



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CRIMINAL CASE NO.18/13

In the matter between:

THE KING

AND

SIFISO NDLANDLA

Neutral Citation: *The King vs Sifiso Ndlandla (18/13) [2020] SZHC (138) 24 July 2020*

Coram: MLANGENI J.

Last Heard: 24th June 2020

Delivered: 24th July 2020

Summary: Criminal Law – accused charged with two counts of attempted murder – evidence showing that the accused’s friend was under severe attack by about six men who punched and kicked him – on seeing his friend being attacked the accused fired two warning shots but the assailants, who were drunk, did not back off – on seeing his friend being stabbed the accused fired a third shot at the crowd, which ripped through the body of one

of them, and although a second person was injured in the process it is not certain that he was injured by gunfire.

Held: In the exigencies of the situation the accused's reaction in firing at the attackers was not unreasonable.

Held, further, that the accused had succeeded in establishing private defence.

Accused acquitted and discharged on both counts.

JUDGMENT

- [1] A drinking spree on the 1st June 2012, at Ngogola bar, ended up in a near fatal bloody confrontation involving the accused and some of his patrons. As a sequel thereof, the accused faces two counts of attempted murder, it being alleged that on the 2nd June 2012 and at or near KaBhudla area, he did unlawfully and with intent to kill, shoot at two persons namely Nkosinathi Ngwenya and Msongelwa Siholongonyane with a pistol.
- [2] The background facts of the matter are largely common cause. The accused operated a bar and bottle store at Ngogola business centre. The bar operates daily, well into the night. The court was informed that closing time was 12:00 midnight. Patrons at this bar came from surrounding areas, and on this particular day there was a significant contingent of people from KaBhudla area which is near Mafutseni. It was common for people from KaBhudla to go to this bar for alcoholic drinks, and they would remain there until well into the night. The accused owned an Isuzu van, and at closing time his patrons would get a ride back home on this van and he would drop them off at different spots close to their respective homes.

- [3] Earlier on in this particular day the accused was in Mbabane at a place known as kaQobonga where he operated another bar. He got to the Ngogola bar sometime between 12:00 midnight and 1:00 a.m. and immediately directed that the bar must close. Money was counted and the bar was closed. There were many patrons who came from kaBhudla area where the accused resides, and he gave a ride to some of them to get back to their respective homes, this obviously due to the fact that at this time of the night there is no public transport. Those who got a ride on the accused's van on this particular day counted no less than ten, and some witnesses suggested that this long wheelbase bakkie was overloaded with people. One witness suggested that they were about twenty. The disc jockey of the day is one of those that got a ride on the accused's van as he resides in the same area as the accused.
- [4] As the accused's van was getting ready to leave the bar, with its human cargo, there is a motor vehicle that was parked right behind the accused's van, making it impossible for it to start the trip. According to the accused this motor vehicle just came and pulled up behind his van. It was described as an Uno and it also had several passengers in it. An Uno is a small vehicle of the Fiat brand which sits four people. In cross-examination it was put to PW3 that on this occasion the Uno was carrying six people and he said that he could not deny this.
- [5] Because the Uno had effectively blocked the way of the accused's van, it was necessary to engage with the occupants of the Uno to give way. This took a bit of time. According to PW3, Nkosinathi Ngwenya, who is one of those who got a ride in the Uno, the delay was occasioned by a minor dispute between two Zwane brothers about who was to drive

the Uno. It was resolved and the Uno gave way for the Isuzu to start the journey towards Edamu and kaBhudla. The Uno followed suit, but it was some distance away. The distance between the two moving vehicles became shorter, and according to PW3 when they got to Enkelebheni they were about 8 metres apart, the accused's van ahead of the Uno.

[6] The two vehicles stopped at a place known as Enkelebheni. The evidence of the Crown witnesses is contradictory on whether the accused's van was behind the Uno or in front of it. This is hardly surprising because other than the time lag between 2012 and 2020, all or most of those who were at the crime scene were considerably drunk, having spent many hours at Ngogola bar drinking alcoholic drinks. It appears to me to be more probable that the Uno pulled up behind the Accused's van.

[7] According to the accused he made a stop at Enkelebheni in order to drop off some people. That is where the bloody conflict occurred, culminating in the charges that have been preferred against the accused.

