 72 of the record.

[41] Page 72 records cross examination of the witness, Nelsiwe Esther Shongwe. It commences with a description of the house and kitchen contents. She concedes to a disparity of exactly where the bush knife was taken from. She also conceded that there was not much fighting inside the house, but outside. She does not challenge a statement that the deceased was shot outside the house any more than saying it could have been inside or outside the kitchen. She was also asked about the state of undress of the deceased, and if the exit wound would cause bleeding.

[42] Again there is no scope to conclude or interpret this to be a statement which places both the accused at the scene of the crime, having shot the deceased in self defence. Also, the same applies to PW 6 - Officer Vusi Dlamini who

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arrested the accused as eventual result by tracing the stolen cellphones through the local service provider. He also recovered the firearm from a police station where it was held. Neither pages 66-77 and in particular the cross examination per page 76, carries the day.

[43] The nearest to the mark is that this investigating officer would have discovered that " .. .it was the deceased who awoke, took a bush-knife and confronted the intruder." Also that "the intruders" were:

> " ...confronted by the deceased inside the house and that when the deceased attacked them, they had not demanded anything from the deceased and his wife."

[44] Again, the Respondent on appeal argued that based on the excerpts referred to just now, it was entirely justifiable to have " ... .inferred that appellant [applicant] pleaded self defence through cross examination" of the three witnesses.

[45] A basic rule of logic dictates that before an inference could properly be drawn and decisive evidential weight attached so it, the foundation stone is that such a statement must first indeed have been made. To argue as the Respondent did, is to attribute a most important consequence to be drawn from statements in cross examination which simply were not made. Nor is there room to extrapolate and infer such a meaning to the cross-examination as contended. Moreover, with no foot on which to stand insofar as the actual words expressed in court goes, the subsequent conclusions cannot be sustained when there is no foundation for such inference in the first place.

[46] It is thus entirely unsustainable to argue as the Crown did in the Supreme Court in the course of hearing the appeal which is now sought to be reviewed, mainly due to a patent error. The Crown consistently but erroneously argued that" ...*both appellants conceded through cross examination that they were both at the scene of the crime when the offence was committed."*

[47] The Supreme Court then referred to this incorrect assertion by the Crown as if it was indeed correct and erroneously relied upon the inference of being

present at the scene of the crime. To have been presumed as having been present at the crime scene then resulted in an application of the doctrine of common purpose to impute the wrongdoing of one person to another. Presently, it was then held that the applicant associated himself with his co accused to the extent that both were held equally liable for the fatal shooting of the deceased. *Dolus eventualis* was attributed to both appellants.

[48] However, it seems to me that the unfounded heads of argument which were presented by the crown somehow found its way into the judgment of the court, even to the extent of specific reference to the particular witnesses to whom the alleged statements would have been made in cross-examination. I have already incorporated the relevant portions of recorded cross examination with regards to Nelisiwe Esther Gwebu (PWl), wife of the deceased, and officer Sipho Magagula (PWS). It was clearly the case that neither of these were confronted with the alleged statements in cross examination, ostensibly to the effect that:

> " ... both appellants conceded through cross-examinations that they were both at the scene of the crime when the offence was committed."

[49] In its unanimous judgment, it was held that:

> "[8] During the cross-examination of PWl, Nelisiwe Esther Gwebu and PW5, Sipho Magagula who was the scenes of crime expert, the appellants put to him that they shot the deceased in self-defence since he was chasing them and armed with a slasher. Undoubtedly, this cross-examination is an admission which places the appellants at the scene of crime during the commission of the offences".

[50] Undoubtedly this finding is incompatible with the evidence on record on which it depends. It is a patent error. It consequently resulted in a dismissal of the appeal and both the applicant and his co-accused had their convictions and sentences confirmed on appeal.

[51] The Supreme Court correctly stated our law on both common purpose and *do/us entualis* with admirable clarity and motivation. However, the point of departure had to be that the applicant must have been present at the scene of crime before any consequences could flow from it. He was not at all imputed to be there when regard is to be had to cross-examination of witnesses. It was never said, on his behalf, that he was there when the shot

was fired, or that he and his co-accused were the intruders or assailants who killed in self-defence. Yet the incorrect assumption of it being so resulted him to continue serving his concurrent sentences of 25 years. He was arrested as long ago as June 2009, more than twelve years ago: The applicant is therefore correct when he argues that confirmation of his convictions and sentences, dependent upon him being present at the scene of crime which is based upon a patent error has resulted in a gross injustice, bringing it squarely under the auspices of Section 148 (2) of the Constitution.

[52] It is trite law in this jurisdiction and elsewhere that the guilt of a person must be proven beyond reasonable doubt. Numerous authorities deal with this concept but the overall consensus was formulated long ago in Rex v Blom 1939 AD 199. In Sean Blignaut v The King Criminal Appeal Case No. 1 of 2003, our former Court of Appeal dealt with the drawing of inferences. Circumstantial evidence, such as exist in the present matter where the only evidence against the applicant lies in his presence at the time when his co accused sold the stolen cellphones, must be most carefully evaluated. The Court said at pages 14 and 15:

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"But when reasomng by inferences drawn from circumstantial evidence the touchstone remains the two cardinal rules of logic enunciated in the leading case of Rex vs Blom 1939 A.D. 199. Those two rules are that the inference sought to be drawn must be consistent with all the proved facts; if it is inconsistent with any proved fact it cannot be drawn. And the second rule is that it must be the only inference that can be drawn from the proved facts; if another one or more reasonably possible inferences can be drawn from those facts one cannot know which is the correct inference to be drawn."

[53] Then question then becomes if there must not be a reasonable possibility that his mere presence at the time of the transaction suffices to draw a proper inference that he was also present when the cellphones were stolen from the house of the deceased and his murder. Is that proof beyond reasonable doubt? Undoubtedly, it would have been a different story if indeed it was so that the applicant was placed at the scene of the crime in the course of cross examination, but as shown, such statements do not exist.

[54] I must therefore draw the inevitable conclusion that had it not been for the patent error dealt with above, the remainder of the evidence does not prove the guilt of the applicant beyond reasonable doubt. Thus, had it not been for this error, the applicant would have been released from prison.

[55] Accordingly, the inevitable order of this Court in its review jurisdiction under Section 148(2) of the Constitution must be as follows:

1. The application for review of Supreme Court of Appeal Judgment No 20 of 2017 insofar as it pertains to the applicant, Muzi Bongani Sikhondze, succeeds.

2. It is ordered that the dismissal of his appeal be substituted with an order that his convictions of the crimes of murder and robbery be set aside and expunged from his criminal conviction record by the Commissioner of Police.

3. It is further ordered that the concurrent sentences of 25 years and 5 years imprisonment also be set aside and that the applicant be liberated from prison forthwith.

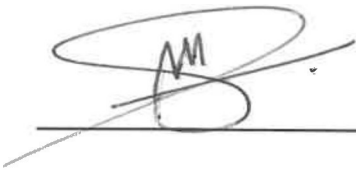
JACOBUSP.ANNANDALE

JUSTICE OF APPEAL

I agree and see my separate remarks below

MJ Dlamini JA

I agree



SB Maphalala JA

I agree

JM CurrieJA

Counsel for the Appellant: Mr M. Dlamini

Counsel for the Respondent: Ms Nompumelelo Ngubeni (DPP)

**MJ DLAIWNI JA**

General observations

[56] I agree with the judgment just declared by my brother, the Honourable Justice Annandale. But the case is such that I felt obliged to address some few observations of my own. The accused were arrested in April 2007 or in June 2009. The first date is that of the accused; the second is that of the police. Both dates are unchallenged on the record and no attempt from any quarter appears to have been made to reconcile the dates. The accused under case No.252/2009 were indicted in March 2010 and trial began at the High Court on 18 July 2012 and ended on 24 October 2016, with judgment delivered on 22 June 2017. The judgment on appeal to the Supreme Cow1 was delivered on 17 October 2018. Even though certified as correct, the record is in some places abridged and incomplete.

