CRIM. CASE NO. 125/98

In the matter between

REX

Vs

BONGANI MKHWANAZI & 3 OTHERS

Coram	S.B. MAPHALALA – J
For the Crown	MR. J.W. MASEKO
For Accused no.1, 3 and 4	MR. MAGONGO
For Accused no. 2	MR. LUKHELE

JUDGMENT
(11/05/2000)

Maphalala J:

At the commencement of trial there were four accused persons all charged with the crime of murder in count one and attempted murder in count two. Accused no. 2 was further charged with two counts of contravening the provisions of the ***Arms and Ammunitions Act No. 24 of 1964*** as amended by ***Act No. 6 of 1988*** viz, possession of a firearm in count three and possession of five rounds of ammunitions in count four. At the close of the crown case the crown conceded that it has not advanced a ***prima facie*** case against accused no. 2, 3 and 4 in respect of the offences of murder and attempted murder and the three accused persons were thus discharged in terms of ***Section 174 (4) of the Criminal Procedure and Evidence Act (as amended).*** Accused no. 1 remained facing the murder charge and that of attempted murder in count two. Accused no. 2 is facing the two counts of contravening the provisions of the ***Arms and Ammunitions Act*** in counts three and four.

The charges against the accused persons read ***ipsissima verba***, thus:

Count One:

"The accused persons are guilty of the crime of murder in that upon or about 9th March 1998, and at or near Ebenezer area in the Shiselweni Region the accused each or all of them acting in common purpose did unlawfully and intentionally kill Elliot Dlamini by shooting him with a pistol".

Count Two:

"The accused persons are guilty of the crime of attempted in that upon or about 9th March 1998, and at or near Ebenezer area in the Shiselweni Region the accused acting with a common purpose did unlawfully and intentionally with intent to kill did unlawfully shot and injured Mgudeni Samuel Mabuza".

Count Three:

"Accused no. 2 is guilty of the crime of contravening Section 11 (1) read with ***Section 11 (8) of the Arms and Ammunitions Act No. 24 of 1964*** as amended by the ***Arms and Ammunitions Amendment Act 6 of 1988*** in that upon or about 11th March 1998 and or near Ebenezer Primary School in the Shiselweni Region the accused did unlawfully and without a current licence or permit possess a 9mm barrette pistol".

Count Four:

"Accused no. 2 is guilty of the crime of Contravening ***Section 11 (2)*** read with ***Section 11 (8)*** of the ***Arms and Ammunitions Amendment Act 6 of 1998*** in that upon or about 11th March 1998 and or near Ebenezer Primary School in the Shiselweni Region, the accused not being a holder of a current licence or permit to possess a firearm of which ammunition is intended to be used did unlawfully possess four (4) live rounds of ammunition".

The accused persons pleaded not guilty to all these offences. Accused no. 1, 3 and 4 were then represented by Advocate Thwala who towards the tail-end of the proceedings had his instructions withdrawn by the offices of Maphalala & Co. who had briefed him. The accused defence was then conducted by Mr. Magongo to the final end of the proceedings. This change of attorneys affected the smooth flow of the proceedings as I am going to comment on later in the course of this judgement.

Accused no. 2 was represented by Mr. Lukhele and the crown case was conducted by Mr. J. Maseko.

The crown proceeded to call its witnesses to prove its case. At the commencement of evidence the testimony of PW1 reflected in the crown's summary of evidence Dr. L. S. Okonda a police pathologist was entered by consent. He is the doctor who conducted autopsy on the body of the deceased and compiled a report of his pathological findings. He found that the deceased died as a result of "brain and pulmonary damages as a result of gunshot" and this is spelt out in his report entered as part of the crown's evidence as exhibit "A".

The evidence of PW2 according to the crown's summary of evidence Dr. Hakim G. Bilar who examined and treated Samuel Mabuza who is the complainant in count two was entered by consent. The doctor found as reflected in exhibit "B" being a form used by district surgeons, medical officers and medical practitioners when making an examination for government (R.S.P. 88) that the complainant had gun shot wounds on the chest, arm and zygomatic area.

The evidence of the ballistic expert from the forensic laboratory in Pretoria was also entered by consent as exhibit "C". The expert compiled an affidavit of his findings after examining the weapon alleged to have been used in the commission of these offences.

The evidence of the identifying witness was also entered by consent and thus dispensing with the need to call the witness to give ***viva voce*** evidence.

It was also placed on record that the firearm found in the house of accused no. 2 mentioned in count three of the indictment was found in the house of accused no. 2.

It appeared at that stage that the accused persons had made confessions before a magistrate and it was indicated to the court that the defence disputed the admissibility of these confessions on the grounds that they were not made freely and voluntarily in conformity with the provisions of the ***Criminal Procedure and Evidence Act (as amended)***. This necessitated at a later stage in the proceedings that a trial within a trial be conducted to establish whether or not the confession were made in accordance with the prescribes of the Act. I must hasten to state for the sake of brevity that this exercise was conducted where the crown called a number of witnesses to prove that the Act was followed and the accused persons individually gave evidence stating the contrary view. The court found that the confessions were not made freely and voluntarily and ruled that the confessions made by the accused persons to be inadmissible in terms of ***Section 226 of the 1938 Act***. I am also not going to outline the evidence of the various witnesses who gave evidence during this exercise. For ease of reference my reasons for my ruling in terms of Section 226 form part of this judgment.

Coming back to the crown evidence. The crown first called PW1 Sifiso Tsabedze who is a 15-year-old boy. He told the court that on the 9th March 1998, he did not go to school as he was assigned to take a sick sibling to hospital. He said as they were walking along a certain footpath following each other he saw accused no. 3 who was carrying a bag. Nearby at a bus stop there was a certain man. Accused no. 3 gave this man some clothes. The strange man then left the scene. As the two of them were waiting for the bus accused no. 2 approached him and sent him to a certain teacher Shongwe to tell him that the parcel was on the bed. PW1 told him that he was unable to do so as he had not reported at school that he was going to be absent from school that day. PW1 described the bag carried by accused no. 3 as a black bag. He told the court that accused no. 3 took out some clothes from the bag and handed them to this strange man. The man changed the shirt and put on another shirt. The man gave the shirt he was wearing to accused no. 3. The man then left the scene. PW1 then left accused no. 3 at the bus stop and proceeded to hospital to send his sick sister. This witness deposed that he did not see accused no. 2 who was a teacher at his school.

This is about the extent of this witness testimony.

He was cross-examined briefly by each defence counsel. The witness was quizzed by Mr. Lukhele whether he knew this strange man and he answered that it was his first time to see him that day and that he cannot identify him again. However, he was positive that he saw accused no. 3 handing the black bag to this man. When asked by Mr. Lukhele for accused no. 2 he told the court that accused no. 2 was a teacher at the school and he was the man referred by accused no. 3 who had requested him to convey a message that the parcel was on the bed.

The crown then called PW2 Zanele Nomathemba Dlamini. She told the court that she also attended the same school as PW1. On the 9th March 1998, she went to school as usual at around 7.15am. She heard gunshots. She proceeded to where the shots eminated from near a Fakudze homestead. As she was near the gate of the homestead she saw a man. Then this man went to speak to Shongwe (accused no. 2). She did not hear what was the gist of their

conversation. She could not recall what this man was wearing and she did not take much note of the man's physique.

She was also cross-examined briefly by both counsel where she revealed that she heard four gunshots and that she could not connect the gunshots with the man she saw that morning.

The crown then called PW3 Nhlanhla Mngomezulu who told the court that he knew accused no. 2 and 3. That as he was proceeding to school he met a certain man called Mgubudeni who asked him to go back home to inform them that a man had just shot them. He went home to inform his grandfather. This Mgubudeni was full of blood. This witness told the court that he last saw the man who shot them at his home the same morning. When he saw the man it was his first time to see him. He did not know what was the main's mission at his home that morning.

This is about the extent of this witness testimony. He was cross-examined briefly where he told the court that it was his first time to see this man that morning and he could not recognized him even if he saw him again.

