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**IN THE HIGH COURT OF**

**ESWATINI JUDGMENT**

In the matter between:

Case No.324/2017

**THE KING**

**VS**

**1. ANDY SABELO MDAKA**

**2. SIBUSISO GIDEON MABUZA**

Neutral citation

*The King v A1u(y Sabelo Mdaka and Another (324/2017)*  
*[2021] SZHC 210. (9<sup>th</sup> November, 2021)*

Coram

M. Dlamini J

Heard

22<sup>nd</sup> October, 2021

Delivered

9<sup>th</sup> November, 2021

**Summary:** The two accused persons stood arraigned for a charge of murder. They both denied the charge.

### **Indictment**

[1] The indictment partly reads about the accused person:

*"In that upon or about 8<sup>th</sup> September 2017 and at or near Vusweni area in the Hhohho District, the said accused persons acting together in furtherance of a common purpose, each or all of them did unlawfully and intentionally kill **Muzi Nkuna** and did thereby commit the crime o.f **Murder.**"*

### **Crown's witnesses**

[2] The crown led twelve witnesses in establishing the charge. The first witness was **Dr. Ravulamanmoha Reddy**, the pathologist. He testified with reference to his report that the cause of death was a gunshot injury which penetrated the deceased right lung, piercing the heart and vertebra. He removed two pellets from the deceased. He handed his report which was marked exhibit **A** by consent of defence. PW1 was not cross examined.

[3] PW2 was **Thandeka Cynthia Shabangu**. She narrated to the comi that she woke up in the morning and proceeded to the bus rank as a resident of Vusweni. She was in the company of another person. The time was about 9:00 a.m. Along the path, they noticed a man lying in a pool of blood. They called for him. He did not respond. They realised that he

was dead. They reported the matter to the community police. Similarly, PW2 was not cross-examined.

[4] At this stage, the defence submitted that it was not objecting to the evidence of the ballistic expert and its report. It further did not contest the evidence of the scenes of crime officer and its report. The court marked their reports as exhibits Band C respectively.

[5] The defence submitted further that it was contesting the confessions. This necessitated a trial within a trial.

**Trial within a trial**

[6] Were the statements before the magistrates admissible? The crown led the evidence of a number of witnesses in establishing admissibility of the statements made by accused persons before the magistrates.

[7] **PW3: Senior Magistrate Siphosini Dlamini** attended to accused No.2 on the 6<sup>th</sup> October, 2017. Although accused No.2 came in the company of a police officer, he excused the police officer. He was left with **Musa Matse**, his clerk, and accused No.2 in his chambers. He ordered that the door to his chambers be shut. I shall capture the details of his conversation with accused No.2 later herein. PW3 handed the statement to court and was provisionally marked as **exhibit D**.

[8] **PW4: Musa Matse**, the clerk to **PW3**. He advised **PW3** that accused No.2 intended to record a confession following that he was approached by a police officer to introduce the matter to **PW3**. He then prepared the

chambers for accused to come in. Accused No.2 entered in the company of the police officer. The Magistrate ordered the police officer to leave. The police complied.

[9] **PW3** introduced himself and **PW4** to accused No.2. He told him that he was not obliged to say anything. Whatever he would say would be recorded down and be used as evidence against him in court. Further, if he wanted to say anything it must be so stated out of his own volition. He then posed the questions reflected in the pro-forma statement. Accused then narrated his version in Siswati as **PW3** enquired which language he intended to use. At the end, **PW3** read back the accused version and enquired if he recorded what was said to him. Accused No. 2 agreed and each page was signed by both **PW3** and **Accused No.2**.

[IO] **PW5: Simangele Mbatha**, who is the Senior Magistrate. She was based in Piggs' Peak Magistrate Court in 2017. On 6<sup>th</sup> October, 2017, she received **Accused No.1** from **Constable 7992 Dlamini**. She took it upon herself that no other persons were around her vicinity except for Accused No. 1, her interpreter and herself. She introduced herself to **accused No.1**. She explained to him his rights to remain silent. She stated that she informed **accused No.1** that he was not obliged to say anything but whatever he would say, would be recorded down and be used as evidence against him in court. Again, if he wanted to say something, he should do so frankly.

1] She then resorted to the pro-forma statement to ensure that **accused No.1** was free and did not feel obliged to say anything to her. **Accused No.1**

opted to say something. **PW5** recorded it down. At the end, **PW5** read out what **Accused No. 1** said to her. **Accused No.1** confirmed the contents thereof. **PW5** handed the statement to cou1i. It was provisionally marked as **exhibit E**.

[12] **PW6: 3282 Constable R.M. Dlamini.** She received the two accused persons who came to the Ngonini Police Station. police. She handed the duo to the Piggs Peak police.

[13] **PW7: 5283 Detective Constable Cindy Magagula.** She was on duty on .5<sup>th</sup> October, 2017 at Piggs' Peak Police Station. She received a call from **PW6** who advised her that three persons were brought to the Ngonini police station by community police ofMbasheni area. She contacted her superior who were at Mbabane headquarters. They advised her to wait for a team from Mbabane. The team arrived. They all proceeded to Ngonini Police Station.

[14] **PW6** handed to them three suspects, namely the two accused persons and one **Sabelo Elphas Mdingo Mamba**. They introduced themselves as police officers. Her role was to caution them. She infonned them that they were not obliged to say anything. Should they opt to say something, whatever they say would be recorded and be used in court against them. The two accused persons each opted to say something. From what they stated, she enquired from each if they were willing to tell a third party such as the Magistrate. They each agreed to be taken before a magistrate. She also advised them that they had a right to an attorney of their choice. On this, she excused herself and returned the following morning.

