

IN THE HIGH COURT OF SWAZILAND

IN THE MATTER BETWEEN:

CRIM.CASE NO. 75/98

THE KING

VS

JUSTICE SIPHO MAGAGULA

CORAM : *DUNN J.*

FOR THE CROWN : *D. WACHIRA*

FOR THE ACCUSED : *E.V. THWALA*

JUDGEMENT

4TH NOVEMBER 1998

The original indictment in this case contained the names of eight accused persons namely Justice Sipho Magagule; Mainstay Vusi Mavimbela; Collen Muzi Ngwenya; Khosi Mkhwanazi; Anthony Mkhonta; Dumisani Dlamini and patick Godwana Mavimbela. The accused were numbered 1 to 8 respectively. At the commencement of the trial, the crown indicated that the charges that had been preferred against accused number 4 Collen Ngwenya had been withdrawn and that he would be introduced as an accomplice witness. In the circumstances, Khosi Mkhwanazi (accused number 5) was remembered as accused number 4 and the remaining accused as accused numbers 5, 6 and 7.

The charges against the accused are as follows:

Count 1

Accused 1, 2, 3 and 4 are guilty of the Crime of Murder. In that upon or about 28th August 1997 at ore near Mountain View Mbabane in the district of Hhohho, the said accuse persons acting jointly with a common purpose did unlawfully and with the intention of inducing submission by CORNELLA GRIFFIN to the taking o fitems listed in Annesture "B" attached hereto, threaten the said CORNELLA GRIFFIN or in her lawful possession, and did rob her of the same.

Count 2.

Accused 1, 2 3 and 4 are guilty of the crime of murder.

In that upon or about 28th August 1997 at or near Mountain View Mbabane in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully and intentionally kill Joshua Wessels Junior.

Count 3.

Accused 1; 2; 3; and 4 are guilty of the crime of robbery.

In that upon or about 28th August 1997 at or near Mountain View Mbabane in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully and with the intention of inducing submission by Susana Catharina Wessels to the taking of items listed in Annexure "A" attached hereto, threaten the said Susana Catharina Wessels that, unless she consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot her and did then and thereupon take and steal from the said Susana Catharina Wessels the said property, which was the property of Susana Catharina Wessels or in her lawful possession, and did rob her of the same.

Count 4.

Accused 1; 2; 3; and 4 are guilty of the crime of robbery.

In that upon or about 28th August 1997 at or near Mountain View Mbabane in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully and with the intention of inducing submission by Cornelia Griffin to the taking of items listed in Annexure "B" attached hereto threaten the said Cornelia Griffin that, unless she consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot her and did then and thereupon take and steal from the said Cornelia Griffin the said property, which was the property of Cornelia Griffin or in her lawful possession, and did rob her of the same.

Count 5.

Accused 1 is guilty of the crime of contravening section 11(1) of the Arms and Ammunition Act 24/1964 as amended by Act No.6/1988 and Act No.5 of 1990.

In that upon or about 9th September at or near Msunduza area in the district of Hhohho the said accused person not being a holder of a permit or licence to possess a firearm did unlawfully possess one 6.35 mm Astra Pistol Serial number 931594.

Count 6.

Accused 1 is guilty of the crime of contravening section 11 (2) of the Arms and Ammunition Act 24/1964 as amended by Act No.6/1988 and Act No.5 of 1990.

In that upon or about 9th September 1997 at or near Msunduza area in the district of Hhohho the said accused person not being a holder of a permit or licence to possess a 6.35 mm pistol did unlawfully possess 17 live rounds of ammunition for a 6.35 mm pistol.

Count 7.

Accused 2 is guilty of the crime of contravening section 11(1) of the Arms and Ammunition Act 24/1964 as amended by Act No.6/1988 and Act No.5 of 1990.

In that on or about 8th September 1997 at or near Mvutshini area in the district of Hhohho the said accused person not being a holder of a permit or licence to possess a firearm did unlawfully possess one 9 mm Star Pistol serial number 1542186.

Count 8.

Accused 2 is guilty of the crime of contravening section 11(2) of their Arms and Ammunition Act 24/1964 as amended by Act No.6/1988 and Act No.5 of 1990.

In that upon or about 8th September 1997 at or near Mvutshini area in the district of Hhohho the said accused person not being a holder of a permit or licence to possess a 9 mm pistol did unlawfully possess 13 live rounds of ammunition for a 9 mm pistol.

Count 9.

Accused 3 is guilty of the crime of contravening section 11 (2) of the Arms and Ammunition Act 24/1964 as amended by Act No.6/1988 and Act No.5 of 1990.

In that upon or about 9th September 1997 at or near Mhlaleni area in the district of Manzini the said accused person not being a holder of a permit or licence to possess a .38 special revolver.

Count 10.

Accused 2; 5; and 6 are guilty of the crime of robbery.

In that upon or about 4th July 1997 at or near Darliach in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully and with the intention of inducing submission by Harriet Wasswa to the taking of items listed in Annexure "C" attached hereto, threaten the said Harriet Wasswa that unless she consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot her and did then and thereupon take and steal from the said Harriet Wasswa the said property of Harriet Wasswa or in her lawful possession, and did rob her of the same.

Count 11.

Accused 2; 6; and 7 are guilty of the crime of robbery.

In that upon or about 4th July 1997 at or near Darliach in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully assault Christine Wasswa, and by intentionally using force and violence to induce submission by Christine Wasswa, did take and steal from her a sum of E400.00 her property or in her lawful possession, and did rob her of the same.

Count 13.

Accused 2; 4; and 5 are guilty of the crime of robbery.