The crown then called PW4 Thembi Kunene. This witness told the court that she was a teacher at Ebenezer where PW1, PW2 and PW3 were pupils. Accused no. 2 was also a teacher there. Accused no. 2 was a Deputy Headteacher at the school. On the 11th March 1998, she was at school and accused no. 2 was present. The police approached her and she was in the company of one Makhosazane Mazibuko. The police requested them to accompany them as they were with accused no. 2. They all proceeded to accused no. 2's house where they said they wanted something. In accused no. 2's bed they retrieved a beret covering a gun. The police then took these items with them, during the search of accused no. 2's house and accused no. 2 did not say anything or made any signals to the police. This witness also mentioned that accused no. 2's house was photographed and she identified some items she saw in the photographs presented to the court. These photographs were entered as part of the crown's case as exhibit "D", "E", "F", "H" and "2".

This witness was not cross-examined by Advocate Thwala but was cross-examined at length by Mr. Lukhele for accused no. 2. The thrust of Mr. Lukhele's cross-examination was whether the door to accused no. 2's house was merely closed or locked. The witness maintained under intense cross-examination that the door to the house was locked in that she saw the police officer open it.

The crown then called its sixth witness Khosi Mazibuko who told the court that she knew accused no. 2 and that on the 11th March 1998, the police approached her. The police were in the company of accused no. 2 when they came to the school. The witness told the court that accused no. 2 directed the police into his bedroom. Accused no. 2 showed them the pillow and he opened it and found a maroon beret with a gun inside it.

This witness was not cross-examined by Advocate Thwala. She was cross-examined by Mr. Lukhele. The witness told the court that the police used a key to open accused no. 2's house. She maintained that it was accused no. 2 who was directing the police where to go and that the accused person pointed out the gun to the police. The following exchange in that regard bears that out:

> "Q: Is it true that the police asked to search the house and he gave them permission?

A: He was directing them. He appeared to have agreed to show the police around.

Q: Was it the police officer who found the gun?

A: The accused pointed out the gun and the police picked it up.

Q: Are you sure that the accused pointed out something?

A: Yes (my emphasis).

Further on it was put to her as follows:

Q: I put it to you that accused no. 2 never pointed out anything but all these items we discovered as a result of a search in his house?

A: He was the one who was pointing out.

The importance of the above-cited exchange will become apparent later in the course of the judgment.

The crown then called PW6 2616 Super Dlamini who was the investigating officer in this case. He told the court that he arrested all the accused persons in this case and cautioned them in terms of the Judges Rules. As a result of the caution some of the accused persons elected to say something and he wrote it down and one wrote his statement himself. He told the court that he arrested accused no. 2 and 4 on the 10th March 1998, accused no. 3 was arrested on the 13th March 1998, and accused no. 1 was arrested on the 18th March 1998. Accused no. 2, 3, and 4 co-operated in his investigations until accused no. 1 was arrested on the 18th March 1998. These accused persons were subsequently taken to the Nhlangano Correctional Centre and he later learnt that they had made statements before a judicial officer in terms of ***Section 226 of the Criminal Procedure and Evidence Act .*** He testified further that he never harassed the accused persons whilst they were still under police custody.

This is the extent of this witness testimony. I must point out that at this stage when this witness was introduced a trial within a trial commenced to determined whether their statements to the judicial officer was admissible in terms of ***Section 226 of the Criminal Procedure Evidence (as amended)***. I am not going to deal with the evidence of the witnesses in the trial within a trial as I have treated it in my ruling in that respect. Save to say that the thrust of the defence cross-examination was that the accused persons were each subjected to numerous torture methods at the police station and even when they were under the care of the Correctional Services pressure was put to bear on them to propel them to make the confessions. The crown called Magistrate Peter Simelane, interpreters PW8 Themba Masina and PW9 Sibongile Tsabedze. The crown then closed its case in the trial within a trial. Each accused person gave evidence under oath. The common thread that ran through their testimony is that they did not make the statements before PW7 Magistrate Peter Simelane freely and voluntarily as they were each subjected to various acts of torture by the police whilst they were still in police custody. Further that the investigating officer Super Dlamini visited them at the remand centre and these visits had a direct bearing on them going to the Magistrate to make these statements.

After evidence was led in the trial within a trial the court entertained submissions from counsel in this case. At this stage I wish to mention that Advocate Thwala's mandate to represent accused no. 1, 3, and 4 had been withdrawn and their defence was proceeded with by Mr. Magongo from Maphalala & Co. The court held that the statements made by the accused persons before PW7 the Magistrate were inadmissible in terms of ***Section 226 of the Criminal Procedure and Evidence (as amended).***

The crown proceeded to call evidence in the main trial. He called the evidence of PW10 Samuel Mabuza who is the complainant in count two. He related in great detail the sequence of events from the time he met accused no. 1 up to the time accused no. 1 shot them together with the deceased until he saw accused no. 2 again at an identification parade where he identified him as the person who shot them on the day in question.

He told the court that accused no. 1 approached him on the day in question and that it was his first time to see him that day. Accused no. 1 told him that he was looking for the deceased with a message from South Africa. The message was that his brother was dead. They then proceeded looking for the deceased. They found him at a certain homestead and accused no. 1 broke the news to him and he was taken aback. Accused no. 1 then suggested that he goes to South Africa with the deceased following this message. Accused no. 1 also insisted that PW10 accompany them up to the nearest shop so that he can give him some money to thank him for assisting him in searching for the deceased. This witness told the court that accused no. 1 spoke to them nicely and gained their trust but what they notice was he was not from that area as he spoke in deep Zulu. As they were walking towards the shop enroute to the bus stop he heard a gunshot. He was in the middle and the deceased was in front. He saw the firearm. Accused no. 1 shot the deceased and he jumped. He again shot him on the left side and the deceased fell down and died. He was confused. Accused no. 1 then came for him and shot him on the left arm and also on the temple and he fell down. He then lost consciousness. He regained consciousness the following day in hospital.

Subsequently, he was taken by the police to Matsapha where he identified accused no. 1 in a parade of other boys who were of similar height and weight. He identified accused no. 1 as the one who shot at them on the day in question. He told the court that after he had identified accused no. 1 he was taken to a separate room.

This is about the extent of this witness testimony.

He was cross-examined at length by Mr. Magongo for accused no. 1, 2, and 3. The cross-examination touched on two aspects. Firstly, that this witness was mistaken that it was accused no. 1 he saw on the day of the shooting. However, this witness was adamant that it was accused no. 1 who shot at them that day. Secondly, it was put to him that he was mistaken when he picked accused no. 1 at the identification parade. Again this witness stuck to his story that he was positive that the man who shot him and the deceased was the same man he identified in this parade which was conducted at Matsapha.

The crown then called PW11 Agnes Dlamini who is the owner of the homestead where PW10 and accused no. 1 found the deceased. She related in detail the message accused no. 1 related to the deceased. As they were having a traditional feast at her home there were a number of people who heard these sad tidings conveyed by accused no. 1. Accused no. 1, the deceased and PW10 then left. Shortly thereafter she heard gunshots eminating from the direction these three people had taken. Then a small boy came running sounding an alarm that people had

been shot. She together with other people proceeded to the scene and they found PW10 still alive bleeding. She asked him what had happened PW10 told her that this person referring to accused no. 1 just shot at them without any reason. The deceased was lying nearby dead. Police were then called to the scene.

This witness further told the court that she at later date was called by the police to Matsapha where she identified accused no. 1 in a parade of other boys. She was also cross-examined at length by Mr. Magongo where she maintained that she could not have been mistaken that it was accused no 1 who came to her homestead that day and left with PW10 and the deceased. She told the court that she had ample time to observe him as he offered him sour porridge (emahewu) to drink and was speaking in deep Zulu. She was also not mistaken that it was accused no. 1 she identified at the identification parade in Matsapha.

The crown then called 2079 Mxolisi Dlamini who is the officer conducted the identification parade where PW10 and PW11 identified accused no. 1 as the person who shot the deceased and PW10. He described in graphic detail how he conducted the parade. I must say this identification parade was conducted in a highly professional manner. He was cross-examined by Mr. Magongo where an issue was taken that the identification parade was not properly conducted because accused no. 1 was not given a comb for his hair whilst the others were. That is the reason he was identified by PW10 and PW11, as he was an odd man out. This was denied by the police officer.

The crown then called PW13 3395 Sergeant E. Dlamini who also formed part of the team that was conducting the identification parade at Matsapha Police Station. His role was to guard the witnesses to make sure that they did not discuss information about the suspect. He told the court that in this case he did not allow the witnesses to discuss the case. He did not observe anything irregular.

The crown then called PW14 Sergeant Maseko who is the Instructor at Matsapha Police Station. He also forms part of the team conducting the identification parade. His role was to collect the witnesses after they have identified the suspect to a separate room.