[57] Before dealing with the merits of the application, I find it pertinent to briefly address what may be described as administrative formalities. As will be seen above or on the file cover, this application bears the Case No.20/2017. This is the same case number that the appeal bore as may be seen from the judgment of this Court on appeal penned by the learned Chief Justice, dated

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the 17th October 2018. This ought not to be the case. The review application should have its own case number. If there is need to associate the review with the judgment sought to be reviewed, the least that could be done would be to identify the review case by a letter such as "Case No. 20A/ 2017" or by a number e.g. "Case No 20 (1) /2017". The failure to accord different case numbers to the appeal and review cases may easily lead to documents being misfiled or misconstrued with unfortunate consequences. A document pertaining to the appeal but relevant to the review should be found in the record on review.

[58] Reference is also made to the Applicant's heads of argument which appear under Case No. 20/2017, but the certificate filing these heads serves under Case No.32/2014 even though filed on 17 April 2020!! How this happens and how the registry allows this boggles the mind. As if not to be outdone, the Respondent filed its answering papers and heads of argument to the application for condonation under Case No.34/2014 but dated 24 April 2020. How these papers were allowed to bear wrong case numbers is difficult to understand. Looks like the registry officers need to be properly trained and supervised. These glitches undermine the authority of the Supreme Court in particular and the Judiciary in general.

[59] Lastly, but not least, not including the original statements in criminal appeals or reviews, in particular, can thwart the appeal or review court in fully understanding and properly dealing with the matter before it. This need arises from the fact that sometimes what is contained in the judgment is not found in the original statements of witnesses or the transcript. The appeal court as the last court of instance has a duty to thoroughly scrutinise the judgment appealed against for any patent shortcomings. The duty of the appeal or review court is not to casually process matters coming before it, but also to ensure that record is in order and justice is served without being too technical. The doctrine of precedent concerns not only the litigants to the case but is also a lesson to would be litigants. That is why also counsel appearing before the Supreme Court must be thoroughly prepared and sufficiently experienced to be of assistance to the Court.

From the Summary of Evidence

[60] One notes that in the Summary of Evidence prepared by then Director of Public Prosecutions in March 2010, it is stated among other things that PWl, the wife of the deceased "will give a full description" of the man who

entered their house on the night of 17 January 2007 carrying a pick. The Summary further states that whilst the deceased and the man with a pick were engaged in a fight "two other men entered and attacked the deceased". Thus, according to PWl there were at least three intruders. Needless to say that ,at the trial PWl was not in any position to give a 'full description' of any of the intruders; she said that she only saw two attackers and could not recall a man with a pick. Even the attacker PWl said she identified turned out to have been a wrong identification according to the police, as that person (Mphilisi Manana) had nothing to do with the crimes charged. Did three or two persons attack the deceased and his wife? What made PWl mistakenly identify one of the intruders as Mphilisi Manana? Did the said Mphilisi Manana make a statement to the police? If so, was that statement part of the police docket? It will be recalled that first accused stated that the cellphones said to have been stolen from the home of the deceased belonged to one Nhlanhla Shongwe who has since somehow disappeared from the face of the kingdom. Could Nhlanhla Shongwe have been the third intruder mistaken by PWl as Mphilisi Manana or was PWl simply daydreaming?

[61] The Summary also recounts that on 19 March 2007, Nompumelelo Magagula (PW7) "visited Accused 1 who requested [her] to go to his house at Mahlabatsini to take something that was in a washing basket and give it to

[PW] Sunday Sikhondze". Ms Magagula proceeded to Mahlabatsini and "retrieved a gun which was in a washing basket". She took the gun and gave it to Sunday at Siphofaneni. But it will be realized that in court PW7 gave a different story, in particular about how she 'found' the gun. PW7 made a statement to the police, but another statement apparently bearing her name was denied by her. No one raised a finger about the two statements one of which she denied.. Who was fooling who? Was PW7 a genuine, independent and trustworthy witness? Or was she a fake witness?

[62] Further, the Summary reflects that m March 2007 Sunday Sikhondze "visited Accused I and 2" and was "instructed by Accused 2 to go to Accused 1's house to take a firearm". But Sunday could not fmd the gun at the house of Accused 1. Sunday then went to Nompumelelo Magagula who handed the firearm to him. Sunday was further requested by accused (2) to "give the firearm to Makinini (Velakubi) Sikhondze" (PW4) for safekeeping. It is clear that the Summary gives a somewhat differing version of events from the account at trial. Why? Could it be that the original statements were revised in the three or four year interval between the arrest and the indictment in 2010? In the above paragraph Nompumelelo was requested by first accused to go to his house and "take something which

was in a washing basket" but in this paragraph Sunday is instructed by the applicant to go to first accused's house to "take a firearm". Whether these glaring mistakes were made by the author of the Summary or were there in the original statements, such discrepancies can only hurt the case for the prosecution. Only the original statements or transcript can help this Court to separate genuine from fake evidence and truth from lies.

The review

[63] It is important to acknowledge that like many other matters that come before courts, this application may be described as borderline in light of the emerging jurisprudence. I say this because on the face of it the application looks like a rehearing of the appeal. But rehearing must be determined in light of the evidence and the judgments) flowing from the original proceedings. A closer look at the application will show that there is more to it than a second bite at the cherry. This may well be due to the fact that the applicant is a lay person. Applications for review under section 148(2) do require a certain level of expertise not only in the presentation of the arguments but also in stating the grounds of review. This is not to mean that persons convicted of crimes - serious crimes - should not come to this Court because they cannot afford a suitable attorney. Reviews at the moment, pause a challenge not only to the applicant but to the Court as well. This

Court is for all manner of litigants. Pro Deo counsel should be available to applicants in serious cases before this Court from beginning to end.

[64] In the application for review which the applicant wrote from Matsapha Correctional Centre on 9 September 2019 he put it thus:

> "It was clear from the trial court judgment and the appeal court judgment that they both found that I incriminated myself during cross examination by putting myself to the scene of crime though my pro deo council (sic).
>
> "Lastly, may honourable court consider that during trial I was represented by a pro deo council, Mr, S.C. Simelane, who asked questions using his knowledge as an attorney. In most of the time he did not get instructions from us as accused persons....Mr.Simelane relied on the statement of crown witnesses that was (sic) recorded by police. He never at any stage raised the issue that we instructed him that we shot the deceased in self-defence because he was chasing us with a bush knife".

This statement written by applicant unassisted by an attorney in sum reflects the position taken by the accused throughout the trial and appeal and review. The crown evidence has several loose ends untied and leaves a lot to be desired.

