



IN THE HIGH

COURT OF ESWATINI

JUDGMENT

Case No. 155/2013

In the matter between:

REX

And

ALEX SIPHO SIMELANE

Neutral citation: *Rex v Alex Sipho Simelane* (155/2013) [2020] SZHC 31 (6 May 2020)

Coram : **T. L. Dlamini J**

Heard : 24, 25/06/2019 15, 16/07/2019 8/08/2019
7/10/2019

Delivered : 6 May 2020

Summary: *Criminal law and procedure – Accused person charged with Murder – Accused pleaded that he acted out of provocation – Also pleaded that he was acting in self-defence – Both provocation and self-defence considered.*

Held: *That on the evidence placed before court, provocation has not been proved.*

Held further: *That self-defence cannot be sustained as the deceased ran away but was caught while fleeing from the accused – Fatal injuries which caused his death were inflicted on him – Accused is found guilty of murder with no extenuating circumstances*

JUDGMENT

Background

- [1] The accused person, **Alex Siphon Simelane**, is before court facing a charge of **Murder**. The indictment states that upon or about 21 April 2013 and at or near Maseyisini area, in the Shiselweni region, the accused did unlawfully and intentionally kill one **Phillip Gamedze**.
- [2] During trial, the crown paraded seven witnesses while the defence only tendered the evidence of the accused.
- [3] In summary, the evidence of the crown is that the accused assaulted Phillip Gamedze (the deceased) using a baton. He heavily assaulted the deceased whilst also sitting on top of him. He assaulted him using the baton all over the head and face until the baton broke. The deceased was assaulted and left lying on the ground with a gaping wound on the head, and a torn tongue, and was covered in blood.

- [4] The defence case is that the accused was provoked by the deceased and his son and thereafter, was assaulted by them. He was first insulted and called by them a dog. He was then assaulted and also hit hard on the head where he bled. A mini-truck that he was driving was smashed on the windscreen, and he became very angry since the mini-truck did not belong to him, hence he fought back. The fight resulted in the deceased being killed.

Chronology of the crown's evidence

- [5] The first witness for the crown (PW1) is Sipehelele Absalom Gamedze. He is a son of the deceased and was with the deceased when the assault that led to his death occurred. He testified that on Sunday the 21 April 2013 at around 17:00 hours the deceased requested to be accompanied by him to the fields where there is an orchard with avocados. He went there to inspect because people have a habit of stealing the avocados. The deceased left ahead of him and he followed.
- [6] On his arrival he found the deceased chasing Siphso Simelane (the accused person). He informed the court that the accused is their neighbour although his homestead is a bit far from theirs. PW1 joined the deceased and they both chased the accused who ran towards a Toyota Hiace mini-truck that he was driving. That is where he stopped and they caught up with him. The accused was carrying avocados that he picked from the orchard.
- [7] PW1 further testified that he then asked the accused concerning an assault that his family subjected his father to on another day. The accused person's

response was that he was in Johannesburg in the Republic of South Africa on that day. PW1 informed the court that he then abandoned that conversation and ordered the accused to put down the avocados. At that moment he started hitting the accused using a stick. It was his evidence that whilst he assaulted the accused with the stick, the accused retaliated by hitting his father (the deceased) using fists.

[8] PW1 also testified that he then smashed the windscreen of the mini-truck that the accused was driving and that is when the accused and PW1 started fighting. The accused held PW1 by the clothes and started calling his two friends. The fight was getting tough, according to PW1. As the two friends approached, the deceased and PW1 then ran away but were chased after by them. On being asked in-chief about who were those friends, he stated that he doesn't know their names.

[9] Whilst being pursued, the accused was armed with a baton that he retrieved from the mini-truck, and he told his friends that they should kill one of them. They were chased until they ran across a river and the accused ultimately caught up with the deceased.

[10] The accused severely assaulted the deceased using the baton. His two friends were also there but did not take part in the assault. PW1 ran straight home where he informed his mother Norah Gamedze about the incident. According to his evidence, he even informed his mother that he does not think that his father would survive from the assault.

