

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.172/98

In the matter between:

**PHILLIP WAGAWAGA M. NGCAMPHALALA
AND SEVEN OTHERS
VS
REX**

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MS. LANGWENYA
FOR ACCUSED 1 & 5	:	MR. S. NXUMALO

ACCUSED 6	:	MR. MASINA
ACCUSED 2, 3, 4 & 8	:	MR. BEN
SIMELANE		

JUDGMENT

The accused are charged on count one with the crime of murder.

The allegation being that on or about 26th December 1997 and at or near Nyamantulwa area in the Lubombo District. The said accused persons each or all of the acting in common purpose did unlawfully and intentionally kill Ndod'ebovu Mamba.

On count two the accused are charged with the crime of murder in that upon or about the 26th December 1997 and or at near Nyamantulwa area in the Lubombo district the said accused persons each or all of them acting in common purpose did unlawfully and intentionally kill Piet Mamba.

On count three the accused persons are charged with the crime of arson in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused persons each or all of them acting in common purpose did unlawfully and with intent to injure Doris Sibandze set her property on fire and thereby damaged and ruined three huts being the immovable property of the said Doris Sibandze.

On count four the accused persons are charged with the crime of arson in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused persons each or all of them acting in common purpose did unlawfully and with intent to injure Esther Lomhlangano Mamba set her property on fire and thereby damaged and ruined her huts being the immovable property of the said Esther Lomhlangano Mamba.

On count 5 the accused persons are charged with the crime of malicious injury to the property in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused persons each or all of them acting in common purpose did unlawfully and intentionally break windows and destroy property inside a house the property of or in the lawful possession of Ncamsile Ncane Ndzabandzaba and thereby destroyed the said property.

On count 6 the accused persons are charged with the crime of arson in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused persons each or all of them acting in common purpose did unlawfully and with intent to injure Esther Fakazile Mamba and her property set on fire and thereby burned down six huts being the

immovable property of the said Esther Fakazile Mamba.

On count 7 accused one only is charged with the crime of assault in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused unlawfully and intentionally assaulted Doris Sibandze by striking her with an open had on the face.

On count 8 accused number five only charged with the crime of assault in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused did unlawfully and intentionally assault Esther Lomhlangano Mamba born Msibi by hitting her with a knobstick on the head.

On count 9 the accused persons are charged with the crime of assault in that upon or about the 26th December 1997 and at or near Sinyamantulwa area in the Lubombo District the said accused persons did unlawfully assault Dotiya Matse by hitting her with different weapons all over her body.

All the accused pleaded not guilty to all the respective counts as set out above and they were duly represented by their respective counsel.

At the commencement of the trial Ms. Langwenya who appeared for the Crown informed the court that accused no.7 had died in custody. Accused no.7 being Philemon Ndzabandzaba.

Certain forms relating to the post mortem examination were handed in by consent in respect of count 1 and 2. Exhibit "A" relating to Ndod'ebovu Mamba was handed in by consent and on its front page the doctor gave the reason for the death of the deceased as multiple injuries. On page 2 thereof the doctor goes on to describe the type of injuries suffered by the deceased on count one. It is stated that the body was charred and the abdominal contents spilled out as well as the brain matter over the left side. There was also a fractured rib on the left side, laceration with lacerated lung 2.7 x 1.43cm and third degree burns all over the body red in colour.

With regard to the brain and cerebral the doctor states that the brain was burned and discoloured. In so far as the spleen, right and left kidneys these were hardened and discoloured. That was the contents of exhibit "A" in relation to the deceased Ndod'ebovu Mamba.

