

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 108/22

In the matter between:

REX

And

JAPHTER SITHEMBISO NTSHALINTSHALI

Neutral Citation: *Rex vs Japhter Sithembiso Ntshalintshali [108/22] [2022]*
SZHC 203 (4 October 2022)

Coram: **LANGWENYA J**

Heard: 26 July 2022; 10 August 2022; 11 August 2022; 20 September 2022; 22 September, 2022; 3 October 2022; 4 October 2022.

Delivered: 4 October 2022.

Summary: *Criminal law-defence of involuntary intoxication if properly raised constitutes a complete defence-The Criminal Liability of Intoxicated Persons Act-The onus is on the Crown to prove beyond reasonable doubt that the accused had the criminal capacity-deciding whether the Crown discharged the onus to prove the accused's overall guilt, requires the court to consider criminal capacity or lack thereof against the background of intoxication-Crown is assisted by the presumption that every person is presumed to have sufficient mental capacity to be responsible for his/her crime-the dislodgment of the presumption of mental capacity is a difficult task requiring evidence from medical experts.*

The accused is charged with the murder of his girlfriend-post-mortem report-deceased died due to pressure over the neck-accused confessed to strangling the deceased following a misunderstanding that deceased was two-timing him-accused found guilty of murder with dolus eventualis.

JUDGMENT

- [1] The accused is charged with the crime of murder. It being alleged by the Crown that on or about 26 March 2021 at eSigangeni in the district of Hhohho the accused unlawfully and intentionally killed Nelisiwe Sethu Ngozo.
- [2] When the charge was put to the accused, he pleaded not guilty.
- [3] The Crown led the evidence of seven witnesses to prove its case. By consent the photographs taken by the scene of crime officer as well as a statement

recorded by the accused before a judicial officer were admitted as evidence and marked exhibit 'A' and exhibit 'B' respectively.

- [4] The accused led evidence on his own behalf and did not call other witnesses.
- [5] At the time of the commission of the offence charged, both the accused and the deceased were children¹. The accused was seventeen years and ten months old while the deceased was sixteen years old. The Court heard that the accused and the deceased were in a romantic relationship when the deceased died in the hands of the accused person.

The Crown's case

- [6] The Crown led the evidence of deceased's mother-Busisiwe Ngozo who was called as PW1. It was PW1's evidence that on 26 March 2021 she sent the deceased and Lindelwa Nosifiso Ndwandwe to grind mealies at the local hummer mill. The pair used a wheelbarrow to carry the mealies to the mill. Lindelwa Nosifiso Ndwandwe is PW1's grandchild and is younger than the deceased. The route that Sethu and Lindelwa used went through a forest. PW1 sent eight-year-old Gcina Ngozo to call the duo from the shop after they had been gone for an inordinate time. Gcina did not find the duo at the shop but saw Lindelwa standing next to the wheelbarrow next to a river on his way back home. Lindelwa is said to have told Gcina that she was waiting for Sethu.
- [7] After getting the report that Lindelwa was waiting for Sethu in the forest, PW1 went there, took Lindelwa home and gave her food. The mealies had not been ground into mealie-meal and was still on the wheelbarrow.

¹ The Children Protection and Welfare Act 6/2012 in section 2 defines a child as (a) 'a person under the age of eighteen years.'

- [8] PW1 returned to the forest with Lindelwa to look for Sethu. In the forest, Mrs Ngozo met *make* Mlotsa who was there with her son collecting firewood. PW1 was informed by *make* Mlotsa that she had not seen Sethu in the forest. *Make* Mlotsa instructed her son to collect firewood at a place which was behind her. No sooner had *make* Mlotsa's son gone to collect firewood at the said place than he came running to his mother and reported that Sethu was lying there on the ground. PW1 rushed to the place where Sethu was said to be and found her lying on the ground motionless and foaming in the mouth. PW1 said she lifted Sethu up and again lay her on the ground. At the time she was hysterical as she noticed that Sethu was dead. PW1 testified that she pulled Sethu's pants and noticed that she was not wearing her underwear. When *make* Mlotsa also arrived at the scene, she raised an alarm. The police and members of the community police were called. After a while, the police arrived, secured the scene and carried out their investigations. The police also recorded statements.
- [9] Mrs Ngozo testified that she knew the accused person; that the accused worked as a herdboys at Mr Khali Dlamini's homestead. The Dlaminis and Ngozos were neighbours.
- [10] PW1 testified further that she had, on two previous occasions found the accused and the deceased in the forest. The deceased was not at school because schools were closed as a result of covid. She admonished Sethu to concentrate on her school work and not on boys. Sethu did not respond to her mother's counsel. On another occasion, PW1 says she again found the duo in the forest and when she called the accused, he fled the scene. It is PW1's evidence further that at other times when she sent Sethu and

Lindelwa to the shops, she saw the accused approach and delay them along the way.

