

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.100_98

In the matter between:

REX

VS

MGCIBELO MALINDZISA & 8 OTHERS

CORAM: MATSEBULA J

FOR THE CROWN: MS. NDERI

FOR THE ACCUSED: MR. NTIWANE

JUDGMENT

The accused stand charged with the crime of murder. The allegation being that on or about the 31st December 1997, and at or near Malindzisa's bus stop in the Nyakatfo area in the Hhohho Region, they each or all of them acting in the furtherance of a common purpose did unlawfully and intentionally kill Michael Khoza and thereby commit the crime of murder.

The trial of this matter has had an unfortunate history in that the accused were first arraigned before the late Justice Dunn and evidence was led on 2nd November 1998. The evidence covered some 38 pages whose record was transcribed and forms part of these proceedings. The accused were represented then as they are now by the same counsel who are appearing for them. The two counsel confronted the Crown witness, PW1 with the contents of the evidence he gave before the late Justice Dunn, and applied to have the

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part proceedings which were before the late Justice Dunn certified and handed in to form part of the present proceedings. This has been done. I have brought in this aspect of the former proceedings because I will refer to the contradictions in the evidence of PW1 later on in my judgement. This will be when the credibility of witnesses is dealt with.

For now, I will deal with the background to the murder charge. This was a sequel to a motor vehicle accident. The motor vehicle, a kombi driven by the deceased collided with the girl of the area, Nyakatfo and the girl died. Near the spot where the accident occurred is a bus stop, a shop, and a mill. It is common cause that within a short space of time a considerable group of people had gathered attracted by the collision. Amongst this group were relatives of the deceased girl. It is also common cause that the emotions were high. It is also common cause that the deceased who was the driver of the kombi that had collided with the girl had left the kombi there and went to report the accident to the police.

At the commencement of the trial, the court was informed that the identity of the deceased would not be challenged. The parties also handed in the post mortem report by consent and informed the court that the contents of the report were not challenged. The report was handed in as exhibit "A." The cause of death was given as "ACUTE INJURY OF THE BRAIN" and the doctor lists 10 injuries found in the body of the deceased and the report states all the injuries are ante-mortem in nature and fresh. These are the following:

1. Lacerated wound 3cm x 1 cm complete thickness over the region of the helix of the right ear in its upper third.

2. Lacerated wound transversely placed 7cm x 1 cm bone deep, 1 cm deep above the top of the right ear.
3. Left upper eyelid lacerated.
4. Left cheek contused.
5. Multiple contusions of different sizes, the biggest measuring 4cm x 2cm, and the smallest measuring the size of a peanut, coalesced in a cluster all over the face.

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6. Lacerated wound 10cm x 2cm x bone deep, obliquely placed in vertical plane, over the right side temporal region, 4cm above the top of the right ear.
7. Lacerated wound 6cm x 9cm x bone deep, obliquely placed in horizontal plane, over the right side occipital region.
8. Lacerated wound 12cm x 2cm x bone deep, across the midline over the occipital region, 2cm below the occipital protuberance.
9. Multiple contusions different sizes coalesced together, all over the chest and back.
10. Both pleura and lungs contused.

The Crown led nothing less than six witnesses of whom Chuluga Malindzisa was PW1. As indicated earlier in my judgement PW1 had given evidence on the 2nd November 1998 before the late Justice Dunn. Reference was made to his evidence of the 2nd November 1998 and he was cross-examined as to some inconsistencies therein. The deposition of the 2nd November 1998 was certified and handed in and it forms part of these proceedings.

As a prelude to the contents of the deposition of the 2nd November 1998, the position at common law is that a witness's previous inconsistent statements may be relevant to the witness's credibility and in the absence of an explanation why the statements are inconsistent his credit will be weakened.

PW1 told the learned Judge on 2nd November 1998, see page 7:

"I may mention My Lord that I may forget them because it is a long time since it happened... "

When PW1 was asked about what he had said before the late Judge on the 2nd November 1998 he maintained that he had told the Judge same as what he had told the court during the present proceedings and PW1 said that that was the truth. His answer was,

"I did say it was accused no.1 who struck the deceased with a clenched fist and Siphos accused no.3 then struck the deceased with a stone and deceased fell. " Answer:

"I made a mistake if I said it was accused no. 1 who struck the deceased when he was behind the three, and deceased fell. It was in fact accused no.3 who did that. "

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In my judgement PW1 was a very honest credible witness, subject to human error, and throughout the trial and especially in cross-examination he was not giving to hedging at all. I have no reason whatsoever to doubt his evidence.

The following is his evidence:-

On the 31st December 1997 he had been in the veld extracting honeycombs, he received a report of a motor vehicle accident involving a girl, Gabsile. He had gone past some homestead where he had a few sips of African brew called "mqomboti" when the report was made. He went to the scene of the accident and found the girl dead. PW1 is a community police. He enquired where the driver of the kombi that collided with the girl was and was told he had gone to the police station. At the scene he found many people amongst them was Siphon Malindzisa accused no.3. He sent accused no.3 to go and call the chief's runner, one Sponono Thumbatsi, PW3. It was PW1's evidence that the accused were also at the scene. Accused no.3 came back with the chief's runner. When the chief's runner arrived at the scene of the accident the police and the deceased had not arrived yet. Immediately thereafter a policeman arrived accompanied by the deceased. They arrived in a white van. This was apparently a "for hire" van as a civilian drove it. PW1 and the community of the area knew the policeman. As soon as they arrived, the policeman and deceased moved towards a point where the driver showed the policeman where the kombi had gone off the road. PW1 stated that the boys had seen the driver and the policeman and they went to the deceased. The women were shouting but he did not see them assault the deceased. I heard them say "a person has died, the one who killed her must also be killed." He stated that all he heard were women shouting and cannot be specific as to who said what as there was a commotion going on.

Mgcibelo accused no.1 was the first to strike the deceased with a clenched fist. I also saw Masheshisa accused no.2 also hitting the deceased whilst accused no. 1 held the deceased. He testified that he then saw the driver run behind a tree and accused no.1 threw a stone at him and deceased fell down and sat.

