



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 134/2015

HELD AT MBABANE

In the matter between:

REX

Versus

SIMANGA NTULO KUNENE

Neutral Citation: *Rex vs Simanga Ntulo Kunene [134/2015] [2019] SZHC 84 (30 April 2019)*

Coram: **M. LANGWENYA J**

Heard: 29 October 2018; 30 October 2018; 25 March 2019; 26 March 2019; 2 April 2019.

Delivered: 30 April 2019

Summary: *Criminal Procedure-Criminal law-accused charged with murder-accused alleged to have acted in concert with Dombolo-accused was the aggressor he accosted the deceased and stabbed him with a knife-Dombolo also stabbed deceased with a knife-it is immaterial that the accused argued that he did not inflict the fatal stab wound-the accused was found to have had the requisite mens rea founded on the doctrine of common purpose-accused found guilty of murder with dolus eventualis.*

JUDGMENT

Introduction

[1] The accused was charged with the offence of murder. In that upon or about 27 December 2014 and at or near Ngelane in the Shiselweni region, the accused did unlawfully and intentionally kill Ndoda Daniel Dlamini and did thereby commit the crime of murder.

[2] Before the charge was put to the accused and before he pleaded thereto, the Crown applied to amend the charge and alleged that the accused was acting in furtherance of a common purpose with Dombolo Motsa when he committed the offence charged. The defence did not object to the application by the Crown. The amendment was accordingly allowed.

[3] When the accused was arraigned he pleaded not guilty to the crime of murder but pleaded guilty to the crime of culpable homicide. The Crown rejected the plea of guilty to culpable homicide.

[4] The contents of the post-mortem report were not objected to by the defence. By consent, the contents of the post-mortem report were read into the Court record as part of the evidence of the Crown. The post-mortem report was marked as exhibit 'A'. By consent, the witness who identified the body of the deceased before the post-mortem examination was carried out was dispensed with.

[5] The Crown called seven witnesses to prove its case. The accused was the only witness for the defence.

The Case for the Crown

[6] The Crown led the evidence of PW1 Sandile Norah Ngobese. On 27 December 2014 he was at a Sibandze homestead with Mcolisi Sibandze, Thembinkosi Fakudze, Nhlakanipho Dlamini and other people drinking beer. It was while he sat drinking with his companions that the deceased arrived and asked to see Ms. Sibandze who was not present at home at the time. The deceased then spoke to Mcolisi and sat on a bench under a tree. After a while the accused and Dombolo arrived and the accused went straight to the deceased. The accused asked the deceased where his brother's teeth were. The deceased enquired from the accused what his surname was and the accused

retorted and said 'you will know me'. The accused drew out a knife from his left hip and stabbed the deceased on the head. The deceased got up and took a gum-tree stick and broke it. Dombolo drew out his knife as well.

[7] The deceased ran to a Dube homestead through a maize field with the accused and Dombolo in hot pursuit.

[8] It was the evidence of PW1 during cross examination that on the day in question he started drinking beer at about 11am and the incident of the stabbing of the deceased happened at around 1pm. It was the evidence of PW1 further that because he had been drinking on the day in question, his state of sobriety was questionable. He told the Court that the accused and Dombolo were drunk on the fateful day. PW1 does not know the state of sobriety of the deceased on the day in question, but said if the deceased was drunk, he was not too drunk.

[9] The case for the defence during the cross examination of PW1 is that when the accused approached and talked to the deceased, Dumsani Matse intervened and pulled the accused away and they both fell to the ground. PW1's response to this line of questioning was that he did not see Dumsani Matse intervene nor did he see the incident of Dumsani falling to the ground while trying to restrain the accused. It was the evidence of PW1 that it is untrue that Dumsani Matse intervened and tried to restrain the accused because if this indeed happened he would have seen it.

[10] It was also the case for the defence when cross examining PW1 that the deceased was stabbed by the accused on the head when the deceased went for his knob stick. This line of cross examination was however not pursued with the other Crown witnesses.

