



IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.105/98

In the matter between:

REX

VS

- 1. DUMISA MAZIBUKO**
- 2. MANDLA MAZIBUKO**
- 3. PERCY GADLELA**
- 4. MPOSTOLI MAZIBUKO**
- 5. MICHAEL JIBHI NHLENGETFWA**
- 6. SIMEON SIPHO MAZIBUKO**
- 7. DAVID GCINA TSELA**

CORAM : MATSEBULA J
FOR THE CROWN : MRS. MUMSY DLAMINI
1ST ACCUSED : ADVOCATE MAZIYA
FOR THE SIX ACCUSED : MR. N.J. HLOPHE

JUDGMENT

09/12/98 11/12/98

The seven accused stand charged with two counts of murder. The allegation being that they murdered the deceased on the 28th September 1997 at or near Maliyaduma in the Manzini District. Some of the accused belong to the same family as that of the two deceased and share the same surname Mazibuko. Those accused who did not share the same surname were in some other way related to the family of the accused and deceased.

On the 27th September 1997 the accused attended a cleansing ceremony on behalf of their late father and uncle one Frank Mazibuko. The ceremony started on the evening of the 27th September 1997 until the morning of the 28th September 1997. The two deceased had not attended the cleansing ceremony. It would appear that the same deceased also lived in the same vicinity as the late Frank Mazibuko's homestead was.

At the commencement of the trial, two post mortem reports in respect of the two deceased were handed in by consent as exhibit "A" and "B" in respect of Popi Robert Mazibuko on count one and Sponono Mazibuko on count two respectively.

According to exhibit "A" and "B" the deceased died as a result of cranio-cerebral facial injuries. These injuries were very extensive. The pathologist listed ten serious injuries in respect of the deceased Popi Robert Mazibuko and nine in respect of Sponono Mazibuko. The injuries on the head caused serious fracture to the skull and damaged the brain. The cause of death is accordingly not in dispute. It is being given as cranio-cerebral facial injuries in both cases. The Court accepts the contents of exhibit "A" and "B" and finds that the deceased met their death as a result of these injuries. What remains to be decided is, who caused these injuries?

PW1 Jabulane Zwane informed the Court that he was a chiefs-runner of the area and knew some of the accused and had known them since 1992. It was his evidence that even though the deceased and the accused were on talking terms there was a bone of contention involving land. He said the dispute had served before the Magistrate court and it was at the time of the death of the deceased pending before the "Indvuna" or Governor of the Eludzidzini Royal Residence Mr. Lusendvo Fakudze.

On the morning of 28th September 1997 the two deceased had arrived at his homestead and reported an incident of their children being barred and prevented from passing below the homestead of Frank Mazibuko. PW1 was asked to report the matter to the Chief. The two deceased left as PW1 was washing his face. Shortly thereafter PW1 heard a loud noise and being curious what the noise was all about he went out to see and saw a crowd of people heading towards the motor vehicle in which the two deceased were travelling. He heard a female voice saying and I quote: "Strike" and saw a wooden log being lowered in a striking motion. He then endeavoured to contact the police. When he was through calling the police, the police asked if he was referring to the matter that accused no.1 Dumisa Mazibuko has already reported. PW1 told the court that accused no.1 was also a police constable.

I consider the evidence of PW1 very important in the light of the evidence of other Crown witnesses, which I shall deal with later in my judgement. It is important however to mention, at this stage a certain pertinent answers to questions put to these witnesses by Mr. Hlophe who represented accused no.2 to no.7.

PW1 denied that the deceased had had celebration during the funeral of the late Frank Mazibuko. He also told the court that he was not aware that the deceased on count one had chased accused no.2 and some of Frank Mazibuko's members when he was armed with a revolver. The court was very impressed with the manner of PW1 answered questions. The court formed the opinion that PW1 was an unbiased witness and the court has no reason to doubt his evidence.