Paragraph 3 of this Court's judgment on appeal reads:

> "[3] The second appellant lodged the appeal on the 26th October, 2017. His grounds of appeal were the following: Firstly, that the court a quo misdirected itself in its finding that the second appellant acted in self-defence during the commission of the offences. Secondly, that the court a quo was wrong in its finding that the second appellant was present when the police fetched the firearm from Siphofaneni. Thirdly, that the court a quo was wrong in linking him to the firearm since it was found in the apartment of first appellant and handed to PW4. Fourthly, that the court a quo misdirected itself by linking him to the cellphones because they were not present in court as exhibits; furthermore that there was no evidence beyond reasonable doubt linking him to the robbery in particular and the commission of the offences

> in general. Lastly, there is no evidence that the second appellant pulled the trigger and inflicted the fatal blow that killed the deceased; however, this ground of appeal ignores the fact that the offences charged are based on the doctrine of common purpose, and in particular the agreement to commit the offences as well as their active association in the commission of the offences for which they were convicted."

4. I take it that by the words "however, this ground of appeal ignores the fact ...."refers only to the last ground of appeal relating to the pulling of the trigger. What about the other grounds?

5. Whither self-defence?

The High Court judgment in part reads:

> "[17] In his cross-examination of PW6, Mr. Simelane tried to show that it was the deceased who struck first as when he awoke he

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· took a bush-knife and attacked the suspects.I However, the witness responded that according to PWl 's evidence the suspects were already in the house when the deceased confronted them.

"[18] The line of cross-examination further gave the impression that after the suspects retreated it was the deceased who then became the aggressor by following them outside and that is when he got shot in self-defence".

[67] The relevant part of the 'line of cross-examination' referred to above begins at p.76 of the Record [of Proceedings under High Court Case No. 252/09] as follows:

"DC: When you received the file, the wife of the deceased PWl, had she recorded a statement?

"PW6: That is correct.

[1] It is to be noted that the transcript speaks only of "intruders" and not "the suspects" or the accused.

"DC: Is it further not correct that, from your perusal of the docket, you discovered that the deceased and his wife were disturbed in their sleep on the fateful day?

"PW6: That is correct.

"DC: Is it further correct that, from your investigation, you discovered that it was the deceased who awake (sic), took a bush knife and confronted the intruders.

"PW6: According to PWl, the intruders were already in the house.

"DC: Whilst the intruders were inside, they were confronted by the deceased, did you discover that when the deceased attacked them they had not demanded anything from the deceased and his wife".

"PW6: They did not demand anything.

"DC: Were you able to ascertain whether or not the intruders retreated from the house and the deceased followed them with the bush-knife.

....



"PW6: According to PWl she said that her husband awoke he grabbed the bush-knife and attacked the intruders and the deceased followed them out of the house.

"DC: It is when he got shot when both deceased and the two intruders were outside the house."[My emphases]

[68] From the foregoing account it seems probable that defence counsel had the docket and possibly also the statement of PWl before him at the time he cross-examined PW6. It follows that defence counsel was not cross examining PW6 to support or establish any express or implied self-defence. The accused had consistently maintained that they were never at the scene of crime that fateful night or at any other earlier time. If the accused were changing their position, they would have had to be open about it; it would serve no purpose for them to be shy and reserved about their defence: indeed they would have had to be as aggressive about it as they had been about their never having been at the scene of crime. Even the expression 'self defence' is nowhere used by defence counsel in his cross examination. Also, if the accused found sense in conceding that they were indeed present at the scene of crime and had indeed shot and killed deceased, they would most probably

have clarified their new stand in their evidence in-chief. But they did no such. And the prosecutor was unable to extract the concession she must have badly desired. Further, defence counsel referred only to 'intruders' not to the accused. If the accused were pleading self defence there should be no second-guessing about it; their life was at stake. And there should be no speculation about a defence which accused have not pleaded. The cross examination of the first accused went as follows:

"CC: I put it to you that the gun that was found in your house was yours.

"ACCl: That is not true ...

"CC: I put it to you that you and your 2 cronies used (the gun) to shoot the deceased.

"ACCl: That is not true. I never did so, whether alone or with others.

"CC: I put it to you that you shot the deceased because he was defending his family and his property by coming after you with a bush knife or slasher.

"ACCI: That is not true.

"CC: I put it to you that you broke into his house to rob him and you shot him with that gun.

"ACCl: Tha·t 1s not true . . . ."

"CC: I put it to you that on 17 January 2007 you went to the home of the deceased to rob him.

"ACC2: That is not true; I do not know where the deceased's home is.

"CC: I put it to you that the cellphones sold to Savita are the ones robbed from the deceased.

"ACC2: That is not true."

[69] Clearly, in the cross examination of both accused, the crown counsel never put it squarely that the accused shot the deceased in self defence. Also, neither accused responded indicating that deceased was shot in self defence or at all. The inference of self defence on the part of the accused is not justified by the evidence on record. There can be no doubt that both accused denied any shooting of the deceased by them in self defence or at all. Of some interest in connection with the cross examination was the prosecution's reference to "you and your 2 cronies". And elsewhere, on p. 89 of the record, crown counsel again said: "I put it to you that the

cellphones did not belong to Nhlanhla only; they belonged to all 3 of you as they had been loot from the crimes you committed that night". Would it be fair to conclude that crown counsel also believed that there were three intruders at scene of crime? If so what happened to the third intruder?

[70] Can the alleged concession that the accused were present at the scene of crime by reason of their pro deo counsel's cross-examination of PW6 be sustained? Para [8] of the appeal judgment tells that during the cross examination of PWl and PW6 "....the appellants put to [PW6] that they shot the deceased in self-defence since he was chasing them and armed with a slasher. Undoubtedly this cross- examination is an admission which places the appellants at the scene of crime during the commission of the offences". The foregoing statement which is in fact a conclusion or inference by the court is not·what defence counsel said in cross examining the witness. As such the statement is overstretched and mistaken. Defence counsel did not say "[accused] shot the deceased in self defence". The court does not say that the conclusion is an inference and not a direct statement by the accused through their counsel. In that cross-examination defence counsel, basing himself on the docket, spoke of and about 'intruders', not the accused. Even then, defence counsel did not say the intruders shot deceased in self-defence.

That the accused were thereby admitting that they were the intruders and killed in self-defence is an inference by the prosecution, erroneously accepted by the trial court and the appeal court. With respect, the transition from the intruders to being the accused persons can only succeed if the firearm found in first accused's house can be shown to have been placed there by first accused or with his knowledge. That was not done. And the accused in their evidence in-chief or cross examination never said or insinuated that they shot deceased in self-defence or at all.

[71] In cross-examining PWl defence counsel said (p50): "In your statement to the police, ['portion read to witness']... after the deceased had woken up, he took a bush-knife . . Did that occur or not, in view of the evidence you have given to court?" [My emph]. By this question during cross-examination the prosecution says the defence conceded killing deceased in self-defence. This seems to be an overreach by the prosecution - even though accepted by the trial court and appeal court. Hoffmann and Zefferttl write: "Before a party is bound by the act of counsel it must be proved that counsel had been properly instructed, but a legal representative's general authority to act on behalf of his client may be inferred from the circumstances. Admission of

[1] **The South African Law of Evidence,** Fourth Edition p.188

fact by counsel or attorney within the scope of their authority to conduct the litigation or transaction in question are admissible against the client". The authors refer in this regard to Dlamini v Minister of Law and Order 1986 (4) SA 342 (D) at 348 G-H; Van der Merwe v Erasmus 1945 TPD 97 at 103 and Standard Bank of SA Ltd v Minister of Bantu Education 1966 (1) SA 229 (N).