Also by consent exhibit "B" was handed in, a report and post mortem examination relating to the deceased on count 2, Piet Mamba. The doctor expresses the opinion that the death of the deceased on count 2 was due to cerebral injuries. On page two exhibit "B" the doctor describes the following he found blood over the skull, forehead, nose, right ear and noted the following injury:

1. Scar over the left forehead 3.5 x 0.6cm with abrasion 4cm and 5cm on the scalp area.
2. Cut wound in front of the right hear 2.0 x 6cm with laceration on the measuring 2.7cm.
3. Laceration of the right oecipital 2.7 x 2.9cm with depressed fractured skull over the peritoccipital region measuring 3.3 x 2cm into the middle cranium pleura and diffused cranium haemorrhage over the brain which was about 230ml.
4. Linear lacerated wound over the right eye 3.7 x 1cm muscle deep.
5. Abrasion over the left arm 17cm area. In so far as the mouth, tongue and thorax the doctor noted blood clots at the right ear and nose.
6. Abrasion over the outer aspect of the right chest 17 x 16cm area fracture sternum at middle right shoulder measuring 3,2cm.
7. Abrasion over the left arm 5 x 0.1cm.

I have taken the trouble to delve into the above because it will be important in the course of this judgment as showing the possible type of weapons that were used in causing these injuries. For the purposes of this judgment it will be appropriate to set out in broad outline the background too and the historical set up of the relationship between the family of the two deceased i.e. deceased on count 1 and deceased on count 2 and that of the accused.

I can do no better in dealing with the above than refer to the evidence of the witness called by the court in terms of Section

199(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT, one Nhlavana Mamba. The witness was stated as PW8 in the proceedings but in fact he is neither PW8 nor DW8 because he was called by this court. This witness testified, according to him he is the "indvuna" of the area and the accused knew him as such. It was his evidence that after the alleged crimes had been committed one Magalaza Mndvoti and Malunga Mamba came to fetch him at his homestead and made a report. As a result of this report he went to where the accused and others had gathered at Mndvoti's grocery. He said he estimated plus minus 10 people at that stage who had gathered at Mndvoti's grocery subsequently other people arrived and the numbers swelled up to plus minus 40. This witness testified that he knew most of the people albeit there were others he did not know. The witness testified that even though a long time has passed since this incident occurred he could remember accused no.1 Wagawaga Ngcamphalala; accused no.5 George Mamba.

The witness named other people with the namesake of Accused no.2 and 2. According to this witness he immediately addressed these people and said:-

"I was too brief, My Lord, because the police were already there. I told them that they had done wrong and this was something big and I even told them that now they were in the hands of the police."

His evidence appears at page 305 of the transcribed record. As far as the transcribed record and my notes the evidence of this witness was not challenged. The court will refer in so far as the question of unchallenged evidence is concerned to the case of **MALELE 1975(4) SA 128 T** where the Judge at page 157 said the following and I quote:-

"It is a standard practice for the cross examiner to put to each opposing witness so much of his own case or defence as concerns that witness. He should also inform the witness of witnesses who will contradict him. It is improper and unfair to let a witness's evidence go unchallenged in cross examination and then to argue at the end that he should not be believed".

For the purpose of this judgment I agree with the sentiment by the judge in that particular case. This witness continued and said that both the plus minus 10-12 and subsequently the increased number which went to plus minus 40 spoke in the siSwati language. This

witness also testified that he had found the deceased, Piet, was one of the persons that he found at Mndvoti's Grocery and he was at the point of dying and subsequently when the witness came back he found that Piet had died.

He said he also saw Ndod'ebovu deceased on count one had also died. He said he knew both the deceased on count 1 and 2. According to the evidence of the witness both the deceased on count 1 and 2 were not acceptable in the area on account of their parents having been told to leave the area. The reasons for this according to this witness was that the parents were alleged to be stock thieves and they were ordered to vacate the area but neither the two deceaseds' parents nor the deceased themselves complied with this order.

Defence counsel for accused no.1 and 5 never challenged this witness's evidence nor did counsel for accused no.2, 3, 4 and 8 challenge the witness's evidence. Mr. Masina counsel for accused no.6 questioned the witness about the meeting having been properly authorised. And the witness was adamant that the meeting had not been authorised. He stated that he was the one who caused meetings to be convened. He stated that he was the one who caused meetings to be convened. When the witness was cross-examined further he threw some light on what he meant by Ingwavuma. He said by Ingwavuma he meant people who lived along the Ingwavuma River and stated that Abednigo's father was still under his jurisdiction. He also stated that their King Maja of the Mamba clan had ordered Ndod'ebovu to move away from where he had his homestead to another area still in his jurisdiction and not out of Swaziland. This witness told this Court that this order was directed to the parents of the deceased on count one. The witness said he knew the accused although they being young they would only come to the meetings called because of certain needs like wanting certain documents but otherwise they don't attend meetings.