[11] The Crown called PW2 Sifiso Mpumelelo Sihlongonyane. He is a resident of Ngelane area. On 27 December 2014 he was at his home with his wife and some people from his church when Thabsile Makhanya, (the wife of PW2) shouted and said there were people who were killing each other outside. When this witness came out of the house he saw the deceased being cornered by Dombolo and the accused next to a pigsty. Dombolo stabbed the deceased on the right side. The deceased tried to flee to the home of his in-laws and was pursued by the accused and Dombolo.

[12] PW3 is Mcolisi Sibandze. He told the Court that in December 2014 the deceased came to Catherine Lomapasi Sibandze's home and said he had come to pay Catherine. Catherine Sibandze is the mother of PW3. The deceased had hardly sat down when the accused and Dombolo arrived at the Sibandze homestead. Dombolo sat next to Mzilikazi Vusi Khumalo while the accused went straight to the deceased, took off deceased's hat and hit him with it on the face. The deceased asked *yemfana uwakabani* that is young man, what is your surname? The response from the accused was: 'you took my brother's teeth off, I want the teeth'. Dumsani Matse stood up and went to the accused, manhandled the accused, kicked and hit him and the accused fell to

the ground. Dombolo went to Dumsani with the intention to stab him. PW3 held Dombolo so he could not stab Dumsani.

[13] Dumsani then left the Sibandze homestead. The accused got up from the ground and went and stabbed the deceased. The accused stabbed the deceased. PW3 let go of Dombolo and Dombolo went and stabbed the deceased. The deceased grabbed a stick and hit Dombolo with it. The stick was about a metre long and was plus-minus 5cm in diameter (width). The accused again stabbed the deceased on the head and on a number of times. The deceased fled to a Dube homestead and was pursued by the accused. According to PW3, the stabbing incident happened at around 4pm.

[14] PW3 was unshaken during cross examination in his evidence that the accused was the aggressor who first took deceased's hat and hit deceased with it. This witness was also unshaken during cross examination when he stated that the accused stabbed the deceased more than once after getting up from the ground where he had initially fallen after he was held by Dumsani Matse.

[15] The deceased is said to have hit Dombolo once with a stick when he was again stabbed by the accused.

[16] The Crown further called the evidence of PW4 Nhlakanipho Dlamini. The evidence of this witness corroborates that of PW3 regarding accused's role

as an aggressor. It is PW4's evidence that the deceased escaped and returned with a stick which he used to assault the accused and Dombolo. This witness did not see the role played by Dumsani Matse during the fracas. It is his evidence that the deceased was stabbed at least twice by the accused and Dombolo and was bleeding. It is PW4's evidence that when the deceased returned from getting a stick he went straight to the accused and attacked both the accused and Dombolo but was overpowered. The deceased then fled to a Dube homestead. PW4 says when the fight began he had hardly spend ten minutes at the Sibandze homestead.

[17] PW5 is Solomon Somfana Khumalo. He is *indvuna* of *KaDlovunga KuMazombizo* area. He was out tending his fields in December 2014 when a child came and called him home as there were people who wanted to see him at home. He went home and found Mr. Fakudze and three other people. Fakudze introduced himself as a police officer based at Nhlanguano Police station. The accused was in the company of the police officer and three other people. The accused stated that there was something he wanted to show them in connection with his arrest. They proceeded to accused's grandmother's home. They found the elders at home. The accused's brother-Sibonelo was also present at home. They went into the house where the accused is said to have put something in the cupboard.