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It was PW 1 evidence that the policeman then asked for a hand to put the dead girl in the van. Accused no.4 who stood at a distance stopped us from assisting the policeman take the deceased girl into the van and said the deceased driver must get up and put the dead girl into the van. The policeman then left. PW1 told the court one George Magagula and Smohlwane, both not before the court also came and struck the deceased driver who was sitting at the time and he fell down. PW1 testified that George had also struck the deceased with a stone. He stated that he had remonstrated with the attackers to no avail. He then left and went to his homestead to take off the overalls as he was feeling uncomfortable wearing them. He could observe what was happening whilst at his homestead. He saw one Mdladla and a Ndwandwe boy assault the deceased. He said Ndwandwe was accused no.5. He said accused no.5 was carrying a big stone. He had admonished them to stop but failed as they threatened him with assault. He then left for his home and heard shouts that they had killed him.

The police contingent then arrived. He went to the scene and observed that the deceased had died. It was his evidence that one Smohlwane, George, and accused no.5 uttered the shouts to the effect that they had killed him. It was his evidence that as the assault was taking place on the deceased, the women folk sat at some distance away. PW1 stated that accused no.9 did not assault the deceased at all except indicating that he was willing to assist the policeman in putting the deceased girl into the van. He did not hear accused no.9 say anything beside this. PW1 then indicated a pole before court and said it was the pole Smohlwane was carrying. The court saw a wattle tree treated pole plus or minus 2 -3 metres long. The witness also pointed out a stone measuring plus or minus 15-30cms rock. He stated that accused no.5 used that stone in assaulting the deceased. It was his evidence that George also had a stone but not as large as the one accused no.5 had. He said the blows were all directed at deceased's head but the clenched fist directed at the back of the neck. The clenched fist was delivered by accused no.1 he said. The witness stated that the assault on the deceased resulted in his falling and sitting on the ground. He maintained that accused no.1 had struck the deceased first and then accused no.3 and the others followed with the log and stones.

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When the police contingency arrived they asked the chief's runner to point out those responsible for the death of the deceased. The chief's runner responded by saying that the policeman who had been there

when the deceased was assaulted saw those responsible. This reaction on the part of the chief's runner is important to note. In my judgement it is understandable because it tends to corroborate PW1's evidence that threats were made against anyone who wanted to lend a hand to the law enforcement agencies on their attempt to obtain evidence relating to the death of the deceased. This attitude also became evident when the chief's runner gave evidence before court. PW1's evidence is to the effect that the people who formed part of the crowd then moved towards the police van of their own volition. But besides this group the police then ordered everyone who was there to go into the police van. PW1 stated that this included people who had come to get their mealies ground. It was PW1's evidence that he too was taken by the police and only the following day was a selection made. He further stated that accused no.7 and 8 were related to the girl who had been run by the kombi driven by the deceased.

Under cross-examination by Mr. Ntiwane on behalf of accused no.1, 2, 3, 4, 6, 8 and 9. PW1 told the court that he estimated the number of people taken by the police to have been plus minus 70. He also answered that when the assaults on deceased started there were not many people and only a few took part in the assault. He identified accused no. 6, 7 and 8 as forming part of the women who were present and that they passed remarks to the boys. He answered that as far as he was aware accused no.6, 7 and 8 were related to the deceased girl. In one of the answers he gave he said he heard the women say, "he should be killed."

Under cross-examination he explained the inconsistency in his evidence of the 12th November 1998 and the evidence he gave in his evidence in chief. In my judgement I cannot find anything extraordinary strange about his explanation. He told the court that he had made a mistake when he said it was accused no.1 who struck the deceased when he was behind a tree. He said it was in fact accused no.3 Siphon who did that.

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He maintained under cross-examination that accused nos. 1, 2, and 3 did assault deceased. In so far as accused no.4 is concerned, the witness PW1 said he did not see him assault the deceased, he only heard him say that no helping hand should be lent to the police in carrying the dead girl into the police van, the deceased should do it instead.

PW1 was also cross-examined by Mr. Simelane on behalf of accused no.5 and 7. His reluctance to point out the people who had assaulted the deceased to the police was also explained by PW1 when cross-examined by Mr. Simelane. He stated, "I did not want to point out the people, because the policeman who had been present should have pointed them out. "One can appreciate this reluctance on the part of the witnesses who reside in the area; a potential revenge is always there irrespective of the truthfulness of the statement he makes.

He admitted that he had eyesight problem but added that this problem only affects him in darkness. He maintained that he had seen accused no.5 and one George using stones to assault the deceased.

In my judgement, I do not attach the failure of PW1 and PW4 to immediately point out the people who attacked the deceased to the police commander when invited to do so as a weakness in their evidence. Beside the potential revenge by certain members of the community, the witnesses could easily have refrained from pointing the assailants out, because they knew members of the community would ostracize them.

The evidence of PW1 Chilunga Malindzisa is in my judgement very credible and satisfactory. I was favourably impressed with his evidence and formed the impression that his evidence is reliable and that this court can safely accept it.

Before dealing with the evidence of Constable Matse PW2, I will prefer to deal with that of PW4 Siponono Thumbatsi. PW4 told the court that he was a chief's runner and has

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been for a long time. He knew the accused and was related to some of them. He proceeded to mention their names and how he was related to them. He corroborated the evidence of PW1 that on the 31st December 1997 he was called by accused no.3 who told him he had been sent by PW1 to call him. He went there and found a white kombi that had collided with the deceased girl. The girl was dead already. He knew the deal girl too; but was not related to her. He had been at the scene when a white van arrived. It was his evidence that no assault took place before the arrival of the white van and further that out of the white van a policeman known to him had alighted and was accompanied by a person he subsequently learnt was the driver of the kombi. The driver was pointing out certain points along the road. PW4 says it was at this stage that he observed the people he found there moving towards the policeman and the driver. He said he was standing at a distance. The crowd started moving and causing a commotion. He then saw the driver of the kombi fall down. It was his evidence that the people he saw move towards the policeman and the deceased were the accused and other people. He went to where the deceased had fallen and remonstrated with them, as he did this someone struck him at the back of his head and he decided to flee. He saw that the deceased was covered in blood and suspected that the attackers intended killing him. He heard nothing and did not see who particularly struck the deceased. He also saw stones being thrown but was unable to say who of the attackers threw them. He said the accused were the only people near the deceased.