The above is in short the background to the case the accused persons are facing. What remains for this court to do is to deal with evidence of the Crown witnesses and that of the accused. Before I deal with the evidence of the Crown I do propose to dispose of one factor relating to certain evidence. Allegedly made by accused no.6 and recorded in RSP 218 and RSP 79. During the trial and to be specific, under cross examination of accused no.6 it emerged that accused no.6 had made certain statements to the police. Initially Mr. Masina hinted that he would have no objection that the statement be handed in as his client had agreed that he had made statements.

However, when the statements were furnished and Mr. Masina noted

their contents he advised the Court that the contents were inadmissible confessions to a police officer. I then stood the matter down to enable Mr. Masina and Mr. Sibandze who was then prosecuting to prepare arguments on the contents of the statements. And thereafter the two counsel advanced their arguments and I made a ruling thereof. I ruled that the statements were admissible. However, when further cross examination was conducted of accused no.6 by the Crown, accused no.6 differentiated between a statement recorded by Sergeant Mkhabela and then signed by herself and one which she herself recorded.

Accused no.6 said she was contesting the statement recorded by the Sergeant even though I had ruled that the statements were admissible by virtue of the fact that they were not of the nature a plea of guilt before a court of law in view of the evidence given by the accused. Under cross-examination I had to reconsider my ruling because under cross-examination she said the Sergeant recorded this statement and asked her to sign. The Crown was unable to advance any contradiction to the answers by the accused and I had to give her the benefit of the doubt in so far as the statement recorded by the Sergeant and which according to her under cross-examination she signed.

The cross-examination dealing with this statement is recorded in detail in the transcribed book of proceedings from page 269 to 274. I won't read the whole record because I believe it will form part of this judgment and also of subsequent records even if the matter would proceed further to appeal this record would be available. Starting at page 268 of the transcribed record the Crown put the following questions and I read the question:

CROWN: "Madam, do you remember this statement I showed you yesterday?"

ACCUSED: Yes I do.

CROWN: This is what I am talking about.

ACCUSED: I thought yesterday you meant that I must open and look at the paper to see whether I did identify my handwriting or thumbprint on the papers".

That is where she explained that there were in fact two statements, one recorded by the Sergeant and the Sergeant asked her to sign that statement and the other recorded by her and I had ruled that the contents were not of the nature of a confession and they were going to be admissible but because of what the accused explained which was acceptable I had to reverse my earlier ruling.

At page 270 the Crown said:

CROWN: "Madam, on the 27th did you write the following?"

ACCUSED: On the 26th I left home going to a meeting which was

said would start at 9.00am”

The Crown asked the accused no.6 being the witness whether she did say that and the answer is “Yes I did say that”.

“When I got to the meeting I got to hear that the meeting held on the previous day on the 25th that is Christmas day they were talking about that we were to attack the people that were giving us problems”.

Then the Crown asked the accused no.6 “Did you say that?” and the accused said “Yes I did”. Thereafter we had some problems with the interpreter Mr. Dlamini who was not present we had to go and get some other interpreter. Going on then accused no.6 states what she said and then the statement recorded in RSP79 is in siSwati but it was translated into English.

For the purpose of this judgment I accept the statement recorded in RSP79 by the accused as reflecting the true state of events. Even though I am not going to read that into the judgment today but I will say the cross examination and answers from the pages that I referred to will form part of this judgment. Incidentally accused no.6 deals with what happened on the occasions when they were going from house to house what would happen and I will pause here to note that her statement corroborates the evidence of the Crown witnesses who gave evidence on those specific points but I will deal with how this can be used against the co-accused.

In that regard I will refer, for the purpose of this judgment to Phipson on evidence, 10th edition and at page 98 where the learned author deals with what he refers to as declaration accompanying acts in criminal cases. And I also will refer to the case reported in the Appellant Division of 1939 the case of **REX VS MILLER AND ANOTHER.** I will come back to this but I will now proceed and read the evidence of the Crown witnesses.