[72] In the Dlamini case (supra), Friedman J said the following, at p. 348 E-H:1

> "Mr. Combrink did not dispute, nor did he seek to argue, that counsel, properly instructed on behalf of the respondents, would have had the necessary implied authority to bind the respondents to the settlement which he concluded. In my view Mr. Combrink is correct in this concession... Mr. Combrink confined his argument to a narrow point. He submitted that before the respondents could be bound by the acts of counsel it must emerge that counsel had been properly instructed. He is undoubtedly correct in this since counsel not properly instructed obviously would not have the necessary authority to act on behalf of a client and a fortiori could

[1] It needs no emphasis that courts of last instance must be particularly astute on the cases that come before them.

not bind the client to a settlement" . [My emphasis]

[73] Murray J. in Van der Merwe (supra) wrote:

> "I am not satisfied that she has proved that she has suffered this additional damage... It is essential, at the very least, for her to say in evidence that the charge was reasonable....And the defect is not cured by the attitude of appellant's attorney in argument - his statements did not constitute an admission of fact that the damages had been sustained and amounted to no more than an expression of his opinion on the evidence adduced, not binding on the client". (p103)

There is need for considerable circumspection in dealing with counsel's admission as binding on counsel's client. In short, it is not necessarily everything said by counsel in conducting the case for the client that must be held as binding the client, in particular, concession to guilt in a murder trial. In casu the alleged concession needed to be clearly set out and pleaded by and on behalf of the clients if it was to bind the accused persons who had all along denied committing the crimes. The alleged concession as gleaned from the cross-examination does not rise to the occasion to

bind the accused as an admission of their being present at the scene of crime.

[74] In S v Gouws 1968 (4) SA 354 (GW), the appellant who had been undefended had pleaded guilty to theft of R2. At trial, the appellant had an attorney who applied that the guilty plea be changed to not guilty. "The legal representative explained the circumstances 'which led to the use of the R2 which he had taken"'. Complainant gave evidence but defence did not. Accused was found guilty on the "admission made by the legal representative", held to have been "binding admission sufficient to prove that the appellant had taken the R2". That alleged admission was more realistic than the words used in casu. In Gouws the attorney used words "use of the R2 which he had taken". That was in clear reference to accused having taken and used the R2. In casu only "intruders" was used and not 'the suspects' or 'the accused' or the words 'self defence'.

[75] On p.77 of the Record, asked about Mphilisi Manana as one of the intruders allegedly identified by PWl, PW6 answered that that was a "wrong identification", since the said Mphilisi Manana "had nothing to do with this

case" and "when we investigated the matter we did not find anything connecting him with the matter". The unanswered question, which nevertheless looms high is: why did PWI identify one of the intruders as Mphilisi Manana? There is no explanation on record how PWI made that mistake save that she made a mistake. We are not told that one of the accused somehow looked like and could be mistaken for, Mphilisi Manana. We are not told where the said Mphilisi Manana was on the fateful night. We are not even told whether there was any light in the bedroom or outside the house, infront of the bedroom and or kitchen. If there was sufficient light, how did PWI misidentify one of the intruders? With respect, the cross-examination of PW6 is not sufficient to place the accused at the scene of crime or exclude Mphilisi as one of the intruders.

[76] Why should the court accept such flippant elimination of Mphilisi as the person identified by PWI? Surely there needed to be some reasonable explanation to justify the alleged 'wrong identification' of Mphilisi as one of the intruders. It should be borne in mind that first accused said that the cellphones belonged to one Nhlanhla Shongwe, a one-time co-accused [with first accused] but who has since apparently gone underground causing a trial to remain unconcluded at Siteki Magistrate's court. Only the police are in a

position to tell whether Mphilisi is not and could not be Nhlanhla. But the police have not been generous with the information. Also, in the cross examination of first accused the prosecution asserted (p89): "I put it to you that the phones did not belong to Nhlanhla only, they belonged to all 3 of you as they had been loot from the crimes you committed that right". "ACCl. That is not true, I was not part of what you are saying". (My emphasis). The record is woefully deficient and unhelpful in all these details. In light of these circumstances did the crown prove its case against the two accused? Was the court justified in holding the accused guilty beyond reasonable doubt?

[77] It must be noted that the cross-examination referred to in these paragraphs 17 and 18 of the High Court judgment took place before the accused gave evidence. Nowhere in connection with these paragraphs did defence counsel state that he was informed or advised by the accused that they shot deceased in self-defence. Accused consistently denied ever being at the scene of the crime or ever shooting deceased in self-defence. In their evidence in-chief and under cross-examination accused never admitted the shooting as such or in self-defence. That was so even though the firearm had already purportedly beer found in the house of first accused. The line of cross-

examination followed by defence counsel seems to have only been strategic, to prepare a fall back on in the event the accused admitted or were adjudged to have shot the deceased later in their evidence in chief, which almost did not happen. Defence counsel's cross-examination was therefore purely academic - short of folding his arms and saying nothing as his clients denied being at the scene of crime on the fateful night or at any other time.

The Firearm

[78] In paragraph 2 of the judgment on appeal, the learned chief Justice wrote with reference to the first appellant (who has not challenged the judgment) "it is apparent from the evidence that the firearm was found in his apartment". By this remark the learned Chief Justice was countering the denial by first appellant that the firearm used in the shooting of deceased did not belong to him. The first appellant was of course aware or had been informed that the firearm was found in his apartment. But still, first appellant denied that the gun (sO found) belonged to him. We must then thoroughly interrogate the circumstances under which the firearm was found.

[79] The firearm said to have been used in the shooting and killing of the deceased by the accused was found by Nompumelelo Magagula (PW7) in the house of first accused. Nompumeleo asked Sunday Sikhondze, a relative of first accused, what to do with the gun she had found. Nompumelelo said that after finding the firearm she kept it for 3 days before passing it over to Sunday Sikhondze. PW7 said she packed the belongings of first accused after a month after the arrest of first accused. PW7 said she received the key from Sicelo Gamedze "after 4 or 5 days after seeing 1st accused in the company of the police". All this unchallenged evidence clearly imply that first accused's apartment was open and available to any illegal interference. This is particularly so bearing in mind that first accused denies knowledge of the firearm which according to his unchallenged evidence the police had not found in his (first accused's) presence. In the result, there is no guarantee that the firearm was not 'planted' in the house of first accused by Sicelo or PW7 or both at the behest of the police.

[80] Sunday Sikhondze who was allegedly the first person to be contacted by PW7 when she found the firearm and the person who told her to keep the firearm for some few days was not made a witness nor Sicelo Gamedze who had custody of the key to the house with the deadly firearm. How the police

came to know of the firearm is not told. When first accused spoke to PW7 at the roadside it was in the presence of the police; he could not have spoken about the firearm or 'something' hidden in the apartment. The person who gave the key to Gamedze does not come out clearly from the evidence. First accused said "The key was given to a young man who lived near where I resided by the police on the following day. The police suggested that he gives the key to my relatives so that they could come and pack up my belongings. His name was Sicalo Gamedze. When we left the Siphofaneni police station, we met Nompumelelo Magagula . . . . I asked her to tell them at home that I had been arrested and that the keys were with Sicelo whom I had seen at the police station. I asked her or my relation to collect my belongings at Manzini back to my home area and she agreed. She used to be my girlfriend ... " (My emphasis) We are not told when again first accused spoke or may have spoken to PW7 or Sunday or Sicelo. These three are all suspect characters whose evidence cannot be entirely trusted.

