CASE NO.115/98

IN THE MATTER BETWEEN:

REX

VS

JUSTICE TEYA MAVIMBELA

CORAM : MASUKU J.
FOR THE CROWN : MR P.L.K. NG'ARUA (D.P.P.)
FOR THE ACCUSED : MR G.M. MASUKU

JUDGEMENT
16/12/1999

The accused stands before me, charged with the crime of murder, it being alleged that on or about the 9th day of February 1997, and at or near Mbadlane area, in the district of Lubombo, the said accused person did wrongfully and intentionally kill one Mfanufikile Tsabedze. The said Mfanufikile was at the time nine (9) years old.

The accused pleaded not guilty to this offence and which plea was confirmed by Mr Masuku, the accused's attorney. In support of the charge, the Crown led the evidence of nine witnesses, whose evidence follows below.

(i) *CRONICLE OF CROWN'S EVIDENCE*

The Crown first led the evidence of James Velaphi Tsabedze (PW1), who stated that he was the deceased's grandfather and that he knew the accused very well and over many years. He recounted that on the 2nd February 1997, the accused who lived in the same neighbourhood came to greet them at his homestead at about 11h30 and to fraternise with them. The accused said he needed money to travel to Manzini but did not have a bus fare. He then said that he wanted to sell a chicken to PW 1 in order to raise enough money for the bus fare.

PW 1 then sent the deceased in the accused's presence to go to Ngogola shop with a E50.00 note to purchase a P.M.9 battery, tobacco and some matches. Ten minutes after the deceased left, the accused also took his leave and said he was going to fetch the chicken. The accused never returned to bring the chicken and the child also disappeared.

The deceased was wearing a checked shirt with red lines together with Khaki shorts with a white binding and a slit on both sides. He wore no shoes. In July 1997, PW 1 states that he heard in the news that the Police had arrested a person who had killed a child. They then went to the Chief's runner, who went with them to the Police at Siteki, where they found the accused seated in an office. The accused refused to speak to the deceased's relatives, preferring to speak to the Chief's runner Mr Thomas Solayena Dlamini, who featured as PW 5 during the trial.

PW 1 also stated that after the child's disappearance, he searched for the child extensively and went to the shop where he was informed that the deceased had been there and had bought the items he was sent to purchase. This information was furnished by the cashier, Mary Tfobhi Simelane who featured as PW 6 in the trial.

Lastly, PW 1 positively identified certain clothes which he said the deceased wore on the day of his disappearance and which were brought to Court as exhibits.

In cross examination, it was put to PW 1 that the day on which the accused came was

the 9th February, 1997 and not the 2nd February, 1997, as alleged by PW 1. This PW 1 denied. It was further put to him that the accused had gone to loan some money from PW 1's home and later drank marula beer with PW 1 and his wife for the rest of the day and night. He slept at PW 1's home and continued to drink with them the following morning. This PW 1 denied.

I am prepared to accept the accused's version of events, including both the date stated by the accused and the fact that they drank marula and slept at PW 1's home. I say this because the accused's story in this regard was confirmed by 3137 Detective Constable Isaac Lukhele (PW 8), who was given this information by PW1. I find no plausible reason for PW 1 to deny the accused's version.

It transpired in cross examination also that PW 1 went to the accused's home as neighbours and enquired about the accused but was informed that the accused had disappeared and his whereabouts were to them unknown. It was put to PW 1 that the accused had gone to work at Mzimpofu during his absence and that the elders at the accused's homestead knew this. PW 1 said he was never told that the accused was at Mzimpofu by the elders at the accused's home.

PW 2 is Irene Thoko Myeni who lives at Malindza and her homestead is about 10.5 kilometres from PW 1 and the accused's homestead. She testified that she had seen the accused in Nhlangano before. She stated that she brews marula for consumption by members of her family but not for sale. She stated that in February, 1997, a man (the accused), in the company of a young boy came to her home asking for liquor. She described the child who fits the description of the deceased given by PW 1, including the clothes worn by the deceased on the day of his disappearance.

PW 2 states further that she asked the accused whose child it was that accompanied the accused and the accused replied that it was his son born from a relationship with a woman from Malindza area. PW 2 then retorted saying that she knows all the girls in the Malindza area but does not seem to know the accused's girlfriend. In response, the accused stated that it could be that PW 2 does not know his girlfriend.

PW 2 states that she gave the accused roasted mealies and also offered him some liquor in a cup with no sugar and he then told PW 2 that his truck had broken down near the Ndlovini river. He thereafter bade PW 2 farewell and left with the deceased. The accused was not charged for the liquor he consumed because he told PW 2 that he did not have coins but had notes in his possession. PW 2 says that she was then approached by Police Officers who were enquiring about the accused and she confirmed having seen him with the deceased. At the time, the accused was in the back of the Police van and he was carrying some human bones.

In cross examination, it was put to PW 2 that she sells liquor and was engaged in the sale of liquor in 1997 but she denied that. It was further put to her that she offered the accused alcohol then believing she would get money in return. It was further put to her that she agreed to sell liquor to the accused. This was denied by PW 2. After this, it was surprisingly put to PW 2 that the accused never went to PW 2's home in February or any other time. It was stated that the accused would say that he had never seen the witness before.

In response, PW 2 stated she had seen the accused in Nhlangano and told the accused PW 2 that he was working in the Public Works Department. It also transpired that PW 2 did not remember the clothes worn by the accused but remembered what the deceased wore. This, she attributed to the fact that the deceased's clothes were extremely dirty, hence she noticed him and not what the accused was wearing.

Later in her cross examination, PW 2 stated that she did not say that she saw the accused in Nhlangano but that she had said the accused asked her where her home is and she informed him that it was at Nhlangano where she was born. Clearly PW 2 lied in this regard. According to my notes, she did say that she had seen the accused in Nhlangano.

The Crown then called PW 3 Dr Abbey Phillip of Good Shephered Hospital. He testified that he had been involved in forensic work for more than twenty (20) years and that on the 15th September 1997, he was requested to conduct a forensic examination in respect of the skeleton of a human being. His findings were that the

skeleton was that of a young adult of about fifteen (15)years who had died about three to six months earlier.

In cross-examination, the Doctor stated that in his view, the bones were longer than that expected of a nine (9) year old as the deceased was at the time of his death, hence he estimated the age of fifteen. However, in re-examination the Doctor conceded that there are situations in his experience where a nine year old would have bones similar to a fifteen year old and vice versa. That was the extent of the Doctor's testimony.

The next witness was PW 4, Alfred Moshoeshoe Tsela who is a member of the community neighbourhood crime prevention scheme. He testified that he knew the accused for a long time as he grew up in that area. According to PW 4, he had been advised of the disappearance of the deceased which coincided with the accused's disappearance in February 1997. According to PW 4, the accused was often seen in the area but he disappeared after the child and was not seen for some time. During the accused's disappearance, PW 4 stated that he went to look for the accused at the accused's grandfather's home, questioned the accused's grandfather, uncle and his wife and two boys at the home where the accused stayed.

