



**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**CASE NO. 270/15**

**HELD AT MBABANE**

In the matter between:

**THE KING**

**Versus**

**ZAMA AUGUSTUS SIMELANE**

**Neutral Citation:** *The King vs Zama Augustus Simelane [270/15] [2019] SZHC  
154 (15 August 2019)*

**Coram:** **M. LANGWENYA J**

**Heard:** 8 March 2018; 25 July 2018; 8 July 2019; 9 July 2019; 18  
July 2019

**Delivered:** 15 August 2019

**Summary:** *Criminal Procedure-the accused charged with murder-pleads  
not guilty-Crown leads circumstantial evidence-requirements of  
circumstantial evidence restated and discussed in relation to  
the facts of the matter-The version of the accused was*

*not put to the Crown witnesses in accordance with the dicta in the landmark case of the The King v Dominic Mngomezulu and nine others, High Court Criminal Case No 94 of 1996.*

*Crown has proved beyond reasonable doubt that the accused murdered the deceased-Accused found guilty as charged.*

## **JUDGMENT**

- [1] The accused was arraigned in this Court on a charge of murder; it being alleged that on or about April 2014 and at or near Matfuntini area in the Lubombo region, the accused did unlawfully and intentionally kill Nozipho Dlamini and did thereby commit the crime of murder.
- [2] The accused pleaded not guilty to the charge preferred against him.
- [3] The Crown called nine witnesses. The accused was the only witness for the Defence.
- [4] On 5 June 2014 during the day, a woman's body was found buried in Mphundvwini forest. PW1 Nyezane Patrick Mahlalela made the gruesome discovery. PW1 was in the company of Johane Nkala, Reuben Malambe and George Mayisa when they made the gruesome find. PW1 is Somthunywa Regina Mahlalela's brother. Somthunywa Regina Mahlalela was called to

give evidence as PW2. PW2 resides at the royal kraal (*emphakatsi*) at Mphundvwini area.

[5] PW1 resides at Mbuzini in the Republic of South Africa. Mbuzini is across the border between Eswatini, and the Republic of South Africa. On 5 June 2014 PW1 left Mbuzini in the company of the people referred to in the preceding paragraph and crossed into Eswatini where they made a stop at PW2's home at the royal kraal at Mphundvwini where they greeted PW2. They informed PW2 that they were in the country to look for honey at Mphundvwini forest. After exchanging pleasantries with PW2, PW1 and the people he was with left PW2 and went to the forest to look for honey.

[6] At Mphundvwini forest PW1 saw a place on the ground that looked like someone had been working there. There was bad odour at the place in question. PW1 dug the place first using his bare hands and later by using the bush-knife he was carrying to dig up the place.

[7] It was while he was digging the place and removing the dirt and soil from the ground that a hand protruded from the ground. At first he thought the hand was that of a monkey. He held the hand and pulled it with both hands. He was shocked when he saw another hand emerging from the ground. At that stage he realized the hands were not of a monkey but of a female human being.

- [8] PW1 and the people he was with then returned to the royal kraal and reported the incident to PW2. The place where the human remains were found was estimated to be about two kilometres from the royal kraal. The estimated time the body was found was 10am. The police were called through 999 soon after the matter was reported to PW2 but they only arrived between 5pm and 6pm on that day. It was already getting dark when the police were taken to the Mphundwini forest by PW1 and other people.
- [9] At the scene, the police dug up the place and retrieved the body. During cross examination, PW1 stated that when the body was taken out of the shallow grave he noticed that it was naked.
- [10] PW2 is Somthunywa Regina Mahlalela. She told the Court that on the day in question she was at home when PW1 arrived in the company of three boys and then left. PW1 subsequently returned home in full flight and informed this witness that he had seen a human being buried in the forest with hands protruding from the ground. PW2 told Tjitji to call the police who later arrived at about 5pm on the same day. She, in the company of other people followed the police to the forest where the police dug out the body from a shallow grave.
- [11] It is PW2's evidence that the body that was dug out was that of Miss Dlamini or LaNkhosi. She knew LaNkhosi to be the accused person's girlfriend. LaNkhosi and the accused had stayed at her home for a period of

between five and six months before she disappeared. She says she knew that was LaNkhosi's body when she saw her legs. She did not see the face of the body of the person who had been dug out of the grave. The face of the body was burned and there was bad odour emanating from the human body.