[81] Did Sunday after collecting the firearm from PW7 inform the police about it? It is not said. All that we next hear about the gun is in the evidence of PW6, 3399 Yusi Dlamini, who said that after arresting first accused on 20 June 2009, "the same accused lead me to Siphofaneni where I arrested

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Melusi Sikhondze. I cautioned both of them and they said something and I retrieved a firearm, a 9mm Norinco pistol at Siteki police station where it had been impounded". It is not told that the accused at any time handed to the Siteki police station the said firearm. PW6 did not know how the firearm got to the Siteki police station. How did the accused know that there was a firearm at the Siteki police station? The accused were not present when the gun was collected by the police from PW4. However, in September 2009 Yusi Dlamini handed over to PW5 the 9mm pistol sealed in a plastic bag. PW4 told the court that on some unidentified day the police came to his home in the company of Sunday. "When they arrived, the police told Sunday to pick [speak?]. Sunday then said he had come to collect what he had given me for safe-keeping. I told them I will show them the gun as per his instruction ... The police officers instructed me to give it to them. I led them to where it was... I pointed out to where the gun was and I picked it up, it was in a plastic bag". PW4 further said that the gun had been with him "for more than a week" and it was in a plastic bag when Sunday handed it to him to keep. Since PW6 said he "did not know how the Siteki police got [the gun]", it appears that PW4 handed the firearm to police officers he did not know. With respect, the Summary is equally confused and unhelpful. On pages 63 - 64 of the record it appears that PW4 only testified in-chief and

there is no evidence of cross examination or the presence of defence counsel for that matter.

[82] The evidence of the Crown regarding the gun and the shooting depends on three witnesses, namely PW5, PW6, and PW7. The possibility that the firearm was planted as intimated by defence counsel should not be entirely discounted. I PW5 is the officer who visited the crime scene and picked up the spent bullet and a cartridge at the home of the deceased. PW6 is the officer who presented the shooting (ballistic) evidence linking the firearm found at first accused's house with the cartridge and spent bullet. PW7 testified about how and where she found the firearm in first accused's apartment. PW7 was alone when she found the firearm in the house which the police had already searched. However, even assuming that the linkage cannot be impugned, the evidence of the Crown as a whole still falls short considering the manner the firearm was said to have been found in first accused's house in first accused's absence. This lacuna in the evidence renders the prosecution case unsustainable. And equally unsustainable is the inference of self defence also said to place the accused at the scene of crime. PW6, said that he first came in contact with the firearm after arresting the

[1] See para [24] of High Court judgment.

first accused and one Melusi Sikhondze in about June 2009. PW6 found the firearm at Siteki police station "where it had been impounded". Under cross-examination, PW6 said that he did not know how the Siteki police got hold of the firearm. The conditions in which PW7 picked up the firearm in the house of first accused leave damaging loopholes in the prosecution case.

[83] PW6 testified that he arrested first accused on 20 June 2009. Following that arrest, PW6 was led to arrest Melusi Sikhondzel PW6 then continues: "I cautioned both of them and they said something and I retrieved a firearm, a 9mm Norinco pistol at Siteki police station where it had been impounded". (p75). PW6 also said that he handed the pistol (sealed) to "2182 Sergeant Magagula for further investigation2 On the other hand, PW5 testified that in September 2009 Vusi Dlamini, the investigator in this matter, handed to him (PW5) the 9mm pistol sealed in a plastic bag. On 23 September 2009, PW5 said he declared and handed over the firearm, cartridge and spent bullet to one Mkhatshwa (presumably an officer at the police station where exhibits are kept). But the big question here is this: Did the accused tell PW6 that the firearm was at the Siteki police station and how the accused

[1] The record is not clear whether Melusi Sikhondze is Muzi Sikhondze the applicant herein.

[2] It is again not clear on the record whether this Magagula is PW5Sipho Magagula, the crime scene's examiner.

were in any way connected with the said firearm? This question arises because the firearm has not been shown to have been found with any of the accused or to have been admitted as belonging to either or both of the accused. In other words, what was that "something" that the accused told PW6 leading him to retrieve the firearm at the Siteki police station? Something does not quite add here. The accused were not present when the police collected the firearm from Velakubi Sikhondze (PW4); so, how did the accused know that the firearm was at the Siteki police station? As it is none of the accused is implicated in this firearm narrative.

[84] On appeal the Court took a rather laid-back approach to the evidence. In para [2], after pointing out that first accused "denied that the firearm used in the commission of the offences belonged to him", the Court simply reacted: " . .. however, it is apparent from the evidence that the firearm was found in his apartment". That was not a problem. But in that response, the Court casually and uncritically accepted that the firearm so found actually belonged to first accused and was placed there by first accused or by a person known to first accused with the consent of first accused since it was in his apartment. That, the Court assumed, notwithstanding the circumstances under which the firearm was alleged to have been found -

circumstances which did not exclude other reasonable ways the firearm could have found its way into first accused's apartment without the knowledge of first accused. When first accused disclaimed knowledge of the firearm first accused should have been thoroughly questioned about how the firearm got to his apartment. That did not happen. In the circumstances, the disclaimer by first accused ought to have stood and be accepted by the Court in the absence of any evidence pointing to the first accused as having placed the gun in the house. The evidence culled from the Summary that first accused requested PW7 to "take something that was in the washing basket" never reached trial stage: where it had come from, it's hard to understand, but does not speak well of our criminal investigation.

[85] PW7 was alone in the apartment of first accused when she found the firearm inside a washing basket behind the door, but apparently not hidden underneath the clothing in the basket. The truth or otherwise of this important piece of evidence, used by the Crown and accepted by trial and appeal courts to connect the accused to the scene of crime, lies embedded in the heart and the conscience of PW7. Why is PW7 to be believed, when we are told that the police, in the presence of the first accused, had thoroughly searched the apartment and found no firearm save for an undocumented TV

set which the police took away? In my opm1on there needed to be something more said about the firearm and the manner it was found to support the bare conclusion that the firearm belonged to first accused merely because it was 'found' in his apartment. In the result, the trial court and the appeal court ought to have entertained a reasonable doubt regarding the 'ownership' of the firearm and the accused being at the scene of crime on the fateful night. On that basis alone, neither of the accused ought to have been associated with the offences charged. The association was patently erroneous.

[86] In the foregoing respect, Professor Rupert Cross writesl "Real evidence may be used as a means of proving facts in issue, it may also be used in an endeavor to establish relevant facts, as when a knife found in the hands of a person accused of murder is produced in order to show the jury that it bears the stains of blood". In casu, the firearm has been used to· prove that first accused, acting in a common purpose with applicant, killed the deceased by means of that firearm as shown by the spent bullet and cartridge found at the scene of crime. But this inference cannot hold. The firearm was not found "in the hands of the accused" or in his house in his presence and or

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[1] **Cross** *On* ***Evidence,*** 4 t h edition at page10

circumstances which eliminate all other reasonable possibilities of the said firearm being left in the house of first accused by some other person such as, for instance, PW7 herself or Sicelo Gamedze. In the circumstances, the firearm may indeed be the firearm used in the killing of deceased but there is no acceptable evidence that the firearm as found belonged to the first accused. If the said firearm was at all used in the shooting of the deceased that is no matter for the accused; some other person(s) may have done the shooting and planted the gun inside the house of first accused. PW7 did not say that the house where the firearm was found was so secure that no other person could have gotten in and left the gun there. And we are not told that PW7 was taken to task for removing the gun from the house of an accused person and thereby interfering with the investigation.

