



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 78/12

In the matter between:

REX

VS

ZWELITHINI MAQUMBANE NKAMBULE

Neutral citation: *Rex vs Zwelithini Maqumbane Nkambule (78/2012) [2012] SZHC145 (2013)8 August 2013*

CORAM

MCB MAPHALALA, J

Summary

Criminal law – accused charged with murder and pleads self-defence – requisites of defence discussed – accused convicted of murder without extenuating circumstances.

Judgment
8 August 2013

- [1] The accused was charged with murder, it being alleged by the Crown that on the 16th February 2012 at Mendulo area in the Shiselweni region, the accused unlawfully and intentionally killed Zanele Nke Dlamini by assaulting her with a bushknife. He pleaded guilty to culpable homicide; however, the Crown rejected the plea.
- [2] PW1 Dr. Reddy is a police pathologist employed by the government of Swaziland and based at the Police Headquarters in Mbabane. He conducted the post-mortem examination on the body of the deceased; she was five months pregnant with a male foetus at the time of death. The cause of death was due to multiple injuries sustained by the deceased.
- [3] The following ante-mortem injuries were observed by PW1: Firstly, a cut wound over and below the right ear to the chin, 16 x 5 cm bone deep involved tissues and the bone. Secondly, a cut wound below and above injury 17 x 4.9 cm bone deep involved vessels, nerves, and vertebral surfaces. Thirdly, a cut wound from the left ear to the back of the neck 11 x 4 cm bone deep with intracranial haemorrhage over the brain. Fourthly, contused abrasions 7 x 2 cm with cut 2 x 0.2 cm below the third injury. Fifthly, a cut wound at the back of the left arm 14 x 2.9 cm bone deep with abrasion over the shoulder 3.1 cm. Sixthly, a cut wound over the back of trunk left outer aspect 2 x 1 cm muscle deep. Seventh, linear scratches over the back of right thigh 7 x 1.2 cm, 6 x 1.1 cm, 9 x 1.1 cm with cuts 3 x 0.3 cm, 15 x 2 cm, 19 x 5 cm, 6 x 2 cm muscle

deep involved blood vessels. Lastly, a cut wound over the back of left thigh 7 x 1.7 cm and 10 x 2 cm muscle deep with scratches 11 cm, 9 cm area. The post-mortem report was admitted in evidence and marked exhibit 1.

[4] PW1 maintained his evidence under cross-examination. When asked by the defence counsel if there was evidence that she had taken Marula beer or alcohol in general, the answer was in the negative.

[5] PW2 Detective Sergeant Nhlanhla Mkhabela is a Scenes of Crime officer based at the Regional Police Headquarters in Nhlngano. He attended a scene of crime on the 16th February 2012 at Buseleni area; he found that Inspector Mabuza had already cordoned the scene. There was a dead body covered with a blanket on a roadway leading to the homestead of Mathambo Mkhwanazi.

[6] PW2 took photographs of the scene, and, he further removed the blanket covering the body. He noticed that the body had multiple injuries, and, it was lying in a pool of blood. There was a gaping wound from below the ear to the chin. Other gaping wounds were on the neck, left ear towards the mouth and left arm. There were four other wounds on the back thighs of both legs. All the wounds were marked with an arrow and further photographed. The photos were processed and developed in his presence. However, the photo relating to the wound stretching from the left ear to the nose was left out during the processing. The photographs were admitted in evidence and it was marked

Exhibits 2-8; the photographs further show the scene where the offence was committed, the body covered with a blanket as well as the multiple injuries on the deceased's body.

[7] PW3 is Thulile Mkhwanazi, a cousin to the deceased; and, she knows the accused. On the 16th February 2012 she was at home together with her mother PW5, her sister in-law and her children as well as the deceased and her two young children. The accused arrived and found them sitting under a tree; he was playing a radio. He greeted them and further increased the volume of the radio; he told the deceased and his children to dance to the music but she refused. The two children danced to the music.

[8] The accused asked the deceased when she would return to their home, and, the deceased told him that she would not return until the accused had met her father to discuss the cause of her departure. The deceased further told him that the bullet from his gunshot was still imbedded in her knee, and, that she needed an operation to remove the bullet. According to PW3 the incidence in which the accused shot the deceased occurred at the deceased's homestead before she fled the homestead; and, that she reported the incident to her father.