THE CROWN CASE

[8] PW3 is Nkosinathi Ngwenya and he is one of three people who got injured in the bloody conflict that occurred at Nkelebheni. He had been given a ride in the Uno and was to drop off at Nkelebheni and proceed to his home. His evidence is that before the Uno stopped at Nkelebheni he heard the sound of gunfire and noticed that there was a brawl on the accused's motor vehicle. Mduduzi Zwane, who was driving the Uno, alighted and went to the accused to calm down the situation. The witness says he remained in the Uno. He did not see fully what was happening but he did notice people being chased. He

did not say who was chasing who. Then the accused threatened to shoot at certain people. He was dared to do so and **“at that time I was shot at and I fell down. I cried for help.....”**. He proceeded to say that when he was shot at he was standing in front of the Uno and the accused was in his van **“where there was a quarrel. He was outside the motor vehicle, threatening to shoot”**. The witness further testified that he did see the firearm that caused him injury. He said that the accused **“went down in his motor vehicle and took the gun out.”** There was moonlight as well as light from the Uno headlamps, hence he was able to see that the gun was black in colour. Under cross-examination he repeated the testimony that by the time the Uno in which he was travelling stopped a bullet had already been fired.

[9] This narration is in sharp contradiction with his earlier evidence that he saw the accused take the firearm from his motor vehicle. If he had actually, seen the firearm being taken out of the accused’s van, then the shooting could only happen there after, not before.

[10] PW3’s version of events is that when he was shot at he was doing nothing, that he was just standing somewhere close to the Uno. Under cross-examination the witness said that earlier on he was at Ngogola bar, drinking, from about 7:00pm till after midnight when the bar was closed, and that during this time he drank about three litres of beer and he was drunk since he does not normally drink a lot. It is probably due to his state of intoxication that although he states that there was commotion on the accused’s van, some people chasing others, he did not see who was chasing who. This despite the fact that all those who were involved are from the same area of kaBhudla. It was put to him that one Mphumuzi Simelane, the accused’s friend who had been travelling in the accused’s van, was pulled down from the van by those who were travelling in the Uno, and assaulted by

them. His answer was that he did not see that, because **“we found the quarrel already having started”**. It was further put to him that when the accused fired, he did that in order to rescue Mphumuzi Simelane who was being stabbed and kicked while lying on the ground, and his answer was that it could be so, but he added that he did not see who was stabbed and by whom.

- [11] PW5 was Mfanzile Socks Sihlongonyane. He is one of those who were at Ngogola bar having alcoholic drinks, and later got a ride on the accused’s vehicle to travel back home at kaBhudla. He says they left Ngogola at about 3:00a.m., and they were about 15-20 on the accused’s motor vehicle. His further evidence is that at Enkelebheni the accused’s vehicle got off the main road and turned southward. He continued in the following manner: -

“Then there was a quarrel, I am not sure who started it. Shortly thereafter, I heard the sound of gunfire. I alighted from the van, and then I heard a second gunshot. The third time it went off, I was shot on the head. At that time many other people were close to the driver’s door..... The one who was shooting was the accused. The other one who was shot is Nathi Ngwenya”.

- [12] He proceeded to say that thereafter they were taken to hospital. From the scene of injury they were taken into the Uno and later transferred into a police motor vehicle which took them to RFM hospital. He further testified that he did see the firearm in the hand of the accused, that there was moonlight as well as light from the accused’s motor vehicle. His injury was on the head, above the right ear. The bullet did not penetrate the skull – it merely grazed the side of the head.

[13] Just like PW3, this witness stated that he does not know what caused the conflict, neither does he know who started it. He also does not know who was quarrelling with whom. This is despite the fact that he was actually on the van when this occurred. Of some significance is that on his understanding of the situation the accused shot **“because of the people who were in the conflict”**, clearly suggesting that the accused was not part of the conflict. During cross-examination he said that he got to Ngogola bar at about 7:00 pm and that they were drinking beer until about 3:00 am on the following day. He says he drank about seven bottles of 750 milliliters, which is more than five litres. Despite this significant amount of drinks he said that he **“was not really drunk”**. I am not persuaded by this assertion. He corroborated that the quarrel took place on the van. Some questions and answers during his cross examination follow below: -

Q: You knew most of the people on the van, why are you unable to tell the court who was involved in the quarrel?

