

IN THE HIGH COURT OF SWAZILAND

REX

Vs

1. THEMBA MAZWENI MAMBA

2. DUMISANI MAVUSO

3. MDUDUZI MNDZEBELE

4. MBUSO MNDZEBELE

5. NGANONO DLAMINI

6. SIBUSISO MHLANGA

7. SITATANYISWA DLAMINI

8. CELUMUSA MNDZEBELE

9. BHEKI GAMA

10. SIZWE MAMBA

11. MFANUZILE MASEKO

12. SICELO MAMBA

Criminal Case No. 133/2004

Coram

S.B. MAPHALALA - J

For the Crown

MR P. DLAMINI (Senior Crown Counsel)

For the Accused

ADVOCATE P. MNGOMEZULU (acting as pro deo Counsel)

JUDGMENT

15th March 2007

Introduction

[1] This criminal trial has an unfortunate history where the learned Judge Alex Shabangu who heard all the evidence died before the parties could make submissions sometime in the year 2005. In view of this sad turn of events and also the number of witnesses who had given evidence for the Crown and Defence the learned Acting Chief Justice directed

is terms of Section 291 *bis* of the Criminal Procedure and Evidence Act (*as amended*) No. 67 of 1938 that another Judge proceeds with the matter hear submissions and give judgment thereafter.

[2] Section 291 *bis* of the Act provides as follows:

a) Where a presiding officer dies, resigns, the presiding officer's services are inoperative or is for a just reason unable to continue with the trial, a re-m' al, review, *appeal* compliant with an order of a superior court, another judicial officer of that court may, at any stage of the proceedings, assume and continue the proceedings;

b) The judicial officer, shall before continuing with the proceedings acquire himself a-herself with the recorded evidence and where the judicial officer deems necessary, call or recall any witness;

[3] It is on this basis that I heard the submissions from both Counsel in accordance with court procedure in criminal trials.

The indictment

[4] The accused persons before court are all charged with the crime of murder where it is alleged by the Crown in the indictment that upon or about 5th December 2003 and at or near Ndlalarnbi area, in the district of Hhohho, the accused acting jointly and in furtherance of a common purpose, did intentionally and unlawfully kill Obadia Hlophe and the accused did thereby commit the crime of murder.

[5] The Crown is represented by Senior Crown Counsel Mr. Phila Dlamini and all the accused persons are represented by Advocate Percy Mngomezulu. The learned Advocate acts for the accused persons on *pro deo* basis.

[6] The preparation of this judgement took longer than I expected as I had to read through the whole record of the proceedings before the late Judge Shabangu *vis-a-vis* the submissions by the learned Counsel before me and I wish to apologize profusely to all concerned for the delay in its delivery.

The chronicle of the evidence.

[7] The Crown led the evidence of nine (9) witnesses and I shall proceed to outline the salient features in each witness testimony. The accused persons each gave evidence on oath and were each cross-examined by the Crown in the normal way. The accused persons also made statements before judicial officers.

[8] The first witness for the Crown was PW1 Dr Reddy the pathologist who examined the body of the deceased and submitted a post-mortem report which was entered in evidence as exhibit "A P. The said report records that the cause of death of the deceased was to burns with fracture skull extradural haemorrhage-. The rep OH further States at page 2 thereof that the body is completely charred with missing lower limbs* portions, soft tissue of abdomen, tongue protruded, intestines exposed burnt organs congested. The following antemortem injuries seen:

1. Third degree burns all over body.
2. Contusion scalp front parietal region 7 - 2cm area, linear fracture over vault left side extended into base of skull extradural haemorrhage over brain 90ml present.

[9] The second witness for the Crown was the identifying witness PW2 Thulile Grace Hlophe who is the daughter to the deceased.

[10] PW3 Titus Dlamini is of the same area as the deceased. He testified that on the day in question at around 11.30am he was returning from leaving cattle on the grazing land. When he was just by the gate of his homestead he met the deceased in the company of other young men who were assisting him in driving the cattle. These were Dumisani Mavuso (accused No. 2) and Mazweni Mamba (accused no. 1). He testified that he did not recall the names of the others who were in the company of the two. They drove the cattle into the grazing land. After all the cattle had been driven onto the grazing land then accused no. 2 asked to talk to the deceased. The deceased refused and ran towards him. He was actually running away from the group. As PW3 stopped to see what was happening accused no. 1 told him to go away as the witness was going to disturb them. He then went away. When he was just about to reach home accused no. 1 came ahead of

him in the company of another Mamba boy. They told him to enter his homestead and to stay there and do not move, which he did

[11] During the night at about 1.30am the police arrived at his home seeking information relating to the crime. The following morning on the 6 December 2003 the police came to his homestead and took him to the grazing land where the deceased was injured.

[12] This witness was cross-examined briefly by Defence Counsel where it was put to him, amongst other things that when the deceased ran to him he told him to leave him alone saying "Hlophe, leave me alone, you know your actions in this area". This witness denied having said that. It was further put to him that the deceased had been labelled a "witch" in the community. He replied that he was not aware of this.