- [11] PW1 identified the baton inside court and the court marked it as EXHIBIT “A”. The court’s observation was that the baton is or looks like one of the traditional sticks used by the Zulu nationals as their traditional dancing stick.
- [12] He further testified that his mother informed him to go and report to the police while she proceeded to where the deceased was being assaulted. PW1 went to report the incident to the police and recorded a statement as well.
- [13] It was put by the defence to PW1 that the accused never stole the avocados but found them down after being left there by boys after seeing the accused and his friends coming and driving in the mini-truck. This was denied by PW1 who stated that he personally saw the accused running away with the plastic in which the avocados were carried. It was further put to PW1 that the accused and his friends were on their way to the river to wash the mini-truck and not to steal avocados. PW1 responded by stating that if that was the case, the truck should not have been found by them at the orchard but should have been at the river which was far from that place.
- [14] It was also put to PW1 that he openly made allegations against the accused person and his family members of having assaulted his father. PW1 denied this and stated that he only asked the accused about where he was when his father was assaulted. It was further put to PW1 that after his conversation with the accused, the deceased then shouted and said “***here are the dogs that almost killed me***”. This exclamation was said to have provoked and angered the accused. This was denied by PW1 who said that his father never said what is now being alleged.

- [15] It was further put to PW1 that the deceased is the one who first assaulted the accused on the head and the accused bled as a result. PW1 stated that this is untruthful and is a lie. He testified that he is the one who assaulted the accused and that the deceased never assaulted the accused.
- [16] Lastly, it was put to PW1 that the accused did not intend to kill the deceased but acted in self-defence as he was being assaulted by PW1 and the deceased, and that he was overcome by anger and acted in the spare of the moment. PW1 denied that the accused acted in self-defence as he chased the deceased for a distance of about 500 metres. He further stated that every person gets angry but the accused was not warranted to act against the deceased in the manner that he did.
- [17] The second witness for the crown (PW2) is Norah Hlamkile Gamedze. She is a wife of the deceased and the mother of PW1. She testified that on 21 April 2013 at around 17:00 hours the deceased and PW1 went to the family fields where there is also an orchard. They went there to check as people stole the avocados. After a while PW1 came back running and reported that there was a fight, and that following the fight he ran away. As he ran away, he could not see his father (the deceased) as he was already down on the ground.
- [18] When asked in-chief about who was PW1 and his father fighting with, PW2 stated that it is the boys from the Simelane homestead but the only one she knows is Siphon, and pointed at the accused person. She then went to where the fight was said to be taking place but told PW1 to go and report to the

police as well. She testified that on her arrival she found the deceased unable to talk. She also testified that the deceased only looked at her once. He had a cut on the head and covered in blood, and that his tongue was cut. The blood was all over his head, and also on the shirt that the deceased was wearing, and on the ground as well.

[19] During cross-examination, it was put to PW2 that prior to the incident, the accused was provoked by the deceased. The response of PW2 was that she has no knowledge of that. It was also put to PW2 that the accused had no intention to kill the deceased but was overcome by anger caused by the exclamation that the deceased made concerning the accused. The response by PW2 was that she has no knowledge of that. What she knows and remembers is that the deceased was once assaulted in the area.

[20] The crown's third witness (PW3) is Dr R.M. Reddy. PW3 testified that he is a police pathologist. He conducted a post-mortem examination on the body of Phillip Gamedze (the deceased) whose body was identified to him by a police officer based at Nhlngano police station with force number 3703. The body was also identified by Sive Gamedze who is a son of the deceased.

[21] PW3 testified that the cause of death of Phillip Gamedze were multiple injuries. He had injuries on the head, being a 2.5 by 2 cm cut on the left skin of his head, a 4 cm cut on his forehead, a 5 by 1 cm skin deep scalp contusion, a 6.2cm area with depressed fracture vault of 5.2 by 2.7 cm on the left side, plus a spread out inflammation within the skull with 130 ml of blood mixed with the brain. He also had a 3 by 1 cm tearing of the upper lip

and fractured jaws with loosened teeth, and fractured ribs that resulted in internal bleeding.

[22] PW3 testified that these injuries were fatal. The torn upper lip and fractured jaws with loosened teeth were however described by PW3 as grievous injuries. The death was caused by the head and chest injuries. These were all inflicted using a blunt object.

[23] As part of his evidence, PW3 handed to the court a report of the post-mortem examination that he prepared. The report was admitted and marked as EXHIBIT “B”. The defence elected not to cross-examine PW3.

[24] The crown’s fourth witness (PW4) is Wiseman Mdumiseni Manana. He testified that on 21 April 2013 they came back from a soccer game and he was with Sipho Simelane (accused) and Ncamiso Simelane. They proceeded to wash a white motor vehicle that they were travelling in. While driving down they saw certain boys picking up avocados from the orchard of the family of the deceased. They joined these boys and picked up the avocados. Whilst they were picking the avocados, the deceased and his son Siphellele came and the boys ran away. They also joined the boys and ran away. PW4 and Ncamiso ran into a bush but the accused ran towards the car.