[9] The accused left the radio and climbed a nearby mountain. On his return he asked the deceased the same question, and, she gave him the same answer. He went back to the mountain for the second time and on his return, PW5 asked

him what he was doing on the mountain, and he told her that he was suffering from a stomach sickness after drinking Marula beer in another homestead within the area. However, he further said that the stomach sickness was now better after he had drank a traditional medicine.

[10] The accused went back to the mountain for the third time. He came back with a slasher and hacked the deceased without uttering a word. She shouted for help and when PW5 tried to intervene; he threatened her with the slasher, and, she retreated. The slasher was sharp; and, the others together with the children fled towards the kitchen, and, the accused pursued them. The deceased tried to flee but she fell down because of the severity of the injuries sustained. The accused returned, rolled her body to face downwards and further assaulted her with the slasher on the neck, back-thighs on both legs as well as the neck. He took his radio and danced, jumping over the deceased's body. Thereafter, he licked her blood from the slasher, and, said his wife's blood was delicious. He looked at his wife's back and said it was fat like that of a chicken. As he continued dancing, he said what he had done to the deceased is what he does to prostitutes. The deceased's children witnessed the killing of their mother; they also ran away together with the children of her sister in-law. The radio was connected to a motor bike's battery. PW3 was able to identify the accused in Court.

[11] Under cross-examination PW3 reiterated and maintained her evidence. In particular she maintained that she observed the assault on the deceased at a close range. She further stated that when the accused had hacked the deceased with the slasher, he took his radio and commented that he had killed the prostitute. He further stated that he wished he had also killed PW3 and PW5 so that the police could have found three dead bodies on the scene. It further transpired from the cross-examination that the accused had chased the deceased from their homestead, threatening to assault her with a slasher; and, that the deceased had been staying at the Mkhwanazi homestead for the past two weeks. The deceased was related to the Mkhwanazi family; PW3's father was an uncle to the deceased.

[12] PW3 further disclosed that the accused had been to the Mkhwanazi homestead on three previous occasions after chasing the deceased. The accused was looking for the deceased; on each occasion, he arrived at the homestead carrying weapons. PW3 denied that on the one of the three occasions, they assaulted the accused together with the deceased's brother Khususu Dlamini and Sibongo Mkhwanazi. However, she admitted that they refused to release the deceased to go with the accused; they advised the accused to discuss their dispute with the deceased's father.

[13] PW3 reiterated her evidence that the relationship between the accused and the deceased had turned sour during the past two years; and, that the deceased had

reported to PW3's parents on many occasions that the accused was constantly attacking her with a bushknife. She emphasized that this happened during the lifetime of her father. She further disclosed that her father would often call the accused to discuss their dispute with the deceased but he would refuse to come.

[14] The defence counsel put to PW3 that the dispute between the accused and the deceased was caused by the paternity of their younger child Nomcebo Nkhambule who was fathered by the accused's workmate, Majuba Ginindza. He further put to PW3 that the said dispute was discussed between the two families; and, that the meeting was held at the homestead of Eric Dlamini, the deceased's uncle prior to the incident. PW3 conceded that the said meeting was indeed held between the two families as alleged by the defence. She clarified that the accused had refused to attend the meeting to discuss the dispute with the deceased's family.

[15] The defence put to PW3 that the accused was willing to continue staying with the deceased as husband and wife notwithstanding the alleged adultery between the deceased and Majuba Ginindza, and, that it was for that reason that the accused was coming to the Mkhwanazi homestead to fetch the deceased. PW3 denied this. Similarly, she denied that the deceased had insulted the accused for not bringing food for the children on the day in question as alleged by the defence counsel.

[16] PW3 denied as alleged by the defence that the accused hacked the deceased after she had threatened to destroy his radio. She further denied as alleged by the defence that PW3, PW5 and the deceased had attacked the accused when he took his radio. No reason was advanced by the defence why they should have attacked the accused. PW3 reiterated that when the accused returned from the mountain on the third occasion, he attacked the deceased and hacked her with the slasher without uttering a word. Incidentally, the defence did not deny that the accused hacked the deceased with the slasher, and, that the others all ran away including the deceased who subsequently fell down. The accused continued to hack the deceased with the slasher even when she was lying on the ground bleeding profusely from the serious multiple injuries inflicted by the accused.