[12] When the body of the deceased was retrieved from the forest, the accused was no longer at PW2's homestead. The accused left without informing PW2 and went to his mother's place.

[13] PW2 told the Court that the accused is her grandson as his mother is her elder sister. Accused's parental home is at Hlathikhulu, Etjendlovu. The accused came to PW2's homestead with LaNkhosi and said they were not going to stay for long as LaNkhosi was looking for a job. At PW2's home, the accused and LaNkhosi shared a room and lived there for a period of between five and six months. At one point the couple had an argument. As a result of the argument, PW2 gave LaNkhosi a E100 note and advised her to return to her parental home. LaNkhosi left.

[14] After a while she returned and informed PW2 that she had been requested by the accused to come and help in the preparation for a ceremony at the royal kraal. The ceremony was held on 12 March 2014. The appointment concerned the celebration of the appointment of *indvuna* for the area. At the end of the ceremony, LaNkhosi did not stay more than five days at the royal kraal. When LaNkhosi was leaving, PW2 gave her meat to give to PW2's

sister at Etjendlovu. When LaNkhosi left, she was accompanied by the accused. That was the last time PW2 saw LaNkhosi alive.

[15] After LaNkhosi left in the company of the accused, the accused returned to PW2's home but only stayed for a period of about two weeks to a month and then left to go to his mother's place. The accused did not inform PW2 when he left her home. It was only when PW2's daughter called Zama's mother that she got to learn that Zama was with his mother. The accused had been gone for a period of not more than two months before the police found the decomposed body.

[16] The Crown further led the evidence of PW3 Makhasane Sizwe Mahlalela who told the Court that the accused is his cousin. It is his evidence that he was from work when he found the accused at the Market. PW3 and the accused sat at the Service Centre and waited for LaNkhosi who alighted from a bus at about 1900 hours. The accused informed LaNkhosi that he had come to fetch her at the bus station. LaNkhosi retorted and said she was not there to meet the accused. The accused asked PW3 to speak to LaNkhosi. When PW3 enquired from LaNkhosi why she was refusing to go with the accused, she told him that she had been called by Arrowshirt and not the accused. PW3 implored LaNkhosi to go home with the accused. The accused and LaNkhosi walked together and spoke at a distance; PW3 did not hear what the conversation was about.

[17] PW3 was later asked by the accused to carry LaNkhosi's hand bag. The trio then walked home together but along the way, before they reached the first hump on the road, LaNkhosi insisted she was not going home with the duo of PW3 and the accused. The accused held her hand and asked that she goes home with him. There was an altercation (*bawilitisana*) and PW3 told them not to fight and that they should instead go home and sort their differences. LaNkhosi refused to go home and said she had not come to the accused.

[18] When PW3 was about to reach his home, he gave LaNkhosi her hand bag and told them he wanted to go sleep. LaNkhosi called PW3 and asked that he should not leave them. PW3 returned to where the couple was because they were again exchanging heated words. PW3, the accused and LaNkhosi walked together and only parted ways when this witness went to his home and the couple continued on to PW2's home at the royal kraal. When this witness left the couple, they were no longer exchanging heated words.

[19] On the following morning, PW3 went to PW2's home in order to find out how the couple fared after the previous day's 'fight' between the two. PW3 was told by PW2 that she had only seen Zama and not LaNkhosi. When PW3 arrived at PW2's home in the morning in question, neither Zama nor LaNkhosi were home. PW3 thought Zama had gone to Tonga. After a few days, PW3 saw the accused passing his homestead but he could not talk to him. According to PW3's knowledge, Zama and LaNkhosi were husband

and wife because they lived together. They were lovers because they had lived together in PW2's home for a long time.