[25] As they continued to run, they then heard the accused calling them by their names. His tone suggested that things were not good and they came back and found the accused being assaulted by the deceased and PW1. PW4 further testified that they were afraid to get closer and ended up picking stones and threw at them so that they could separate. They then picked up

sticks of gum trees and drew closer and that is when the deceased, the accused and PW1 split.

[26] The accused then got the chance to run away but went to the motor vehicle to get the baton he used to assault the deceased. PW4 and Ncamiso chased after PW1 who however, outran them. When coming back from chasing PW1 they found the accused severely beating the deceased with the baton such that the deceased bled from the nostrils. The deceased was on the ground at that moment and the accused was on top of him.

[27] PW4 also testified that they shouted at the accused telling him to stop assaulting the deceased but he continued and did not stop. They eventually had to physically restrain him by holding him so that he stops. It PW4's evidence that they then left the deceased there and proceeded to the car where they found its windscreen smashed and damaged. The accused then called the police and reported about the damaged windscreen and Mr Gamedze. The police came and took the accused, Ncamiso and PW4 to the Nhlanguano police station.

[28] When asked in-chief if PW4 and Ncamiso also assaulted the deceased, his response was that they never did. In other words, he was only assaulted by the accused. He also identified the baton which the accused used to assault the deceased.

[29] During cross-examination, it was put to PW4 that the accused's instruction is that he never stole the avocados but found them on the ground and took them after having been left there by the boys who ran away. In response PW4 stated that there is no truth in that. It was also put to PW4 that the assault on the accused by the deceased and his son provoked and angered him, hence the accused retaliated and assaulted the deceased. PW4 conceded and agreed.

[30] It was further put to PW4 that whilst being assaulted by the deceased and his son, the accused was injured on the hand and the head, and he bled as a result. PW4 agreed and informed the court that the accused was injured on the head and hand as well. It was also put to PW4 that an instruction by the accused is that the damage caused by the smashing of the windscreen of the mini-truck made him to be very angry as it would cause more trouble for him at home. In response, PW4 stated that he has no knowledge of that because he does not know what came into the mind of the deceased.

[31] The defence attorney also put it to PW4 that the accused had no intention to kill the deceased but was overcome by anger as everything happened very fast. In response PW4 stated that there is nothing that he can say on that. Lastly, it was put to PW4 that the accused acted in self-defence as he was being assaulted by two men and he was alone. PW4 responded by stating that there is nothing that he can say on that as well.

[32] On re-examination, the crown reminded PW4 that a statement was made to him to the effect that the accused acted in self-defence when he assaulted the deceased. He was then asked if at the time when PW4 came from chasing PW1, the deceased had in his possession any weapon. His response was that the deceased was lying down on the ground at that time and there is nothing that he could do. In other words he was already helpless. He was asked if the accused continued to assault him despite that the deceased was already lying on the ground. His response was that the accused continued to assault him.

[33] The fifth crown witness (PW5) is police officer 4601 Const. Richard Bongani Dlamini. According to his evidence, he was stationed at Nhlangano police station in April 2013. He testified that on 21 April 2013 at around 17:30 hours he received a report through the police emergency number 999. The caller was Alex Siphon Simelane (the accused) who reported a case of Assault with Intent to cause Grievous Bodily Harm (Assault GBH) and Malicious Injury to his motor vehicle with registration number DSD 801 AS.

[34] He proceeded to the scene with 6484 Const. Thabiso Sithole where they found the caller with Wiseman Manana (PW4) and Ncamiso Simelane. While they interviewed these three, a woman named Annie Ngwenya came. She was a community police of that area. She reported that there is a man who was full of blood and gasping for air lying next to a sports ground. They then proceeded to where the reported man was and directed the three to go and wait near a store that is near the sports ground.

[35] They found many people surrounding the injured man who was identified as Phillip Gamedze (the deceased). Norah Gamedze (PW2) who is the deceased person's wife was also present. The deceased was lying on his back and facing upwards, and was soaked in a pool of blood. He was snoring and had visible injuries particularly on the head which was swollen by then. PW5 testified that his investigation revealed that the cause of the injuries on this man is related to the report he came to attend. They then carried this person into the police motor vehicle for the purpose of taking him to hospital. His wife accompanied him. He also took the accused, PW4 and Ncamiso Simelane to Nhlanguano police station for questioning.

[36] The three were left at the police station and the deceased and his wife were rushed to Nhlanguano Health Centre. On arrival, the deceased was taken into the examination room where PW5 was requested to take the wife outside as she was crying. He was then told in the absence of the wife that Phillip Gamedze was no longer alive but had died.

[37] PW5 was asked during cross-examination about who injured the accused as PW5 testified that the accused reported that he got injured and the motor vehicle he was driving was damaged. His response was that the accused recorded in his statement that he was assaulted by the deceased person.

