



IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.93/99

In the matter between:

REX

VS

- 1. NHLANHLA CHARLES MORATELE**
- 2. PARTY MERVIN DLAMINI**

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MR. MDLULI
FOR THE ACCUSED	:	MR. SIGWANE

JUDGMENT

16/05/01

The two accused are indicted on one count of murder it being alleged that on or about the 19th December 1998 and at or near Msunduza location, Mbabane in the District of Hhohho the accused, each or both of them acting with common purpose did unlawfully and intentionally killed Lucky Vilakati.

At the commencement of the trial, counsel for the Crown and counsel the handed in certain post-mortem reports by consent and informed the court that the cause of death was not being challenged. Both counsel agreed that the witness who had been called to give evidence about having identified the body of the deceased was to be dispensed with. Such identification was not being challenged. Manase Dlamini was called to give evidence as PW1. Her evidence was to the effect that Lucky Vilakati was her lover and they resided at Msunduza. It was her evidence that on the 18th December 1998 she was in the company of her sister Geraldine

Lorraine Bila not necessary walking but in the company. They were later joined by one Fikile Lukhele who later gave evidence as PW3. PW3 enquired where Lucky, the deceased was. All these persons, mentioned above, sat and enjoyed intoxicating drinks.

PW1 told PW3 that the deceased has not arrived because her evidence at the time was plus minus 7pm. The deceased arrived subsequently and proceeded to go and have a bath. When deceased came back from taking a bath, accused no.1 arrived. Accused no.1 then asked PW3 if she could take Mhlume Dlamini to Matsapa where Dlamini was said to have been bereaved. PW3 declined to assist Mhlume Dlamini in driving to Matsapa as she was of the view that he had too much to drink and will not be able to drive. PW3 then turned to the deceased and asked if he is prepared to drive Mhlume Dlamini to Matsapa. It was PW1's evidence that her boyfriend, the deceased stated that he had no problem as long as they would not delay. PW1 stated that the motor vehicle belonged to PW3. PW1 further told the court that accused no.1 accepted that the deceased would drive the motor vehicle. It was from PW1's homestead that the party decided to proceed to PW3's homestead. PW1 said once they had arrived at PW3's homestead, accused no.1 and PW3 started having an argument as accused was no longer prepared to hand-over the car keys to PW3. PW1 stated that they did not want to get involved in the argument of accused no.1 and PW3, they started to go back to their homestead. PW1 however said the deceased remained at PW3's homestead. Apparently, it would appear that the intention was that they would all go to Matsapa, PW1 and the others waited for PW3. They also waited for the deceased and accused no.1 to collect them for the purposes of proceeding to Matsapa. The party of PW3 never returned.

PW1 thought accused no.1 and the deceased had decided to first go to Gobholo before fetching them for the trip. PW1 said she and Lorraine who subsequently gave evidence as PW2 and Reilly PW2's boyfriend decided to go to Sibongile's place. It was PW1's evidence that the three of them left for Sibongile's place and she locked the door to her house. After spending sometime at Sibongile's place, they decided to go back to PW1's homestead. When they arrived at her house they found that the door was no longer locked. She pushed the door open and in the house she found the deceased lying on the bed and the house was lit. PW1 said she then closed the door. She said as she closed the door, accused no.1 and 2 arrived and pushed the door open and entered the house. They immediately asked, "where is he?" and went straight to the bedroom. Once in the bedroom accused no.1 asked deceased why he

started the motor vehicle without the ignition keys. Accused no.2 asked what deceased wanted from his mother, PW3.

PW1 further testified that she then asked who had actually got the engine of the motor vehicle started whereupon accused no.1 answered that it had been started by the deceased. It was PW1's evidence that she then told them that the noise they were making was unnecessary. This advice apparently did not go well with the accused no.1 and he suddenly slapped PW1 with his open hand. When all this was happening, the deceased was lying on his bed reading a book or novel. Then accused no.1 and 2 would intermittently made feints at deceased by using empty bottles as deceased lay on his bed unperturbed. They accused no.1 and 2 would also make feints by means of clenched fists and accused no.2 would continually ask deceased what he wanted with his mother.

