

In the matter between:

REX

VS

**THEMBA ENOCK MABUYAKHULU
THWENTWE BHEJANE MYENI
VUSI MBHAMALI
LUBHOKO ABSALOM MABUZA**

CORAM	:	MASUKU J.
For the Crown	:	MR J.W. MASEKO
For Accused 1 & 2	:	MR G.M. MASUKU
For Accused 3 & 4	:	MR H.M. MDLULI

JUDGEMENT

i) **CHARGE AND PLEA**

The accused persons stand before me charged with the crime of murder. The indictment alleges that on or about the 17th June, 1999 at or near Mlindazwe area in the Shiselweni District, the said accused persons, each or all of them acting in common purpose did wrongfully and intentionally kill one Mpiyonke Volovolo Shabangu.

The accused persons all pleaded not guilty to the charge and their respective pleas were subsequently confirmed by their respective Counsel.

ii) **ADMISSIONS.**

By consent of all the counsel involved the following issues were admitted. First, the identity of the deceased, which dispensed with the need to call the identifying witness. Second, the cause of death. In this regard, a post-mortem report prepared by Dr R.M. Reddy was handed in by consent and was marked Exhibit "A".

The said report records that the deceased died as a result of haemorrhage resulting from multiple injuries. It further recorded the following ante-mortem injuries: -

- a) laceration over left parietal 5 x 2cm scalp deep, left ear 4 x 2.1cm bone deep
tempered region 1.3 x 1cm 2.1. x 1.3cm scalp deep with confused abrasion over
left neck, outer aspect 7.2cm area. Fracture left orbit, temporal bone with subdural
haemorrhage over brain about 50ml and fractured lower jaw,
loosened teeth present.
- b) abrasion over back of left shoulder 3.7cm and 1.6cm area present
- c) abrasion over back of right shoulder 2.3.cm area
- d) penetrating wound over back of right chest 3.6 x 1 cm lung deep. It involved
muscles, intercostals structures, pleura, 7 rib lung. Back to front downwards,
pleural cavity contained 450 ml blood edges clean cut angle sharp.
- e) penetrating wound over outer and back of left chest 2 x 1cm, 1.8 x 1cm, 1.7 x
1cm, 1.8 x 1cm lung deep. It involved muscles, intercostals structures, pleura,
5 rib edges clean cut, angle sharp front to back medially, pleural cavity contained
about 950 ml blood.
- f) penetrating wound front of lower chest 2 x 1cm intestine deep. It involved
muscles, peritoneum, intestine front to back edges clean cut, angle sharp.
- g) penetrating wounds front of abdomen left 1.8 x 1 cm intestine deep. Front to
back, involved muscles, peritoneum, intestine, blood in peritoneal cavity about
600ml edges clean cut, angle sharp.
- h) penetrating wounds front of lower chest 2 x 1 cm intestine deep. Front to
back,
involved muscles, peritoneum, intestine front to back edges clean cut, angle
sharp.
- i) abrasion over left knee 1.7 x 1 cm.

Third, the Court was informed that the accused persons made confessions freely and voluntarily before two Magistrates. There was no objection to the handing in of the same, nor was the free and voluntariness of the statements challenged on the accused person's behalf. The statements were accordingly handed in and marked Exhibits 'B', 'C', 'D' and

‘E’, respectively. In short, all the accused persons, in their statements stated that the deceased threatened to kill them through witchcraft machinations which induced fear in them and the sought for, found the deceased, assaulted him with stones and sticks and as a result of which he died.

iii) CHRONICLE OR CROWN’S EVIDENCE

The Crown, in support of its case called five witnesses. PW 1 was MkhETFwa Myeni. He told the Court that he resides at Mdlebeni area in the Shiselweni region and that he knew the deceased and the accused, all of whom were from his home area. He testified that on the 17th June, 1999, which was a Thursday, he woke up in the morning to cut some logs in the forest and that on his return, he saw people who congregated some distance away and had their heads together.

It was his further evidence that he met some of those people next to the garden, when he was about to enter his home. Those that he met were Accused 2 and 3, who greeted him and he responded. He passed them and arrived at the Matsenjwa homestead where he lived. After his arrival at the homestead, Accused 1 and 4 arrived and they were carrying knobsticks. They performed the “*giya*” dance and they announced that they had killed the deceased. PW 1 stated that this declaration surprised them because they saw bloodstains on the said accused persons’ knobsticks. After that, the accused persons left.

PW 1 further testified that when he saw these people with their heads together he could not identify them but recognised them as the same persons he had seen when he met them at his home. It was his further evidence that he never lost sight of the persons he saw until he reached his home. PW 1 was shown two knobsticks which he positively identified as those which were being carried by Accused 1 and 4 on the day in question. He identified one in particular with a crack and which he said was in Accused 1’s possession.

PW 1 further testified that Accused 2 and 3 were not carrying anything when he met them. It was his further evidence that after Accused 1 and 4 announced that they had killed the deceased person, he went to the scene and found the deceased already dead. The scene where the deceased had died was about 800 metres from his homestead and it was his evidence that the deceased was on a path that crosses a road. It was this witness’ further testimony that he knew a man in his area known as Guguza and who had died. He however denied any knowledge how the said Guguza had met his death. It was his further evidence that he did not attend Guguza’s funeral and did not even know when the Guguza was buried.