The Crown also led the evidence of PW2 Vusi Sibusiso Gama who said some of the accused were his uncles and so were the deceased. The other accused were his cousins. Throughout his evidence, he referred to the

different accused as he is related to them by saying, “cousin so and so” or “uncle so and so”. According to this witness who was plus minus 150 metres from the scene said he saw the boy who disappeared just before the trial whose name has been given as Manqoba carrying a small stick. He saw the deceased on count one alighting from the motor vehicle and the boy fled and stopped where accused no.2,3,5,6 and 7 were. He saw deceased on count one striking accused no.5 on the side of his body and injuring him. PW2 also saw deceased on count two alighting armed with a knobstick and that accused no.6 had dispossessed the deceased on count two of the knobstick and had struck him with it. Deceased on count two had fallen to the ground. He saw accused no.6 fetching a wooden log from the homestead and striking the deceased on count two who was already on the ground and unarmed. He also saw accused no.1 dispossessing accused no.6 of the rock and going to fetch a motor vehicle to convey the injured people to hospital. PW2 saw accused no.2 and the deceased engaged in a fight and deceased falling. After the deceased fell and accused no.2 went away he noticed that the deceased was getting up and accused no.2 went back to strike him with a bushknife on his head three times. When accused no.2 was walking away and before entering the homestead, accused no.2 was seen by the witness licking the blood from the bushknife. This witness also made a very good impression to the court and was not shaken under cross-examination. I have no reason why his evidence should not be accepted.

The Crown also called PW3 Sozabile Lloyd Ngwenyama. He too testified that he knew the deceased. They were his uncles, some the accused were his cousins, others uncles. He told the court that the other accused were not related to him but he knew them by sight, having seen them at the homestead on the night in question. All the accused were present he told the court.

When he was about to leave he asked the accused to give him some meat. Then he heard a female voice shouting, "Here is the motor vehicle we have been waiting for." PW3 immediately went out of the tent where the ceremony was and saw four boys running to stop the motor vehicle. He said these boys managed to stop the vehicle. These boys were Manqoba, the boy who disappeared just before the trial, accused no.3, accused no.5 and accused no.7. He told the court that Manqoba was carrying a branch, which was exhibited and handed in. He said Manqoba stood in front of the motor vehicle so that the driver had to rev the engine to frighten Manqoba away but to no avail. The others stood on the side and at the back of the motor vehicle. It was his evidence that the driver of the motor vehicle then came out. He was armed with a bushknife. The other accused and Manqoba fled towards the homestead. A group of people came from behind and a fight ensued. It was his evidence that the fight was fierce. When PW3 first saw this he was standing in the yard and this yard would not have been far away considering the evidence of PW1 who said the road passes not far from the yard.

PW3 said as the other group closed in to the motor vehicle, the deceased Sponono also alighted from the vehicle. This piece of evidence corroborates that of PW1. He said the deceased was armed with a knobstick. He used the knobstick to strike some of the attackers but was subsequently disarmed. The other deceased was also disarmed. It was PW3's evidence that it was at this stage that accused no.6 went and fetch a wooden log and used it to strike deceased on count two. PW3 says he was there on the scene trying to intervene. He saw accused no.1 dispossessing accused no.6 of the log and striking deceased on count one with it. He said at this stage both the deceased were on the ground and had no weapons.

PW3 saw accused no.2, 4 and 6 actively engaged in the fight. He told the court that he saw accused no.4 kicking the deceased as they were on the

ground. PW3 was then told by accused no.2 not to intervene but to leave the deceased there because they have killed his father. When PW3 left, he testified that the deceased had died but when he was at the homestead he heard a female voice saying one of them is getting up, meaning one of the deceased. PW3 then saw accused no.2 fetching another bushknife not the one the deceased had been armed with and accused no.2 went back and found deceased seated with his legs outstretched. Accused no.2 struck the deceased three times with the bushknife and as the witness proceeded towards the homestead accused no.2 licked the blood of the bushknife.

I find corroboration in the evidence of PW1, PW2 and PW3. I have taken into account the witnesses may not necessarily give the correct sequence of the event as they unfolded at the time. This is to be expected in any trial but on the whole the witnesses were able to tell the court what some of the accused did in the commission of the offence. This to me, for the purposes of common purpose suffices.