PW1 realised that the situation was developing into a nasty confrontation, she decided to go and phone the police from the neighbour's house. As she was leaving, her sister Lorraine PW2 arrived. PW2 gave evidence that she had been woken up by noise from her neighbouring house and went to PW1's house. She testified that the time was plus minus 6.30pm and she wrapped herself with a towel as she had already been in bed. PW2 said as she arrived at PW1's house, she entered and saw deceased lying on the bed reading a book. As she met PW1 before she left for the neighbouring house to phone the police and asked her what the noise was all about. PW2 said that she did not know but accused no.1 were quarrelling with the deceased and according to PW2, PW1 was saying accused no.1 had found deceased and PW3, his girlfriend in bed at Gobholo. PW2 said she was surprised at these news. It was her evidence that accused no.1 also told her that deceased started the motor vehicle without the ignition keys. It was PW2's evidence that she then enquired from the deceased if infact he had done all these things he was accused of and deceased denied and said PW3 had actually started the motor vehicle. PW2 said she saw accused no.1 making feints at the deceased with a beer bottle and sometimes accused no.1 would strike deceased with his clenched fists. She said deceased did not seem to react to this assault but continued reading his book. PW2 then said she then advised accused no. 1 and 2 to drop the matter and they would discuss it the following day. Accused no.1 slapped PW2 with his open hand that she fell down but she rose up again and moved away from accused no.1 and 2 and the deceased. She went and stood at some distance and folded her hands. As she stood at the distance, she could see accused no.1 and 2 continuing with the actions against the deceased,

that is making feints at the deceased. She confirmed that PW1 had left for the neighbour's house to call the police. PW2 said this quarrel continued resulting into a candlelight (lamp) falling off so that the house was plunged into darkness. PW2 said she then saw accused no.2 remove his T-shirt and still asking what deceased wanted with his mother and said I will show you a lesson. It was PW2's evidence that once the light had gone out there was some commotion in the bedroom. She formed the opinion that the fighting was taking place as she suddenly heard glasses or bottle breaking. Immediately thereafter accused no.1 and 2 went out fleeing. She remained in the house but did not see the deceased go out when accused no.1 and 2 went out fleeing. She then decided to re-enter the bedroom looking for the deceased. She looked at the bed where deceased had been lying but could not see him. She thought deceased could have fallen from his bed. As she left the room, she stepped on something she felt was a human part of the body, she felt like it was a hand of a human being. She got a fright, shaking with fear and went out of the house. As she stood out of the house, a group of person arrived asking where is the person who injured accused no.2. PW2 in turn ask if accused no.2 had infact been injured. The answer she got was that he had been injured in his face. One of the boys grabbed hold of her and told her they won't let her go until she shows them where the person who injured accused no.2 was. She became frightened and told them a lie that accused no.1, 2 went out fleeing and deceased had also gone out fleeing. She said some of the boys decided to enter the house. They looked for the deceased, they could not find him as it was dark. One of the boys decided to leave and the one holding PW2 would remain. He assured them that he would keep PW2 held until she showed him where the person who had injured accused no.2 was. The boy that was holding her, led her to PW2's grandmother's house. He was all the time asking where was the person who had injured accused no.2 and she persisted that she did not know but had seen him flee after the accused no.1 and 2 had fled.

PW2 said suddenly at that stage the police arrived accompanied by PW1. PW2 told PW1 that she feared deceased had died because she had stepped on human organ in the bedroom. The police and PW1 entered the house and found the deceased lying next to the entrance of the bedroom. She noticed that he had an injury opposite his heart region. Deceased was conveyed to the hospital. Police said the deceased body was still warm however, on arrival at the hospital, he was confirmed dead and taken to the mortuary.

PW1 and PW2 were taken to the police station where statements were recorded. They only returned to their respective homes at plus minus 5am. It was PW2's evidence that on their arrival at PW1's homestead, they found a knife on a sofa and accused no.2's T-shirt. The knife and shirt was handed in as exhibit 1 and 2 respectively.

To go back to the evidence of PW1, it was her evidence that as she was leaving to go and phone the police, she met her sister PW2 Regalina Lorraine. It was further her evidence that at the homestead where she phoned the police, the occupants did not want to open the door for her and she had to shout outside requesting them to call the police and she told them about the problem at her homestead. After passing the message to the occupants, she decided to go back to her house. As she approached the house, she noticed that the house was in darkness. She again decided to go back to the neighbour's homestead that is the Khumalo's homestead and again pleaded with them to phone the police.