[38] PW5 was also asked if he saw the injuries that the accused talked about. His response was that he never saw any injury on the accused person.

[39] The sixth witness for the crown (PW6) is 4131 Assistant Inspector Enock Zane Tsabedze. According to his evidence, he is a trained scenes of crime officer stationed at the Nhlanguano Regional Headquarters. His duties include taking pictures of crime scenes, and to investigate and take finger prints. He testified that on 22 April 2013 he received a call from the Nhlanguano police station. He was asked to come and take pictures of a pointing out at Maseyisini area. On arrival at the police station, he found police officers, including 5318 Assistant Inspector Mbuli, who explained to him about why he was called.

[40] He testified that officer Mbuli took him to meet the accused whom he asked about what is it that he wanted to say that led to him being called. The accused, according to PW6, told him that he wanted to show the police the exhibit that he used to assault the deceased. He was told this information in the presence of officer Mbuli who then cautioned the accused according to the Judges' Rules. The content of the Judges' Rules was recited by PW6.

[41] Thereafter they proceeded to the parental homestead of the accused where they found his father and introduced themselves to him. They also explained to him the reason why they came to the homestead. They then proceeded to where the accused led them. His father joined them. Before going, the accused was again cautioned by officer Mbuli according to the Judges' Rules.

[42] The accused led them to a white van that was parked inside the yard of the homestead. He retrieved a broken baton from the back of the van. The baton was red with white stripes around. Thereafter, after being cautioned again,

the accused led them to the scene where he assaulted the accused. Traces of blood were visible at the scene.

[43] The accused then took them to another place which he said is where the fight started. That is where they found the other piece that was broken from the baton. It had blood stains on it. The court was given a photo album that contains the pictures that were taken at all the places of the pointing out by the accused.

[44] It was put, during cross-examination, to PW6 that the accused was threatened by the police at the station and that they demanded that he leads them to the crime scene, and also show to them the exhibits he used when committing the offence. The witness responded by stating that the accused never told him anything to that effect, and that he did not even indicate that he was threatened.

[45] It was also put to PW6 that the accused was not cautioned according to the Judges' Rules prior to the pointing out. His response was that he personally heard the police investigator when cautioning the accused.

[46] The seventh crown witness (PW7) is officer 5315 Detective Assistant Inspector Gcinile Mbuli. She is based at the Nhlanguano police station under the Criminal Investigation Department (CID). She testified that on 22 April 2013 she received a docket for a Murder case that happened the previous day. One Phillip Gamedze of Maseyisini was assaulted and died while undergoing treatment at the Nhlanguano Health Centre.

[47] She also testified that she learnt that the suspect was in police custody. She proceeded to the cells, after having interviewed a few people, where she found the accused and introduced herself to him as the investigator of the case he was facing. She then took him to the CID office where there was 3165 Assistant Inspector Mabuza, 3686 Inspector Vilane, Scenes of Crime officer 4131 Assistant Inspector Tsabedze and other police officers. She further testified that she cautioned the accused and informed him that he is not obliged to say anything and that whatever he may say will be recorded and may be used against him as evidence in court.

[48] Having been cautioned, the accused had something to say and took them to a place called Joppa, at his parental homestead where they found his father, one Gideon Simelane. They introduced themselves to Gideon as police officers who are investigating the death of Phillip Gamedze. Gideon informed them that he already knew about the matter they were investigating. They told him that the accused wanted to give them something. The accused led them, after being cautioned according to the Judges' Rules, to an open garage where there was a half lorry with a shuttered windscreen. At the back of the lorry, he retrieved a broken baton (EXHIBIT Ä"). He told them that it is the exhibit he used to assault the deceased.

[49] The accused also led them to his house where he gave them clothes that he was wearing on the day. He was again cautioned according to the Judges' Rules before he retrieved and gave them the clothes. He then took them to the scene and showed them where the deceased was lying after the assault. On the grass there was blood. Thereafter he took them to where the

misunderstanding took place. That place is near the avocado orchard. That is where they found the other part of the broken baton. Officer 4131 Assistant Inspector Tsabedze took pictures of all the scenes. This happened in the presence of Walter Gumbi, a community member of that area. Thereafter, they all went back to the police station.

[50] Pw7 then proceeded to the Nhlanguano Magistrates Court where she obtained an order to take blood samples from the accused for purposes of conducting a DNA examination. The blood sample was taken from the accused by the Nhlanguano Health Center nursing staff. She gave the blood sample to officer 4131, Assistant Inspector Tsabedze, for onward transmission to the Police Headquarters in Mbabane.