[87] In para [4] the appeal Court, while rejecting accused's contention that the court a quo misdirected itself in convicting the two accused, stated: " ... It is the fmding of this Court, in light of the evidence on record, that the appellants attacked the deceased and his family at their homestead during the night and robbed Nelisiwe Gwebu of two Nokia cellphones". Unfortunately, the "evidence on record" referred to by the Court was not identified. PWl did not identify any of the accused as the person who robbed her and killed

her husband. What is worse, PWI identified, as one of the attackers, someone else who was cleared by the police as a "wrong identification". PWI had also wrongly stated that one of the attackers had carried a pick. In the result, there was simply no 'evidence on record' that the accused attacked the deceased and his wife. The accused did not confess to such an attack. The inference, apparently drawn from the ballistic report and the cellphones is of a doubtful nature on which to hang the accused. There is also no evidence on record that deceased was "shot and killed by the appellants in cold blood" or at all.

[88] For reasons not explained, the ballistic report was handed in by consent. The author of that report filed an affidavit and did not give evidence. That report is said to have shown that the firearm allegedly found in first accused's apartment was the firearm used to kill the deceased. That may or may not be correct. As far as the accused are concerned, the truth or otherwise of that report is irrelevant until it is shown that the firearm in question did belong to first accused. In other words, until it is shown, among other things, that the firearm was not a 'plant', that is, "something especially incriminating or compromising, positioned or concealed so as to be discovered later", at the instigation of the police. In my view, once the

evidence of PW7 regarding the finding of the firearm is duly interrogated and weighed will be found wanting and the conclusion reached by the trial court and accepted by the appeal court should crash on the ground. For there is nothing else on record to prove that the firearm belonged to first accused other than the inference drawn from the bare fact of it being found in first accused's apartment. Nowhere on the record was first accused ever confronted with the ownership of the firearm. It was assumed that first accused owned the gun. That was wrong. In the result, until some credible explanation is placed before court how PW7 found the firearm where the police had failed, the entire evidence about the firearm said to belong to first accused should be rejected as false and contrived. Admitting such evidence was a patent error. Adding to the doubt, is PW7's virtually mysterious appearance on the road to Siphofaneni town. She is stopped by the police who facilitate her being asked by first accused to get the key from Sicelo and remove his belongings from the rented apartment to his parental home. That unexplained meeting leaves a great deal to be desired and the unanswered question whether PW7, a former girlfriend of first accused, was herself not 'planted' by the police in order to facilitate the purported discovery of the firearm, sticks out like a sore thumb.

[89] The broad narrative as told by PW7, who 'found' the firearm, is captured in paragraphs 20 and 21 of the High Court judgment. But in her own words, she said: "What I know about this matter is that I was walking to Siphofaneni and I was stopped by a police motor vehicle, it was a kombi. I was called to the motor vehicle and was asked if I knew the identity of the 2 people in the car. I looked and saw that it was Joseph and Muzi. Joseph wished to talk to me and he asked me to pack his belongings from his house and take them home. He told me I would get the key from Sicelo, a friend of his. I organized transport . . . When I began packing, I found a gun with a washing basket. . . . Before leaving, I telephoned Sunday and I told him about the gun and asked him what to do . . . I kept it for 3 days after which Sunday came to fetch it. ... The gun was blackish, small; I had never seen a gun before". And further asked during cross-examination, how she found the clothing at first accused's house, PW7 responded: "The things were not tidied, his bed was not made and his clothes in the wardrobe were in disarray....The gun was on top of the clothing".

[90] Sunday Sikhondze, handed the firearm to an uncle of first accused by the name ofVelakubi (Makinini) Sikhondze (PW4) who took it for safekeeping. The firearm was at a later date collected from Velakubi by the police in the

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presence of Sunday. That, presumably, is how the firearm found its way to the Siteki police station. The accused were not present when the firearm was removed from the illicit custody of PW4. And unless told by someone the accused would not know that the firearm was at the police station in Siteki.

[91] Para 24 of the High Court judgment reflects that PW7 knew that the house of first accused had been searched by the police before she went in to pack the belongings of accused; and that she heard about the police search after she had done the packing. "She confirmed that when she got to accused 1's house she found it untidy and the firearm was in plain sight. That if the police had got there before her they would have found it". This last sentence, however, does not necessarily mean that the police did not get to first accused's house before PW7; for it would be most surprising and unprofessional that the police would arrest first accused but fail to search his house for any incriminating evidence before departing with him. The question is: How did the police fail to find the gun or is it that at the time the police searched the gun was then not there?

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[92] The police must have been to the house of first accused before PW7. That having searched but not found the gun can only mean that the police themselves possibly left the firearm there for PW7 to find it or the gun was placed there by some other person who had access to the house after the police searchers had left but before PW7 got there or PW7 herself came in with the gun and pretended to have found it in the house. We are told that PW7 took some time before getting to pack first accused's belongings because, as she said, she was still looking for a truck to ferry the belongings home. In the meantime, the key to the house was with a 'friend' nearby that house. Add to all. this, the seemingly innocent appearance of PW7 on the roadside whom the police must have known to be or to have been a girlfriend of first accused and had even interviewed her. In all the circumstances, I do not see how the firearm was said to have belonged to first accused who used it in common purpose with the applicant. In all the circumstances of the case, it is not unfair to wonder whether the investigation was not manipulated to the prejudice of the accused. For instance, PW7 is said to have had two statements with the police one of which had her signature but which she denounced. PW3 (Savita) also had two statements. Of the second statement he told the court that he wanted to help the police by telling the truth only. Unfortunately, from begin to end the

defence was not sufficiently probing, only lukewarm and perfunctory, but still the case for the Crown had significant shortcomings.

The cellphones

[93] The evidence regarding the cellphones alleged to have been stolen from the deceased and his wife is also not without shortcomings. From the evidence reflected in the High Court judgment that the cellphones were disposed of by the thieves during the same month, January 2007, that the alleged killing and robbery supposedly took place. On some undated day in January accused 1 and 2 and a third person (named Nhlanhla Shongwe) sold the cellphones to Paul Savita (PW3) and Justin Chanda (PW2) at the residence of first accused at Mbekelweni. The alleged robbery occurred on 17/18 January. The record and judgment also reflect that soon after the sale of the two cellphones, one of the two was found to have a live sim-card which was removed by PW2 and given to Joe Manda, a friend of PW3.

[94] After Manda had used the sim-card to call his girlfriend, "the Police were able to trace the sim-card via the calls. Early the following morning the

police arrived at his (Chanda) home in the company of Manda and his girlfriend...." At the police station Chanda (PW2) explained that the sim card was extracted from a cell phone that Savita had purchased from men at Mbekelweni. Chanda testisfied that he knew the two accused by sight but not the third person who was present with the accused during the sale. After questioning PW2 the police looked for PW3. As soon as the police got in touch with PW3 he fled to South Africa and only returned about two years later. PW3 did not behave like an innocent person when he was contacted by the police. PW3 admitted that he and his brother used to buy and sell second-hand cellphones from the accused. The cellphones, however, were never found because as PW3 told the police, they were taken to Zambia by Mwanda who bought them from PW3. It would seem that the buying and selling of cellphones between the accused and PW3 gives rise to a reasonable possibility that the cellphone which threw up a live sim-card was not necessarily one of the cellphones allegedly stolen from the home of the deceased. Also, PW3 had other sources of cellphones.

