

# **IN THE HIGH COURT OF SWAZILAND**

## **JUDGMENT**

**HELD AT MBABANE**

**CRIMINAL CASE NO:**

**158/13**

**In the matter between:**

**REX**

And

**SITHEMBISO KHUMALO**

**Neutral Citation: Rex v. Sithembiso Khumalo (158/13)  
[2019] SZHC 148 ( 21<sup>st</sup> August 2019)**

Coram: Magagula J

Dates heard: 15/11/18; 22/11/18;  
17/4/19; 10-11/7/19;  
17-18/7/19 and 23/7/19

Delivered: 15<sup>th</sup> August 2019

[1] In this matter the accused person is charged with the crime of murder. It is alleged in the indictment that:

***“ Upon or about the 3<sup>rd</sup> March 2013 and at or near Piggs Peak area, in the Hhohho region, the accused person did unlawfully and intentionally kill SABELO GAMA and did thereby commit the crime of MURDER.”***

[2] Upon arraignment the accused person pleaded not guilty. The crown therefore began to lead its witnesses to prove the commission of such offence by the accused person.

**Pw1 - DR R.M REDDY (POLICE PARTHOLIGIST)**

This is the doctor who conducted a post - mortem examination upon the deceased at Piggs Peak Government Hospital. His report was handed in by consent and it is marked Exhibit “A” The report reveals two penetrating wounds on the chest and back of left chest. There are also cut wounds on the front and back of the chest. There is a scratch on the front of the right arm and on the left forearm. There is also an abrasion over the top of the left shoulder. The doctor concluded that the cause of death was haemorrhage as a result of a penetrating injury to the heart and left lung.

**Pw2 - NKOSINATHI BHEMBE** (an accomplice witness): This witness told the court that during 2013 he was residing at Rocklands compound where he was employed by one Mr

Patrick Sacolo. On Saturday the 3<sup>rd</sup> March, 2013 and before 5:00pm he and his friends proceeded to Piggs Peak Town. At Piggs Peak they enjoyed alcohol beverages at Pholani bar. They met the accused person at this bar.

[3] It is this witness's evidence that he had last seen the accused in prison whilst they were both serving jail term in 2010. He greeted the accused and asked him where he was coming from. He informed him that he was from Ndzingeni area in the Northern Hhohho where he was staying at his uncle's homestead. The accused then left at around 7:00pm. He however returned after he met his friend at the bus rank. This was Njabulo Mabuza who said he was from South Africa.

[4] They continued drinking at Pholani until 12:00 midnight when the bar closed. They then proceeded to Vuya Vuya where they continued drinking until this bar also closed at around 3:00am. They then proceeded to Highlands Inn where the bar operated for 24 hours.

[5] Pw2 told the court that on the way to Highlands Inn the accused drew a knife and scratched the ground with it uttering the words:

***“ Today I will kill a dog here in Piggs Peak.”***

Pw2 says he discouraged the accused from doing what he was doing saying he (Pw1) was known in Piggs Peak and people would have a bad view of him as they were together.

[6] This witness told the court that the accused did not heed his admonition. Instead he called him ***“litaki”*** (an idiot) and said he did not like idiots. He continued with his conduct and as Pw2 admonished him it was like he was encouraging him.

Just at that moment Pw2 saw accused and Njabulo running taking the way to Mhlatane. He eventually realised that they were chasing after a man as he heard them shout at him. The man however outpaced them.

[7] When they returned they came across the deceased. Upon meeting the deceased they attacked him and demanded money from him. Njabulo drew a knife and stabbed him on the shoulder at the back and ran away. The accused remained, drew a knife and had a squabble with the deceased. The deceased fought back in defence. The accused however overpowered the deceased. He sat on the deceased’s belly and stabbed him several times on the chest. He then ran to the dam where he washed the knife he had used to stab the deceased.

[8] Pw2 then went to the deceased and tried to call him but he did not respond. Pw2 then ran away from the scene. As he ran away he saw the accused proceeding towards the Highlands Inn. He rushed and caught up with him. He told him that what he had done was terrible.

The accused said he did not care even if he was arrested since he had brothers at the Correctional Services.

[9] The two proceeded to Highlands Inn bar and at some point accused requested Pw2 that they should go and smoke dagga. It is this witness who had the dagga. They went to some spot within the Highlands Inn premises where Pw2 gave the dagga to accused to roll it. It is at this moment that accused handed the knife to Pw2 and the latter had a good look at the knife. He returned it back to the accused and they continued smoking until Pw2 left Highlands Inn in the early hours of the morning between 6:00 am and 7:00 am. At the bus rank he came across the people he had left Rocklands with the previous day and they took a taxi back to Rocklands. This was a Sunday. He related to them the events of the previous night.

[10] On the following Thursday police officers came to Pw2's place of residence at Rocklands. They questioned him about the murder and he told them what he knew and they then arrested him. This witness described to the court the clothes that accused was wearing on the day deceased was killed and went on to identify them before court. He then handed them in as part of his evidence and they were collectively marked " Exhibit B". He also described the knife he saw at Highlands Inn. He further identified it in court and handed it in as part of his evidence. It was marked " Exhibit C".