[51] She also explained to the accused his rights, one of which is the right to see a Magistrate if he so wishes, and tell the Magistrate whatever he may wish to say. The accused expressed a wish to see a Magistrate. Arrangements were then made. The accused was then handed over to 6477 Constable Shongwe by PW7.

[52] PW7 then showed to the court exhibits that were pointed out by the accused. These are; broken baton found at accused's home, blue jeans, black jacket, bottle green t-shirt, black t-shirt with lime colour, brownish soft shoes and the broken part of the baton found at the scene.

[53] It was put to PW7 that she is not in a position to tell the court about the cause of the fight between the accused and the deceased. She conceded but stated that her investigations revealed that the fight emanated from a

misunderstanding about avocados. It was also put to PW7 that the accused was provoked by the deceased and his son PW1, and that he acted in self-defence as they assaulted him. In response she stated that she doesn't know about the provocation. She however stated that when considering the distance from where the assault took place up to where the body of the deceased was found, the accused could have calmed down.

[54] A Forensic Report, marked as EXHIBIT "F", and a Confession that was made before Magistrate M.Z. Nxumalo were handed to court by consent of the parties. The confession was read for the record and was marked as EXHIBIT "G".

[55] To a great extent, the Confession made before the Magistrate is consistent, as it will later be seen, with the evidence given by the accused before this court. There are however, aspects of the evidence that are inconsistent.

[56] The Confession states that the accused left his parental homestead at Maseyisini at about 12:00 hours to watch soccer at the King Sobhuza stadium. He was driving in a mini lorry and was in the company of Ncamiso Simelane, Mduduzi Sangweni and Wiseman Manana. They picked one Hlophe guy (whose name I could not read) at Maseyisini. Upon reaching the Saw Mill Company they picked a Kuhlase guy (whose name I could not read as well). He was at a football pitch.

[57] Upon arrival at the King Sobhuza stadium the accused and his friends were notified that the soccer game will no longer proceed as the pitch was not playable due to rains of the past few days. They later drove back and arrived

at Maseyisini at around 17:00 hours. They then took the mini lorry to have it washed by the river. When they were next to the river, they saw people carrying plastics. Upon seeing them, the people ran into a nearby forest. At the time the accused was with Wiseman Manana and Ncamiso who then alighted from the mini lorry and chased after the people who ran into the forest. The accused then saw another boy who was also carrying a plastic bag. Upon seeing the accused the boy ran away as well and left the plastic bag on the roadside. The accused alighted from the mini lorry and took the plastic bag. He discovered that it contained avocados.

[58] The accused then saw Mr Gamedze (the deceased) who was with his son. When they reached him, Gamedze's son shouted at the accused and told him to put down the avocados. The accused obliged and put the avocados down. The son then accused him of having previously assaulted his father with members of his family. Mr Gamedze then shouted, saying that "***these are the dogs who almost killed me, we must deal with them***".

[59] The Confession further reflects that the accused stated that he was then hit on the head by Mr Gamedze using a stick, hence the big wound on the head. His son also assaulted him using a stick but the accused managed to run away. The accused then called Ncamiso and Wiseman who came running. Upon seeing them, Mr Gamedze's son (PW1) ran away and but ran towards the lorry. He picked up a branch of a tree and smashed the windscreen of the lorry. The accused asked his friends Ncamiso and Wiseman to chase after Mr Gamedze's son but he outpaced them. The accused gave chase and caught up with the deceased by the river. The Confession also reflects that

the accused fought the deceased using a stick. He managed to dispossess and grab the stick from the deceased. He used the stick and fists to assault him.

[60] When Ncamiso and Wiseman returned from chasing PW1 they found the accused assaulting the deceased and they asked the accused to forgive him. He then stopped assaulting him and they then went away and left the deceased lying on the ground. When they got to where the lorry parked, they called the police and reported the damage of the windscreen. When it started to get dark, they left the area and met the police along the way. Whilst talking to the police, a female person came and informed the police that there was a person who had difficulty in breathing. The police then went to fetch the person and took him to hospital. The police also took the accused and his friends and left them at the police station. On their return from hospital, the police informed them that they were arresting them as the person has passed away. That is all the accused confessed to before the Magistrate. Confession was made on 23 April 2013.

[61] The Confession was read into the record and the crown then closed its case.