PW 4 continued to state that these denied any knowledge of the accused's whereabouts. He proceeded to Big Bend and also to Mafutseni where the accused's girlfriend resided but did not find the accused. The accused's girlfriend, according to PW 4 conceded that the accused used to stay with her but had disappeared and she did not know of his whereabouts.

On the 15th July 1997, PW 4 got information that the accused was at his grandfather's home to attend his uncle's funeral and was approached by PW 4 asking him about the deceased's whereabouts. The accused first wept and denied any knowledge of the child. The accused later stated that the child was at Mankayane at a certain Tsabedze homestead where he was employed to herd goats. According to PW 4, he did not believe the accused and decided to report the matter to the Mpaka Police Post, where he spoke to PW 8 Constable Lukhele.

PW 4 continues that the following morning, he proceeded to Mankayane in a Police van which was driven by PW 8 Constable Lukhele. In that vehicle also were the accused and one Volo Vilakati. When they reached Velezizweni, the accused pointed at a homestead which he said was the Tsabedze homestead where the deceased was left. When they arrived there, they found that the homestead was a Nkambule homestead. The head of the family there who was introduced as PW 9 denied any knowledge of the deceased child. He also denied knowledge of the accused.

The accused, on hearing this insisted that he had left the deceased at the homestead in the hands of a Tsabedze man, which was vehemently denied by PW 9. They then apologised to PW 9, who was visibly infuriated by the whole episode at which point the accused said they should leave because they were refusing to hand the child over to them.

When they approached a river below PW 9's homestead, the accused then told PW 4 and the others that the deceased was left at Malindza. The accused said he and the deceased boarded a white mini bus and alighted at Sichushe. PW 4 and his companions proceeded there and the accused led them to a spot where a skull and other human bones were found. The leg bones were missing. The accused confirmed that those were the remains of the deceased's body. They also found clothes which were later identified as those worn by the deceased during the day of his disappearance. The accused was then handed to the Royal Swaziland Police.

In cross examination, it was put to PW 4 that he and the members of community neighbourhood crime prevention scheme severely assaulted the accused and, as a result he was taken to Velezizweni by PW 4 and companions and that he randomly pointed at Nkambule's homestead in order to abate the assaults and to save his life. He was also threatened by PW 8 with beating. This PW 4 vehemently denied. He reasoned that they politely questioned the accused and when he said the deceased was at Mankayane, they decided to go there. When they did not find the deceased, he then told them that the deceased was at Malindza, where they eventually found his bones. For those reasons, PW 4 said there was no need to assault or threaten the accused.

It was further put to PW 4 that the accused did not know the spot where the bones were found and that it was PW 4 who actually led them to the spot. This was vehemently denied by PW 4. It was further put that the accused never confirmed that the bones found were the deceased's but that he was told so by PW 4. This was also denied by PW 4.

It was also put to PW 4 that the accused's grand father knew where the accused was and that if he had been asked about the accused's whereabouts, he would have simply told them that the accused was at Mormond's Farm at Mafutseni, where he worked. PW 4 insisted that the accused's grandfather denied knowledge of the accused's whereabouts and stated that he went to the farm and was told that the accused had long left the place.

The Crown then called PW 5, Sibongile Patricia Motsa who is a cashier at Ngogola store. She stated that at around 14h30 to 15h00 some parents of a child came to enquire from her whether any child had come to the shop to purchase a battery and tobacco and her answer was in the affirmative. She was further asked the direction taken by the child after purchasing the items and she stated that she did not notice.
The child came alone to the shop at about 11h00.

The child had a E50.00 note and bought items which cost only E5.00 and she gave him E45.00 change. PW5 said she had not seen the child previously but took notice of him because he was too young to carry that sum of money. PW 4 proceeded to describe the clothes which the child was wearing. Save to add that the child also bought a box of matches, nothing turned on the cross examination, which was in any event very brief.

The next Crown witness was PW 6, Mary Tfobhi Simelane who is the wife to PW 1 and is the deceased's grandmother. Her evidence was that the deceased was sent to the shop in her presence and at around 13h00. The accused was also present, having arrived at around 11h00. She confirmed that the deceased was sent to purchase a battery, tobacco and matches.

PW 6 stated further that she had known the accused for a very long time (more than fifteen years) and that the accused stayed at a Dlamini homestead which belonged to the accused's grandfather. Her evidence was that the accused left a short while after the deceased departed for the shop. She also described the clothes that the deceased wore on the date in question.

It was her further evidence that the deceased did not return home and PW 1 went to look for him at around 14h00 but in vain. She further stated that in July 1997, they heard that the Siteki Police had arrested a criminal who had killed a child. They then requested Thomas Dlamini PW 7 to take them to Siteki where they found the accused. There the accused refused to speak to the Tsabedze family because he was afraid. Instead, the accused asked to speak to Mr Thomas Dlamini PW 7. She however did not know whether the accused and PW 7 did talk.

In cross examination, it was put to PW 6 that the day when the accused visited was on Saturday 8th February, 1997 but the witness insisted that it was on Sunday the 2nd February, 1997. It was put to the witness that the accused had been invited to drink marula but this was denied. PW 6 said the accused had just come for a visit. She stated further that there was no marula on that day and went on to deny that the accused drank marula and even slept at her homestead as put to her. She further denied that the accused continued drinking marula at her home until 11h00 the following day as it was put to her by the defence.

It was also, put to her that the accused never said he was selling a chicken. PW 6 however confirmed having been told by PW 1 that the accused had come and said that he was selling a chicken which PW 1 said he would pay with the change the deceased would bring from the shop. PW 1 then told the accused to go and fetch the chicken. That was the extent of the important aspects relating to PW 6's evidence.

The Crown then called PW 7, Thomas Salayena Dlamini who testified that in July 1997, he was approached by PW 1 and PW 6, requesting him to take them to Siteki Police Station. He agreed to do so and that when they arrived at Siteki, in the company of PW 1, PW6 and Kuleni, the deceased's father, they asked to see the

accused person.

The accused refused to speak to the Tsabedzes and wished to speak to PW 7 alone. He said the Tsabedzes obliged and he then spoke to the accused. Nobody else was present. It is PW 7's evidence that he told the accused that they were looking for the deceased who disappeared on the same day with the accused and the accused told PW 7 that he met the deceased child on its way from the shop and it was carrying E45.00, having purchased certain items.

The accused then told the deceased to return with him towards the main road where they both boarded a mini bus. They alighted at Highway bus stop and went into a forest where he killed the deceased. PW 7 asked how he had killed the deceased and the accused told him that he throttled the deceased and left him without burying him. PW 7 asked the accused why he had killed the child seeing that he had already taken the money from the deceased and the accused said he must have been bewitched. PW 7 then asked the Tsabedzes to go in and were shown the deceased's clothes which they recognised and they began to cry. Lastly, PW 7 stated that the accused said he did not speak to the Tsabedzes because he was afraid and only told the witness because PW 7 was a Chief's runner. PW 7 also stated that the accused appeared distressed but was physically in a sound state and had no bruises.