The crown then called PW14 Owen Siwela. This witness presented difficulties for the crown as in the course of his evidence the crown declared him a hostice witness in terms of ***Section 173 of the Criminal Procedure and Evidence Act (as amended)***. He was subsequently cross-examined by the crown which confronted him with the statement he made to the police. In cross-examination it appeared that this witness was testifying out of the statement he made at the police station. This witness is a young man of 20 years. The deceased is his grandfather and accused no. 2 and 3 are his uncles. It also emerged during the course of the trial that this witness was under extreme pressure not to divulge what he knew concerning the roles played by accused no. A1, A2, A3 and 4 in the commission of the offence. His evidence at the end of the day amounted to nothing. I must point out, however, as an aside that the crown ought to have charged the person/s who were preventing this witness from giving evidence with the crime of obstructing the course of justice.

The crown then recalled Super Dlamini to give his main evidence as the investigating officer in this case. He attended the scene of the shooting that had occurred at Ebenezer on the 9th March 1998. He described what he did at the scene. He saw the deceased lying down in a pool of blood and Pw10 was still alive and he rushed him to hospital. He came back to the scene and retrieved spent cartridges, which he kept as exhibits. Later he arrested the accused

persons on different dates. As for accused no. 2 he told the court that the firearm was found in his house after he (accused no. 2) had said that it was there. The officer told the court that accused no. 2 had been cautioned prior to him telling them that the firearm was in his house. Accused no. 2 asked for the keys from another woman and he opened his house and went straight to his bedroom and he picked up a pillow and inserted his hand. He retrieved a firearm inside a black beret. There were four rounds of ammunition found in accused no. 2's bedroom together with the firearm. He took all these as exhibits.

This witness was cross-examined by Mr. Magongo. The crown then called PW14 1826 Sergeant Msibi who was stationed at Hlathikhulu Police Station at the material time. He told the court that he was present when accused no. 2 was arrested. He told the court that accused no. 2 led the investigating team to his house where he pointed out the firearm and four rounds of ammunition.

He was cross-examined by Mr, Lukhele for accused no. 2.

The crown then called PW15 Sergeant Gamedze the Force Armourer. His evidence was that the firearm together with the four rounds of ammunition were serviceable. Under cross-examination by Mr. Lukhele he told the court that this firearm was not classified as an arm of war.

The crown at this stage then closed its case. That is when accused no. 2, 3 and 4 were discharged in terms of ***Section 174 (4) of the Criminal Procedure and Evidence Act (as amended)*** in respect of count one and two viz, murder and attempted murder, respectively. Accused no 2 remained only in respect of count three and four under the ***Arms and Ammunition Act.***

At this stage accused no. 1 then gave evidence under oath led by his attorney Mr. Magongo. He told the court that he is a taxi driver from Umlazi Township, Durban South Africa. On the 18th March 1998, he was at Lavumisa in South Africa when he was arrested by the Swaziland police and taken into Swaziland. When he was arrested he was not cautioned in terms of the Judges Rules, he was merely bungled into a motor vehicle. He thought he was being kidnapped. The police took him to the Hlathikulu Police Station where he was interrogated by many police officers. There he was informed that he had killed a person and they did not tell him the name of the person he was alleged to have killed. He only got the true facts of the matter when he received summons in respect of this case. Accused no. 1 went further to describe how he was taken to the identification parade. There he was not told of his rights as stated by the crown witnesses who gave evidence in this regard. The accused person disputed most of the evidence given by the police officers who conducted the identification parade.

Accused no. 1 went further to dispute the evidence of the other crown witnesses who told the court that he is the man who came with a story looking for the deceased and eventually killed the deceased that day. That in fact he has never set his foot in Swaziland prior to being abducted by the police from the Lavumisa border in South Africa. His explanation of being at Lavumisa is that he had come there to visit his girlfriend who works in a shop there. In short, accused no. 1 denies having committed these offences. The accused person was cross-examined at some length by the crown. In his response he stuck to his story, which he gave in-chief. However, he introduced a new aspect of the matter, which was not suggested to the two crown witnesses who identified him at the identification parade. He told the court that the reason these two witnesses pointed to him was because they were shown his

(identification document) with his picture at the police station prior to them going to the identification parade.

Mr. Lukhele for accused no. 2 led him in-chief. His evidence is that he was arrested within the schoolyard at Ebenezer. The police then asked him to take them to the house to retrieve the firearm. Indeed they all proceeded there and he got his house keys from his neighbour where he usually left it. The house was opened by the police and proceed to show them the firearm, which was under a pillow wrapped in a beret. He divulged that this firearm belonged to accuse no. 3 who was his friend. Accused no. 3 occasionally left his firearm at his homestead for safe keeping. He told the court in this instance a child had been sent in his absence to place the firearm in his house.

This is about the extent of accused no. 2's evidence.

He was cross-examined by the crown where he confirmed that the firearm was left in a bag by a certain child and that he is the one who placed the firearm under the pillow. He further re-affirmed that the firearm belonged to accuse no. 3 who was a soldier.

The court then entertained submissions. In respect of accused no. 1, the crown contended that it had led cogent and reliable evidence to establish his guilt. The evidence of PW10 the complainant in count two is clear and is without any blemishes that it was accused no. 1 who shot at them. Further his evidence is corroborated by the evidence of PW11 Agnes Dlamini who also told the court that accused no. 1 came at her homestead and later the three left. Shortly thereafter she heard gunshots and a child came to report that there has been a shooting.

Mr. Maseko submitted that the evidence of these crown witnesses is corroborative of each other. They further went on to identify the accused person in a properly conducted identification parade and there is no reason to fault their powers of observation as they saw accused no. 1 in broad light on the day in question. They had ample time to observe him as he related to the gathering at PW11's homestead his mission. PW11 even gave him a drink of sour porridge (emahewu). The crown holds the view that a case beyond a reasonable doubt has been proved against accused no. 1 that he killed the deceased and shot at the complainant on the day in question.

In respect to accused no. 2 Mr. Maseko submitted that the accused when giving evidence –in-chief came with a totally different story which was not suggested to the police officer who gave evidence. The whole story of the child leaving a bag at accused no. 2's home is new. Further, the crown argued that accused no. 2 told the court that he took the firearm himself from the bag and placed it under the pillow. All in all, the crown contended that in respect of accused no. 2 it has proved possession in terms of the law. I was referred to ***Milton*** on the ***South African Law and Procedure (Vol 111 – Statutory Offence) at page 167*** to buttress this view.

Mr. Magongo for accused no. 1 argued at great length that the crown has not proved its case beyond a reasonable doubt against his client. The accused person was arrested in South Africa and thus his arrest was unlawful, as it did not follow any extradition procedures. To this proposition Mr. Magongo cited the case of ***S v Ebrahim 1991 (2) S.A. 553.*** It was argued further that PW10 and PW11 could not have identified accused no. 1 on the day the offences were committed because he was never in Swaziland until his unlawful abduction by

the police at Lavumisa. The defence furthermore punched holes in the manner the identification parade was conducted. Mr. Magongo argued that the medical report reflecting the injuries sustained by the complainant in count two is a variance with his evidence he gave to the court.

Mr. Lukhele for accused no. 2 submitted that the crown has not proved its case against accused no. 2 beyond a reasonable doubt in respect of counts three and four. He argued that the accused was charged with contravening ***Section 11 (1)*** read with ***Subsection 8*** of the Arms and Ammunition Act not ***Section 11 (9)*** of the said Act. Mr. Lukhele conceded that the crown has satisfied the element of intention but the other element of possession is lacking. The court was referred to ***Criminal Case No. S. 97/83*** in the case of ***Rex vs Christopher Kimera*** (unreported).

In reply on points of law the crown argued on the issue of the jurisdiction of this court to hear this matter. Mr. Maseko submitted that whether or not a court has jurisdiction depends on either the nature of the proceedings, or the nature of the relief claimed, or in some cases both. The crucial time for determining whether a court has jurisdiction is at the commencement of the action (see ***Thermo Radiant Oven Sales (Pty) Ltd vs Nelspruit Bakeries (Pty) Ltd 1969 (2) S.A. 295 at 310***). Jurisdiction once established continues to exist until the end of the action even though the ground upon which jurisdiction was established cease to exist. (See ***Thermo Radiant Oven Sales (Pty) Ltd (supra)***. The crown further argued that if at all accused person (accused no. 1) found the court's jurisdiction wanting, that should have been raised at the commencement of the hearing. Jurisdiction is one of the pleas available to an accused, which, properly should be raised at the commencement of the trial and cannot be raised at any other time. The final reply by the crown is that if a plea to jurisdiction is to be successful, it must be shown that the court has no cognisance of the matter either because the offence was, if the allegation of the state be true, committed outside the geographical limits of the court's jurisdiction, or because from its nature or by reason of the absence of allegation or proof of a precedent step necessary to give the court jurisdiction, it is one of which the court is not empowered to take cognisance. (See ***Landsdown and Campbell, South African Criminal Law and Procedure Vol. 5***).