PW1 Esther Lomhlangano Mamba told the Court that she was related to PW2 Doris Sibandze and that her husband was deceased on count one. It was her evidence that she knew the accused even though she did not know their names but they lived in the same

area as she did. She said on the 26th December 1997 she was on her way to attend a funeral when suddenly she came upon a mob of people armed with an assortment of weapons and some were half naked.

She had just come out of the house when she was ordered to go back into her hut but she refused. One from the mob struck her with a stick on her forehead and forced her to open the door of the hut, two girls then came out of the hut these were Nobuhle and Bethulisile who subsequently gave evidence in this trial.

PW1 and the girls were then ordered by the mob to proceed to Ndod'ebovu's homestead, Ndod'ebovu being the deceased on count one. She said they reached Ndod'ebovu homestead and the mob surrounded and encircled PW1 and the two children and one Esther Matsenjwa were subsequently called as PW6 under the name of Esther Fakazile Mamba. PW1 said the mob told them that they were going to die with Ndod'ebovu and then PW2 was Doris Hlabezile Mamba. It was her evidence that she knew the accused they resided in the same area that she did, she said on the 26th December 1997 she was from the fields when the accused and others came to her homestead.

She said it was accused no.1 and she named other names besides accused no.1, she also named accused no.4 as Mabandla. PW2 said he accused no.2 was Mlahlwa and she also said she knew accused no.6 Elizabeth and no.9, Gawozi and no.10 she said was Jackie. She also named one Ntini as the accused next to the accused no.6. PW2 said these people asked her to produce the muti bag, she told them that she did not know anything about muti bag. She however, said she entered and came out with her own bag. She said this was her personal bag and it contained personal effects. She said at this juncture her husband Ndod'ebovu came out carrying a spear and was assaulted by the members of the mob.

According to PW2 accused no.1 started the assault on the deceased, PW2 then saw the body of her husband on fire. She stated that she did not see how it was set on fire. According to PW2 she tried to put out the flames and the members of the mob just stood there and watched. The others were hitting the deceased. PW2 said she

saw the deceased fall down and members of the mob covered him with grass and continued to burn. A tyre was then placed over his head. According to PW2 it was one Mkhali of the member of the mob who put this tyre on the deceased and she said Mkhali was not before court. She said the mob demanded the muti bag from the deceased which according to them he had used to kill one Joseph Tsabedze. It was her evidence that Mkhali and accused no.1 uttered these words.

PW2 then fled to a neighbour one Msongelwa who did not come to her rescue however. She said she returned in the evening and found that three of her huts had been razed by fire. She said it was Mkhali who burned the huts. The court has considered this piece of evidence by this witness against the allegation that it was Mkhali who set the huts on fire but the court does not accept her evidence on this point. According to her, she fled to a neighbour who could not assist her and then came back. She could not have seen Mkhali set the huts on fire. What is the fact is that these huts were set on fire. And the accused who formed part of the mob that were there, I reject that these accused were coerced into joining the mob and I accept the evidence of the "indvuna".

This evidence is considered in conjunction with the documentary evidence of accused no.6 and for the purpose of this judgment this court is not going to consider any differences in the names of the accused as being very material. The court is satisfied she did say she knew the accused because they lived in the same area where she lived and the court is also satisfied that she was asked by members of the mob to produce the muti bag. And the court finds that there is corroboration in so far as this question of production of the muti bag as of the other evidence of the Crown witness. And that the deceased on count one was also ordered to swallow some of the contents of the bag when it was produced.

This evidence the court considers to be viewed with a common purpose, i.e. the motive of the attack on Ndad'ebovu he was alleged to be a wizard. This evidence is corroborated by the documentary evidence as contained in RSP79 referred to by this court earlier on in the judgment. This witness, that is PW2, continued and stated that the members of the mobs were armed with sticks and knob sticks and that they were angry. She said accused no.1 Wagawaga slapped her with his open had and demanded that she should produce the muti bag. She pointed out that the remains of the burnt items which she claimed were the remains of her own items she identified this as her own items which had been burnt.