In cross examination, it was put to PW 7 that the accused never requested to speak to PW 7 but that PW 8 Constable Lukhele directed that PW 7 be brought to where the accused was. This was denied. He further denied the defence's suggestion that PW 8 directed PW 7 to come so that he could be a witness. He proceeded to deny that in the office where he spoke to the accused there were Police Officers who included Zwane, Lukhele and Mbatha.

It was further put to PW 7 that PW 8 told the accused in PW 7's presence what to say to PW 7. This was also vehemently denied, the witness insisting that he was alone when he spoke to the accused person. This witness proceeded to state that the accused spoke to him nicely and he showed no signs of fear. He stated further that the accused was emotionally distressed but physically he was fine. It was further put to PW 7 that the accused had visible injuries to the knees and that his chest was

swollen. The witness denied having seen these injuries.

The Crown then proceeded to call PW 8 3137 Constable Isaac Lukhele, who stated that he was stationed at Mpaka Police Post in July 1997. He stated that at or about 23h00, PW 4 arrived at the Police Post and informed him that the accused, who was a suspect in the deceased's death had been seen at his home. He was a suspect because he went missing on the same day as the deceased.

PW 8 states that he proceeded to Mbadlane and found the accused with some vigilantes and took him to Mpaka Police Post. According to PW 8, the accused was fine and had no injuries on his body. At the Post, PW 8 asked him about the deceased and the accused stated that he knows the child and that the child was at Velezizweni in the Mankayane area. The accused promised to take PW 8 to where the deceased is. He gave the accused blankets and allocated him an office in which he would spend the night.

The following morning, PW 8 states that he went to the accused, greeted him and gave him water to wash and some tea. The accused re-affirmed his willingness to lead PW 8 to Velezizweni where the deceased was. Together with the accused, PW 8 proceeded to Mbadlane where PW 4 and Volo Vilakati embarked and they proceeded to Velezizweni to a Tsabedze homestead, where the accused said the deceased was.

On reaching the summit of Ludvondvolo hill, they saw a sign written Velezizweni and they asked the accused which direction they should take in order to reach the Tsabedze homestead. The accused then pointed a homestead to which they proceeded. On arrival there, PW 8 introduced the members of his team to a man who introduced himself as Johannes Nkambule, the owner of the homestead. PW 8 and the accused then informed PW 9 about the purpose of their mission i.e. to fetch the child.

Accused then said he had left a child with a man at the same homestead, but it was not Mr Nkambule. This puzzled Nkambule who immediately summoned all the members of his household and showed the party all his children. He stated that other than the children he had shown to the party, no children were missing and no children

were employed at his home. The accused uttered not a mumbling word.

PW 8 then asked the accused if he persisted in his earlier story that he had left the child there but no answer was forthcoming. PW 8 then apologised to PW 9 about the whole episode, especially because Mr Nkambule PW 9 was visibly annoyed. The accused then said they should proceed to the vehicle which had been parked about six hundred metres from PW 9's homestead. Before leaving PW 9's yard, PW 9 asked for permission to talk to the accused. He addressed the accused saying that the accused must not play games with the Government Officers but must tell them the truth about where the child is. The accused again never replied.

When they reached the vehicle, PW 8 asked the accused where the child was, seeing that he was not at Velezizweni. The accused said they should drive back to Malindza, next to Malindza High School and he will show them. PW 8 asked whose homestead they were proceeding to at Malindza and the accused said the child is dead. PW 8 asked the accused who killed the child and the accused gave an answer. At that point PW 8 proceeded to warn the accused in terms of the Judge's Rules and they went into the motor vehicle and proceeded to Malindza.

On arrival at Malindza High School, PW 8 opened the back of the van, enquiring from the accused the direction to be taken. The accused pointed to the left and they drove on a dirt road. The accused then knocked at the back of the van indicating that the vehicle should stop. Indeed, PW 8 stopped the vehicle and the accused came out and led them to a spot at which some human bones and clothes were found. This was under a huge tree.

PW 8 then raised Police Officers from Siteki under Scenes of Crimes Department and in particular, spoke to Inspector Matsenjwa, who photographed the scene and made marks. Inspector Matsenjwa then took the bones and clothes in a plastic bag to Siteki. PW 8 also took the accused to Siteki, where he laid a charge of murder against the accused and the accused was detained there. He then returned to Mpaka, where he was stationed.

PW8 stated that at some later date, some officer from Siteki Police Station phoned

him and requested him to bring the deceased's relatives and PW 7. These were accordingly conveyed to Siteki by PW 8 who left them at the Charge Office and proceeded to Court where he had some cases to attend.

In cross-examination, it was put to PW 8 that the accused was hand cuffed to a bed at a certain homestead. This was denied. It was further put to PW 8 that when he went to fetch the accused person, the said accused person had bruises on his body. Generally, it was put to this witness that the accused was assaulted and handcuffed by the community crime prevention scheme and State Police repeatedly, at Mankayane, Sichushe area, where the bones were found and at Siteki Police Station. This was vehemently denied by this witness. It was also put to PW 8 that he threatened to shoot the accused if they did not find the deceased at Velezizweni. This again was denied.

It was also put to this witness that due to incessant assaults, the accused pointed PW 8 and the others to Velezizweni randomly and in order to avoid losing his life. This was denied. It was also put to PW 8 that he directed accused as to what he had to say to PW 7 and this was in the presence of Officers Zwane and Mbatha. As a result of that, the accused made admissions to PW 7 in the presence of PW 8 and the aforesaid Police Officers. It was further stated that at the end, PW 8 confirmed that the accused had admitted everything he had instructed the accused to admit to PW 8.

In re-examination, PW 7 stated that his role in investigating the matter was very minimal. He charged the accused and detained him at Siteki Police Station after which a Police Officer by the surname of Nhlabatsi took over the matter. PW 8 then returned to his own station. In short PW 8 denied all the allegations of assault of the accused attributed to him. PW 8 further confirmed that he only handed over the deceased's relatives to the Shift Officer and vehemently denied ever being present when the accused made his admissions to PW 7.

The Crown then called 3279 D/Sgt. Wilson Zwane, who stated that in July 1997, he was stationed at Siteki Police Station. He denied ever assisting in the investigation of the deceased's matter in any way. This Officer denied ever assaulting the accused person or seeing any of his colleagues doing so. In cross-examination, it was put to

this witness that he assaulted the accused with a Mbatha Police Officer and other Police Officers. It was further put to him that a bundle of sticks was brought into the C.I.D. room and each Police Officer there present armed himself with a stick and they proceeded to assault the accused person.

The defence further put to the witness that during interrogation, the accused was hand cuffed behind was made to stand upright and was also suffocated in the witness's presence. It was further put that as the suffocation continued, the accused collapsed and excreted on himself. It was further put to PW 9 that the accused was assaulted with sticks while he lay helplessly on the ground until a senior female Police Officer intervened. It was further put that as a result, the accused's chest swelled and he had sore ribs and was wounded on his knees.

The witness denied all that was put to him. He stated that he had not seen the accused person before. He also vehemently denied ever taking part in the investigation of the matter. He also denied ever assaulting the accused or ever seeing anybody assault him.

(ii) *Application In terms of Section 174 (4)*

At this stage, the defence applied for the acquittal and discharge of the accused person in line with the provisions of Section 174(4) of the Criminal Procedure and Evidence Act, 1938, as amended.