[11] In cross - examination it was put to this witness that his evidence did not reflect the truth since it is at variance with what he told the police. He was particularly referred to

paragraph 9 of the statement he recorded with the police where he allegedly stated:

***“ When we were about to reach the T - junction to Mhlatane he took the road to the left carrying the knife. Next to the dustbin a man followed Sithembiso and I asked why he was leaving me behind. He never answered.***

***I also followed slowly and I heard them shouting “ fuseki.” Sithembiso was wearing white clothes. I hid and pipped to see what they were doing.***

***I saw Sithembiso holding the knife and they were kicking him. After sometime I saw them running to town. I heard a man breathing badly. I went to him and held him by the leg and said to him***

***“ Mnetfu,” but there was no response. I ran back towards the park shocked and shouting “ I have never seen such.”***

[12] Upon being questioned this witness clarified that the man who was following Sithembiso (accused) was Njabulo. Further on being questioned whether the name of this person was Njabulo or Njabuliso, he said it was actually Njabuliso and he was seeing him for the first.

His response to the question why he did not tell the police what he was now telling the court, namely the chasing of a

man who outpaced accused and Njabuliso, stabbing of deceased by the accused and he later running to wash the knife at the dam, the witness's response was that he told all this to the police. He did not know why they left it out. He further denied that the statement was ever read back to him but conceded that he signed it.

[13] It was further put to this witness that accused never gave him a knife but he maintained that accused gave him the knife to hold whilst he was rolling dagga. He later demanded it back rather harshly. Quizzed on whether the accused was wearing a jacket on the day in question the witness conceded that accused was wearing a jacket. The witness stated however that when they proceeded to Highlands Inn accused had given the jacket to Njabuliso. Accused was wearing white clothes at this time.

[14] **Pw3. NIKIWE GWEBU**

This witness told the court that she had two children with the deceased and one of them passed away. She further told the court that she was called by the Piggs Peak Police to identify the deceased's cellphone on the 11<sup>th</sup> March 2013. She duly identified the cell phone amongst other cell phones at the Piggs Peak Police Station. She told the police that the cell phone was a Nokia N70 which was black and grey in colour.

The witness further identified the cell phone to the court and handed it in as part of her evidence. The cell phone was marked exhibit "D" by the court.

**Pw4 MPENDULO FAKUDZE**

[15] This witness told the court that on Saturday the 3<sup>rd</sup> March, 2013 he went to Piggs Peak with the accused. After the accused bought some polish at Piggs Peak they proceeded to Pholani bar where they had alcoholic beverages. Mzambia Mazibuko from Bulandzeni and another person not known to this witness joined them.

[16] As they continued drinking liquor the accused began to be provocative to other patrons of the bar. He tried to control him and eventually suggested that they should go back home. The accused who had given this witness E20-00 for bus fare then demanded this money and did not heed the suggestion to go home. This witness then left and went home.

[17] The following day in the morning the accused came to Pw4's home and said he had come to check on him. The accused was then having a cell phone and playing music on it. The cell phone was grey in colour. After greeting each other Pw4 accompanied accused out of the homestead. As they were walking Pw4 asked the accused where he got the cell phone since he did not have one the previous day. His response was that he got it from a "litaki" (idiot) at Pholani. It is Pw4's



evidence that he did not pay much attention to this statement . They then departed.

[18] Pw4 did not see the accused thereafter until he met him on a Wednesday afternoon when Pw4 was going to the shop. Accused said he was on his way to bid Pw4 farewell. Accused said he was leaving because the previous day and whilst drinking marula brew at Ntandweni in Mgungundlovu, an area still under the Ndzingeni constituency, he was attacked by one Sizwe Dlamini with palms. Accused said this did not go down well with him and he felt like killing the said Sizwe.

[19] Pw4 begged the accused to discard the thought of killing Sizwe. He also dispossessed the accused of a knife he was carrying. Pw4 continued to the shop and eventually returned home. I should mention that Pw4 described the accused as his brother - in - law.

[20] On Saturday morning of the same week, Police officers came to Pw4's home carrying the accused in their motor vehicle. The police asked this witness if he knew the person in the motor vehicle and he replied in the affirmative. The police then said the accused should do the talking. The accused then told Pw4 that he had come to collect the knife the latter had dispossessed him of. This witness retrieved the knife from a maize screed where he had put it and handed it to the police. The witness said the knife had a black handle and

was sharpened on both side. It looked like it was handmade. The witness proceeded to identify the knife in court and said he was handling it in as part of his evidence. The witness further described the shoes and trousers worn by the accused on the 3<sup>rd</sup> March 2013. He proceeded to identify the white sandals and white trousers worn by the accused on the said day. He stated that he did not recall what accused was wearing on top on the 3<sup>rd</sup> March, 2013. He handed into court these items as part of his evidence. He also pointed out at the accused on the dock.