[18] Inside the cupboard, the police found nothing, no knife. The accused asked his brother where the knife was as it was no longer in the cupboard. Sibonelo's response was that he took the knife and hid it in the toilet. Sibonelo,

this witness, the police and the accused went to the toilet where Sibonelo retrieved the knife from behind the toilet seat. The accused confirmed that the knife was the one he was pointing out. The police took the knife and left with the accused. PW5 remained behind. This witness looked at the knife and described it as having a black handle, with 'ears' a bayonet- *libhayinedi*. The police took pictures of the knife soon after it was retrieved from behind the toilet seat. This witness did not observe that the front part of the knife was broken.

[19] PW6 is 6298 Detective Constable Gabsile Dlamini. In December she was based at Nhlangano Police station under the scenes of crime unit. She worked as a scenes of crime officer for three years. On 27 December 2014 she received a phone call from 4131 Sergeant Tsabedze who informed her a person had died at Nhlangano Health Centre-a secondary scene. She proceeded to Nhlangano Health Centre with other police officers and found sergeant Tsabedze as well as the body of Ndoda Daniel Dlamini-a 52 year old resident of Ngelane. The deceased had stab wounds and she took photographs of the deceased's body. The photos reflect that the deceased had a stab wound above the nipple below the right shoulder; on the outside of the left hand; behind the left ear; on the head and a stab wound on the left shoulder. The photographs were handed into court as exhibits.

[20] She then collected and packaged all the clothes that were found at the scene. This included a golf shirt which was put in a sealed bag and marked RSPFSL 1 19573 named GGDI; a jacket top was also sealed in a bag marked

RSPFSL 2 and named GGD2; a pair of trousers that the deceased was wearing was sealed in bag marked RSPFSL 3 and named GGD 3. The sealed items were taken for forensic analysis.

[21] On the 28 December 2014, PW6 in the company of 2750 Detective Sergeant Mkhabela and 4131 Detective Sergeant Tsabedze went to Ngelane to the crime scene at a Sibandze homestead. The police photographed the crime scene.

[22] On 30 December 2014, in the company of other police officers she went with the accused who wanted to point out a knife. The knife was retrieved from a toilet in a small hole. The knife was photographed. The Court was however not shown the photograph of the knife. This witness said she does not know why the picture of the knife was not included in the photographs the police took. She says she is no longer stationed at Nhlangano Police station; that she is now stationed at Lobamba police station. This response is not satisfactory. A police officer who comes to give evidence in Court is also doing so as an officer of the Court. As officers of the Court, police officers are held to a standard higher than that of ordinary witnesses. For a witness who is a police officer to come to Court and give an explanation which is no explanation- that she does not know what happened to exhibits that she is testifying about is unacceptable. Such conduct is deprecated.

[23] PW7 is 5560 Detective Constable Sidumo Fakudze. He told the Court that in 2014 he was stationed at Nhlanguano Police station in the Criminal Investigation Department (CID). On 27 December 2014 he was on duty, when at about 530pm he received a telephone call from 999 reporting that a person had been stabbed at Ngelane. He with 3165 Detective Sub-Inspector Mabuza, 6007 Detective Constable Dlamini and 5897 Detective Constable Fakudze went to Ngelane. On arrival at Ngelane they were told that the stabbed person had been rushed to Nhlanguano Health Centre. When the police got to the Health Centre they found that the stabbed person had died.

[24] The Scenes of Crime department was called. PW7 and the police officers he was with returned to Ngelane to investigate the matter. They interviewed people and recorded statements. Their investigations led them to the accused who was arrested on 29 December 2014. The accused was found at his home at Ngelane. On arrival at accused's home, the police introduced themselves as police officers to the accused person. They cautioned the accused according to the Judges' rules and informed him they were investigating a case of murder. Following what the accused said he was arrested and taken to Nhlanguano police station. At the police station he was again cautioned according to the Judges' Rules before he said he wanted to point out something. The police returned to Ngelane with the accused. Before the police and the accused arrived at Ngelane, they went to Somfana Khumalo's homestead and requested him to accompany the police as an independent witness during their investigation and pointing out exercise. Somfana Khumalo went with the police to Ngelane.