In cross-examination by Mr Masuku, PW 1 stated that he was the deceased’s brother – in-law and that he was taken aback at the deceased’s demise. He confirmed that he knew the accused persons and also knew Guguza as a resident of the same area but whose home was far from the witness’ home. There were three rivers to be crossed in order to reach Guguza’s home.

Mr Masuku asked why PW 1 did not attend Guguza’s funeral and he stated that he was away. His relationship with said Guguza was however cordial. He admitted to be a person who imbibes alcohol but denied having partaken of any intoxicating liquor on the day in question. PW 1 further informed the Court that the “*giya*” dance by A1 and A4

was only three metres from where he was. It was put to him that the said accused persons never “*giyaed*” on the said day but PW 1 insisted that they did. It was PW 1’s further evidence that A 1 and A4 had gone to his home to drink traditional brew.

He stated further under cross-examination that there were less than ten people who were at the homestead on that day. Mr Masuku proceeded to ask PW 1 about his religious persuasion and he stated that he believed in ancestral worship but did not believe in witchdoctors nor in their potions (*muti*). He further stated that he did not believe in the existence of witchcraft. It was then put to him that the accused persons genuinely believed that the deceased was bewitching them. PW 1 stated that he did not know anything about that.

Mr Masuku further stated that he was instructed by his clients that they were threatened with death by the deceased. PW 1 stated that he had no knowledge about that. He stated further that his further instructions were to the effect that the threat by the deceased caused the accused persons to defend themselves spontaneously. PW 1’s response was that he did not know about that.

Mr Mdluli, also subjected PW 1 to cross-examination. In the battle of wits that ensued, PW 1 was asked if Guguza was related to any of the accused persons and PW 1 stated that Guguza was related to all the accused person and was the father of A 3. He was asked as to how Guguza died and he stated that he did not know. PW 1 conceded however that he heard that Guguza was sick before he died but did not get to know the nature of the sickness. Mr Mdluli stated that he was instructed that PW 1 knew of the illness which culminated in Guguza’s death but PW 1 denied this.

Mr Mdluli further stated that he was instructed that PW 1 knew that Guguza was bleeding through the mouth and that this was common knowledge throughout the entire community. PW 1 agreed that he heard of the sickness but did not know of its nature because he lived far from Guguza’s home. PW 1 was further asked if he knew that the deceased had been summonsed to answer certain charges by the Chief and whether he knew that the deceased was, as a result of that summons ordered to vacate the area. PW 1 answered in the negative. Further, PW 1 was asked if he attends the Chief’s summonses and he stated that he does not normally attend.

It was put to PW 1 that he knew that the deceased was called by his Chief to answer witchcraft charges and he was found guilty, as a result whereof he was ordered to vacate the area. PW 1’s answer was that he did not know because on the day when the deceased was called, he did not attend the meeting. This prompted Mr Mdluli to ask which day, whereupon the accused stated that he did not know anything. It was put to PW 1 that he attended the hearing but he denied that.

It was further put to PW 1 that he was present when immediately after the verdict, the deceased declared publicly that he will deal with Accused 3 and 4 one by one. PW 1 stated that he was not there. It was further put to PW 1 that Guguza was on that day in PW 1’s presence threatened by the deceased who told him that he would die on a certain day and it happened. Again, PW 1 said that he did not know that. When asked if he agreed that the deceased never left the place as ordered, PW 1 stated that he heard that the deceased was around and met him on other occasions but stated that he never knew that the deceased was expelled from the area. In answer to further questions, PW 1 stated that he

did not believe any person could die due to witchcraft.

It was put to PW 1 that he does, believe in witchcraft because he was one of the forty-two people who went to complain about the deceased's witchcraft practices but PW 1 denied being party thereto. It was further put to PW 1 that he sold liquor to accused 1 and 4 but he denied this, saying the girls did so. It was put to him that A4 never performed the "giya" dance, which PW 1 denied. PW 1 was asked as to why he did not tell the Court in his evidence in chief that Accused 1 and 4 were served with traditional brew at Matsenjwa's homestead and he said he thought he did. Later he conceded that he did not. Mr Mdluli stated that this was deliberately omitted in order to create an impression that the accused persons were in a joyous mood. PW 1 insisted that they did performed the "giya" dance.

In re-examination, PW 1 was asked at what time he returned from the forest and he stated that it was around 12 noon. When asked at what time he saw the people he referred earlier, his answer was that he did not notice because he got delayed at a grocery shop before he saw the people. He was not even certain as to when he arrived at his home because he is illiterate. He stated however that it was after 13h00. He also told the Court that he had been at home for sometime when Accused 1 and 4 arrived.

The Crown then called PW 2, Londiwe Msibi, also a resident of Mdlebeni. She confirmed knowing the deceased, whom she stated she last saw in 1999. It was PW 2's evidence that she was going to the shop and passed his body – he was dead. She then informed Obed Dlamini about the deceased's death. It was her evidence that she knew that the deceased had died because there was a big stone resting on his head and his head had been crushed. It was PW 2's further evidence that the deceased had clothes on his body. She identified a green/yellow jacket which she saw before coming across the deceased's corpse but stated that she did not know to whom it belonged.

She was shown a stone which she however stated that she could not confirm if it was the one she found on the deceased's head.