PW4 Constable Mcebo P. Langa an official of the scenes of a crime and a photographer handed in exhibit "1" certain photos taken at the scene of the crime. The photos clearly show the motor vehicle in which the deceased had been travelling, and the deceased bodies. The photos themselves especially those befitting the deceased are extremely horrifying. It is in keeping with the evidence given by the witnesses that brutal assault was carried out on the bodies of the deceased. The deceased were killed in such an inhumane and brutal fashion and the photos corroborate this. The photos also corroborate part of the description given by authorities in exhibit "A" and "B".

The Crown also led the evidence of PW5 Sergeant Chris Khumalo the investigating officer. He received a report and went to the scene of the crime. He told the court that the report had been made by accused no.1 who

had conveyed the injured persons either to the police station or to the hospital. These injured persons were accused no.5 and no.7.

The evidence of PW3 is to the effect that when accused no.1 took accused no.5 and no.7 to the hospital or the police station, the fight had continued. It is important to note at this stage that when accused no.1 took these people to hospital he also took the bushknife that one of the deceased had been armed with to the police station.

Then there is evidence that as the fight continued, accused no.2 fetched another bushknife from the house and that clearly explains why there was the evidence of PW1 and PW2 that accused no.2 had used another bushknife. After he had used the bushknife that he fetched from the house, accused no.2 licked the blood from it.

The evidence of PW5 reinforces the evidence of PW3 that the bushknife used by accused no.2 was not the same bushknife of which the deceased on count one had been dispossessed. That bushknife that the deceased was dispossessed of had already been taken to the police station. The fact that that bushknife was not traced and brought to court does not detract from the fact that a bushknife had been in fact used. In fact there was evidence that there was also a gun seen there but these two were never found by the police and brought to court.

The wooden log was handed in as exhibit "2". PW5 arrested the accused and took them to the police station where he warned them in terms of the Judges Rules. He then charged them. Some of the accused made written statements, which were handed in as exhibits. The contents of these statements have been noted for the purposes of credibility and consistency to the evidence of the accused **viva voce**. It is against this background that the evidence of the respective accused are going to be analysed. I do not

lose sight of the fact that the Crown bears the onus of proof beyond reasonable doubt.

By consent, the summary of evidence of PW10 was to be handed in. the contents of the summary of evidence relates that presence of the bushknife was not contested. That evidence reads as follows and I quote:

“Mandla (accused no.2) came back and hit the deceased with a bushknife for the second time.”

This piece of evidence corroborates the evidence of PW2 Vusi Sibusiso Gama who testified and I quote:

“Accused came and disposed accused no.6 of the log and then went home and fetch a motor vehicle. He picked up the injured no.3 and no.5 and another. He did not pick up the deceased.

After accused no.1 had left, accused no.2 and the first deceased continued fighting and the deceased fell. The two deceased were left there. Popi the deceased on count one got up and sat on his buttocks. Accused no.2 went back and hit him three times with a bushknife on his head.”

There is therefore no doubt in my mind that when accused no.1 left for the police station he took the bushknife with him. The evidence that accused no.2 came from the homestead with another bushknife is therefore corroborated and reinforced by the evidence of PW5 who also told the court that accused no.1 had brought with him a bushknife to the police station. That bushknife was the one the deceased on count one had brought along when they arrived in a motor vehicle.

At the close of the Crown case, I acquitted and discharged accused no.1 on both counts in terms of Section 174(4) of the **CRIMINAL PROCEDURE AND**

EVIDENCE. Even though Mr. Hlophe had made an application of acquittal of some of the accused the application was refused.

Mr. Hlophe then called accused no.2 to his defence. Accused no.2 denied being involved in the attack on any of the deceased. He told the court that he drank a lot, became drunk and went to sleep. He said he was woken up by loud noise. And here again, I will note that the most crucial defence that he was asleep at the time were never put to the Crown witnesses who incriminated him in the offence. Accused no.2 stated in his evidence that when he woke up he was still drunk. This too was never put to the Crown witnesses. Accused no.2 stated in answer from the Crown counsel that he did not know why he said in his statement that the police came to his house. He said he does not know why he said that. This is very strange that he could make a statement and say in cross-examination he does not know why he made it.

In answer to another question by the court, he said he did not tell the police in his statement that he was drunk because the police had noticed that he was infact drunk. This statement may not in itself have any relevancy but it certainly goes a long way when one considers the credibility of a witness.