[25] On arrival at accused's home, the accused was again cautioned according to the Judges' rules. The accused got inside the house and went to a cupboard only for Sibonelo to interject and say he (Sibonelo) took the knife which was in the cupboard and hid it in the toilet.

[26] Sibonelo led the police with the accused to the toilet. At the toilet, Sibonelo showed the police the knife where he had put it. The knife was visible when he pointed it out and the police saw it. This witness asked the accused if this was the knife he used to commit the offence charged and his response was in the affirmative. The officers from the Scenes of Crime department then took a photograph of the knife. The witness showed the Court a knife with a black handle that looks like it is made of rubber.

[27] The police and the accused then left Ngelane and returned to Nhlanguano Police station where the accused was again cautioned in terms of the Judges' rules and a statement was recorded from him. The accused was then charged with the offence of murder.

The Defence Case

[28] The accused told the Court that on 27 December 2014 he was at Mazombizwe at his maternal home kaMotsa with his uncle Dombolo Sibusiso Motsa. Early in the morning he started drinking liquor with Dombolo because there was a cleansing ceremony at his maternal home. They skinned a goat on the day in question before they set out to imbibe in alcoholic

beverages elsewhere. At 12 noon, and at the instance of Dombolo they went to a Hlophe homestead to have more drinks. They bought two 750ml bottles of castle beer and drank it. Mzilikazi came and said they should go to kaLaMasango for more drinks. Mzilikazi left first and the accused, Sandile, Muzi Mdluli and Dombolo followed him to Ka LaMasango. At Ka LaMasango they found Mzilikazi already enjoying drinks there. It was hardly three minutes after they started drinking that Dombolo showed the accused the deceased and informed him that the deceased is the man who had assaulted him on a previous occasion.

[29] The accused then went to the deceased and confronted him and asked him why he assaulted Dombolo Sibusiso Motsa. At the time the accused asked this question, his state of sobriety was questionable as he was drunk but not too drunk not to recall what happened.

[30] While the accused asked the deceased why he had assaulted Dombolo, the deceased asked who accused was and pushed him very hard. The accused had not introduced himself to the deceased. Wilson Matse came and held the accused, kicked him and the accused fell to the ground. The accused denies taking the deceased's hat off the deceased and hitting him with it.

[31] When the accused fell as a result of the assault from Matse, the latter also lost balance and fell to the ground. Dombolo came with a knife and stabbed the deceased on the head. The accused denied the evidence by Mxolisi Sibandze

and Nhlakanipho Dlamini that the accused stabbed the deceased on the head when he rose from the ground.

[32] It is the evidence of the accused that when the deceased got off the bench he sat on, he went to a field nearby and took a log and Dombolo followed him. The deceased returned and Dombolo said the deceased wanted to assault him. The accused drew out a knife and stabbed the deceased behind the ear. The accused states that he was negligent to stab the deceased in the manner he did. His aim was to protect his uncle, Dombolo whom the deceased wanted to assault.

[33] People tried to intervene and separate the warring faction. Dombolo stabbed the deceased on the chest. When the deceased was stabbed on the chest, the accused was not too close to them because he was held back by people who were trying to stop the fight. The accused confirms PW2's evidence that Dombolo stabbed the deceased whilst next to a pigsty on the right side of the chest. The accused says he only stabbed the deceased once.

[34] It is the evidence of the accused that when the deceased left the pigsty, he fled to a Dube homestead and was not pursued by the duo. Instead, he and Dombolo went to a Hlophe homestead. Along the way to a Hlophe homestead they were joined by Sandile Muzi Mdluli who was present during the fight at the Sibandze homestead. At the Hlophe homestead, the accused and Dombolo went inside a house thatched with grass where liquor was sold and

bought themselves beer. They then heard a crowd was looking for them and when they checked outside the house they were in the crowd began to pelt the house with stones. When the crowd tried to get inside the house they were in, the accused and Dombolo pushed the door shut. The crowd then set the house alight. The accused and Dombolo ran out in different directions. The crowd went after Dombolo and others threw stones at the accused.