These are the issues confronting this court in this case. I have reviewed the evidence in its totality and have considered the insightful submissions made by counsel in this case. As I have alluded to earlier the court is now left to determine the guilt or otherwise of accused no. 1 and accused no. 2. The former is facing the charges embodied in counts one and count two viz, murder and attempted murder. The former is faced with count three and count four being offences under the ***Arms and Ammunition Act (as amended).*** In doing so I shall proceed with accused no. 1.

The first issue the court has to determine is whether the court had jurisdiction to try the accused as it has been contended he is a South African citizen and was abducted from South Africa without any extradition having being carried out in terms of the 1968 Treaty with South Africa. That the ***ratio decidendi*** in ***S vs Ebrahim 1991 (2) S.A. 533*** should be applied in the present case. In that case it was held amongst other things that a court in South Africa had no jurisdiction where an accused person was abducted from a foreign state by agents of the South African state and handed over to police in South Africa. The accused person was later charged with treason in a South African court convicted and sentenced. It was held that as a common law principle removal of a person across territorial limits from the area where he was illegally apprehended is regarded as abduction and a serious injustice. It appears to

me that the case in ***casu*** is distinguishable from ***Ebrahim*** in that in the latter case the accused person had prior to pleading launched an application for an order to the effect that the court lacked jurisdiction to try the case in as much as his abduction was a breach of international law and thus unlawful. The application in the ***court a quo*** was overruled. In the case in ***casu*** no such application was made to the court at the commencement of trial. It appears to be a trite principle of law that the crucial time for determining whether a court has jurisdiction is at the commencement of trial. Jurisdiction once established continues to exist until the end of the case. To this effect I refer to the case of ***Thermo Radiant Oven Sales (Pty) Ltd (supra).*** Further it would appear to me that our legislature has made it clear what procedure to follow in the event accused persons amongst other things challenges the jurisdiction of the court.

First and foremost ***Section 155*** of the ***Criminal Procedure and Evidence Act (as amended)*** provides ***ipsissima verba*** thus:

> "155 (1) if the accused does not object that he had not been duly served with a copy of the indictment or summons or have it quashed under Section 152 he shall either plead to it or except to it on the grounds that it does not disclose any offence cognisable by the court,
>
> (2) if he pleads he may plead either –
>
> (a) that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons;
>
> (b) that he is not guilty;
>
> (c) that he has already been convicted of the offence with which he is charged;
>
> (d) that he has already been acquitted of the offence with which he charged;
>
> (e) that he has received the Royal pardon for the offence charged;
>
> (f) that the court has no jurisdiction to try him for such an offence; or (my emphasis)
>
> (g) that the prosecutor has no title to prosecute.
>
> (h) that the matter is pending before another court

Section 152 (1) of the said Act provides as follows:

> "(i) The accused may before pleading, (my emphasis) apply to the court to quash the indictment or summons on the ground that it is calculated to prejudice or embarrass him in his defence.
>
> (2) …….
>
> (3) …….."

Furthermore, Section 153 (1) provides:

> "Notice of motion to quash indictment, etc and certain pleas to be given.

> If the accused intends to apply to have an indictment or summons quashed under Section 152, or to except, or to plead any pleas mentioned in Section 155, except the plea of guilty or not guilty he shall give reasonable notice (my emphasis) regard being had to the circumstances of each case) to the Attorney General or his representative if the trial is before the High Court, or to the Public Prosecutor if the trial is before a Magistrate's court, or if the prosecution is a private one, to the private prosecutor, stating the grounds upon which he seeks to have the indictment or summons quashed or upon which he bases his exception or plea".

This is the procedure, which ought to have been followed in this case. It is not proper for defence counsel to sneak (as it were) this plea when making submissions after the close of evidence. The whole point of testing the veracity of such a plea is lost, as the crown had not been given a chance to adequately address it. As per the ***dicta*** in ***S vs Ebrahim (supra)*** the onus of proving a lawful arrest is always on the person justifying the arrest. The arrested person is required to allege merely the fact of his arrest against his will by or at the instance of the respondent, and it is for the respondent to aver and prove the circumstances which justify such arrest. The cases of ***Principal Immigration Officer and Minister of Interior vs Narayansamy 1916 T.P.D. 274 at 276; Minister Van Wet en Orde vs Matshoba 1990 (1) S.A. 280 (A) 284 E-G and 286 A-C*** were cited with approval in ***Ebrahim.*** One wonders in the present case when was the crown to discharge this onus when such a plea is advanced at the tail end of the proceedings. In the totality of what I have outlined above and also the submissions made by Mr. Maseko in this regard I come to the conclusion that the court does have jurisdiction to try the accused person. As an aside, in South Africa ***Section 110 (1)*** of the ***Criminal Procedure Act*** provides that if the accused does not plead the absence of jurisdiction, but guilty or not guilty or another plea which was not accepted, the court will have the necessary jurisdiction by law.

Now having disposed of this matter I now come to the guilt or otherwise of accused no. 1 in the commission of count one and count two, viz, murder and attempted murder. It appears to me that there is overwhelming evidence against him that he committed these offences. It is common cause that the deceased in count one died as a result of brain and pulmonary damages as a result of gunshot as fully described in the autopsy marked exhibit "A".

It is also common ground that the complainant in count two PW10 Samuel Mabuza sustained gunshot wounds on the chest, arm and zygomatic area as observed by Dr. Hakin G. Bilar who attended to him as reflected in exhibit "K" which was handed to court by consent. PW10 Samuel Mabuza described in graphic detail how he met accused no. 1 up to the time they went together from homestead to homestead looking for the deceased. In my view Mabuza had ample opportunity to observe this man by the time they met right after they found the deceased at PW11 homestead up to the time the three left together accused no. 1 promising him money for his assistance in search of the deceased. This witness was honest, credible and I have no reason at all to doubt his testimony. He did not have any reason to fabricate a story against a total stranger. Further, in my view he positively identified accused no. 1 in what I consider a well-conducted identification parade as the person who shot them on the 9th March 1997. I do not think he was mistaken in his identification. The defence made some play that the identificating witnesses were shown an ID of accused no. 1 and were shown accused no. 1 at the Hlathikulu Police Station hence they were able to point to the accused person. The surprising aspect of this allegation is that it was not put to PW10 and the other witness (PW11) that the reason they pointed at accused no. 1 is because they had prior sight of him as the suspect. This is against established ***dicta*** in ***S vs P 1974 (1) S.A. 581 (A)*** where Macdonald JP at page 582 made these trenchant remarks:

> "It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial, so important is the duty to put the defence case that practitioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court".

Similar sentiments were expressed by Hannah CJ (as he then was) in ***Rex vs Dominic Mngomezulu and others Criminal Case No. 96/94 (unreported) at page 17.*** In the case in ***casu*** this was not done but surprisingly these question were put to the officers who conducted the parade. I think it would have been proper to hear it from the horse's mouth (so to speak).

The evidence of PW10 in largely corroborated by that of PW11 Doris Dlamini who told the court that on the morning of the 9th March 1997, they were having some traditional festivities at her homestead where the deceased was also a participant. Whilst the festivities were proceeding PW10 came together with a man (whom she described in court as a boy) and that this man related that he was looking for the deceased with some sad news about his daughter in South Africa. She told the court that she observed this young man who was well mannered and spoke in deep Zulu. She offers the young man "emahewu" (traditional maize drink) who sat down and drank it. She was able to observe him until he left with the deceased and PW10. Shortly thereafter she heard gunshots emanating from the direction these three people took. Subsequent to that a small child came running announcing that there has been a shooting. People from the homestead including her rushed to the scene and found the deceased dead and Pw10 shot. The young man was nowhere to be found.