- [15] On the following morning, **PW7** enquired from both accused whether they were still willing to narrate their version to the magistrate. They agreed. She arranged another police officer to take them to the magistrates.
- [16] **PW7** was cross-examined at length. It was put to her that a female police officer caused accused to lie down and stepped on them. They were severely assaulted. **Mbazo**, a police officer also assaulted them. It was further put to this witness that the reason the investigation moved away from Ngonini police station to Horo police station was because the accused persons were screaming when they were assaulted by the police. Their screams attracted the crowd that was nearby as Ngonini police station is situate next to the bus rank.
- [17] The officer maintained her evidence-in-chief that the accused were cooperative at all material times. The reason they moved to Horo police station was because the interviewing room at Ngonini was small to accommodate them and the accused. She denied that she schooled the accused on what to say before the Magistrates.
- [18] **PW8: 3024 Detective Assistant Superintendent Sibusiso Dlamini.** He testified that he was on duty on 5<sup>th</sup> October, 2017. He was at Mbabane headquarters. He received a call from the desk officer Piggs' Peak that there were murder suspects at Ngonini police station. He gathered some of his colleagues and proceeded to Ngonini, via Piggs Peak police station. At Ngonini he found the three suspects. **PW6** cautioned them. They were

handed two fire arms. They interviewed the trio. As they continued with the interview, members of the public interrupted them. They decided to proceed with the interview at Horo police station.

[19] At Horo they cautioned each accused. Each accused opted to say something. The interview revealed that **Mdingo Mamba** was not involved in the charge. The two accused decided to do a pointing out. This was after a caution that they were each not obliged to point out at anything and that if they did, whatever would be pointed out would be used as evidence against them in court. Each opted to point out something. The accused both led the police to a mountain where they pointed at a dagga field and ash.

[20] **Accused No.1** was further cautioned. He led them to his parental homestead and next to his house. He pointed at an orange empty cartridge of a twelve (12) bore short fire arm. Constable **Cindy Magagula** took it as an exhibit. **Accused No.1** further led them into his house where he pointed at a black sweater, black pair of tekkies and a yellow T-shirt.

[21] **Accused No.2** led them to his house where he pointed out at a yellow overall, green open shoes inscribed Adidas and a T-shirt. They took all the items pointed out and returned to Horo police station. The pointing out were conducted between 1700 hours and 1800 hours. From Horo police station they then went to Piggs Peak police station. The time was 1900 hours when they reached Piggs' Peak.

[22] The defence denied any cautioned administered upon the accused. It was said that **PWS** assaulted **accused No.2**. It was disputed that the accused pointed out at the ca1iridge. It was said that accused gave the police the nearest clothing available out of fear. The accused were taken to Horo for the police to continue assaulting them.

[23] **PWS** stood his ground during his cross-examination which was along similar lines as that of **PW7**. The crown closed its case on the trial within a trial.

### **Defence case on trial within a trial**

#### **Accused No. 2**

[24] **Accused No.2** decided to take the witness stand and gave evidence under oath. He testified that he was arrested on 5<sup>th</sup> October, 2017. **Mbazo** called them saying they should repo1i at Ngonini police station. They went there, taken by Mgulubane Mamba. The police asked them if they knew about the death of a person. They did not tell them the name of the deceased. The police held him and caused him to lie down and **Mbazo** assaulted him. When they noticed that they were screaming, they took them to Haro police station saying that they were making noise. At Horo police station, they handcuffed him while his hands were swollen. They assaulted him all over the body.

[25] They were then taken to Piggs' Peak police station. The following day, they were told to go to the magistrate and admit everything about the charge. He did tell the Magistrate that the police assaulted him. He



continued to record the statement because the police had told him that they would assault him if he did not.

[26] Prosecution cross-examined **accused No. 2**. He was asked why he failed to tell the Magistrate that he was assaulted by **Mbazo**. **Accused No. 2** said that he did. When asked again later in the same cross-examination, he said that he was afraid of the police that they would assault him again. When asked why **Mbazo**, who came to court to testify as **PWS** was not reminded that he assaulted him all over the body, he said he did not know.

[27] At this juncture, the defence closed its case. **Accused No. 1** did not testify with regard to the trial within a trial.

#### **Analyses of the evidence on trial within trial**

##### **Accused No.1**

[28] **PWS** recorded the statement from **accused No. 1**. She was briefly cross examined to the effect that **accused No.1** was coerced into recording the statement by the police. **PWS** disputed same by responding that if it were so, **accused No.1** would have told her. She testified further that she warned **accused No.1** before recording the statement that if he chose to say something, that would be used against him in court during his trial. His rights to remain silent were explained in details, testified **PWS**. **PWS** responded further that **accused No.1** did not tell her that he had been assaulted by police when defence Counsel put it to her that **accused No.1** had been assaulted by police prior to recording the statement.

[29] Going through the pro-forma statement, it is clear that when **accused No. 1** appeared before **PWS**, he did so freely, voluntarily and without inducement from anyone. This is gathered from the responses to the pro forma questions posed by **PWS**. His statement reflects that he had not been assaulted by anyone including the police when he made the statement before **PWS**.