The Section in question reads as follows;-

> *"If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge sheet or any charge of which he may be convicted thereon, it may acquit and discharge him."*

From the Legislative nomenclature, it is abundantly clear that the decision whether to grant the discharge lies solely in the discretion of the trial Court. The question to be decided being whether on the evidence led by the Crown, a reasonable Court **might,**

not should convict the accused persons. see **REX v DUNCAN MAGAGULA & 10 OTHERS CRIM CASE NO. 43/96** per Dunn J.

From the evidence which I have above chronicled, I came to the view that there was adduced *prima facie* evidence that the accused committed the offence wherewith he is charged. I accordingly refused to grant the application for the acquittal and discharge of the accused person.

I find it quite apposite to state that in my experience, three scenarios arise at the close of the case for the Prosecution. Firstly, where overwhelming evidence against the accused is adduced by the Crown. Secondly, where the evidence led is open to some attack and a doubt persists as to whether the Court could grant a discharge. The last catergory involves cases where the Crown's evidence is hopelessly weak such that no Court reasonable or otherwise could convict thereon.

The duty of defence Counsel at this stage is to make an objective analysis of the evidence led. This analysis requires the exercise of *uberrima fidei,* which has come to be expected of all legal practitioners, from time immemorial. If at the end of the analysis the defence is of the view that the evidence adduced by the Crown falls within the first catergory, it must not move such application at all, regardless of the client's instructions.

If it comes to the view that the case falls within the second catergory, then it may move the application to see whether the Court upholds the application. In the last catergory, the defence is in duty bound to move the application and the Court, depending on the circumstances should uphold the application.

There is a growing tendency in this Court amongst practitioners to move such applications in relation to matters that fall within the first catergory i.e. where overwhelming evidence is led. This in my view borders on abuse of the Court process. In as much as practitioners, especially defence counsel appear on their client's instructions, which they are ethically bound, to vigorously pursue within the lawful, equally, they also owe a duty to the Court, as officers of the Court. They are not expected to move applications which are frivolous, spurious and vexatious just to

be seen to carry out their client's mandate. Practitioners should always strike a balance between the duty to their clients and their duty to Court. Many scholars on Legal Ethics are of the view that the latter duty should carry more weight. I fully subscribe to their school of thought.

In my view, this case clearly falls within the first catergory and as such, there was no need ethically, to move the application. Doing so, in my view did totter closely on the brink of abuse of the Court process, moreso because more often than not, the Court will be required to recline, consider and hand down its ruling thus inevitably resulting in unnecessary loss of time. This will affect the accused negatively, especially in view of the Non-Bailable Offence's Order and the congested roll that we run. In future, Section 174 (4) applications should be considered with painstaking care and moved only in appropriate cases as outlined above.

(iii) *Analysis of the Crown's Evidence.*

The Crown's evidence in this matter was in my view largely credible. Most of the Crown's witnesses were impressive and stood their ground well under cross-examination. In particular, I would mention the following – James Tsabedze, Thomas Solayena Dlamini, 3137 Constable Isaac Lukhele, Mary Tfobhi Simelane, Sibongile Patricia Motsa and 3279 D/Sgt. Wilson Zwane and PW9 Johannes Duma Nkambule.

There are certain inconsistencies in the Crown's case which merit some attention. I will start with PW 4 whom I considered not reliable in certain respects. Firstly, PW 4 Alfred Mashoesheo Tsela, stated to the Court that after the accused had been apprehended by him and members of his crime prevention scheme, he went to the Mpaka Police Post to report that he had apprehended the accused person and returned the following morning because they were already asleep at the homestead where the accused had been left.

PW 8 3137 Constable Isaac Lukhele on the other hand mentioned that the accused was taken to the Police Station that very night. His version appears to be in accord with the defence case. I find the account of this incident by PW 7 to be the most reliable one, particularly because PW 7's whole evidence in my view was highly

impressive. There were no aspects thereof by way of which I was unhappy.

Another aspect of PW 4's evidence which I found unimpressive was when the Court conducted an inspection *in loco* at Sichushe. This was after PW 4 had already adduced his evidence in court. During his evidence in Court, PW4 stated that the deceased's corpse was found under a tree covered with leaves as it was under a tree. At the scene, PW 4 then stated there were many leaves and it was a season different from the instant one. He was asked what month it was when they came to find the deceased's corpse and he said though he did not record, it was in February, although he was not certain. He proceeded to say that it was wet and during the marula season. He further stated that the grass was green and knee-high.

From the record, it is common cause that the deceased's body was discovered in July, which is in the middle of winter season. I take judicial notice of the fact that during that season, it becomes dry, with leaves having fallen from the trees. It cannot therefore be true that the grass was green and it was wet. On the other hand, it is true that the body may have been covered with leaves as deceased was killed in February, at the beginning of the winter season, he was already dead and the leaves could reasonably be expected to have covered his body by the time his corpse was found.

Another contradiction in the Crown's evidence which occasions spasms of disquiet relates to the evidence of PW 1, supported by PW 6 his wife. The two witnesses stated that the accused did not spend the night at their home on the night before deceased's disappearance contrary to the accused's story that he had spent the night at PW 1's home and that they drank marula brew for the whole night and continued drinking on the following morning, which was the day of the deceased's disappearance.

PW 8, on the other hand states that he was told by PW 1that the day of the deceased's disappearance was preceded by the drinking spree. I therefore find the evidence of PW 8 and that of the accused in accord with truth. I have no idea what may have motivated PW 1 and PW 6 to insist that the accused had not slept at their home on that night and they further claim that there was no marula that day. This indicates that PW 1 and PW 6 may have mistaken the dates.

The last but vexing contradiction relates to how PW 7, found himself at the Siteki Police Station accompanying the deceased's family. According to PW 7, he was asked by PW 1 and PW 6 to accompany them in his capacity as the Chief's runner. This was also confirmed by PW 6, who stated that in July 1997, they went to Siteki after they heard that the Siteki Police had arrested a criminal who had killed a child. They then asked PW 7 to accompany them.

PW 8, on the other hand stated that some people from Siteki Police Station called and asked PW 8 to bring the members of the deceased's family together with PW 7. It is not clear as to how the people from Siteki knew PW 7. In the circumstances, it is not clear as to how PW 7 got to Siteki Police Station. I will however accept the evidence of PW 7 himself who was corroborated by PW 6 regarding this event.

The last incident which needs mention relates to the distance between the accused's home and PW1's home. In chief, PW 4 stated that the distance from PW 1's home to the accused's home was not very far, it being within a whistling distance. PW 6 on the other hand stated in chief that the distance was about three hundred metres. When the Court made the inspection *in loco*, the distance was confirmed to be one and a half kilometers.

It is clear that the Crown's evidence in this regard is not consistent. It is however important to note that the defence put to PW 1 that the distance is five hundred metres. This clearly shows that there was a gross under estimation of the distance by all the parties, taking into account that all of the people, except the accused, appeared to me to be highly unsophisticated, their encounter with the classroom appearing to be seriously doubtful.