- [11] During cross examination, PW1 stated that she did not know that Sethu and the accused were in a romantic relationship. PW1 testified that she had no knowledge of a misunderstanding between the accused and the deceased emanating from the latter two-timing the accused on the day Sethu died.
- [12] The Crown also led the evidence of Sethu's father-PW2 Mr Mandlenkhosi Christopher Ngozo. He testified that he was present at the Mbabane government mortuary before a post-mortem examination was carried out on Sethu. He testified that before the post-mortem examination was carried out, he observed that the mouth of Sethu was red in colour as if it was burnt. PW2 was not cross examined.
- [13] PW3 is Zandile Lucia Simelane, a resident of eSigangeni and a neighbour of the Ngozos. It is her evidence that she had employed the accused as a herdboys and he had worked for her for about two years before Sethu died. PW3 testified that on the day Sethu died, the accused had informed her that he was leaving his employment and was now returning to his parental home as plans were afoot to get him back to school. The accused then left PW3's homestead. On the day the accused left, PW3 got information that the accused had been seen with the deceased earlier on the day. PW3 testified that the accused and Sethu were in a romantic relationship. On the following day, she went to Sethu's parental home to pass her condolences. She then went to Mbabane. In Mbabane she met the accused and exchanged pleasantries with him.

- [14] It was when PW3 enquired from the accused how he had left Sigangeni that the accused is said to have asked PW3 if anyone had seen him leave. Immediately, the accused fled from PW3, crossed the road and disappeared at the bus rank, ducked and dived from PW3. PW3 met her cousin-Phumlani Sihlongonyane and asked him to help arrest the accused. Phumlani arrested the accused when he was next to the Jet entrance. The accused was taken to the plaza police post where he was handed in by Phumlani Sihlongonyane in the presence of Zandile Lucia Simelane- PW3.
- [15] Mr Phumlani Emmanuel Sihlongonyane's evidence is that he arrested the accused person at Mbabane bus rank after he got information that the accused was involved in the death of the deceased at eSigangeni. Mr Sihlongonyane knew the accused from eSigangeni. When PW4 arrested the accused, he informed him that the police were looking for him. The accused is said to have retorted and said he had done nothing wrong.
- [16] At the plaza police post, the accused was received by PW5 3198 Sergeant Mbhamali in the afternoon of 27 March 2021. Sergeant Mbhamali called Assistant Inspector Gcinile Fakudze to inform her about the accused. PW5 recorded a statement from Zandile Simelane.
- [17] The investigating officer in this matter is 5277 Detective Assistant Inspector Gcinile Fakudze. On 26 March 2021, she received a report of the sudden death of Sethu Ngozo at eSigangeni. She was with other police officers when she went to the scene of crime at eSigangeni. At the scene of crime, she found a lot of people. She found that the scene of crime officer Constable Motsa had attended the scene of crime already. At the scene of crime-a forest- she found the body of the deceased lying dead and motionless. She interviewed Busisiwe Ngozo and Likusasa Mlotsa who were

at the scene of crime at the time. The police were informed that when the deceased left home on the fateful day, she was with Nosifiso Ndwandwe. When the police arrived at the scene, Nosifiso was not at the scene. The police recorded a statement and opened an enquiry file. On 27 March 2021, Nosifiso was brought to the police station by her grandfather. She was interviewed and a statement was recorded from her.