[13] The fourth witness for the Crown was PW4 Thembisile Mndzebele (nee Shongwe) who is also a resident of Ndlalambi. She related the events of the 5th December 2003, saying that whilst she was seated in her cooking hut a person by the name of Mazweni came to where she was. He requested a cup of paraffin from her. She did not ask why he wanted the paraffin. She then sent children to get the paraffin for him. The child came to her in the kitchen with the paraffin and gave it to him. Then Mazweni walked out and left. This witness identified Mazweni as accused no. 1.

[14] This witness was cross-examined briefly and nothing of consequence was revealed by her evidence.

[15] PW5 Thulani Starky Dlamini was introduced by the Crown as an accomplice witness and was accordingly cautioned by the court in terms of the law. He testified that on the day in question, accused no. 1 took him to en-kraal cattle and inform others that they would meet at Mganwini between 7.00pm - 8.00pm. He (PW5) stayed at home until accused no.2 Dumsane Mavuso, accused no. 4 Mbuso Mndzecele and accused no. 6

Sibusiso Mhlanga came to collect him. He told them to go as he was still going to report or ask for permission from his mother and that he will find them along the way. He eventually caught up with them along the way. They were then pushing vehicle tyres and carrying paraffin. In addition to the group there was now accused no. 1, accused no.5 and no. 12, Muzi Mkhonta not before court and Banele Mamba not before court, they then proceeded to the grazing fields. When they arrived in the bush he discovered that the deceased had been removed from where he had seen him earlier to another spot. They went over to where the deceased was. The deceased was still breathing but he could not speak. Accused no. 1 enquired from the group as to who were going to stand for 15 years imprisonment because they were all going to be arrested. Some agreed and others did not agree. The deceased was pulled by his feet to the place where he was going to be burnt. The witness then left the area. At the spot where the deceased was to be burnt there was accused no. 2 and accused no. 6, accused no. 12 and one Mfanuzile Dlamini who was later introduced as PW6.

[16] This witness was cross-examined at great length by both Counsel and I shall revert to some of his pertinent answers in due course.

[17] At this stage of the proceedings the Crown introduced into evidence statements made by the accused persons before Judicial Officers and these were entered by consent of both the Crown and the Defence. These statements were made by accused no. 1, 2, 5, 6, 8, 9 and 12 and they were entered as exhibits B1 to B8, respectively.

[18] The Crown then called another accomplice witness, one Mfanuzile Dlamini as PW6. He testified at great length that on the night of the 3rd December 2003, before the 5th December 2003, when the deceased was killed. He together with others including accused no. 1, 2, 6, 8 and others who are not before court went to the deceased homestead. Their mission was to ask the deceased about his clay pot which he used to bewitch people of Ndlalambi area. The deceased peeped through the door and he saw

them. The deceased ran to another hut saying he wanted his brother to hear what the group want to say to him. The group then left the deceased homestead without causing any harm to the deceased.

[19] PW6 proceeded to testify that on the 5th December 2003, he was called by accused no. 1, 2 and former accused no. 10. The three were at Mndzebele's homestead. Accused no. 1 told him that they had caught the deceased and he had pointed out to them all his muti that he uses to kill the people of Ndlalambi. They proceeded to the grazing land where he found the deceased with an injury on the head. The deceased was among other people, there were Mduduzi Mndzebele former accused no. 3 Mbuso Mndzebele (accused no 4), Sibusiso Mhlanga (accused no. 6) and Sicelo Mamba (accused no. 12). The deceased was taken to another spot where he alleged that he was going to point out his muti. Along the way the deceased was assaulted with sticks, in another spot where he was supposed to point out the muti they found his dogs and the dogs ran away when they saw them. The deceased was eventually taken to a spot where he was to be burned. Firewood was collected by accused no. 6 and accused no. 12. Car tyres were put on the fire. Accused no. 1 poured paraffin that had been left on the head of the deceased. He (PW6) and accused no. 12 Sicelo Mamba lifted up the deceased and they threw him into the flames. He came out of the fire and they lifted him up and threw him into the flames for the second time. He came out for the third time and he was lifted up by accused no. 4 and accused no. 6. This time he could not come out of the flame.

[20] The defence cross-examined this witness at some length and I shall revert to his replies later on in the course of this judgment as it pertains to some aspects of this case.

[21] The seventh witness for the Crown was one PW7 3524 Detective Constable Maxwell Hlatshwayo who was introduced as a Scene of Crime Officer. He attended the scene and took photographs of the scene. He handed to court the photographs as exhibit "CI" up to "C4".

[22] The next witness for the Crown was PW8 GE Mhlanga who is a community police of the area. He received a report that someone was being burnt in the grazing fields and he went out to investigate. He saw a person on the fire and there was no one next to the fire. He waited there for the arrival of the police. The police arrived and they instructed them to remove the burning person from the fire. His lower body was burnt to ashes.

[23] The last witness for the Crown was the Investigating Officer PW9 2277 Detective Inspector Methula who arrested and charged the accused persons.

[24] As I have stated earlier on in this judgment all the accused persons gave evidence under oath. The salient feature of their evidence is that they were driven to manhandle the deceased in order to obtain a clay pot containing the medical portions used to bewitch the people of Ndlalambi area.

[25] Their evidence took a similar vein as to what is stated by DW1 Mazweni Mamba who stated at page 174 of the record:

"Ngisane invited me to join them to go to the homestead of Mr. Hlopfae and to enquire where his calabash was. that he used to kill people".