[95] Thus for the stolen two Nokia cellphones we have a lone sim-card. Even though PW2 told the police that he knew the persons who sold the cellphones to PW3, the police did not take PW2 there to meet and confront

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the sellers. Instead the police sought and waited for PW3 who was then out of the country. First accused said he was arrested about three months from the sale of the cellphones. This makes it about March-April, 2007. First accused said that was the time when the police searched his room and found no firearm. But the police say the accused were arrested in 2009 after the return of PW3 from South Africa and following the two statements PW3 made to the police in March and June, 2009.

[96] The first accused in his evidence in-chief and in cross-examination never said that there was a sim-card in any one of the cellphones sold to PW3 as alleged by PW2 and PW3. No sim-card was ever identified by PWl as belonging to any of the stolen cellphones. It is comm.on-cause that cellphones of a particular make or description may well look-alike. We are not told with which of the two cellphone numbers submitted by PWl the sim-card corresponded. PW2 said that the cellphones were examined by him and PW3 before being bought. Why was the sim-card not found then? The sim-card only came up when PW2 and friends were drinking behind the Mozambique Restaurant in Manzini not at Mbekelweni. With respect, there is no convincing evidence that the incriminating sim-card came from any of the cellphones PW3 may have bought from the accused. Both accused did

not mention any sim-card in the cellphones they allegedly sold to PW3. The crown prosecutor did not question any of the accused about the sim-card. The sim-card could have come out of any other Nokia 6111 cellphone PW3 or PW2 may have bought from any other back-street seller of second-hand cellphones. The prosecution case is not conclusive or free from reasonable doubt.

Conclusion

[97] After relating the evidence as given by the vanous witnesses for the prosecution and the defence the High Court concluded: "[53] The Crown has in my view proved that the deceased was unlawfully and intentionally killed. He was gunned down at his home at night while defending himself, his wife and his property. [54] The defence advanced by the accused is that the deceased chased them after they had left his house with a slasher. The suggestion is that they were defending themselves when they shot the deceased". I have already stated why in my opinion this conclusion by the trial court and accepted by this Court on appeal is not sustainable. For the court to come to the conclusion as stated must first show that the accused

admitted or were shown by evidence aliunde to have been at the scene of crime on the night in question. It would be a clear contradiction in terms for the accused to deny that they were at the scene of the crime and at the same be heard that they killed deceased in self-defence. Based only on the cross examination the court was not justified to conclude that the accused were pleading self-defence. In fact the accused did not plead any defence to the two counts other than denying the commission of the offences and ever being at the place of the commission of the offences. Neither the cellphones nor the firearm succeeded to position the accused at the scene of crime. The cellphones and the firearm were never found by the police in the hands of the accused. In my view the conviction of the accused for the two offences was a patent error of law. The prosecution had proceeded on a common purpose as binding the two accused to a common fate. I do not know why both accused should not be discharged on the basis of this application. Be that s it may, I agree with the conclusion and orders just made by Justice Annandale.

**MJ DLAMINI**

**JUSTICE OF APPEAL**

## MINORITY JUDGMENT

## SP DLAMINI JA

[98] I have had the privilege of reading the majority judgment penned by His Lordship Justice J.P. Annandale in this matter. However, with the greatest of respect, I find myself having to write a dissenting judgment as I do not agree with the majority judgment.

[99] Firstly, I find it unnecessary to deal with the facts and background of the matter because in my view these have been sufficiently dealt with in the majority judgment.

[100] Secondly, it is also not necessary for me to venture into the evidential aspects of the case because I find myself procedurally hamstrung to do so, it is my considered view that the matter before this Court does not meet some of the jurisdictional pre-requisites flowing from Section 148 (2) justifying the reopening of a judgement of this Court in its appellate jurisdiction and by extension that of the High Court in the exercise of its original jurisdiction. My reasons for this stance I have taken follow below.

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[101] At the outset, I wish to point out that it is unfortunate that the Supreme Court many years ago found itself having to operationalize Section 148 (2) in the absence of an Act of Parliament and/or Rules as envisaged in the Constitution of Eswatini Act 1 of 2005. As a result of this anomaly there has been a lot of teething problems resulting in, inter alia, lack of clarity and consistency in some of the Judgments of this Court as to the operationalization and the requirements to be met by a litigant who seeks to exercise his or her rights under Section 148 (2).

[102] Notwithstanding the above, the Supreme Court has grappled with the fundamental issues and problems in relation to Sections 148 (2) starting with the watershed judgment of this Court in the case of **PRESIDENT STREET PROPERTIES (PTY) LTD vs MAXWELL UCHECHUKWU AND 4 OTHERS (11/2014) (2015) SZSC 54** (29th JULY, 2015) and the many others that followed that case namely: **SIMON VILANE N.O. AND OTHERS vs LIPNEY INVESTMENTS (PTY) LTD, MANDLENKHOSI VILANE N.O. UMFOMOTI INVEST -MENTS (PTY) LTD (78/2013) (2014) SZSC 62 (3 DECEMBER 2014), ATTORNEY GENERAL vs THE MASTER OF THE HIGH COURT**

(55/2014) [2014] SZSC 10 (30 JUNE 2016), SIBONISO CLEMENT DLAMINI N.O. vs PHINDILE NDZINISA AND TWO

OTHERS (67/2014) [2014] SZSC 08 (9TH DECEMBER 2015) AND SWAZILAND AUTHORITY vs IMPUZI WHOLESALERS (PTY) LTD. (06/2015) [2015] [SZSC 06] (9TH DECEMBER 2015).

[103] From the above cases, there are 4 relevant aspects that can be established;

*Firstly, that a party seeking a relief under Section 148(2) must do so by way of a substantive application;*

*Secondly, that the application is not merely a re-appeal of an issue or issues that were canvassed on appeal; and*

*Thirdly, that the circumstances of the matter are such that it is appropriate for the court to exercise its discretionary powers to grant the relief sought;*

*Fourthly, that the said application must inter alia demonstrate the existence of exceptional circumstances that shows a*

***serious injustice against the party aggrieved by the judgment of this court and should be without any other remedy.***

[104] The matter falling for consideration by this Court was initiated by way of 3 letters addressed to the Registrar of the Supreme Court.

(105] The first letter addressed to the Registrar is dated 06 September, 2019.

[106] In terms of the aforesaid letter the Applicant lists his grounds of review as follows;

*"1. I* ***want this honourable court to review the decision on the appeal court judgment page 6 last paragraph. The appeal court ruled*** *we* ***put to PWJ Nelisiwe Gwebu and PWS Sipho Magagula during cross examination that we shot the deceased in self-defence. There is no any evidence in record that support the finding of the appeal court.***

2. *May the honourable court review the decision of the appeal court on page 6 second paragraph which says the firearm used bullet and the*

*empty catridges links me to the commission of the offence. There is no evidence in record that links me to the firearm.*

3. *May the honourable court review the decision of the appeal court to overlook the evidence of PW3 Paul Savita who told him that he want to sell two cellphones to him, then they went to meet him where he found him with me and another man then accused number 1 gave him the cellphones to him. No evidence that show was involved in the transaction. Even the 1st accused excluded me in transaction* ***between them. The appeal court overlooked the findings of the trial court judgment on page 134 paragraph 1 on the record of proceedings where the trial court said it believe the evidence of PW3 that he purchased th cellphone from accused 1 who robbed PWJ of them, and further said accused 1 has already been placed at the scene of crime by his possession of firearm that was used to kill the deceased.*** "

[107] The second letter addressed, to the Registrar dated 09 September 2019. This letter is word for word the same as the letter dated 06 September 2019 except that at the end the Applicant adds the following;