- [18] While continuing with their investigations, the police got information that the deceased was last seen with the accused before she died. The police went to the Dlamini homestead where the accused was employed as a herdboy. The police found that the accused left his employ on 26 March 2021. The police got information that the accused was from Mahwalala and that his parental home was at eJubukweni.
- [19] The investigating officer subsequently received a call from Mr Mbhamali, the post commander at eSwatini Plaza Police Post that the accused was at the plaza police post. The accused was collected from the police post and transferred to Mbabane police station. At the police station, the police introduced themselves to the accused, explained their mission and cautioned him in terms of the Judges' rules. It was while the police were questioning the accused that they established that he was a minor at the time as his date birth is 23 May 2003. The police found that *make* Vilakati is the guardian of the accused. The accused person's guardian was asked to accompany the accused to the social welfare department for assessment and subsequent remand before a magistrate. The accused was remanded into custody at the Juvenile Correctional Centre. The accused later made a confession before a Magistrate.

[20] By consent of the accused, defence and Crown Counsel, the confession was admitted as evidence. This was after the Court had enquired from the accused if he was aware of the confession and of its contents and whether he wanted to have it admitted as part of the evidence. The accused person's response was in the affirmative. As pointed out earlier, the confession was admitted as exhibit 'B.'

[21] The statement was made by the accused person before a judicial officer at the Mbabane Magistrate Court on 30 March 2021. The proforma form reflects that the accused was neither forced, coerced or induced in any manner to make the statement. I capture underneath the contents of the statement which are as follows:

'I am a resident of Jubukweni where my parental home is and I stay with my step mother and siblings. I have come before the presence of the judicial officer to give an explanation of what unfolded in respect of a murder case that (*sic*) I happened in respect of that I am a suspect.

On Friday the 26th March 2021 and at Sigangeni I woke up in the morning and my grandmother sent me to assist her fetch firewood and on completion of this task one of my friends Lwethu Vilakati called me on my phone and (*sic*) and he as a herd-boy in the area and invited me to come and lend a hand on a gardening task he was carrying out at his employer's place. I went there on foot and we worked and completed (*sic*). Upon completion (*sic*) he took out a cigarette to smoke and extended the cigar to me asking me if I did not want a smoke and I declined.

He again extended a similar invitation when we were in his room and I smoked and the cigarette felt unfamiliar as if it had been loaded with dagga and immediately on finishing I got dozed and dizzy and felt as if the ground was in motion and it appeared like there was fire and I took my phone and perused WhatsApp and a message came through from my girlfriend Sethu Ngozo the deceased and I could hardly make sense of what was written (*sic*) saying to may confused state and I opted to call her to explain what she was saying and she said that I had said that I wanted to see her and bid her farewell as on Monday I was billed to return to school at Mbabane Central and would stay at Mahwalala.

I tried to stand and I was intoxicated and my knees were trembling and I staggered when walking and headed to our usual meeting spot. Sethu Ngozo the deceased was in the company of her sibling going to the hummer mill and she came to our usual spot next to the forest we greeted each other and I could faintly recognize her. I

asked her where her phone was and she said she had left it in a charger at her home and I asked her that I had heard a story that she was now double crossing me and if there was any truth in that and she categorically denied that and out of nowhere in a (*sic*) dozed state I recall strangling her and dragging her by the hat from the sweater and she tried to fight back and I did not see the rest of the details and to this day I'm shocked and surprised how I did that. My girlfriend fell and I thought I was now going to the shops whereas I was going to the forest to the deceased's younger sister (her sibling) who was waiting for her I did not say anything and I went back to check on her again but she was still lying there (*sic*) motionlessly. I went back home changed and packed a bag with the aim of leaving for Mahwalala but (*sic*) guilty conscious felt in and I abandoned such and headed for the mountain and sat there for about 21 minutes and I dozed off into a deep slumber and I woke up at night and I remember having images of a reflection of having seen Sethu and when I checked I saw a huge crowd gathered at Sethu's home and it (*sic*) dawned that she had died. I left my bag in the mountain and went to Mbabane town with an aim to go to the Police station to tell them everything that had happened and I sat in the rank thinking a certain person grabbed me and said the police wanted me and I was taken to the police station and during the grabbing my phone got lost. I was then arrested and that is all I can say.

Signed by the accused, judicial officer and the court interpreter.

- [22] Dr R. M. Reddy testified that on 31 March 2021 and at Mbabane government mortuary, he conducted a post mortem examination on the body of Sethu Ngozo whose reputable age was sixteen years old. His conclusion is that the deceased died due to pressure over the neck. He also took deceased person's blood and preserved it for chemical analysis. The result of the chemical analysis, the court heard, was that Sethu's blood contained fluvoxamine, a drug used in the treatment of depression and obsessive-compulsive disorders. The post mortem report was marked exhibit 'C.'