Also I find it not only false but fallacious that accused no. 1 has never set foot in Swaziland until he was kidnapped by the police at Lavumisa. The evidence that he was in Swaziland at the material time come from an unlikely source. PW14 Owen Siwela who was declared a hostice witness by the crown and who tried his level best to conceal the roles played by the accused persons gave damning evidence against accused no. 1 that accused no. 1 was present at his homestead at Ebenezer and had conversations with the other accused persons. He did not gather what was the reason for accused no. 1's presence at his grandfather's homestead. This evidence clearly places accused no. 1 at Ebenezer in Swaziland at the material time.

Again I have no reasons to disbelieve the evidence of this witness. She gave her evidence in an open manner and she did not have any reason to fabricate a story against a total stranger whom she described as a well-mannered young man. Even her evidence of identifying accused no. 1 at the parade I have no hesitation that she pointed to a person she saw on the 9th March 1997. Her evidence was not shaken at all in cross-examination and the vital question, which was put to the officers that before the parade she was shown accused no. 1's ID, which had his picture, was surprisingly not put to her. My observations as regards PW10 in this respect equally apply. From the aforegoing it is clear to me that accused no. 1 committed the offences levelled against him. It would appear to me that though direct intention to kill in the circumstances was not established. Accused no. 1's intention can be inferred from the nature of the injuries of these people and the weapon used. I thus conclude that the crown has proved intention in the form of ***dolus eventualis.***

In arriving at this conclusion of law I sought assistance from the ***dicta*** in the case of ***Vincent Sipho Mazibuko vs R. 1982 – 1986 S.L.R. 372 (CA) at page 380 C:*** thus:

> "A person intends to kill if he deliberately does an act which in fact he appreciates might result in death of another and acts recklessly as to whether such death result or not"

Now coming to accused no. 2 who is faced with two counts under the ***Arms and Ammunition Act***, it is abundantly clear from the evidence that the crown had proved intention as required by the law as reflected in the excepts I have earlier on in my judgment alluded to. The only remaining requisite, which the court is to satisfy itself, is whether possession has been proved. I am persuaded by Mr. Lukhele for accused no. 2 to conclude that this aspect of the matter has not been proved having regard to the circumstances of this matter. I am fortified in coming to this conclusion by the remarks made by Nathan CJ (as he then was) in the case of ***Regina vs Robert Christopher Kimera Criminal Case No. S. 97/83 (unreported)*** where the learned Chief Justice had this to say at page 7:

> "It has been held in a large number of cases that before a person can be said to be an occupier of premises he must be shown to have some appreciable measure of control thereof".

The learned Chief Justice went further and cited with approval the South African case of ***Cowie vs Pretoria Municipality 1911 T.P.D. 628 at page 636*** where Wessels J expressed the following:

> "The person who hold a place, who controls it, and who is actually upon the premises, is the occupier" (my emphasis).

I agree in ***toto*** with Mr. Lukhele on the strength of the authorities he cited in this connection.

In the result, I rule as follows:

i) Accused no. 1 is guilty in respect of counts one and two.

ii) Accused no. 2 is found not guilty and acquitted forthwith.

S.B. MAPHALALA
JUDGE

CRIM. CASE NO. 125/98

In the matter between

REX

Vs

BONGANI MKHWANAZI & 3 OTHERS

Coram	S.B. MAPHALALA – J
For Defence	MR. J.W. MASEKO
For Accused no.1, 3 and 4	MR. MAGONGO
For Accused no. 2	MR. LUKHELE

RULING IN TERMS OF SECTION 226 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT – TRIAL WITHIN A TRIAL

(31/01/00)

Maphalala:

Section 226 of the Criminal Procedure and Evidence Act of 1938 (as amended) provides in Subsection 1 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…"

The accused persons are charged as follows:

Count 1 – The accused persons are guilty of the crime of murder in that upon or about the 9th March 1998, and at or near Ebenezer area in the Shiselweni region the accused each or all of them acting in common purpose did unlawfully and intentionally kill Elliot Dlamini by shooting him with a pistol.

Count 2 – The accused persons are guilty of the crime of attempted murder in that on the same day at the same area the accused with a common purpose did unlawfully and intentionally with intent to kill did unlawfully shot and injured Mgudeni Samuel Mabuza.

Count 3 – Accused no. 2 is guilty of the crime of contravening Section 11 (1) read with Section 11 (8) of the Arms and Ammunitions Act No. 24 of 1964 as amended by the Arms and Ammunition Amendment Act No. 6 of 1988.
In that upon or about the 11th March 1998, and near Ebenezer Primary School in the Shiselweni region the accused did unlawfully and without a current licence or permit possess a 9mm Barretta pistol.

Count 4 – Accused no. 2 is guilty of the crime of contravening Section 11 (2) read with Section 11(8) of the Arms and Ammunition Act 6 of 1988.

In that upon or about the 11th March 1998, and near Ebenezer Primary School in the Shiselweni region the accused not being a holder of a current licence or permit to possess a

firearm for which ammunition is intended to be used did unlawfully possess four (4) live rounds of ammunition.

All the accused persons pleaded not guilty to the offence. Accused no. 1, 3, and 4 were initially represented by Advocate Thwala who was in the middle of the trial within the trial had his mandate to represent the accused withdrawn by his instructing attorney Mr. Magongo took over the defence of the accused person. Accused no. 2 is represented by Mr. Lukhele. The crown is represented by Mr. Maseko.

The crown called a number of witnesses to testify as to whether the statements made before Nhlangano Magistrate by all four accused person were in conformity with Section 226 of the Penal Code insofar as the requirements of the proviso to that section require. The defence attitude at this stage is that these statements were not made in conformity with the said proviso. This is the issue the court is called upon at this stage to determine. In the event the court rules in favour of the crown the statements will thus be rendered admissible and to included in the body of the rest of the crown's evidence. In the event the court rules otherwise the statement will be rendered inadmissible.

The crown called the evidence of the investigation officer in this case Super Dlamini to show that there was no pressure of any sort which was put to bear on the accused persons to make these statements before the Magistrate. The officer went through intense cross-examination by both counsel where it was put to him that he administered so-called tube method and the kentucky styles of torture, which put the fear of God to the accused propelling them to go to the Magistrate to tell it all. The officer denied this allegation. It was further put to him that even after the accused persons had been transferred to the Nhlangano Remand Centre Dlamini continued to pay the accused persons visits to impress on them that they were to go and make statements to the Magistrate. A suggestion was made that Super Dlamini had told each accused person what to say to the Magistrate. This again was denied by the police officer. The crown then called the Magistrate himself who recorded the statements Mr. Peter Simelane. The Magistrate related the sequence of events from the time each accused person was brought to him to the time he actually recorded the actual statements. He described in great detail how he proceeded to caution each accused persons as required by the pro-forma used by magistrate in recording statements from the accused persons. The Magistrate general view is that the accused persons came to him in a calm fashion and did not show any sign of agitation throughout the time he took the statements from the accused persons to suggest that they had been threatened or forced to make these statements before him. The Magistrate was also subjected to intense cross-examination by both counsel where a number of points were revealed which have a bearing on whether the accused persons gave their statements freely or involuntarily. At page 97 of the transcript of these proceedings the following exchange is recorded:

> "Q: Who told you that you could come to me?
>
> A: Kwasho amaphoyisa akwa Hlathi – afika le Correctional Centre eNhlangano.
>
> Interpretation: Upon asking the next question in English My Lord he answered me again in siSwati which means the "he had been told by the Hlathikulu Police who earlier arrived at the Correctional Centre in Nhlangano.

The above exchange is in respect of accused no. 1.

In respect to accused no. 2 at page 104 line 10 of the transcript the following is recorded:

> Q: Was anything said or done to you to make this statement, if so what was said to you?
>
> A: Kukhona ema threats emaphoyisa ema RSP lawenta kimi ngate ngabhala sitatimende lesingasilo liciniso ngiko ngitobhalisa lesi manje".
>
> Interpretation: There were threats that were made by the Royal Swaziland Police on me which made me record something that was not the truth and that is why I have decided to come and record this one now"

Further at page 105 the following appears:

> Q: Were you assaulted by anybody since the start of the investigation or since your arrest? If so, by whom and what was the nature of the assault?
>
> A: (in SiSwati).
>
> Interpretation: Yes, there was a tube, which was tied around my face, and I was not able to breath at that time. And Secondly, the Royal Swaziland Police also inflicted several insults on my person.

In respect of accused no 3 the Magistrate told the court that accused no. 3 told him that he made the statement at the police station. He was assaulted and tortured with the tube such that he could not breath.