In cross-examination, Mr Masuku asked PW 2 to describe the terrain when she found the accused and she stated that it was next to cultivated fields, next to a pathway. She was further asked if there were rocks other than the one she found on deceased's head and her answer was that she did not take notice of the area around the corpse. Mr Mdluli did not ask any questions from PW 2.

PW 3 was Obed Silevana Dlamini, who is also resident of Mlindazwe. His evidence was to the effect that he knows the accused persons as they are from the same area. It was his evidence that on a Thursday last year at around 13h30, the accused persons came to his home and there asked for the deceased who was at PW 3's home. They accused him of having stolen a chicken from a Matsenjwa homestead which he proceeded to sell at a George Dlamini's home. PW 3 further testified that he then said to Accused 2, the Chief's Runner that it was fortunate that he was present and would attend to the alleged crime.

PW 2 then stated that he saw a Police van driving past and he told the accused to walk on a certain path in order to meet the Police van but the accused persons insisted on taking another path. It was PW 3's further evidence that since Accused 2, the Chief's runner, was present, he allowed the accused persons to take the path they chose disregarding the one

which he had chosen.

It was PW 2's further evidence that a girl later came to his home to report that the deceased had died. The Royal Swaziland Police also came looking for the deceased. PW 2, the girl and the Police then went to the scene where the deceased had died. According to PW 3, the spot where the deceased lay was about 2 to 3 kilometres from his home. On arrival at the scene, PW 3 stated that he saw a roundish stone on the deceased's head. Next to the corpse was a tree, which was next to a ploughing field. It was PW 3's evidence that there were some stones in the area which had been used to demarcate the extent of the nearby fields.

PW 3 was shown two stones and he identified the round one, which he confirmed was on the deceased's head. PW 3 further testified that he observed injuries on the deceased's body, which in his view were caused by a knife. These, according to PW 3 were from the waist to the neck area. In particular, PW 3 stated that he observed two stab wounds on the side of the neck and another two on the deceased's back. It was PW 3's further evidence that there was a lot of blood on the deceased's head and also observed fractures on the head which led to his jaws being twisted. PW 3 also testified that the deceased's corpse was then taken to the mortuary and later buried. PW 3 then went to the Chief's kraal to report the news of the deceased's death.

Mr Masuku cross-examined PW 3. He was asked if deceased enjoyed a harmonious stay prior to his death and PW 3 stated that the deceased's latter days were not happy ones because some people went to lodge complaints to the Chief about the deceased, to the effect that he was ill-treating them. Asked about the basis of the complaint, PW 3 stated that the complaint was that the deceased, after having imbibed alcoholic beverages would, late at night, on his return home from the drinking spree shout and insult the residents. PW 3 stated that the only complaint communicated to the Chief related to the insults.

Mr Masuku stated that according to his instructions, a complaint was filed with the local council relating to allegations of witchcraft. PW 3's response was that he was unaware of that allegation. It was his further testimony that he knew Guguza well but was unaware of what caused his death, although he was aware that Guguza was sick. When put to him that Guguza died due to witchcraft spells, PW 3 stated that he did not know that. Mr Masuku further stated that according to his instructions, Accused 1 and 2 were threatened with death by the deceased publicly, stating that he would deal with them in the same manner as he dealt with Guguza. In response, PW 3 stated that this may have been reported to the Chief's kraal but he never heard about it, save the complaint he referred to earlier.

Mr Masuku further stated that the threat uttered by the deceased instilled fear in the accused persons and further infuriated them and PW 3 would not comment thereon. Mr Masuku further stated that the existence of the threat on the accused persons compelled them to act spontaneously in trying to defend themselves. It was PW 3's response that the accused persons should have gone to the Chief to report the matter rather than to take the law into their own hands. When asked whether he believed in the existence of witchcraft, PW 3 stated that he had heard about witchcraft but did not know anything about it.

When it was Mr Mdluli's turn to cross-examine PW 3, he asked if PW 3 attended Guguza's funeral and the answer was in the negative, PW 3 stating that he had been sent to go somewhere. When asked what happened at Guguza's home after the funeral, PW 3 stated

that he only heard what happened from other people. PW 3 was asked if as a member of the Royal Kraal he sits to hear cases of community members and he answered in the affirmative.

Mr Mdluli stated that he was instructed that the Luhlekweni people, including Accused 3 and 4 complained that the deceased was uttering threatening words to their lives. PW 3 confirmed that the people came to report to Indvuna of the area but their complaint was that he insults them at night. PW 3 agreed that the matter was referred to the Chief but denied that the allegations against the deceased centred around witchcraft. Mr Mdluli stated that he was instructed that the deceased had said that the accused's beards will face upwards and that PW 3 was told about it. PW 3's response was that this allegation was made but the deceased denied it. Mr Mdluli further stated that the accused was also alleged to have said that women's private parts will also face upwards and PW 3 response was that these were the insults complained of. He denied having been told that the deceased said that the people's ears would be filled with sand.

PW 3 denied that the penalty meted to the deceased was expulsion from the area, as suggested by Mr Mdluli. According to PW 3, the deceased was removed and allocated land in another area in the same chiefdom. PW 3 agreed however that the deceased never complied with the Chief's directive and further agreed that Guguza died after the Chief's directive had been issued.