A: The motor vehicle was full. I was on the window behind the driver, the quarrel started as we were alighting from the van.

Q: Did the quarrel lead to a fight?

A: There was no fighting. There was only gunfire.

Q: When you heard gunfire where was the Uno?

A: On the first occasion it was behind, On the second occasion it was in the front where it parked.

[14] This witness was also asked if he had noticed Ndumiso Zwane and Mduduzi Zwane during the brawl and what they were doing at the time. He said that they were there, doing nothing. A question was put to him, and he answered as appears below: -

Q: You were drunk, hence you do not recall what was happening and who quarreled with who?

A: It all happened in a short space of time

Upon further cross-examination, the witness admitted that in the statement he recorded with the police he did mention that there was a quarrel among the people on the van, and the quarrel led to a fight. But curiously, he does not recall who was fighting whom. It was put to him that what happened was not exactly a fight – rather a mob of people attacked Mphumuzi Simelane with fits, kicks and beer bottles. He denied this. It was also put to him that one Siboniso Gamedze, who was a community policeman in the area, saw the assault on Mphumuzi Simelane by those who had been travelling in the Uno, and that he was concealing this in order to protect his mates. He also denied this.

[15] One Siboniso Gamedze testified as PW6. This witness was a community policeman of the area at the time. He gave a much clearer account of what he saw at Nkelebheni junction, although his oral testimony was often at odds with the statement that he recorded with the police soon after the incident.

[16] Like the preceding witnesses, PW6 stated that when the two vehicles got to Enkelebheni the Uno stopped behind the accused's van and that

“.....when the van stopped some boys got off and pulled one guy down and assaulted him. The one who was assaulted was also on the van. He is Mphumuzi. He was assaulted by Thokozani Khoza, Ndumi Zwane and Mbali Ngwenya. As Mphumuzi was being assaulted the accused called two names and said they must stop assaulting Mphumuzi. Then the accused shot three times and the crowd dispersed. Some were crying”.

It is of significance that the witness specifically said that Ndumi Zwane had been travelling in the Uno. For the first time, it becomes apparent that although the commotion was on the accused's van, some people from the Uno were involved, and this did become clearer during cross-examination of this witness.

[17] The witness further stated that when the accused discharged the firearm he aimed at the crowd, not to any particular person. After the shooting the accused made a U-turn and drove in the direction of Mafutseni. Since he was still on the accused's van he shouted at the accused to drop him off, which he did. As he proceeded home he saw someone lying down, it was Mphumuzi Simelane, and he then phoned the police. He later assisted the police in conveying Mphumuzi Simelane to hospital. He further mentioned that one other person who was injured is Nkosinathi Ngwenya and this Ngwenya testified as PW1. He described the firearm that was used as being black in colour.

[18] Under cross-examination this witness denied a number of things that he was said to have recorded in his statement to the police. He denied that he said the accused phoned the police and stated that what actually happened is that as the accused was making a turn he was talking to someone on his cellphone. He does not know whom he was talking to. He further denied that the accused shot once and stated that he shot three times in succession. The witness proceeded and said the following: -

“He shot straight to the crowd. There was no warning shot. All three shots were directed to the crowd.... before that he shouted to them to stop”

[19] When all of this happened the witness was on the accused's van. He was asked the questions that follow: -

Q: Before the accused produced a gun what did he do that you saw?

A: He alighted from the motor vehicle, stood next to the door and shouted. He said Chuks and Ndumi should leave Mphumuzi.

Q: In your statement to the police you recorded that the accused said the two should stop killing Mphumuzi. Are those the words you used?

A: Yes

Q: How many people attacked Mphumuzi?

A: Chuks, Ndumi and Thokozani Khoza.

Q: In your statement you said those who attacked Mphumuzi were about six in number. Do you dispute that you said so?

A: Mduduzi Zwane joined to intervene. I don't recall recording that they were six.

Q: They did not adhere to his plea, he continued shouting at them as they assaulted the hapless police officer?

A: He did shout. I don't remember how many times he shouted.

Q: Accused instructs me that he tried to intervene and he was hit with a beer bottle?

A: I did not see that.

Q: When he went for his gun he saw one of the assailants stabbing Mphumuzi?