[20] During cross examination, PW3 stated that the accused never asked LaNkhosi why she was going to Arrowshirt.

[21] The Crown called PW4 Vusi James Magagula-aka Arrowshirt who told the Court that he is employed as a kombi driver and lives at Maphiveni. The deceased was his girlfriend. It is his evidence that he was approached by the accused while he was at work at the Manzini bus rank. It was PW4's first time to see the accused even though he had heard about him from Buhle Dlamini, the deceased. The accused asked this witness to help him get hold of Buhle Dlamini because he had been sent by his grandmother to ask for her hand in marriage. The accused is said to have told PW4 that he was eager to marry the deceased through customary law because his grandmother lived alone and therefore wanted a wife who would stay with his grandmother. This witness agreed to help the accused get hold of Buhle. The accused asked PW4 to entice Buhle to come and see PW4. The plan was that on arrival Buhle would not find PW4 but would find only the accused waiting for her. The accused is said to have stated that if he called Buhle, she would not agree to come to the accused because they had an altercation when they last met. PW4 was amenable to the plan and called Buhle who agreed to come and meet PW4.

[22] PW4 told Buhle to board the Pierters Bus and alight at Service Centre, Lomahasha and go to his house. This, however was a ruse because, all the while PW4 had been in touch with the accused updating him about where Buhle was on her journey to Lomahasha in the course of that day. PW4 did not have a problem letting the accused marry Buhle, because he already had three wives. It was PW4's evidence that he consented to accused taking Buhle with him when she alighted from the bus at Lomahasha.

[23] Buhle later called PW4 and told her that she found the accused at the bus stop when she alighted from the bus. Buhle told this witness that the accused was taking her to his grandmother's home. PW4 told Buhle to go well. Later in the evening, when PW4 called the accused and Buhle's numbers, their cell phones were not available on the network. That confused this witness.

[24] During cross examination, it was put to PW4 that on 27 March 2014 he called the accused and was angry that the deceased was two-timing him and the accused. This was denied by PW 4. It was also put to PW4 that on Friday 28 March 2014 the accused came to Manzini bus rank following a request to do so by PW4. PW 4 denied that the accused came to Manzini bus rank at his instance. It was during cross examination that it was stated that the deceased agreed to come to Lomahasha on 7 April 2014, a fact that was confirmed by PW 4.

[25] The deceased alighted from the bus at Lomahasha and did not find PW4 at the bus stop because he had gone to park the kombi at KaMashaba. The deceased called PW4 and said the accused was at the bus stop and was told by this witness that she should go with the accused.

[26] It was put to PW4 that after parking the kombi, PW4 bought petrol with a container. This was denied by this witness. It was not, however suggested why PW4 bought the petrol in a portable container. It was further put to this witness that the accused called him to come over as per their arranged meeting. It was put to this witness that as a result of his failure to come to the meeting with the accused and the deceased, the accused was compelled to take the deceased home. This was denied by this witness. It was put to PW4 that the accused last saw Nozipho when she received a phone call from PW4 and went to be with PW4. PW4 denied that the deceased went to be with him on 7 April 2014; he stated that the accused took the deceased home on that evening. I pause to observe that it is telling that on the one hand the accused admits taking the deceased home with him when the meeting that he was supposed to hold with PW4 failed to materialize; on the other hand, the accused denies taking the deceased home and says he last saw the deceased when she received a phone call from PW4.

[27] The Crown called PW5 Ntombi Maziba. She told the Court that she is a vendor at Mfundza next to the post office at Lomahasha. She used to live at Moneni in Manzini and sold her wares at Manzini market. She used to see

the accused at Manzini market. She left Manzini and relocated to Lomahasha when she became pregnant. Her father advised her to go home at Lomahasha so her mother could help her with the child. At Lomahasha her mother advised her to become a vendor at the market so she could provide for her child.