[26] The above-cited is also stated by the accomplice witness PW6 Mfanuzile Maseko who stated the following at page 92 of the record:

"He then told us that we were supposed to find out from the deceased as to "a/here he was keeping his muti which he used to bewitch the people".

"Yes, my lord, I cannot deny that our intention was to get the clay pot".

[27] Similar evidence as the above is found in the testimonies of the other accused persons as seen at page 220 in respect of accused no. 2 Dumisani Mavuso. At page 265 in respect of accused no. 3. At page 292 in respect of accused no. 5. At page 315 in respect

of accused no. 6. At page 376 in respect of accused no. 12.

The arguments

[23] According to the Crown the accused persons acted in furtherance of a common purpose in committing this offence. In this regard the court was directed to the legal authority of *Burchell and Huii South African Criminal Law and Procedure Vol. I Edition, 1982*, at page 30 and the case of *R vs Shezi 1972 2j U. 119*.

[29] It is submitted by the Crown that at the first stage that is where the deceased was hit on the head and taken to the veld), there is no direct intention proved by the Crown. However, *dolus eventualis* may be inferred from the circumstances of the case. The deceased was injured on the head, he had a fractured skull. Despite that he was not taken to hospital by the accused persons, they continued assaulting the deceased saying he must point out the clay pot he used in bewitching the people of Ndlalambi area. In this regard the Crown relied on the *dictum* in the Court of Appeal case of *Vincent Sipho Mazibuko vs R 1982 - 87 S.L.R 372 CCA*) at page 380 where the following was stated:

"A person intends to kill if he deliberately does an act which in fact he appreciates might result in the death of another and set recklessly as to whether such death result or not".

[30] The Crown contends that on the facts of the present case that clearly the accused person consciously accepted the risk in that the actions or conduct of the accused persons show that they had a constructive intention to murder, (see *S vs Lombard 1987 (3) SA 198*). It was further contended by the Crown that at a later stage the accused then showed directly their intentions to kill the deceased as opposed to the *dolus eventualis* they have shown so far. Accused no. 1 approached PW4 and asked for paraffin. The paraffin was poured into the deceased's head before he was thrown into the fire. The accused person then fetched car tyres to the grazing land for purposes of making fire. The fire which they used to burn the deceased. The accused persons then collected firewood and they made

fire which fire they burnt the deceased ir_

[31] On the other hand it was contended by the tinned .-i^c<:aie appearing for the accused re King on the *dictum* in the Scmm AfBcm. Case of 5 vs Lungile 1999 (2) S.A. 597 A where Olivier JA scales the following at page 600:

"*Dolus* being a subjective state of mind, the several thought processes attributed to an accused must be established beyond reasonable doubt, having due regard to the particular circumstances of the case".

[32] It was contended by the defence on the basis of the above *dictum* that *dolus eventualis* depends on the question whether a reasonable man (a *bonus partefamilias*) would in the circumstances have foreseen the possibility of death but in *casu* in view of the fact that the accused intention was only to grab hold of the medical portions as *per* the preponderance of evidence at our disposal the accused could not have foreseen the possibility of the death of the deceased.

[33] It is contended further for the defence that accused motive was to grab hold of the clay pot and not to kill the deceased. They were patient with the deceased for the whole day employing strategies to pressurise him to show them the clay pot The fact that they approached the deceased during the day further proves that the accused were only interested in obtaining the clay pot

[34] Furthermore, it was contended that accused persons like Bheki Gama (accused no. 9) never said anything, never did anything and was strictly dormant and so was Dumisani Mankiso (accused no. 2) and Mduduzi Mndzebele (accused no. 3) should be released with a warning. Mazweni Mamba (accused no. 1) although he was active throughout but he was not there in the final scene. Further, although Mbuso Mndzebele (accused no. 4), Nganono Dlamini (accused no. 5) and Sibusiso Mhlanga (accused no. 6) were the last to leave but they left before the deceased died so that a possibility of a *novus actus imer.ience* could have happened. In this regard the court was referred to the cases of *R*

vs Biyana 1938 EDL 310 at 311, Rex vs Fundakubi 1948 (3) S.A. 810 at 818 and that of S vs Lungile (supra).

[35] The defence also referred to two landmark decisions in South Africa in *S vs Safatsa and others 1988 (1) S.A. 868 (A)* and that of *S vs Mgedezi and others 1989 (1) S.A. 687* at page 705 - 6 and also the textbook by *C.R. Synman - Criminal Law 2nd Edition* at page 259. In the latter authority the following was said:

"The crucial requirement (of the doctrine of common purpose is that the persons must all have had the intention to murder and to assist one another in commirxiig the murder".

The applicable law.

[36] It is trite law that where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime. Furthermore, it is not necessary to establish precisely which member of the common purpose cause the consequence, provided that it is established that one of the group brought this result (see *J.M. Burchell The South African Law of Procedure Vol. I at page 307* and the cases cited thereat).

[37] The Appellant Division in *S vs Mgedezi (supra)* has **drawn** a distinction between common purpose liability where there is a prior agreement, expressed or implied, to commit **a crime (the mandate** situation) and where there is no such prior **agreetDent**. In **the** lasimentioned situation certain additional requirements have to be satisfied before the principle of imputation, which is the characteristic of common purpose liability, can arise.