Notwithstanding the above criticisms of the Crown's case, I am still of the firm view that the Crown presented a *prima facie* case. The blemishes to the Crown's evidence referred to above are not in my view of a material nature. They are only superficial and do not go to the heart or root of the matter such as to disturb the witnesses' credibility on the material issues.

With regard to PW 4 and other witnesses, whom I found to have been untruthful or mistaken in certain respects, one can have recourse to the remarks of Solomon J. in **R v Khumalo 1946 AD 480 at 484,** where the learned Judge of Appeal stated as follows:

> "*Now it is no doubt competent for a Court while rejecting one portion of the sworn testimony of a witness to accept another portion; but, where a witness is*
>
> *clearly perjuring herself in matters of great importance, there should be very good reasons to justify a Court in finding that in other respects she is speaking the truth."*

The respects in which I am unhappy with PW 4's evidence and the other are not of a material nature.

(iv) *Pointing out of the Deceased's Corpse by the accused.*

The question of pointing out in Swaziland is governed by the provisions of Section 227 (2) of the Criminal Procedure and Evidence Act No.67 of 1938, which reads as follows:-

> *"…Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person, or in consequence of information given by him, may be admitted, not-withstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."*

This Section has been the subject of decision by the Court of Appeal in the cases of **JULY PETROS MHLONGO AND TWO OTHERS VS REX** App.case No.185/92 and **GEORGE LUKHELE AND 5 OTHERS** App. Case No.12/92, both unreported.

In the latter case, it was stated as follows at page 12.

> *"In regard to that Section the South African Appeal Court has laid down that*

> *the Section does not permit evidence of the confession of an Accused person, in the guise of a pointing out by him…. The same view has been expressed in the court in the case of* ***July Petros Mhlongo and Others v Rex****, an unreported* ***Case No.185/92****. There it was laid down that the relevant Section validates only the pointing out. If it forms part of a confession by the accused, it must be proved to have been freely and voluntarily made and the accused must have been properly warned of his rights."*

In *casu*, the defence never questioned the pointing out at all. The defence's story put to the Crown witnesses, particularly PW 4 and PW 8 was that it was PW 4 who led the accused and pointed to the spot where the deceased's bones were found. No mention of coercion was made which may have led the accused to point out the deceased's bones.

It was only to PW 8 that it was put that the accused had been assaulted to point out the spot at Malindza. This assault is clearly inconsistent with the motivation for the pointing out suggested to PW 4. Furthermore, PW 9, Mr Nkambule, who struck me as a honest and reliable witness completely denied that the accused was ever assaulted near his home. This was also denied by PW 4 and PW 8. When they reached Malindza, it was PW 4's evidence, corroborated by PW 8 that it was the accused who knocked at the back of the van indicating for them to stop so that he could lead them to the deceased's bones.

PW 8 stated that the accused told them to go to Malindza and he would show them where the deceased's body is. The accused proceeded to state that the child was dead and asked who killed him, the accused gave an answer, which I ruled inadmissible against him. The accused was then properly warned by PW 8, in accordance with the Judges' Rules and they proceeded to the scene where the deceased's bones were found.

In my view, the pointing out meets the two pronged test set out in the ***George Lukhele*** (supra) case, namely that the Court must be satisfied that the pointing out was done freely and voluntarily and secondly that the accused was properly warned of his rights. Although the statement made by PW 8 which was subsequently expunged

from the record is inadmissible against him the accused, the pointing out meets the rigours of Section 227 (2) and I hold that the pointing out of the bones is admissible against the accused person. See the case of **JAMLUDI MKHWANAZI v REX APPEAL CASE NO.4/97** at pages 7 – 9 and the authorities therein cited (per Tebbutt J.A.)

It is inconceivable that PW 4 would go to an isolated spot ten kilometers from his homestead and spot the deceased's body without telling his relatives, allow the accused to the lead them to Velezizweni and later turn around and point the spot as insinuated by the accused. This must be viewed in light of the evidence, confirmed by the defence in cross-examination of PW 2 that the accused did go to PW2's home on the 8th February 1997. The accused's suggestion that it is PW 4 who pointed the spot where the deceased was is therefore rejected as false, distant from all possibilities and probabilities in the matter.

This clearly negatives the allegations of assault, which came as an afterthought or came oblivious to the case earlier put. In **R v NHLEKO 1960 (4) SA 712 (A) at 720 A – D (cited in S v SHEEHAMA 1991 (2) 860 AT 873,** it was stated as follows:-

> "*….But where there is actual violence towards an accused in custody it will commonly be aimed at producing self-incriminatory statements or other conduct from fear of continuance or repetition of violence. And whether that is the purpose or not, if such statements or conduct in fact follow the violence it is a natural inference that they were or may have been induced by it.*
> *The burden rests on the Crown to prove that any statement of the accused Which it tenders was freely and voluntarily made and, if there has been violence before the statement, it must satisfy the trial Judge that the violence did not induce the statement, either because it did not have an inducing tendency in the first instance or because that tendency had in some way ceased to operate".*

In my view, the Crown has satisfied me that the pointing out was made freely and

voluntarily. One may not exclude the possibility of the accused having been assaulted before he was handed over to the members of the Royal Swaziland Police but not afterwards.

(v) *Confession made to Thomas Solayena Dlamini*

As indicated in Mr Dlamini's evidence (PW 7), the full text of which is adumbrated above, the accused, when visited by PW 7 in the company of the members of the deceased's family, requested to speak only to PW 7. The accused then proceeded to tell PW 7 how he killed the deceased. The question to be decided is that of the admissibility of that confession, regard being had to the provisions of the Criminal Procedure and Evidence Act.

The applicable Section in this case is Section 226 (1) of the Act together with Proviso which reads as follows:-

> *"Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:*
>
> *Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto"*

In my view, there are certain requirements to be satisfied before a confession can be held to be admissible according to the Section. Firstly, the confession must be proved by competent evidence to have been made by the accused. Secondly, it must have been made before or after apprehension, whether on a judicial examination or after commitment. Thirdly, it may be reduced to writing or may not. Lastly, it must be shown that such confession was made freely and voluntarily by the accused in his sober senses without any undue influence.

As to the first requirement, I am of the view that it has been satisfied. The evidence of PW 7 is in my view competent and he gave an account of what happened and was never shaken in cross-examination. In my view, he was an independent person who was not related to the deceased's family and was regarded as neutral by virtue of his position as a Chief's Runner in his area.

Secondly, it is clear that the confession was made after apprehension, as PW 7 states that he accused was then at Siteki Police Station. According to PW 8, the accused had already been charged. As to the third requirement, it is clear from the evidence of PW 8 that the confession was oral. This was not denied by the defence and the third requirement is in my view satisfied.

The last requirement is that the confession must have been made freely and voluntarily. Innes C.J. in **R v BARLIN 1929 AD 459 at 462,** stated as follows regarding the meaning to be attached to the words "freely and voluntarily made:-

> *"The common law allows no statement by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made – in the sense that it has not been induced by any threat or promise proceeding from a person in authority."*

PW 7, to whom the confession was made stated under cross-examination that he was alone with the accused when the confession was made. He stated that the accused appeared to have been emotionally distressed but physically, he was fine. It was put to PW 7 that the accused had obvious injuries to the knees and chest and that he was told by PW 8 what to say to PW 7 and after the accused had finished making the admission, PW 8 in the presence of the other Police Officers told the accused that he had done exactly as he had been instructed.