In respect of accused no. 4 the pro forma reflects that he was told by the police to make a statement to a Magistrate. At page 114 paragraph 15 the accused told the Magistrate in answer to question that he was assaulted by Super Dlamini who slapped him with an open hand and placed a certain item around his face such that he could not breathe. Further the officer insulted him about his blindness and also insulted him by his mother's private parts. He also insulted him by his mother's mourning gowns.

From the above exchanges it is clear that all the accused persons were assaulted one way or the other by the police at Hlathikulu Police station and this tarnishes the evidence of Super Dlamini who emphatically denied that such ever took place. The accused story is consistent in that they told the Magistrate this when they went to him and repeated them in their defence in the trial within a trial. Further, another unfavourable points mentioned by accused no. 1 to the Magistrate that police came at the Correctional Service at Nhlangano and told him to make a statement before the Magistrate. This dispels the officer's testimony that he never visited the Remand Centre in respect of this matter after the accused persons were transferred to the Remand Centre from the police station at Hlathikulu.

Another interesting revelation made by the Magistrate in cross-examination which I think has a great bearing on this matter is when he conceded that he could not say that the statements were made freely and voluntarily as he did not know if the accused persons came to his office freely and voluntarily. E could not comment on what transpired prior to the accused making statements to him. This point is important as defence counsel argued about this when the court heard submissions. I am going to come to that in due course.

The two interpreters Themba Masina and Sibongile Tsabedze were called to comment on their translations of the statements. Their evidence was of a formal nature. They were each

briefly quizzed more on their competency to translate from one language to another rather than on any matter of substance. Nothing much turned on their evidence to prove or disprove the voluntariness or otherwise of the statements made by the accused persons.

At this stage the crown closed its case in the trial within a trial.

Each accused person gave evidence-in-chief lead by their attorneys. The general thread that runs through their evidence is that they were tortured by Super Dlamini and other officers whilst they were in the custody of the police. As a result of the torture they were propelled to go to the Magistrate to make these statements. Further, that the said officer Super Dlamini visited them at the Remand Centre to impress on them the need for them to go and make these statements reminding them further of the torture they have already endured in the hands of the police. They testified that despite a long lapse of some months from that torture from March to May the memory of those days still brought cold sweats down their spines.

The accused persons were each cross-examined at length and for the most part they stuck to their guns.

The accused persons also called the evidence of the office from the Remand Centre in Nhlangano at the material time who told the court that police officers from time to time do visit inmates who are awaiting trials.

The court heard submissions.

The view taken by the crown is that it has satisfied all the requirements of the proviso to Section 226 of the Act. I was referred to certain portions of the record to buttress the crown case. Further numerous legal authorities were cited (see ***Lansdowne and Cambbell of South African Criminal Law Vol. V at pages 854 – 855); S v Blght 1940 AD 355 at page 361*** (as to the test to be applied in such cases). Mr. Magongo for accused No. 1, 3 and 4 is of the view that the statements made by his clients were not made in conformity with the Section. And to add to buttress his arguments he cited the following legal authorities ***S v Mahlala 1967 (2) S.A. 401; S v Thabela 1958 (1) S.A. 264; S v Khuzwayo 1949 (3) S.A. 761 at 768; Mzinyoni Mzungu Dlamini v R 1982 – 86 S.L.R. 231; S v Sakhone 1981 (1) S.A. 410 (T); S v Hoho 1992 (2) S.A. 159 and S v Zwane 1950 (3) S.A. 720*** (on the requirement of undue influence). The gravamen of Mr. Magongo's argument is that the crown has not led evidence, which showed what propelled these people to go and make these statements. That in this respect there is a ***lacuna*** in the ***Mzinyoni case*** (supra)

Mr. Lukhele for accused no. 2 also took the same view adopted by Mr. Magongo for accused no. 1, 3 and 4 and argued that the onus of proof throughout lies on the crown to prove all the essential elements required by the proviso to Section 226. Relying was also made to the ***Mzinyoni case*** (supra). Mr. Lukhele as his counterpart did argue that the crown has not led evidence to show what happened which propelled the accused person to make this statement. Mr. Lukhele relied heavily on the ***dicta*** in the case of ***R v Ndoyana and another 1958 (2) S.A. 562*** were De Villiers JP had this to say at page 563:

> "Whether an accused person confession has been free and voluntarily and without undue influence depends on the surrounding circumstances from before the time that he first expresses the desire to make a confession until he finally puts his signature or mark on the written confession… evidence of these circumstances should be given".

These are the issues. It is trite law that the onus is upon the crown to prove beyond reasonable doubt that the alleged confession before the Magistrate was made freely and voluntarily and without the accused having been unduly influenced. It appears to me that in the present case all the accused persons were assaulted, insulted in various ways when they were in police custody although the officer denied this aspect of the matter. It also appears to me that the officer was not candid to the court that no visits were made to the accused persons at the Remand Centre prior to them making their statements. The court has not been furnished with the evidence of what happened to the accused persons propelling them to make these statements. This is also in view of what the Magistrate who recorded the statements said that he cannot say whether the accused persons came to him freely and voluntarily. I agree with the submissions made by both counsel in this regard especially the trenchant observation by De Villiers JP in the case of ***Ndoyana (supra).***

In sum, I am not satisfied beyond reasonable doubt that the statements were made by these accused persons freely and voluntarily, and without them having been unduly influenced. I think there is a reasonable possibility that threats were made, as alleged by them. I also consider it reasonably possible that the cumulative effect was to put them in a position in which they were in fact under pressure, so that their free will was thereby eroded.

I rule that the alleged confessions are inadmissible.

S.B. MAPHALALA
JUDGE

CRIM. CASE NO. 125/98

In the matter between

REX

Vs

BONGANI MKHWANAZI & 3 OTHERS

Coram	S.B. MAPHALALA – J
For Defence	MR. J.W. MASEKO
For Accused no.1, 3 and 4	MR. MAGONGO
For Accused no. 2	MR. LUKHELE

RULING IN TERMS OF SECTION 226 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT – TRIAL WITHIN A TRIAL
(31/01/00)

Maphalala:

Section 226 of the Criminal Procedure and Evidence Act of 1938 (as amended) provides in Subsection 1 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…"

The accused persons are charged as follows:

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Count 2 – The accused persons are guilty of the crime of attempted murder in that on the same day at the same area the accused with a common purpose did unlawfully and intentionally with intent to kill did unlawfully shot and injured Mgudeni Samuel Mabuza.

Count 3 – Accused no. 2 is guilty of the crime of contravening Section 11 (1) read with Section 11 (8) of the Arms and Ammunitions Act No. 24 of 1964 as amended by the Arms and Ammunition Amendment Act No. 6 of 1988.
In that upon or about the 11th March 1998, and near Ebenezer Primary School in the Shiselweni region the accused did unlawfully and without a current licence or permit possess a 9mm Barretta pistol.

Count 4 – Accused no. 2 is guilty of the crime of contravening Section 11 (2) read with Section 11(8) of the Arms and Ammunition Act 6 of 1988.

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All the accused persons pleaded not guilty to the offence. Accused no. 1, 3, and 4 were initially represented by Advocate Thwala who was in the middle of the trial within the trial had his mandate to represent the accused withdrawn by his instructing attorney Mr. Magongo took over the defence of the accused person. Accused no. 2 is represented by Mr. Lukhele. The crown is represented by Mr. Maseko.

The crown called a number of witnesses to testify as to whether the statements made before Nhlangano Magistrate by all four accused person were in conformity with Section 226 of the Penal Code insofar as the requirements of the proviso to that section require. The defence

attitude at this stage is that these statements were not made in conformity with the said proviso. This is the issue the court is called upon at this stage to determine. In the event the court rules in favour of the crown the statements will thus be rendered admissible and to included in the body of the rest of the crown's evidence. In the event the court rules otherwise the statement will be rendered inadmissible.