A: I did not see that. What I did see was that Mphumuzi was bleeding..... I saw this when we were taking him to hospital as I was holding him.

Q: No shots were fired after they let go of Mphumuzi?

A: Correct

Q: Those who assaulted Mphumuzi dragged him from the van?

A: Yes

Q: Do you know the reason why he was assaulted?

A: I did not get to know the reason.

[20] Inconsistencies between some aspects of the statement that the witness recorded with the police and what he testified in court are cause for concern. He says that when he recorded the statement he was still traumatized by the events that had occurred. He also said that his understanding of English is limited. Overall, his story in the witness box was not incoherent or desultory, and he did not go out of his way to incriminate the accused, neither did he evince any gusto in favour of those he witnessed assaulting Mphumuzi. I am certainly viewing his evidence with a degree of caution, but it was not so bad as to make him a totally unreliable witness. As I indicated earlier, his evidence does give a more coherent account compared to the witness who preceded him.

[21] Colani Pununu Dlamini was next to testify and he did so as PW7. In respect of the events that took place at Ngogola bar, prior to the bar being closed, his evidence is consistent with that of the preceding witnesses. The one addition that he made is that prior to departure from Ngogola bar there was a quarrel between Mbali Ngwenya and Mphumuzi Simelane, that Mduduzi Zwane made peace and took Mbali Ngwenya to the Uno and Thokozani Khoza to the accused's van. Clearly, the intention was to keep the disputants apart. The preceding three eye witnesses did not mention this. This, if true, probably speaks to the extent to which the *dramatis personae* were intoxicated. Given the absence of evidence on what precipitated the

violent brawl at Nkelebheni, this witness' evidence gives a useful hint that what transpired at Nkelebheni was probably a spillover from the dispute that occurred at Ngogola, especially given the witness' account that at Ngogola he separated the two disputants such that one rode in the Uno and the other one rode on a van.

[22] The witness proceeded to testify that at Nkelebheni junction the accused's van stopped and: -

“As we alighted Thokozani Khoza slapped one guy from Mafutseni with an open hand. Sandile Thwala alighted from the other side of the van, accused slapped Sandile Thwala and then shot..... Those who were in the Uno came and asked accused why he assaulted Sandile and why he shot. Then there was a fracas. I did not get to know what the cause of the conflict was. Mbali and others wanted to assault the accused”.

[23] In his evidence in chief this witness said nothing about Mphumuzi Simelane being dragged from the loading bin of the van to the ground and being assaulted and stabbed. And he is the only one, at this stage, who has said that the accused slapped Sandile Thwala before firing a shot.

[24] In cross-examination this witness was asked if he did make a statement to the police and he confirmed. He was asked whether he did tell the police that he saw Mbali Ngwenya stabbing Mphumuzi Simelane and he said he does not remember. He later stated that he did not know Mphumuzi Simelane then. During further cross-examination the witness said that when he told the police that he witnessed the assault he was telling lies, the reason being that **“we were being suffocated by the police.”** On being probed further, his

response was that he was not a suspect and was not tortured **“but those who came out of the interrogation room were crying. There was a bench and a suffocating plastic. When there is a bench and a plastic I know that people are tortured. Some of what I recorded I did not see, some of it I saw.”**

[25] It is needless to point out that this witness was a flop and his evidence cannot be relied on.

[26] PW8 was 5581 Constable Bheki Vilane who, at the time, was a police officer stationed at Mafutseni Police Station under the CID department. He was one of the investigators assigned to this matter. He testified that on the 2nd June 2012 and at Mafutseni Police Station he questioned the accused in respect of this matter and after due caution in terms of the Judges Rules the accused voluntarily handed over to him a firearm which was a pistol, black in colour. It had a magazine with eight rounds of live ammunition. Thereafter the officer, in the company of 5766 Constable Madlopha, proceeded with the accused to the scene of crime where one empty cartridge was found on the ground and taken to Mafutseni Police Station.

[27] It is opportune to mention at this stage that the accused does not deny that he used his firearm which was licenced, to shoot at the crowd of people who were at the scene. He also does not deny that he fired three rounds of ammunition, so the fact that only one empty cartridge was retrieved at the scene of crime does not change the matrix of the case in any material way. PW8 handed over the pistol, black in colour, which was marked **“Exhibit 1”** and the eight rounds of live ammunition which was collectively marked **“Exhibit 2”**, and the holster which was marked as **“Exhibit 3”**. This officer mentioned that there are other eyewitnesses in the matter whose statements

could have been recorded but they were too drunk to assist the cause in any meaningful way. Such is the story of this case.