[30] Accused No. 1's instructions to his defence Counsel that he was assaulted and coerced in making the statement is not supported by any evidence therefore. In the result his statement stands to be accepted by the court and from its content treated as a confession. In this regard, it is formally marked as **exhibit E**.

#### **Accused No. 2**

[31] PW3 was cross-examined at length on the response to question No. 10 of the pro-forma statement. The question reads:

*"10. Were you assaulted by anybody since the start of this investigation or since your arrest? If so, by whom and what the nature of the assault? "*<sup>1</sup>

[32] Accused No.2 responded:

*"A. Yes I was assaulted by **Mbazo** (Police officer) who gripped my wrists with hand cuffs. "*

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<sup>1</sup>Exhibit D question 10

[33] Similarly question 11 reads:

*"Have you received any injuries? If so where and, what is the nature thereof? (give full description)?"*

[34] The answer was:

*"A. I am swollen where the hand cuffs were put on my Hand."*

[35] However, question 12 reads:

*"12. Do you have any wounds, bruises or injuries on your body? If so, what caused it? (Give full description)."*

[36] **Accused No. 2** responded as:

*"No."*

[37] Then there is question 9 which reads:

*"9. Were any threats made to you, which induced you to make this statement? If so by whom and what was said?"*

[38] The answer was:

*"No."*

[39] It is upon the totality of the responses that the honourable Senior Magistrate, **PW3** proceeded to record the statement from **accused No. 2**.

[40] Section 226 (1) of the Criminal Procedure and Evidence Act No. 67 of

1938 (CP&E) promulgates:

*"226. (1) 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."***

[41] The question that confronts me is whether the statement of **accused No. 2** could be said to be within the confines of section 226(1) of the CP&E. Clearly, in order for the statement to be admitted, it must be made freely and without any inducement. **Accused No.2** pointed out that he was assaulted by means of hand cuffs. This evidence creates doubt on the determination of voluntariness of the accused. No person who alleges assault upon him could be deemed to have made a statement freely. This assertion at the instance of **accused No. 2** taints his freedom and voluntariness on making the statement.

[42] The statement by **accused No. 2** stands to be rejected on the allegation of assault by **accused No. 2**. This allegation of assault however, does not go to the merits of the charge. It is only accepted for purposes of admissibility

of the statement and nothing further. In the result, no

confession exist as far as **accused No. 2** is concerned in this case. The provisional marking of **exhibit D** is discharged.

**Main trial continuation**

[43] **PW9: Mdingo Elphas Mamba.** But for the COVID 19 pandemic, he was a security guard. In September, although he could not recall the date, at about 10:00 p.m. to 11:00p.m, he received a call from **accused No.1. Accused No.1** requested him to come to the mountain where they were cultivating dagga. He enquired what had happened. He did go. He met **accused No. 1** and **accused No.2** along the way. **Accused No. 1** could not speak. He enquired what had happened. **Accused No. 1** said, "*Lapha sesidutjukelwe ngu Muzi Nkuna.* We do not know whether he was alive or dead." **Accused No.1** also told him that a person by the name **ofMuzi Nkuna** had died on their behalf.

[44] The trio proceeded down the mountain. He went home and slept, leaving the duo to proceed with their ways.

[45] In the morning at about 6:00am. -7:00am, he saw **accused No.1** and **accused No. 2** approaching, from the mountain.

[46] **PW9** was cross-examined at length. He confirmed that he was part of the dagga cultivators. He denied that he was ever arrested for the charge facing accused person. He saw **accused No. 1** carrying the firearm in issue. The record on his statement to the effect that **accused No.1** told him that he accidentally shot **Muzi Nlrnna** was incorrectly interpreted. It should be that **accused No. 1** told him that **Muzi Nkuna** had died on

their



behalf (*Sesifelwe nguMuzi Nkuna*). I shall reveal to his evidence under cross-examination later herein.

[47] **PWIO: Petros Mandia Tsabedze.** He resides at Mbasheni and does farming. On 2<sup>nd</sup> September at about 8:00 a.m. **Ma polo Maziya (Mapolo)** arrived at his homestead. He was in the field. **Mapolo** was heading to the mountain to fix some water pipes as he wanted to water his garden. **Mapolo** told him that he could not stay long in the mountains as there were then firearms. **PWIO** enquired as to what firearms those were. **Mapolo** stated that on Sunday at around 9:30 p.m., he was at the mountain attending to the water source. He met **accused No. 2** and **Mdingo**. **Accused No.2** was wearing a coat. The wind blew and flipped open his coat. A firearm was exposed. **Mdingo** then said, "This week a person will die through the firearm." Indeed a person died in the said week.

[48] Around 4:00p.m., on the same day, **PWIO** went to the shops. Mduzuzi Mamba arrived. **PWIO** enquired where **Mdingo**, his brother was, from Mduzuzi Mamba. He asked for **Mdingo's** cellular number. He called **Mdingo** to come where he was. **Mdingo** obliged. **Mdingo** did tell him that on Sunday he was at the mountain at about 9:00p.m. He was with **accused No. 2**. He enquired what they were carrying. He said that a pellet firearm. **PWIO** told **Mdingo** to surrender the said firearm to him as he would be home.

[49] At about 7:00 p.m. again on the same day, **PWIO** received a call from **accused No. 1** saying they were at his (**PWIO's**) home. Following that

he (**PWIO**) was still attending to other matters, he asked that they wait for

him. **PWIO** then called Mr. Gwebu to proceed to his homestead in order to witness what would transpire. Mr. Gwebu obliged.