Defence case

- [23] The accused person is an orphan. His father and mother died in 2012 and 2015 respectively. The accused was in Grade 4 when his father died; he was in Grade 6 when his mother died. When his father died, there was no one to look after him. His mother did not live with the accused when his father

died, she had moved on with her life and had two children from a different partner.

- [24] After the death of his father, the accused sought and found employment at Sigangeni at Zandile Simelane's home. He was employed as a herd-boy. He got employment as a herd-boy after he failed to get a sponsor to pay his school fees in Form one at Mbabane Central High School in 2019.
- [25] On 26 March 2021 he was at Zandile Simelane's home when gogo Shongwe asked him to help her collect firewood-a task he did and completed. On the same day, he was called by his friend Lwethu Vilakati and asked to come and help him with gardening. Lwethu offered the accused a cigarette to smoke but the accused declined the offer. The accused testified that although he smoked occasionally, he did not smoke dagga. On completion of the gardening task, the accused and Lwethu retired in Lwethu's house where the accused was again offered a cigarette to smoke by Lwethu. The accused accepted the cigarette and smoked it. No sooner had he finished smoking the cigarette than he felt his strength ebb away as well as his body temperature rise as if his body was heating up. He immediately thought the unusual reaction of his body was a result of the cigarette he had smoked. The accused testified that he became weak and his eyesight was blurred as he could not see clearly. He became tired and fell asleep. Before he slept, he was informed by Lwethu that the cigarette he had offered him was laced with dagga.
- [26] While he was asleep, his phone gave notification that he had received a WhatsApp message from Sethu. He tried to read the WhatsApp message from Sethu but could not see it clearly. He then called Sethu to find out what she was saying. Sethu enquired about the accused person's whereabouts and

reminded him that he had promised to bid her farewell as he said he would be leaving Sigangeni to return to Mahwalala. Sethu is said to have suggested that the accused meet her at their usual meeting spot.

- [27] The accused testified that when he stood up to go meet Sethu, his knees were wobbly but he walked slowly and met Sethu at their usual meeting spot. The walk from Lwethu's place to where Sethu was waiting took the accused two minutes. When he met Sethu he asked where her mobile phone was. Sethu stated that her phone was at home charging. The accused asked Sethu about a photo of herself with a male she allegedly posted on WhatsApp. Sethu told the accused that the male person in that photo was her brother. The accused would hear none of it as he stated that he knew all of Sethu's brothers. The accused informed Sethu that he had heard that she was now seeing someone else. Sethu denied the accusations.
- [28] The accused assaulted Sethu with an open hand. Sethu retaliated and further pushed the accused. The accused slipped and fell. A fight ensued. Sethu held the accused by the right shoulder and pushed him. The accused testified that he fell because he was weak. The accused then grabbed a wooden object and hit Sethu with it on the head. The accused further grabbed Sethu's hood and pulled her with it after twisting it using the strings of the hood. It is the accused person's evidence that even as he assaulted and strangled Sethu, he did not know what he was doing; he did not think of the result of his actions because he was intoxicated.
- [29] The accused testified that when he strangled Sethu, she lost strength and she began to foam on the mouth. It was when he saw foam coming out of Sethu's mouth that he let go of her neck and Sethu fell to the ground. The accused says he sat for a while thinking Sethu would come round but she did

not as she lay on the ground motionless. The accused subsequently left the deceased lying on the ground and went to the shops. On his way to the shops, he met Sethu's younger sister standing there. He greeted her and continued on his way home. At home, the accused changed the clothes he was wearing and wore clothes in readiness to leave and board public transport. He packed his clothes in his bag and bid members of the family where he worked farewell. He went to the bus stop but did not board the bus as he again went to the place where at he had left Sethu lying on the ground. After finding that Sethu was still lying there, he changed his plans and went to sleep in the mountain until the following day.

[30] It was in the next morning while he was in the mountain that he was able to see a lot of people going to Sethu's homestead. He left his bag in the mountain and travelled to Mbabane.

[31] At the market area in Mbabane, the accused testified that he met his friend Mmeli Hlandze but could not tell him about what had happened because Mmeli was rushing to Piggs Peak. The accused subsequently met Zandile Simelane and after exchanging pleasantries with her, he told her he was from his parental home at eJubukweni and was on his way to Nhlangano with Mmeli. It was not true that the accused was from eJubukweni because he testified that he slept on the mountain at Sigangeni and came to town the next morning.