It was his evidence that PW1, at the request of the police called upon him to assist carry the dead girl into the police van. He stated that those who stood close warned them not to carry the dead girl into the van and said the one who killed her must carry her. He said when he arrived at the scene these people were moving about and the deceased was lying covered in blood. The witness stated it was the people moving up and down who injured the deceased. He stated that it was accused no.4 who said the person who killed her should remove the dead girl. After he was struck with a stone he decided to leave. He only returned after the arrival of the police contingent.

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Amongst the mob, he saw accused no.1, 3, and 4. He told the court that he admonished the people moving around the deceased to stop assaulting him and he was pertinent that he had admonished accused no.1 and one George. It was his evidence that the admonishing was directed at the assailants because he had seen the deceased fall down and was covered in blood. He also admonished them because they were ordering members of the public not to give the policeman a hand in carrying the dead girl to the van.

Richard Sabelo Matse was called as PW2. He told the court that he received a report from the deceased Michael Khoza and accompanied him to the scene of the accident. When he got there he found a kombi with the registration TBP855T and the body of the dead girl wrapped in a blanket. He said there were many people at the scene. As soon as he alighted from the van in the company of the deceased, he heard accused no.4 shouting and saying, "this is the driver." He said the deceased was at that stage busy showing him where the kombi had gone off the road and showing him the point of impact. It was his evidence that the mob advanced on them and accused no.6 and 7 uttered the following words, "he too must be killed because he killed a human being. " Accused no.1 came from behind and grabbed the deceased by his T-shirt and accused no.1, 2, and 4 physically assaulted the deceased. He said he tried to intervene being assisted by PW4 and for a while it seemed as if they were succeeding in their efforts. Deceased then managed to flee towards a group of women. PW2 said he then saw accused no.6 throw a stone at the deceased and the deceased was struck and he fell. Accused no.2 then came and struck deceased with a bottle on the head and accused no. 1, 3, 4 and 5 hit deceased with stones while he was in a fallen state. He said accused no.7 and 8 were collecting stones and handing them to others to assault the deceased.

PW2 told the court that he tried to intervene once again, but accused no.2 came with a broken bottle together with accused no.4 and threaten to cut him with the broken bottle. PW2 said he realised that the situation was becoming desperate and asked if he could be allowed to take the dead girl to the mortuary. PW2 said accused no.4 threatened to take the deceased into the kombi and burn it up if PW2 dared to

take the deceased girl away

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PW2 then suggested that he takes deceased into the motor vehicle as he was still alive but the accused threatened to set alight the motor vehicle as well. PW2 then resolved to go back to the police station and called for reinforcement. He went and came back with the reinforcement but found that deceased had already died. He said with the help of the reinforcement arrests were effected. It was his evidence that the number of people who had surrounded them initially were in the region of plus minus 100. It was his evidence that when accused no.6 and 7 said he must also die because he has killed another human being they were referring to the deceased. He said there were other people who stood there and were not involved in the assault.

It was his evidence that accused no.1, 2 and 4 first assaulted the deceased by their clenched fists and deceased fled towards the group of women, and he was then struck with stones so that he fell. He told the court that accused nos.6, 7, and 8 collected stones. He said accused no.1, 2, 3, 4 and 5, 6, 7 and 8 took part in the assault. It was his evidence that when the stones were thrown those who threw them were near the deceased. He said when he left for the reinforcement he did not see where PW1 and PW4 were but the deceased was already covered in blood and was lying down.

PW4 was cross-examined very extensively. He admitted that he had pointed out some of the accused because he had seen them at the scene of the crime. In answer to one of the questions put to him he said at first many people had offered to avail themselves as witnesses but later these potential witnesses expressed fear of being victimised if they gave evidence. He said he had made a mistake when he said accused no. 1 was Masheshisa. He said in his pocket book he had not recorded his name as Masheshisa.

He said he was not the investigating officer but was merely a witness. He said one Sergeant Mahlalela was. He said he had made a police report and handed it to Sergeant Mahlalela. He said the shouting by accused no.4 when he arrived in the company of the deceased incited the people. According to him accused no.4 said, "this is the driver".

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When the women shouted that the deceased should also be killed, he and the deceased were already surrounded.

He explained that the difference between his account and that of PW1 were due to the fact that things were happening very rapidly and that these differences can be expected. He explained that any contradictions he might have made in his evidence before court as opposed to his written statement would have occurred because of the passing of time. In my view the witness was not broken down in cross-examination. Admittedly there were contradictions here and there but not such that they would vitiate the whole of his evidence. He was also cross-examined by counsel representing accused no.5 and 7. Again, in my view the witness stood his ground in cross-examination.

PW3 was called as a scene of the crime photographer. He drew up a sketch plan and a key thereto which he read, confirmed and handed in certain photos he took at the scene of the crime. These were handed in as exhibit "CI-6." The defence did not challenge the sketch plan and key or the photographs.

According to-

1. "C1" the deceased's body is lying next to some shrubs some distance away from the road.
2. "C2" shows the body of the deceased the face is clearly badly injured.
3. "C3" shows some object that could be the log that was referred to in evidence.

4. "C4" shows the kombi TBP855T. The car windscreen and rear windows were shattered.
5. "C5" shows the front windscreen also shattered.
6. "C6" shows the dead girl.

PW5 gave evidence even though the report on post-mortem examination had been handed in by consent and the contents were not disputed. He confirmed that deceased died as a

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result of injuries to the brain. Dr. Ramohan said blunt instruments could have caused such injuries found on the body e.g. stones, falling or a log. He said a broken bottle could have caused the lacerations. It was his evidence that according to exhibit "A" deceased was hit many times with such instruments similar to the ones described above.