[38] It is important to realise that although the prosecution is relieved of the task of establishing a causal link between the conduct of each participant in a common purpose, each participant must be proved to possess the requisite fault element (*mens rea*) for conviction of that consequent crime. Unlike the felony-murder rule which applies in some Anglo-American jurisdictions the common purpose rule in South Africa and also in Swaziland does not involve a departure from the fundamental principle that fault (*mens rea*) is required. In terms of the felony-murder rule a killing in the course of the commission of certain offences can lead to a murder conviction even.

[39] Botha J A in *S vs Mgedezi (supra)* laid down the following prerequisites which have to be proved by the prosecution to have been present in order for a participant in a common purpose leading to the death of another to be guilty of murder of that person:

- a) Presence at the scene of the violence;
- b) Awareness of the assault
- c) Intention to make common cause with those who were actually perpetrating the assault;
- d) Manifestation of a sharing of a common purpose with the perpetrating of the assault by performing "some act of association with the conduct of the others and possession of the requisite *mens rea*."

[40] The learned Judge of Appeal in *Mgedezi* also emphasised that a mere spectator in a crowd, obviously, cannot be held liable for violence committed by others in the crowd and the court must carefully examine the individual role of each alleged participant in a common purpose and the specific evidence against each participant and not "tar each accused with the same brush".

[41] In *Safatsa (supra)* a crowd about one hundred people attacked Y, who was in his house, by pelting the house with stones, hurling petrol bombs through the windows, catching him as he was fleeing from his burning house, stoning him, pouring petrol over him and setting him alight. Eight people were charged with *inter alia* murder. Two of them were not guilty on the murder charge by the trial court. The remaining six were convicted of murder. According to the court's finding, their conduct consisted of acts

such as grabbing hold of Y, wrestling with him, throw'ing stones at him, exorting the crowd to kill him, forming part of the crowd which attacked him, making petrol bombs and setting Y's house alight In a unanimous judgment delivered by Botha JA, the appeal court confirmed the convictions of the six accused who were convicted of murder. The appeal court based their convictions on the doctrine of common purpose, since it found that they all had the common purpose to kill Y. The court rejected the argument advanced on behalf of the accused that they could be convicted of murder only if a causal connection were proved between the individual conduct of each of the accused and Y's death. The court in fact assumed that it had not been proved that the individual conduct of any of the six accused contributed causally to Y's death. The court examined the most important previous decisions relating to common purpose and held that, although in the past the courts might not have said so specifically, it was tacitly assumed that a causal connection between the acts of an individual participant in the common purpose and Y's death need not be proved in order to sustain a conviction of murder in respect of such a participant. It is sufficient that the individual participant actively associated himself with the execution of the common purpose. The court rejected the argument that the notion of active association was too vague to serve as a touchstone for liability and stated that adherence to the requirement of causal connection between each participant's act and Y's death would necessitate stretching the concept of causation beyond acceptable limits, *inter alia* by resorting to the device of "psychological causation" - a concept which the court was not prepared to endorse.

[42] Therefore, there exists no reason why the concept of common purpose cannot be applied in the instant case, provided of course that the requirements enunciated in *Safatsa's case supra*, and formulated with greater precision in *Mgedezi's case supra* and confirmed in *S vs Jama anc others 1989 (3) S.A. 427 (A)* must be proved beyond a reasonable doubt in the case of each accused. Further, it is necessary for the court to look carefully at the scope of the "common purpose" and at each individual's participation therein. The existence of a common purpose according to *Mgedezi's case supra* does not

relieve the court of its task of deciding the criminal responsibility of each accused separately. Where the death results unexpectedly or accidentally, (see *Dr Stuart Canadian Criminal Law 214FF*) the felony - murder rule, which applies in certain Anglo-American jurisdictions involves an application of the doctrine of *versar. in re illicita* which has now, for good reasons, been rejected by our courts.

The court's analysis and the conclusion thereof.

[43] It is common cause on the facts that the deceased on the day in question died "due to burn with fracture skull extradural haemorrhage". It is also common cause that all the accused persons were with the deceased on the day the deceased died and that they participated in varying degrees in his death. Some of the accused persons left the scene earlier and others went the full hog until his death. This is the crux of this criminal case. I shall therefore proceed to determine each accused's role in this rather unfortunate case thusly:

Accused No. 1 Themba Mazweni Mamba (DW1)

[44] In order to fully understand the roles taken by each accused person in this sad saga I find it imperative to outline in great detail the evidence of each accused person *vis a vis* the evidence of the crown witnesses.

[45] The accused testified that on the 3rd December 2003, around 10.00pm one Ngisane Kunene came together with Magongo Marrbi, Mduduzi Mamba, Sicelo Mamba and Sizwe Mamba to his home whilst sleeping and knocked at the door. He asked Ngisane what was the matter at that time of the night. Ngisane invited him to join them and go to the homestead of the deceased and to enquire from him where his calabash was that he used to kill people. The group then proceeded to the homestead of the deceased and they found that the deceased was sleeping inside the hut of his son Mabhengu Hlophe. On

arrival he found the *hvyi* having formed a group and these were Ngisane Kunene. Magcqq: Mamba, Mduduzi Mamba, Dumisane Mavuso, Mfanuzile Dlammi, Sksb Mamba, Celumusa Mndzebele, Sizwe Mamba. He told these boys i: dispense from the home of the deceased and they did and walked ott :: the deceased homestead to their respective homes.