[21] In cross - examination Pw4 confirmed that he recorded a statement with the police. The statement was given to him to read and sign if correctly recorded. He confirmed that he signed the statement. When asked if he signed the statement before a commissioner of oaths as recorded on it, the witness stated that he does not recall appearing before any commissioner of oaths. When it was suggested to him that his statement was tempered with the said he could not be sure about that.

[22] When it was put to Pw4 that he never took a knife from the accused he was very adamant and firm mentioning that he recalls very well that the day was a Wednesday. It was further put to this witness that when the police came to his homestead, the accused never talked to him nor did he talk to the police. This witness was very firm that he did talk to the accused who asked for the knife he had given to him. It

was further put to this witness that when the police came to his homestead they left the accused in their vehicle and then returned with the knife. This witness denied this and stood by the version he had given in chief.

All and all this was a very impressive witness who was not shaky in any aspect of his evidence. He came out of cross - examination unscathed.

**Pw5 - SANELE SIKELELA MNCINA**

[23] This witness is a community policeman of Mgungundlovu under the Ndzingeni constituency. He told the court that on the 9<sup>th</sup> March 2013 just before 11:00 am he received a phone call from the police who requested him to go to Sibusiso grocery. Upon arrival at the shop the police told him that they were from Piggs Peak and Mbabane. They said they wanted this witness to assist them with a murder case which had occurred in Piggs Peak.

[24] They gave him a chance to identify the person in their motor vehicle and he identified him as Sithembiso Khumalo, the accused. The witness further identified the witness on the dock in court. The police further requested this witness to accompany them to the homestead where the accused resided. Upon arrival at the homestead of Mtshawe Mkhonta where accused resided, this witness introduced the police to the owner of the homestead and explained their mission

namely, that they were looking for certain clothes of the accused.

[25] The accused then led them to a house with different bedrooms. In accused's bedroom they did not find the clothes. The accused opened another bedroom where they found the clothes. The clothes were: a pair of white trousers, a white t-shirt and a blue and red jacket. The police further asked the accused about a cell phone and he said it was at a Tsabedze homestead.

[26] Before proceeding to the Tsabedze homestead Vusi Dlamini was called telephonically and he said he was at Siyabonga grocery. Vusi eventually joined them and he had a cell phone with him. This was a Nokia N70 which was silver and grey in colour.

This witness identified the cell phone in court as well as the clothes he had described. He handed these items in as part of this evidence. Asked by the prosecutor on the status of the accused at the time, this witness stated that the accused looked healthy and had no visible injuries.

[27] In cross - examination this witness agreed that he recorded a statement with the police at Siyabonga grocery. He however denied that the statement was made before a commissioner of oaths when this was suggested to him by defence counsel.

Further this witness conceded that the police appeared to know the clothes they were looking for. When he pointed out some track suit the police told him that this is not what they were looking for. When he pointed out the clothes before court they stated that these were the clothes they were looking for.

[28] This witness was asked in cross - examination if accused was cautioned on his rights before pointing out and he said he did not hear any such. The witness was also asked how he knew the cell phone to be a Nokia N70 and he said he is familiar with that type of cell phone.

Again this witness struck me as reliable witness.

[29] **Pw6 - VUSI MABANDLA DLAMINI**

This witness told the court that the accused came to his home and found him sitting under a tree. Accused was carrying a Nokia N70 and he requested him to charge it. He stated that he had no charger for that kind of cell phone. However on checking the size of the battery for the Nokia N70 they realised that its battery could fit into this witness's cell phone. Pw6 then charged the battery of the Nokia N70 using his phone. Whilst the phone was charging he left to look after cattle.

[30] Upon his return this witness found that the accused had left with his cell phone leaving the Nokia N70 behind. This witness went to accused's place of residence to get his cell

phone but he did not find him. He then received a phone call from Pw5 requesting him to go to Siyabonga grocery. Upon his arrival there he found Pw5 with police officers. The police asked him if he knew the accused and if he left anything with him. He told the police that accused left a cell phone Nokia N70 silver on the front and black on the back. The police told him to give the cell phone to them and he obliged. He then asked for his cell phone from the accused who was in the police vehicle and he gave it to him.

This witness identified the cell phone in court and said he was handing it in as part of his evidence.

[31] In cross - examination it came out that at the time the police retrieved the cell phone from Pw6 the accused never said anything about the cell phone. The police only asked this witness if accused had left anything with him and he told them that he left a cell phone. The police then demanded the cell phone and he gave it to them. He then demanded his cell phone from the accused who gave it to him.

**Pw7 - 3524 DETECTIVE SEARGENT MHLABA HLATSHWAYO**

[32] This witness is a scenes of crime officer. On the 3<sup>rd</sup> March 2013 he was called to attend a murder case near Mhlatane High School in Piggs Peak. On arrival at the scene with other officers he found a man lying dead and facing upwards. He noted the clothes the deceased was wearing and on closer examination he observed six wounds on the deceased body

one of which was still bleeding. He took photographs of the wounds. This witness handed in the photographs depicting the wounds as well as the position in which the deceased was found. He handed the photographs in as part of his evidence. They are marked “ **Exhibit 1 A - G**”. This witness was not cross - examined by the defence.