Mr Mdluli further stated that according to his instructions, the deceased did not take kindly to being ordered to leave the area and therefore uttered unsavoury words to Guguza and the deceased and further told Guguza that he will die on a certain day. PW 3 stated that he was unaware of that. It was put to him that this did happen and PW 3 stated that he could not deny that because he did not know about it. He further stated that he did not know about Manwele coming to Guguza's home and telling the mourners that she was remorseful because she had used muti on the deceased's instructions to bewitch Guguza, which muti had been given to her by the deceased. PW 3 further denied knowing about an allegation attributed to the deceased after Guguza's death, to the effect that the accused were next in line. He however stated that he would hear such issues when they are reported at the Chief's kraal. It was also put to him that fearing the imminent danger threatened by the deceased, the accused persons acted in the manner they did, including Accused 3, Guguza's son. PW 3 stated that he understood what was being put to him.

In re-examination, PW 3 was asked how far apart is the deceased's home from Guguza's and it was PW 3's evidence that they were neighbours. It was his further evidence that Accused 1's home is close to Accused 3's but Accused 4 was across a mountain, but they fetched water from the same stream. He further stated that he did not know whether A2, A3 and A4 were the deceased's friends before his death.

The Court then asked PW 3 the nature of the charges which he presided over and he stated that there were no charges laid against the deceased but only complaints to the effect that the deceased was insulting them. When asked about the nature of Guguza's sickness, PW 3 stated that he was informed that he had a sharp pain around the chest.

PW 4 was Mavela Mandla Mbhamali, also of Mlindazwe area. He testified that he knew the deceased and the accused persons as they were all from his area. It was his evidence that on the 17th June, 1999, he went on a drinking spree at Matsenjwa's homestead when

Accused 1 and 4 came carrying knobsticks and announced that they had killed the deceased person. It was his further evidence that they invited any relative of the deceased there present to identify himself so that they could also kill him.

According to PW 4, all the people kept quiet and looked at each other in amazement. It was his further evidence that Accused 4 proceeded to say that in order to confirm that the deceased had given up the ghost, he produced a knife and plunged it into the deceased's body. Accused 1 and 4 further invited persons who wanted to see the deceased to take a certain footpath and further stated that the deceased's corpse was next to a cotton field. PW 4 further testified that a Police van approached and Mr Matsenjwa asked his patrons to take their leave as the Police may have laid a charge for selling the brew illegally.

PW 4 stated further that as they moved away, he beckoned some of the patrons to go with him to the spot where the deceased had met his death as the Police were already there. It was PW 4's evidence that they proceeded to that spot and on arrival there, he requested from the Police to see the deceased's corpse, whereupon the Police agreed but instructed PW 4 not to move too close to the deceased such as to disturb the scene of the crime. PW 4 further testified that he observed that the deceased's head had been crushed with stones and that on the left side, there were visible injuries. It was his further testimony that he did not see the knife that Accused 4 spoke about. Lastly, PW 4 stated that Accused 4 never disclosed why the deceased's relatives also had to be killed.

In cross-examination, Mr Masuku asked what type of brew PW 4 was imbibing and PW 4 stated it was traditional brew. He stated that when A 1 and A 4 arrived, he had arrived at the Matsenjwas less than thirty minutes earlier. He denied having imbibed any intoxicating beverage earlier and further stated that when he was forced to depart, he had consumed about 750ml of brew and was sober as he had not started feeling the effects of the brew. When asked if he established the cause of the deceased's death, PW 4 stated that the deceased was regarded as a witch. PW 4 further stated that witchcraft exists and that if you believe in it can affect you but if you do not it cannot.

PW 4 was asked if it would surprise him that the deceased had threatened to bewitch Accused 1 and 2 and his answer was that he had heard that from other people but one would not lightly believe such. He stated that he did not know as was put to him that the deceased bewitched Guguza. He stated further that he had heard from other people that the deceased had publicly threatened to bewitch the deceased.

Mr Masuku stated that he was instructed that the accused were provoked and acted spontaneously in order to avert the deceased's threat and PW 4 agreed. Mr Masuku further stated according to his instructions the deceased's threat to bewitch the accused persons was reported to the Chief's kraal for purposes of intervention and PW 4 stated that the Indvuna, in his presence referred the matter to the Chief at Qomintaba. According to PW 4, he did not follow up the case at Qomintaba since it is far from his home. PW 4 confirmed hearing that the deceased was to be resettled elsewhere but denied hearing that some men were commissioned by the Royal Kraal to look for an area to which the deceased would be resettled.

In answer to Mr Masuku's question, PW 4 confirmed that the deceased refused to leave the area. He stated that he was informed that the deceased had said that he would not leave without killing the leaders of the people who went to report him at the Royal Kraal. PW 4

agreed with Mr Masuku's instructions to the effect that at Matsenjwa's homestead, Accused 1 never mentioned that he had killed the deceased and never invited the deceased's relatives to identify themselves.

Asked about how the stones were positioned in relation to the deceased's corpse, PW 4 stated that one was on the side of head below the neck and one was in front of the deceased's face and both had traces of blood. PW 4 was asked to describe the terrain where the corpse lay and he stated it was in a grassy, uncultivated area, under a tree and that there were no stones around, save some which were placed to demarcate the fields. PW 4 stated that it is some of those stones that were used by the accused to assault the deceased person. The witness correctly described and identified the stones which were brought as exhibits in Court. Looking at the stones, the Court did confirm that both had traces of blood and in addition, the round stone had some human hair embedded in it.