In that upon or about 22nd June 1997 at New Chekers in the district of Hhohho the said accused persons acting jointly with a common purpose did unlawfully and with the intention of inducing submission by Kenneth Mandlakayise Mbuli to the

taking of items listed in Annexure "E" attached hereto, threaten the said Kenneth Mandlakayise Mbuli that unless he consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot him and did then and steal from the said Kenneth Mandlakayise Mbuli the said property from the lawful possession of the said Kenneth Mandlakayise Mbuli or from his lawful possession, and did rob him of the same.

Count 14.

Accused 2 and 4 are guilty of Contravening section 3 (1) of the Theft of Motor Vehicles Act, 1991 as amended.

In that upon or about 24th June 1997 at Malunge Township in the district of Hhohho the said accused person acting jointly with a common purpose did steal a motor vehicle registration number SD 760 GHJ, an Opel Astra the property of Osman Mansoor or in his lawful possession.

Count 15.

Accused 2 and 4 are guilty of the crime of Housebreaking with intent to steal and theft.

In that upon or about 24th June 1997 at Malunge Township in the district of Hhohho, the said accused persons acting jointly with a common purpose did unlawfully and intentionally and with intent to steal break and enter the house there situated of Osman Mansoor, and did unlawfully steal items listed in Annexure "F" annexed hereto, the property or in the lawful possession of the said Osman Mansoor.

Accused numbers 1; 2; 3; 4 and 5 were represented by Mr Thwala and accused numbers 6 and 7 conducted their own defence. When called upon to plead, the accused pleaded not guilty to all the charges.

Counts 1; 2; 3 and 4 are closely related and involve the same accused persons and may thus be conveniently dealt with together. The evidence led by the Crown on these counts is as follows:

Joshua Francois Wessels (the deceased on count 1) his wife Susana Cathrine Wessels (PW2) his son Joshua Francois (the deceased on count 2) and his sons Fiance Cornelia Griffin (PW3) retired to bed in their house in the Mountain View area of Mbabane

at about 10.00 p.m. Wednesday 27th August 1997. Joshua (senior) shared a bedroom with his wife and their five year old grandson. Joshua (junior) shared a bedroom with his fiancée. All the lights in the house were turned off. The outside lights were on. Joshua senior and his wife were awakened and his wife was awakened later that night by voices in the house. They both got up and dressed. Joshua opened the bedroom door and three black men immediately entered the bedroom. Two of the men were armed with pistols. The third man was armed with an axe and a knife. The one pistol was silver in colour and the other was black. Joshua asked the men what they wanted. The men responded by ordering Joshua and his wife to keep quiet and to sit on the bed. The men asked if there was money or firearms as they had been declared and handed in at the Oshana Border Post.

The man with the silver pistol took a towel and cut it into strips with a pair of scissors. The strips were then used to tie Joshua and his wife's hands together. Joshua's hands were tied at his back. The couple were then caused to lie on their stomachs on the floor. Later on, following a plea by Mrs Wessels, they were allowed to sit on the bed. The men continued searching the room until the man with the black gun came across a safe in one of the drawers. This man who was the most aggressive of the three rebuked Joshua and accused him of lying when he stated that there were no firearms in the house. He insisted that there were firearms in the safe.

The safe contained 8 or 9 rounds of ammunition which the man took. At that stage the man was striking with his back to Joshua. Joshua with his hands still tied behind his back, jumped up and nudged into the man with his chest. The man turned around and fired a shot which struck Joshua in the leg. Mrs Wessels ran towards Joshua and the man fired two more shots that struck Joshua in the stomach. Joshua was on his knees and he pulled himself into the corner of the room. He was bleeding and had difficulty in breathing. The man who had fired the shot ran out of the room. As Mrs Wessels was attending to Joshua she saw her son coming out of his room and running up the passage. A shot rang out and when Mrs Wessels went to the passage she found her son lying on his back with a hole in the side of his head. He was dead. His fiancée went out of the house and was able to call on the neighbours for assistance. Joshua Wessels (senior) whilst undergoing treatment at the theatre of the Mbabane Clinic.

Entry into the Wessels' house was gained through a window next to the kitchen.

Mrs Wessels drew up a list of items that were taken from the house, in the course of this incident. The list was read into court as part of her evidence. Mrs Wessels and her son's fiancée were subsequently called to the Mbabane Police Station. There, Mrs Wessels identified her husband's wrist watch (Exhibit 4) and a pair of denim jeans (Exhibit 5) that were taken in the course of this incident. Her son's fiancée identified a

purple kit bag (exhibit 1); two music cassettes (Exhibit 6) and the pair of denim jeans (Exhibit 5).

The evidence of Mrs Wessels and her clearly established the commission of the charges of murder on counts 1 and 2 and of the taking of property from their house under circumstances that amounted to robbery under counts 3 and 4.

The evidence upon which the crown bases its case that the four accused are the persons who committed the crimes on counts 1 to 4 is based on the evidence of the accomplice witness Collin Ngwenya (PW1); evidence of the finding of certain of the items that were taken from the Wessel's house, in the course of the robberies, in the possession of some of the accused; evidence of a ballistics expert that certain spent cartridges that were recovered in the Wessel's house after the murders, had been fired in a pistol recovered from accused number 1; evidence of a finger print impression which was lifted at the Wessels' house. And the evidence of a confession to the murders by some of the accused to a traditional healer (inyanga). I shall deal first with the evidence of the accomplice witness.