**Pw7 - 4988 DETECTIVE CONSTABLE THAMI MABUZA**

[33] This witness is the chief investigating officer in the matter before court. He narrated to the court how he received a docket to investigate the matter before court. He further told the court that on the 7<sup>th</sup> March 2013 he got information which led him to arrest Nkosinathi Bhembe (Pw2) at Rocklands compound in Piggs Peak.

[34] On the 8<sup>th</sup> March 2013 he received information that Sithembiso Khumalo, the accused was seen at Ndzingeni area and together with other officers he proceeded to Ndzingeni area. They met accused along the road in the company of a young boy. After introducing himself and the other police officers they cautioned him in accordance with the judges rules. The accused opted to say something but as it is was getting dark they conveyed him to Piggs Peak where he was detained in police cells.

[35] On the 8<sup>th</sup> March 2013 in the morning he was taken out of the police cells. Having been cautioned that he was not obliged to point out anything he freely led the police officers

back to Ndzingeni area. At Ndzingeni the police officers were joined by one Sanele Mncina, a community policeman. In the presence of Mr Mncina the accused pointed out:

- a white t - shirt
- a pair of white trousers
- a blue and maroon jacket
- a blue hat
- white omega sandals

as the clothes he was wearing on the date of the commission of the offence. All these clothes were seized as exhibits.

[36] After pointing out the clothes, the accused further led the officers to one Vusi Dlamini whom they found next to Ntandweni bus stop. There the accused pointed out a black and grey Nokia N70. The police who were still accompanied by Sanele Mncina were further led by the accused person to one Mpendulo Fakudze of the same area where accused pointed out to a hand made knife. The knife had a black handle. After pointing out these items the accused was conveyed back to Piggs Peak Police Station where he and Pw2 were formally charged with the offence of murder. This witness handed into court the items seized as part of his evidence.

[37] The cross - examination by Mr Dupont was mainly centred on what happened during the pointing out. There appeared



to be some contradictions among the crown witnesses regarding what was said or happened during the pointing out. There was however no contradictions in so far as the pointing out itself is concerned. This witness's evidence was in agreement with that of the other crown witnesses that it was the accused who pointed out the clothes he was wearing on the date the crime was committed. His evidence was also in line with that of the other witnesses that the accused pointed out a cell phone and a knife.

[38] When it was put to this witness that the accused had received the cell phone from Njabuliso Mabuza he flatly denied this. He also denied ever being told by the accused that the cell phone belonged to Njabuliso Mabuza. It was further put to this witness that the accused never pointed out any knife but the police went into Mpendulo Fakudze's home and came with a knife. The witness flatly denied this maintaining that the accused freely and voluntarily led them to Mpendulo. It was also put to this witness that the police severely assaulted the accused person before the pointing out. This witness denied this and added that there would be no need to assault accused as he was co-operating with the police. He further stated that Correctional Services would not have accepted him unless he first went to hospital.

[39] It was further put to this witness that accused told the police that the deceased was killed by Njabuliso Mabuza. This witness denied this and stated that he actually interviewed

Njabuliso Mabuza who denied ever killing the deceased. This witness was also asked if it is possible when investigating a murder charge for the police to miss and not record information as to who actually stabbed the deceased.

He replied in the negative. He was told that Pw2 said he told the police that accused stabbed the deceased but the police did not record this. This witness maintained that such was not possible.

The crown then closed its case.

## **THE DEFENCE CASE**

The defence led two witnesses namely Detective Constable Sindi Magagula and the accused person.

### **Dw1 - 5283 DETECTIVE CONSTABLE SINDI MAGAGULA**

[40] This witness confirmed that she is the one who recorded a statement from Pw2. She told the court that she recorded everything Pw2 said and read the statement to him to confirm if it was correctly recorded. Pw2 confirmed the statement and signed it. When this witness was told that Pw2 told the court that he told her that he saw the accused stab the deceased and proceeding to wash the knife in a dam and this witness did not record this, she said that was not possible. She recorded everything Pw2 told her.

[41] In cross - examination this witness confirmed that she wrote the statement in English and translated it Pw2 in Siswati.

Whilst admitting that she is not a sworn translator she maintained that there were no chances of her wrongly translating the statement to Pw2. Further quizzed if she was aware that accused and Pw2 were friends and were co - accused at the time she answered in the affirmative. It was further suggested to this witness that Pw2 would do anything to protect himself and the accused at the time and she disagreed with this suggestion.

## **DW2 - SITHEMBISO KHUMALO (THE ACCUSED)**

[42] The accused confirms in his evidence that he left Ndzingeni with Mpendulo Fakudze in the afternoon of Saturday the 3<sup>rd</sup> March 2013 and they proceeded to Piggs Peak town. After buying some toiletries and polish they proceeded to have alcohol beverages at Vuya Vuya and Polani bars. There they were joined by Mzambia Gama, Nkosinathi Bhembe (Pw2) and Njabuliso Mabuza - Mpendulo Fakudze eventually left them. They later proceeded to Highlands Inn where the bar operates 24 hours.