[46] On the 5th December 2003, around 8.00am whilst he was in the maize fields he was approached by one Sicelo Mamba who told him that the group was going to the old man (meaning the deceased) to ask him about his clay pot. They then proceeded to the deceased homestead. In the grazing fields they found the deceased looking after his cattle. They asked him about the clay pot but the deceased refused to talk to them. They surrounded him but deceased refused to say anything, instead the deceased produced a knife and went straight to Dumisane Mavuso (accused no.2). Dumisane Mavuso retreated and later picked up a stone and hit the deceased with it on the head. The deceased fell down and sat under a tree nearby. They then took him to the river to wash the blood from his head where he was hit by Dumisani Mavuso. They washed the blood off his head and afterwards they proceeded to ask him about the clay pot. The deceased told them that the clay pot was available and he suggested that they all go along with him so that he would show it to them.

[47] They then proceeded to the forest where they found two dogs. The dogs ran away. The deceased then told them to move to another place where he wanted to show them something else. When they got there he showed them some honey combs which were already collected. He said when he saw this he was very scared. At that point they stood around the area whilst the deceased was seated under a tree. At that moment the time was around 3.30pm to 4.00pm. The deceased could not show them the clay pot They proceeded to ask him about the clay pot until he mentioned that he was involved with others in this practice of witchcraft including one Sidumo Dlamini. Teacher Khumalo and Bongekile Hlophe. There was one other woman he did not mention by name because he

was scared of her. At that point they made a fire under the tree. Then two of them amongst the group picked the deceased up, one holding the legs and the other was holding his hands. They played around with him over the flames of the burning fire. Even at that point the deceased refused to tell them about the clay pot. At that time it was 4.00pm to 4.20pm and those that remained were Sibusiso Mhlanga, Mfanuzile Dlamini, Mbuso Mndzebele, Sicelo Mamba, Mduduzi Mndzebele. He then left in the company of Sanele Mamba and Sitatanyiswa Dlamini. They then proceeded to look for a traditional healer to cast bones and tell them where the clay pot was in the area.

[48] However they did not find the traditional healer and then proceeded to their different homes as they were hungry by then.

[49] They then went back to rejoin the others where the deceased was. The time was approximately about 9.00pm. He then left the group because the deceased was still refusing to take out his clay pot. He then left the scene in the company of Dumisane Mavuso, Mfanufikile Mamba and Banele Mamba. They all went to their homes. This accused told the court that this was what he knew relating to the death of the deceased

[50] The accused person was cross-examined at great length by the Crown.

Accused no. 2 - Dumsani Mavuso (DW2)

[51] He testified in court that on the 3rd December 2003, one Mioduzi Magongo, Xgisane and Sizwe all came to his home and knocked on his door. They told him that there was a person who was leading cattle out of the kraal and suggested that they collect the cattle and put them back into the kraal. From there they all proceeded to the homestead of the deceased. They called at the deceased and he peeped through the door. They then went back to their homes.

[52] On the 5th December 2003, they found the deceased outside the gate leading to the grazing land and they spoke to him. He was with Magongo and Sicelo.

[53] The accused told the court that they found the deceased outside the gate leading to the grazing land and his cattle were still outside the grazing land. They got to him and spoke to him. He testified that he was invited by Magongo and Sicelo who did not tell him what the mission was. When they got to the grazing field they found another group. They told him that they had come to the deceased to ask him about the clay pot. He said the clay pot was for witchcraft purposes and the deceased was known in the area for bewitching other people using medical portions. From there the deceased cattle were driven inside the grazing land. The deceased then came to the group who then asked him about these allegations. At that moment one Titos Dlamini came by and the deceased tried to get some protection from him but Titos told him to get away from him as he did not know anything about the deceased's sins. When they again approached the deceased he pulled out a knife. He wanted to stab him with that knife and he hit the deceased with a stone on his head. The deceased fell down and Sicelo and Sibusiso took him and put him under a tree in the shade. The accused then went away from that place and never saw anything after he had left. He went home and the time was around 9.30am to 10.00am.

[54] Later on at around 2.00pm he met Mazweni who informed him that the deceased had admitted the clay pot. Mazweni suggested that they go there to see it. They then proceeded to where the deceased was. The deceased then led them to the bush where they found two dogs belonging to him. After that they proceeded to the second forest where they found a consignment of honeycombs which had been retrieved or collected when they asked the deceased about the clay pot he told them that the clay pot was with another lady. They then left the deceased and proceeded to look for a traditional healer at about 3.30pm to 4.00pm.

[55] Later on he proceeded to the grazing field with another boy by the name of

Mfanuzile where they found the group who had made a fire. When the fire was burning accused no. 1 advised them not to put the deceased into the burning fire but they said they were now interrogating him. Accused no.1 advised them not to throw him into the fire. Thereafter he, together with accused no. 1 and Mfanufikile left the scene leaving them behind. They went to their homes.

[56] The accused person was also cross^x examined searchingly by the Crown.