The accomplice Collin Ngwenya gave the court an account of how the offences on counts 1 to 4 were committed. He told the court that he knew the four accused persons by sight and that they are resided at Msunduza location where he was also resident. He told the court that whilst on his way for a visit to his girlfriend on the afternoon of the 27th August 1997 he came across accused numbers 1, 2 and 3 in the Mangwaneni area. He greeted the accused. In the course of the greeting he was asked by accused number 2 if he knew Khazi Mkhwanazi (accused number 4). He was asked by accused number 2 to go to Msunduza location to call accused number 4 and to inform him that accused numbers 1, 2 and 3 required his assistance in relocating certain of their property. Collin knew accused number 4 and he set out for Msunduza where he met him and conveyed the message from accused number 2. Accused number 4 was not certain that he would be able to find the place at which the accused were and he requested Collin to accompany him to that place. Collin did so. After accused number 4 had joined accused number 1; 2 and 3 accused number 2 told Collin to remain with them until after the operation they were going to be involved in. Accused numbers 1; 2 and 3 held discussions with accused number 4 away from Collin. This all took place on a hill in the Mangwaneni area.

When it started getting dark, accused number 2 stated that it was time to leave to collect

their property. The four accused left with Collin and walked through a forest until they got to no residential area of Mountain View. The houses in the area had their lights on. According to Collin, the accused made a fire near the edges of the forest. The four accused then went to one of the houses and walked around it. They returned and suggested that they should all take a nap until later that night. Collin was awakened by the accused and informed that it was time to proceed. They all walked towards one of the houses. Collin was made to stand about 6 to 7 paces away from the house and told to keep guard in case anybody came around the house.

The four accused went to the house and Collin next saw accused number 3 carrying a piece of wood. Accused number 2 gained entry into the house through a window which did not have burglar bars. Collin had earlier seen burglar bars on that window. Once accused number 2 was inside, a door was opened and accused numbers 1, 3 and 4 entered the house. After a while accused number 4 came out and enquired from Collin if there was anybody around. Accused number 4 went back into the house and returned with a hi-fi music system and a litre bottle of krest soft drink. He placed these items near Collin and told him to guard them. Accused number 4 returned to the house and a short while thereafter Collin heard four to five shots being fired in the house. It was Collin's evidence that he thought that the accused were being fired at by the owner of the house. Collin started running away. After running for a short distance, he saw the four accused coming out of the house and running after him. He was told to stop. None of the accused were injured.

According to Collin, the accused were carrying bags, with goods in them. In addition, accused numbers 1 and 2 were each carrying a pistol. Accused number 1 had a black coloured pistol and accused number 2 had a silver coloured one. Collin was seeing the pistols for the first time at that stage. He, enquired from accused numbers 1 and 4 as to the shooting. Accused numbers 1 and 4 replied that the people in the house had started fighting with them and that the shots had been fired to scare them (the people in the house). They all walked together until accused numbers 2 and 3 branched off and headed in the direction of Bahai Centre. Accused number 1 told Collin to go with them towards Msunduza. Accused number 4 gave Collin a kit bag with goods inside. Accused numbers 1, 4 and Collin parted ways near Timele Bottle Store in Msunduza. Collin went to his room where he opened the kit bag. The bag contained women's clothing.

On the following day, the 28th August Collin met with accused number 1 and told him to turn the bag and its contents and not to say a word about the events of the previous night. Collin burnt the clothes but kept the kit bag (Exhibit 1)

At about 3.00 am of the 9th September 1997 the police went to Collin's room at Msunduza. The police were with accused number 2 and 3. Collin was arrested and informed that he was a suspect in the murder of the deceased on counts 1 and 2. The

police took possession of the kit bag (Exhibit 1) which Collin had explained was given to him by accused number 4.

Accused number 1 was arrested on the same morning as Collin and Collin saw him at the Mbabane Police Station.

Collin was subsequently charged together with the four accused. he was present when Mrs Wessels and her sons fiance identified the kit bag (Exhibit 1) the wrist watch (Exhibit 4) the deim jeans (Exhibit 5) and the cassettes (Exhibit 6).

Mr Thwala subjected Collin to a fairly lengthy cross-examination. A great deal of the cross-examination was directed at the circumstances under which Collin stated he got involved in the events leading to the visit to the Wessel's house. It was suggested to Collin that his evidence was highly improbable and that he was trying by all means to minimise the part he had played in the whole incident. He was question as to why he had not runaway whilst the accused were in the house. He gave the explanation that he was scared and would not have known which path to follow, back to Msunduza. His evidence of what he said transpired at the Wessel's house was not challenged. It was put to Collin that he was involved with accused numbers 1; 2; 3 and 4 in the planning of the dommission of the offences on counts 1 to 4. It was suggested that his planning had taken place on the hill near Malangawane after he had been sent to call accused number 4.

Collin adhered to his evidence throughout the cross-examination. It transpired during the cross-examination that a donment had been prepared by Collin and the four accused whilst they were in custody awaiting their trial. The document apparently sought to set out their defence and certain irregularities which they maintained had been committed by the police in the course of the investigation. The document was handed to their defence Counsel who happened to be Mr Thwala's. Mr Thwala challenged Collin's evidence in the light of the content of the document. Collin gave the explanation that he was the more literate and fluent of the accused and that he had been told what he write in the document by the accused. He stated that to his knowledge, the contents of the document were not true and were contrary to the statement he had made to the police and subsequently to a Magistrate. The document was marked Exhibit C. In the absence of a challenge of the truth and accuracy of Collin's evidence and in the light of the clear stat4ement that was put to him by Mr. Thwala that he was involved with the accused, in the planning of the commission of the offences on counts 1 to 4 there is really very little purpose in any further detailed analysis of his evidence. The defence portion at the end of the cross-examination of Collin to this, that Collin was involved in the planning of the offences with the accused and was attempting in his evedence, to minimise the role he had played therein.

The items that were positively identified as having been taken in the count of the murders and robberies are said to have been recovered by the police as follows:

The kit bag (Exhibit 1) was recovered by the police in the room of Collin, in the early hours of the 9th September 1997. Collin's explanation for his possession of the bag was that it was given to him by accused number 4, following the incident at the Wessel's house.