Superintendent Sabelo Hlophe testified that he had come as a result of the request for reinforcement. This request had been made by PW2. It was his evidence that the mob had become uncontrollable and they shouted that, "This is how we deal with murderers. " He asked PW2 how the murder had taken place and PW2 told him what he had seen happening i.e. he had seen the killing of the deceased by the mob but was afraid to point the people out as he was stationed in the area. PW6 said PW2 then pointed Sikelela Shiba accused no.4 and said he only knew accused no.4 and advised PW6 to call him. PW6 said he called accused no.4 the mob started to make uproar. They said they had all participated in the killing. By this, the witness was referring to the accused and others who had been collected by the police. For some reason, the defence never challenged this piece of evidence and there is no reason why the court should not accept it. This concluded the Crown case.

Mr. Ntiwane applied for the discharge of accused no.9 at the close of the Crown case in terms of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT as amended. There was no evidence against accused no.9. I therefore allowed the application and accused no.9 was acquitted and discharged.

Mr. Ntiwane then called accused no. 1 to the witness stand. Accused no. 1 admits having been present at the scene of the crime and had seen the deceased being assaulted. He testified that he was amongst the women who were with the dead girl. He said he never took part in the assault of the deceased and he does not know why he was arrested.

In cross-examination he stated the following:-

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"He received a report about the dead girl and went there. Once he was there he greeted no one, spoke to no one, all he said apparently expecting to receive no reply was, "She is already dead. "

He did not take notice of the comments made by the people. He did not even know if a tractor, which was also parked there, could have knocked the dead girl. He did not react at the death of the girl.

Under cross-examination this witness was clearly portrait as giving a story which was devoid of all truth. He admitted that although he would shun all manner of violence, he would however come close to any place where violence was being perpetrated and observed it He admitted that he had done just that on the 31st December 1997. But when asked what each of the co-accused that he knew and had seen at the scene of the crime had done he suddenly somersaulted and stated he had not seen any. He stated that he saw them after the arrest. Accused no.1 was clearly lying. He said he was not aware the deceased had died and he was only aware of the dead girl. He said he was annoyed when the police took him away. Most of the facts he deposed under cross-examination were never put to any of the Crown witnesses.

Accused no. 1 even went so far as to state under cross-examination that there were two groups at the scene of the crime. One group was violent and the other was not violent. However accused no.1 failed to tell the court in cross-examination what the violent group did which the non-violent group did not do. I have dealt somewhat at length with what accused no. 1 said under cross examination because in my view, accused no. 1 completely broke down under cross examination and gave a version which totally contradicted the version he gave in evidence in chief. I am left in no doubt that accused no.1 took part in the assault of the deceased.

Masheshisa Mhlanga gave evidence as DW2. His evidence was basically denial of having been involved in the assault of the deceased. He admitted that he had been present.

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DW2 was very vague in his evidence in chief but under cross-examination he revealed more facts e.g. he saw the deceased being surrounded while he was in a sitting position. He knew some of those who surrounded the deceased. He saw those who had surrounded the deceased move away and saw that the deceased covered in blood. Having seen all the above, he was unable to see who assaulted the deceased. He was only curious to know what had injured Gabsile and not curious to know who had killed the deceased. DW2 said in answer to some of the questions put to him, "I don't know if a person is struck with a wooden pole if he would be injured or do I know if he is hit by a motor vehicle if he would die. " The cross-examination was very long and at the end I was of the view that DW2 had collapsed and his evidence in chief no longer holds water.

Sipho Malindzisa accused no.3 was called as DW3. He too gave a similar version to that of DW2. He received a report and went to the scene of the accident. DW3 corroborated the evidence of PW1 about fetching PW4. All he saw was some people sitting under a tree and others moving in a commotion. He saw the deceased covered in blood. He saw the deceased bleeding but did not see who had injured him. Here too, as with the other accused 1 and 2, accused no.3 begins his evidence by disassociating himself with any assault on the deceased yet under cross-examination he admits having seen certain occurrences which would have placed him at a point where he would have seen the assailants of the deceased. For some unexplained reasons he never saw this but only saw the deceased covered in blood. When pressed further he admits having seen them assault the deceased but he cannot identify them.

When he was re-examined by his counsel he states he has a difficulty in identifying the assailants because he had not gone to the scene of the accident for the purposes of identifying people. Here too as with the previous two accused, I am satisfied that this accused did take part in the assault of the deceased. To what extent did each accused take part in the assault will be dealt with when dealing with the doctrine of common purpose.

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DW4 was Sikelela Nhlankh Shiba. In his evidence in chief he stated that he too was arrested on the 31st December 1997. He had arrived at the scene of the accident at plus minus 10am. He saw a kombi parked at the scene and asked a certain Bulana Dlamini what the matter was and was told that the kombi had killed a young girl Gabsile. He saw PW2 arriving in the company of the deceased. He saw PW2 and the deceased moving down towards a point where the kombi first went off the road. It was his evidence that it was as the two were moving down that a crowd followed them. He said plus minus 30 people followed them. It was his evidence that as the crowd caught up with PW2 and the deceased he saw exchange of blows. DW4 said he went there and found the deceased already covered in blood. He saw PW3 arriving and admonishing the attackers by saying, "why are you killing the person. " DW4 said when he saw PW4 admonishing he moved away because he feared that PW3 might also include him in the number of attackers. He went and stood next to PW2. PW2 asked him to assist him remove the body of Gabsile but he refused as he feared the people would attack him. He told PW2 that the person who had caused the death of the girl must give a hand.

I would want to pause here and refer to PW1 's evidence. PW1 specifically said it was accused no.4 DW4

who stopped PW1 from giving a hand to the police in removing Gabsile's body. Indeed PW4's evidence also corroborates that of PW1 in this aspect

According to accused no.4, PW2 would have said to him, "You too are not willing to assist me, leave the place." This was never put to the policeman in cross examination

The assault on deceased commenced when he was already at the scene but he conveniently was unable to identify a single assailant of the deceased.

Under cross-examination accused no.4 admitted that from the time he arrived at the scene he had a clear view of PW2 and that of the stranger i.e. the deceased. He stated that groups of people sat under two trees. The women next to the deceased girl and other under another tree. Some of these people moved and followed PW2 and the deceased.

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He saw plus minus 30 people following the deceased. He then saw a fist fight. He went closer to observe but he says that as he arrived there nothing was happening. He feared that PW4 who was admonishing the attackers to stop because he would include him as one of the attackers. He then moved away and went and stood under a tree.