Both witnesses PW1 and 2 were extensively cross-examined by the respective counsel. The major discrepancies centred around which members of the mod did what at any given time. It is true that the

witness mentioned the different people who did certain acts at different times. In the Court's opinion this can be expected where one is dealing with a mob consisting of plus minus 40-5 people. Why even the accused in their versions when they gave evidence they mentioned different people who did different things at different times.

The only difference in their account being that the people who did these acts are either the people who had been discharged by the Magistrate or the one who had died in custody.

PW3 Ncamsile Ncane Ndzabandzaba was the wife of the deceased on count 2, Piet Mamba. On the 26th December 1997 she was at her aunt's place had left to go and watch a soccer march. She and her husband, the deceased Piet Mamba had left their homestead and everything was in order. She said while enjoying a meal at her aunt's place she and another woman were informed that a certain house was on fire. She said she and her friend went there and found that Mamba's homestead was on fire. She said she tried to retrieve some of the goods from within the burning house and at that stage she saw people milling around the homestead.

She subsequently heard noise at her homestead went there and found that her windows had been shattered and the curtains had been pulled down. She went into the house and found that the property in the house had been burnt. She estimated the burnt property as in the region of E1,800,00. She did not know who caused the damage to her house she also identified some of the remains of her damaged property.

PW3 was cross examined by Mr. Nxumalo the counsel for accused no.1 and 5. The witness in my view stood her ground she was not shaken. Mr. Simelane on behalf of accused 2, 3, 4 and 8 had no questions to put to the witness nor did Mr. Masina counsel for accused no.6. On behalf of accused no., 10 Mr. Simelane had no questions.

PW4 was Nobuhle Hleziphi Mamba testified that she knew accused and she knew them by sight. She said she knew some of the names of the accused. She named accused no.1 and 6, accused no.7 and accused no.8 accused no.9 and accused no.10. She said

the accused resided in the same area that she did she also knew the deceased that is Tsabedze. She said accused no.6 was related to the late Tsabedze. She said she was present on the 26th December 1997 and was in the presence of PW1 and others when a group of people arrived at the homestead she said amongst this group were some of the accused persons. She identified five of the accused who was amongst the group. She said the group comprised of plus minus 40 people. She said the group of people were angry and scolded her mother asking her to open the door of the hut she was in. It was her evidence that PW1 and PW2 were about to leave to go to a funeral. The group then ordered the witness and her companions to proceed to the homestead of the deceased on count one. She said she was unable to identify the persons who were speaking from that group of people she merely heard some voices.

She said these people ordered them to proceed to Nnod'ebovu's homestead. She complied and they proceeded there. She said they were being driven by the mob as they proceeded to Nnod'ebovu's homestead. At Nnod'ebovu, Nnod'ebovu's wife denied any knowledge of where the deceased was. She said a member of the mob one Mabandla kicked the door of the deceased's house and out came the deceased. The deceased was armed with a spear and Mabandla grabbed hold of him from behind and the deceased fell down and other members of the mob pounced on him and assaulted him.

It was PW4's evidence that the deceased protested and vowed that the law would come to his rescue and the voice again from the mob came again and said, "How is that law going to help you because you are going to die" PW4 said the mob then encircled them and then she heard a voice again asking for petrol. According to her she said it was accused no.2 who was asking for petrol. She said petrol was provided and accused no.2 poured the petrol on the deceased and he burned. She said someone had kicked the deceased and he fell down and the mob pounced on him and assaulted him further.

PW4 said accused no.6 was sympathetic towards PW4 and her sister and advised them to remove some of the personal effects from the house. She said ultimately the deceased, Nnod'ebovu died. It was her evidence that when accused no.6 advised PW4 and her sister to

remove some of the personal effects from the house, accused no.4 prevented them from doing so and threatened them with assault. According to her it was accused no.2 who ordered Nnod'ebovu's wife to produce the muti bag. She said the wife was unable to produce the muti bag instead she brought her own bag which contained some cough mixture and some indigenous muti called "sibhaha". At Nnod'ebovu's homestead the homestead was set alight and according to PW4 it was Ntini and Mabandla who set the huts alight.