PW1 further stated that while she was at Khumalo's house she heard the sister calling the person and said the person was silent. PW1 said she turned around to go to her homestead and at that stage the police also arrived and they then went into the homestead together. She together with the police using a torch, they entered the house and PW2 told the police that she had stepped on the deceased and he did not show any sign of being alive as he did not move. The police found the deceased behind the door, she testified, and even when they turned him around he showed no sign of being alive. PW1 said they then noticed a hole on his chest opposite the heart. Deceased was wearing a jacket which was opened on the front. The deceased was then wrapped in a blanket and taken to hospital. He was certified dead on arrival. PW1 and the others then went to the police station to make statements. When they went back to the homestead, they found a knife on a sofa, a T-shirt and a police cap. PW1 said the knife was bloodstained. She reported her discovery to the police and the police instructed them not to touch the knife. The police subsequently came and took possession of the exhibits. PW1 identified the knife before court as the one found on the sofa. The knife was exhibit 1. She also identified exhibit 2 as the T-shirt belonging to accused no.2.

PW1 stated that the table and sofa was turned upside down. PW1 was cross-examined extensively by Mr. Sigwane on behalf of accused no.1 and 2. According to PW1 drinking started plus minus 6.30pm. She said they started drinking at this time because they waited for Reggy PW2's boyfriend to arrive at plus minus 6.30pm. Reggy was to purchase the liquor

for them. When he came, he first bought four bottles of beer and accused no.1's boyfriend Fikile Lukhele PW3 later joined them and they all enjoyed the drinks. She was not sure how long it took to finish the bottles of beers but guessed it could have taken them two hours.

I was impressed by the witness, from the answers she gave during cross-examination and her demeanour throughout the trial. The answers she gave in cross-examination corroborated with her evidence in chief. Examples are the following:

In her evidence in chief, she testified that when the group went to PW2's homestead, an argument began between PW3 and accused no.1 ensued over the failure by accused no.1 to release the keys to PW3. PW1 stated that the rest of the group waited outside and did not enter PW3's homestead.

Under cross-examination, she told Mr. Sigwane that she did not see any beers at PW3's homestead because she and her sister and others did not go into the house nor could she assist Mr. Sigwane whether or not there were people in the house. She also said that she did not go to van Delt's place, that is another drinking place.

In her evidence in chief, she said when there was this argument about the ignition keys, she and her companion went back to her homestead where they waited for Fikile and her companion to join them for the trip to Matsapa. From the homestead, she and her companions went to Sibongile for further drinks. At Sibongile's place they consumed two beer bottles and thereafter they all went back to their respective homes.

PW3, by her own admission was heavily under the influence of intoxicating liquor that she refused to drive a motor vehicle. PW3's evidence is corroborated by her own live-in lover and her own son accused no.1. PW1 stated that even though accused no.1 had taken drinks, he was not so drunk. I find PW1 a very honest and reliable witness. She stated under cross-examination that she cannot definitive state about accused no.1's sobriety except that he was not so drunk that he did not know what he was doing.

In so far as accused no.2 is concerned, PW1 said he knew him as a teetoller. In cross-examination by Mr. Mdluli for the Crown, accused no.2 said he never took any drink on that day.

In cross-examination by Mr. Sigwane asking PW1 whether or not she and others discussed the occurrence of that evening leading to the death of the deceased, PW1 said, "We generally spoke about it and asked ourselves how it came about that deceased was killed." That is a witness who is honest otherwise she could have denied having discussed this. The demeanour of her and the forthright answers demonstrate that PW1 was giving evidence of what actually occurred and at no stage did she try to embellish her evidence and answers to questions put. In cross-examination she answered as far as she could remember.

PW1 denied that she ever slapped deceased in his face after accused no.1 had informed her that he had found PW3 together in the bedroom drinking. She denied a struggle had ensued between her and the deceased nor did she see how accused no.2 was injured. She insisted that accused no.1 and 2 had made feints at the deceased as he was lying on the bed reading a book.

Further, under cross-examination PW1 said she and her sister PW2 met as she PW1 was going out to phone the police. This evidence is corroborative of what actually took place.

PW2's evidence in chief and under cross-examination corroborated what accused no.1 and 2 were saying and doing to deceased as he lay on his bed. PW2's evidence in chief corroborated that of PW1 in material respect. What was not said by PW1 in her evidence in chief but said by PW2; I do not consider as contradictory evidence but on the contrary I view it as complementary to the evidence of PW1.

After considering the evidence of PW2 and the evidence as a whole, I find that there is corroboration in their evidence. Also, I find that PW3's evidence very unreliable in so far as the death of the deceased was concerned. On her admission, she said she was so drunk that she declined to drive the motor vehicle to Matsapa. In favour of accused no.1 I would consider PW3 as his wife not just a girlfriend in view of the fact that they have been staying together for a long time and he had children with her. What has been challenged by Mr. Mdluli whether or not the motor vehicle belongs to accused no.1, for the purpose of my judgment, is immaterial.