[28] She was at the market when she saw the accused entering the post office gate and going into the salon. In the salon, the accused asked to charge his phone. She exchanged pleasantries with the accused. The accused told this witness he was from South Africa and was waiting for his girlfriend. The accused enquired from this witness when Arrowshirt's kombi gets to Lomahasha from Simunye. Arrowshirt's kombi subsequently arrived and parked. Arrowshirt went to a 'chicken dust' stall. The accused sent this witness to give Arrowshirt E10.00 for airtime. Arrowshirt was eating at the 'chicken dust' stall. When PW5 gave Arrowshirt the money, he said he has airtime. He took the money and put it in his pocket. Arrowshirt then dialed a number on his cell phone. When PW4 called the number, this witness saw a name 'sweetie' on Arrowshirt's phone. He put the phone on loudspeaker. He asked the lady on the phone where she was and her response was that she was about to reach Manzini but that she did not have bus fare to make the trip from Manzini to Lomahasha. Arrowshirt said she should board the bus that was about to leave Manzini and that he would pay her bus fare.

[29] PW5 returned to the accused and told him what she heard from the lady Arrowshirt was calling. PW5 told the accused that the lady said she was on her way. At five minutes to six, this witness collected her wares and left the market to go home. She left the accused at the market place.

[30] PW 6 is Dorah Zaba Dlamini and is deceased person's mother. In April 2014 the deceased left home and said she was going to Manzini. The deceased said Arrowshirt called her to come and collect stock of her wares. The deceased was gone for two days when Arrowshirt called PW6 and told her he had seen Nozipho alight from a bus and she was met by the accused. It was the evidence of this witness that Arrowshirt told her when the deceased alighted from the bus she was forcefully grabbed by the accused and PW4 advised the deceased to agree to going with the accused lest she was hurt. This evidence was not challenged during cross examination.

[31] According to PW6, the deceased and the accused were lovers; the accused was abusive towards the deceased. It was her evidence that she knows of two occasions where the accused assaulted the deceased at her home and one occasion where the accused poisoned the deceased.

[32] The accused's home is next to that of the deceased at Etjendlovu. The two families used to get along but all that changed when the deceased died.

[33] PW7 is Adam Sacolo and an independent witness who was requested by the police to accompany them and assist in the observation of the scene and what the accused would show them. The scene was, according to this witness, a bush next to the royal kraal. The police parked their vehicle and the accused alighted from the vehicle. They walked to the scene in the bush in an area that was a dug up place (*kungumsele*). The accused pointed out the place where the dead body was found. The dead body was no longer there. The accused also pointed out a stone next to a dug up place in the bush. PW7 says he heard the accused say he used the stone to hit the deceased. The accused pointed out the place where he said he threw the deceased's clothes. No clothes were found at the scene.

[34] It was put to PW7 that the accused never pointed out anything to the police; that he was led to a place the police said they retrieved deceased's body. This witness was adamant that the accused pointed the place out to the police. It was put to PW7 that the accused was heavily assaulted by the police before he was led to point out the scene where deceased's body was found. PW7 said when he was there, the police never assaulted the accused.

[35] PW8 is 6042 Constable Lungelo Ngwenya. He told the Court that on 5 June 2014 he was on duty at the Siteki Police Station when he received a call from his supervisor to attend to a scene of crime at Matfuntini, Lomahasha. He, with other police officers proceeded to the scene in two motor vehicles but parked the vehicles a distance away and walked to the scene as

it was a bushy place. The man who had reported the matter to the police was leading the way.

[36] At the scene, he noticed that the place was slightly burnt and a decomposed human body was retrieved from the scene. On further inspection of the body, he noticed that it was a female body. The upper torso of the body was burned-from the arms to the head. Most of the lower torso was buried from the waist down in a shallow grave. Next to the body was ash and it appeared that clothes had been burned. The whole body was dug out of the grave and taken to the mortuary after photographs were taken. The photographs were handed in as part of the evidence of this witness and were collectively marked 'Exhibit 1.'