[32] The accused testified that he then went to the bus rank and thought about handing himself over to the police because he felt guilty about what he had done. It was as he walked across the bridge that he felt someone grab him. The person who grabbed him told him the police were looking for him. The accused told the person in question that he done nothing wrong. The accused

denied asking Zandile Simelane if they had seen what had happened at Sigangeni.

- [33] It was not true that the accused had done nothing wrong. It was not true also that the accused was from his parental home at eJubukweni when he met Zandile in town.

Application of the law to the evidence

Provocation

- [34] During submissions, Mr Mtetwa for the accused stated that the accused was provoked by the deceased. Crucially, this submission is not based on the line of cross examination that was adopted by the defence. I will nevertheless deal with the issue of provocation vis-à-vis the case for the accused. Section 2 of the Homicide Act² states as follows:

‘Killing on provocation

2 (1) A person who-

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

shall be guilty of culpable homicide

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

Section 3 of the Act defines provocation as follows:

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

² 44/1959

the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.'

- [35] In order for the defence of provocation to prevail, there must be an act of provocation which results in the accused person losing self-control and meting out appropriate retaliation to the person who does the wrongful act or utters the insult. It is important not to overlook that the question is not merely whether the accused was provoked into losing self-control but also whether a reasonable man would have lost his self-control and having done so would have acted as the accused person did.
- [36] In my view, loss of self-control is not absolute; it is a matter of degree. This therefore means a person who completely loses his/her temper on some minor provocation and reacts with savage violence cannot hope for a verdict of culpable homicide on the ground of provocation as set out in the Homicide Act.
- [37] The accused, it would appear claims provocation on the basis of deceased's denial that she was two-timing him. Accused testified during cross examination that two days' before Sethu died he had seen her photograph on WhatsApp where she allegedly posed with a man. He then confronted her about the photo and also informed her that he had heard that she had been regularly seen in a car with a male. Sethu denied all the accusation. From this evidence, it appears that the accused claims cumulative and immediate provocation. The accused suspected that his girlfriend was two-timing him. How a denial by Sethu would, in the circumstances amount to provocation is unclear to me. What is clear though is that the evidence of cumulative provocation in the absence of immediate provocation cannot suffice to establish the elements of the defence of provocation being: the act of provocation, the loss of self-control and the appropriate retaliation.

[38] It is not for the defence to make out a *prima facie* case of provocation in as much as it is for the Crown to prove that the killing was unprovoked. In my view, the Crown has succeeded to prove that the killing of Sethu Ngozo was unprovoked.

Intoxication

[39] The accused pleaded intoxication. Section 2 of The Criminal Liability of Intoxicated Persons Act³ states as follows:

Intoxication as a defence to a criminal charge

- 2 (1) Subject to this section, intoxication shall not constitute a defence to any criminal charge.**
- (2) Notwithstanding subsection (1) intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-**
- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
 - (b) he was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**
- (3) If a defence of intoxication under subsection (2) is established, the accused shall be discharged if the case falls under subsection (2) (a) and if the case falls under subsection (2)(b) section 165 of the Criminal Procedure and Evidence Act, No. 67 of 1938, shall apply.**
- (4) Intoxication shall however be taken into account for the purpose of determining whether an accused person had formerly any intention, specific or otherwise, in the absence of which he would not be guilty of the offence charged**
- (5) For the purpose of this section 'intoxication' includes a state produced by narcotics or drugs.**

Did the Crown discharge onus placed on it?

[40] Deciding whether the Crown discharged the *onus* to prove the accused person's guilt, requires of the court to consider criminal capacity or lack

³ 68/1938

thereof against the background of intoxication. The issue is whether the accused person at the time of the event was intoxicated, which condition, when properly raised, will be an effective defence in so far as it prevents formation of the intention to commit the offence charged.

[41] In *Eadie v S*⁴ the Supreme Court of South Africa postulated that where an accused person pleads intoxication, it is incumbent on the State to prove that he had criminal capacity to commit the crime at the relevant time.