Accused no 4 Mbuso Kwali Mndzebele (DW3)

[57] He testified that on a Friday 5^E December 2003. Mazweni (accused no. 1) came to his homestead and told him that there was a meeting at a playground where they usually held meetings pertaining to the development of the area. On arrival there he found Sicelo Mamba, Sizwe Mamba, Sibusiso Mhlanga. Fana Tsabedze and others he could not recall. The group then started addressing them about the issue of the deceased and that they should proceed to him to enquire from him about the clay pot which he used to kill people of the area. They then left the place and went to the grazing land where it was alleged the deceased was. They found him at the grazing fields looking after his cattle. They then asked him about the clay pot and that he should lead them to where he kept it. The deceased then ran away towards the direction of a certain man Titos Dlamini and asked him for help. Titos Dlamini declined to assist him saying he did not know the deceased's sins. Titos Dlamini then left them and went to the direction of the homesteads. They continued asking the deceased who then produced a knife and tried to stab Dumisane who ducked and picked a stone. He hit the deceased with the stone and he fell down on the ground. After he had fallen down Sicelo and Mhlanga lifted him up and took him to the shade under a tree near the road. Dumisane, Sizwe and Mazweni then left them and went away. That is when they decided to take the deceased to the river to wash his injured head. When they had washed him they asked him about the clay pot. He then mentioned names of other people who he said worked with him. He mentioned Sidumo

Dlamini and one Khumalo. Thirdly, he said there was another woman and that he would not tell them her name because she was keeping the clay pot. He then told them that he will show them other things other than the clay pot. The deceased then led them to the forest where at first they found two dogs in the forest. After that he led them to another forest where they saw honey combs already collected. The deceased told them that the honey combs were taken out by his zombies. After that Sanele Magongo started the fire. Then Sibusiso Mhlanga and Magongo put the deceased on top of the flames of the fire. They asked him if he was still resisting to give them the clay pot. He then told them one of his children called Bongekile would direct them to the lady who had the clay pot. They then went to a traditional healer who would assist in producing the clay pot. Those who went to the inyanga were Mazweni Mamba, Dumisani Mavuso, Sitalanyiswa Dlamini, Magongo Mamba. But these people never brought back the inyanga. They waited for sometime at roughly 5.30pm to 6.00pm they met Mfanuzile Dlamini and Sibusiso Mhlanga and others they then decided to go to their homes to eat as they were hungry. When they came back from their homes they found that the fire was lit under the mango tree. The time was about 9.00pm. At that time he decided to leave the scene because the deceased was still refusing to take out his clay pot.

[58] He testified that at that point one Mduduzi Mndzebele came by pushing a tyre. He went again to look for another tyre. After that Sanele started another fire. When they had left him near the fire. Sicelo Mamba and Mfanuzile took him and threw him into the fire. He came out of the fire and they asked him again, if he was still refusing to produce the clay pot. At that point Mazweni Mamba, Dumisane Mavuso, Mduduzi Mndzebele, Magongo Mamba and Thulani Dlamini ran away leaving them at the scene. Then Sicelo Mamba and Mfanuzile Dlamini again put deceased in the fire for the second time around. He was taken out and was again asked if he was still refusing to produce the clay pot. At that time seven of them were at the scene. These were himself, Mfanuzile Dlamini, Sicelo Mamba (accused no. 12), Sibusiso Mhlanga (accused no. 6), Sizwe Mamba (accused no. 10), Nganono Dlamini (accused no. 5) and Muzi Mkhonta. After that he together with

Sibusiso Nfhlanga (accused no. 6) took the deceased and put him into the fire. After that he fell outside the fire and they then left him. He was still alive. After realising that he was refusing to give them the clay pot they then left. They all seven of them proceeded to their homes and parted ways.

[59] This accused person was also cross-examined at great length by the Crown.

Accused no. 5 Xganono Leo Dlamini (DW4).

[60] The former accused also related under oath what took place on the 5th December 2003. He was also involved in the incident when the group approached the deceased asking him about the clay pot. He deposed that he was invited by Mfanuzile Dlamini to come to a meeting so the issue could be discussed. He was asked to join the group in approaching the deceased and asking him about the clay pot which he used to bewitch people at NdiEambi area. When he arrived at the grazing field he saw the deceased sitting under a tree. Then a fire was made in the field. Then Mfanuzile and Sicelo came to the deceased and picked him up and threw him into the fire. The deceased then came out of the fire and he fell down next to the fire. They then asked him where the clay pot was but he refused to tell them where it was. They then took him for the second time and threw him into the fire and this was done by Sicelo and Mfanuzile. The deceased came out of the fire and they asked him where the clay pot was. After that Mbuso Mndzebele and Sibusiso Mhlanga came for the third time and put him again back into the fire. They then left him there in the fire. They then left being himself, Mfanuzile, Sicelo, Sibusiso, Mbuso, Muz: Mkhonta and Sizwe. They then parted to their homes.

[61] The accused person was cross-examined by the Crown.

Accused no. 9 Sibusiso Mhlanga (DW5).