On the same morning of Collin's arrest, the police reported to a house where accused number 1 was. Accused number 1's girlfriend opened the door. Accused number 1 was fast asleep. And the police found an Astra pistol (Exhibit 3) under his pillow. There were 7 live rounds of ammunition (Exhibit 17) in the pistol. The police also found a black wallet with 10 live rounds of ammunition (Exhibit 18). There was a wrist watch on a table. Accused number 1's girlfriend told the police that the watch belonged to accused number 1. The wrist watch (Exhibit 4) is the one which was subsequently identified by Mrs Wessels.

Accused number 3 was arrested on the 8th September 1997, at Mvutshini (The circumstances under which he was arrested will be dealt with in more detail later on) According to 2624 Constable Mkhonta (PW7) 1061 Inspector Maphosa (PW9) accused number 3 was wearing the denim jeans (Exhibit 5) at the time of his arrest. Following accused number 3's arrest he led the police to a room at Mhlaleni on the 9th September. There he pointed out 9 live rounds of ammunition (Exhibit 20) and the music cassettes (Exhibit 6).

2184 Sergeant Maseko (PW5) who is attached to the Scenes of Crime Unit of the Royal Swaziland Police, reported to the Wessels' house at about 3.00 am on the 28th August. On arrival, Maseko noticed that one of the window panes on the dining room window was broken. It appeared that the burglar bars to that window had been removed. Maseko found a hi-fi set near the door. Inside the house, Maseko recovered 4 spent cartridges and 1 spent bullet.

Maseko proceeded to dust for fingerprint impressions on the broken window pane; the hi-fi set found near the door; a glass wing and a litre bottle in the kitchen and a BMW motor vehicle parked in the garage. Maseko was able to lift prints from each of these objects. The prints were marked EBM1 to EBM6.

Maseko attended the post-mortem examinations of the two deceased persons. In the course of the examinations, a spent bullet was recovered from the body of Joshua Junior and two spent bullets were recovered from the body of Joshua senior.

The fingerprint impressions (EBM1-EBM6) were sent to the Criminal Investigations Bureau at the Police Headquarters, where they were examined by 1725 sergeant Thwala. The 4 spent cartridges (exhibit 8) and the total of 4 spent bullets were forwarded to the Forensic Science Laboratories in South Africa.

1725 Sergeant Thwala compared the 6 fingerprint impressions including those of accused number 2 (impression marked AK1). Thwala is a specially trained officer in fingerprint analysis and identification. He came to the conclusion that all the 6 impressions he received were made by accused number 2. He was, however, unable to find the accepted minimum of 12 points of similarity in respect of 5 of the impressions.

In so far as the 6th impression was concerned, sergeant Thwala came to the conclusion that, that impression was made by accused number 2. Sergeant Thwala made enlargements of the impression which he placed alongside of the impression taken from accused number 2. With the impression in that position, he indicated the 12 points of similarity between them. The enlarged impressions were handed in as Exhibit 14. The points of similarity indicated by sergeant Thwala are quite clear even to an untrained eye. The impression with which accused number 2's impression was compared is the one that was lifted from the 1 litre bottle (Exhibit 10) which was found at the Wessels' house.

It is common cause that the 4 spent cartridges (Exhibit 8) and the 4 spent bullets (Exhibit 8) and the Astra pistol (Exhibit 3, recovered from this under A1's pillow) were forwarded to the Forensic Science Laboratories in Pretoria for examination. The exhibits were examined by Sergeant Morue Du-Preez on the 27th January 1998.

In examining the exhibits sergeant Du-Preez fired a few bullets through the Astra pistol. He used the spent bullet and the spent cartridge for purposes of comparison with the spent bullets and cartridges he had received. The examination entailed a microscopic examination of the exhibits. Sergeant Du-Preez came to the conclusion that the spent cartridges were fired through the Astra pistol. He produced an enlargement of one of the cartridges viewed alongside the test cartridge showing the point of similarity. The enlargement was handed in as Exhibit F.

In so far as the spent bullets were concerned sergeant Du-Preez was not in a position to

conclude that these had been fired through the pistol. It was his evidence that there were insufficient marks on the bullets for such a conclusion to be drawn. Sergeant Dr-preez's report was handed in as Exhibit

F.

Philemon Lukhele, a traditional healer (inyanga) of Mirutshini area and who was called as PW4, told the court that accused numbers 2 and 3 came to his homestead on the 6th September 1997. Lukhele stated that he had known accused number 3 for over a year prior to that date and that he was seeing accused number 2 for the first time. Accused number 3 had been to Lukhele's homestead for treatment before accused numbers 2 and 3 reported to Lukhele that they required his assistance. They explained that they, together with other persons, had killed two whitemen in the Mountain View area some 10 days prior to their visit to Lukhele. The assistance they required to as treatment which would prevent their detection and arrest for the killings, by the police. It was Lukhele's evidence that he advised accused numbers 2 and 3 what his fee would be namely E750.00 per person. He further advised the accused that they should bring a live chicken for a cleansing ceremony and that they should each bring an item of clothing they had worn recently.

According to Lukhele accused numbers 2 and 3 returned on the morning of the 8th September 1997 in the company of accused number 6. They had no live chicken and personal items of clothing. Accused numbers 2 and 3 explained that they had agreed, with their colleagues, to meet at Lukhele's homestead that morning. Lukhele explained that the treatment he was going to give the accused for purpose of avoiding detection by the police involved each accused being covered over a container of boiling water into which he would place some medicine (muti). This is known in siSwati as kufutsa and had an effect similar to a sauna and is designed to "cleanse" the patient. Lukhele told the court that he directed the accused to go and collect firewood which would be used for boiling the water. Lukhele also arranged for the nice accused to be given food. In the course of all this Lukhele stated that he was given a silver pistol (Exhibit 2) by accused number 2. Lukhele wrapped the pistol in a ceremonial cloth and placed it in his "surgery".