[50] At his homestead, **PWIO** found **accused No. 1, accused No. 2** and **Mdingo**. They produced a pellet firearm. He enquired if indeed that was the same firearm they carried while at the mountain when **Mapolo** met them. They all agreed. **PW10** took the firearm for safe keeping. He instructed Mr. Gwebu to summon **Mapolo** to a meeting the following morning.

[51] The following morning around 6:00a.m, **accused No. 1, accused No. 2, Mdingo, Mapolo** and Mr. Gumedze all attended. **PW10** produced two firearms. These were the pellet firearm, handed to him by **accused No.1, accused No.2** and **Mdingo** the previous day and his (**PWIO**) own firearm. He asked **Mapolo** to identify the firearm he said that he had seen at the mountain. **Mapolo** said that the said firearm was not amongst the firearms presented to him. **PWIO** then turned to the trio who had handed the pellet firearm to him and ordered them to go and fetch the correct firearm. The three all left.

[52] **Accused No. 1, accused No. 2** and **Mdingo** returned after about half an hour carrying a home remodelled firearm. **PW10** placed it among the two firearms that were already there. He asked **Mapolo** to pick up the relevant one. **Mapolo** picked up the remodelled firearm and said that was the firearm he saw at the mountain carried by **accused No. 2**. **PW IO** took all three firearms to the Ngonini police station. He went with **accused No. 1, accused No. 2** and **Mdingo**.

[53] PW10 was not cross-examined. The next witness was **Mapolo**.

[54] **PW11: Sicelo Mapolo Maziya (Mapolo)**. He testified that someday, he was on the mountain. **Accused No. 2** arrived with **Mdingo Mamba. Accused No. 2** stood at his front wearing a long black coat. He produced a firearm and placed it on his front. **PW1** spoke to **accused No. 2** saying, "Today you are carrying a firearm." **Accused No. 2** agreed and said that indeed he was armed. **Accused No. 2** further said, "These days, we shall shoot a person. Once we do that, we shall take his body into these shrubs and bury it, in order to conceal evidence." Indeed the shrubs were nearby the dagga fields.

[55] After a week, while again at the mountain to attend to the water source, **PW1 1** received a call from his brother informing him that a dead body had been found. The person had been shot and was found lying on the other side of the mountain. **PW11** descended the mountain and proceeded to **PW10**. **PW11** informed **PW10** of the incident where he saw **accused No. 2** carrying a firearm while in the company of **Mdingo (PW9)**. **PW10** undertook to call **accused No. 2** and **Mdingo** to make enquiries.

[56] **PW10** did call **accused No. 2, accused No. 1** and **Mdingo**. **PW10** also called him (**PW1 1**) to identify a firearm brought by the trio. It was a pellet firearm. He noted that was not the firearm he saw at the mountain carried by **Accused No. 2**. They admitted that the relevant firearm was the remodelled one. They left undertaking to bring it. After some time they returned. **PW10** took it and placed it among the two firearms that

were already on the floor. He asked him, **PWI 1**, to identify the one he saw at the mountain. He picked up the remodelled one.

[57] **PWIO** took the firearms to the Ngonini Police Station. He entered while **Mdingo, Accused No.1, Accused No. 2** and he (**PWII**) remained behind outside the police station. This witness (**PWII**) clarified that **Accused No. 1** was carrying the remodelled firearm when they returned with it.

[58] His cross-examination was very brief. It was pointed out that **PWIO** testified that he, **PWI 1**, told him that **Mdingo** uttered the words. "In these days the firearm will kill a person and they will burn the body in the shrubs to conceal evidence." **PWI 1** pointed out that it was understandable why **PWI O** testified so because **Mdingo** and **Accused No. 2** were together on the mountain on that day.

[59] **PW12: 5283 Detective Cindy Magagula**. She is the lead investigator. On 4<sup>th</sup> October, 2017, she received a call from **Nkuna** family in Mbasheni with a team of investigators, they all proceeded to Mbasheni. The **Nkuna** family reported the death of their son. This report triggered her investigation. On 5<sup>th</sup> October, 2017 while at Piggs Peak police station, she received a call from Ngonini police station advising her that **PWIO** was present with two firearms and that the accused person had surrendered themselves to **PWIO**. They were also present at the police station in the company of **Macetjani Mamba**.

[60] She together with other police officers proceeded to Ngonini police station. They found the suspects. She introduced herself and her

colleagues as police officers from Piggs' Peak who were investigating a murder case. Following that there was a lot of noise outside, they decided to go to Horo police station, a quiet place. They first interrogated **Mdingo (PW9)** followed by **Accused 1** and lastly **Accused 2**. They formed the opinion that **Mdingo (PW9)** was not part of the crime. They excused him.

[61] Both **accused No. 1** and **accused No. 2** were cautioned as per the judges' rules individually. They both opted to lead them to the scene of crime at the mountain. They proceeded to the mountain. Again at the mountain **PW12** individually cautioned the accused against pointing out. They each opted to point at the scene of crime. They pointed at ashes which were the remains of the deceased's clothing.

[62] They led the investigation team to a bush next to **Accused No. 1's** parental homestead. **Accused No. 1** was again cautioned not to point out at anything, failing which whatever he pointed out would be used as evidence against him in a court of law. **Accused No. 1** opted to point out at an empty cmiridge, orange in colour. **Accused No. 1** also led the police into his homestead. He was cautioned. He produced clothing that he wore on the day of the incident. These were a yellow T-shiti inscribed ANC, a black jacket and black tekkies.