The crown called the evidence of the investigation officer in this case Super Dlamini to show that there was no pressure of any sort which was put to bear on the accused persons to make these statements before the Magistrate. The officer went through intense cross-examination by both counsel where it was put to him that he administered so-called tube method and the kentucky styles of torture, which put the fear of God to the accused propelling them to go to the Magistrate to tell it all. The officer denied this allegation. It was further put to him that even after the accused persons had been transferred to the Nhlangano Remand Centre Dlamini continued to pay the accused persons visits to impress on them that they were to go and make statements to the Magistrate. A suggestion was made that Super Dlamini had told each accused person what to say to the Magistrate. This again was denied by the police officer. The crown then called the Magistrate himself who recorded the statements Mr. Peter Simelane. The Magistrate related the sequence of events from the time each accused person was brought to him to the time he actually recorded the actual statements. He described in great detail how he proceeded to caution each accused persons as required by the pro-forma used by magistrate in recording statements from the accused persons. The Magistrate general view is that the accused persons came to him in a calm fashion and did not show any sign of agitation throughout the time he took the statements from the accused persons to suggest that they had been threatened or forced to make these statements before him. The Magistrate was also subjected to intense cross-examination by both counsel where a number of points were revealed which have a bearing on whether the accused persons gave their statements freely or involuntarily. At page 97 of the transcript of these proceedings the following exchange is recorded:

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> A: Kwasho amaphoyisa akwa Hlathi – afika le Correctional Centre eNhlangano.
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> Interpretation: Upon asking the next question in English My Lord he answered me again in siSwati which means the "he had been told by the Hlathikulu Police who earlier arrived at the Correctional Centre in Nhlangano.

The above exchange is in respect of accused no. 1.

In respect to accused no. 2 at page 104 line 10 of the transcript the following is recorded:

> Q: Was anything said or done to you to make this statement, if so what was said to you?
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> A: Kukhona ema threats emaphoyisa ema RSP lawenta kimi ngate ngabhala sitatimende lesingasilo liciniso ngiko ngitobhalisa lesi manje".
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> Interpretation: There were threats that were made by the Royal Swaziland Police on me which made me record something that was not the truth and that is why I have decided to come and record this one now"

Further at page 105 the following appears:

Q: Were you assaulted by anybody since the start of the investigation or since your arrest? If so, by whom and what was the nature of the assault?

A: (in SiSwati).

Interpretation: Yes, there was a tube, which was tied around my face, and I was not able to breath at that time. And Secondly, the Royal Swaziland Police also inflicted several insults on my person.

In respect of accused no 3 the Magistrate told the court that accused no. 3 told him that he made the statement at the police station. He was assaulted and tortured with the tube such that he could not breath.

In respect of accused no. 4 the pro forma reflects that he was told by the police to make a statement to a Magistrate. At page 114 paragraph 15 the accused told the Magistrate in answer to question that he was assaulted by Super Dlamini who slapped him with an open hand and placed a certain item around his face such that he could not breathe. Further the officer insulted him about his blindness and also insulted him by his mother's private parts. He also insulted him by his mother's mourning gowns.

From the above exchanges it is clear that all the accused persons were assaulted one way or the other by the police at Hlathikulu Police station and this tarnishes the evidence of Super Dlamini who emphatically denied that such ever took place. The accused story is consistent in that they told the Magistrate this when they went to him and repeated them in their defence in the trial within a trial. Further, another unfavourable points mentioned by accused no. 1 to the Magistrate that police came at the Correctional Service at Nhlangano and told him to make a statement before the Magistrate. This dispels the officer's testimony that he never visited the Remand Centre in respect of this matter after the accused persons were transferred to the Remand Centre from the police station at Hlathikulu.

Another interesting revelation made by the Magistrate in cross-examination which I think has a great bearing on this matter is when he conceded that he could not say that the statements were made freely and voluntarily as he did not know if the accused persons came to his office freely and voluntarily. E could not comment on what transpired prior to the accused making statements to him. This point is important as defence counsel argued about this when the court heard submissions. I am going to come to that in due course.

The two interpreters Themba Masina and Sibongile Tsabedze were called to comment on their translations of the statements. Their evidence was of a formal nature. They were each briefly quizzed more on their competency to translate from one language to another rather than on any matter of substance. Nothing much turned on their evidence to prove or disprove the voluntariness or otherwise of the statements made by the accused persons.

At this stage the crown closed its case in the trial within a trial.

Each accused person gave evidence-in-chief lead by their attorneys. The general thread that runs through their evidence is that they were tortured by Super Dlamini and other officers whilst they were in the custody of the police. As a result of the torture they were propelled to go to the Magistrate to make these statements. Further, that the said officer Super Dlamini visited them at the Remand Centre to impress on them the need for them to go and make these statements reminding them further of the torture they have already endured in the hands

of the police. They testified that despite a long lapse of some months from that torture from March to May the memory of those days still brought cold sweats down their spines.

The accused persons were each cross-examined at length and for the most part they stuck to their guns.

The accused persons also called the evidence of the office from the Remand Centre in Nhlangano at the material time who told the court that police officers from time to time do visit inmates who are awaiting trials.

The court heard submissions.

The view taken by the crown is that it has satisfied all the requirements of the proviso to Section 226 of the Act. I was referred to certain portions of the record to buttress the crown case. Further numerous legal authorities were cited (see ***Lansdowne and Cambbell of South African Criminal Law Vol. V at pages 854 – 855); S v Blght 1940 AD 355 at page 361*** (as to the test to be applied in such cases). Mr. Magongo for accused No. 1, 3 and 4 is of the view that the statements made by his clients were not made in conformity with the Section. And to add to buttress his arguments he cited the following legal authorities ***S v Mahlala 1967 (2) S.A. 401; S v Thabela 1958 (1) S.A. 264; S v Khuzwayo 1949 (3) S.A. 761 at 768; Mzinyoni Mzungu Dlamini v R 1982 – 86 S.L.R. 231; S v Sakhone 1981 (1) S.A. 410 (T); S v Hoho 1992 (2) S.A. 159 and S v Zwane 1950 (3) S.A. 720*** (on the requirement of undue influence). The gravamen of Mr. Magongo's argument is that the crown has not led evidence, which showed what propelled these people to go and make these statements. That in this respect there is a ***lacuna*** in the ***Mzinyoni case*** (supra)

Mr. Lukhele for accused no. 2 also took the same view adopted by Mr. Magongo for accused no. 1, 3 and 4 and argued that the onus of proof throughout lies on the crown to prove all the essential elements required by the proviso to Section 226. Relying was also made to the ***Mzinyoni case*** (supra). Mr. Lukhele as his counterpart did argue that the crown has not led evidence to show what happened which propelled the accused person to make this statement. Mr. Lukhele relied heavily on the ***dicta*** in the case of ***R v Ndoyana and another 1958 (2) S.A. 562*** were De Villiers JP had this to say at page 563:

> "Whether an accused person confession has been free and voluntarily and without undue influence depends on the surrounding circumstances from before the time that he first expresses the desire to make a confession until he finally puts his signature or mark on the written confession… evidence of these circumstances should be given".

These are the issues. It is trite law that the onus is upon the crown to prove beyond reasonable doubt that the alleged confession before the Magistrate was made freely and voluntarily and without the accused having been unduly influenced. It appears to me that in the present case all the accused persons were assaulted, insulted in various ways when they were in police custody although the officer denied this aspect of the matter. It also appears to me that the officer was not candid to the court that no visits were made to the accused persons at the Remand Centre prior to them making their statements. The court has not been furnished with the evidence of what happened to the accused persons propelling them to make these statements. This is also in view of what the Magistrate who recorded the statements said that he cannot say whether the accused persons came to him freely and voluntarily. I agree with the submissions made by both counsel in this regard especially the trenchant observation by De Villiers JP in the case of ***Ndoyana (supra).***

In sum, I am not satisfied beyond reasonable doubt that the statements were made by these accused persons freely and voluntarily, and without them having been unduly influenced. I think there is a reasonable possibility that threats were made, as alleged by them. I also consider it reasonably possible that the cumulative effect was to put them in a position in which they were in fact under pressure, so that their free will was thereby eroded.

I rule that the alleged confessions are inadmissible.

S.B. MAPHALALA
JUDGE

CRIM. CASE NO. 125/98

In the matter between

REX

Vs

BONGANI MKHWANAZI & 3 OTHERS

Coram	S.B. MAPHALALA – J
For Defence	MR. J.W. MASEKO
For Accused no.1, 3 and 4	MR. MAGONGO
For Accused no. 2	MR. LUKHELE

RULING IN TERMS OF SECTION 226 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT – TRIAL WITHIN A TRIAL
(31/01/00)

Maphalala:

Section 226 of the Criminal Procedure and Evidence Act of 1938 (as amended) provides in Subsection 1 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…"

The accused persons are charged as follows:

Count 1 – The accused persons are guilty of the crime of murder in that upon or about the 9th March 1998, and at or near Ebenezer area in the Shiselweni region the accused each or all of them acting in common purpose did unlawfully and intentionally kill Elliot Dlamini by shooting him with a pistol.