Later that morning members of the Royal Swaziland Police surrounded Lukhele's homestead and ordered all those who were present there, to come out of the houses. According to Lukhele he and the three accused were immediately handcuffed by the police. Accused no. 4 had a black waist-bag. The police searched it and found 5 live rounds of 9mm ammunition. Accused number 2 was questioned as to where the firearm for the ammunition was he replied that he had given it to Lukhele. Lukhele produced the pistol. According to the police officers who were involved in the arrest of the three accused number 3 was wearing the pair of denim jeans (EXhibit 5) at the time of his arrest.

The four accused all gave evidence on oath. At this stage I will confine myself to their evidence relevant to counts 1 to 4 in which they are jointly charged and with which I have just been dealing. Accused number 1 denied all knowledge of Collin Ngwenya's evidence. He denied all knowledge of the crimes charged in counts 1 to 4. Accused number 1 explained the circumstances under which he first saw the Astra pistol (Exhibit 3) as follows. He was asleep in his girlfriend's room when he was rudely awakened by members of the Royal Swaziland Police on the morning of 9th September 1997. The police informed him that they had information that he was in possession of a firearm. The police demanded that he produce the firearm. Accused number 1 told the court that he had no firearm. The police started searching the room and ordered him to observe what they were doing. After a while, one of the officers shouted that he had found the firearm. It was accused number 1's evidence that he did not see where the gun was found and suggested that it must have been planted by the police in the room. Accused number 1 confirmed that when his girlfriend was asked about the gun she stated that it belonged to him. The police saw a wrist watch on the coffee table. They questioned accused number 1's girlfriend about it and she replied that it belonged to accused number 1. Accused number 1 also confirmed the evidence of the finding of the ammunition in a coat which his girlfriend told the police belonged to him. Accused number 1 denied all knowledge of the firearm. The wrist watch; the coat and the live ammunition which was found in it. Accused number 1 maintained that his girlfriend was the prisoner of the room was the person that should have been held responsible for the items that the police found.

Accused number 2 denied all knowledge of Collins's evidence. Accused number 2 stated that he met Collin for the first time after his arrest at Sidwashin Prison. He denied all knowledge of counts 1 to 4.

Accused number 2 gave a detailed account of what he stated transpired at the Inyanga's homestead. He denied having jointly, confessed with accused number 3 to the killing of two white men. He denied having given the pistol to the Inyanga. His evidence regarding the pistol was that the Inyanga was lying when he told the police that the pistol belonged to him (accused number 2). Accused number 2 denied that the black waist bag containing 5 live rounds of ammunition was found in his possession.

Accused number 3 denied all knowledge of the offences on counts 1 to 4. It was his evidence that Collin was falsely implicating him in the murder and robbery charges. He admitted the evidence of his visit to the homestead of the Inyanga. He explained that he had visited the Inyanga for cleaning in order to secure a job. He denies having confessed to the killing of two white men to the Inyanga. He denied the evidence of the police officers to the effect that he was wearing the pair of denim jeans (Exhibit 5) at the time of his arrest.

Accused number 4 gave evidence of his arrest at Langeni area by the Lobamba Police on the 16th November 1997. He denied all knowledge of Collin's evidence. He gave evidence of several attempts by the police to persuade him to become an accomplice witness. It was his evidence that he was given a statement which he was asked to repeat before a magistrate. The accused told the court that he refused to accede to the police request. He denied having given the hit bag (Exhibit 1) to Collin.

The accomplice has implicated the four accused in the commission of the offences on counts 1 to 4. As an accomplice witness Collin's evidence must be approached with the contrary rule in mind. It appears to me that the accomplice knows more about the planning of the commission of the offence than he could be prepared to tell the court. It is quite obvious that the accomplice must have been drawn into the discussions which he says the accused were involved in after he was sent to go and call accused number 4. I do not accept that he believed that the accused were planning a legitimate "relocation" of goods belonging to them. The accomplice will have the court believe that he agreed to remain with the accused and to assist them in the "relocation" of the goods, without making any enquiries about the relocation. Mr Thwala is in my view quite correct in his submission that the accomplice had tried by all means to minimise the role he played in the planning of the offences. Be that as it may, however, there can be no doubt whatsoever that what the accomplice has testified to regarding the meeting of the accused

near mangwaneni; the trip to and the ling in wait nest to the Wessels' house; the entry into the Wessels' house; the sound of gunfire, and the exit from the house by accused with gfoods is correct and truthful. There has been no suggestion by the defence that the accomplice has in anyway tried to minimise the role be played when be and the accused got to the Wessels' house. The accused have simply denied that they were present. The accomplice has decided the role be played, in keeping a watch outside the house whilst the accused were inside.

Overall, I gained a highly favourable impression of the accomplice as an honest and credible witness. He had been charged with the accused and held in custody until shortly before the trial when he was released to becon an accomplice witness. He gave a satisfactory explanation fo how he had , gone along with the accused in prsenting what was to be their defence to the inictment, to their consel. He maintains that he has told the court the truth and that this was what he told teh magistrate, in a confession. This evidence was not challenged and as earlier inidcated it was squarely puit to me accomplice by the defence, that he was involved in the planning of the offences with the accused, on the hill near Mangwaneni.

Outside the clear evidence which both corroborates that of the accomplice places the accomplice's evidence implicating accused number 4 beyond any doubt.