This was vehemently denied by the witness who stated that the accused had no obvious injuries and that the accused never informed him that he had been assaulted to make the confession or that he had been told what to say to PW 7.

PW 8 also denied that he had assaulted the accused with sticks and further denied

having seen anyone assaulting the accused at Siteki Police Station. He denied having told the accused what to say to PW 7 and further denied that he was present when the accused made the confession to PW 7. He also denied that he told the accused that he, the accused had admitted everything as he had been told.

I am satisfied that the confession made by the accused was made freely and voluntarily. As earlier mentioned, both PW 7 and PW 8 were impressive and credible as witnesses and they stood well to cross-examination on the question of assaults. There were no injuries seen especially by PW 7, who was an independent person and no suggestion made that the accused reported to PW 7 that he had been assaulted in order to make the confession.

Furthermore, the reason for the assault suggested to PW 8 is absurd. It was put to him that he was assaulted because he had not admitted everything and therefore it was necessary for the accused to be assaulted in order to admit to PW 7. Having pointed out the bones, there was no need for the Police in my view to subject the accused to further assaults. Even the parts of the body where he was allegedly assaulted were not consistent from the question put to PW 7 and PW 8 in cross-examination.

I therefore rule that the confession made to PW 7 was made freely and voluntarily. As PW 7 said which I believe, the accused feared to speak to the deceased's family for obvious reasons and out of remorse, he preferred to tell the whole story to PW 7. There was no suggestion that the accused was dragged into the office. In point of fact, PW 7 stated that the accused was brought into the office where they were and was not limping as would be the case if he was injured on his knees as alleged.

(vi) *The Defence Case.*

Having refused to grant the application in terms of the provisions of Section 174 (4) of the Act, the accused opted to adduce sworn testimony and called no witness. His evidence is as follows:-

On the 8th February, 1997, the accused left his mother's parental home and went to

PW 1's parental home where he arrived between 8h00 and 9h00: PW 1 then took him to his own home where they sat and drank marula until after dark. He spent the night at PW 1's home because he does not like traveling at night and was highly inebriate then. Drinking marula with him was PW 1 and PW 6.

The following morning, they woke up at around 6h00 and continued drinking with PW 1. At 7h00 PW 6 came, having made the fire and joined them in the drinking spree. They drank until 11h00, when the accused had to leave because he was to prepare to go to work. From PW 1's homestead, the accused went to Mdumezulu to the home of Mbhamali to drink marula. He arrived there at around 13h00 and returned to his mother's home very late and slept in his grandmother's hut.

The next morning, the accused woke up at 07h00 and his grandfather came to his hut and told him that PW 4 and some people had come looking for him the previous day. The accused did not discuss that issue with his grandfather as he had to rush for work in Manzini at John's farm. The said John, according to the accused was the owner of Mormond Electrical, whose farm is situate near Hhelehhele, towards Mzimpofu.

The accused said he rented a house at Mangwaneni and stayed there until the day of the night vigil where he was arrested by the vigilantes. The accused proceeded to say that he had a girlfriend who resided at Mafutseni and confirmed that PW 4 had been to his girlfriend's place once, looking for the accused and not twice as stated by PW 4 in his evidence. The accused confirmed that his girlfriend informed him that PW 4 and other men had come to look for him. According to the accused, his girlfriend told him that PW 4 had said there would be serious trouble on the day that he would meet the accused.

The accused proceeded to state that he informed his grandfather as to where he was going. During the night vigil, the accused stated that he was carrying a table into the tent and was handcuffed by PW 4. PW 4 told him that he wanted to speak to him together with the vigilantes. The accused initially refused but eventually succumbed because he did not want to be seen causing a scene during the bereavement. The accused was taken to the road where he was asked where the deceased is. PW 4 and his companions were armed with an assortment of items including sticks, sjamboks

and knobkerries. He was taken to a homestead where he was hand cuffed to a bed.

The accused says he told PW 4 and company that he did not know the child and they began to assault him severely. He could not even attend the funeral. Later, PW 4 came with John Dlamini and they conveyed the accused to Mpaka Police Post, where he was handed over to PW 8. PW 8 showed him an office where he would sleep and handcuffed his left wrist to an iron bar of the window while his ankle was handcuffed to a table.

The accused said due to the assaults, he then told PW 4 and others that the child was at Velezizweni, in a quest to keep the assaults at bay. He said he thought PW 4 and his team would not go to Velezizweni. The following morning, PW 4 and Volo armed with knobkerries proceeded with him and PW 8 to Velezizweni. PW 8 had a pistol and a small flexible stick and the accused was threatened that if the child was not found he would be killed and they would report that he was shot whilst escaping from lawful custody.

On account of the severity of the assaults, the accused pointed randomly at a place i.e. Velezizweni. On arrival there, he was asked by PW 8 and PW 4 where the home is and the accused told them that he knew nothing about it. Later, he pointed at PW 9's homestead because of assaults. He even asked PW 9 to intervene in the assaults. After PW 9 denied knowledge of the child, they went back to the vehicle and PW 4, PW 8 and Volo broke some wattle branches and assaulted him. PW 8 then said they left the child at Malindza and they returned there.

The accused said he did not raise an alarm because it was useless to do so and later said he did not ask PW 9 to intervene because he was very hungry, having had nothing to eat that morning. They then drove to Malindza and stopped next to a river and there told the accused that if he does not tell the truth, he would be left there to die. When he came out of the Police van, they assaulted him with thorny sticks and was caused to walk on a dry riverbed where the bones were eventually found. PW 4 was leading the way. The accused denied pointing at the direction to be followed.

The bones were together in one place. PW 4 then put the skull on the accused's

hands which were handcuffed since morning. Then PW 8 produced a pistol and said he would shoot the accused if he refused to take the skull. Then he agreed to take the skull. A Policeman was then called to shoot some photographs.

Thereafter, the accused was conveyed to Siteki where he was introduced to Police Officers in the Criminal Investigation Department, officers Zwane and Mbatha, who assaulted him with sticks severely after being told that he had killed the deceased. He was being assaulted because they were ridding the accused of "cleverness". The accused claims that he was standing and a jersey was put over his head and he was suffocated until he excreted. He was rescued by a female officer.

The following day, PW 8 fetched PW 7 and told the accused to tell PW 7 that he the accused had killed the child. The accused refused to do this. PW 8 then told him that he will not be convicted. He then finished talking to PW 7, after which he was told to go to make a statement to the Magistrate. The accused said he had gone to the Magistrate to confess but the Magistrate told him that he was not obliged to confess. The accused then told the Magistrate that he knew nothing about the offence but had been framed.

The accused said he told the Magistrate that he had come to make a statement as he was alleged to have killed a person. He further informed the Magistrate that he had been assaulted by the Police in order to confess to an offence he knew nothing about and even showed the Magistrate the injuries on his body as they were still fresh.