[62] The accused is the only witness who testified for the defence. He testified that on the 21 April 2013, at around 1300 hours, he went to a soccer game at King Sobhuza stadium with Wiseman Manana (PW4) and Ncamiso Simelane. On arrival at the sports ground they found that there was no game playing. They then went to hang around the shops until around 1700 hours, where after they proceeded to wash the car they were using. Whilst they were passing a place that has trees, some boys emerged and ran away as the accused and his friends were approaching. Wiseman and Ncamiso alighted

from the motor vehicle and pursued the boys. The accused proceeded and drove in the motor vehicle and when he was about to reach the orchard garden other boys who were coming from the orchard and carrying avocados emerged and ran away as well.

[63] The accused also testified that he stopped the motor vehicle with an intention to frighten these boys. The boys dropped the avocados down and he took them. While he was returning to the motor vehicle, the deceased and his son (PW1) came. They asked him about what he was carrying and he told them that it is avocados that he picked from the ground. They then drew closer and handled him in a violent manner. The accused testified that PW1 told his father (the deceased) that this is the dog who assaulted him (deceased) in the forest. Whilst he paid attention to PW1, the deceased then started assaulting him using a stick on the head. PW1 then joined his father and assaulted him as well.

[64] The accused further testified that he ran for a short distance and then started calling out his friends who came out from a bush running. Upon realizing that the two friends of the accused were coming, PW1 told his father that they should run away. Upon reaching the place where the mini-truck was parked, PW1 hit and smashed its windscreen, and they continued to run away. Having arrived where there is a river, they stopped and told the accused and his friends that they will beat them up. The accused testified that he then ran back to the mini-truck where he retrieved the baton as he was very angry at that time.

[65] Whilst running back to the mini-truck, the deceased and his son continued to assault him and he then defended himself using the baton he retrieved from the vehicle. The baton broke and they started fighting by throwing stones at each other until he was left with the deceased. The deceased was overpowered and he fell down. The accused, according to his evidence, continued assaulting the deceased while he was down until Wiseman came and told him that he should stop assaulting the deceased. They then returned to the mini-truck where he called the police and reported about the smashing of the windscreen and Mr. Gamedze as well.

[66] While on their way with his friends, they met the police who talked to them. Whilst the police were asking them questions, a woman came and reported that there was a man who was lying down and unable to breath well. The police told them to wait and rushed to where this person was. On return, the deceased was inside the police motor vehicle and was accompanied by his wife, PW2. The accused and his friends were then taken to the Nhlangano police station where the police left them. On return, the police told them that Mr. Gamedze has since died. That is how the accused was arrested and charged with Murder, according to his evidence.

[67] Premised on his evidence that he was also assaulted on the head by the deceased, the accused was asked in-chief if he sustained any injury on the head. His response was that he was injured but was not taken to hospital by the police. Again, based on his evidence that Mr. Gamedze eventually died on arrival in hospital, he was asked in-chief if he had the intention to kill him. His response was that he never had any intention to kill him.

[68] On cross-examination, it was put to the accused that PW4 testified that they saw boys picking up avocados and they joined them. He responded by stating that it is not true. He was then asked about why that was not put to PW4 if it was untruthful. His response was that he did not know how to put that question to him. It was also put to the accused that due to old age (72 years), the deceased could not physically match him in a fight as he was much younger and more active than the deceased. There was silence from the accused until the court asked him if he has any response to that. He answered by stating that he has no response. That was the evidence of the accused. The defence then closed its case.

Analysis of the evidence

[69] It is common cause that the deceased died from multiple injuries that were inflicted on him by the accused person. It was his evidence that he was informed about the passing on of the deceased shortly after the police left him at the police station enroute to hospital where the deceased was admitted, attended to, and certified dead on arrival.

[70] The cause of death was confirmed by PW3, a pathologist who conducted a post-mortem examination. He testified that the death was caused by multiple injuries. Some were inflicted on the head. There was a depressed fracture vault of 5.2 by 2.7 cm on the left side of the head, plus a spread-out inflammation within the skull with 130 ml of blood that was then mixed with the brain. The deceased also had a 3 by 1 cm tearing of the upper lip and fractured jaws with loosened teeth, plus fractured ribs that resulted in internal bleeding. These were all fatal injuries, save the torn upper lip and fractured jaws which the doctor described as grievous injuries. According to

the evidence of the doctor, the death of Phillip Gamedze was caused by the head and chest injuries.