[17] The defence did not deny that during the assault, the accused turned the deceased face down and continued with the assault; and, that the accused subsequently phoned the police and reported that he had killed his wife. The defence disputed that the accused had told the police that he wished he had killed PW3 and PW5 as well; the defence argued that PW3 had not said this allegation in her evidence in-chief, and PW3 conceded.

[18] PW4 is Paul Dlamini, an uncle to the deceased; he is the father in-law of the accused. On the 16th February 2012 he received a report from his sons that the accused had killed the deceased. His homestead in the same neighbourhood as

the Mkhwanazi homestead. He proceeded to the scene and found the deceased covered with a blanket; he removed the blanket and noticed injuries on the back of neck, on the head, below buttocks, on the chin, on the arms as well as the throat which was cut. When the police arrived, PW4 expressed shock at the death of the deceased; furthermore, he told them that he was still recovering from the incident in which the accused had shot the deceased and that he wanted to take her to hospital where the bullet would be removed from her body. According to PW4 the deceased had apologized for the shooting of the deceased contending that she was shot accidentally when he was shooting a dog.

- [19] He confirmed that the relationship between the deceased and the accused became hostile immediately after they were married. The accused often attacked the deceased with knives and hammers; but the accused would apologize to him after every incident. In one instance in which the accused had attacked the deceased with a knife, the matter was reported to the police who in turn referred the matter to the Swazi National Court at Hlatikulu for criminal trial. The deceased withdrew the charge during the proceedings saying she had forgiven the accused. He further confirmed that prior to this incident, the deceased had fled her marital home to stay at the Mkhwanazi homestead because of the physical abuse from the accused. He further told the Court that the accused did not show remorse by apologizing to him for the death of the deceased.

[20] Under cross-examination PW4 maintained her evidence. He was impressive and answered all questions with ease. He told the Court that after the accused had shot the deceased, she fled to his homestead to report the matter. However, she was scared to report the matter to the police for fear of reprisals from the accused. PW4 conceded, however, that the deceased had mentioned to him about the paternity dispute of their minor child during the joint family meeting; however, the deceased had insisted that the accused was the father of the minor child. He reiterated that the marriage between the deceased and the accused was turbulent, and, that in one instance, there was a quarrel between the accused and the deceased's mother at a time when she was wearing mourning gowns in honour of the deceased's father. The accused ended up assaulting the deceased's mother and inflicted injuries on her body. The deceased's mother died prior to the death of the deceased. PW4 reiterated that the deceased was known in the community to carry dangerous weapons.

[21] PW5 is Sellinah Mkhwanazi (nee Shongwe) the mother of PW3. She corroborated the evidence of PW3 in all material respects. In particular she confirmed that on the 16th February 2012, the accused arrived at her homestead, and found them sitting under a tree with PW3, the deceased and her two children, her daughter in-law and her children. His mission was to fetch the deceased; however, she refused insisting that she cannot go back until he had met her uncle and discussed the removal of the bullet from her body. She further told the Court about the dancing of the accused with his children as well

as his three trips to the nearby mountain before hacking the deceased to death with the slasher. She confirmed that the accused threatened her with the slasher when she tried to intervene; and she also ran away like the others. Generally, she corroborated the evidence of PW3 in all material respects.

[22] Under cross-examination she maintained her evidence. She denied as alleged that the accused found them drinking Marula beer; she further denied that the accused drank Marula beer after she had offered to him. Similarly, she denied that the deceased had insulted the accused for not bringing food for the children. She also denied that the deceased had threatened to destroy the accused's radio as a basis for killing the deceased. She told the Court that the deceased was seated quietly; and she denied that the deceased had attacked the accused when he picked up his radio.

[23] PW5 reiterated her evidence that the accused had threatened her with the slasher when he attempted to intervene and stop him from hacking the deceased. The defence counsel conceded that the accused hacked the deceased with the slasher but suggested that it was pursuant to the attack by the deceased together with PW3 and PW5; and PW5 denied the alleged attack and contended that the hacking of the deceased was not provoked. The defence conceded that the accused had brought the slasher to the Mkhwanazi homestead and placed it at the entrance to the homestead. She confirmed that at one time the accused had come to her homestead armed and intending to force the deceased to return

to his homestead, but, he was disarmed by Sibongo Mkhwanazi and Khususu Dlamini.