The accused proceeded to deny that he ever sold a chicken to PW 1 and further denied that he followed the deceased when he went to the shop to purchase the items he was sent to purchase by PW 1. Furthermore, the accused denied having visited the homestead of PW 2 on the day in question and he further denied knowing or having ever seen PW 2 at all. The accused confirmed that he admitted having committed the offence to PW 7, as he had been told to do. He told PW 7 that he killed the child by throttling him.

According to the accused, PW 8, Mbatha and Zwane were present when he admitted to PW 7. The accused stated that the deceased's relatives were outside at the time.

The accused further denied having requested to speak to PW 7. The accused proceeded to state that he was in a bad state, having been subjected to assaults and was unable to sleep. He was injured on his arms.

In a searching and tactful cross-examination by the Director of Public Prosecutions, some startling answers began to emerge. The accused said he did not know the deceased and had not seen him nor heard of him before. For the first time, the accused stated that he never grew up in Malindza but he would visit occasionally to see his maternal grandparents and relatives. The accused said he visited Malindza only during the marula seasons when he would drink with his friends, the closest being PW 1 whom he knew only four years ago.

The accused denied ever meeting PW 6 before the 8th February, 1997. He denied ever seeing her over the four years he drank marula with PW 1. When asked who would serve them with food in the absence of PW 1's wife, the accused said PW 1 obtained food from his aunt's place. When asked if PW 1 ever told him that he had a wife, he agreed but stated that his wife had deserted him and this was during the four years which he had known PW 1.

The accused when probed further, denied having seen the deceased on the 8th February 1997. Later, he admitted seeing the boy on that day. He stated that when the deceased was sent to the shop, he was not there but PW 1 told him that he was coming back. On his return, PW 1 told the accused that he had sent the deceased to buy tobacco only.

I will not however recapture all the salient points of the cross-examination as in my view, the accused proved to be a pathological liar. To demonstrate this, I will refer to differences in his evidence from what was put to the Crown's witnesses. Authority for the proposition that the defence case must be put to Crown witnesses is legion. In this regard, I will refer to **S v P 1974 (1) SA 581 and 582 and R vs DOMINIC MNGOMEZULU AND OTHERS CRIM.CASE NO.94/90.**

In the latter case, Hannah C.J. as he then was had this to state at page 17 and with

which I am in respectful agreement; namely;

> "*It is, I think clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution witness' testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story."*

In casu, there are elements of both. There is on the one hand a catalogue of issues which were never put to the Crown witnesses or which were never disputed and when the accused gave his evidence, he challenged or alleged for the very first time. On the other hand, there are instances where the case put to the Crown witnesses is at variance with the accused's testimony. In the latter case however, I have no hesitation in concluding that no blame whatsoever should be apportioned to the defence counsel. Defence Counsel put the case to Crown witnesses to minute detail. He could only do so from instructions given to him by the accused. Where the accused gave instructions at variance with his story, it is because the accused change his story.

The following are examples of issues which were never put to the Crown witnesses but were alleged for the first time by the accused in his evidence in chief.

- It was never put to PW 4 that the accused's girlfriend had been told by PW 4

  that when they met there would be serious trouble i.e showing bad blood between PW 4 and the accused, confirmed by the alleged assaults.

- It was never put to the Crown witnesses that when PW 4 apprehended the accused at his grandmother's home, PW 4 and his colleagues were armed with sticks, sjamboks and knobkerries.

- It was never put to PW 4 that he was with John Dlamini when they conveyed him to Mpaka Police Post. PW 4's evidence was that he got public transport to go there and actually went alone. He came back with PW 7 to fetch the accused.

- It was never put to PW 7 that he was armed with a pistol when they went to Velezizweni.

- The defence never put to PW 4 and PW 8 that on arrival at Velezizweni the accused denied knowledge of the deceased or his whereabouts.

- It was further not put to PW 4 and PW 8 that they broke wattle branches at Velezizweni to assault the accused there with.

- It was never put to PW 4 and PW 8 that on arrival at Malindza, PW 4 and PW 8 threatened to leave the accused in a forest if he did not tell the truth.

- It was never put to PW 8 that he produced a pistol and threatened to shoot the accused therewith and that the accused eventually agreed to carry the skull because was threatened with shooting by the accused.

- It was not put to PW 8 and PW 10 that the accused was suffocated with a tube at Siteki Police Station until he excreted. What was put to PW 8 is that the accused was assaulted until he excreted.

- It was never put to PW 1 that as a result of the long lapse since the time he sent the deceased to the shop, PW 1 complained to the accused that the child was not coming back with the tobacco.

- It was never put to PW 7 that he found the accused crying at Siteki

because of injuries on his arms. In point of fact, what was put to the Crown's witnesses was that the accused had been injured on his knees, ribs and chest.

- It was never put to the Crown witnesses that the accused did not know the deceased and PW 6

- It was never put to PW 1 or PW 6 that the deceased was not sent in accused's presence

- It was put to PW 1 that the accused worked at Mzimpofu later, it was put to other witnesses that he worked at Mafutseni

There are also the following discrepancies between what was put to the Crown's witnesses and the accused's evidence.

Whilst the accused stated that he had never seen PW 2, and had never been to her home, it was put to PW 2 that she had wanted to sell alcohol to the accused at her homestead in February, 1997, for financial gain.

It was put the Crown witnesses that the accused went to the home of a Mr Mbhamali at Mdumezweni, where as the accused in chief said he went to the home of Mbhamali Mavimbela.

It was put the PW 8 that the reason why the accused was assaulted at Siteki Police Station was because he had not made a full confession. In chief, he said he was assaulted because the Police wanted to rid him of "cleverness".

It was put to PW 1 that the accused worked in Manzini for Mormond Electrical. In chief, accused said he worked at Mafutseni for John a Director of Marmond.

The accused was terrible as a witness. He was fidgety and was very uncomfortable

whilst he was subjected to scorching cross-examination by Mr Ngarua. He was highly evasive and avoided answering straightforward questions, pretending that he did not understand them. Clearly the accused showed himself to be a liar and I will mention instances where he lied.

Firstly, he lied when he alleged that he never knew and had never seen the deceased and PW 6. About the child, he first said he had never seen him but then changed and said he had seen the child on the 8th February 1998. It is clear that the accused knew the deceased very well.

He also lied about the alleged bad blood between him and PW 4. At first he said PW 4 was jealous because he the accused had been recommended to be a Chief 's runner. When asked who had recommended him, he said a Mavimbela elderly man whose name he did not know and who died. Probed further as to how long he had known that man, he said it was only for two years. A chief's runner cannot be recommended if known only for two years. He later said he was not certain if this was serious because it was mentioned at a drinking spree. It must also be borne in mind that the accused in chief said he visited Malindza only for four years and only during the marula season.

The accused also lied relating to the reasons why he did not come to Malindza between 9th February and July 1997. He said it was because of work commitments and later said during that time he would go to his parental home. Earlier on, he had said he always went to Malindza to drink marula during the marula season. He proceeded to state that he did not work on weekends and could have gone to drink and from the facts proved, the reason for his disappearance in the area was the disappearance of the child.