I also accept, for the purpose of this judgment, PW3 and deceased did in fact enter the bedroom at Gobholo and enjoyed drinks thus accused no.1 arrived when both and found them

there. As to whether Mhlume was also in the bedroom together with PW3 and deceased that can only be a speculation and I am not prepared to speculate. The only person who said Mhlume was also in the bedroom is a person who cannot be relied upon because of her state of sobriety, that is PW3. Accused no.1 should have taken exception to PW3 allowing deceased to enjoy drinks in the bedroom is also understandable in terms of human experience. It is not expected that in a big house, a stranger should go into the bedroom and drink with another person's wife. According to PW3, they all went into the bedroom, whereas there was a kitchen and a sitting room, there was no reason why they should have sat in the bedroom.

Under cross-examination by Mr. Sigwane, PW3 was not very helpful. This, again is understandable. PW3 was so drunk that she does not even remember how she landed at the police station. She told the court that she noticed in the morning when she woke up from bench of the police station and she did not know how she arrived there.

PW4 3695 Constable Cyprian Dube also gave evidence. He received a report and went to the scene where he found a knife on the sofa and a T-shirt. PW4 was referring to exhibit 1 and 2.

PW5 2377 Detective Sergeant Vusi Dlamini also gave evidence. He was one of the investigating officers. As a result of information, he traced accused no.1, cautioned him in terms of the Judges' Rule and arrested him. It was his evidence that accused no.2 reported to the police station all by himself. He said after questioning him in terms of the Judges' Rule, he was then arrested him.

The Crown then rested its case.

Mr. Sigwane called accused no.1 to the witness stand. His evidence was to the effect that he and PW3 had been lovers for a period of nine years. Out of this relationship, children were born. He gave his age as being 40 and was employed at the time of his arrest. Accused no.2 is his live-in lover's eldest son, not his brother but his stepfather. He and the deceased had a healthy relationship, he said. They would drink together. PW1 and PW2 are his neighbours.

It was his evidence that on the 19th December 1998 he visited PW3 and found her in the company of others. They were all drinking. He said his purpose for the visit was to request

PW3 to convey a friend of his to Matsapa where his friend was bereaved. He further gave evidence that he himself would not accompany them to Matsapa because he was busy selling his liquor. He said he was selling liquor at one of PW3's homestead. He said they have another homestead at Gobholo where they also stay.

Accused no.1 said his request for the use of the motor vehicle was turned down because PW3 was not in a fit state to drive a motor vehicle. This request and its negative results took place at PW1's homestead where drinking was taking place, people who were present there were the following, PW1, PW2 and her boyfriend, PW1's, the deceased in this case was also present. When PW3 advanced her reasons for being unable to drink, deceased offered that he would drive the bereaved friend to Matsapa. This offer by the deceased was accepted by accused no.1, he said but on condition that accused no.1 was allowed to go and fetch more liquor for sale whilst the others went to Matsapa. Further that the deceased was not going to spend most of his time at the night vigil. Accused no.1 said, after this arrangement he left for his house. On that day, he had started drinking from minus plus 12pm. Deceased subsequently arrived at the accused no.1's homestead accompanied by the other companions but according to accused no.1, only PW3 entered the house. The rest remained outside. I pause here to note that this evidence is corroborative of the evidence of PW1.

Accused no.1 said in his evidence that an argument then ensued over the handing over of the ignition keys. It was accused no.1's evidence that this argument ensued because PW3 was so drunk that she had become uncooperative. He said he then decided to leave her alone and he left. He left her in the house, when he returned, he found PW3 not at home. He enquired from the children and they told him that she had gone to Gobholo to deliver some groceries to the children. He said he wondered how she could have managed to get the motor vehicle started as he had the ignition keys in his possession and the duplicate keys were kept at Gobholo. He had not given permission to anyone to drive the motor vehicle without the use of the ignition keys. He said he then decided to go to Gobholo to see if infact PW3 was at Gobholo. He said he actually ran to Gobholo, on foot. When he got there, he found the motor vehicle parked outside, he entered the house and found the bereaved Mhlume seated in the kitchen. He asked Mhlume how they had arrived at Gobholo and asked where PW3 and the others were. Mhlume told him that they were in the house. He proceeded past the dining room into the bedroom and to his shock he found PW3 sitting with the deceased enjoying drinks. Accused no.1 was unable to say how far apart was PW3 and the deceased sat because