He was asked how could PW4 include him at that stage as according to him no further assault was taking place. He answered that he feared PW4 would include him. He was asked who did he see assault the deceased and his answer was that he saw no one. He did not even see stones being thrown, he only saw commotion. He said when he went closer he saw four people of Magagula surnames and saw accused no.5 and accused no. 1. When asked why he "had not told counsel representing him about some of the things he mentioned for the first time under cross-examination, he said he left this by mistake. He said the people who surrounded the deceased merely stood there and did nothing.

The evidence of accused no.4 was very unsatisfactory. At the end of the cross-examination his evidence in chief riddled with contradictions. I am satisfied that the evidence of PW1 and PW4 is reliable and it is safe to accept their evidence in preference to that of accused no. 1, 2, 3 and 4. I will further deal with the totality of evidence when dealing with the legal principles and decided cases.

Mr. Simelane called to the witness stand accused no.5 Gciza Ndwandwe. His evidence in chief was to the effect that he had come from hospital and had his arm in a plaster of paris and also had head injuries. His head was in bandage. He could not have been able to pick up stones and throw them at the deceased he said. He did not see anyone strike deceased. When he arrived there the deceased was already lying down.

Accused no.5 was cross-examined extensively by Miss Nderi. In answer to some of the questions he stated that anyone who saw him would have seen the plaster of paris around his arm. He denied the allegations by PW1 and PW2 that he used stones to assault the deceased with. He said even though he had stopped there and saw the two dead people he

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spoke to noone and asked noone about the presence of the dead bodies. He concluded that the deceased's body was covered in blood as a result of an assault from the nature of injuries he excluded the possibility that a bus had hit him. He formed the opinion that the deceased had been hit with fists because there was blood all over his body. He said he had told his counsel that his arm was in plaster of paris and said the reason this was not put to witnesses was because on the 2nd November 1998 none of the witnesses who testified had told the court that he had assaulted the deceased. He did not know why the witnesses now implicated him. He told counsel for the Crown that he remained at the scene of the accident for two hours.

After a thorough appraisal of accused no.5's evidence I am convinced that he became uncomfortable under cross-examination because his answers were so improbable as to be false. That he would have arrived at the scene of the accident and decide not to enquire from anyone about what had happened is not what a man who spent two hours at the scene would have done.

Mr. Ntiwane for accused no.6 called her to her defence. She stated that she was a businesswoman and a driver. On 31st December 1997 she received a report of an accident involving the young Gabsile. She went there and found many people under a tree crying. She enquired from LaMhlanga. Unlike the previous accused she enquired immediately on arrival at the scene. Accused no.6 described in details about seeing a kombi with foreign registration numbers and saw the arrival of the van. She then saw many people rise up. This included those who were in her immediate vicinity. For some strange reasons her good observation vanishes. The last she sees of these people who rose up was when she followed the policemen PW2 and the deceased. She could hear lot of noise and heard PW2 calling accused no.4 but did not hear what PW2 said to accused no.4. She heard people crying and shouting. She then assisted the mother of the dead girl and as she said, she literally carried her home.

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A consignment of police came and enquired who had killed the deceased and they were told the people who were there killed the deceased. She says that because of the noise she cannot remember the names mentioned. She saw the deceased lying, facing up and covered in blood. The police then asked who was responsible for the death of the deceased and when no one answered the police ordered everyone to get into the van voluntarily, she said, and she states that is how she was arrested. She denied that she had shouted that deceased must also die. She also denied that accused no.7 and 8 also threw stones at the deceased. She said it was improper for the deceased to have been assaulted after the accident.

Ms. Nderi for the Crown took the accused in cross-examination for a considerable time. In answer to some of the questions she said the following; she said this was the version that she told her counsel when he obtained instructions. She said she was a respected member of her community and whatever she said is taken seriously. She would never countenance any wrongdoing to take place in her presence. She said although it was never put to the witnesses she had told the defending counsel these facts i.e. they, the women folk had remained seated throughout they only stood up when they accompanied the mother of the dead girl home. She denied that she had joined in the attack as PW1 and PW3 said in their evidence. She denied that she had said the driver must be killed, which was evidence given by PW1.

An important revelation by this accused was that for the first time during the trial she said there were two groups at the scene. One was violent and another not violent. Pressurised further what the violent group did accused no.6 said the violent group indicated their violence by standing up. She said she did not know what the group did once it stood up. Asked further what this violent group did once it stood up accused no.6 said they screamed and say, "Oh my God the child." She admitted that if the violent group would have said the driver must be killed then that would have been sufficient incitement to have the driver killed.

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In my judgement the concessions made by accused no.6 in cross-examination so radically altered her evidence in chief that it would be proper to say she broke down in cross-examination. She introduced certain new revelations like the presence on the scene of the violent group and stopped short of telling the court what that violent group did and who it comprised of. In my judgement her evidence was not reliable evidence. I will deal with this aspect of the evidence when considering all the evidence given in the trial.

Mr. Simelane called accused no.7 to the witness stand It was her evidence that she was arrested together with the other accused on the 31st December 1997. She had received a report and went and saw the dead girl to whom she was related. She uncovered her and had a closer look at her. She sat there and cried. She noticed the arrival of the white van. She also saw the kombi, unlike the other witnesses she does not say that she saw the deceased in the company of the policeman. She saw the police walking

down to the crowd and coming back to pickup the dead girl. She then saw the police put the deceased in a plastic bag. She denied that she shouted that the deceased should be killed. She denied that she threw stones at the deceased.