[43] They did not enter the Highlands Inn premises since they had liquor in a bag which would not be allowed to enter Highlands Inn. They sat under trees and drank the liquor. Another person came and had a conversation with Njabuliso. They were talking about dagga business and they appeared to be quarrelling. At that point the accused, Mzambia and Pw2 left and went inside Highlands Inn. They told Njabuliso

that they were leaving his bag on the spot. As they left they heard some noise and whistling on the road. Mzambia went to where the noise was and accused and Pw2 went into Highlands where they had drinks and smoked dagga. After smoking the dagga the accused had a black out and he slept. Accused was unconscious until he was woken up by Njabuliso at about 5:00 am. He asked accused why they had left him and accused told him that they told Njabuliso when they were leaving for Highlands Inn.

[44] Njabuliso asked the accused to give him his contact details. Accused told him that he had no cell phone as he had given it to his mother. Njabuliso then gave him the phone which has been presented as an exhibit before court. Njabuliso had two cell phones at that time. At sunrise they proceeded back to Piggs Peak. When they were near Piggs Peak Police Station Njabuliso showed accused a place called D4 and said that is where he stayed. At that time a motor vehicle came and took Njabuliso. Accused remained there with Pw2. The two eventually parted when accused went to the bus rank and boarded a bus that took him home.

[45] At Ndzingeni the accused alighted at Ntandweni bus stop where he met Vusi Dlamini. He asked Vusi to charge the phone but he did not have a charger for the phone. The accused borrowed Vusi's phone to call his uncle but eventually left with it and left his with Vusi so that he could charge it. On the Thursday accused was arrested by the

police who took him to Piggs Peak Police Station where they showed him Pw2 in a cell. They asked him if he knew Pw2 and he answered in the affirmative. They then said he and Pw2 would explain in the morning how the person died and they put him in a cell. It is the accused's evidence that at the police station he was assaulted by police and suffocated with a tube. As already indicated in the evidence of Thami Mabuza the police deny this.

[46] The accused then narrates how he eventually went to Ndzingeni with the police where they were joined by Sanele Mncina before proceeding to his place of residence. There the police asked him to show them the clothes he was wearing on the 3<sup>rd</sup> March 2013 and when he showed them a navy -blue track suit they said this is not what they wanted. He took them to another room where there was a washing basket from which the police took his uncle's maroon jacket and a pair of white trousers. They asked him what he used to kill the deceased and he said he did not kill anyone. They eventually took him to Mpendulo Fakudze's place of residence where the police entered the homestead and returned with Mpendulo Fakudze. Mr Mabuza (PW8) was then carrying a black plastic bag in which something was wrapped. They then returned to Piggs Peak. At the Police Station they took him to the CID room where they produced the cell phone which accused admits he knew. They also showed him the knife saying "***This is the knife you used***

***in committing the offences.***” Before he could respond the police assaulted him. They also said he took the cell phone from the deceased and he denied this saying he took the cell phone from Njabuliso.

[47] The police asked if the accused knew where Njabuliso stayed and he told them that he said he stayed at D4 compound. They proceeded to D4 and Njabuliso was there but he eluded the police and disappeared. They asked accused where else they could find him and he said he could be found at Ntontozi. They went there but could not find him. They returned to Piggs Peak where the police said they would continue searching for Njabuliso but if they do not find him they would charge the accused person. Accused was eventually taken to court together with Pw2. They were remanded into custody and were taken to the Piggs Peak correctional facility. It is the accused’s evidence that he was taken to hospital the following day for the injuries he sustained on being assaulted by the police. He was eventually transferred to Mbabane Government Hospital where it was confirmed that his ear drum had been damaged and he could be assisted at Good Shepherd hospital where he would have to pay E35,000-00.

[48] The accused denied being in possession of any weapon when he went to Piggs Peak on the 2<sup>nd</sup> March 2013. He further denied ever provoking anyone or using any knife to scratch the road and say he would kill a dog. He further denied ever

stabbing or killing the deceased. Although he saw Njabuliso arguing with a man accused did not know, he never saw Njabuliso attacking this man either nor stabbing the deceased. He confirmed that he was with Pw2 all the time. He had no issues with anyone at Ndzingeni community, and not even Sizwe Dlamini as alleged by Mpendulo Fakudze. The accused further said Mpendulo Fakudze was lying when he said the police opened the police vehicle and accused said Mpendulo should produce the knife he had given to him.

He maintained that whilst he was with the police at Ndzingeni he never communicated with either Mpendulo Fakudze or Vusi Dlamini.

[49] In cross - examination the public prosecutor, Mr Mngomezulu put it to the accused that whilst proceeding to Highlands Inn the accused and his company never sat at the park or under trees to drink beers. It was also put to the accused that the story of Njabuliso and someone unknown to accused having an altercation at the park and accused, Nkosinathi Bhembe and Mzambia leaving the two there was an after thought as it was never put to Nkosinathi Bhembe. Accused further confirmed in cross - examination that he did not see Njabulo kill the deceased. Quizzed on why the story of is blacking out at the Highlands Inn was not put to Nkosinathi Bhembe the accused said he had no opportunity to do so. It was put to him that such is an after thought since he had every opportunity during cross - examination. The

accused was cross - examined on numerous pieces of evidence which he stated in chief but which were not put the prosecutions witnesses and his response was that he did not know that he could do this. The accused was of course represented through out the trial.