the sooner he entered the bedroom, PW3 suddenly stood up. He confronted them and asked why they stayed in the bedroom for drinks instead of using the dining room and also asked how they started the engine without the ignition keys. Accused no.1 said while he was engaged and shouting, PW3 did not give any answer but immediately fled. He himself went out. Accused no.1 immediately went out following PW3 but lost trace of her. When he returned to the house, he found that Mhlume and the deceased had also disappeared. He said at Gobholo there were some stock of beers, he then decided to load them into the motor vehicle and take them to Msunduza. He said he loaded plus minus six crates and looked for accused no.2 and traced him. They offloaded the crates of beers.

Accused no.1 then proceeded to van Delt's shebeen and as he entered the yard. As he entered the yard he saw PW3 leaving van Delt's place. He called her back but she started fleeing but he managed to grab hold of her and slapped her with his open hand. He said he assaulted her because he was angry with her for running away firstly, from Gobholo and now she was running away from van Delt's place. It was accused no.1's evidence that accused no.2 then came in between them and intervened. Accused no.2 took PW3 away. Accused no.1 remained at van Delt's house but eventually left. He had drunk one bottle of beer at van Delt's place.

When accused no.1 got home he found accused no.2 and PW3 was nowhere to be found. He tried to ascertain where she was and was told that she could be at PW1's home. Accused no.1 and 2 went to PW1's house. As they approached the house, they heard PW3's voice coming from the direction of PW1's house. However, they did not find her at PW1's house. As they were leaving, PW1 invited them in the house. Accused no.1 stood while accused no.2 entered. It was at this stage that PW1 asked why he had assaulted PW3 as she came crying to her house earlier on that evening. Accused no.1 told the court that he told her how he had found PW3 and deceased drinking together in the bedroom. Accused no.1 said that he promised to come the following day to explain to PW1 more about the Gobholo incident. It was accused no.1's evidence that PW1 got angry with PW3 for having sexual intercourse with the deceased. He told the court that a fight then ensued. He told the court that a fight ensued between PW1 and the deceased. They hit each other with open hands. When this fight took place, accused no.2 decided to intervene. Deceased grab hold of accused no.2 by his T-shirt, they pushed each other in the process, furniture fell and the bottle was also shattered. Then accused no.1 saw accused no.2 coming out wearing his T-shirt and was

covered in blood. Again, here the court would pause and say that according to cross-examination the shirt was pulled out by the deceased during the fight between the deceased and his girlfriend. Accused no.2 went straight to accused no.1 and they left for their homestead.

Accused no.1 testified that when they went past a street light, he noticed for the first time that accused no.2 was bleeding around the left eye. Accused no.1 confirmed that during the struggle between accused no.2 and deceased a candle light had gone out. However, accused no.1 says the candle went out when accused no.2 was intervening and at that stage, the deceased held accused no.1 by his T-shirt. Accused no.1 described the injury sustained by accused no.2 as a serious one. He took accused no.2 to hospital. After this incident, he did not see deceased again. They left the deceased in his house. Accused no.1 did not see where PW1 was when PW2 left. He denied that he and accused no.2 made feints at the deceased as he lay on his bed. He denied that accused no.2 had threatened deceased that he would teach him a lesson.

Under cross-examination by Crown, accused no.1 said he was not annoyed by PW3 and the deceased drinking in the bedroom but was shocked. He said he only wanted to reprimand them for sitting in the bedroom drinking.

In answer to another question, accused no.1 said PW1 and PW2 incriminated them because after the death of the deceased, the allegation was that they had killed the deceased. He also said that after the light had gone out they fled because accused no.2 was injured and feared the deceased would inflict injuries on them. He also said he became aware of accused no.2's injury when they went under a street-light. Accused no.1 said accused no.2 had shouted while in the house of PW1 but did not say that he had been injured. He also said when accused no.2 came of the deceased's house, he was running but never said he had been injured. Asked why he did not say so in his evidence in chief, accused no.1 said he did not remember if he had not said so in his evidence in chief. Accused no.1 also said he never assaulted PW2. He did not deem it necessary that accused no.2 should be taken to the police because accused no.2 had no quarrel with the deceased. He thought they would get together and discuss the matter as a family. He denied that he and accused no.2 acted in furtherance of common purpose in killing the deceased.