*"It was clear from the trial court judgment and the appeal court judgment that they both found that I incriminated myself during cross examination by putting myself to the scene of crime through my pro deo counsel.*

*Lastly may honourable court consider that during trial I was represented by a pro deo counsel Mr. S.C. Simelane who asked questions using his knowledge as an attorney. In most of the time he did not get instructions from us as accused persons. He never finished case without explanation. Mr. Simelane relied on the statement of crown witnesses that was recorded by police. He never at any stage raised the issue that we instructed him that we shot the deceased in self defense because he was chasing us with a bush knife.*

*The issue of the bush knife came from the evidence of PWJ Nelisiwe Gwebu. See page 48 first paragraph.*

*For the sentence the sentence is too harsh for Mr. to serve due to the way I was convicted. I admitted that for a crime of murder in a robbery the sentence is right. But in my case considering all the circumstances, I ask the honourable court to give me a sentence that*

*is equivalent to the part 1 played in the whole case. From the evidence of the crown concerning the issue of cell phones, if the court finds that it was a criminal element to be with accused 1 and the other man when accused 1 sold the cellphone to PW3, may the court give me a sentence equivalent to that aspect not for the charge* ***of murder.***

*I* ***will submit my heads of arguments in due course."***

[ 108] The third letter addressed to the Registrar is dated 10th April 2020. This letter appears to have the Correctional Services stamp but does not have the stamp of the Registrar of the Supreme Court yet it was uplifted from the Registrar's file. It had become clear when writing this judgment that I had the letter dated 06 September 2019 and the one dated 9 September 2019 yet the other Justices had the latter letter. Lo and behold during my enquiries I discovered that there was the letter of 10 April 2020 at the Registry that none of the Justices had at the hearing of the matter. As to how this happened remains a mystery to me and leaves a lot to be desired in the systems that obtain at the 'Registrar's office. Actually, if an urgent and

immediate intervention is does not address the system, of operating at the Registry we must brace ourselves for a calamity.

[109] The letter dated 10 April 2020 is the longest of all the 3 letters. Although this letter incorporated the contents of the two other letters it went further; firstly, it challenged the com,, petence of the pro deo counsel and concluded that by his inefficiency the Applicant did not get a fair trial; Secondly, in

what is termed in the letter as "Heads of Argument" the Applicant punched holes in the evidence - in chief and the conclusions of the High Court particularly when it came to the issue of self-defence. The heart of the Applicant's letter is that the Crown failed to prove its case beyond reasonable doubt and hence the judgment of this court in its appellant jurisdiction ought to be reviewed and set aside. (I would have reproduced the letter as part of my judgment but unfortunately it is just too long).

[110] I do not think it is necessary to decide whether any of the letters is the right one to be considered; all the letters do not meet the requirements of Section 148 (2) in my view.

[111] Other than Rule 31 (4) of the Rules of this Court, I have tried to find in our law any bases of excusing an unrepresented accused from compliance with the applicable Procedure and Rules without success.

[112] Rule 31 (1) provides that;

> "(4) Notwithstanding anything to the contrary herein an appellant or respondent who is not to be represented by an attorney or counsel at the hearing of the appeal shall be excused from compliance with the provisions of this rule. (Replaced by L.N. 102/1976.)"

[113] This is the only Rule that shelters an unrepresented litigant and it relates to the relaxation of compliance with Rule 31 that deals with filing of Heads of Argument.

[114] Having said the above, Courts as a general approach and as a matter of common sense have particularly in criminal matters adopted a flexible and accommodating approach when dealing with unrepresented litigants. I am

not entirely convinced that such an approach means a total suspension of relevant legal processes.

(115] In any event, in this particular case at least on the 19 May 2020 it appears that the applicant was already having the current Legal Counsel representing him when the matter was postponed. Again the Applicant was represented by the same Counsel when the matter was postponed on 22 October 2020 for hearing in the current Session of this Court.

(116] Surely, Applicant and his Counsel had plenty of time to put their house in order regarding this application, as it were, but without good reason failed and or neglected to do so.

[117] That it is essential that a party seeking to benefit from the provision of Section 148 (2) must do so by way of application and is paramount not only to allow the other party to respond but also for the benefit of the Court to have a fully ventilated case. This did not happen in this particular case. In my view, this anomaly could not be cured by simply canvassing the issues in

the Heads of Argument. Accordingly the purported application under Section 148 (2) stands to be dismissed.

[118] The next issue to consider is if the inadequacies of the purported application were to be excused by this Court whether it amounts toa re-appeal or not.

[119] In his letters seeking a review of the judgment of this Court he lists three challenges to the judgment. However, when analysing the three challenges they all amount to his defence namely that there is *no* evidence linking him or placing at the scene of the crime.

[110] This defence was advancediby the Applicant before **botll the** High Court and this Court on Appeal. In both instances the Applicant was unsuccessful to persuade the Court to uphold his defence. This Court is **f'J-ov v** being asked to re-evaluate the evidence and find in favour of the **A p p cliant** by now upholding his defence. This to me is no more than a seco0-£1_ bite to the same cherry or a re-appeal. On this ground the application JSO stands to be dismissed.

[111] It appears to me that in promulgating Section 148 (2) the intention of the Legislator was not to provide for a re-appeal. Even if it can be argued that there is a material error in the impugned judgment and thus the majority judgment concluded that there is an error in the evaluation of the evidence by this Court in its appellant jurisdiction; I am of the firm view in the circumstances of this Section 148 (2) does not apply.

[112] It has to be readily accepted that it couldn't have been the intention of the Legislature to create a paraUel appellate jurisdiction; one under the normal appeals process and the other under Section 148(2). It seems to me with respect that the majority judgment embraces re-appeals under Section 148 (2). This is my principal point of disagreement with the majority judgment and not so much the analysis of the evidence.

[113] In dismissing an application for review, this Court in **MICHAEL MASOTJA SHONGWE v HENRY SIBUSISO SHONGWE N.O. AND THREE OTHERS** (supra) had this to say per Justice Annandale;

> ***"The bottom line of what the applicant really wants is a reversal of the Orders of Court to have the transfer reversed. His siblings and***

*the executors of the estate applied for such relief and it was granted in their favour. His f!,ppeal did not change the situation; hence, the "second bite at the cherry", to rehash the same matter with the hope of a favourable outcome this time. It is not going to happen."*

[114] In **XOLILE GAMA V FOOT THE BILL INVESTMENTS (PTY) LTD,** this Court had this to say at paragraph 25;

*"The Applicant has done no more than to repeat the arguments before the* ***High*** *Co.u rt and before this court on Appeal. The* ***Application is nothing else but an appeal disguised as a review and it stands to be dismissed".***

(See also **SWAZILAND REVENUE AUTHORITY vs IMPUNZI WHOLESALERS (PTY) LTD.** (supra)).

[115] It is an established principle that it is discretionary upon the Court to grant a review. It is equally trite that the Courts must exercise their discretionary powers not in an injudicious manner. In view of what is already stated

regarding prospects of the purported application, I am not persuaded that this matter is one in which the Court may exercise its discretionary powers in favour of the Applicant.

[116] Regarding the question as to whether the application demonstrates an error warranting the intervention and review of the impugned judgment of this Court as concluded in the majority judgment, I similarly find that in view of what is already said that question falls away.

[117] Accordingly, the purported application to review the judgment of this Court in its appellate jurisdiction ought to have been dismissed.

**S. P. DLAMINI JA**