Mr Mdluli also cross-examined this witness. From the cross-examination, the following transpired. Firstly, that PW 4 knew PW 1 and that they were together imbibing alcoholic beverages at the Matsenjwa homestead. Secondly, that PW 1 arrived earlier than PW 4. PW 4 confirmed that Accused 4 told them that he stabbed the deceased to confirm if he had died and that this was said in PW 1's presence, and that PW 1 must have also heard those words. Mr Mdluli stated that he was instructed that Accused 4 never uttered those words but PW 4 insisted that he did. He further denied that the deceased never referred to any knife as was suggested by Mr Mdluli.

Mr Mdluli put it to PW 4 that Accused 4 never made the utterances that were attributed to him but PW 4 insisted that he did and that had it been otherwise, he (PW 4) would not have known that the deceased had died whilst they were imbibing the brew. It further transpired during the cross-examination that PW 4 knew Manwele, whom she described as his aunt's daughter. It further transpired that PW 4 did not attend Guguza's funeral. It transpired further that PW 4 attended the hearing at the Indvuna's home but that he did not attend the hearing at Qomintaba.

PW 4 further told the Court under cross-examination that the charges levelled against the deceased were by his neighbours who complained that on his return from drinking sprees, the deceased would when passing near their homes, utter words to the effect that sand would fill the men's mouths and women's private parts. PW 4 further stated that on account of the seriousness of the allegations, the Indvuna could not issue a verdict but referred the matter to Chief Tsekwane.

PW 4 agreed with Mr Mdluli's instructions that Accused 1,2 and 3 are among the people to which the allegations above were directed but denied that Accused 4 was included because he lived on the other side of the mountain. When it was put to him that Accused 4 was also threatened, PW4 stated that he did not know that because he did not see Accused 4 at the Indvuna's kraal. He denied that Accused 4 was at the Indvuna's kraal. This witness was not re-examined.

The last Crown witness was 2267 D/Sgt. Danger Dlamini (PW 5), who was the Investigating

Officer in this matter. It was his evidence that on the 17th June, 1999, he received a report and went to Mlindazwe area, where he found the deceased lying down next to a footpath. He saw stab wounds on the deceased's left side of the body and between the shoulders at

the back. It was his further evidence that he observed some minor injuries on the left side of the deceased's body. He testified further that he found a stone resting on the deceased's head and thereafter obtained information which led him to the Accused persons before Court. He first went to Accused 2, whom he found at home and cautioned him in accordance with the Judges' Rules. As a result, Accused 2 told him something which amounted to a confession. It was PW 5's further evidence that at A2's homestead, he also found Accused 3, whom he also duly cautioned. Accused 3 also told PW 5 something that amounted to a confession. The same applied to Accused 1 who was found at his home.

PW 5 stated that as a result of the caution, in addition to giving a statement that amounted to a confession, Accused 1 gave him a knobstick and a knife. PW 5 further testified that Accused 4 was not found at his home but he surrendered himself to the Police on the 21st June, 1999, and having been duly cautioned, Accused 4 led PW 5 to his home and handed a knife and knobstick to PW 5. All the items referred to were handed into Court as exhibits 1,2,5 and 6 by PW 5.

PW 5 also handed in two stones which he found at the scene where the deceased was found. The round stone, according to PW 5 was found on the accused's head and had traces of blood on it. PW 5 also handed in another stone which he said was in front of the deceased's face and may have been used in killing the deceased person. These stones were marked Exhibits 4 and 7, respectively. PW 5 also handed in a green/yellow jacket which he said belonged to the deceased and was found next to where he had died. The jacket was marked Exhibit "3".

In cross-examination, Mr Masuku asked PW 5 whether from his investigations he was able to ascertain the reasons which led to the deceased's death and PW 5 stated that the accused persons accused the deceased of being a witch and that on that day, they had attended the funeral of Accused 3's father. Mr Masuku further stated that according to his instructions, Accused 4 only volunteered the knobstick but the knife was found by PW 5 after a random search. This PW 5 denied.

On the other hand Mr Mdluli told PW 5 that according to his instructions, Accused 4 only volunteered the knobstick and further that the knife was picked up by PW 5 inside a hut. PW 5 denied this even when it was put to him that it so happened. At this juncture, the Crown closed its case.

iv) APPRAISAL OF CROWN'S CASE

As regards the charge that the accused persons are facing, the Crown's evidence is largely credible and reliable and I have no hesitation in accepting it. The one witness whom I found to have been untruthful was PW 1 under cross-examination. There are certain important factors that he did not disclose in his evidence in chief. An example is when he did not mention that Accused 1 and 4 came to the Matsenjwa homestead and there imbibed alcohol with other people. What was most significant however were his answers in relation to the deceased's alleged witchcraft practices. He denied knowledge of important community issues which were common knowledge like how Guguza died and; that Guguza was summonsed to the Chief's kraal.

This is apparent from this excerpt as recorded in my notebook:-

Q: Do you know whether the deceased was called to the Chief's kraal to answer Certain charges

A: No.

Q: Did you get to know that the deceased was told by the Chief to vacate the area

A: No.

Q: I put it to you that you know very well that deceased was called by the Chief and tried for witchcraft and the verdict was that of guilty and he was ordered to vacate

A: I do not know because even on the day they were called I did not go there

Q: Which day

A: I do not know anything.