Accused no.2 was also called to his defence. He corroborated the evidence of accused no.1 to a greater or lesser extent. It was his evidence that he went in search of his mother PW3 and ended up at PW1's homestead. PW3 was not at PW1's homestead but they decided to leave but as they were leaving they were invited inside by PW1. According to accused no.2, he and accused no.1 then entered and stood by the entrance. This is not the evidence that was given by accused no.1. It was further accused no.2's evidence that PW1 and deceased were in the sitting room and deceased was seated on a sofa in the dining room. It was accused no.2's evidence that he did not drink at all on that day because he was busy selling liquor. According to accused no.2, PW1 and PW3 were drunk. Accused no.2 said he never saw PW2. It was his evidence that the deceased was also drunk but not as drunk as PW1 and PW3. He said he did not see deceased read any book or novel. He never threatened the deceased that he would teach him a lesson nor he made feints at the deceased. He corroborated accused no.1 in so far as the confrontation and the hitting between PW1 and the deceased. He said he then came between PW1 and the deceased as he was intervening.

Accused no.2 told the court that as he intervened, deceased grabbed hold of him by the collar of his T-shirt and throttled him. As the deceased was throttling him, he held him by his hands and tried to break lose from the T-shirt and in the process he knocked against a table behind him, burning candle, bottle which was on the table fell down. He said he suddenly felt some object striking him on his forehead above his eyes. He said it was the deceased who struck him and he sustained an injury. It was accused no.2's evidence that as he was struck deceased was still holding him but at this stage deceased was using only one hand.

I do again pause here to note that this is not what accused no.1 saw. It was his evidence that the object with which the deceased struck him broke. Accused no.2 said it was after he had been struck that he removed his T-shirt. He denied that he removed his T-shirt before he and deceased started struggling. It was his evidence that as he took off his T-shirt he did not see where PW1 was. He did not see PW2 arriving at PW1's homestead. It was accused's evidence that he left deceased holding his T-shirt and ran out explaining that deceased had injured him. This again was not corroborated by accused no.1 who was present at the scene. Accused no.1, according to him saw the injury on accused no.2 when they went past a street light.

It was his evidence that as he went out he met accused no.1 and together they went home. Accused no.1 then took him to hospital. The people who were drinking in the homestead asked accused no.1 how accused no.2 got injured and he told them that the deceased had injured him. I may deviate and say that I first queried whether what accused no.1 said was infact admissible and later ruled that it was infact admissible after being addressed by two counsel.

Accused no.2 was cross-examined by Mr. Mdluli on behalf of the Crown. In answer to one of the questions put to him, he said the following and I quote:

“I stood by the doorway at PW1’s house and accused no.1 stood behind me.”

To a further question, the answer he gave and I quote:

“PW1 then invited us in.”

Accused no.2 when further cross-examined by Mr. Mdluli admitted that this was never put to PW1 that infact these were the instructions he gave to his counsel. Accused no.2 said his counsel had put to it the Crown witness that the deceased had throttled them. This, according to the record, is incorrect, it was never put. Mr. Sigwane conceded that infact he did not put it to any of the Crown witnesses that the deceased throttled accused no.2.

Accused no.2 further admitted under cross-examination that he stated in his evidence in chief that the deceased struck him with a bottle above his eyes caused during the struggle between him and deceased. Deceased had at some stage used one hand grabbing hold of him and therefore deceased must have used the other hand in striking him with the bottle. He did not see where accused no.1 was during the struggle between him and the deceased.

Under cross-examination by Mr. Mdluli accused no.2 told the court that when deceased get hold of him, he raised an alarm by saying, “Heee”. Accused no.2 said he did not specifically call accused no.1 to come to his rescue nor did he call PW1. The answer was he fled immediately after he managed get out of his T-shirt. He says he did not lay a charge against the deceased because he thought accused no.1 was going to do that on his behalf. He said, however, accused no.1 never took him to the police station to lay a charge against the deceased. He said it never occurred to him that the police should be informed about the assault on him by the deceased.

Accused no.2 admitted that it was never put to PW2 that she had not been at PW1's house during the struggle between him and deceased. Accused no.2 said he had however instructed his attorney accordingly.

Both counsel have made their submissions and the court has carefully considered these submissions in the light of the evidence as a whole. Before going into the merits, there is a certain point I want to make and is even though accused no.1 played down the incident of his live-in-lover being found in the bedroom enjoying liquor together with the deceased, in fact this unexpected incident shocked and infuriated him.