[62] The accused person also described at some length the events of the 5th December 2003, when he was seated at his home when he was called by certain boys to join them in the fields. Then one Bheki Gama who was in this group told them to go to the deceased to enquire about the whereabouts of the clay pot. The said clay pot was used for bewitching people in the area. When they spoke to the deceased he was not cooperating with them. He continued to drive his cattle into the grazing fields. Then one Titos Dlamini came along. The deceased then asked Titos Dlamini to help him. But Titos Dlamini replied and said "Hlophe leave me alone, I do not know your crimes". Mr. Dlamini then left the scene. After that the deceased drew a knife and ran towards Dumisane Mavuso. He attempted to stab Dumisane who ducked and picked up a stone and hit the deceased on the head. The deceased fell down. He together with Sicelo picked him up and put him under the shade. They waited with him for a while and after that they took him to the river to wash him as he was bleeding. When they had finished washing him at the river they asked him about his clay pot and deceased said he was going to direct them to where the clay pot was. The deceased then led them to the bush where they found dogs in the forest. After that he took them to another forest where he showed them honey combs which had already been collected. They asked him what had collected the honey combs from the bee hive and' he said they were collected by his supernatural powers, his zombies. He concluded that he was indeed a wizard and that he was going to give them the clay pot_ They then sat down with the deceased and the time was 3.00pm. The deceased then told them that he was working with Sidumo Dlamini and Khumalo. The deceased also told them about another lady and said that was where the clay pot was kept. He also told them about one of *his* children by the name of Bongsi Hlophe who actually performed some of the practices of witchcraft. After being told about all this the accused person stated that he was convinced that indeed the deceased was a wizard. Then Banele and Magongo Mamba prepared a fire. After the fire was started he together with Sicelo Dlamini held the deceased over the fire. The time then was 3.30pm to 4.00pm. He held the deceased by the legs whilst Sicelo was holding his head. The fire was between them. They moved him twice onto the flames. The deceased then told them that he was

scared to tell them because the lady would kill him. At that time it was suggested that Mfanuzile should go look for a traditional healer who would search for the clay pot because there was an indication that it existed. Then Mazweni Mamba left in the company of Bheki Gama, Celumusa Mndzebele, Sitatanyiswa Dlamini and Dumisane Bazuka Mavuso. The accused remained with the deceased with Mfanuzile Dlamini, Mduduzi Mndzebele, Mbuso Mndzebele, Sizwe Mamba and Sicelo Mamba. When it was about 5.00pm and upon realizing that they were not coming back they decided to go to their homes to eat because they were hungry, no one remained with the deceased.

[63] After eating he went back to where the deceased was and the time was around 7.00pm when he rejoined the group. At that point Mazweni ran away with others who were Dumisane Mavuso, Mduduzi Mndzebele, and Mfanufikile Mamba. He remained with Mbuso Mndzebele, Mfanuzile Dlamini, Sicelo Mamba Nganono Dlamini and Muzi Mkhonta. They proceeded to put the deceased on the fire but deceased refused to divulge anything about the clay pot. At that point he left with Mfanuzile Dlamini, Sicelo Mamba, Mbuso Mndzebele, Ngsnzio Dlamini, Sizwe Mamba and Muzi Mkhonta. He deposed that when he left the deceased was still alive. •

[64] The accused person was cross-examined at length by the Crown. Accused no 9 Bheki Gama (DW6).

[65] The accused person deposed that on the 5th December 2003, he was in his homestead at about 11.00am when he was called by one Mazweni Mamba to proceed to the grazing fields where the deceased was. They wanted to talk to the deceased and the deceased refused to talk to them. The deceased then drew a knife with which he wanted to stab one Dumisane with. However, Dumisane ducked and picked up a stone and hit the deceased. The deceased fell down. They then took the deceased to a place under a tree nearby. They then took the deceased to the river to wash his wound after being hit by Dumisane. As he was being washed he was asked about the clay pot which they allege the deceased was

bewitching people. From there the deceased led them to the forest where they found two dogs. From there the deceased took them to another forest where he showed them honey combs. Thereafter the group continued interrogating the deceased. Thereafter he left the group to go home and prepare his church **gowTis** because he was to attend a night vigil at Emvembili. That is the extent of his evidence

[66] He was cross-examined briefly by the Crown.

Accused no. 12 Sicelo Mamba (DW7).

[67] The last accused person who gave evidence was accused no. 12 Sicelo Mamba who gave a lengthy account of the events of the 5^w December 2003. He is also a resident of Ndlalambi and on the day in question he was called by one Banele Mamba who told him that deceased was in the field and that they should proceed to interrogate him about the death of people at Ndlalambi area. They then proceeded to the grazing field where the deceased was also heading his cattle. They found that there was another group in front which had already stopped the deceased and confronted him about the issue. Then one Titos Dlamini came along. The deceased asked Titos Dlamini to assist him from the crowd. Titos Dlamini answered the deceased by saying that he did not know his sins. Immediately after that he left. That is when the deceased asked Dumisane Mavuso as to what they actually wanted from him. Dumisane replied and told the deceased that there was nothing converse with him. The deceased then produced a knife and headed straight to Dumisane wanting to stab Dumisane with the knife. Dumisane picked up a stone. The deceased was hit on the head. They then took the deceased to the river. When they got to the river the deceased was washed on his head. Mfanuzile then started interrogating the deceased asking him as to where the clay pot was. He replied that they should all go with him and he would point out as to where the clay pot was.