[71] In defence, the accused pleaded provocation. He testified that the deceased called him a dog and also assaulted him using a stick. The motor vehicle he was driving was also damaged and left with a shattered windscreen by the deceased and his son PW1. The **Homicide Act No.44 of 1959** defines provocation to *mean and includes any wrongful act or insult of such a nature as to be likely... to deprive a person of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.* [s.3 (1)]

[72] The **Black's Law Dictionary, 10th ed.**, defines provocation as *“Something (such as words or actions) that affects a person's reason and self-control, esp. causing the person to commit a crime impulsively.”*

[73] When examining **s.3 of the Homicide Act**, in the case of **R v Robert, Dlamini 1987 – 1995 (1) SLR 381 at 384, Rooney J** stated what I quote below:

“It is laid down in the Homicide Act 1959, that a person who unlawfully kills another under circumstances, which but for the section would constitute murder, and does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, shall be guilty of culpable homicide.” (own emphasis)

[74] It is trite that for the defence of provocation to be sustained, the accused must have acted in the heat of the passion or heat of the moment, and must have so acted before there is time for his passion to cool. **See also: Tonny Zola**

Mamba v Rex (02/2017) [2018] SZSC 12 (9 May 2018) and Rex v Thulani Peter Dlamini (28/06) [2013] SZHC 147 (8 August 2013)

[75] *In casu*, the deceased and PW1 ran away after the accused called his two friends, PW4 and Ncamiso Simelane. They were chased after and the accused caught up with the deceased near a river. Under cross-examination, PW1 estimated the distance covered in pursuit of the deceased to 500 metres. This evidence was not denied, and was not challenged either. In my opinion, the pursuit of the deceased is evidence of the presence of an intention to catch up with the person being pursued, and to deal with him.

[76] My opinion about the perceived intention I refer to in the paragraph above is strengthened by the common cause fact that the accused went to retrieve from his car the baton that he armed himself with and used to assault the deceased. The confrontation they had did not find the accused in possession of the baton but he went to retrieve it from the mini lorry that he was driving.

[77] Another evidence of PW1 which was unchallenged is that whilst PW1 and the deceased ran away, and were being pursued, the accused told his friends that they should kill one of them. That is, kill either the deceased or PW1. This, in my view, involves a thought process. Its execution cannot, in law, be regarded as ‘acting in the heat of the passion or moment’.

[78] Indeed the accused caught up with the deceased and assaulted him using the baton until the deceased became helpless, according to the evidence of PW4 who was present and was in the company of the accused when the incident occurred. He also testified that upon finding the accused assaulting the

deceased who was then lying on the ground helplessly, they asked and pleaded with him to forgive the deceased but the accused continued to batter him using the baton.

[79] It is my finding that the accused did not act in the heat of the passion or heat of the moment. His defence of provocation is therefore not upheld and is rejected by this court.

[80] The accused also pleaded and testified that he acted in self-defence when the deceased was killed. He told the court, in his testimony, that the deceased assaulted him on the head using a stick, and that the deceased was joined by his son in the assault committed on him. He was injured and bled as a result.

[81] Killing in self-defence is excusable in certain circumstances. To operate as a defence on a charge of murder or culpable homicide, the following three conditions must exist. These are, (i) *the accused must have been unlawfully attacked, and had reasonable grounds for believing that he was in danger of death or serious injury*; (ii) *the means used in self-defence must not have been excessive in relation to the danger apprehended*; and (iii) *that the means used must have been the only method, or the least dangerous, whereby the accused could reasonably have thought that he could avoid the threatened danger.* (See: **Gardiner and Lansdown, South African Criminal Law and Procedure, Vol. II, sixth edition at p.1546**)

[82] PW4 testified that whilst they were driving to wash their car in the river, they saw boys picking-up avocados from the orchard of the family of the deceased person. They joined these boys and picked-up the avocados. The deceased and his son then came and they all ran away. PW4 and Ncamiso ran into a bush but the accused ran towards the car. Thereafter they heard the accused calling them and they responded to the call and came back.

[83] The evidence of PW4 that they joined the boys and picked-up the avocados in the orchard, which I find to be true, and the reason that the deceased went to the garden in order to check as people were stealing the avocados, is evidence, in my view, that the accused and his companions were found stealing avocados from the orchard of the deceased person. During cross-examination, PW4 testified that there is no truth in the statement by the accused that the boys who ran away left the plastic on the ground and that the accused picked it from there. The orchard, being property of the deceased, he (deceased) had the right to guard and protect it against any theft from it. Under common law, an owner of property has the right to protect his property. The accused was therefore, in my view and finding, not wrongfully attacked by the deceased. He was found in the property (orchard) of the deceased stealing. On this finding alone, the plea of self-defence is untenable.

[84] **Gardiner and Lansdown** (supra), further states that “*where a man can save himself by flight, he should flee rather than kill his assailant ... But no man*

can be expected to take a flight to avoid an attack, if the flight does not afford him a safe way of escape". (p.1547)

[85] The evidence placed before this court is that the deceased and his son fled from the accused and his two friends. They were however chased after and the accused caught-up with the deceased near the river, a distance estimated to be around 500 metres. This is where the accused assaulted the deceased until he became helpless, according to the evidence of PW4. This fact makes the plea of self-defence, again, to be untenable. The accused pursued and killed a person who was fleeing away from him, and was therefore not a danger to him anymore.