[35] The crowd was estimated to be 50 to 55 people who chased after the accused and Dombolo. Some of the people were in a quantum kombi while others were in a van and others were on foot. The people pursued Dombolo and others pursued the accused. The accused fled home and was protected by his uncles who stopped the crowd from entering into his maternal's homestead at the gate. Sibonelo was also present at home.

[36] At home, the accused placed the knife on the table. The crowd left. Sibonelo took the knife but did not tell the accused where he hid it. The accused described the knife as having a black handle and that in the front part it was broken, and that its handle was made of plastic. The accused told the Court that the knife that was produced in Court as an exhibit is not the one he used on the fateful day.

[37] Sibonelo then informed the accused that Dombolo was captured, assaulted and killed. The accused was subsequently arrested and he informed the police that Sibonelo took the knife. He returned to his maternal home with

the police, the police introduced themselves to the elders and Sibonelo took them to where he had hidden the knife.

[38] In December 2014, the accused was 19 years old and was and is still unmarried. He does not have children. Before he was arrested, the accused worked for Inyatsi Construction Company as a labourer when the company was constructing a dam. He was doing piece-jobs and was not a permanent employee. At school he went up to Form1. He could not continue with his education because of financial constraints as his father separated with his mother.

[39] The reason the accused carried the knife on the fateful day is because he had been using it in the morning to skin a goat, he then put it in his pocket. It was a mistake, the accused said to carry the knife. The accused told the Court that they had not planned on killing the deceased. Dombolo's state of sobriety was questionable when he said they should go to the Hlophe homestead.

[40] Since the day he was arrested, he has not left prison. Even though he was granted bail by the Court he was not able to go out because he could not afford to pay the bail amount.

[49] During cross examination, the accused stated that he did not stab the deceased on the head but was forced by the police to say he stabbed him on the

head. The accused conceded that he stabbed the deceased behind the ear. The accused told the Court during cross examination that when he and Dombolo went to the Sibandze homestead, they had no intention of killing the deceased more so because they did not know that they would find the deceased at the Sibandze homestead. The accused informed the Court that he did not set out to kill the deceased. He stated that it was on spur of the moment he confronted the deceased after Dombolo told him the deceased had assaulted him on an earlier occasion.

Application of the Law to the Facts

[50] The Crown alleges that the accused acted in furtherance of a common purpose with Dombolo when he murdered the deceased.

[51] Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the Crown must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*.

Dolus Directus and Dolus Eventualis

[52] As stated in various decisions both in our jurisdiction and in South Africa, in cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis*. A person acts with *dolus directus* if he committed the offence with the object and purpose of killing the deceased.

Dolus eventualis, on the other hand is different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might or will occur, therefore dicing, as it were with the life of the person against whom the act is directed.

[53] *Dolus eventualis* therefore consists of two parts: first, foresight of the possibility of death occurring and second, reconciliation with that foreseen possibility.

[54] I should stress that the wrongdoer does not have to foresee death as a probable consequence of his actions. It is sufficient that the possibility of death is foreseen, which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.

[55] With this definition in mind, I set out to consider the totality of the evidence to determine whether the essential elements of the crime of murder have been proved.

Actus Reus

[56] The accused and Dombolo stabbed the deceased with knives and the deceased sustained injuries which resulted in his death. This evidence satisfies the element of an act or action or differently put *actus reus* which was carried out by the accused and Dombolo which resulted in the death of the deceased.

No Evidence of *Dolus Directus*

[57] According to the evidence before the Court, it has not been shown that the accused and Dombolo pre-planned the attack on the deceased; nor has it been shown that the duo set out to cause the death of the deceased. The accused says so much in his evidence during cross examination: that they did not set out to kill the deceased because they did not know that they would find him at the Sibandze homestead where they had gone to have more alcoholic drinks. For this reason, this Court cannot find that there was *dolus directus* on the part of the accused and Dombolo to cause the death of the deceased.