[63] **Accused No. 2** who was also cautioned led the investigation team to his parental homestead. He produced a yellow overall, white T-shiti inscribed "Adidas" and black push-in saddlers. They all proceeded to Piggs' Peak police station where **Accused 1** and **Accused 2** opted to say something. She

enquired from them if whatever they were wishing to

say, they could repeat before a third party. They agreed. She requested one of her colleagues to take **Accused 1** and **Accused 2** to the magistrates.

[64] **PW12** handed the items collected as a result of pointing out. They were admitted as evidence without any objection from the defence.

A black slat as ashes was marked as Exhibit '1';

Pellet gun as exhibit '2';

12 bore firearms exhibit '3';

Yellow T-shirt, black jacket and black tekkies by **Accused 1** as exhibit '4';

Yellow overall, white T-shirt and shoe flops for **Accused 2** as exhibit '5';

Orange cartridge as exhibit '6';

Small tiny pellets as exhibit '7'.

[65] She was cross examined briefly. She explained that in as much as deceased was found wearing clothes, the remains of the ashes were for extra clothes he was wearing on the day of the incident. She was confronted with **PW10's** evidence to the effect that **Ma polo** told **PW10** that **Mdingo** told him that some of those days the firearm carried by **Accused 2** would be used to kill a person. Further that the two firearms were surrendered to **PW10** by the two including **Mdingo**. She responded that such evidence do not implicate **Mdingo (PW9)**. She explained that she could not take the remodelled firearm which was used in the crime for finger print lifting because it was in the course handed by various persons.



The crown closed its case. **Accused 2** testified under oath, followed by **Accused 1**.

### **Defence case**

#### **Accused No. 2**

[67] **Accused 2** testified that he was residing at Mbasheni. In 2017, he worked in the forest farming dagga together with **Accused 1** and **Mdingo**. **Mdingo** arrived at the mountain carrying the firearm. **PWI O** told him that he had been given the firearm by the deceased. The firearm was lastly taken by **Mdingo**. They did give the firearm to **PWIO**. He was arrested by Piggs' Peak police and he voluntarily surrendered himself to the Ngonini police station.

[68] **Accused No. 2** was cross-examined at length by prosecution. I shall revert to his cross-examination later herein.

#### **Accused No. 1**

[69] **Accused 1** testified that in 2017, he was farming dagga. He held a meeting with **Accused No. 2** and **Mdingo (PW9)**. **Mdingo (PW9)** said that he had a fireann he intended to lend them so as to use it when guarding the dagga fields. He enquired if it was licenced as it would not be proper for them to use a firearm. **Mdingo (PW9)** said that it was not licenced. They asked where he would source it from. He said that from the deceased brother. They agreed that **Mdingo** should bring the firearm so that they can scare away monkeys and baboons.

[70] **PWIO** called **Mdingo (PW9)**. **Mdingo** told them that **PWIO** said that he should produce the firearm. They asked what his response was. He said that he told **PWIO** that the firearm he was carrying with **Accused No. 2** was a pellet gun. It is then that they decided to take the pellet gun to **PWIO**. **PWIO** instructed them to leave the pellet gun and return the following day. They obliged. **PWIO** produced the pellet gun and his own firearm. **PWIO** asked **Mapolo** to identify the gun he saw at the mountain carried by **Accused 2**. **Mapolo** said that it was not there.

[71] **PWIO** turned to them and said, "*Gentlemen bring the gun.*" He, **accused No. 1** stood up and called **Accused No. 2** and **Mdingo** aside. He told them that they should take the firearm to **PWIO** because if they fail, it would be as if they were hiding something. They left to collect the firearm where **Mdingo** had kept it. **Mdingo** retrieved it from above his homestead from a house. They took it to **PWIO**. **PWIO** took it and placed it on the ground. He asked **Mapolo** if it was the firearm he saw. **Mapolo** agreed.

[72] Then on the death of the deceased, he testified that they were called by **Mdingo** around 1:00 a.m., to come to the mountain. When they were about to climb the mountain they met **Mdingo**. **Mdingo** told them that deceased had been injured on his behalf. He enquired as what would happen as the firearm belonged to the deceased family and he had borrowed it. They returned to their respective homes.

[73] The following day they met **Bongi Mamba** who is **Mdingo's** brother. **Mdingo** told them that the firearm was for the deceased family.

**Mdingo's** brother asked that it should not be revealed that the firearm belonged to the deceased family as the deceased brother might lose his job. They agreed to deny knowledge of the firearm. The pellet gun belonged to his **accused No. 1's** father. He took it from home. He never shot with it.

[74] **Accused No. 1** was also cross-examined at length. I shall capture his cross-examination later herein.

### **Determination**

#### **Issue**

[75] Has the Crown proved the commission of the offence by the accused beyond reasonable doubt? Precisely, has the crown proved the elements of murder, namely unlawfulness, intention, common purpose to kill a human being by measure of beyond reason (and not any) shadow of doubt?

#### **Common cause**

[76] It is common cause that the accused person died as a result of a gunshot wound that pierced his right lung as so authored by the pathologist. The deceased name was **Muzi Nkuna**. It is not in issue that the said **Muzi Nkuna** was found lying in a pool of blood in the morning by **PW2** along the path at Vusweni area.