Ms. Nderi cross-examined the accused. She said she was not curious to know who had caused the girl's death. She did not see the deceased because she was crying very loud. She did not ask how the dead girl was killed but admitted one would have expected her to ask such a question. She did not hear when someone said the driver had arrived even though she was there when he arrived. She admitted that she ought to have asked who had killed the deceased even before starting to cry. For the first time she admitted that she found PW1 at the scene and he told her that the driver had left. She was asked why she had not said this in her evidence in chief, she said she forgot

Accused no.8 Tsiwane Shiba a married housewife with 12 children ranging from 3 to 26 years. She knew the deceased girl because she was related to her parents. On the 31st December 1997 she received a report about the death of Gabsile. She went there and found the girl dead. She saw the kombi that had collided with her. There were many

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people there. She asked one Mdolo Radebe to uncover the child so that she sees her. She saw the dead child and wept together with the mother of the child. Many people joined in the crying. She agreed that she together with others took the dead girl's mother home and left her at home. She came back but she left when she saw the arrival of a motor vehicle with a policeman. The crowd stood up but she did not see what they did. The policeman called out Sikelela but she did not hear what the policeman said to him. She came back and sat with the other women. Thereafter the police contingent arrived and asked them to move away from the dead child's body. She only became aware of the deceased when the police ordered the people to get into the police vehicle. There was commotion, they ordered perpetrators to board the motor vehicle but no one responded. They ordered everyone in, she also boarded the motor vehicle under protest.

At the police station she was interviewed during the night. She was asked if she knew why she was arrested. She was told she had been arrested in connection with the deceased. She denied ever-assaulting deceased. She did not hear any woman saying deceased must be killed. She did not incite any one nor did she see any woman handing stones in order to assault deceased. She did not see deceased being assaulted.

Under cross-examination by Simelane she denied that she had handed a stone to assault deceased. During her cross-examination by Ms. Nderi she said she was on her way to the shop on 31st December 1997. She said it did not occur to her to ask where the driver of the kombi was. She noticed that the windscreen was shattered. It was a white kombi. It had two colours but she was shocked she was not certain of the colours. She said Gabsile had an injury on her foot and head. The accident happened in front of the shop but off the road. She was not angry but felt sad. It did not occur to her that she should be angry. She was crying because she will never see the child again. She did not think that it was the child who got in front of the kombi because it appeared that the kombi had strayed to her. She did not become angry even if it had been the driver who was on the wrong. She was not angry with the driver who went off the road and collided with the child. Accused

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no.4 is her first born child. She did not see him at the scene of the crime nor did she see him carrying a log. She did not hand over stones to him.

She was not curious to know if there were other people who could have been involved in the accident nor was she, in relation to her children She first denied having seen any other passenger in the van but later admitted that there were but she did not know how many they were. She stated that she was not concerned about what had happened. She paid attention to the mother of the dead girl when she, the

mother, rolled on the ground.

There was no questions put to the effect that the ladies moved because they only moved when they assisted the bereaved mother. She did not see any of the happenings described by other witnesses. She did not see the deceased come towards where the women were. She did not take notice of the violent and non-violent mob. She had gone to show her solidarity with the community.

It was never put to Matse that he called Sikelela the accused nor was it put that she had accompanied deceased's mother to her home. She stated under cross-examination that she had forgotten most of the happenings on the day because it is now a long time since this happened.

When the cross-examination was becoming too uncomfortable she decided to say, "I don't know ". Clearly the defence of this witness was an afterthought. It was never put to the Crown witnesses. However, the court should not lose sight of the fact that no onus rests on the accused to convince the court of the truth of any explanation which he gives. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal. See R VS DIFFORD 1937 AD 370 @373. The onus rests on the Crown to prove its case beyond a reasonable doubt. However, proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. See MILLER VS MINISTER OF PENSIONS [1947] 2 ALLER 372 @373. Fanciful possibilities should not be admitted if the course of justice were to be done.

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Having dealt with the total evidence given at the trial I now wish to deal with the law applicable in circumstances such as the present ones.

I have been referred to a plethora of decided cases and authorities on the subject of the doctrine of common purpose. I am indebted to all three counsel for the invaluable assistance. As a prelude to dealing with the doctrine of common purpose, I wish to cite the case of R VS CHENJERE 1960(1) SA473 (FC) where the court held that the liability of associates is not dependant upon their having made the perpetrator their agent and therefore having given him a mandate. They are liable because they participated in the perpetrators' crime with the necessary mens rea. So, too in S VS MALINGA 1963(1) SA692 AD, it held that where an accused person acted in concert, their liability was held not to be a vicarious one but based on their own mens rea. The association in a common illegal purpose constitutes participation i.e. the actus reus. It is not necessary to establish and show that each party did a specific act towards the attainment of the joint object. (See R VS KGOLAJNE 1960(1) PH 110 AD).

The act of one participant in causing death of the deceased is imputed to other participants as a matter of law, provided, of course that the necessary mens rea is present. The causal connection between the act of each participant in causing death of deceased need not be proved. See in this regard S VS SAFATSA AND OTHERS 1988(1) SA868.

PW1 Chilinga Malindzisa said all the women shouted and said, "one person is dead, the one who caused that death must also be killed. " PW1 said accused no. 1 was the first to strike the driver of the kombi. Accused no. 1 held him by the neck and as deceased turned he struck him with a fist. PW1 also told the court that accused no.2 also struck the deceased whilst accused no. 1 was holding him He saw accused no. 1 throwing a stone at him, which struck him, and he fell. PW1 said accused no.4 stopped those who wanted to assist the policeman carry the dead girl into the van and said deceased must stand up and carry the dead girl. This attitude of accused no.4 clearly places him squarely in a position

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where he is part of those acting in common purpose with the participants. This is apart from other evidence incriminating him.

PW1 told the court that a certain man called Smohlwane came with a log and struck the deceased and one George came and struck the deceased with a stone. He said accused no.5 and a Mdladla boy were

also busy hitting the deceased. PW1 tried to remonstrate to no end. Accused no.5 was carrying a big stone. He and others threatened PW1 with assault for remonstrating with them. Accused no.5 and others shouted that they had killed the deceased. PW1 said the stones and blows were directed to the head of the deceased. Clenched fists landed on deceased's neck. Accused no.1 struck and accused no.3 did the same.

Under cross-examination accused no.6, 7 and 8 clearly emerged as forming part of the group of women shouting remarks directed at the boys. PW1 heard a female voice say he should be killed. PW1 was positive that accused no. 1 and 2 did assault the deceased and that accused no.4 said deceased should get up and carry the dead girl into the motor vehicle.

One can understand PW1's attitude in not wanting to be seen identifying the assailants at the scene of the accident because of the real danger of being ostracized by members of the community. PW1 was adamant that he had seen accused no.5 use a stone on deceased. He also saw Smohlwane and George assault the deceased. George and Smohlwane were striking deceased on neck and head. PW1 said all the women before court spoke and remonstrated about the cause of death of the dead girl. Asked why he did not point the people out to the police he said he feared to do that and thought the policeman would do it.