Evidence of *Dolus Eventualis*

[58] The evidence of both the Crown and the defence is *ad idem* that the accused stabbed the deceased with a knife. Whether the knife used was broken on its front part is irrelevant considering that earlier in the day the accused had used the same knife to skin a goat. The description of the knife by PW6 that it was a bayonet was also not disputed by the defence.

[59] The accused and Dombolo used knives to stab the deceased on different albeit delicate parts of his body. The post-mortem reports describes in graphic detail the injuries suffered by the deceased being: (1) cut wound over scalp middle right 3.7cm x 1cm scalp deep; (2) cut wound below left ear 4.3cm x 1cm muscle deep; (3) cut wound left shoulder back 3.2cm x 1cm muscle deep; (4) cut wound over left hand dorsum 3cm x 1cm skin deep; (5) penetrating wound obliquely placed front of right chest outer to nipple 4cm x 1.1cm lung deep present. It involved muscles, intercostal structures, pleura, lung upper lobe through and through, edges clean cut, angle sharp, front to back pleural cavity contained about 1800ml blood.

[60] The weapon(s) used and the manner it was used given the parts of the body to which it was directed established the requisite *mens rea* in the commission of murder with *dolus eventualis*. Given the nature of injuries occasioned, the weapon(s) used and the manner in which the assault was perpetrated one cannot fail but read realization of risk or possibility of death ensuing from such conduct. At the time the accused stabbed the deceased he must have foreseen and therefore did fore-see, the potential fatal consequences of his action. In his words the accused said even though he was drunk when he stabbed the deceased, he was not drunk to a point he did not know what he was doing. In the circumstances, I have no doubt that in stabbing the deceased in concert with Dombolo the accused must have foreseen and did fore-see, that his conduct might result in the death of the deceased but he reconciled himself to that event occurring and dived with deceased person's life. This constitutes *dolus eventualis* on his part.

Import of the Doctrine of Common Purpose

[61] The doctrine of common purpose is clear; and the law is settled in this regard.

[62] The doctrine of common purpose is satisfied if it is shown by the Crown that the accused was present at the scene where the crime or violence was being committed; second, it must be shown that the accused was aware of the assault on the deceased; thirdly, the accused must have intended to have common cause with the person(s) who was perpetrating the assault; fourthly, the accused must have manifested his sharing of a common purpose with the perpetrator of the assault by himself performing some act of association with the conduct of Dombolo; lastly, the accused must have had the requisite *mens rea*¹.

[63] In *S v Thebus*² the Court explained what the ‘requisite *mens rea*’ entails if the prosecution relies on the doctrine of common purpose. The Court stated as follows:

the **‘If the prosecution relies on common purpose, it must prove beyond reasonable doubt that each accused had the requisite mens rea concerning unlawful outcome at the time the offence was committed. That means he/she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself/herself reckless as to whether the result was to ensue’³**

¹ Distilled from: *S v Molimi* [2006] ZASCA 43 at para 33; *S v Mgedezi* 1989 (1) SA 687 (A) at 7051-6 C.

² [2003]ZACC 12; 2003 (6) SA 505 (CC).

³ At para 49.

[64] In *Dewnath v S*⁴ the Court held as follows:

‘The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi* makes it clear that: i) there must be a close proximity in fact between the conduct considered to be active association and the result; and ii) such active association must be significant and not a limited participation removed from the actual execution of the crime’.

[65] The accused admits to being negligent when he stabbed the deceased but is quick to state that the stab wound he inflicted behind the ear of the deceased is not the one that caused the death of the deceased according to the post-mortem report. This argument is without merit. This conclusion is supported by the accused’s conduct and what transpired during the infliction of the injuries on the deceased and immediately after the deceased fled the Sibandze homestead when he was pursued by the accused and Dombolo who continued to stab him close to the pigsty as observed by PW2.