## **Examination of the evidence**

### **Accused No. 1**

[77]

The first part of call is the confession made by **accused No. 1 to PW5**. The confession reads to the effect that on a particular day although he could not recall the date, it was a Thursday. **Accused No. 1** went with **accused No. 2** to the mountain to keep guard over dagga. While at the mountain, he fell asleep around 11:00p.m. He heard **accused No. 2** touching him saying, "Here is a person in the field." They scanned him over again but could not see who it was but could hear that it was a person cutting the dagga. They then went to the place where he entered where there was a gate as the place was fenced. When they reached it, he saw them. When he saw them, he ran away. As he ran away, **accused No. 1** was carrying a modified firearm. He positioned the firearm and fired. When the firearm made a loud bang, **accused No. 1** heard the person crying. When he heard him crying, he realised the voice as he said "I'm dying." They then entered the field. When they reached him, he was very remorseful when he realised that it was his very close neighbour since there is only one homestead in between. They left the field as the person was completely still. They then discussed and asked from **accused No. 2** what they should do now that things were like that. He said what had happened grieved him as the person is not only his neighbour but they had a good relationship. There would be trouble at the person's home if they could learn that he is the one who has done such a thing. They then patched a plan to go home and get something to wrap him with and remove him from the field. They proceeded home and fetched something to wrap him with. They returned to the mountain. They reached it and took him, wrapped him and took him to another open place at Mashawulo.

When they had finished they unwrapped the plastic that they had used and placed next to him dagga which was inside a sack. They returned. They took the plastic they had wrapped him with together with things they found him with and burned them.

[78]

How they reached the police, it is that there was a person who knew. He (that person) saw one of them carrying the firearm. He was not present on that day. This person reported to the community police that he saw certain individuals carrying the firearm. The community police called them to talk about the matter. This community police was **Mandia Tsabedze**. When he spoke with them, **accused No. 1** then asked for **Mdingo Mamba** and **accused No. 2** aside and told them to submit it to the community police so that they can see it and surrender it to the police. They then returned to the community police and he told them that what they wanted they would produce. They should just wait a little while for them so that they can fetch it. They proceeded to fetch it and he also gave them the pellet firearm as well. When they gave them, they stood up and said they were going to Ngonini to surrender it to the police. Time after time, they saw police arriving on Wednesday. **Accused No. 1** was at the football pitch doing some exercises and his homestead across over the other side. What happened when he saw the cars as they were two and people alighting which were many, he was frightened and ran away. This is because he had not anticipated that they would come in that fashion following that they were anxious to surrender the things. They had thought that they would call and say following the items that were taken to them they should report for purposes of discussion.

[79] At home, they left a message that they should report at 8:00a.m. tom01Tow at Ngonini. When they received the message, they requested Richard Mamba to accompany them to the Ngonini police. When they reached the police, they first interrogated **Mdingo Mamba**. When they finished they put him in a motor vehicle. They took **accused No. 2**. They inten-ogated him and he think they did not reach any conclusion as when they came out with him they said that he should come and board the same motor vehicle and go to Horo. On reaching Horo, they took **accused No. 2** and started with him to re-interrogate. When they were through interrogating him, they said he should enter. When he reached there, Mr. Ray spoke and as he was speaking **accused No. 1** raised his hand. He said **accused No. 1** should wait as there were many people who needed to speak. He said he was requesting to speak. He allowed him to speak. He told them that he did not want to waste time for the law enforcement as what they had gathered about was known to him as it happened on his behalf. He then narrated the events as he had done before the court.

[80] From the above, the only enquiry this court must determine is whether there is evidence *aluendo* to the above confession by **accused No. 1**. This is premised on the ruling by this comi that the confession by **accused No. 1** is admissible.

#### **Evidence *aluendo***

[81] **Exhibit A**, the post mortem report as presented by **PWI, Dr. Reddy** the pathologist, is evidence *aluendo* to the confession by **accused No. 1**. **PWI** 's evidence stood unchallenged. His repo1i, **exhibit A** was admitted

by consent. **Exhibit A** reflects that the deceased was identified as **Muzi**

**Nkuna.** He died as a result of a shot gun injury in the lung and heart. **Accused No.1** confessed that he directed the firearm and discharged it. After its bang, he heard a person crying. He later discovered the person was his close neighbour. This person was lying still. He confessed to his death as he stated that they later removed his body to an open ground.

[82] **PW2** testified that as they walked to the bus stop in the morning, they found a person lying in a pool of blood. In other words her evidence corroborates the evidence of the confession that the deceased's body was not found on the mountain where the shooting took place.

[83] **PWIO** and **PWI 1** corroborated the evidence in the confession by **accused No. 1** that a person was subsequently killed at the mountain. A firearm was used. This firearm was produced by, amongst others, **accused No. 1**. In fact, **PWII** testified that **accused No. 1** came carrying the firearm when it was surrendered to **PWIO**. This according to **accused No. 1** in his confession was the firearm he used to kill the deceased.

[84] There is also the evidence of the scenes of crime officer. His report **(exhibit C)** point at the deceased lying next to a sack containing some dagga inside. This is what is reflected in **accused No. 1's** confession that having taken the deceased to an open ground, they then placed a sack packed with dagga next to him. **Exhibit C** was admitted by consent of the defence.