PW2 also identified and implicated accused no.1, 2 and 3 in the assault of the deceased. He saw the deceased run towards the women and saw accused no.6 striking him with a stone. He saw accused no.2 striking the deceased with an empty bottle and accused no. 1,

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3, 4 and 5 hitting him with stones. Accused no.7 and 8 were collecting stones and handing them to others in order that they should use them for the assault. PW2 also testified about the threats used by accused no.4 in the event assistance was lent to the police to carry the dead girl to the mortuary.

PW2 said accused no.6 and 7 were referring to the deceased when they said he must die because he had killed the girl. PW2 said the women at some stage also stood up and surrounded him and the other people who were intervening. PW2 was adamant that accused no.6, 7 and 8 collected stones. PW2 referred to accused no.1 as Masheshisa. When asked why he had referred to accused no. 1 as Masheshisa he explained that he had made a mistake and that in his notebook he had not written accused no. 1 's name as Masheshisa. He also said he was not the investigating officer in the matter but only a witness.

In the nature of the prevailing atmosphere at the time of the assault on the deceased and the pace at which the assault was taking place, I do not agree with the defence that what PW1 saw and PW2 did not see necessarily mean there is a conflict in their evidence. PW2 said as the assault was being carried out, accused no.6 and 7 were saying deceased must die.

The court had the opportunity to observe the Crown witnesses thoroughly both in evidence in chief and under cross-examination. They appeared to me to be credible and honest witnesses who answered questions without hesitation. Giving the court the impression that as far as their memory served them what they told the court was true. PW2 would readily admit where he made an error.

PW1 and PW4 explained to the court why they were reluctant to point out some of the accused when the members of the police ask them to do so at the scene of the crime. They feared ostracisation by members of the community of whom the relatives and sympathisers of the bereaved family formed a major group.

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I do not consider the failure by some of the Crown witnesses to have seen what the other saw is affecting their credibility. The happenings were taking place very fast and I consider their evidence to be complementary than non-corroborative. In my judgement the accused's demeanour and credibility in their

evidence in chief and especially under cross-examination left a very poor impression in the court's mind. Each accused starts off by giving a graphic exposition of the events and suddenly the ability of observation diminishes when questions are put as to whether the witness saw any one of the people present assault the deceased. I am aware that the accused bears no onus of proving their innocence. It is the Crown that must prove the guilt of the accused beyond a reasonable doubt. However, the court, evaluating the facts in the trial, cannot ignore the improbabilities of the defence witnesses' evidence.

Considering all the evidence, in its entirety I am satisfied that the Crown has succeeded in proving its case beyond a reasonable doubt and find the accused guilty as charged.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

The accused were convicted by me of murder of the deceased Michael Khoza a murder committed on the 31st December 1997. The Crown relied mainly on the doctrine of common purpose in respect of some of the accused especially women.

I dealt with the application of the common purpose doctrine fully in my judgment. What remains to be done now is to deal with the enquiry into the presence or otherwise of extenuating circumstances. Towards this end, the three counsel has addressed me and I hereby extend my appreciation for their invaluable assistance. I have been referred to a plethora of case law and legal authorities that I find to be very persuasive. I do not propose to deal with all the authorities to which I have been referred. I will confine myself to a few of the local Court of Appeal case law.

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In terms of Appeal Case No. 11/98, the case of DANIEL DLAMINI VS REX. The court held the following accepted definition of extenuating circumstances:

"which morally although not legally reduces an accused person's blame worthiness or the degree of his guilt. "

In this case reference was made to the Court of Appeal of Botswana decision in the case of DAVID KALETSWELA AND TWO OTHERS VS THE STATE CRIMINAL APPEAL CASE NO.26/94. The case I have referred to, that is Daniel Dlamim's case Leon J A held and I quote, at page 2 of his judgment:

"In reaching a conclusion on whether or not extenuating circumstances are present, the court makes a valuable or moral judgment after considering all the relevant facts and circumstances both mitigating and aggravating in order to make such a judgment. In these circumstances, it seems to us to be quite inappropriate to determine the issue by raising the question of onus. The duty falls upon the court."

I will also refer to a case that was tried by me, the case of SANDELE DLAMINI & MAPHEVU BHEMBE APPEAL CASE NO. 1/97 page 8 where the provisions of Section 296 of the CRIMINAL PROCEDURE AND EVIDENCE ACT 1938 deals with the extreme penalty, the death penalty where an accused person under the age of 15 is involved. In that case which I have already indicated was tried by me, I had found that the accused was plus minus 24 years old. The Court of Appeal found that I could not have raised the age of the accused on the basis of what the accused had said about his age because that was hearsay. They held that I ought to have called the mother to give evidence about his age. However, they were convinced that the accused was in fact above the age of 18.

I will now refer to a paragraph in which they deal with a person who is above the age of 18 but in the region of the 20's. I read at page 8 of the said judgment:

"It is clear that appellant one was a youngster of immature age in the region of 20 years. That, in itself is an extenuating circumstances and they referred to the case of REX VS MATHABANE 1975(4) SA564 which in my view, justifies the setting aside of the death sentence and substituting therefore one of 15 years' imprisonment to run concurrently with the sentence imposed (inaudible). In view of the fact that

there was no admissible evidence of the age of appellant one, it is

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not necessary to comment on the absence of an approach by the court in accordance with the procedure recently laid down in DLAMINI VS REX. "

I may also refer to the case of JAMESON SIPHO DLAMINI VS REX APPEAL CASE NO. 18/97 reading at page 5 of that judgment and I quote:

"In determining the issue of extenuating circumstances nothing which in fact influenced X's or emotions and thus his conduct can be ruled out of consideration merely because it was unreasonable for him to allow it to influence him or because on a policy grounds it is thought inadvisable to treat it as an extenuating circumstance. "

For instance, if X was motivated by a belief in witchcraft that consideration may not be rejected on the grounds either that a belief in witchcraft is unreasonable, or that it is contrary to policy to make any allowance for those who believe in witchcraft."