[37] On 10 June 2014 when the post mortem examination was conducted by the pathologist, this witness was given part of deceased's lower jaw for onward transmission to the police headquarters and to Pretoria for forensic examination. He also took blood samples from Simo Dlamini-a twin brother of the deceased. The blood sample was also taken to police headquarters and to Pretoria for forensic as well as DNA examination. The results confirmed that the deceased was Simo Dlamini's twin sister Nozipho Dlamini.

[38] By consent, the post mortem examination was handed into Court and was marked 'exhibit 2.' The pathologist, Dr. Komma Reddy determined the cause of death to be due to strangulation.

[39] The Crown led the evidence of PW9 4171 Detective Constable Bongani Bernard Maphalala. He is the investigating officer in this matter. In April 2014 he was stationed at Lomahasha police station when he received a murder docket and commenced his investigation by recording statements. The accused was the suspect in the matter. On 6 June 2014 he got in touch with the accused who was at Timbutini at the time.

[40] Acting on information, he, in the company of 4254 detective constable Msibi and 6101 constable Mncina proceeded to Timbutini where there was reinforcement from Lukhozi from the Lubombo region. They went to Herbert Sibandze's homestead where the police introduced themselves to Herbert and informed him they were looking for the accused. Herbert showed the police the house where the accused was sleeping and the police found him there. The police introduced themselves to the accused and informed him they were investigating a case of murder in which the accused was a suspect. The accused was warned in terms of the Judges' rules. The accused said something. Acting upon what the accused said, he was taken to Lomahasha police station where he was formally detained.

[41] On the following day, he was taken to the criminal investigation department for questioning. He was again warned in terms of the Judges' rules. The accused was cooperative and said something to the police on the basis of which the police were led to Mphundwini mountain. PW9 testified that the accused freely and voluntarily led the police to Mphundwini mountain after

he had been warned in terms of the Judges' rules that he was not obliged to show the police any exhibits but that if he did, whatever he showed to the police would be used in court as evidence against him. At the mountain, the accused pointed out a stone and a remainder of an iron hook (a piece of a hand bag sling) belonging to a bag which was burned. At the time of the pointing out by the accused, the police were in the company of PW7- an independent witness.

[42] On the same day, this witness was led by the accused to the homestead of his mother at the Nansi area where a red sweater and khakhi trouser were recovered. The exhibits were taken to Lomahasha police station and the accused was formally charged with murder. The khakhi trouser, red hooded sweater, black hand bag sling and stone were labeled exhibits 'A', 'B', 'C' and 'D' respectively. The stone was said to have been used in the commission of the offence.

[43] It was put to this witness that the accused was assaulted by the police until he soiled on himself. PW9 denied such assault ever happened. It was also put to this witness that the accused was forced by the police to make a confession at the Simunye magistrate court. This was denied by PW9 who stated that the confession never happened because the accused initially said he wanted to make a confession but subsequently changed his mind when he got to the magistrate. It is PW9's evidence that the accused was never forced to make a confession.

[44] It was put to PW9 that the accused was once in a love relationship with the deceased, but that when the deceased died he was no longer in a love relationship with her. This was disputed by PW9. It was also put to PW9 that the accused last saw the deceased at Mbuzini where the accused has an extended family homestead. This was also denied by this witness. The Crown closed its case.

### **The Defence Case**

[45] It is the evidence of the accused that on 7 April 2014 he was with PW3 at Lomahasha when the deceased alighted from the bus between 7pm and 730pm. It is accused's evidence that he did not force Nozipho to go home with him but that she voluntarily went with the accused after PW3 had spoken to her. During cross examination, the accused conceded that when she alighted from the bus, the deceased did not want to go with him. Notably, the accused avoided answering the question that he and the deceased had an argument on the evening of 7 April 2014.