## **ANALYSIS OF THE EVIDENCE**

[50] The evidence of (Pw1) Dr R.M Reddy reveals that the deceased suffered numerous stab injuries on his chest, back and arms. It also reveals that the cause of death was haemorrhage resulting from a penetrating injury to the heart and lung. There is no doubt in my mind that the deceased died as a result of the stab injuries.

[51] The key aspect of the evidence of Pw2, Nkosinathi Bhembe is that he saw the accused sitting on the belly of the deceased and stabbing him several times with the knife which was produced and handed in as an exhibit before court. Pw2 also told the court that when he tried to call the deceased thereafter, he did not respond. There is again no doubt in my mind that the deceased died as a result of this stabbing.

[52] The evidence of Pw3, Nikiwe Gwebu confirmed that the Nokia N70 which the police found in the possession of Vusi Dlamini (Pw6), belonged to the deceased. Pw6 told the court that the cell phone, which was also handed in court as an exhibit, had been given to him by the accused person.



[53] The evidence of Pw4, Mpendulo Fakudze, revealed that the accused had went to Piggs Peak with him on Saturday the 3rd March 2013. He however left him there and only met him the following day. When he met him he was carrying a cell phone, Nokia N70 which he did not have the previous day. When he asked where he got the phone, his response was that he got it from an idiot at Pholani bar. This witness further revealed that on a subsequent Wednesday he met the accused carrying a knife. Accused said he had come to bid this witness farewell as he felt like killing Sizwe Dlamini. His reason was that Sizwe Dlamini had assaulted him during a marula drinking session the previous day. This witness discouraged the accused from killing Sizwe and actually dispossessed him of the knife. The police found the knife in his possession when they came with the accused.

[54] The evidence of Sanele Sikelela Mncina (Pw5) a community policeman at Ndzingeni area, showed that he was present when the accused pointed out clothes he was wearing on the night of the murder. He was also present when the accused person led the police to Vusi Dlamini where he pointed out the Nokia N70 cellphone.

[55] The evidence of Pw6, Vusi Dlamini confirms that the Nokia N70 cell phone which the police found in his possession had been given to him by the accused person.

[56] The evidence of Pw7 and Pw8, the police officers merely confirms the pointing out by the accused of the clothes worn by him on the night of the incident; the cell phone belonging to the deceased and the knife used in killing the deceased. It also confirms that they eventually arrested the accused as well as Pw2 who has since been made an accomplice witness.

[57] In his defence the accused maintains that he never killed the deceased nor did he see anyone killing or assaulting the deceased. He particularly denies ever being dispossessed of a knife by Pw4 and denies any knowledge of such knife. As regards the cell phone he maintains that it was given to him by Njabuliso Mabuza with whom they were together on the night of the incident. Although he does not specifically say that he saw Njabuliso assaulting the deceased, he manifestly wants the court to believe that it was Njabuliso who killed the deceased.

### **SUBMISSIONS BY COUNSEL AND THE LAW**

[58] During submissions both counsel were in agreement that the court ought to treat the evidence of Pw2 with caution since he is an accomplice witness. As I understand it from the submissions and particularly the authorities referred to by counsel this caution turns upon the credibility of the accomplice witness and the reliability of his evidence.

The handling of evidence of accomplice witnesses is regulated by section 237 of the Criminal Procedure and Evidence Act, 1938 which provides:

***“ Any court which is trying any person upon a charge or any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:***

***Provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been actually committed.”***

[59] In the case of MFANIMPELA MBUYISA AND ANOTHER vs REX (20 AND 21/2015) 2017 SZSC 05 (12 May 2017) JUSTICE B.J ODOKI commented on the above section as follows at paragraph [51]:

***“ Several decisions have considered the above section and given some guidelines on its application. First, the court must find that, the evidence of the accomplice witness is credible. Second, there must be independent evidence that the offence was actually committed. Third, there is a need in the court to observe the cautionary rule.”***

[60] A reading of the section itself reveals that the evidence of the accomplice is sufficient provided that there is independent proof that the offence was actually committed. The courts have however expounded the cautionary rule to encompass, *inter arlia*, corroboration of the accomplice's evidence as well as credibility of such witness. (see R v. MTETWA 1976 SLR 364 at 367 B-C).

[61] The reasons why the evidence of an accomplice witness has to be treated with caution and carefully scrutinized were stated by the Appellate Division of the South African Supreme Court in the case of S v. Hlaphezula 1965 (4) SA 439 (A) to be the following:

- (i) The accomplice is a self - confessed criminal;
- (ii) He may have various reasons to implicate the accused. For instance he may have a desire to shield a culprit and where he has not been sentenced he may harbour a hope for clemency.
- (iii) Since he knows exactly what happened he has the capacity to convince the court even falsely so.