[28] Under cross-examination this officer was asked about a bench which was kept at Mafutseni Police Station as well as suffocating plastic, both of which were mentioned by witness Colani Pununu Dlamini who testified as PW7. The officer admitted the existence of a bench and denied any knowledge of a suffocating plastic. Regarding the evidence that people came out crying from the interrogating room, and that this is the reason PW7 told lies when recording his statements, the officer emphatically denied this and added that in any event statements are not recorded by the investigating officers but are recorded before general duty officers. I have already observed that PW7 is not a reliable witness.

[29] For the sake of completeness I make reference to the evidence of PW4, Assistant Superintendent Harry Vusi Madonsela who is a police officer based at Headquarters in Mbabane, Forensic Ballistics Section. He is trained in identification of ammunition, fired bullets and cartridges. This includes determination whether used cartridges and/or used ammunition matches a firearm or not. He testified that on the 1st August 2012 he received sealed exhibit bags marked **“Mafutseni RCCI 313/2012 and 314/2012 and 201/2012”**. These bags contained a 9mm CZ pistol serial number C5936, a 9.19 mm fired cartridge case and 8 cartridges of 9.19 mm size. After testing the firearm, he concluded that it was intact and functional. Further tests led to the conclusion that the fired cartridge case which he had received was fired from the CZ pistol serial No. C5936. The witness then handed in his affidavit in support of his findings and it was marked as Exhibit **“C”**.

- [30] I mentioned above that PW4's testimony is for the sake of completeness, because the accused does not deny that he is the owner of the pistol and that he did fire live rounds of ammunition from it on the 2nd June 2012, resulting in the injuries that are the subject of this criminal trial.
- [31] PW1 was Dr Sibusiso Mkhize who is a medical practitioner who at the material time was based at Raleigh Fitkin Memorial hospital in Manzini. On the 2nd June 2012 he attended to one Nkosinathi Ngwenya who had signs of alcohol intoxication. Ngwenya is PW3 and he is the subject of count one. The doctor found on Ngwenya two tangential wounds on the left part of the chest, allegedly caused by gunshot. One was an entry wound and the other was an exit wound. This witness handed in his RSP 88 report which was marked "**Exhibit A**".
- [32] There is no doubt that Ngwenya is lucky to be alive, and it is hardly surprising that as he was testifying in court he was struggling to hold back tears.
- [33] Dr Jabu Mavundla, also of RFM hospital, testified as PW2. On the 2nd June 2012 she attended to Msongelwa Socks Sihlongonyane whose clothing was blood-stained. According to the doctor, this patient had a graze wound on the right temporal region. On the space for remarks the doctor wrote "**alleged assault**". In this context I mention that in "**Exhibit A**" doctor Mkhize wrote "**alleged gunshot**". This shows that there is no conclusive proof that the injury on Sihlongonyane was caused by gunshot, and in all probability, he did not tell the doctor that the graze wound was a result of gunshot, otherwise in all probability the doctor would have mentioned this important aspect. What this suggests is that the accused may not be the one who inflicted that wound, and in the circumstances that have been

described to the court it could have been anyone. However, in the final outcome of this trial this aspect is of no consequence.

[34] This, then, is the case of the Crown. All of the Crown witnesses had been at Ngogola bar drinking alcoholic drinks and dancing to the vibes of the DJ, for many hours. According to some of them, this started in the early evening of the 1st June 2012 till about 3:00 am on the 2nd June 2012. Most of them were cross-examined on their state of sobriety at the time of the incident at Nkelebheni and they admitted to being intoxicated. Gamedze, who testified as PW6, was not cross-examined on this aspect, but he was also at Ngogola bar for as many hours as the others and there is no reason to believe that he was not drunk. I noted earlier that his oral evidence was, in many respects, at odds with the contents of the recorded statement that he made to the police.