DW2 Percy Gadlela's evidence comes very close to collaborating PW1 and PW2's evidence except that DW2 denies that he and the other boys blocked the path of the motor vehicle in which the two deceased were travelling. He also denies that they went to the road in response to a woman's voice that the motor vehicle they have been waiting for had arrived. DW2 admits however to pointing out a branch to the police that is said to have been carried by Manqoba. He tells the court that the police said he should say so. It is very strange why the police would implicate an accomplice witness instead of implicating the accused who is being charged. And it is also

strange why he would want to point out this branch if it had nothing to do with the blocking of the motor vehicle the deceased were travelling in.

Under cross-examination by the Crown he stated he never bothered to ask why the deceased were attacking them. According to DW2 once he had entered the homestead fleeing from the attackers, he completely forgot about the attackers. He did not even bother to see if the attackers returned to their motor vehicle after pursuing them. This is absurd in the extreme. According to DW2 the police coerced him to point out the branch and say that Manqoba had been carrying it. This is highly unlikely. Why would the police want to implicate Manqoba instead of the accused. Both DW1 and DW2 made a very poor impression on the court's mind. I have no hesitation to reject their evidence as being false.

The third witness for the defence was Mpostoli Paul Mazibuko. His story is similar to DW1 and their version were never put to the Crown witnesses. DW3 was very poor in the witness stand such that he deliberately lied. He stated that the police had forged his signature in the statement that he made to them. This was never put to the police witness.

Under cross examination he admitted that exhibit "F" contained the true account of what he had said. Why would the police forge his signature if he admits? I have no hesitation at all at rejecting DW3's evidence as false.

DW4 Michael Jibhi Nhlengetfwa, his evidence is to the effect that he was coming to the rescue of accused no.7 when he was attacked by the deceased on count two with a knobstick. He fell down and he was choked by the deceased on count one. He managed to dispossess the deceased of the bushknife or picked from the ground. He did not strike any of his attackers with the bushknife he had gained possession of but merely took it to accused no.1.

DW4 in his evidence makes a damning indictment to the police. He says the police pointed firearms at him at the hospital. This piece of evidence was never put to the police officers when they gave evidence. He, too like the other two witnesses who were attacked by the deceased did not bother to ask why they were attacked. DW4 denies most of the contents of exhibit "E" a statement, which he made to the police. Pressed further by the Crown counsel he admits the contents. DW4 made a very poor impression in the court's mind especially under cross examination. The court rejects his evidence as well.

DW5 Simeon Mazibuko. His story is similar to the other accused that became drunk and went to sleep. He denies the evidence of PW2 and PW3. According to him he did not even see the fight. He was told by Siphwe and an old lady LaNkambule what had happened. He denies the presence of PW3 at the night vigil and this too was never put to PW3. According to him he saw the motor vehicle's doors wide open but for reasons unknown he did not see any dead bodies in the vicinity. He said he asked Siphwe and LaNkambule who informed him about the injured persons but they did not tell him anything about dead persons. This, clearly is an attempt to distance himself from anything to do with the dead bodies. He concedes that PW2 and PW3 visited all their cousins and uncles and did not discriminate. He does not know why they incriminate him. The court finds no reason why PW2 and PW3 would suddenly and falsely incriminate accused by giving evidence that accused had taken part in the assault of the deceased.

David Gcina Tsela was DW6. His evidence was along the same lines as DW5. Asked by the counsel for the Crown why he left accused no.5 behind because they were going to the same place and will board the same bus the answer was that he wanted accused no.5 to find him at the bus stop. He also says that he did not know where the bus stop was. DW6 too does not seem to

have seen the assault on the deceased nor was he aware that they have been killed. He did not bother to ask who are the people who attacked them and says this is because he was in pain. To me that would be the reason to find out who the attackers are if you are in pain.

Under cross-examination when he was asked to read his own statement, he objected and stated he could not read his own handwriting. He states that if there is any difference in his written statement and the oral evidence, it is because when he made the written statement he was still confused. The court finds this witness to be a very unreliable and unsatisfactory witness. That concluded the defence case.

We now deal with the case law. The accused are charged with the murder on count one of Popi Robert Mazibuko and on count two the murder of Sponono Mazibuko. The allegation is that on or about the 28th September 1998 at or near Maliyaduma at the Manzini District they did, all of them acting in common purpose did wrongfully and unlawfully killed Popi Robert Mazibuko and Sponono Mazibuko and thereby committed the offence of murder.