Firstly, the firearm (Exhibit 3) which the police state was found under accused number 1's pillow has been positively identified by the evidence of Dr-Preez as the pistol that fired the four empty cartridges that were found in the wessels' house. The wrist -watch (Exhibit 4) that accused number 1's girlfriend daid belonged to accused number 1 was proved to have been taken from Mr Wessels sennior at the time of his murder. The police evidence of the circumstances under which the pistol and the wrist watch were recovered is in my view beyond any doubt truthful. Accused number 1 concedes that the items were found in the room in which he was with his girlfriend. What the accused has attempted to do is deny responsibility for the items by suggesting that they were planted in the room by the police or that his girlfriend was in a better position to explain their presence. I respect accused number 12's evidence in his regard. The items were recovered within 12 days of the murder of the deceased. The pistol is linked to the killing. The wrist watch belonged to teh deceased Wessel senior. This evidence calls for an explanation from acused number 1. He has failed to give a satisfactory explanation. The evidence of the accomplice placing accused number 1 at the scene of the offences is corroborated by thid evidence.

Accused numbers 2 and 3 confessed to the Inyanga, Lukhele, that they had killed two white men about eleventh days prior to their visit to the inyanga. This places the date of the killing at about the time testified to by the accomplice. The inyanga was in my finding and honest and credible witness. Like so many inyangas and diveners who have appeared in this court he appears to have found nothing wrong in trying to assist the accused in avoiding detection by the police despite his being informed about the murder. Here again, the two accused simply deny that they made a confession to Lukhele and have attempted to place an innocent explanation on their two visits to Lukhele's homestead. i can find no reason for Lukhele to have fabricated the evidence of the confession and the

reason for the visit to his homestead by the two accused. I reject the evidence of accused numbers 2 and 3 in so far as it relates to their visits to the Inyanga. The two minicassettes (Exhibit 6) and the denim jeans (Exhibit 5) which were identified by Mrs Wessels and Wessels junior's fiancée were recovered from accused number 3. I accept the police evidence to that effect. The possession by the accused of these items which were taken from the Wessels house on the night of the murder called for an explanation from accused number 3. His denial of possession of the items in question is in my view totally false. His possession of the items and the absence of a reasonable explanation for such possession places accused number 3 at the scene of the crimes, in line with the evidence of the accomplice witness.

Accused number 2's fingerprint has been positively identified on the 1 litre bottle of krest (Exhibit 12,) which was found at the scene. This evidence clearly places accused number 2 at the scene of crime at the relevant time and corroborates the evidence of the accomplice.

Nothing was found in accused number 4's possession linking him with presence at the scene. The kit bag (Exhibit 1) was found in the possession of the accomplice who said it was given to him by accused number 4. I have found the accomplice to be a trustworthy and reliable witness. His evidence is supported by the independent evidence which links accused numbers 1, 2 and 3 with the scene of the crimes. There can in my view be no reason for the accomplice to falsely incriminate accused number 4. The evidence of the accomplice regarding what transpired leading up to the entry into the Wessels' home was not seriously challenged or shaken under cross-examination. Again, as earlier pointed out, it was pointedly put to the accomplice that he was involved in the planning of the commission of the offences with all the accused.

Having considered all the evidence tendered by the crown and the four accused on counts 1 to 4 I have no hesitation whatsoever in accepting the evidence of the accomplice witness, Collin Ngwenya as truthful. Further, that the possession by accused numbers 1 and 3 of items that were taken from the Wessels' house links them with the commission of the offences. The presence of accused number 2's fingerprint on the 1 litre bottle places him at the scene of the crimes. The unchallenged evidence of the accomplice that he called accused number 4 to where the other accused were near Mangwaneni and the suggestion to the accomplice that he was involved in the planning of the offences with all the accused is in my view sufficient evidence against accused number 4.

It is alleged in counts 1 to 4 that the accused were acting in furtherance of a common purpose in the commission of these offences. There is evidence of the accused having held discussions near Mangwaneni. They inspected the Wessels house before lying in wait in the forest. They all entered the house and there is evidence that at the time they entered the bedroom where Wessels senior was, two of them had pistols. The pistols have been identified as those that were found in the possession of accused numbers 1 and 2. The third person was carrying an axe. The fact that two of the accused were armed with pistols must have been known to all the accused at the very least, at the time that the accused entered the house. According to Mrs Wessels the two men had their guns drawn when her husband opened the door.

The possibility that the firearms might be used after the accused gained entry into the house must have been appreciated by each accused. In *R v. DUMA & ANOTHER* 1945 AD 410, Tindal JA stated at p 415.

The liability of persons who assist in the carrying out of a common criminal purpose was considered in R.v. GARNSWORTHY AND OTHERS (1923W.L.D. 17) and; in my opinion, the principles applicable were formulated with substantial accuracy by, Dove-Wilson JP, in the following Terms – ‘where two or more persons continue in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known would be a probable result of their endeavouring to achieve their object. If, on the other hand, what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being liable; but if what is done is just what anybody engaging in this illegal combination would naturally, or ought naturally to know; would be the obvious and probable result of what they were doing, then all responsible.’”

According to Mrs Wessels, Wessels senior was shot when he made an attack on the man with black pistol. Wessels was trying to resist the attack by the men in the house. Wessels junior was shot when he ran out of his room, in response to the noise and gun fire in his father’s room. The sort of resistance with which the accused were faced is what they must each subjectively have known was likely in the operation upon which they had embarked. They each must have known or appreciated the possibility of the firearms being used. See Buckell and Hunt, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOL I 2nd Edition p 430 –436 and the authorities there cited. The crown’s evidence has in any view clearly established that the accused were acting in furtherance of a common purpose.