All the case law quoted above put the matter beyond any doubt that the new trend, and this is a landmark, no onus rests on an accused person even on a balance of probabilities to show the person's or otherwise of extenuating circumstances. Referring back to the case of DANIEL DLAMINI VS REX which I have mentioned above, I will refer to page 2 in which a number of cases are quoted and I will read them so that it forms part of my judgment on extenuating circumstances. Paragraph 2 reads as follows and I quote:

"I turn now to discuss with the question of onus but it becomes necessary before doing so to say something about the concept of extenuating circumstances and the duty of the court in considering this question. The acceptance general definition of an extenuating circumstance is one which morally, although not legally, reduces an accused's person's blameworthiness or the degree of his guilt, (then they refer to BIYANA 1938 EDL 310 at 311; S VS LETSOLO 1970(3) SA476(A); R VS FUNDAKUBI AND OTHERS 1948(3) SA810 at 818 and the landmark decision of Botswana Court of Appeal in DAVID KALELETSWE AND 2 OTHERS VS THE STATE CRIMINAL APPEAL 26/94)) where many of these cases on this topic are collected. "

I now then refer to page 3, the last two paragraphs where the Court of Appeal said the following and I quote:

"We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on an accused person and, as mentioned earlier herein, the question of onus is really inappropriate to the enquiry. This is made clear by what was said in that case about the duty of the Court. "

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They continue:-

"We note in particular the significance which Schreiner J A ascribes to the "subjective side " and that no factor not too remote or too faintly or indirectly related to the commission of the crime and which bears on an accused's moral guilt can be ignored. (R VS FUNDAKUBI (supra)).

It seems to us that there is therefore an over-riding responsibility on the Court and its officers - Counsel - to ensure that the second phase of the process - the enquiry as to the presence or absence of extenuating circumstances - is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is inter alia to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above... when all the evidence is in, the Court is obliged to evaluate the testimony and submissions before it, consider and

weigh all the features of the case, both extenuating and aggravating... This would include evidence tendered during the second phase enquiry. It will then make its "value on moral judgment."

The first sentence which reads: "It seems to us that there is therefore an over-riding responsibility to the Court and its officers and Counsel". To me, it means that it is the Court's duty and by Counsel, they do not only mean "Crown Counsel" but they also include the defence Counsel, when this enquiry is conducted. Therefore, the other cases which I have been referred to dealing with the onus rests on an accused on a balance of probability has clearly been unequivocally overruled by this latest case law.

In casu Ms Nderi has conceded correctly my view that the absence of premeditation is also a ground for this Court to find extenuating circumstances to have been present and I so find. The accused are guilty as charged, extenuating circumstances having been found.

JUDGMENT ON SENTENCE

This Court is guided by other decided cases for example case of STATE VS ZINN 1969AD in which the learned Judge who delivered the judgment dealt with what we refer to as triad, that is the interest of the accused, of the society and the prevalence of the

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crime in question. Having said that, I have taken into account what has been said by Mr. Ntiwane on behalf of accused no.1, 2, 3, 4, 6 and 8 and all the personal circumstances he outlined. I have also taken into account that they have been in custody, most of them, since the 31st December 1997 that this case was once tried by the late Dunn J who unfortunately passed away before he could finish it. The Court takes into account in their favour that all along they have been having nightmares because of this pending case.

The court also takes into account what was said by Mr. Ntiwane the fact that each case is to be decided on its own merits. And that this is not the type of a case of mob violence which we usually have here where people come together and plan to get rid of either a person because he is a witch or because he is an opponent or threatens another's business. Having said that I will proceed to deliver the sentence and preface it with the following sentencing:- that one of the most difficult part of a criminal trial - handing down an appropriate sentence in a particular case is an extremely difficult task. Sentencing can never be uniformed, each case must be dealt with and treated on its own merits as I have already mentioned. For the purpose of sentence in this particular case, I am going to differentiate between accused no. 1, 2 and 3 on their basis of immature age as against the older accused. In this respect I will again refer to the case of SANDDLE DLAMINI COURT OF APPEAL CASE NO.1/97 where the question of immature age was dealt with in a judgment delivered on the 11th March 1998. I will also differentiate between the women on one side, this is on the basis that they being the people who bring human beings to this world perhaps when they saw this young girl, Gabsile lying dead they were overcome by emotions knowing that she they will never see her again.

Initially, before I was addressed on mitigation I considered the sentence to be in the range of 15 years as is the practice presently being followed by this Court But after I was addressed in mitigation I had a change of heart and I agree with the submissions made that this case is distinguishable from the ordinary case of mob violence. The basis of my being lenient on other older accused than the accused I have already mentioned is because this episode occurred at the spur of the moment, it was not a case where they sat down and

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decided they wanted to get rid of the driver. There are however, aggravating circumstances in this case. The deceased was at all material time prepared to face the consequences of the unfortunate accident resulting in the death of the young girl Gabsile. He took the time of leaving his kombi and went to the police station to report what had happened and on his way back he was assaulted by the accused and

killed and now noone knows what led to the death of the young girl.

The court has a duty to send a very clear message to all other members of the community that it does not pay to take the law into their own hands. The only way to send the message is by sentencing people who are convicted after doing what you did in a manner that people will realise that they should not do so in future.

The following sentences will be handed down:

Accused no.1 will be sentenced to seven (7) years' imprisonment.

Accused no.2 will be sentenced to seven (7) years' imprisonment.

Accused no.3 will be sentenced to seven (7) years' imprisonment

Accused no.6 because of the reasons I have stated she will be sentenced to seven (7) years' imprisonment.

Accused no. 7 will be sentenced to seven (7) years' imprisonment.

Accused no.8 will be sentenced to seven (7) years' imprisonment

In respect of each of the accused that is 1 to 3 and 6 to 8 the sentences will be backdated to the 31st December 1997.

Accused no.4 for the reasons I have stated he will be sentenced to ten (10) years' imprisonment and his sentence will be backdated to the 31st December 1997. Accused no.5 will be sentenced to ten (10) years' imprisonment backdated to the 17th July 1998 the date on which he was arrested and placed in custody.

J. M. MATSEBULA

JUDGE

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