[86] **Nathan CJ**, in the case of **R v John Ndlovu 1970 – 1976 SLR 389** stated as quoted below:

“A person acting in self-defence may apply force as is reasonably necessary in the circumstances to protect himself against an unlawful threatened or actual attack. The test whether a person acts reasonably in self-defence is an objective one. 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.” (own emphasis)

[87] The evidence shows that the deceased ran away but was pursued by the accused. He caught-up with the deceased after a chase of about 500 metres and assaulted him using the baton. The evidence of PW4 that the accused assaulted the deceased until the deceased fell and laid down helplessly, and bled from the nostrils, was unchallenged. He also testified that despite their

plea to the accused that he should forgive the deceased, the accused did not stop assaulting him until they had to physically restrain him from further assaulting him. It is therefore my finding that the accused did not apply force that was commensurate with the danger that the deceased posed to the accused. On this finding, the plea of self-defence cannot be sustained and warrants a rejection by this court, and is so rejected.

[88] Based on the evidence placed before court, I am satisfied that the crown proved its case beyond reasonable doubt. The accused is found guilty of the murder of Phillip Gamedze.

SENTENCING

[89] In mitigation, it was submitted on behalf of the accused that he is an unsophisticated person from the rural areas of Maseyisini, with limited education. He has three minor children whose mother is unemployed. The children are therefore dependent on him for maintenance and support. It was also submitted that he cooperated with the police to the extent that he pointed out items that were used in the commission of the offence, and recorded a Confession before a Magistrates' court.

[90] It was further submitted that the accused person's family substantially contributed towards the burial of the deceased person, and that this assistance demonstrates how greatly remorseful the accused person and his family became. The court was urged to also take into account the age of the accused

person at the time of commission of the offence. It was submitted that he was immature. Unfortunately, the court was not informed about his age.

[91] It was submitted on behalf of the crown that the court should impose a sentence that would deter other would be offenders. The right to life, it was submitted, is protected by the **Constitution Act, 2005**, and that violent crimes are now common and require the court to intervene by imposing harsher sentences on offenders.

[92] It was also submitted that the accused ought to have foreseen that striking the old man of 72 years with the baton on the head and the face would result in death but recklessly continued to assault him. It was argued that this shows a direct intention to kill, and that the direct intention constitutes an aggravating factor.

[93] It was further submitted that the attack on the deceased was committed in a vicious manner as the accused sat on top of the deceased, and then viciously and repeatedly assaulted him on the head and the face, which are delicate and sensitive parts of the body. It was argued that the deceased was assaulted and killed whilst he was lying down and helpless. It was submitted that the manner by which the accused was killed constitute an aggravating factor, and the court was urged to impose a sentence of 20 years imprisonment.

[94] I have taken into account the triad. There is no record of previous convictions against the accused that has been submitted to this court, and for sentencing purposes, I consider him as a first offender. I have also taken into consideration the cooperation of the accused with the police and the

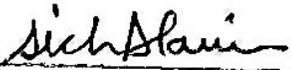
contribution that his family made towards the burial of the deceased. I have further taken into consideration the fact that the accused is a father of two minor children who depend on him for maintenance and support.

[95] It is also a fact that society looks up to the courts to protect its members from criminal behavior and from offenders as well. Murder is one of the common ills that our society has to deal with and bring to an end. Human life is guaranteed and protected by our Constitution. The importance of human life is a subject of teaching from the church as well, and the courts must play the role expected of it by society.

[96] The deceased was killed by the accused who was found in possession of avocados that were stolen from the orchard of the deceased person. The deceased was battered to death using a baton that the accused armed himself with, after he went to retrieve from a mini lorry that he was driving. The deceased was severely assaulted and battered with the baton on the head and face while lying down helplessly. The assault continued even though the deceased was then bleeding from his nostrils. The assault continued notwithstanding that the friends of the accused pleaded with him and asked that he should forgive the deceased person. He continued to batter the deceased until he was physically restrained from continuing by his own friends.

[97] On the evidence outlined above, I find that there are no extenuating circumstances.

[98] Having considered the triad, the accused is sentenced to imprisonment for eighteen (18) years. The period of imprisonment is to take into account any period that the accused has spent in custody in relation to this offence.



T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For the crown : Mr B. Ngwenya
For the accused : Ms N. Mabuza