From the above, it is clear that at the beginning, the witness knew nothing about the summonses but later mistakenly admits knowledge and immediately thereafter pleads ignorance. He was fidgety and uncomfortable under cross-examination. I entertain no doubts about the fact that he lied about the allegations of witchcraft levelled against the deceased, and the deceased's subsequent summonses to the Royal Kraal. His evidence in chief is however unaffected in my view, as was correctly pointed out in **R v KHUMALO 1946 A.D. 480 at 484**, that the triers of fact are entitled, while rejecting one portion of the sworn testimony of a witness, to accept another portion.

PW 2 was impressive in her evidence and I cannot fault her. PW 3 was another impressive witness. I was however unimpressed with his account of the nature of the allegations levelled against the deceased before the Chief. According to PW 3, these allegations only related to insults and vulgar language the deceased addressed to his neighbours. Later in cross-examination, PW 3 however acknowledged that allegations of witchcraft were levelled against the deceased but the deceased refuted them. I am prepared to hold that PW 3, like PW 1 was being economic with the truth regarding the allegations of witchcraft levelled against the deceased.

The truthfulness of the allegations of witchcraft are clear from the evidence, particularly that of PW 4, who was an independent and impartial witness. He was truthful and adduced his evidence in a straight forward and matter of fact manner. His evidence supported the defence's story that there was a general belief in the community that the deceased was a witch. He even confirmed that the deceased was summoned before the Chief and the Indvuna to answer allegations of witchcraft. He even confirmed that the deceased was ordered to vacate the area because of the allegations.

From this evidence, I am satisfied that the Crown established a *prima facie* case against the accused persons. It is clear from the acceptable evidence of PW 1, confirmed by that of PW 4 that Accused 1 and 4 came to the Matsenjwa homestead where they "giyaed" and Accused 4 announced that they had killed the deceased. I reject the denial by the accused persons of this event. PW 1 further stated that he saw some men with their heads together and whom he later identified as the accused persons.

In addition to this, PW 4, whom I regard as truthful and who was unshaken in cross-examination, stated that Accused 4 even declared that to confirm if the deceased had died, he stabbed the latter with a knife and further invited those who wanted to see the deceased to walk on a certain path. PW 4 followed this path and saw the deceased dead with injuries consistent with those that the Accused 4 mentioned. Furthermore PW 1 and PW 4 both confirm that Accused 1 and 4's knobkerries trace of blood.

PW 3 also gave evidence which I consider reliable that connects the accused to the offence. It is not disputed that all the accused persons came to PW 3's home and asked for the deceased whom they accused of having stolen a chicken but refused to hand him over to the Police, choosing to take another path and on which they killed the deceased.

The large stones brought as exhibits also had traces of blood and the round one also had traces of human hair. All this is said appreciating that the accused persons all made confessions before judicial officers, the contents of which was not subsequently challenged neither was the voluntariness of the making those statements challenged. It is therefore clear that the Crown succeeded in establishing a *prima facie* case against the accused persons. For this reason, no application was moved in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938 for the acquittal and discharge of the accused persons at the close of the Crown's case.

PW 5 was also calm and impressed me as a truthful witness. I have no reason to fault his evidence. He was unshaken in cross-examination.

(IV) THE DEFENCE CASE

All the accused persons gave evidence under oath. Accused 1 gave evidence with which the other accused persons identified themselves and which they regarded as being applicable in their respective cases.

Accused 1's evidence was to the effect that he and his co-accused were ill-treated by the deceased who said that all the people's ears will face upwards and will be filled with sand. He further stated that men's beards and women's private parts will face upwards and be filled with sand. He further testified that the deceased said he digs his own muti and did not buy it. He stated that the following day, another man will have his knees facing upwards and indeed Makhukhula Msibi could not wake up on that day.

The following day, continued Accused 1, the **libandla** met and discussed the issue, whereupon three men were chosen to go to report the deceased's threats to the Chief's runner so that a meeting with the deceased could be convened. At that meeting, the deceased was asked if he had uttered the statements attributed to him but he refused to say anything and refused to involve himself in the talks. The matter was referred to the Indvuna, but there again, the deceased was unco-operative. The Indvuna then referred the matter to the Chief, who after questioning the deceased was satisfied that the deceased was ill-treating his neighbours. The Chief then told the deceased that he was not a good neighbour and would for that reason be removed to Mconcweni area. The Chief appointed two emissaries who took the deceased there but he refused to go.

It was Accused 1's further evidence that the deceased threatened the following people with

death – Guguza first, Makhukhula Msibi, Makhewu Myeni, Accused 1 and then stated that the others would follow after these utterances, Guguza took ill and on a day that the deceased had mentioned i.e. the 12th, Guguza indeed died. After the Guguza's funeral, a lady known as Manwele Mabuyakhulu, after being manhandled by the mourners confessed that she had caused the deceased's death by pouring some **muti** into the deceased's beer at the deceased's instruction.

On hearing Manwele's confession, the accused persons became grieved in their spirits as they were also mentioned as people in the deceased's hit list. The accused persons then decided to assault the deceased in order to teach him a lesson such that he would never use **muti** again in his life. Accused 1 testified that they found him at Lusekwane Dlamini's home and went with him for a short distance. They took him to a field, assaulted him and left him alive. Accused 1 testified that he understood the deceased's aforesaid utterances to mean that he would kill them i.e. ears, beards and women's private parts being filled with sand. It was his further testimony that after assaulting the deceased, he, in the company of Accused 4 went to Lugufa Matsenjwa's homestead and there bought traditional beer and imbibed the same. Accused 1 denied performing the "'giya' dance and making the declaration that the deceased had died.