[24] PW6 is Inspector Mfihlo Mabuza who was the CID Desk Officer at Hlatikulu Police Station. He was the investigating officer in this matter. On the 16th February 2012, he received a report relating to this matter. He passed the message to Sgt. Mkhabela, the Scenes of Crime Officer as well as to the Serious Crimes Unit, also known as Lukhozi, both of which were based at the Nhlanguano Police Regional Headquarters. At the scene he found the body of the deceased covered with a blanket; they examined the injuries, and, photographs of the scene were taken.

[25] At the scene the situation was very tense since members of the community wanted to avenge the death of the deceased by attacking the accused. The accused was hiding in a nearby forest and, he was afraid of the mob which had gathered at the scene baying for his blood. Together with the accused's mother, the police phoned the accused to surrender himself to the police and assuring him of his safety. Eventually, he surrendered himself to the police.

[26] The police introduced themselves to the accused and further cautioned him that he was not obliged to say anything to them, but that whatever he said or hand over to the police would be used in evidence during the trial. The accused, who was still in possession of the slasher handed it over to the police; the

slasher had bloodstains. The accused was formally charged with murder on arrival at the police station. Clothes which the accused was wearing during the commission of the offence were taken by the police as exhibits.

[27] During the trial the items taken from the accused were admitted in evidence. The slasher was marked Exhibit A, the trousers Exhibit B, the T-shirt Exhibit C and the Takkies shoes Exhibit D. PW6 maintained his evidence under cross-examination. The prosecution then closed its case.

[28] The accused gave evidence in his defence. He testified that his relationship with the deceased was good until 2011 when he discovered that he was not the father of the younger child. This evidence is in sharp contrast to that of PW3, PW4 and PW5 who described the marriage as a failure from the beginning with the accused physically abusing the deceased with various weapons. The accused further testified that the deceased had told him on the 31st December 2011 that the father of the younger child is Majuba Ginindza. However, PW4 testified that at a joint family meeting, the deceased had denied that the accused was not the father of the younger child; and, this evidence was not disputed during the trial. Incidentally the accused testified that he had tried but failed to discuss this paternity dispute with Majuba Ginindza, the alleged father of the minor child.

[29] The accused conceded that the deceased left their marital homestead on the 18th January 2012 and went to the Mkhwanazi homestead. He went to fetch her but he was told that the elders were not present to discuss the return of the deceased to her marital home. On another occasion he went to the Mkhwanazi homestead to give bread to his children; however, he was attacked by PW3, Sibongo Mkhwanazi and Khususu Dlamini, and, he sustained injuries; however, he doesn't know why he was assaulted, and, he did not report the matter to the police.

[30] This evidence is in sharp contrast to the evidence of PW3 who testified that the deceased came three times to the Mkhwanazi homestead after the accused had chased her from their marital home. She further told the Court that in each of those occasions, she demanded the return of the deceased, and, that he was always armed with weapons. PW5 corroborated PW3 in this respect and stated that on one occasion, he was disarmed by Khususu Dlamini, the brother to the deceased and Sibongo Mkhwanazi, the brother to PW3.

[31] The accused testified that on the 16th February 2012 the deceased phoned and invited him to the Mkhwanazi homestead to drink Marula beer which she had prepared. He took with him a bushknife which he would use to cut logs on his way back home to finish constructing a vegetable garden. At the Mkhwanazi homestead he was offered Marula beer which he drank together with PW3, PW5 and the deceased. However, this was denied by PW3 and PW4 who told

the Court that they did not offer Marula beer to the accused, and, that they were not drinking beer when the accused arrived. PW5 told the Court that she does not even drink liquor at all.

[32] The accused further testified that the deceased had asked him why he did not bring food for the children, and, he told her that he was not prepared to feed the entire Mkhwanazi family. The deceased insulted him saying that he was useless; and, the others laughed at him and further encouraged her to continue insulting him. He then decided to leave; he picked up the slasher and heard the deceased threatening to destroy the radio. When he tried to take the radio, PW3, PW5 and the deceased hurled stones at him; however, he used the slasher to block the stones and he was not hurt. He admitted hacking the deceased with the slasher ostensibly because they were attacking him with stones. When he realised that the deceased was hurt and bleeding from the multiple injuries, he reported the incident to the police.