[35] None of the Crown witnesses told the court the cause of this bloody conflict. This is despite the fact that most of those present were from the same area of kaBhudla, which adjoins Mafutseni, and most of them knew each other and often used aliases – apparently names acquired in the game of soccer. Only one witness gave a hint – and only a hint – that the flare-up at Nkelebheni might have been a spillover from things that had happened at or around Ngogola bar. This witness is PW7, Colani Pununu Dlamini.

[36] None of the Crown witnesses clearly describe the stabbing of Mphumuzi Simelane, despite the fact that he was grievously injured, as it became apparent when he gave evidence for the defence. Some of the witnesses said that at Nkelebheni the Uno sped past the Isuzu van and suddenly turned to face the opposite direction and that this is when the conflict occurred. Others said that the motor vehicles were both facing the same direction – southward – the Uno behind the

Isuzu, but not exactly linear. Some said that during the physical confrontation they were just standing there, doing nothing.

- [37] In her written submissions Ms. Mabila for the Crown asserts that these witnesses were credible and reliable in their evidence and that they were not shaken under cross-examination. I certainly do not agree. Above I have pointed out glaring shortcomings in the evidence of the Crown. If it wasn't for the vast experience of defence attorney Mr. B.J. Simelane I could well have dealt with a Section 174(4) application in this matter.

THE DEFENCE CASE

- [38] The accused gave evidence on his own account. He stated that at the time material to this case he was self-employed, operating a nightclub with a bar and discotheque at Ngogola. On the day in question he got to the bar between 12:00 midnight and 1:00am on the 2nd June 2012. He immediately ordered that the bar should be closed as time was up. His staff counted money and the bar was closed. As usual, as he was leaving he gave a ride to the patrons who resided around his home area of kaBhudla and Mafutseni. He was driving an Isuzu van which is a long-wheel base. As he got into his car he noticed an Uno motor vehicle which was behind his car, in such a way that he could leave only once the Uno moved to make way. The accused asked his friend Mphumuzi Simelane, who is a police officer, to engage those in the Uno so that they could make way. The Uno did give way. As he travelled with his patrons on board he stopped over at Ngongolwane to drop off someone and proceeded towards Nkelebheni junction where he was to drop off some other people.
- [39] He further testified that he stopped at Nkelebheni junction to drop off some people and as they were alighting he heard noise from the back

of the van, someone shouting **“they are assaulting us”**. He says that he then pulled down the window on his side and saw the Uno which was directly behind his van. One of those that he saw on the Uno was Mduduzi Zwane. As he alighted from his motor vehicle he noticed that there was commotion among those who were on the loading bin and his friend Mphumuzi Simelane was being dragged and he fell down. At that stage the accused says he was hit with a bottle on the back of the right shoulder. He says at that stage Mphumuzi Simelane had been dragged for about four metres from the car. Around that time he opened the door of his motor vehicle and took out his firearm. He proceeded in this manner: -

“I then called Chuks and Ndumi to let go off Mphumuzi. They were on him, assaulting him and kicking him while on the ground. I said they should stop killing him but they continued. They were about seven on him. I shot twice in the air to disperse them.” They did not disperse. One man with a white top was on Mphumuzi, stabbing him. Then I shot in that direction where he was. I did that because he was stabbing my friend Mphumuzi”.

[40] At that stage, according to the accused, someone shouted that he was now hitting the flesh (sewudvubula mbamba) and they dispersed. He further testified that the Uno then sped past his motor vehicle, threatening to knock him and others. He did not notice whom he had injured. He then reversed his motor vehicle and made a turn in the direction he had come from. He says that he drove slowly and called 999, the emergency police line. Some evidence that the accused led has no relevance to the charges that he faces, e.g. evidence relating to what he did after reversing his motor vehicle. I say this because at this stage the injury had already occurred. His defence counsel drew to his attention the evidence of PW3 who said that a shot was fired

even before the Uno had stopped and he denied this. He also denied that the fight was not between those on the Uno and those on the van but was among those on the van only. He also denied the allegation that when he shot at PW3 the latter was just standing, doing nothing. His words were that there **“was no reason to shoot at him, unless he was part of the crowd where I shot.”** Commenting on the evidence of Siboniso Gamedze, PW6, that he fired three shots directly to the crowd, his response was in the negative, adding that two shots were to the air and one was to the crowd. I pause here to observe that in my view if all three shots were actually aimed at the crowd a lot more damage would have occurred. We already know that one bullet went through the body of PW3. I am persuaded by the evidence of the accused that not all shots were aimed at the belligerent crowd.