Count 2 – The accused persons are guilty of the crime of attempted murder in that on the same day at the same area the accused with a common purpose did unlawfully and intentionally with intent to kill did unlawfully shot and injured Mgudeni Samuel Mabuza.

Count 3 – Accused no. 2 is guilty of the crime of contravening Section 11 (1) read with Section 11 (8) of the Arms and Ammunitions Act No. 24 of 1964 as amended by the Arms and Ammunition Amendment Act No. 6 of 1988.
In that upon or about the 11th March 1998, and near Ebenezer Primary School in the Shiselweni region the accused did unlawfully and without a current licence or permit possess a 9mm Barretta pistol.

Count 4 – Accused no. 2 is guilty of the crime of contravening Section 11 (2) read with Section 11(8) of the Arms and Ammunition Act 6 of 1988.

In that upon or about the 11th March 1998, and near Ebenezer Primary School in the Shiselweni region the accused not being a holder of a current licence or permit to possess a firearm for which ammunition is intended to be used did unlawfully possess four (4) live rounds of ammunition.

All the accused persons pleaded not guilty to the offence. Accused no. 1, 3, and 4 were initially represented by Advocate Thwala who was in the middle of the trial within the trial had his mandate to represent the accused withdrawn by his instructing attorney Mr. Magongo took over the defence of the accused person. Accused no. 2 is represented by Mr. Lukhele. The crown is represented by Mr. Maseko.

The crown called a number of witnesses to testify as to whether the statements made before Nhlangano Magistrate by all four accused person were in conformity with Section 226 of the Penal Code insofar as the requirements of the proviso to that section require. The defence attitude at this stage is that these statements were not made in conformity with the said proviso. This is the issue the court is called upon at this stage to determine. In the event the court rules in favour of the crown the statements will thus be rendered admissible and to included in the body of the rest of the crown's evidence. In the event the court rules otherwise the statement will be rendered inadmissible.

The crown called the evidence of the investigation officer in this case Super Dlamini to show that there was no pressure of any sort which was put to bear on the accused persons to make these statements before the Magistrate. The officer went through intense cross-examination by both counsel where it was put to him that he administered so-called tube method and the

kentucky styles of torture, which put the fear of God to the accused propelling them to go to the Magistrate to tell it all. The officer denied this allegation. It was further put to him that even after the accused persons had been transferred to the Nhlangano Remand Centre Dlamini continued to pay the accused persons visits to impress on them that they were to go and make statements to the Magistrate. A suggestion was made that Super Dlamini had told each accused person what to say to the Magistrate. This again was denied by the police officer. The crown then called the Magistrate himself who recorded the statements Mr. Peter Simelane. The Magistrate related the sequence of events from the time each accused person was brought to him to the time he actually recorded the actual statements. He described in great detail how he proceeded to caution each accused persons as required by the pro-forma used by magistrate in recording statements from the accused persons. The Magistrate general view is that the accused persons came to him in a calm fashion and did not show any sign of agitation throughout the time he took the statements from the accused persons to suggest that they had been threatened or forced to make these statements before him. The Magistrate was also subjected to intense cross-examination by both counsel where a number of points were revealed which have a bearing on whether the accused persons gave their statements freely or involuntarily. At page 97 of the transcript of these proceedings the following exchange is recorded:

> "Q: Who told you that you could come to me?
>
> A: Kwasho amaphoyisa akwa Hlathi – afika le Correctional Centre eNhlangano.
>
> Interpretation: Upon asking the next question in English My Lord he answered me again in siSwati which means the "he had been told by the Hlathikulu Police who earlier arrived at the Correctional Centre in Nhlangano.

The above exchange is in respect of accused no. 1.

In respect to accused no. 2 at page 104 line 10 of the transcript the following is recorded:

> Q: Was anything said or done to you to make this statement, if so what was said to you?
>
> A: Kukhona ema threats emaphoyisa ema RSP lawenta kimi ngate ngabhala sitatimende lesingasilo liciniso ngiko ngitobhalisa lesi manje".
>
> Interpretation: There were threats that were made by the Royal Swaziland Police on me which made me record something that was not the truth and that is why I have decided to come and record this one now"

Further at page 105 the following appears:

> Q: Were you assaulted by anybody since the start of the investigation or since your arrest? If so, by whom and what was the nature of the assault?
>
> A: (in SiSwati).
>
> Interpretation: Yes, there was a tube, which was tied around my face, and I was not able to breath at that time. And Secondly, the Royal Swaziland Police also inflicted several insults on my person.

In respect of accused no 3 the Magistrate told the court that accused no. 3 told him that he made the statement at the police station. He was assaulted and tortured with the tube such that he could not breath.

In respect of accused no. 4 the pro forma reflects that he was told by the police to make a statement to a Magistrate. At page 114 paragraph 15 the accused told the Magistrate in answer to question that he was assaulted by Super Dlamini who slapped him with an open hand and placed a certain item around his face such that he could not breathe. Further the officer insulted him about his blindness and also insulted him by his mother's private parts. He also insulted him by his mother's mourning gowns.

From the above exchanges it is clear that all the accused persons were assaulted one way or the other by the police at Hlathikulu Police station and this tarnishes the evidence of Super Dlamini who emphatically denied that such ever took place. The accused story is consistent in that they told the Magistrate this when they went to him and repeated them in their defence in the trial within a trial. Further, another unfavourable points mentioned by accused no. 1 to the Magistrate that police came at the Correctional Service at Nhlangano and told him to make a statement before the Magistrate. This dispels the officer's testimony that he never visited the Remand Centre in respect of this matter after the accused persons were transferred to the Remand Centre from the police station at Hlathikulu.

Another interesting revelation made by the Magistrate in cross-examination which I think has a great bearing on this matter is when he conceded that he could not say that the statements were made freely and voluntarily as he did not know if the accused persons came to his office freely and voluntarily. E could not comment on what transpired prior to the accused making statements to him. This point is important as defence counsel argued about this when the court heard submissions. I am going to come to that in due course.

The two interpreters Themba Masina and Sibongile Tsabedze were called to comment on their translations of the statements. Their evidence was of a formal nature. They were each briefly quizzed more on their competency to translate from one language to another rather than on any matter of substance. Nothing much turned on their evidence to prove or disprove the voluntariness or otherwise of the statements made by the accused persons.

At this stage the crown closed its case in the trial within a trial.

Each accused person gave evidence-in-chief lead by their attorneys. The general thread that runs through their evidence is that they were tortured by Super Dlamini and other officers whilst they were in the custody of the police. As a result of the torture they were propelled to go to the Magistrate to make these statements. Further, that the said officer Super Dlamini visited them at the Remand Centre to impress on them the need for them to go and make these statements reminding them further of the torture they have already endured in the hands of the police. They testified that despite a long lapse of some months from that torture from March to May the memory of those days still brought cold sweats down their spines.

The accused persons were each cross-examined at length and for the most part they stuck to their guns.

The accused persons also called the evidence of the office from the Remand Centre in Nhlangano at the material time who told the court that police officers from time to time do visit inmates who are awaiting trials.

The court heard submissions.

The view taken by the crown is that it has satisfied all the requirements of the proviso to Section 226 of the Act. I was referred to certain portions of the record to buttress the crown case. Further numerous legal authorities were cited (see ***Lansdowne and Cambbell of South African Criminal Law Vol. V at pages 854 – 855); S v Blght 1940 AD 355 at page 361*** (as to the test to be applied in such cases). Mr. Magongo for accused No. 1, 3 and 4 is of the view that the statements made by his clients were not made in conformity with the Section. And to add to buttress his arguments he cited the following legal authorities ***S v Mahlala 1967 (2) S.A. 401; S v Thabela 1958 (1) S.A. 264; S v Khuzwayo 1949 (3) S.A. 761 at 768; Mzinyoni Mzungu Dlamini v R 1982 – 86 S.L.R. 231; S v Sakhone 1981 (1) S.A. 410 (T); S v Hoho 1992 (2) S.A. 159 and S v Zwane 1950 (3) S.A. 720*** (on the requirement of undue influence). The gravamen of Mr. Magongo's argument is that the crown has not led evidence, which showed what propelled these people to go and make these statements. That in this respect there is a ***lacuna*** in the ***Mzinyoni case*** (supra)

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