The doctrine of common purpose has undergone a number of adaptations since the formulation by Dove Wilson JP in **REX VS GUNSWORTHY 1923 WLD17** where phrases like “ought to have known” have been replaced and substituted by words like “possible” so that instead of “where two or more persons combine in an undertaking for illegal purposes 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 they ought to have known would be a probable result of their endeavouring to achieve their object.” In **S VS MALINGA 1963(1) SALR 692A** the word “probable” was substituted by the word “possible”. It was in Malinga supra that it was held that criminal liability based on common purpose was not vicarious liability but depended on an actor’s own association in the common design is

therefore seen as the conduct element. In crimes such as murder association or conspiracy with the “actual” killer may be sufficient to render such a person guilty of murder if his association with the main perpetrator can be said to have casually contributed to the death of the deceased. See in this respect the **GENERAL PRINCIPLES OF CRIMINAL LAW THROUGH THE CASE - PJ VISSER JP VORSTER AT 448.**

I find the following facts to have been proved. PW1 Jabulane Zwane heard a loud noise, went of his house to investigate and saw a lot of people descending towards the deceased’s motor vehicle. He heard a female voice saying “kill, strike” and saw a wooden log being lowered in a striking fashion. The motor vehicle upon which the people were descending was the one the two deceased had been travelling in.

PW2 Vusi Sibusiso Gama stood at plus minus 150 metres away from the motor vehicle in which the two deceased were travelling. He saw the motor vehicle stopping and saw Manqoba carrying a small stick. Deceased on count one alighted and Manqoba fled and stopped where accused 2, 3, 5, 6 and 7 were. He saw the deceased on count one hacking accused no.5 with a bushknife on his side and also saw accused no.7 being hacked. He saw deceased on count two alighting as other persons were trying to dispossess deceased on count one of his bushknife. He saw deceased on count two being disarmed by accused no.6 and accused no.2, 5 disarming deceased on count one of the bushknife and accused no.2 and 5 chopped by deceased with the bushknife. He saw accused no.6 fetching a wooden log and striking the deceased who was already on the ground and unarmed. He saw accused no.1 dispossessing accused no.6 of the log. Accused no.2 and the deceased Popi were still fighting and Popi fell on the ground. Accused no.2 went away. Popi rose, and sat on his buttocks, accused no.2 returned armed with another bushknife and chopped Popi on his head three times. He then saw accused no.2 licking the blood from the bushknife.

PW3 Sozabile Lloyd Ngwenyama identified all the accused. He heard a female voice shouting and saying "here is the motor vehicle we have been waiting for". He went out of the tent and saw four boys running to stop the motor vehicle in the road and stopped it. These boys were Manqoba, Gadlela accused no.3, accused no.5 and accused no.7. Manqoba carried a branch and stood in front of the motor vehicle. The driver of the motor vehicle revved it to frighten Manqoba to no avail. The other boys stood by the motor vehicle. The driver alighted armed with a bushknife and struck accused no.5 and no.7 with it. The other persons fled to the homestead. Another group emerged from behind and a fight ensued between the deceased and accused 2, 4 and 6. PW3 approached the scene and tried to intervene. He saw Sponono the deceased alighting armed with a knobstick. As he was busy intervening he could not see who was hitting who. He saw Popi and Sponono being disarmed. He saw accused no.6 fetching a wooden log and striking Sponono with it. He saw accused no.1 disarming accused no.6 of the log and striking Popi twice with it and accused no.1 took the injured accused no.5 and 7 away. The remaining accused continued with the fight these were accused no.2, 4 and 6. He saw accused no.4 kicking the deceased as they were on the ground. PW3 was informed by accused no.2 not to intervene as these people had killed his father. He left and when he was at home he heard a female voice saying "he is getting up." He saw accused no.2 going to fetch a bushknife, came back and struck the deceased on count one three times on his head with the bushknife.