I find accused numbers 1,2, 3 and 4 guilty as charged on counts 1, 2, 3 and 4. I enter a discharge against the accomplice witness Collin Ngwenya undermining him against prosecution for the offences that are subject of counts 1, 2, 3 and 4.

Counts 5 and 6 allege the possession by accused number 1 of an astra pistol and 17 rounds of ammunition in contravention of section II(1) and II(2) respectively, of the Arms

and Ammunition Act no. 24/1964 as amended. The circumstances under which the pistol and the ammunition were recovered in the house in which accused number 1 was found sleeping have been dealt with earlier. Accused number 1 did not challenge the evidence of the police that his girlfriend pointed him out as the owner of the jacket where the 10 rounds of ammunition were recovered. This was said by the police to have taken place in the room, in the presence of accused number 1. The suggestion by accused number 1 that the pistol was planted by the police is in my view absurd. Accused number 1 was invited by the police to observe the search they were conducting. The pistol was recovered from underneath the pillow he had been using. The accused failed to produce a permit to possess the firearm and the ammunition. The defence conceded that the pistol was serviceable and that the ammunition was live. Accused number 1 is accordingly found guilty as charged on counts 5 and 6.

Counts 7 and 8 allege possession by accused number 2 of a 9 mm Star Pistol and 13 live rounds of ammunition in contravention of sections (I(1) and 11(2) respectively, of the Arms and Ammunition Act as amended. The evidence of the Inyanga, Lukhele, was very clear as to how accused number 2 gave him the firearm in question as part of the general cleansing for which the accused had visited his host. The firearm was identified by the accomplice witness in court as the one which accused number 2 was carrying when he came out of Wessels' house. Mrs Wessels also identified the firearm as being similar to the one that was carried by the men who entered their bedroom. It is without any hesitation that I accept the crown's evidence of how the pistol was recovered. In so far as the ammunition was concerned, 8 live rounds were found in the pistol. A further 5 live rounds were found in the black waist bag which accused number 2 had. I reject as false his denial of knowledge of the ammunition and the suggestion that the Inyanga was in possession of the firearm. It was accused number 2 that told the police that he had given the firearm to the Inyanga. The defence concedes that the firearm is serviceable and that the ammunition is live. Accused number 2 had no permit to possess the firearm ammunition.

I find accused number 2 guilty as charged on counts 7 and 8.

On count 9, accused number 3 is charged with possession of 9 live rounds of ammunition. The ammunition was pointed out by accused number 3 on the day following his arrest. That was on the day on which he also produced the music cassettes. The defence concedes that the ammunition is live. Accused number 3 had no permit to possess the ammunition. I find accused number 3 had no permit to possess the ammunition. I find accused number 3 guilty as charged on count 9.

The charges on counts 10 and 11 are against accused numbers 2, 5 and 6. The complainant on count 10, Harriett Wasswa is the mother of the complainant on count 11 Christine Wasswa. Harriett was at home with her two daughters during the evening of the 4th July 1997. As they were preparing to go to bed, there was a bang at the door. Harriett went to the door and was confronted by two men who had firearms. The men entered the house and threatened to shoot her. They demanded money from her. The men took possession of her handbag. They proceeded to one of Harriett's daughters and

heat her up. They took money from her handbag. According to harriett the sound of a third person could be heard outside the house. The men removed items of clothing and electronic goods from the house. A list of items (Exhibit G) that were taken was read into court by harriett. The men, made, off with the goods in Harriett's Toyota Corolla motor vehicle registration number SD 314 HS.

Christine informed her mother's evidence of the entry of the two men. She confirmed that the men demanded money from her. According to Christine the men made off with a total of E350.00 from her.

Sometime after the robbery Harriett was called to the Mbabane Police Station where she identified the items exhibited in court as Exhibits 40 to 50. According to Harriet these were items that were taken in the course of the Robbery. Harriett also identified the shell of her motor vehicle. The engine, wheels and other parts had been removed.

The police gave evidence of the circumstances under which the items identified by Harriette, were recovered. Engene Mavuso told the court that he was approached by accused number 2 on the 5th September 1997. Accused number 2 had a JVC music system. Accused number 2 offered to sell the system to Mavuso for E800.00 it was Mavuso's evidence that he declined the offer and instead requested accused number 2 to leave the system with him so that he could record some music. Accused number 2 agreed to this and left the system with Mavuso. Accused number 2 returned on a later date. Mavuso asked him for the speakers for the system so that he could play back what he had recorded. Accused number 2 gave Mavuso the speakers and left. Sometime thereafter Mavuso received a message that the police wanted to see him. Mavuso went to the police station and was told to produce the music system he had received from accused number 2.

Mavuso identified the music system in court. It is the system which was identified by Harriette, as Exhibit 47. Mavuso adhered to his evidence under cross-examination and maintained that he had received the music system from accused number 2. I accept Mavuso's evidence that he received the system from accused number 2.

Joshua Mangaliso Dlamini told the court that he was approached by accused number 2 sometime during July 1997 and requested to go and check whether or not a TV set which

accused number 2 had was functioning. He tested the TV and found that it was working. Accused number 2 then asked Joshua to find a buyer for the TV. Joshua approached a colleague at work and informed him about the TV. That colleague, Terror Matsebula purchased the TV set. Sometime during September 1997 accused number 2 went with the police to Joshua's homestead looking for the TV set. Terror Matsebula confirmed having purchased the TV from Joshua and the it was subsequently taken from him by the police. The TV set is the one which harriett identified as Exhibit 50.