[46] The accused surmised that the deceased did not want to speak to him because she had a guilty conscience that she took meat and groceries from the accused-ostensibly to take to accused's grandmother in Hlathikhulu-but instead went to spend the groceries and the meat at Arrowshirt's place. Again, this version about groceries and meat was never put to Arrowshirt.

[47] The accused testified that when he got to PW2's home with Nozipho, he found that PW2 was not at home. The accused and Nozipho crossed the border to Mbuzini where his extended family members live on the evening of 7 April 2014. The accused stated that at Mbuzini they were seen by his aunt Tjitji when they arrived. The accused testified further that it was Tjitji who gave him the keys to the house they slept in. Surprisingly, Tjitji was not called to give evidence in support of the accused's version. It is also important to point out that the version about crossing the border to Mbuzini was not put to the Crown witnesses.

[48] It is the accused's evidence that the deceased subsequently got a lift back to Eswatini on the following morning and that it was the last time he saw the deceased. The accused never called the deceased when they parted ways on the day.

[49] During cross examination, the accused was asked why he did not dispute the evidence of PW3 that on the morning of 8 April 2014 he went to PW2's home to find out how the accused and Nozipho had fared after their fractious encounter on the previous evening: that on arrival, the accused and the deceased were not present at PW2's home and that only PW2 was at home. PW2 informed PW3 that she had only seen the accused and not the deceased at her home. In response to the question, the accused told the Court that he does not recall the evidence of PW3. The accused denied that he had seen PW2 at her home on the evening of 7 April 2014; the accused stated that was

the reason he and the deceased then crossed the border to Mbuzini where members of his extended family lived.

[50] The accused conceded and confirmed that PW2 last saw the deceased when there was a ceremony at the royal kraal; when the deceased left with meat and went to Hlathikhulu. According to the accused, the ceremony at the royal kraal was held on 12 March 2014.

[51] The accused denied that he had approached PW4 at Manzini bus rank and that he enquired about the relationship he had with the deceased. The accused denied also that he had implored Arrowshirt to stop his relationship with the deceased because the accused had been asked by PW2 to marry the deceased through customary rites. The accused denied further that he had requested Arrowshirt to call the deceased on his behalf because the deceased was not on speaking terms with the accused.

[52] The accused did not proffer an explanation why PW5 Ntombi Maziba's evidence went unchallenged: that the accused gave her money for airtime to give to PW4; that PW4 then called a woman and put the phone on loudspeaker so that PW5 could listen to the conversation; that PW5 then told the accused that the woman's response was that she was about to reach Manzini but that she was without bus fare to make the trip from Manzini to Lomahasha; that PW4 told the woman to board the bus that was about to leave Manzini to Lomahasha and that PW4 said he would pay her bus fare;

and that PW5 relayed to the accused the response she overheard over PW4's phone from the woman. The denial by the accused that he had asked Arrowshirt to call the deceased and entice her to come to Lomahasha came very late in the trial and it was also not put to Arrowshirt nor to PW5.

[53] The accused conceded that on 7 April 2014 he was with PW5 at the market place.

[54] The version of the accused is that he called the deceased and asked about the groceries he had given her when she left PW2's home after the ceremony that was held at the royal kraal was concluded. It is unclear when the accused made the call. In the background, the accused says he heard a man's voice like there was a fight. It is the case for the accused that subsequent to this call, he received a phone call from Arrowshirt. Accused's version in this regard was also not put to Arrowshirt.

[55] The accused denied that he gave Ntombi Maziba E10 to give to Arrowshirt to buy airtime so Arrowshirt could call and track the deceased's whereabouts on 7 April 2014. When the accused was asked why this evidence was not put to PW5, he was evasive and told the Court he was using the Sim card for Eswatini.

[56] During cross examination, it was put to the accused that Arrowshirt agreed to the arrangement of enticing the deceased to go meet the accused because he believed the accused was going to marry the deceased. The accused denied this was the arrangement.