At some stage the accused denied having been to PW 1's homestead before the 2nd February, 1997 and pretended to confuse PW 1's homestead with PW 1's parental homestead. Later in cross-examination, he admitted to have been to PW 1's home several times and that because PW 1's wife was not there (which is untrue), PW 1 obtained food for them from his aunt. In fact, it was never put to any of the Crown's

witnesses that the accused had never been to PW 1's home before the 8th February, 1997.

Another aspect in respect of which the accused lied is when he was asked in chief why he did not raise an alarm to PW 9 when he was assaulted. He first said it was no use and on second thoughts said it was because he was hungry. Earlier, it had been put to PW 9 that he was asked by the accused to intervene and this was hotly disputed by PW 9.

Mr Ngarua, in cross-examination asked the accused as to why he did not tell PW 1 that he did not know anything about the deceased disappearance at the Siteki Police Station when PW 1, PW 6 and PW 7 went to see the accused. The accused said he did not find it proper to tell PW 1 anything because he knew nothing about the child. It seems very strange the accused would not declare his innocence to his friend, who had been informed that it was the accused who had killed his grandchild.

I also note that it was put to PW 1 that the deceased was not his grandson. In chief however, the accused referred to the deceased as PW 1's grandson.

In **S v VAN DER MEYDEN 1991 (1) SACR 447 AT 449,** Nugent J. stated the approach to be adopted in arriving at the accused's guilt with absolute clarity. He stated as follows:-

> "*The **onus** of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, **R v DIFFORD 1937 AD 370 at 373 and 383)**. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the*
>
> *evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two*

> *are inseparable each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the the evidence. A court does not look at the evidence implicating the accused in*
>
> *isolation in order to determine whether there is proof beyond reasonable doubt, and so too does not look at the exculpatory evidence in isolation in order to determine whether there it is reasonably possible that it might be true."*

Having considered the evidence *in toto* in this matter, and which I have analysed in some detail above, I come to the inescapable conclusion that the Crown's case establishes the accused's guilt beyond a reasonable doubt. At the same time, there is no reasonable possibility that the innocent explanation put by the accused might be true. In light of the *prima facie* case established by the Crown's evidence, the accused could and should have called witnesses to buttress his version, to show that it could be reasonably true. For instance, a person from Mbhamali's homestead should have been called to confirm that the accused went there to drink marula as alleged.

In this regard, I find it apposite to refer to the judgement of Isaacs J.A. in **DAUKA JOSEPH MASIYA & ANOTHER vs THE QUEEN CRIM. APP. NO.7/83** at page 17, where it is stated thus:-

> "*Although of course there is no onus placed on an accused to prove his innocence, the Crown evidence in this case was such as to expect some explanation from the Appellant. Such explanation was not given. Indeed the fact that his evidence was rejected as being mostly lies is another factor that weighs the scale against him."*

The inference to be drawn from the evidence is that the wanted some money to travel to Manzini and went to PW 1's home, where in his presence, the deceased was given E50,00 to buy a few items. After sometime, the accused followed the deceased, who by then had purchased the items and met him on the way. He directed the deceased, who knew him well to board a mini bus which took them some ten kilometers away, where they walked to the home of PW 2.

There the accused drank some marula and in the company of the deceased. From PW 2's home, he went southwards to a spot some 800 metres away and there killed the deceased by throttling him. This was made in an admission to PW 7. The explanation by the accused is fraught with grave inconsistencies and improbabilities, exacerbated by the accused being highly unreliable as a witness.

In the circumstances, there is only one verdict that I can possibly return. The accused is found guilty of murder as charged.

Save where otherwise stated, I express my gratitude to Counsel on both sides for the assistance they rendered to this Court and for their professional and ethical handling of this matter.

T.S. MASUKU
JUDGE

JUDGEMENT ON EXTENUATING CIRCUMSTANCES
26/01/2000

On the 16th December 1999, the accused was found guilty of having committed the crime of murder. With the assistance of Counsel on both sides, the Court found that extenuating circumstances were existent and I then indicated that reasons therefor would follow in due course. These now follow:-

Section 295 of the Criminal Procedure and Evidence Act 67/1938, provides as follows:-

1) If a court convicts a person of murder it shall state whether in its opinion
there are any extenuating circumstances and if it is of the opinion that

there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section

shall not effect the validity of the verdict or any sentence imposed as a result thereof.

2) In deciding whether or not there are any extenuating circumstances, the Court shall take into consideration, the standards of behaviour of an ordinary person of the class of the community to which the convicted person belonged.

In **R v VILAKATI AND ANOTHER 1977 – 78 SLR 133 at 134 D,** Nathan C.J., as he then was, stated that in extenuation the question is "whether there are any circumstances, not too remotely or indirectly related to the commission of the crime which bear upon the accused's moral blameworthiness in committing it." In other words, extenuating circumstances may be referred to as any factors bearing on the commission of the offence, which morally, although not legally, reduce an accused person's blameworthiness or degree of guilt.

In the case of **DAVID KALELETSWE AND 2 OTHERS v THE STATE** Criminal Appeal 26/94, a judgement of the Botswana Appeal Court which was adopted by our Court of Appeal, in **DANIEL DLAMINI v REX** Appeal Case No.11/98, it was held that the duty to establish whether extenuating circumstances exist falls upon the Court. This appears to be supported by the legislative nomenclature in sub section (1) of section 295 quoted *ipsissima verba* above. In the case of **S v LETSOLO 1970 (3) SA 476 (AD),** Holmes J.A. stated that some factors which might be relevant to extenuation include immaturity, intoxication, provocation and many others, the list being inexhaustive. It was argued on the accused's behalf that because of the evidence, which was accepted by the Court that the accused was inebriated when he committed the offence in question, intoxication should be regarded as an extenuating factor in this case.

In the spirited argument, Mr Ng'arua argued that intoxication *per se* should not be

regarded as an extenuating factor. What must be shown is that the cumulative effect of that factor probably had a bearing on the accused's state of mind in doing what he did. Mr Ng'arua further argued that if intoxication *per se* would be held to be an extenuating factor, that would tend to send wrong signals to members of the public, namely that if you are inebriate when you commit the offence, your crime will inevitably attract a lesser sentence than that of a sober counter part. This submission has a lot to commend itself for.

Having considered the facts in this case, I come to the conclusion, although not without hesitation that intoxication does *in casu* rank as an extenuating factor, regard being had to the evidence that the accused had been drinking the whole of the previous night and continued to drink on the day of the deceased's death. No one can be able to ascertain the effect the consumption of such large volumes of alcohol had on the accused's state of mind. Certainly, the circumstances in which the offence occurred is an *inducium* that the accused may not have been in full possession of his mental faculties, his sense of humanity and compassion having been completely switched off. This may be attributed to the excessive consumption of alcoholic beverages.

In view of the aforegoing, I hold that intoxication does *in casu* constitute an extenuating circumstance thus saving the accused person from mandatory death sentence prescribed by the Criminal Procedure and Evidence Act, 67/1938.

T.S. MASUKU
JUDGE