- [41] Under cross-examination the accused did not deny that he may have been carrying about twenty people on his van. He confirmed that he fired three shots, and that anyone who was hurt by a bullet would have been among those that were assaulting Mphumuzi Simelane because that is where he aimed, the purpose being to save Mphumuzi from his persisting assailants. He was asked if it is one bullet that happened to injure two people at the same time and his answer was that he did not know that. I have made the observation that it is by no means certain that Msongelwa Sihlongonyane’s injury was occasioned by a gunshot. Accused stated that he does not know Msongelwa Sihlongonyane, and that if the said Msongelwa testified that he was shot at while alighting from the van he would be telling lies. He also stated that one of the assailants was armed with a knife while others had beer bottles. He further stated that he shot at the crowd to disperse it and save Mphumuzi Simelane, and that the crowd did disperse, and thereafter he did not shoot.

- [42] It was also put to him that according to the evidence of PW6, Mphumuzi Simelane's assailants were three – Thokozani, Chunks and Ndumi and his answer was that the assailants were around seven, and that the two names he shouted to stop killing Mphumuzi are those that he knew by name- the others he did not know by name.
- [43] The second witness for the defence was Mphumuzi Simelane who testified as Pw2. He is a policeman based at Mafutseni Police Station. He testified that on the day in question he was at Ngogola bar, upon the invitation of his friend the accused. Like many others who testified before him he narrated how the journey from Ngogola started, that there were many people on the van, including some ladies whom he did not know. It is a matter of some curiosity that despite the extensive evidence of no less than five witnesses, ladies hardly feature. But then there is a lot more curiosity in this matter, such as that the cause of the bloody conflict remains a matter of conjecture.
- [44] His further evidence was that at the junction known as Enkelebheni the accused's van stopped to drop off someone and at that stage the Uno, which came from behind, did a tyre spin and turned to face the direction that it had come from. About six people alighted from it and came running to the accused's motor vehicle. The witness says that he was sitting on the edge of the loading bin when those from the Uno came charging, one of them said that the accused was so confident because he was in the company of a policeman – the witness. He says that at that stage three men pulled him off the van and to the ground. When he tried to rise he was stabbed at the chin by one Ndumi Zwane. Many others from the Uno were assaulting him with fists and kicking him. Those who were assaulting him were more than six. He became dizzy and heard sound like gunfire which seemed to emanate from far. He subsequently lost consciousness which he gained at RFM hospital in Manzini. He was treated and discharged the same

day but his body was numb, such that he could not tell exactly where on his body the injuries were. On the same day, the 2nd June 2012, he was admitted at Manzini clinic and discharged on the 4th June 2012. On the 11th June he went to Manzini Clinic for review. At that stage his abdomen was swollen and it was noticed that a sharp object had penetrated the area during the assault.

[45] He further stated that at Enkelebheni junction he last saw the accused when he was still on the driver's seat. Defence Counsel informed the witness that one Nkosinathi Ngwenya, PW3, had told the court that there was shooting even before the Uno had parked behind the van, and his answer was that it was not so. He stated that when he heard the gunshot he was already lying down. He further stated that on the van there was no quarrel, so those who came charging at the van cannot claim to have gone there to make peace.

[46] During cross-examination this witness insisted that those who attacked him were not three but more. He is not sure who was shot and how, he only heard gunfire.

Court: How serious was the injury on your chin?

Accused: It was a cut around. It was sutured, as well as two stitches on the edge of the left eye.

[47] DW3 was one Bongani Siphiso Thwala whose evidence substantially corroborated that of DW2 on the events that took place at Enkelebheni. He stated that knives were brandished and the accused's van was scratched with a knife by Ndumi Zwane. He further stated that there was no conflict among those who were on the van, there was only noise of drunk people talking to each other.

[48] Under cross examination this witness admitted that he was drunk. Some questions and answers during cross-examination of this witness are captured below: -

Q: I put it to you that three people assaulted Mphumuzi?

A: When he was down it was free for all.

Q: Msongelwa was shot by the accused while trying to alight from the accused's motor vehicle?

A: I don't know that. When Mphumuzi was assaulted there had been no gunshots.

After this witness the defence closed its case.