In the light of the above facts, it is not necessary for this court to make a finding as to which accused's conduct was causally related to the death of the two deceased. In the light of the case law mentioned supra and also **S VS THOMO 1969(1) SA385 A** and having regard to the principles relating to the doctrine of common purpose, if a court finds that the conduct of a socius consists of some form of conscious assistance to the principal actor

which is directed to the achievement of the purpose present to the mind of the socius at the time he so conducted himself this suffices to render him criminal liable for his part.

I am therefore satisfied that the accused acted in common purpose in killing the two deceased and I find them guilty, that is accused no.2 to no.7 guilty as charged.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

Ordinarily after conviction of accused persons on a charge of murder the accused are called to the witness stand to give evidence when the question of extenuating circumstances is being investigated. However, this is not an invariable procedure, a trial Court can always examine the whole evidence during the trial and find the presence or otherwise of extenuating circumstances.

The Court after convicting the six accused of the crime of murder the Court had to consider whether there were or not extenuating circumstances. The Court had to consult certain authorities including decided cases in order to determine this. Amongst others, the Court has consulted the case of **REX VS MTHEMBU 1982/1986 SLR @24** and **REX VS ZIBANE MKHOMBENI DLAMINI 1970/76 SLR @440** where it was held the following and I quote:

“The trial Court can only decide the question of extenuating circumstances upon evidence either led specifically on that which may differ from the evidence led in the main trial or which may fairly be gathered from the case as a whole. The Court cannot speculate upon what might possibly be extenuating circumstances.”

I indicated to Mr. Hlophe that I was of the view **prima facie** that considering the evidence as a whole, extenuating circumstances were present. However, when I invited Mrs. Dlamini to indicate her attitude Mrs. Dlamini was of the

view that she would address me and submit that there were no extenuating circumstances. In view of the attitude by Mrs. Dlamini I allowed her an opportunity to address me. She stated in her submission that even though the accused has stated in their evidence-in-chief that they had been under the influence of liquor or drunk this should not be accepted by this Court as evidence because it had never been put to Crown witnesses. She stated that therefore this was not evidence properly led before this Court.

Mrs. Dlamini further submitted that there was also no evidence of any belief in witchcraft. Although the accused's mother was taken to a prayer woman but there was no evidence that this has anything to do with witchcraft. She stated further that the accused were the perpetrators of the dispute involving a land and they cannot be said to have been morally unblameworthy for the final result.

I am now briefly going to refer to what the attitude of our courts in Swaziland as indeed also in South Africa define extenuating circumstances. Extenuating circumstances have been held to be circumstances not too remotely or indirectly related to the commission of the offence, which would reduce the accused's moral blameworthiness. In this regard, I will refer to the case of **MBUYISA VS REX COURT OF APPEAL 1979/81 SLR @283**. During the trial evidence has been led that there has been long standing feud between the Mazibuko clan and when the late Frank Mazibuko died the two deceased did not even attend the funeral because of this feud. It is clear that if they had gone there they would possibly have been a fight and possibly a loss of life. Also, during the cleansing ceremony the two deceased did not deem it fit to go and attend because they were considered enemies. All this emerged during the trial infact whenever they went pass the homestead of the late Frank Mazibuko in a motor vehicle the two deceased would be armed. The Court did not read that to mean they were perpetrators of the fight, which ultimately ensued. It was clear if they had

not been armed they would have been attacked by the people who considered them to be their enemies.

I am stating this to show that infact there was this long standing feud and as a result of this feud ultimately there was this fight which resulted in the death of the two deceased.

In my judgement there is sufficient evidence to show that there are extenuating circumstances in this matter excluding the question of consumption of liquor. Therefore, the present accused's moral blameworthiness can be said to have had an effect on the commission of this crime. It is not like a case of accused persons who would go about robbing people in order to take their monies without any reason whatsoever.

In the result, I find that there are extenuating circumstances in this matter.

JUDGMENT ON SENTENCE

One of the most difficult task the trial Court has is when it comes to sentence because whilst it is easy for witnesses to give evidence what each accused did and the court take that into account but the stage of passing sentence the Court has to take into account in favour of the person who has been convicted certain factors. Infact the courts are so impartial in these matters that sometimes an accused person uses vulgar language directing it to the Court but the Court will have to be calm when it comes to sentencing and take factors into account that the accused might not even have advanced in order to pass an appropriate sentence.