[57] According to the evidence of the accused, he called the deceased and enquired about the groceries he had, on an earlier occasion given to the deceased to take to his home in Hlathikhulu. The accused says he was keen to know why the deceased had instead taken the groceries and the meat to Arrowshirt's place. Regrettably, Arrowshirt was never confronted with this evidence about groceries being left at his house by the deceased. It is also remarkable that PW2 did not tell the Court that the meat she gave to the deceased to take to Hlathikhulu never reached its destination.

[58] The accused denied ever assaulting the deceased, but conceded that they had misunderstandings like all lovers do. According to the accused, one of the misunderstandings concerned instances where the accused would direct the deceased to carry out certain instructions and she would not-an example being when she failed to take the groceries to Hlathikhulu.

[59] It was also put to the accused that at some point he tried to poison the deceased but was stopped by deceased's father. This was denied by the accused even though it was not put to Dorah Zaba Dlamini that it was not true that the accused had tried to poison the deceased.

[60] During cross examination the accused confirmed that the deceased had said that she was there to meet Arrowshirt and not the accused on 7 April 2014. When it was put to the accused that even PW3 confirmed hearing the deceased say she was at Lomahasha to be with Arrowshirt, the accused said he does not remember that evidence well.

[61] It was the evidence of the accused that the deceased was his girlfriend from 2011 until 2014. He said he lost interest in the love relationship with the deceased when he discovered that she was seeing someone else.

### **Application of the law to the facts**

[62] *Failure of the accused to put his case to Crown witnesses.*

[63] The importance of putting one's case to the opposing party is captured by Hannah CJ in the celebrated case of *R v Dominic Mngomezulu and nine Others*<sup>1</sup> as follows:

‘It is, I think, clear from the foregoing that failure by Counsel to cross examine on important aspects of a prosecution’s testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of the cross examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period of time. It is also important that Counsel should put the defence case accurately. If he does not, and the accused

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<sup>1</sup> Criminal case No. 94/1996

subsequently gives evidence at variance with what was put the Court may again infer that there has been a change in the accused's story.'

[64] The essence of *Dominic's* judgment is that, if a prosecution witness gives evidence which is adverse to the defence case, then the defence Counsel has a duty to cross examine that prosecution witness on those aspects of that witnesses' testimony which impacts negatively on the defence case<sup>2</sup>.

[65] What is made plain by *Dominic's* judgment is that it is important that a party called upon to cross examine the opposing party's witness must put its case fully to the witnesses. This is because once the said witnesses have been excused, the likelihood of the Court recalling or allowing them to be recalled is very minimal. In this regard, a party has to ensure that its case is fully canvassed in all its material aspects, leaving nothing to chance because once the witnesses have been excused, the witness will not ordinarily be called to deal with issues which come as an afterthought to the cross examiner. As a result, the Court is entitled to reach its verdict on the evidence led to draw inferences, if any, from that evidence and no more. That said, suffice to say, the accused cannot be allowed to reconfigure his case or to recalibrate it without an adverse inference being drawn.

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<sup>2</sup> See pages 16 and 17 of *R v Dominic Mngomezulu and Others (supra)*

### *Circumstantial Evidence*

[66] In this matter there is no direct evidence on the identification of the perpetrator in respect to the charge of murder. The prosecution relies on circumstantial evidence that calls for inferential reasoning of the Court. Circumstantial evidence must be credible, cogent and also must irresistibly point to the guilt of the accused and no other person.

[67] In evaluating the evidence, the Court is guided by the cardinal rules of logic set out by Watermeyer JA in *R v Blom*<sup>3</sup> where the following was said that: two cardinal rules of logic which could not be ignored when it comes to reasoning by inference are:

- (a) The inference sought to be drawn must be consistent with all proved facts, if it is not, then the inference cannot be drawn.
- (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[68] These rules have been adhered to and applied by the Courts almost as if they were statutory enactments.