[33] Under cross-examination the accused conceded hacking the deceased with the slasher in the presence of his children and the other people who were at the Mkhwanazi homestead. He told the Court that he hacked the deceased in an attempt to defend himself against the unlawful attack from PW3, PW5 and the deceased. This allegation was denied by PW3 and PW5 who reiterated that when the accused returned from the mountain on the third occasion, he proceeded to hack the deceased with the bushknife without uttering a word.

[34] The accused told the Court that the reason he hacked the deceased several times was because he was drunk; however, he did not mention the issue of drunkenness during his evidence in-chief. Similarly, the issue of drunkenness was not put to Crown witnesses; such evidence constitutes an afterthought. It is a trite principle of our law that the defence case should be put to the prosecution witnesses in order for them to respond to the allegations; otherwise, the evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief. See the case of *Elvis Mandlenkhosi Dlamini v. Rex Criminal Appeal No. 30/2011* at para 22 and 23.

[35] It is apparent from the evidence that the accused hacked the deceased to death with the bushknife; and, that he accused foresaw the possibility of her death, but he continued hacking her repeatedly and was reckless whether or not death resulted. *Troughton ACJ in Rex v. Jabulani Philemon Mngomezulu 1970-1976 SLR 6 (HC)* at p.7 stated:

“The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[36] *Cohen ACJ in Beadle v. Rex 1979-81 SLR 35 (CA)* at p. 37 said:

“Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not. The requirements according to

the learned authors are: (i) subjective foresight of (ii) possibility and (iii) recklessness.... The subjective foresight test ... takes account only of the state of mind of the accused, the issue being whether the accused himself foresaw the possibility of the consequences of his act.... If the accused in fact foresaw the possibility of the consequences in question and was reckless as to whether or not they did result, he intended them in the legal sense.”

[37] *Mens rea* in the form of intention may also be determined from three factors: firstly, the nature of the weapon used in the commission of the offence whether or not it is lethal, secondly, the area of the body where the injuries are inflicted whether it constitutes vital or sensitive organs of the body. Thirdly, the seriousness and extent of the injuries sustained by the victim whether or not they are life-threatening. The bushknife used in the commission of the offence was a lethal weapon, and, it was described by PW3 and PW5 as very sharp. The injuries were inflicted in delicate parts of the body including the head. The injuries sustained, as reflected in the post-mortem report as well as the photographs admitted in evidence show that the attack on the deceased was brutal, vicious, gruesome and inflicted with the full might of the accused.

[38] The accused contends that when he hacked the deceased to death, he was acting in self-defence. However, there is no evidence that he was attacked by PW3, PW5 and the deceased; PW3 and PW4 deny that together with the deceased, they attacked the accused as alleged or at all. The accused has conceded that during the alleged attack by PW3, PW5 and the deceased, he was not hit by the

stones allegedly thrown at him; and, certainly he was not injured. Even if he was attacked, which has not been proved, he would not have been entitled to inflict multiple fatal injuries upon the deceased in the manner that he did with a very sharp and lethal weapon. He continued hacking the deceased even after she had fallen to the ground. Worse still she was defenceless and not armed with any weapon.

[39] It is a trite principle of our law that a person may apply such force as it is reasonably necessary in the circumstances to protect himself against unlawfully threatened or actual attack. The test whether the accused acts reasonably in defence is objective; and, the force used must be commensurate with the danger apprehended, and, if excessive force is used, the plea of self-defence will not be upheld. See the case of *Rex v. Nhlase Anthony Nxumalo* Criminal Case No. 87/2010 and *Rex v. John Ndlovu* 1970-1976 SLR 389 (HC) at p.390.

[40] *Ramodibedi CJ in Bhutana Paulson Gumbi v. Rex* Criminal Appeal No. 24/2012 at para 15 said:

“...self-defence is only available if three requirements are met, namely, if it appears as a reasonable possibility on the evidence that:-

(1) the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;

(2) the means he used in defending himself were not excessive in relation to the danger; and

(3) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.”