According to accused no.1 and 2 they heard accused no.3's voice at the deceased's house. They went there and found that she had been there earlier on but had since left. At deceased's house, deceased is present and accused no.1 does not accost him for having sat in the accused's bedroom in the company of PW3 and enjoying liquor. Instead, it is deceased's girlfriend who slaps the deceased with an open hand after she had been informed by accused no.1 what had happened. For the purpose of this judgment, I do not have the slightest hesitation in rejecting this evidence by accused no.1 and 2.

It is unimaginable that accused no.1 could stand-by and do nothing when firstly PW1 and deceased had exchanged blows. Secondly when deceased and accused no.2 struggled that he would stand-by even though he was the person who had been aggrieved. Deceased went to accused no.1's house. He went into accused no.1's bedroom with the accused's live-in-lover and enjoyed drinks notwithstanding that PW1 and PW2 had been drinking. I am satisfied that the incident leading to the injury by either accused no.1 or 2, PW1 and PW2 were comparatively not as drunk as they have been described by accused no.2. This, I say considering the manner they gave their evidence. They corroborated each other on all material respects. PW2 heard a noise at PW1's house. PW2 was already in bed. She woke up and went there and met PW1 on her way to go to Khumalo's place to phone the police. PW1 told PW2 in so many words why she was going away. PW2 described what she saw and observed what accused no.1 and 2 were doing to deceased as he lay on his bed. It was her evidence that accused no.1 and 2 were in fact making threats at the deceased. Accused no.1 was asking deceased how he started the motor vehicle without an ignition key and accused no.2 wanted to know what the deceased wanted with his mother. The defence never challenged the evidence of PW2 that she was present at PW1's place.

Accused no.2 told the court that he had instructed his attorney that in fact PW2 was never present at PW1's place. It is trite that a party has a duty to cross-examine on aspects which he disputes. His failure to cross-examine on this aspect may in appropriate cases have serious consequences in that an adverse inference may be drawn against him. In support of this legal principle, see **MALELE 1975(4) SA 128 T** and also **NKOMO 1975(3) SA 595 M**. Our local decision on the point is **R VS DOMINIC MNGOMEZULU & OTHERS SLR (unreported)**. This court is very much alive *ratio decidendi* in **M 1946 AD 1023** which is to the effect that:

“It is not prerequisite for an acquittal that the court should believe the innocent account of an accused”.

It is sufficient that it might substantially be true but such possibility should not be allowed to deflect the cause of justice. See also **MILLER VS MINISTER OF PENSION 1947 AER 372 @373**.

Considering the evidence as a whole especially the manner of accused no.1 and 2 under cross-examination by the Crown, I am satisfied that the Crown has proved its case against the two accused. I do not find it necessary to deal with in details about the doctrines of common purpose suffice that the acts and declaration of (1) conspirators are admissible in evidence against the other provided that their acts were performed and declarations made in furtherance of the common purpose. In spite of these legal principles, see **REX VS MILLER 1939 AD 106 @115**. Also **REX VS MAELLET 1957(1) SA 492 A @494(F)**.

In my judgment I have accepted that accused no.1 and 2 were making threats to the deceased and ultimately accused no.2 struggled with the deceased and deceased was later found with a stab wound which according to the post-mortem report was the cause of the death of the deceased. The post-mortem report as I said initially was handed in by consent and the contents thereof are taken by this Court in consideration when handing down this judgment.

I reject the idea that some group of boys came and that it is a possibility that they are the people who stabbed the deceased.

In the result, I found that the Crown has proved this case beyond reasonable doubt and found both accused guilty as charged.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

You have been convicted of this crime of murder. There are usually two stages of trial in a crime of murder, that is the trial leading to an acquittal or conviction. If acquitted then it is the end of the matter but if convicted then there is a second stage which is just as important and that is to find out whether there are extenuating circumstances which can save them from being sentenced to hang. It is not only the court that decides whether extenuating circumstances are present but it is both the court, defence counsel and the Crown counsel who will address the court and the court having read the record then come to a conclusion whether or not extenuating circumstances are present.

Mero mutu I am going to find that although you have been convicted of a very serious crime that is a human being has been killed there are repercussions. He might have children anyway there is no evidence to that effect. He might have relatives that are attached to him who will feel that punishment should be meted-out. Having found and addressed by both counsel to whom I am very indebted that there are extenuating circumstances, I would in fact find that there are extenuating circumstances.

JUDGMENT ON SENTENCE

The two accused Nhlanhla Charles Moratele and Party Melvin Dlamini were convicted of the crime of murder of one Lucky Vilakati. I postponed the matter to the 30th May 2001 in order to enable the two counsel to address me on the question of whether or not extenuating circumstances are present.