From Nnod'ebovu's homestead the mob left PW4's homestead they were singing and chanting slogans like "Away With The Thieves", "Away With The Wizards, They Must Be Killed". PW4 says she was in the middle of the mob as it proceeded towards the homestead. She said she was with her sister and others. When they reached Msongelwa's homestead accused no.6 advised PW4 to take out her own clothes and those of her sister because they had nothing to do with what the elders of her family did. She said she took some of the personal effects out and accused no.2 suddenly stopped them and took the effects back into the house and the house was set alight.

PW4 saw this happening and from there they proceeded to Bethulisile's house. At Bethulisile's house accused no.6 advised PW5 and Bethulisile that they should remove their personal effects but before they finish removing them accused no.2 set the house alight. From there they proceeded to their Uncle Singelengele's homestead. PW4 and her companions were still walking in the middle of the group. PW4 stated that the mob continued shouting the slogans. "Away With The Thieves", "Away With The Wizards". At Singelengele's homestead PW4 saw Ntini set Nompumelelo's hut alight. She said she did not see who set the rest of the huts alight. She said Ntini was accused no.7.

The court observed that according to the indictment Ntini is accused no.8 and accused no.7 died in custody. The mob informed PW4 and her companions that they should proceed to Piet's homestead. Once at Piet's homestead the mob sent PW4 and Bethulisile to go and guard Bethulisile's possessions. PW4 said it was accused no.2 who sent them, accused no.2 said PW4 and Bethulisile should rather leave because they will feel aggrieved when their mothers were killed by the mob. PW4 estimated the mob to be plus minus 40. PW4 was examined by the counsel for the different accused. In my view, she stood her ground save for the difference in the names of the accused and what each accused said and did. Again I pause here to say this is understandable considering the happenings at the time and the number of people involved.

The Crown next led the evidence of Mandla Tsabedze PW5 this was

the witness who was subsequently discredited by the Crown and declared a hostile witness. According to the Crown he has deviated from the original statement he had made to the police but before he was discredited he had given a lengthy evidence more or less corroborating the evidence of PW1 to PW4 to some respects. His statement made to the police was identified and read to him and he identified the statement but stated that it had been dictated to him by the police officer. The court will ignore the contents of this statement. However, ignoring the contents of this statement I still find sufficient corroboration of the other Crown witnesses to one another.

The accused themselves were also called to their own defence excluding accused no.9, 10 and 11 who were acquitted and discharged at the close of the Crown case. The remaining accused's case can be summed up in one phrase they denied everything that had been stated by the Crown's witnesses. The court has no hesitation in rejecting the explanation in toto. The Court is going to deal briefly with the onus of proof which is borne by the Crown. But before I do that I wish to state that I have got some difficulty with regard to the assault charges that is count 7, 8 and 9. I am of the view that the acts of assault were done with the single intent of intimidating the complainants to comply with the main motive of getting cooperation from the complainants to get Ndod'ebovu. In all fairness to the accused they should get the benefit of the doubt. I will now have to deal with the question of onus. Having said what I have been saying in my judgments in the paragraphs above, I should hasten to add that I am aware that no onus rests on an accused person to convince the court of any proof of any truth or any explanation given. And in this respect I will refer to the passage in the Hoffman and Zeffert SOUTH AFRICAN LAW OF EVIDENCE (4th ed.) page 535 where the learned authors deal with criminal standard. Reference is made to the well known case of **REX VS DIFFORD 1937** at page 370-373 where the learned Judge said the following and I quote:

“No onus rests on accused person to convince the court of any truth or any explanation. If he gives an explanation even if

that explanation is improbable the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but also that beyond reasonable doubt it is false. If there is any reasonable or possibility of his explanation being true then he is entitled to his acquittal”.

Similarly on the same page in the case of **REX VS M. DAVIS AJ** said the following:

“The court does not have to believe the defence story still less does it have to believe it in all its details. It is sufficient if it thinks that there is a reasonable possibility that it may be substantially true”.