FINDINGS OF FACT

[49] I make the following findings of fact: -

47.1 all those who were involved in the scuffle were very drunk, with the possible exception of the accused.

47.2 The confrontation was most probably initiated by those who were travelling in the Uno.

47.3 The attackers were armed with knives and beer bottles.

47.4 At the time when the accused discharged his firearm his friend Mphumuzi Simelane was under severe attack, at the hands of about six people.

47.5 At the scene of conflict there was insufficient lighting.

THE LAW

[50] On the available account of what transpired at the scene of conflict the accused's explanation deserves a careful thought in order to determine if it is reasonably possibly true. Ordinarily, the accused person would have no reason to act violently towards people who put

food on his table, his patrons at Ngogola bar. He has tenaciously advanced private defence in that he acted in defence of his friend Mphumuzi Simelane who, according to the accused, was being **“killed”**. The court heard from Mphumuzi about the severity of the stab wounds that he sustained in the attack. The court also heard that not only were they friends but that on that particular day Mphumuzi was at Ngogola bar upon the invitation of the accused. Clearly, there was a bond between the two. But even if there wasn't, there is nothing in law to suggest that if a person acts in defence of a stranger who is in imminent danger, does not have the benefit of private defence.

[51] The attack on the person or property must either have commenced or imminent, and the force used to repel the attack must be reasonably proportionate to the attack¹. Where the accused has advanced grounds of self-defence or defence of another, the onus is upon the Crown to negate such defence². Masuku J. has emphasized the objective analysis of the facts in order to determine reasonableness and proportionality, and the need to avoid what is often described as an armchair approach. I quote His Lordship Masuku J. in part: -

“It is very well, sitting in the cool, calm atmosphere of the court to opine that the accused should have taken this step or that when faced with an unlawful attack upon him. The trier of facts must, however, try to place himself in the position of the accused in the circumstances that existed at the time.....It must also be remembered that it is not necessary that the accused person should have feared for his life.....”³

[52] Much earlier, in 1914, Innes J.A.'s words are to similar effect. I quote His Lordship below: -

¹ The King v Maxwell Nkambule (333/14) [2018] SZHC (60) at para 60.

² R v Muleko 1955(2) SA 401

³ R v Bongani Munyamunya Maziya, Criminal Case No. 192/2009, page 7.

“Men, faced with moments of crisis of alternatives, are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position.⁴”

[53] The rampant crowd of attackers were armed with beer bottles and knives. The accused person actually saw his friend being stabbed. The attackers did not heed the accused’s entreaty to stop assaulting Mphumuzi, neither did they retreat when warning shots were fired. This in my view speaks to the level of intoxication of this belligerent and rampaging crowd. The court was not told that the accused had any object of defence other than the firearm. When the warning shots failed to deter the attackers the accused had no choice, in my view, but to act in the manner that he did.

[54] To hold that the accused had the option to use any lesser force under those circumstances would be falling into the trap of an armchair critic who, in the serenity of his surrounding, is quick to apportion fault.

CONCLUSION

[55] The case of R v Patel⁵ is in point. In this matter the deceased attacked the accused’s brother with a hammer and the accused saw the deceased as he was about to land a second blow. At that point the accused shot and killed the deceased, in defence of his brother. On appeal it was held that the accused had not acted unreasonably. Holmes AJA had this to say: -

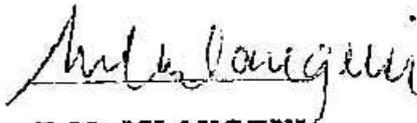
“It may well be that the danger could have been by less

⁴ Union Government v Buur, 1914 AD 273 at page 286.

⁵ 1959 (3) SA 121.

drastic means. But, as already mentioned one must beware of being an armchair critic. The accused was suddenly confronted by an emergency not of his own creation. He had to act quickly. Delay on his part might well have proved fatal to his brother Baboo; the next hammer blow might have landed on his head, for he was in a crawling position after the first blow on his back.....In this critical situation the appellant used the only weapon to hand – his revolver..... In my view the Crown did not prove beyond reasonable doubt that in doing this he exceeded the bounds of justifiable homicide.”

[56] On the basis of the foregoing, I hereby acquit and discharge the accused.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Crown: Ms. N. Mabila

For the Defence: Mr. B.J. Simelane