[62] For the foregoing reasons the courts have introduced some safeguards to reduce the risk of a wrong conviction. In the Hlaphezula case ( Supra) the court listed such safeguards to be *inter arlia*:

- (i) Corroboration of the evidence implicating the accused in the commission of the offence
- (ii) The absence of gainsaying evidence from the accused,
- (iii) Accused's mendacity as a witness: or the implication by the accomplice of someone dear or near to him.

[63] In R v. Ncanana (1948) SA 399 A at 405 -406, Shreiner JA also observed that:

***“ .....An accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness particularly equipped by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth .....The risk that he [the accused] may be convicted wrongly will be reduced, and in most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice.***

***And it will also be reduced, even in the absence of these features, if the triar of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the***

***merits of the former as a witness and the demerits of the latter are beyond question.”***

[64] In S.V Masuku (1969) 2 SA 375 (N) page 375 -7 the court held ***inter arlia***:

***“ Where there is no such corroboration there must be some other assurance that the evidence of the accomplice is reliable.***

***This assurance may be found where the accused is a lying witness or where he does not give evidence.***

***The risk of incrimination will also be reduced in a proper case where the accomplice is friend of the accused.”***

[65] From the authorities it is clear that one safeguard against false implication of an accused by an accomplice witness is that the evidence of the accomplice must be corroborated by some other independent evidence implicating the accused.

However the absence of corroboration is not necessarily fatal to the prosecution’s case. If the accused is implicated by a friend or someone dear to him, that reduces the risk of wrongful incrimination. Also where the accused is lying or does not give evidence gainsaying the evidence of the accomplice, the risk of wrongful incrimination is reduced.

[66] Even though when recording a statement with the police Pw2 did not

give the exact account as he gave in court, his story is still that he saw the accused attacking and killing the deceased . I do note also that when he made the statement to the police he was still a suspect and not a witness who had resolved to tell the truth. I therefore have no doubt about the credibility of the accomplice witness and I accept his evidence as the truth.

[67] Even if the evidence of the accomplice were to be doubted, it came out in evidence that the accused and the accomplice witness were friends. They were drinking alcoholic beverages together on the night in question and they had known each other since 2010. There is nothing to suggest that their relations turned sour at any stage. The accomplice witness would therefore have no reason to fabricate a story incriminating the accused.

[68] Further the accused gave evidence which struck me as untruthful and an after thought since it was not put to the crown witnesses. Besides not being put to the crown witnesses his evidence is just improbable. His evidence is basically that he never saw how the deceased died nor did he see anyone assaulting him. He however concedes that he was with the accomplice witness all the time and they never parted. It baffles the imagination how the accused could not

see how the deceased died when the accomplice witness saw it.

This also goes to show that the accused is not being falsely implicated by the accomplice witness. He actually killed the deceased.

Also the evidence of Pw2 was corroborated by Mpendulo Fakudze who dispossessed him of the knife used in killing the deceased. I also accept that the accused freely and voluntarily pointed out the knife, cell phone and clothes handed into court as exhibits.

## **FINDINGS**

[69] Considering the evidence in its entirety the court makes the following findings:

69.1 The accused died as a result of being stabbed by the knife handed into court and marked Exhibit “ C”.

69.2 The accused, possibly acting in concert with one Njabuliso Mabuza stabbed the deceased to death. I reject without an *iota* of doubt the accused’s allegation that he does not know anything about the killing of the deceased. Such cannot stand against the direct evidence of Pw2 that he personally saw the accused stabbing the deceased to death. The accused has not advanced any plausible reason why Pw2, who was a friend of the accused could possibly fabricate such a



terrible story against him. I also reject without any hesitation the story by accused that he, Pw2 and Mzambia left Njabuliso arguing with a person the accused did not know at a park. I also reject the story of the accused suffering a black -out at Highlands Inn. These allegations are clearly an after thought as they were not put to the crown witnesses in cross - examination.

69.3 I have no doubt that the cell phone was taken by the accused from the deceased; that the knife used in stabbing the deceased belonged to the accused and that the clothes handed into court as having been pointed out by the accused were duly pointed out by him.

69.4 I accordingly find that the accused killed the deceased.

[70] I now turn to consider if the accused had any intention to kill the deceased. It is the evidence of Pw2 that as they were proceeding to Highlands Inn the accused drew a knife and scratched the road saying he would kill a dog that night in Piggs Peak. Thereafter the accused and Njabuliso chased after a man who outpaced them. Upon their return from chasing the man they came across the deceased. They attacked him and demanded money from him. Njabuliso drew a knife and stabbed him on the shoulder at the back and ran away. The accused remained, had a squabble with

the deceased who tried to resist the accused. The accused however over powered him, sat on his belly and stabbed him numerous times until he died.

[71] By stabbing the deceased numerous times in the chest area with a knife, the accused could not have intended anything else other than to kill the deceased.

It is the finding of the court that the accused had intention in the form of ***dolus directus*** when he killed the deceased. The deceased had not provoked the accused in any manner.

## **VERDICT**

I accordingly find the accused guilty of murder as charged.