Mr. Hlophe has addressed me at length concerning each and everyone of the accused. Factors that I have to take into account but I have to write out a judgement and specifically focus my attention on each and everyone of them. I cannot do that in a haphazard manner because we are dealing with

lives of human beings nor can I say there will be one sentence for all because each accused has got different personal circumstances which have to be taken into account even though the doctrine of common purpose was taken into account in arriving at the conviction but the court will have to take personally each circumstance relating to each accused.

SENTENCE

Passing of a sentence on each of the accused has presented me with some difficulty as some of the accused have been convicted or complicity resulting to commission of crimes. These crimes are different from crimes of rape where another person can hold a woman so that another male can rape the woman, these crimes differ in that you can enable the murderer to kill a person by doing something which if the murderer is convicted you will also be equally guilty. In the former case, the rape, there is no way that a person who helped the rapist by holding the woman can also be convicted of rape because rape is defined in such a way that it is the person who does the act by penetrating the woman.

In this particular matter, I find some of the accused to have intentionally contributed to the death of the two deceased. Those accused who delivered the fatal blows on the deceased were able to do so because those are the accused that responded to the female voice-call that the motor they have been waiting for had arrived. They had stopped the motor vehicle. If the accused who successfully barred the motor vehicle in which the two deceased were travelling had not done so the accused who subsequently delivered the fatal blows on the deceased and brought about their death would not have succeeded in doing so.

Mr. Hlophe has addressed me in mitigation that some of the accused have been convicted on the basis of common purpose doctrine and that the part played by them was minimal. I have given serious consideration to fact that

Mr. Hlophe has drawn my attention in regard to each of the accused. I have endeavoured to individualise in doing so as I have taken the nature of the offence, the interest of the public and the interest of each of the accused into account. In so far as the circumstances of this particular case are concerned I have not lost sight of the long-standing feud of the Mazibuko family. There are two camps here, those on the side of the deceased and those on the side of the accused.

Considering all these factors, I pass the following sentence:

Accused No.2 - Mandla Patrick Mazibuko will be sentenced to seven years imprisonment backdated to 29th September 1997.

Accused No.3 - Percy Gadlela is sentenced to five years imprisonment backdated to 29th September 1997.

Accused No.4 - Mpostoli Mazibuko is sentenced to seven years imprisonment backdated to the 29th September 1997.

Accused No.5 - Michael Jibhi Nhlengetfwa is sentenced to a five years imprisonment backdated to the 29th September 1997.

Accused No.6 - Simeon Siphon Mazibuko is sentenced to seven years imprisonment backdated to the 29th September 1997.

Accused No.7 - David Gcina Tsela is sentenced to 5 years imprisonment backdated to the 29th September 1997.

JUDGMENT ON SECOND COUNT

You were sentenced on the 7th December 1998 to their respective sentences you are aware of. I omitted to deal with the second count and you are aware you were convicted on both counts as charged. I then arranged with the

Director of Public Prosecution to have you brought here so that I sentence you on the second count as well. I have explained to your counsel that there is no prejudice on your part because you were in any event convicted on the two counts of murder and you were sentenced by me only on one count. What remains is that the court should now pass sentence on the second count. I have indicated to Mr. Hlophe that there would be no prejudice because I contemplated ordering that the two sentences run concurrently.

Accused are sentenced as follows on count two:

Accused No.2 - Mandla Patrick Mazibuko will be sentenced to seven years imprisonment backdated to 29th September 1997.

Accused No.3 - Percy Gadlela is sentenced to five years imprisonment backdated to 29th September 1997.

Accused No.4 - Mpostoli Mazibuko is sentenced to seven years imprisonment backdated to the 29th September 1997.

Accused No.5 - Michael Jibhi Nhlengetfwa is sentenced to a five years imprisonment backdated to the 29th September 1997.

Accused No.6 - Simeon Sipho Mazibuko is sentenced to seven years imprisonment backdated to the 29th September 1997.

Accused No.7 - David Gcina Tsela is sentenced to 5 years imprisonment backdated to the 29th September 1997.

Each accused is sentenced on the same terms and conditions with the proviso that the two sentences are ordered to run concurrently.

J.M. MATSEBULA

JUDGE