[66] After stabbing the deceased, the accused continued to spend time with Dombolo at the Hlophe homestead where they continued to have more alcoholic beverages until they were flushed out by the angry crowd which was baying for their blood.

⁴ [2014] ZASCA 57 at para 15

[67] The accused took up the cudgel on Dombolo's behalf. He was not coerced to do battle on behalf of and in conjunction with Dombolo when they launched an attack of the deceased. After seeing Dombolo stab the deceased, the accused did not flee or dissociate himself from Dombolo in anyway. The fact that the accused was not under duress and had every chance to dissociate himself from the assault (but did not) of the deceased suggests that he had an understanding with Dombolo to participate in criminal activity. It is reasonable therefore to infer that the accused far from being caught unawares in unlawful conduct, had an intention to commit the crime of murder with Dombolo.

[68] The evidence shows that the requirements for a conviction on the basis of common purpose as stated in the cases referred to in the cases cited above, have been met in relation to the charge of murder. It is clear that the accused was present at the scene of the crime and was armed with a knife. He therefore made common cause with Dombolo in committing the murder. The accused manifested his sharing of a common purpose with Dombolo by performing an act of association with the conduct of Dombolo when he stabbed the deceased and in concert with Dombolo later chased after the deceased and continued to stab and assist Dombolo in the stabbing of the deceased when he was next to the pigsty. The accused had the requisite *mens rea* to commit the murder.

[69] The accused may not have intended the criminal result of murder, but he and Dombolo must have foreseen the possibility of the criminal result [of

murder] ensuing. This is by virtue of the fact that they were both carrying knives which they then used on the deceased and thus actively associated themselves with the criminal act of murder.

Contradictions in Evidence of Crown Witnesses

[70] The credibility of PW1, PW3 and PW4 was attacked on the ground that on the day of the incident they were drunk as such were unable to recount with precision the events of the day. I have found the evidence of the Crown witnesses of PW1, PW3 and PW4-these being witnesses who had been drinking alcoholic drinks on the day to be credible. Whatever contradictions there may be in their evidence is to be expected from people who were trying to recall and recount events which happened four years ago. The contradictions attending the Crown witnesses' evidence do not go to the heart of the matter. The contradictions do not detract from the fact that the accused was the first to accost the deceased; that the accused was seen stabbing the deceased in concert with Dombolo.

The Accused Acting in Defence of Dombolo

[71] It was suggested that the accused stabbed the deceased because he was acting in defence of Dombolo who had called for help when the deceased tried to assault him with a stick he had collected from a maize field. I cannot

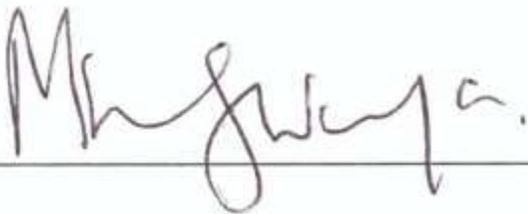
but conclude that using a knife to thwart a man armed with a stick that is approximately one metre long by plus-minus five centimetres in width is disproportionate to the attack and thus unreasonable in the circumstances.

The Evidence of Pointing out of Knife by Accused

[72] The evidence of pointing out by the accused was not pointing out according to the law. The evidence before the Court is that it was Sibonelo and not the accused who pointed out the knife said to have been used in the commission of the crime charged. Sibonelo, and not the accused had taken and hidden the knife in the toilet where he later retrieved it in the presence of the accused, the police and PW6 among others. There is therefore no confession by conduct that the accused made in this regard.

Verdict

[73] For the reasons set out above, the accused is found guilty of murder with *dolus eventualis*.



M. LANGWENYA J.

For the Crown:

Mr. S. Gama

For the Defence:

Mr. B.J. Simelane