[68] He testified that when they reached the forest they saw two dogs in the forest Banele

asked him if it was indeed where the clay pot was. He again said they should go somewhere else to a second forest where they found honey combs harvested. They then asked him where the clay pot was because he had promised to show them the clay pot. That is when he told them that the clay pot was in the possession of one lady whom he was afraid to mention. He told them that they should not assault him alone because he was not working alone and that there were a number of people he was working with. He was asked as to who were the other members forming his group and then he named them. That is when a fire was made. At some instance he was placed in the fire and taken out on a number of occasions. The time at that point was roughly 3.30pm.

[69] At that point some of the group then left to look for another traditional healer to come and assist them in finding the clay pot. They left to look for the traditional healer but unfortunately he was not found. Thereafter they went to their respective homes. Thereafter he went back to the deceased and again lit up the fire. Other members of the group ran away. The time at that point was around 9.00pm to 10.00pm.

[70] He testified that he with one Mfanuzile picked up the deceased and threw him onto the fire and he was able to get out of the fire. Again Mfanuzile interrogated the deceased asking him where the clay pot was. They again threw him back into the fire and he was able to get out of the fire. Mfanuzile continued interrogating him but unfortunately he did not tell them anything. Thereafter together with Mfanuzile moved away. The deceased was still alive. He left and went home and left Mbuso Mndzebele and Sibusiso Mhlanga. He was arrested subsequently on the 6th December 2003. The accused person further deposed that he was deeply hurt when he heard that the deceased had died because their main objective was not to kill the deceased.

[71] This accused person was also cross-examined by the Crown.

[72] It appears to me on the facts adduced by the Crown and the evidence led by the

accused persons themselves that accused person like Bheki Gama (accused no. 91 never said anything, never did anything and was dormant and so was Drrnisani Mavuso (accused no. 2) and MDCUZI Mndzebele (accused no 3) and therefore all these accused persons are found not guilty and acquitted forthwith. Accused no. 1 being Mazweni Mamba although he was active throughout but he was not there in the final scene. It is my view therefore that also in his case on the facts he ought to be found not guilty and acquitted forthwith.

[73] Accused no. 4 being Mbuso Mndzebele. accused no. 5 being Nganono Dlamini and accused no. 6 being Sibusiso Mhlanga were the last to leave but they left before the deceased died. In their case the argument by their attorney is that there is a possibility of *novus actus intervenience*. In support of this argument the court was referred to the South African decided cases of *Rex vs Fundakubi (supra)* and *S vs Lungile (supra)* and *S vs William's 1986 (4) S.A. 1188A*.

[74] In my view on the facts of this matter I cannot say that there was a *nova causa* in the death of the deceased. The facts are clear that the accused died of "burns with fracture skull extradural haemorrhage". It is abundantly clear on the evidence that the accused persons put the deceased over a fire on a number of occasions. One accused person holding the head and one other holding the legs. . It is also in evidence that the deceased was hit by a stone on the head brandished by one of the accused persons where he bled and the accused persons tried to wash his wounds after the event.

[75] In law this expression *novus actus interveniens* means "a new intervening event". If a *novus actus interveniens* (sometimes abbreviated to *novus actus* or *nova causa*) has taken place, it means that between X's initial act and the ultimate death of Y. an event which has broken the chain of causation has taken place, preventing us from regarding X's act as the cause of Y's death. *Novus actus interveniens* is actually a negative "test" of causation. A causal relationship is assumed to exist if an act is *a condition sine*

qua non of a result and a *novus actus* is lacking. On the facts of the present case I cannot say that there was a *novus actus*.

[76] Having found that on the facts of the present case there was no *novus actus* it now behoves me to consider the roles taken by the remaining accused persons. It appears to me that the *diaw* applicable to the facts of the present case is the one propounded in the Supreme Court case of *Vincent Siphon Mazibuko vs R* 1982 - 87 S.L.R. 372 (C) at page 380 where the following was said:

"A person intends to kill if he deliberately does an act which in fact he appreciates might result in death of another acts recklessly as to whether such death result or not"

[77] On the facts of the present case the remaining accused persons might at some stage had the intention of finding the clay pot but as they placed the deceased on the fire several times they all acted recklessly in the circumstances of the case and therefore on the legal authority- in *Vincent Siphon Mazibuko (supra)* they acted "recklessly as to whether such death result or not". In *S vs Mini* 1963 (3) S.A. 188 (A) 19 it was said "the proposition is well established in our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not" There need not necessarily be a prior conspiracy. The common purpose may also arise spontaneously, and evidence of the behaviour of the different co-accused may lead a court to conclude that this has happened. The operation of the doctrine of common purpose does not require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about (see *C.R. Snyman (supra)* at page 259 and the cases cited thereat). It is on this basis that I find that the remaining accused persons went the full hog until the death of the deceased and therefore would be liable for the final result.

[78] In the result, for the afore-going reasons I find that accused no. 4 being Mbuso

Mndzebele, accused no 5 being Nganono Dlamini, and accused no. 6 being Sibusiso Mhlanga are all guilty of the crime of murder in that on the 5th December 2003, and at or near Ndlalambi area, in the district of Hhohho the accused acting jointly and in furtherance of a common purpose did intentionally and unlawfully kill Obadia Hlophe.

S.B. MAPHALALA

JUDGE