Goodman Dlamini told the court that sometime during July 1997, he was approached by accused number 2. Accused number 2 had a Toyota Corolla 1.3 motor vehicle. The vehicle had no registration plates. According to Goodman discussion the sale of the motor vehicle ended up with the vehicle being left with a friend of Goodman's Siphon, who was interested in buying it. Subsequently, accused number 2 demanded payment for the vehicle from Goodman. It was Goodman's evidence that payment was demanded from him because Siphon was not paying and accused number 2 maintained that he had been introduced to Siphon by Goodman. The vehicle's engine was subsequently removed and placed in one of Goodman's taxis. The wheels and other parts of the vehicle were said by Goodman to have been removed by accused number 2. The shell of the vehicle was abandoned near Luphohlo dam. Harriett was able to identify the shell as that of the vehicle that was taken from her house on the 4th July 1997.

Accused number 5 was arrested by 2624 constable M khonta on the 9th September 1997. The house of accused number 5 was searched. The police found and took possession of several items from the house. Of these items, harriett was identified 4 jackets (Exhibit 40 – 43) 1 navy coloured bag (Exhibit 49).

In the course of the interrogation of accused number 6, he led the police to Corporation, in Mbabane where he produced a Reebok kit bag. This bag (Exhibit 45) was identified by harriett Wasswa.

Accused numbers 2, 5 and 6 denied knowledge of the items that were identified by Harriett Wasswa. They denied that the respective items were found in their possession. I have no hesitation whatsoever in accepting the very clear evidence of the recovery of the items, identified by Harriett, from the three accused.

The three accused were found in possession of items that had recently been stolen from harriet Wasswa and her daughter. The accused have simply denied knowledge and possession of the stolen items. I find accused numbers 2, 5 and 6 guilty as charged on counts 10 and 11.

On counts 12, accused numbers 2, 6 and 7 are charged with the robbery of Doctor Caithness. The crown led the evidence of an accomplice witness, Bongani Lukhele as

part of the evidence on this count. Bongani told the court that he knew accused numbers 2 and 7 from Siphocosini. He met accused number 2, who was driving a motor vehicle, at Siphocosini in the company of accused numbers 2 and 7. They proceeded to Msunduzi, in the motor vehicle driven by accused number 2. They met accused number 6 at Msunduzi and accused number 2 introduced accused number 6 to the accomplice and accused number 7. The four men then held a brief discussion in which they agreed to meet later that evening for purposes of stealing a motor vehicle in the checkers area.

The three accused and the accomplice met at Msunduzi at about 10.00 pm of the 16th July 1997. They walked to checkers. They spent some time near Mobeni flats before inspecting the houses where there were motor vehicles. Bongani gave details of how they eventually got to a house where a Mercedes Benz motor vehicle was parked in the garage. The 4 men jumped over the gate, into the yard of the homestead. According to Bongani accused number 7 the youngest in the group was reluctant to enter the yard and was threatened into doing so by the other accused. Bongani then proceeded to give a detailed account as to how the house was broken into and as to how, items were removed from the house. The items that were taken, were placed in the Mercedes Benz in which the accused and the accomplice subsequently drove off.

Dr. Cathness told the court of the circumstances under which his house was broken into and as to how he was robbed. His evidence in that regard is quite clear and I need not repeat it.

The accomplice testified that accused number 2 drove the Mercedes Benz motor vehicle. They drove past Msunduzi location. Accused number 2 lost control of the vehicle and it overturned in the early hours of the 17 July. According to the accomplice he and the accused men helped themselves to the items that they had taken from Dr Cathness's house. It was his evidence that they all had a bag with clothes and compact discs. In addition, accused number 2 had a wrist watch which was taken from the complainant. Some items were removed from the vehicle and hidden along the way to Msunduzi. They walked back to Msunduzi location.

Bongani told the court that he was wanted by the police in connection with some other case. He moved to Tshaneni. After a while he decided to hand himself over to the police and to tell them about the robbery. He handed over the bag he had taken (Exhibit 23) to the police.

Dr. Cathness identified his damaged Mercedes Benz motor vehicle to the police on the 17th July. Some of the stolen items including a computer glass case; keyboard; mousetrap

screen and a music system were in the vehicle. They were damaged.

Dr Caithness also identified his wrist watch (exhibit 21) which according to 2624 court. mkhonta was worn by accused number 2. an antique sword (Exhibit 22) and the diving ag (Exhibit 23 which was recovered from the accomplice witness.

The accomplice was not challenged in his evidence of the robbery. It was put to him that he was in fact the person who needed a motor vehicle that night and that he was in fact the ringleader. The accomplice maintained under cross-examination that accused numbers 6 and 7 were present during the robbery.

The police gave evidence of the recovery of the items that were subsequently identified by Dr. Caithness.

The accomplice was a most impressive witness. I found him to be a truthful and reliable witness. The denial of all knowledge of the offence by the three accused is in my finding totally false. I find accused numbers, 6 and 7 guilty as charged on count 12, I enter a discharge in respect of the accomplice witness Bongani Lukhele, indemnifying him against prosecution for whatever part he played in the commission of the offence on count 12.

On count 13, accused numbers 2, c and 5 are charged with the robbery of Keneth Mbuli. Evidence on this count was given by Musa Fakudze who lives with Mbuli and who was present in the house and who was also subjected to the same treatment as Mbuli, Mbuli and Fakudze were asleep in their house during the night of 22nd June 1997. They suddenly realised that there were people in the house. Some men entered the bedroom where Mbuli and Fakudze were. The men demanded money and firearms as were generally. Mbuli and Fakudze were eventually tied up and the men made off with the goods. A list of which was read to court by Fakudze. The men drove off in a white Jetta Vehicle belonging to Mbuli. They had demanded the keys for this vehicle whilst they were in the bedroom with Mbuli and Fakudze.

The Jetta motor vehicle was subsequently found, having overturned along the Mbabane/Piggs Peak main road. Fakudze was called to the Police Station where she identified the following items :