[85] The above is sufficient evidence *aluendo* to the crime of murder against **accused No. 1**. In his testimony **accused No.1** denied ever killing the deceased. He pointed at **PW9 (Mdingo)** as the perpetrator. His evidence under oath cannot sustain for a number of reasons. It is contrary to the confession he recorded before **PWS**. It was never put to **PW9** that he is the one who called them on the fateful night and confessed to them (**accused No.1** and **accused No. 2**) that deceased had died on his hands. In that regard, his defence stands to be rejected as an afterthought.

#### **Accused No. 2**

[86] The confession by **accused No. 1** cannot be admitted as evidence against **accused No. 2** by virtue of section 228 of the CP&E. The question is, what evidence was adduced on behalf of the Crown that supports his charge?

[87] **PW9** testified that according to his estimate, in the month of September at about 10:00 to 11:00p.m., he received a call from accused No. 1 to the effect that there were at the mountain and that he should come to them. He woke up and proceeded to the mountain. He however, met both accused persons both descending from the mountain. It is then that he learnt from them that **Muzi Nkuna** (the deceased) had died in their hands. This evidence stood unchallenged throughout **PW9's** cross-examination. **PW9** was only cross-examined as follows on it:

**Counsel Jele:** *"In your statement at second page you recorded that you met **Mdalw** in the company of **Mabuza** who*

*informed you that he had accidentally shot **Muzi Nkuna**. Was that interpreted correctly?"*

**PW9** *"He said to me (sesidutjukelwe ngumuntfi1) a person had been shot on their behalf"*

[88] **PW1 1** testified that while attending to the water source at the mountain, he saw **accused No. 2** producing a firearm. Asked to identify the said firearm he saw **PW11** carrying at the mountain, **PW11** pointed at the same firearm said to have been used in the commission of the offence. This evidence by **PW11** that he produced the firearm identified in court was not challenged under cross-examination. In fact **accused No. 2** admitted having carried this firearm. He was cross-examined by the Crown after adducing his evidence-in-chief as follows:

**Counsel Dlamini:**

*"PWJ 1 said he saw you carrying a man made firearm and you told him that within a week the firearm would kill someone and you would burn the person in the sandanezwe shrub?"*

**Accused No. 2:**

*"1 was carrying the gun but J'm not the one who uttered those words. "*

[89] **PW1 1** testified that **accused No. 2** testified that the said firearm shall be used to kill a person in that week. Once the person is killed, he shall be burned in the shrubs nearby in order to conceal evidence.

[90] I note that according to **PW10**, the above utterances were said (by PW1 1) to have been conveyed by **PW9** whereas **PW11** testified that they were said by **accused No. 2**. I will accept that the words were so uttered as the defence itself acknowledged that they were so stated. That there were uttered by **accused No. 2 or PW9** is irrelevant for purposes of accused No. 2's guilt. However, the utterances are material to corroborate the evidence that indeed subsequently there was death at the mountain. Not only that, but there was also evidence of burning of items which was adduced by **PW12**, the investigator. According to the evidence of **PW12**, **accused No. 2** led the investigation to the mountain, viz., the scene of crime. A black slate of burnt items was pointed out by **accused No. 2**. This black slate was testified to by **PW12** as part of the clothing that the deceased had on the fateful night. Such evidence was extracted from **PW12** by the defence through cross-examination and is therefore admissible in law. Now this is corroboration of the utterances that evidence shall be concealed through burning after the killing of a human being.

[91] The evidence of the pointing out was not challenged by the defence. The only reasonable inference to be drawn therefore is that **accused No. 2** who pointed out at some of the burnt clothing of the deceased in the form of a black slate was part of the killing of the deceased.

[92] ' In his defence which was under oath, **accused No. 2** testified:

**Counsel Jele:** *"You heard that you were involved in the killing of the deceased. What do you /mow?"*

**Accused No. 2:** *"I know nothing about the death of Muzi Nkuna. That is all."*

**Counsel Jele:** *"You never heard anything about the death of Muzi Nkuna?"*

**Accused No. 2:** *"I heard nothing about the death of Muzi Nkuna."*

[93] The above responses to his Counsel's questions fly at the face of **accused No. 2** who pointed at the scene of the crime together with evidence of the burnt clothing of the deceased. Such evidence stands to be admissible as it was not challenged.

[94] The above evidence viewed together with the evidence adduced by **PW9** that he received a call in the thick-<est of night (about 10:00p.m. and 11:00p.m.) to proceed to the mountain. As he obliged, he met **accused No. 1** and **Accused No.2**. They informed him that a person died at their hands. This evidence was never challenged during the cross-examination of **PW9**. It stands to be admitted therefore. It is evidence of common purpose against **accused No. 2**.

[95] Not much evidence was adduced by **accused No. 2** in his defence. His evidence that the firearm came with **PW9** and informed them that he had sourced it from a person who was then deceased, being **Samuel Nkuna** (deceased 's brother) is of no evidential value in light of the above unchallenged evidence. Further, it is contradictory to what was put to

**PW9** during cross-examination by the defence that the firearm was sourced by **PW9** from a Mozambican national.

**PW9, a competent witness?**

[96]

It was contended on behalf of the defence that **PW9** ought to have been introduced as an accomplice witness. The lead investigator, **PW12** testified that in her investigation, they found that **PW9** was not involved in the commission of the offence. I think correctly so as none of the evidence adduced showed that he was on the fateful night at the scene of the crime. I have already pointed out that his evidence to the effect that he received a call on the night of the killing of the deceased from **Accused No. 1** and was informed that a person had died in the hands of the duo was not challenged. This evidence which stands unchallenged confirms the conclusion drawn by **PW12** that **PW9** was not involved. The utterance made before **PW11** that a person shall be killed by the use of the firearm in accused disposal does not suffice to hold that he ought to be treated as an accomplice because of the unchallenged evidence that he was informed by the duo that deceased died in their hands, so to speak. I must however, point out that the court did consider **PW9's** demeanour just like all the witnesses that were paraded herein. He did answer questions to the best of his ability. He did explain what he had initially understood by the terms 'arrest', 'interrogation' when first questioned if he was ever arrested or interrogated about the murder of the deceased.