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<sup>3</sup> 1939 AD 188 at 202-203

[69] In *R v Mthembu*<sup>4</sup> it was stated that the approach can also be put differently: the state must satisfy the Court, not that each separate item of evidence is inconsistent with the innocence of the accused, but only that the evidence taken as a whole is beyond reasonable doubt inconsistent with such innocence.

[70] In *R v De Villiers*<sup>5</sup> it was pointed out that the Court should not consider each circumstance in isolation and then give the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance.

[71] The rules set out in the above cases are about ‘connecting the dots’ of the evidence presented before the Court. The proven facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[72] When each little piece of evidence, like that the accused was the last one to be seen with the deceased on 7 April 2014; that when the body of the deceased was found, the accused was nowhere to be found; that on 7 April 2014 the accused left with the deceased ostensibly to go to PW2’s home with her but deceased was never seen by PW2 on the said date; that when

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<sup>4</sup> 1950 (1) SA 670 (A)

<sup>5</sup> 1994 AD 493, 508-509

the deceased alighted from the bus at Lomahasha she told the accused she had come to see Arrowshirt and not the accused-a fact which angered the accused who then manhandled her and forced her to go with him; that the accused says his relationship with the deceased had ended when he heard that she was in love with someone else but still forced the deceased to go with him on the evening of 7 April 2014; that he had feigned to be in love with the deceased to Arrowshirt in order for him to entice the deceased to come and meet the accused notwithstanding that the love relationship between the accused and the deceased had ended; that during the tenure of the love relationship between the accused and the deceased the accused was abusive towards the deceased; that the accused failed to call Tjitji who is said to have seen the couple arrive at Mbuzini- is put in its place, every other reasonable inference is excluded leaving the inference that the deceased was murdered by the accused.

[73] The accused had motive to commit the crime charged. The accused had been jilted by the deceased in preference for Arrowshirt and the deceased said so much to the accused when she alighted from the bus on 7 April 2014. The accused did not take kindly to being jilted it would seem. He hatched a plan on how he could get the deceased to meet him albeit without her knowing. The accused made an elaborate plan punctuated with lies that he wanted to meet up with the deceased so he could ask for her hand in marriage. The accused met PW4 where his 'fake' story about wanting to marry the deceased was told to PW4. The accused was convincing because PW4 gave in to the plan and agreed to assist the accused.

[74] The accused exercised the biblical patience of Job on 7 April 2014 as he waited for the better part of the day at the bus stop at Lomahasha until the deceased arrived between 7pm and 730pm. In the course of the day, the accused would, from time to time get updates from PW4 on how far the deceased was before she arrived at Lomahasha.

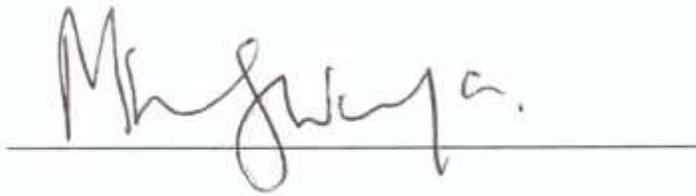
[75] The deceased was unwilling to go with the accused after alighting from the bus. She had to be convinced by PW3 to do so. At some point when PW3 sought to take the route to his home and leaving the couple to walk home, PW3 was asked by the deceased not to leave them alone.

[76] I have found the evidence of the Crown witnesses to be not only cogent but credible and worthy of belief.

[77] I have found the evidence of the accused to be fraught with contradictions and untruths and therefore not worthy of being believed. The accused was making his case as he went along; he was evasive in his response to pertinent questions under cross examination and his memory was fraught with selective amnesia on crucial parts of his evidence.

[78] The evidence against the accused was overwhelming and in my respectful view, the prosecution has proved beyond reasonable doubt that the accused committed the murder of the deceased.

[79] In the result, the accused is found guilty of murder.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written above a horizontal line. The signature is cursive and somewhat stylized.

**M. LANGWENYA J.**

For the Crown: Ms. N. Masuku

For the Defence: Mr. G. Mhlanga