

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 137/98

In the matter between

REX

And

**SIMANGA EPHRAEM LUKHELE
TREVOR MASALA JELE
WILLIAM MSIBI
PHATHIZWE BULUNGA**

Coram
For the Crown
For Accused No. 1 and 2
For Accused No. 3 and 4

S.B. MAPHALALA – J
MRS. DLAMINI
MR. K. VILAKATI
MR. B. SIMELANE

**RULING IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE
ACT (AS AMENDED)
(14/07/99)**

Maphalala J:

The accused persons are charged with the crime of murder. The crown alleges that upon or about the 25th February 1998, at or near Malindza area, Lubombo region, the accused persons acting in common purpose did unlawfully and intentionally kill Mduduzi Tsabedze.

The accused persons all pleaded not guilty and the crown proceeded to call witnesses to prove its case. Each witness for the crown was duly cross examined by defence attorneys for the respective accused persons in accordance with established procedure.

At the close of the crown case the defence made applications in terms of **Section 174 (4) of the Criminal Procedure and Evidence Act (as amended)**. The import of which is that the crown has failed to prove a **prima facie** case to put accused no 2, 3, and 4 to their defence and they are thus in terms of the said section entitled to their discharge forthwith. The application was vigorously opposed by the crown.

The facts of the matter are briefly this: On the 25th February 1998, the deceased was in the company of one Siphso Mkhathshwa at a shopping complex called Highway. They were looking for one Dzeliwe who was deceased lover. Dzeliwe had been seen earlier during the day talking with the accused persons. As PW1 and deceased were looking for Dzeliwe, the accused persons surrounded them. They pounced on

them. PW1 was able to escape. The accused persons assaulted the deceased. PW1 raised an alarm and many people came to the scene. Deceased was conveyed to hospital but later died.

The court heard submissions for and against the application. I have scrutinized the evidence of the crown and carefully considered the submissions made by counsel. The test to be applied at this stage of the proceedings was correctly enunciated by Dunn J in the case of ***Rex vs Duncan Magagula and 10 others Criminal Case No. 43/96 (unreported)***. That the section is of similar import as the South African Criminal Procedure Act 51 of 1977. The test to be applied in such applications is whether there is evidence on which a reasonable man, acting carefully might or may convict. It is clear from the wording of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) that the decision to refuse to discharge is a matter solely within the discretion of the trial court. However, such discretion must be properly exercised, depending on the particular facts of the matter before court.

Having laid the premise the court ought to operate within I now proceed to determine whether or not the crown has made a ***prima facie*** case within the ambit of the section. The crown case against the accused persons is based on the doctrine of common purpose. The essence of this doctrine is that where two or more people associate in a joint unlawful enterprise, each will be responsible for any acts of his fellows which fall within their common design or object (see ***S vs Safatsa 1988 (1) S.A. 868 (A)***). The crucial requirement is that the persons must all have the intentions to murder and to assist one another in committing the murder (see also ***S vs Duma 1945 A.D. 415*** and ***S vs Mkhize 1946 A.D. 197 at 206***).

In the present case from the facts before me it is clear that the deceased died as a result of a blow delivered by accused no. 1. This is common cause. The question I have to answer is whether the other three accused persons also had the requisite intention to kill. In my respectful observation from the facts of the case it cannot be said that the other accused persons had the necessary intention prior to the killing. Moreso, the log which ended up being the killer weapon was picked up by accused no. 1 at the scene when he confronted the deceased.

In view of the foregoing my respectful view is that accused no. 2, 3 and 4 have no case to answer within the ambit of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) and they are discharged forthwith.

S.B. MAPHALALA
JUDGE