**Verdict**

[97]

In the final analysis on the above, I must enter as follows:

- [23.1] Accused No. 1 is found guilty of murder **of Muzi Nkuna;**  
[23.2] Accused No. 2 is found guilty of the murder **of Muzi Nkuna.**

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## **SENTENCING**

### **Extenuating Circumstance and Mitigation**

#### **Defence**

- [98] Both accused persons did not take to the witness stand. His defence Counsel submitted mitigation factors on their behalf.

#### **Accused No. 1**

- [99] Accused No. 1 was said to be thirty-eight years old. He was married with two minor children. His wife was unemployed. His nuclear family depended on him for survival.

#### **Accused No. 2**

- [100] Accused No. 2 was thirty-seven years old. He too was married and had four minor children. His wife was not employed. He was therefore the sole breadwinner.

#### **Factors common to both accused persons**

- [101] Both accused persons were first offenders. They both had never seen the sight of a class-room and therefore completely illiterate. They were both employed at Ngonini Estate as labourers. They were each earning the sum of E1500.00 per month. Following the death of their

neighbour, the deceased herein, they stopped cultivating dagga. They were remorseful for their deed. They cooperated with the police throughout the investigation. They have religiously attended their trial every time they were so directed. Society view them as killers. This is a punishment on its own. The death of deceased was accidental as so contended by Mdingo (PW9).

### **Extenuating circumstances**

[102] The defence submitted that this was a case of *do/us eventualis*. It is an extenuating factor on its own. Fmihher, the accused were convicted on circumstantial evidence. Again this is an extenuating factor.

### **Crown - aggravating factors**

[103] It was submitted on behalf of the Crown that the court should consider that after the duo had shot the deceased, they failed to make means for the him to get help. They left him at the mountain and only returned later to remove his body away from the scene of crime. They concealed evidence.

[ I 04] The court should take into account that the accused persons herein were convicted of murder, a very serious crime by reason that life was lost. This life was lost for purposes of an illegal activity, namely dagga. Murders involving dagga were now prevalent in the country.

### **Court - Analysis**

- [105] In meting out sentence, it is the duty of the trier of fact to take a tripartite approach. This involves considering the personal circumstances of the accused persons herein, society's perception and the crime itself. Whatever sentence, the purpose should be to rehabilitate the accused persons and in the same vein, deter other would-be offenders.
- [106] I consider the age of the accused persons. They were not so youthful at the time of the commission of the offence in 2017. However, they are responsible citizens of the country in that they are both married. They have minor children. They are not just the head of their respective families but also sole bread winners.
- [107] The accused persons are first offenders. They had no brush with the law previously. I accept that they were in gainful employment and earning E1500.00. I further consider that they cooperated with investigation and therefore not much tax-payers money was wasted in the process. The pointing out is evidence of such cooperation. They attended their trial every time they were so directed and arrived in court in time. All these weigh in their favour for purposes of sentence.
- [108] Turning to the indictment, accused persons are convicted of a very serious offence. This is because life of a human being was lost for good. Both society and family members of the deceased were abruptly



deprived of the benefits they would have gained from the life of the

deceased. Worse still, this life was lost during an illegal activity in the country. As pointed out by prosecution, many lives have been lost in such dagga businesses and trade through unlawful killing.

[109] I consider that the firearm had been in the hands of the accused for some time before it was actually put to use as it was seen by PW! I. Having killed the deceased, the duo removed its body to an open area where a bag, full of dagga was placed next to him. Whether the duo were sending a message to the community at large to say, 'See what happens to those who steal dagga' is not clear. What is obvious though is that such an act aggravates their sentence. At the same time, I do take into account that when they met PW9, they informed him that '*Sesidutjukelwe ngumuntji1.*' These words uttered are indicative of a remorseful person.

[110] Turning to society, I have already pointed out that when the deceased met his death, the duo were engaged in an unlawful activity of dagga cultivation. A further and more serious crime was therefore committed in the process of commission of another crime. Surely, society cannot countenance such. No doubt, society looks up to the court to mete out a befitting sentence in such circumstances.

[111] I accept that there are extenuating circumstances in this matter. The reason deceased met his death was because according to accused persons, more particularly accused No. 1, he was stealing their dagga.

In brief there was a ground for the accused person to react in the manner they did, albeit not justified by law.

**Sentence**

[112] In the above, I enter as follows:

[112.1] Accused No. 1 is sentenced to a custodial sentence of life imprisonment of thirty (30) years without the option of a fine.

[112.2] Accused No. 2 is sentenced to a custodial sentence of life imprisonment of thirty years without the option of a fine.



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**M. DLAMINI J.**

For Crown : **M. S. Dlamini of Director of Public Prosecutions Chambers.**

For Defence: **S. M. Jele of S. Jele & Associates.**

Delivered on 15<sup>th</sup> November, 2021