[42] In discharging the *onus* the Crown is aided by the natural inference that in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Consequently, an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the issue of intoxication. It is important that the evidence in support of the defence of intoxication must be carefully scrutinized before a decision on the issue is arrived at. In deciding the question of the accused person's criminal capacity, the court must take into account all the facts of the case including the nature of the accused person's actions during the relevant period⁵.

Conduct of the accused prior to, during and after commission of crime

[43] The conduct of the accused before, during and after the commission of the offence charged is telling. Before the commission of the offence, the accused voluntarily smokes a cigarette laced with dagga; after taking a smoke he sleeps and wakes up after his phone gives notification of a message from Sethu. Accused says he was unable to see clearly what the message from

⁴ 2002 (3) SA 719 (SCA) at para 2

⁵ *S v Rickerts* (CC 08/2015)[2016] NAHCMD 30 (25 February 2016).

Sethu was saying. Astonishingly, he was able to see and call Sethu's number. He heard, processed and understood the reminder from Sethu to come bid her farewell. Accused was able to take a two minutes' walk from Lwethu's house to their usual meeting spot with Sethu. The accused is able to give a coherent, rational and detailed account of what happened when he met Sethu and how he strangled her. He also recounts in a detailed manner what he did when he left Sethu at the crime scene. He remembers that he did not report the incident to anyone at the homestead where he herded cattle because he was scared about how the family would react towards him. In my view, the evidence reflects that the accused had the necessary intention when he committed the offence charge. The amnesia he says he had during the commission of the offence is as selective as it is devoid of any truth. I accordingly reject it as such.

- [44] The defence of intoxication is not sustained only by the accused person's word that he was intoxicated. More is required. It is the degree of intoxication that may have an effect on criminal accountability of the accused that must be evaluated. It is not enough to argue that the accused person's intoxication played some role in the commission of the offence if no evidence is led showing the extent thereof.

Presumption to have sufficient mental capacity

- [45] Regarding the *onus* to prove criminal capacity, the Crown is assisted by the presumption that every person is presumed to have sufficient mental capacity to be responsible for his/her crime and if an accused person wants to dislodge that, evidence from which the contrary may be reasonably inferred is required. Explaining this point, Lord Denning stated as follows:

'In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say 'I had a black-out.'

- [46] The relevant issue as to the degree of intoxication will have to be assessed in view of the evidence tendered, which evidence did not include any medical expert evidence on behalf of the accused person.
- [47] The only evidence that the accused was intoxicated comes from himself. It is the accused who testified that he smoked a cigarette which was laced with dagga and thereafter became intoxicated. After the accused pleaded intoxication, Mr Matsenjwa for the Crown meticulously put it to him that smoking the cigarette was a voluntary act and the accused's response was in the affirmative.
- [48] According to the provision of the Criminal Liability of Intoxicated Persons Act, the defence of intoxication can only avail the accused where the state of intoxication was caused without his consent; that is not so in this matter. In the absence of a medical report setting out the effect intoxication had on his criminal liability, the court cannot conclude that as a result of the alleged intoxication, the accused was insane, temporarily or otherwise, at the time of the commission of the offence charged.

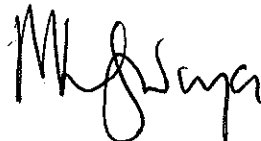
Was defence of intoxication properly raised?

- [49] The ultimate question is, whether in this case, the defence of intoxication was a properly raised defence. Put differently, does the defence only require a statement by the accused that he was intoxicated and therefore does not know and cannot remember what he did? I think not. As stated by Lord Denning, it is a difficult task to displace the presumption of mental capacity

absent medical evidence confirming same. In the present matter, no such evidence was provided and that is a serious drawback for the accused person's case.

[50] The accused testified that when he left the scene of crime he went to the shops ostensibly because he thought he would find Lwethu at the shops playing snooker. It is his evidence that he had forgotten that he had left Lwethu at his home when he went to meet deceased. The accused testified also that when he strangled Sethu with the strings of her hood, he did not know what he was doing; he also did not think of the consequences of his action because, as he put it, he was intoxicated. The selective memory exhibited by the accused in this regard is not credible. I find the claim of having been temporarily incapacitated as a result of intoxication to have a hollow ring to it. I therefore reject it as false beyond reasonable doubt.

[51] In the result, the accused is found guilty of murder.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown: Mr Ayanda Matsenjwa

For the Defence: Mr X. Mtetwa