It is also opposite to consider the position as stated in the case of **MILLER VS MINISTER OF PENSIONS 1947** to English Law Report at page 373 and at page 523 of Hoffman and Zeffert. Considering the totality of the evidence it is my considered view that this court is left in no doubt that the accused acting in the furtherance of a common purpose committed the crimes as set out on counts 1, 2, 3, 4, 5 and 6. In reaching this conclusion I am very much aware of the fact that the liability of each accused rests on his or her ***mens rea*** in these cases. Considering the evidence of the Crown witnesses which to a great extent is corroborated by the statement made by accused no.6 in RSP79. At page 249 of the transcribed record reference has already been made to what she said there. At page 270 accused no.6 stated what the meeting was all about.

In the light of the above I find it difficult to credit that none of the accused did anything towards the furtherance of the purpose for which the so called abduction forced them to join. This is the mob to accomplish the mission of killing wizards, witches and thieves that were a menace in that community. This court finds that there is evidence of declaration accompanying acts laying down the foundation of a common purpose. The evidence of the Crown witnesses deposed to the executive statements and acts allegedly deposed to and done by some of the accused excepting the presence of other accused and rejecting that they were merely asked to be present and do nothing. In this regard the court will again refer to Phipson at page 98. In the 9th edition the author says the following:-

“It is immaterial whether the existence of the conspiracy or

the participation of the defendants be proved first. Although either element is nugatory without the other”.

I have already said that the court is aware that such executive statements are not necessarily the evidence of the truth of the assertion that they contain. I refer to **REX VS MILLER 1939 AD** at 119.

In the present case however the acts and declaration of some of the four conspirators were made and performed in the furtherance of the common purpose. I find myself justified in admitting the evidence of one conspirator against the other. I have dealt with the documentary evidence relating to the statement made by accused no.6 and being admitted as her statement. See also in this regard the case cited in the works of this learned author that is **REX VS BLAKE**. Considering the evidence in its totality I find that the Crown has proved its case beyond reasonable doubt in respect of the following counts:

Count 1, 2, 3, 4, 5 and 6. This is in respect of accused no.1, 2, 3, 4, 5, 6 and 8. In so far as count 7, 8 and 9 i.e. the assault charges and notwithstanding that on count 9 no evidence was led, the court is of the view that there exists improper splitting of charges. On count 8 accused no.5 is found not guilty and is acquitted and discharged. On count 9 the accused acquitted and discharged. No evidence was led against them.

JUDGMENT ON SENTENCE

The offences of which you have been convicted especially counts 1 and 2 are undoubtedly very serious crimes. In appropriate cases they are visited with a death sentence but the court have found in your case that there are extenuating circumstances and there has been a wide range of mitigating factors which have been brought to my attention by your respective counsel. Amongst other factors that you have been in custody for a period of four (4) years three (3) months. That must have been a mental torture to you not knowing

what the final outcome of this case would be. I dare say it is also a mental torture that amongst the crimes of which you have been convicted of are two counts of murder and that in itself to know that you have taken lives of two human beings whom you will never see again is a mental torture.

I have taken all these factors into account including your personal circumstances. The court however, cannot only take factors in your personal accounts and not consider the interests of the society. As was stated in the case of **S V ZINN 1969(2) SA 538(A)** where Judge Rumpff referred to as the triad. That is consisting of a crime, the offender and the interests of society.

Considering all these factors and taking into account the interests of society I pass the following sentence:-

Accused no.1, 2, 3, 4, 5, 6 & 8 on count one and two.

On each count they are sentenced to an imprisonment for 7 (seven) years. The court orders that on each count the sentence be backdated to 27th December 1997, that is the date you were taken into custody. The court orders further that the two sentences that is count one and two to run concurrently with each other.

Counts 3, 4 - arson

Count 5 - malicious injury to property

Count 6 - arson

The court will take all these counts together for purposes of sentence. On these counts you are sentenced to 5 (five) years' imprisonment and they are also backdated (i.e. applies to each accused) from 27th December 1997.

J.M. MATSEBULA

Judge