## **SENTENCE**

[72] As enjoined by law in determining the sentence that the court ought to impose upon the accused person I take into account the nature and seriousness of the offence, the interests of society and the circumstances of the accused person. I also take into account the submissions made by both council for the crown and counsel for the accused person.

[73] That murder is one of the most serious offences cannot be overemphasized. The right to life is protected both in our

constitution and the United Nations Universal Declaration on Human Rights. Our society and indeed the international community views the taking away of the life of another person in very serious light. In sentencing convicts who have killed other people the courts ought to take such views of the community into account.

[74] What is even more disturbing is that the rate at which people lose their lives in the hands of others is increasing at an alarming speed in our country. There is now hardly a week that passes without someone being deliberately killed by another. This court is also infested with murder cases and on my roll in particular at least more than seventy-five per cent (75%) of the matters are murder cases. This is the case in all the three annual sessions of the court. This is an indication that the sentences imposed by the court for such offences probably no longer have any deterrent effect.

[75] I find myself compelled to agree with the submission by the prosecution that:

***“ the taking of life so mercilessly, without provocation whatsoever and with such viciousness in our society has become so prevalent thus this honourable court is moved to mete out a stiffer sentence so as to act as a deterrent effect to any other ....person who may opt to take a life in such a manner.”***

Murder is a very serious offence and it is in the interests of society that people who kill others should be removed from the community and preferably permanently.

[76] Defence counsel has called upon the court to find that there are extenuating circumstances in this case since the accused had been drinking from the late afternoon of the 2<sup>nd</sup> March 2013 until the early morning hours of the 3<sup>rd</sup> March 2013. The accused also stated in his evidence that he was also smoking dagga. This evidence was indeed not challenged. To the contrary it was confirmed by the accomplice witness. There is however no direct evidence that the accused's actions were caused by his state of sobriety. To the contrary it seems that the accused person left home prepared to cause harm similar to that which he caused. When he left home he armed himself with a deadly weapon being the knife handed into court as an exhibit. Had he not armed himself with such a dangerous weapon whilst he was undoubtedly sober, probably he would not have taken away the innocent life. I cannot however positively find that the accused was not drunk when he committed the offence. To the contrary there are strong indicators that he was drunk.

[77] In the South African case of *S v. Letsolo* 1970 (3) SA 476 (A) Holmes JA stated:

***“ Extenuating circumstances have more than once been defined by this court as any facts,***

***bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard the trial court has to consider:***

***(a) Whether there are any facts which might be relevant to extenuation such as immaturity, intoxication or provocation (the list is not exhaustive)***

***(b) Whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;***

***(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.***

***In deciding (c) the court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."***

[78] It is my view that the accused was probably intoxicated when he committed the offence and he probably would not have committed it had he not been intoxicated. I accordingly find his state of sobriety at the time to be an extenuating circumstance.

[79] In mitigation it was submitted on behalf of the accused that he was twenty - four years when he committed the offence

and is currently thirty (30) years. He is therefore young and deserves another chance in life. He has one minor child. He has a rural background and he is an unsophisticated person.

[80] On the other hand the prosecution implored the court to take into account that the accused mercilessly killed an innocent person who had not provoked him in any manner. He brutally assaulted the deceased with a deadly weapon, to wit, a knife stabbing him at least seven times in the chest area involving his heart and lungs. It was further submitted that the accused person has shown no sign of remorse as he gave false evidence in court. The accused actually made threats that he would kill someone on the right in question and he proceeded to do just that.

[81] The prosecution also implored the court to impose a proportionate sentence. In striving to achieve such the court is to be guided by the following principles:

***“ (i) The gravity of the offence and harshness of the penalty;***

***(ii) The sentences imposed on other criminals in the same jurisdiction;***

***(iii) The sentence imposed for the commission of the same crime in other jurisdictions”.***

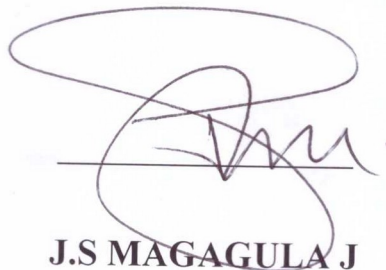
[82] I fully agree with the prosecution that the principle of proportionality ought to be adhered to. However I think the

court should be alive to prevailing circumstances when it comes to following the trend in sentencing. Where it is clear that the sentences imposed no longer have any deterrent effect upon would be offenders, the courts ought to step up the sentences to achieve this sentencing principle. It is one indicator that sentences no longer have a deterrent effect if the prevalence of the offence rises.

[83] Having taken into account the nature, seriousness and prevalence of the offence of murder in our country, previous sentences for the same offence in this country, the interests of our society and the circumstances of the accused, the following sentence is imposed upon the accused:

83.1 The accused is sentenced to twenty - five (25) years imprisonment without the option of a fine.

83.2 The sentence is backdated to the 8<sup>th</sup> March 2013 which is the date on which the accused was arrested.



J.S MAGAGULA J

**For the crown:**

**T. Mamba**

**For the Defence:**

**I - Dupont**