[41] It is apparent from the evidence that the accused was not attacked by the deceased, PW3 and PW5; hence, he was not in danger of death or serious injury. On the contrary the evidence shows that the accused was the one who unlawfully attacked the deceased without provocation

[42] The next enquiry is whether there are any extenuating circumstances in the matter which would reduce the moral blameworthiness of the offence. *His Lordship Ramodibedi CJ in Bhekumusa Mapholoba Mamba v. Rex* Criminal Appeal case No. 17/2010 quoted with approval the decision of *Holmes JA in S. v. Letsolo* 1970 (3) SA 476 (A) at p. 476 where the learned judge had this to say:

“Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to consider –

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

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

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

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

[43] At para 13 and 15 *His Lordship Justice Ramodibedi CJ* stated the following:

“13.Now, a finding of *dolus eventualis* as opposed to *dolus directus* may, in a proper case, constitute an extenuating circumstance. *In casu*, I consider that *dolus eventualis* coupled with provocation constitute extenuating circumstances...

....

(15) Now it well-settled that the absence of premeditation, depending on the circumstances of each case, may constitute an extenuating circumstance.”

[44] In the *Mapholoba* case the Supreme Court found that extenuating circumstances were present on the basis of *mens rea* in the form of *dolus eventualis* as well as provocation. In the present matter the accused has been convicted on the basis of *dolus eventualis*; however, provocation even though alleged in the form of insults by the deceased was not proved. Worse still the deceased was killed in broad daylight in the presence of her two young children; and, this experience will haunt these children throughout their lives.

[45] *Dr. S. Twum JA* in *Ntokozi Adams v. Rex* Criminal Appeal No. 16/2010 at para 14 (v) said:

“14. (v) The general rule is that it is for the accused to lead evidence which would show extenuating circumstances in the crime of murder even though it is also true that the Court is not limited to circumstances appearing from the evidence led by or on behalf of the defence. On the contrary, the Court must also have regard to all the relevant evidence, including even the evidence led on behalf of the Prosecution. The time for gauging the existence of the extenuating circumstances, is of course, the time of the commission of the crime. This means that there must have been a real possibility that the accused at the time of committing the crime was in fact in a state of mind which lessened his moral blameworthiness.

(vi) In sum, the Court probes the mental state of the accused to determine extenuating circumstances.”

[46] Aggravating factors exist in the present matter, namely, the unprovoked brutal and gruesome killing of the deceased, the consistent and repeated hacking of the deceased even when she had fallen down, the evidence that the accused danced over the deceased’s body after he had killed her, the boasting that he had killed a prostitute, he leaked the blood of the deceased from the murder weapon and commented that it tastes deliciously. He mocked her that her backside was as fat as that of a chicken. Worse still fourteen injuries were inflicted on the deceased. The deceased was also pregnant at the time of her death.

[47] As stated in the preceding paragraphs there is no evidence that the accused was intoxicated. PW3 and PW5 denied that the accused found them drinking liquor or that they offered the accused liquor to drink. In the circumstances I find that no extenuating circumstances exist in this matter.

[48] It is now settled in this country, pursuant to the advent of the Constitution of 2005, that the absence of extenuating circumstances does not automatically compel the trial Court to impose a death penalty. Section 15 (2) of the Constitution has invalidated section 296 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938. The current position is analysed properly by the Supreme Court in *Ntokozo Adams v. Rex* (supra) at para 30 where Moore JA said as follows:

“[30] In my judgment, section 15 (2) clearly amends section 296 (1) of the Criminal Procedure and Evidence Act. Section 2 (1) of the Constitution enacts that it is the supreme law of Swaziland and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency be void. Since S. 296 (1) provides that the death sentence shall be passed (mandatory) and section 15 (2) provides that it shall not be mandatory, that part of S. 296 (1) which mandates death by hanging upon an offender convicted before or by the High Court of murder, is inconsistent with S.15 (2). The result now is that the death sentence is not mandatory. The Constitution has enacted a paradigm shift. Under the old sentencing regime S. 296 (1) of Criminal Procedure and Evidence Act, the High Court was bound to pass the death sentence unless it could find the existence of extenuating circumstances in respect of the murder. Trial judges had to make difficult moral judgments in

borderline cases in order to avoid passing the death sentence. Now that is removed.”

[49] The Crown has proved the commission of the offence beyond reasonable doubt. Accordingly, I find the accused guilty of murder without extenuating circumstances.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Accused

Attorney S.C. Simelane

For Crown

Principal Crown Counsel S. Fakudze