In cross-examination, Accused 1 conceded that he did not know for a fact that Manwele was given muti by the deceased. He was asked if the deceased made a specific statement to the effect that he would kill the witness and Accused 1 said that he was satisfied that he was also included. He however conceded that nothing was directed to him as an individual. He stated further that they decided to take the law into their own hands because they had reported to the Chief but in their view nothing was done to the deceased. They feared that they would also die. When asked how he knew that Guguza died on the 12th since he is illiterate, Accused 1 stated that he accepted what the deceased had said and accepted that Guguza died on the 12th as the deceased had said so.

Furthermore, Accused 1 stated that he assaulted the deceased once with a stick in the shoulder area, next to the neck. He re-affirmed his story in chief that although the deceased had fallen down, he was however still alive when they left him and it never occurred to them that the deceased would die as a result of the assaults. The witness distanced himself from the numerous bruises and stab wounds noted by the Pathologist. He denied stabbing the deceased. In re-examination, Accused 1 stated that the deceased had mentioned his name as an intended victim after the deceased had refused to be relocated.

The Court asked the accused why they did not forcefully remove the deceased from the area and he said they thought the authorities would but they never did. He stated that he did not see the deceased's condition when they left him and did not see whether he was injured or not save that he had fallen down and could speak.

Accused 2 confirmed Accused 1's story. In cross-examination, he was asked how big the

stone was that he used to assault the deceased, and he stated that it was big enough for him to hold it with one hand. He stated further that he hit the deceased with the stone between the shoulders. He stated further that they took the deceased away from Lusekwane's home because they were angry and failed to restrain themselves. It was his evidence that Guguza's home was quite a long distance from Lusekwane's as there were two valleys to walk through. He conceded that it was anomalous for him, as the Chief's runner to take the law into his own hands. Accused 2 stated that he never saw the boulder on the deceased body but saw it for the first time at the Police Station. In re-examination Accused 2 stated that his name as a victim was mentioned by the deceased and the deceased said that Accused 2 was one of the persons who caused the deceased to be summoned to the Chief's kraal.

Accused 3 also identified himself with Accused 1's evidence in Chief. He stated that the deceased singled out his name as an intended victim and this was when the deceased stated that Guguza, Accused 3's father had become proud because Accused 3 was working. Accused 3 also said that he used a stone that he took in one hand to assault the deceased. In cross-examination this accused person was asked of the deceased's condition when they left him and he stated that the deceased was still alive and was able to speak. He alleged that the deceased even told the accused persons to stop assaulting him. He further stated that it did not occur to him that the deceased would die as the intention was to assault him until he left the area.

Mr Maseko asked Accused 3 if it did not occur to him that if they did not kill the deceased he would have an opportunity to bewitch them and Accused 3 stated that he thought the deceased would leave the area.

Accused 4 also confirmed Accused 1's story. He stated that one day, the deceased passed next to his home and called the witness' name and said that since Guguza, the leader had died, the accused person would follow. He stated that he believed that 'muti' could kill a person. He stated further that he was present when Manwele confessed and he believed that she had told them the truth. It was his further evidence that he hit the deceased with a knobstick on the hip and knee. He denied pointing out a knife to the Police Officer. He further denied having "*giyaed*" and having declared that the deceased had died at Matsenjwa's homestead.

ANALYSIS OF DEFENCE CASE

One main weakness evident in the Defence case is the fact that some issues were raised for the first time when the accused persons took the witness' stand. It was never put to the Crown's witnesses that the deceased specifically threatened any of the accused persons with death. What was put was that the deceased was threatening the people in his area with death. The particulars of what was said to each accused person where and when was only mentioned in Chief. All that was put to PW 4 was that the accused persons were among the persons generally threatened. For this reason, I have no hesitation in holding that the places, times and words allegedly uttered by the deceased when threatening the accused persons are an afterthought since they were never put to the Crown witnesses. See **S v P 1974 (1) SA 573** and **R v DOMINIC MNGOMEZULU & OTHERS CASE NO.93/90**.

I also reject as false the accused's story that the deceased was left alive after the assault.

In their confessions, the accused persons stated that they killed the deceased. This was said by Accused 4 at Matsenjwa's homestead when he declared that they had killed the deceased. This was also confirmed by PW 1. The assaults allegedly inflicted by the accused persons as recorded in their evidence in chief is likewise rejected as false. From their own evidence, the accused were angry with the deceased and failed to restrain themselves. There could have been no *novus actus interreniens* which could have resulted in the deceased's death. I find therefore that the deceased died as a result of assaults and stab wounds inflicted by the accused persons. Accused 4, in particular confessed to having stabbed the deceased.

The accused persons, although acknowledging that they killed the deceased by the statements that they made to the Magistrates and by accepting the post-mortem report, now seek to ameliorate their roles in the deceased's death by down playing the assaults they inflicted. I reject their stories in this regard as false. What I do accept however and which is borne out by the Crown's evidence was the fact that the accused persons believed that the deceased was a witch and had killed Guguza and was going to kill members of the community, including themselves. I therefore have no hesitation in holding from the evidences and inferences that the deceased died as a result of assaults inflicted upon him by the accused persons.