For a long time in the past, courts in Swaziland consistently have that extenuating circumstances were to be proved by an accused person on the balance of probability. However, the Court of Appeal has since authoritatively set the record straight by handing down judgment on sentence where it categorically stated that no such onus rests on the accused person. I do not propose to this judgment to refer to the numerous decided cases suffice that the Court of Appeal went so far as advising the trial Judge also to take cognisance during the trial or any such factors has made them to establish the presence of the extenuating circumstances. This is precisely what I have done so that over and above what the two

counsel have addressed relating to whether or not extenuating circumstances are present. I have taken into account such factors as turned to establish the existence of extenuating circumstances.

I may take this opportunity to thank the two counsel for invaluable assistance rendered by them in the course of this trial.

For my part I find the following to have the effect of establishing that there are extenuating circumstances:-

- (a) To a greater or lesser extent accused no.2 was directly under the influence of accused no.1 who is his stepfather.
- (b) Accused no.2 is the biological son of PW3 who is accused no.1's live-in lover with whom he has five children.

Subjectively therefore, accused no.2 felt threatened if the balance in the family were to be disturbed by the infiltration of the deceased in the relationship and his repeated utterances directed at deceased, and I quote: "What do you want with my mother?"

Mr. Mdluli on behalf of the Crown has conceded and went on to address the court quoting decided cases in support of the existence of extenuating circumstances. See in this respect a case referred to **VAN ROY 1976(2) SA 580** relating to the influence flowing from a person in authority over one who is subservient to the other. Mr. Mdluli stated in his submissions that accused no.2 was young and accused no.1 was in the position of *loco arantis* vis-à-vis accused no.2. I agree with Mr. Mdluli in this respect *in toto*. Mr. Mdluli also drew the court's attention to the insensitive action of the deceased in that he shared liquor in the bedroom of accused no.1, in the presence of accused no.2 and the absence of accused no.1, with PW3. Mr. Sigwane in turn also shared and associated himself with the submissions made by Mr. Mdluli. Mr. Sigwane further added that accused no.2 had been drinking until 6pm so he could not have been sober. Mr. Sigwane referred the court to the Court of Appeal case **JAMLUDI MKHWANAZI VS REX APPEAL COURT CASE NO.4/1997** where it was held that in considering the question of extenuating circumstances no factor however remote should be ignored whether too faintly or indirectly to the commission of the crime.

In the light of all the above submissions, this court found that extenuating circumstances are present. I rule therefore that the accused are guilty and rule further that extenuating circumstances are present.

Mr. Sigwane addressed the court further in mitigating circumstances. He informed the court that both accused are first offenders. The court takes that into account especially in so far as accused no.1 who has reached the age of plus 40 years. Mr. Sigwane also said, at the time of the commission of this crime, accused no.1 was employed and providing maintenance for his five minor children. He also asked that accused no.2 is still young and should be given a chance to reform and rehabilitate.

The matter of sentence predominantly is within the discretion of the trial court in the sense that it is trial court who fate with all the factors that surfaced during the trial. However the trial court exercised its discretion judicially not arbitrary. See in this respect **STATE VS AMATA 1997(1) SACR 480 @499** where the learned Judge Jones J, as he then was, said the following:

“In weighing considerations, I should bear in mind the need (a) to show an understanding of and compassion for the witness as a human being and the reasons why they commit serious crimes by avoiding an overly harsh sentence; (b) to demonstrate the outrage of society at the commission of serious crimes by imposing an appropriate and if necessary, a severe sentence; (c) to ask the sentence which is balanced, sensible and motivated by sound reasons and which will therefore meet with the approval for the majority of law abiding citizens.

If I do not, said the Judge, the administration of justice will not enjoy the confidence in respect of the society”.

I am in total agreement with the learned Judge’s consideration. Having considered that I am going to be quick in saying that I am not going to take an armchair of attitude in sentencing the two accused. That is the reason I have taken all the factors into consideration. Having taken all the factors mentioned above, I consider the following sentence to be appropriate.

I may pause and add that the sentence I am handing down is on the very lenient side. Normally we now hand sentences ranging from 12 to 18 years for murder cases.

Accused no.1 is sentenced to an imprisonment for a period of 9 (nine) years and I order that the sentence be backdated to the 19th December 1998.

Accused no.2 for reasons stated is sentenced to an imprisonment of 7 (seven) years. In this case I order the sentence to be backdated to 19th December 1998.

J.M. MATSEBULA

Judge