The defence attorneys urged the Court to find that certain defence have been established, namely, self-defence, necessity and provocation. In relation to self-defence, it was argued that the deceased had threatened to kill the accused persons using witchcraft and that they killed him in order to defend themselves and thereby averted the threat from materialising.

For the private defence to avail, there must be an unlawful attack upon a legal interest and which had commenced or was imminent. See Burchell and Hunt "South African Criminal Law and Procedure", Vol 1, 2nd Edition, Juta & Co. pages 323 to 326. The authors state that the unlawful attack must take the form of a positive actor, an actual interference, the mere continuance of an existing situation being insufficient.

In this case, there was no positive act perpetrated by the deceased. It is only alleged that he threatened to kill the people in his area using witchcraft. This does not in my view constitute an attack in the sense that would justify the killing of the person who issued the threat what is envisaged is a physical attack. The authors further state, at page 326 that the defence will not avail if the person uses force if the attack is to begin at sometime in the future. Clearly, the alleged attack was not immediately threatened but would have been anticipated in the future. Sight must not be lost of the fact that the reason why the deceased was killed was not because of the threats he had issued to the accused persons but the revelations by Manwele. These angered the accused.

Regarding the defence, the authors further state that the attack must be directed against the attacker, be necessary to avert the attack and that the means used must be reasonable in the circumstances. The defence in this case falls short since the accused persons never went to the Chief's kraal to report what Manwele had said but they decided to take the law into

their own hands. It was unnecessary and unreasonable for them to kill the deceased but they had to report him. A person who threatens to kill another should not be killed as a means to stop the threats from materialising. He must be reported to authorities. If the Chief failed to resolve the issue, the accused persons should have reported the matter to His Majesty, using the established channels. This defence must fail. There are many people who die at the hands of people who perceive them to be witches and to allow this to be a defence would set a bad precedent and would encourage people to take the law into their own hands, knowing that they will be acquitted at the end of the day.

Regarding the defence of necessity, Burchell and Hunt (supra) state at page 338 that for an act to be justified on the ground of necessity, the following must be shown: -

- a) a legal interest of the accused must have been endangered
- b) by a threat which had commenced or was imminent but which was
- c) not caused by the accused's fault; and in addition, it must have been
- d) necessary for the accused to avert the danger; and
- e) the means used for this purpose must have been reasonable in the circumstances.

Loosely put, this defence applies in situations where the accused was confronted with a choice between suffering some evil and breaking the letter of the law in order to avoid it and he chooses the latter. In this case, as I have held, that the means used to avert the perceived attack were not reasonable in the circumstances. The accused should have gone back to the Chief to report about further acts of intimidation by the deceased and the fact that the deceased refused to leave the area notwithstanding the order by the Chief. This defence must fail. It does not apply to cases where there is no physical attack but there is what may be said to be a supernatural threat.

The last defence canvassed on behalf of the accused persons was provocation. In this regard the Court was referred to the provisions of Section II of Homicide Act 44 of 1959.

Section 2 of the aforesaid Act reads as follows:-

- (1) A person whom
 - 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 only be guilty of culpable homicide.

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

Section 3 states as follows:-

- 1) *Subject to this section "provocation" means and includes any wrongful act or insult such as to be likely, when done or offered to an ordinary person or in the presence of an ordinary persons to another who is under his immediate care or to whom he stands in a conjugal, parental, filial fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.*

The first difficulty with regard to this defence is that it was never put to the Crown witnesses. For that reason, it is unclear as to what actions constituted the alleged provocation. It therefore falls to be regarded as an afterthought according to the authorities of **MNGOMEZULU** and **S v P** (supra). I therefor reject it.

I am of the view that it should fail for other reasons as well. If the provocation is alleged to stem from the threats allegedly issued by the deceased to the accused persons, it is not clear from the evidence when the threats were issued in relation to the killing of the deceased. In any event, it is clear that there was a lapse of time in between the offering of the threats and the deceased's death. For that reason, the requirements of Section 2 (1) (b) are not met since there was more than sufficient time for the accused persons passion to cool. For that reason, I am also of the view that this provocation alleged should fail as it is my considered view that the act which caused the deceased's death does not bear a reasonable relationship with the provocation alleged.

If on the other hand, the provocation alleged is caused by the revelations made by Manwele, I am of the view that same should not avail because they did not kill Manwele, who stated that she was the one who administered the deadly potion. She should have been the one who provoked the accused. The person who was assaulted was the deceased and not Manwele. In any event, I am of the view that there was no sudden provocation in this case which prompted the accused to cause the deceased's death before there was time for the accused persons' passion to cool.

According to the accused person's evidence, Manwele made the confession at Guguza's home and the accessed persons walked a long distance, crossed two valleys for over an hour before they found the deceased at the Dlamini homestead. It is also unclear as to how the accused knew how the deceased was at the Dlamini homestead. It is possible that

they went to the deceased's home first but did not disclose this to the Court as it would prolong the time for their passion to cool. Even when they found the deceased, they did not pounce on him like thunder at the Dlamini homestead. Instead they invented lies, accusing the deceased of having stolen a chicken and thereby baited him from the Dlamini homestead. They even refused to hand the deceased to the Police and I am therefore of the view that taken in their totality, the facts do not support a finding that the death occurred in the heat of passion. There was time for the passion to cool.

I therefor return a verdict of guilty to the crime of murder where-with all the accused persons were charged.

T.S. MASUKU

JUDGE